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What's Been Happening

1 — The Biden Administration's Final Push to Decouple from China — 1

[**In One Sentence**]

- On December 2, 2024, the U.S. Commerce Department issued new export controls targeting China's semiconductor industry, including two new Foreign Direct Product Rules and the addition of 140 new organizations and firms to its Entity List.
- Commerce Secretary Gina Raimondo emphasized that these measures aim to "impair the PRC's ability to indigenize the production of advanced technologies that pose a risk to our national security," while underscoring the Commerce Department's "central role" in executing the U.S. national security strategy.
- In response, Beijing announced a ban on the export of several materials critical to the production of semiconductors, communication and military technologies, and the export of dual-use items to the U.S.
- According to the Chinese Ministry of Commerce, the Chinese retaliation covers materials such as gallium, germanium, antimony, and superhard materials, while graphite exports will be subject to "stricter end-user and end-use reviews."

[**Mark the Essentials**]

- Rep. John Moolenaar, Chair of the House Select Committee on CCP, criticized the Biden administration's new measures to restrict Chinese access to U.S. semiconductor manufacturing equipment and affiliated technologies. He argued that the new export control regulations still allow chip companies such as Semiconductor Manufacturing International Corp (SMIC) to exploit "loopholes" and evade the sanctions.
- Following Washington's announcement of its latest export controls, four Chinese semiconductor industry bodies issued an advisory to Chinese chip firms to remain "cautious" about acquiring U.S.-made chips, which they describe as "no longer safe, no longer reliable." The Internet Society of China urged the Chinese internet firms to "expand cooperation" with semiconductor suppliers in other countries. To safeguard the security and stability of the automotive industry and its supply chain, the Chinese automakers association emphasized the need for automotive firms to "exert caution in purchasing U.S. chips."
- On November 22, 2024, the U.S. Department of Homeland Security (DHS) added 29 Chinese companies to the sanctioned entities list under the Uyghur Forced Labor Prevention Act (UFLPA), effectively preventing them from importing U.S. goods. Beginning November 25, 2024, the Bureau of Industry and Security (BIS)

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will enforce a "rebuttable presumption" that goods from the entities either include materials sourced from Xinjiang province or involve collaboration with the region, barring their import under the UFLPA.

[**Keeping an Eye On…**]

- With its time in office winding down, the Biden administration has gone into regulatory overdrive to deepen the 'selective decoupling' of U.S.-China advanced technology ecosystems. On October 29, the U.S. Justice Department issued a massive 422-page Proposed Rule to prevent access to Americans' bulk sensitive personal data as well as government-related data by countries of concern, such as China. The rule proposes to establish a new national security-based regulatory regime governing the collection and transfer of personal data. Two types of commercial transactions between a "US person" and a "country of concern" are to be prohibited—transactions involving "data brokerage" (with the term defined broadly) and transactions involving human genomic data. Also, on October 29, the U.S. Treasury Department released a Final Rule to prohibit outbound investments in semiconductors and microelectronics, quantum information technologies, and AI systems to China. The purpose of the Outbound Order is to shut down a pathway for Beijing to exploit the "intangible benefits"—including enhanced standing and prominence, managerial assistance, investment and talent networks, market access, and enhanced access to additional financing—that accompany the flow of US investments to China. The order marks the first instance of the U.S. government controlling outbound capital flows for national security reasons. And while the regulation is framed as addressing capital flows, it effectively regulates the coverage of 'greenfield' and 'brownfield' investments in these national security technologies and products too. Finally, on December 2, the U.S. Commerce Department issued a Final Rule that upgrades the existing controls on China's access to semiconductor manufacturing equipment so as to impair its capability to produce advanced node semiconductors. The rule significantly expands the Commerce Department's foreign direct product rule's (FDPR) application to semiconductor manufacturing equipment (SME) and three types of software tools. In addition to these SME controls, the rule imposes controls on the transfer of AI-related high-bandwidth memory (HBM) chips, which are crucial for accelerating AI training and inference tasks, as well as adds 140 Chinese entities spanning tool companies, chip fabs and shell companies masquerading as investment firms to the Entity List. Alongside, the Biden administration continued to aggressively push out CHIPS Incentives Awards totaling in the many billions to the likes of Intel, BAE Systems, GlobalFoundries, and TSMC. In his September 2022 speech, National Security Advisor Jake Sullivan had listed three "families of technologies"—computing related technologies; biotechnologies and biomanufacturing; clean energy technologies—as "force multipliers" that would define the geopolitical landscape of the 21st century. Given their foundational nature, the U.S. would seek to "maintain as large a lead as possible" over adversary nations, he had maintained. The Fall 2024 measures constitute a cleanup play by the administration in this regard as it endeavors to maintain as large a lead as possible in these technologies, utilizing its "small yard, high fence" approach on strategic trade controls.

[**Expanded Reading**]

- Commerce Strengthens Export Controls To Restrict China's Capability To Produce Advanced Semiconductors For Military Applications, Bureau of Industry and Security, December 2, 2024
- Moolenaar Urges Raimondo To Close Dangerous Loopholes In New Export Control Rules, The Select Committee of the CCP, December 5, 2024

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- China Industry Bodies Urge 'Caution' In Buying US Chips In Reprisal To Biden Sanctions, *South China Morning Post*, December 4, 2024
- DHS Will Now Restrict Goods From Over 100 PRC-Based Companies From Entering The United States Due to Forced Labor Practices, Department of Homeland Security, November 22, 2024

2 — TikTok on the Brink; EU and China Struggle to Reach Deal on EV Tariffs — 2

[**In One Sentence**]

- On December 6, 2024, the U.S. Court of Appeals for the D.C. Circuit upheld the constitutionality of the *Protecting Americans From Foreign Adversary Controlled Applications Act* which mandates that Chinese parent company ByteDance divest TikTok by January 19, 2025, or have the latter face a ban on its U.S. operations.
- Also on December 6, TikTok requested the Appeals Court to pause its ruling—meaning the law would not take effect—until the U.S. Supreme Court had the "opportunity" to review the case.
- As of December 9, the European Union and Chinese officials are still not able to agree on a price undertaking agreement to resolve the tariffs imposed on Chinese electric vehicles (EVs).
- Meanwhile, the European Commission is actively working to bolster the development of EV battery manufacturers within EU member states through a 1.2 billion euro auction for hydrogen production and a 2.4 billion euro call to fund net-zero technologies, with the goal of safeguarding Europe "against dependency on a single supplier."
- France, Germany, and Sweden have jointly urged the new European Commission to prioritize making Europe self-sufficient in battery production.

[**Mark the Essentials**]

- Following the adverse ruling, TikTok has argued that the U.S. Supreme Court should "have an opportunity" to review the case, given that it is an "exceptionally important case" that touches on First Amendment rights.
- TikTok has also argued that pausing the ruling would allow the incoming Trump administration sufficient time to assess the situation, suggesting that the new administration might "moot both the impending harms and the need for Supreme Court Review." The company emphasized the potential impact of banning TikTok in the U.S., warning it would silence the "voice of over 170 million Americans here in the U.S. and around the world" starting on January 19, 2025.
- Despite ongoing challenges in reaching a comprehensive agreement on the European Union's tariffs on Chinese EVs, Chinese manufacturers continue to pursue collaborative ventures within Europe. Chery Automotive from China launched a joint venture product, the EBRO S700, with Spanish EV companies on November 23 in Barcelona, and other Chinese EV brands such as BYD, Leapmotor, NIO and Xpeng are actively advancing their market entry and joint venture plans across Europe.
- To "sidestep the new EU tariffs on Chinese BEVs (battery-powered EVs)," Chinese EV firms are increasingly shifting their production focus to PHEVs (plug-in hybrids). According to the Chinese Passenger Car Association, exports of Chinese hybrid EVs to Europe have more than tripled to 65,800 compared to the same period in 2023. In the third quarter of 2024, plug-in hybrids and conventional hybrid EVs accounted for 18% of Chinese total exported vehicles to Europe.
- The collapse of Northvolt, Europe's leading homegrown EV battery supplier, has become a "Nordic noir thriller", threatening Europe's development of the battery industry and its green transition by 2035. More

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importantly, the bankruptcy of Northvolt has exposed the European EV industry's reliance on Asian EV battery suppliers, especially Chinese battery companies.

[**Keeping an Eye On…**]

- So what comes next in the long-running saga to shut down Chinese ownership of TikTok in the U.S.? Or failing which, shut down TikTok's operations altogether in the U.S? On December 6, the U.S. Court of Appeals for the D.C. Circuit upheld the U.S. government's view that Chinese ownership of the social media app, and particularly the Chinese state's potential to manipulate content covertly on the TikTok platform, constitute a national security threat. As such, unless TikTok executes a qualified divestiture by January 19, 2025—or the President grants a 90-day extension based upon progress towards a qualified divestiture—the platform will effectively be unavailable in the United States. The 170 million U.S. subscribers of TikTok can go stew. The court could point to no instance, past or present, of the Chinese state covertly coercing TikTok into manipulating content in the U.S. That said, in the court's view, the fact that U.S. intelligence agencies could provide no concrete evidence did not mean that it was speculative to infer that TikTok's content would not be manipulated in the future to conform to the PRC's "censorship, propaganda, or other malign purposes." Rather, the U.S. government's "informed judgment" was that such manipulation could—and would—happen, and that the court would not substitute its judgment for those of the political branches (executive and legislative) on questions of national security. "Great weight" must be given to this informed judgment, the court averred. Furthermore, the court also noted that the *Protecting Americans From Foreign Adversary Controlled Applications Act* that singles out TikTok was not an effort to "control the flow of ideas to the public" or "influence the content that appears on a substantial medium of communication." It did not impinge on First Amendment protections. Rather, the government was acting solely "to prevent a foreign adversary from doing so," and the divestiture exemption was proof that ending foreign adversary control, not content censorship, was the objective. The narrow logic of the Appeals Court's ruling, focusing as it does on the national security question, is no doubt watertight (although the only evidence of content manipulation that it can point to are arguably Taiwan-linked ones which the court ought to know is not considered by Beijing as being "outside of China"). But the larger First Amendment-related questions that were part-and-parcel of the appeal remain just as relevant—and unsatisfyingly unanswered; the court only tangentially engaged the landmark *Lamont v. Postmaster General* First Amendment ruling. By the court's own reading, a president is not allowed to ban "communications or informational materials" on the basis of the International Emergency Economic Powers Act (IEEPA) after declaring a "national emergency" (due to the IEEPA's Berman amendment). Yet, if Congress and the President concur that a relevant First Amendment-related "communications or informational material" constitutes a threat to national security, then a ban is allowable. So, a presidentially-declared national emergency is no good, but a presidentially-signed bill with a finding of a national security threat is good to sideline First Amendment protections. Question: Aren't (some) national emergencies declared typically because there is a threat to national security in the first place? And in treating TikTok essentially as a broadcaster or publisher, the court also erred. TikTok may have the media reach well beyond that of a broadcaster or publisher but technically, at bottom, it remains a digital intermediary. And thus, it enjoys the benefit of 'intermediary liability' protection for content shared on the platform on the basis of Section 230 of the Communications Decency Act of 1996. The basis of the court's support for the government's argument for divestiture is also suspect. On the one hand, the court supported the government's "informed judgment" that the Chinese

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state's ability to manipulate content covertly on the TikTok platform is real and present – even if never pursued in the U.S. As such, Bytedance, a Chinese entity subject to the jurisdiction of the PRC, must divest TikTok. On the other hand, the court took note of the fact that as per a National Security Agreement (NSA) between the Biden administration and TikTok, certain 'Excerpted Data' as well as 'Public Data' is allowed to flow to China so as to enable Bytedance engineers to continually develop TikTok's recommendation engine and platform source code (the U.S. is looking to shut down the NSA). So, here's the question: If the value of what TikTok offers its users is intrinsically linked to the development of its algorithm in China, how does one disentangle the two and yet maintain the value of TikTok in the U.S. marketplace? Its value, after all, stems from its secret sauce—the recommendation algorithm. Or is the case, which the Court does not state but implicitly suggests, that ByteDance must essentially surrender the intellectual property behind its secret sauce to an American buyer. But here too, then, the Court observes that its concurrence with the government's position does not amount to a regulatory taking—which it seems to be. All said, there is much to chew over in the Appeals Court's ruling. Be that as it may, none of the above should be deemed as absolving Beijing of its greasy fingerprints in the cyberespionage and information manipulation space. Its cyberoperations are laid out in detail in the ruling, and Bytedance does not deny that it has manipulated content "outside of China" at the PRC government's behest. At times, it can almost seem as if the Chinese government is its private sector's own worst enemy.

[**Expanded Reading**]

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- Appeals Court Upholds TikTok Ban, Declining To Block Law That Would Force Sale, *CBS News*, December 6, 2024
- China Automakers Pivot To Hybrids For Europe To Counter EV Tariffs, *Reuters*, December 5, 2024
- EU Will Give Aid For EV Batteries That Have Less China Content, *Automotive New Europe*, December 4, 2024
- As The EU Imposes Tariffs On Chinese EVs, Spain Aims To Become A "Connector Country", *EV Engineering News*, December 3, 2024
- Why Isn't Europe Diversifying From China?, Rhodium Group, December 2, 2024
- Europe's Battery Crisis A Humiliating Reminder Of China's EV Dominance, *South China Morning Post*, November 29, 2024
- EV Battery Maker Calls For Cheaper EU Energy To Counter China, *Bloomberg*, November 25, 2024

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