

October 6, 2022

Volume 2, Issue 20

What's Been Happening

1 — Where is IPEF Headed? — 1

[In One Sentence]

- Some IPEF countries suggested the possibility of reaching an early agreement on digital trade, but U.S. Trade Representative (USTR) Katherine Tai says talks of IPEF “early harvest” is “premature.”
- Although Cambodia, Laos and Myanmar have not been invited to join IPEF, ASEAN’s Secretary-General expressed the “hope” that all members become part of IPEF.
- The U.S. and EU have launched a new “Trade and Labor Dialogue” with business and labor representatives to discuss worker concerns, impacts of the digital economy, and the future of work.

[Mark the Essentials]

- The Office of the USTR published three broad negotiating goals for IPEF’s trade pillar: resilience, particularly of supply chains; inclusion, in terms of pursuing high standards in labor rights and digital economy; and sustainability, described as using trade as a tool to address climate and environment challenges.
- Addressing the topic of agriculture and IPEF, some advocacy groups have urged the administration to not just focus on “20th century” market access and deregulatory practices, but also devote at least as much attention to decarbonization, supply chain resilience and anti-corruption-related considerations.
- The United States recently announced plans to establish a “Trade and Investment Dialogue” with Pacific Island countries by the end of 2023 to “target [their] economic, investment and market-access needs.”

[Keeping an Eye On...]

- The Indo-Pacific Economic Framework (IPEF) has been billed as a new model or type of trade agreement. In one important respect though, IPEF represents continuity with the (supposedly broken) earlier model. From a transparency standpoint, there appears to be few or no plans to discard the secretive negotiating practices of the past. The substantive details of the IPEF negotiations are to be kept strictly under wraps during the course of the negotiations by the parties involved and proposals and materials exchanged are to remain confidential for a period of five years after the agreement enters into force. To be fair, such a confidentiality requirement is fairly standard in trade negotiations; though it is also worth pointing out in this context that in the U.S.-Mexico-Canada (USMCA) agreement Washington specifically inscribed a provision that if either Canada or Mexico were to sign a free trade agreement with China, the USTR must have “an opportunity to review the full text” of the envisaged FTA at least 30 days before its signing. Not much confidentiality, it seems, in that case. The USTR’s confidentiality requirement has long been a bone of contention, particularly for

protectionist-minded labor and ‘civil society’ constituencies looking to pick apart an on-going negotiation by pointing to a delicate or controversial pro-business provision. More recently, it has also been a bone of contention on the Hill as Congressmen and women of both parties have rightly pilloried the USTR for a lack of consultation and transparency during trade agreement negotiations with foreign nations. The Commerce Clause of the U.S. Constitution does, after all, give Congress the power “to regulate commerce with foreign nations.” And Congress has a right to know about the substantive concessions being exchanged that it will later be called upon to ratify. (Of course, no Congressional ratification is envisaged in the case of IPEF.) This lack of consultation has, if anything, been exacerbated by the Biden administration’s ‘new model’ or type of trade agreement, the structure, purposes and end-goals of which remain fairly abstruse, and which has never received formal congressional assent. Thus, it is instructive that even as USTR touts its new model of trade agreement, it remains wedded nevertheless to some of the least desirable and self-serving practices of the past. On transparency, the old model seems pretty good so far as USTR is concerned.

[Expanded Reading]

- [TTC, IPEF, and the Road to an Indo-Pacific Trade Deal: A New Model](#), Atlantic Council, September 29, 2022
- [U.S. seeks early results for Indo-Pacific trade initiative](#), *Nikkei Asia*, September 28, 2022 [Paywall]
- [ASEAN tells the US it welcomes opportunities not interference](#), *Radio Free Asia*, September 28, 2022
- [The Indo-Pacific Economic Framework for Prosperity: Biden-Harris Administration’s Negotiating Goals for the Connected Economy \(Trade\) Pillar](#), Office of the United States Trade Representative, September 23, 2022
- [Remarks by President Biden Before the 77th Session of the United Nations General Assembly](#), The White House, September 21, 2022
- [U.S. Trade Representative and U.S. Department of Labor Host Transatlantic Tripartite Trade and Labor Dialogue with Union and Business Leaders](#), USTR, September 21, 2022

2 — CHIPS, Tariffs, and Industrial Policy in Action — 2

[In One Sentence]

- USTR officials have noted that the Trump-era Section 301 tariffs are no longer only about compelling change in China’s practices, but are also part of the effort to promote U.S. domestic supply chain resilience.
- U.S. Secretary of State Antony Blinken told Central and South American countries that the CHIPS and Science Act will build a resilient semiconductor supply chain in the Americas by investing in manufacturing in the Western hemisphere.
- The U.S. Commerce Department is planning to implement guardrails against potential stockpiling practices intended to abuse the two-year moratorium on AD/CVD duties on Southeast Asian solar imports.
- The Court of International Trade ruled to allow the Commerce Department to draw adverse facts inferentially about China’s export financing program after the Chinese government “repeatedly stonewalled” U.S. inquiries.

[Mark the Essentials]

- The White House has recently named a leadership team tasked with implementing the CHIPS and Science Act. According to the administration, the selected officials are “experienced in large-scale program management, finance and the government’s needs for accountability.”
- Concluding its Section 232 investigation into neodymium-iron-boron permanent magnets, the Commerce Department found that, while increasing reliance on Chinese and other foreign imports constitutes a national security threat, it advises against imposing tariffs due to the “severe lack of domestic production capability.”

- In a separate lawsuit that challenges the legality of the Trump-era Section 301 tariffs on Chinese goods, plaintiffs are again urging the Court of International Trade to order a full removal of the tariffs.

[Keeping an Eye On...]

- Kudos to the Biden administration Commerce Department. Unlike the Office of the USTR, it both has the foresight to look beyond tariffs as the solution to every national economic welfare problem and does not feel compelled either to drum-up lame justifications to levy or maintain illegal tariffs. On September 21, 2022, after a year-long Section 232 investigation—the first such probe launched by the Biden administration—the Commerce Department recommended a broad menu of ‘industrial policy’ measures to lessen the national security threat arising from the import dependence of rare earth neodymium-iron-boron (NdFeB) permanent magnets from China. NdFeB magnets are not only key to numerous defense applications but also essential for critical infrastructure and climate change applications. And China currently holds a lock across the product supply chain. The ‘industrial policy’ measures that were recommended range from tax credits for domestic manufacturing, allocation of funds from the Bipartisan Infrastructure Law, utilization of authorities under the Defense Production Act to establish production facilities as well as facilitate industry-wide voluntary information sharing agreements, engagement with allies and partners, and minimum domestic and ally content requirements, among others. Crucially missing from the list of recommended measures are Section 232 tariffs of the variety that the Trump administration had imposed on imported steel and aluminum (and which a WTO panel will soon find to have been illegal). It was always clear that developing a domestic magnet value chain and reducing import dependency was better accomplished by rolling out a medium-term domestic transition plan, keeping market conditions predictable and undistorted, and providing policy support for materials sourced from outside China and/or processed into magnets outside China. And that it made particularly little sense to impose unilateral tariffs and disadvantage downstream users, such as U.S. electric vehicle manufacturers, through higher input costs. On industrial policy, the Biden administration has shown thoughtfulness and good judgment. Someday, it will hopefully be capable of bringing a similar level of insight to tariff policy.

[Expanded Reading]

- [Dispatch from the Frankfurt Forum: How the US and Europe can turn crisis cooperation into sustained partnership](#), Atlantic Council, September 29, 2022
- [Frankfurt Forum on US-European GeoEconomics](#), Atlantic Council, September 28, 2022
- [Secretary Antony J. Blinken At the Ministerial Meeting of the Alliance for Development in Democracy](#), U.S. Department of State, September 20, 2022
- [Biden-Harris Administration Announces CHIPS for America Leadership](#), White House, September 20, 2022
- [Wiley Wins International Trade Dispute on Behalf of Coalition of American Millwork Producers](#), Wiley Law, September 16, 2022
- [Commerce Department Punishes U.S. Companies And Subverts Biden’s Effort To Fight Inflation](#), *Forbes*, September 15, 2022 [Paywall]

3 — Outbound Investment Screening to Further U.S.-China Decoupling — 3

[In One Sentence]

- Lawmakers, business stakeholders and experts discussed the potential outlook for outbound investment screening amidst continuous push for relevant legislative actions.
- Senator Pat Toomey said he is willing to legislatively support the creation of an outbound investment screening mechanism if it has a sufficiently narrow focus.
- Congressional leadership has called on President Biden to establish an outbound investment screening mechanism through executive action.

[Mark the Essentials]

- Arguing that legislation on outbound investment screening might not pass in the short-term, Senate Majority Leader Chuck Schumer, House Speaker Nancy Pelosi, and sponsors of the National Critical Capabilities Defense Act called for immediate executive action on outbound investment.
- A vocal opponent of the current outbound investment screening proposal, Senator Toomey argued that the outbound investment review framework should, at most, only apply to direct U.S. investment in Chinese entities and concern technologies that would have already been subject to export controls.
- Senator Toomey also expressed concerns that “a deliberative, open and democratic process” will be lacking if the White House is given authority to determine the scope of the outbound investment screening mechanism.
- At a hearing held in the Senate Banking, Housing and Urban Affairs Committee, Information Technology Industry Council (ITI) Executive Vice President of Policy, Robert Strayer, argued that the U.S. government should clearly define a limited and specific subset of technological capabilities as well as the types of transactions and ownership limitations that would be subject to outbound investment screening.
- Noting the important role global markets and global supply chains play in U.S. technological leadership as well as the private sector’s “best” data and understanding of the landscape, Strayer also advocated for an iteration of government-business consultations as the Administration and Congress get down to refining the particulars of the proposed screening mechanism.
- Meanwhile, former Assistant Secretary for Export Administration, Richard Ashooh, suggested that outbound screening be implemented through an interagency coordination mechanism that models the current institutional framework for export controls on emerging and foundational technologies.

[Keeping an Eye On...]

- Welcome to the newest arena of U.S.-China decoupling: outbound investment screening and controls. In July 2018, the attempt at trade decoupling was initiated with the Section 301 tariffs. In August 2018, the focus was on Chinese M&A activity and inward investment screening via the Foreign Investment Risk Review Modernization Act. In May 2019, the first round of technology denials began in earnest, with the Chinese telecommunications firm Huawei firmly in the crosshairs. In the time since, episodic efforts at data flow decoupling have also been undertaken. Screening and controls on China-bound investments is now the newest policy kid on the decoupling block; the urgency of which was highlighted by National Security Advisor Jake Sullivan in an important policy speech in July 2021. Fleshing out concrete legislative action is however turning out to be a heavier lift than anticipated, with neither the House introduced version of December 2021 (as part of the America COMPETES Act) nor the revised Senate version of June 2022 seemingly capable of drawing a bipartisan consensus. Questions abound on the particulars: What is a critical national capability? Which of these should be denied to China? How broad should this range of covered investments be? Where should the perimeter of extra-territorial

application of jurisdiction reside, etc? At this time, the locus of activity is shifting from the Hill to the White House. With a view to getting the ball rolling, the Biden administration is expected to establish this outbound investment screening framework by way of executive order later this fall. Down the line, the executive order is to be supplemented, and improved, via legislation, which is incidentally how the oversight of inbound foreign investment was also established—an executive order followed by statutory action.

[Expanded Reading]

- [Toomey Warns Against Establishing a Flawed Outbound Investment Regime](#), United States Senate Committee on Banking, Housing and Urban Affairs, September 29, 2022
- [Examining Outbound Investment](#), Hearing at United States Senate Committee on Banking, Housing and Urban Affairs, September 29, 2022
- [Closer Scrutiny of US Investments in China Is Sought by Lawmakers](#), *Bloomberg*, September 29 [Paywall]
- [Sand in the silicon: Designing an outbound investment controls mechanism](#), Center for a New American Security, September 14, 2022
- [Outbound Investment Screening Would be a Mistake](#), Council on Foreign Relations, June 30, 2022