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The Biden Administration's Trade Policy: Promise and Reality

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Abstract

This Article critically analyzes seven elements of the Biden administration trade policy: (1) buy American; (2) tariffs; (3) World Trade Organization; (4) free trade agreements; (5) China; (6) technology; and (7) Russia. Although President Biden has made a clean break from Trump policies in many areas, this is not the case when it comes to international trade. Regretfully, Biden has chosen to keep in place most of the failed trade policies of his predecessor—the Trump tariffs and the China trade war. It is not too late to shift ground, to negotiate mutual abolition of the Trump tariffs, to open free trade negotiations with the EU and UK, to join the Comprehensive and Progressive Trans-Pacific Partnership, to adopt a multilateral strategy with allies to check Chinese trade excesses, and to reengage with the World Trade Organization. Topping the list of needed reforms of the multilateral trading system are: (1) subsidies; (2) state-owned enterprises; and (3) forced technology transfer. These are best addressed through a WTO plurilateral agreement and/or preferential trade agreements. The Biden administration should prioritize these urgent reforms. Rather than promoting “free” trade and multilateral trade reforms, the Biden administration continues its predecessor’s nationalistic policies so that trade serves domestic political ends. Such state intervention in trade policy consists of the strategic use of tariffs, subsidies, “buy American” rules, and regional trade arrangements without regard to the rules of the multilateral trading system. These new policies represent a decisive retreat from globalization and openness to trade.

The Congress, directed by the Biden administration, has adopted a far-reaching industrial policy in the form of four laws that subsidize key sectors of the U.S. economy: American Rescue Plan Act (\$40 billion); Infrastructure and Jobs Act (\$1.2 trillion); Inflation Reduction Act (\$369 billion); and Chips Act (\$252.7 billion). This subsidization coupled with “buy American” protectionism constitute a departure from the free trade ideal that has characterized U.S. policy since the end of World War II.

Keywords: International trade; tariffs; subsidies; globalization; free trade; protectionism; buy american; technology transfer; world trade organization

A. Introduction

During the last six decades of the twentieth century, the United States played the role of benign hegemon in international affairs, most notably in international economic relations. In the 1940s, the United States led the establishment of the International Monetary Fund, the World Bank, and the General Agreement on Tariffs and Trade. Subsequently, the United States spurred the success

of international trade negotiating rounds, including the extremely significant Tokyo and Uruguay Rounds, the latter of which created the World Trade Organization (WTO). United States' leadership was the key to the establishment of the rule of law in international trade, coupled with the rules-based, adjudicatory WTO dispute settlement system.

During the first decades of the twenty-first century the United States abandoned its global leadership role on virtually all fronts,¹ most notably in international economic relations. The culmination of this abandonment was the administration of Donald Trump, and his "America First" foreign policy.

The Biden administration took office in January 2021, vowing "to repair [US] alliances and a return to a position of American leadership."² In international economic relations this may be taken to mean a return to support of the WTO, the elimination of barriers to international trade, and revival of the rules-based multilateral trading system.

The thesis of this Article is that American leadership in international economic matters, for the most part, is moribund and will not be revived. Although the Biden administration gives lip service to American leadership and multilateralism in international trade, economic and political constraints loom as unmovable obstacles to significant changes in American policy concerning international trade.

The Biden administration took office in January 2021 against the background of the Trump administration's wholesale reversal of longstanding U.S. trade policy norms. Under the banner of nationalism and populism that ignored economists and expert advice, the Trump administration (1) levied extra tariffs on a wide variety of imported products in a futile attempt to save manufacturing jobs and lower the U.S. trade deficit; and (2) openly derided multilateralism in trade, investment, and economic matters.

Upon assuming office, President Biden used his executive powers to sign orders reversing wholesale a great number of Trump administration policies, especially in the areas of climate change, immigration, protection of the environment, and civil rights.³ President Biden used the Congressional Review Act⁴ to prevent many Trump era regulations from coming into force. Most political observers expected that Biden would also quickly repudiate the nationalistic and protectionist trade policies of his predecessor.

These hopes and expectations were in vain. Biden has taken no dramatic action to reverse Trump era trade policies and actions. Former trade officials from both Democratic and Republican administrations⁵ called upon President Biden to repudiate Trump's policies on trade and (1) remove the national security tariffs on steel and aluminum; (2) negotiate an end to the China trade war; (3) begin negotiations on free trade agreements with the European Union and the United Kingdom; (4) apply to join the Comprehensive and Progressive Trans-Pacific Partnership Agreement (CPTPP);⁶ (5) revive the U.S. commitment to the WTO and the rules-based multilateral trading system; and (6) end the U.S. boycott of the WTO Appellate Body. Biden has also ignored the pleas of industry groups to end the China tariffs to offset the supply chain economic woes.⁷ Biden also has ignored calls to repeal the Trump era tariffs as a means of moderating runaway inflation.⁸

¹See generally *What Happened to the American Century?*, 98 FOREIGN AFF. (2019).

²Joseph Biden, United States President, Foreign Policy Address, New York City (Jul. 11, 2020).

³President Biden issued 77 executive orders in 2021, all of which may be found in volume 86 of the Federal Register.

⁴5 U.S.C. § 801.

⁵Stan Anderson & William N. Walker, *Biden's Failure to Reverse Trump's Tariffs has Real Consequences*, WASH. POST, May 26, 2021, at A19. See also Catherine Rapell, *It's Time for Biden to Scrap the Trump Metal Tariffs*, WASH. POST, Jun. 4, 2021, at A21.

⁶After the Trump Administration repudiated the TPP, eleven Asia-Pacific nations concluded a free trade agreement based upon the TPP, the CPTPP, which became effective in 2018-19.

⁷See Eric Kulisch, *Industry Groups Say Ending China Tariffs Would Offset Supply Chain Pain*, AM. SHIPPER (Oct. 7, 2021), <https://www.freightwaves.com/news/industry-groups-say-ending-china-tariffs-would-offset-supply-chain-pain>.

⁸Fareed Zakaria, *President Biden has the Means to Reduce Inflation. Why isn't he Acting?*, WASH. POST, May 20, 2022, at A18.

Rather, the Biden administration, with razor-thin control of Congress, has taken a cautious approach to trade that leaves most Trump administration policies in place. Although the Biden Administration pays lip service to multilateralism and rejects the inflammatory rhetoric of Trump, the trade policies of the Trump administration so far largely continue under President Biden. Only at the margins have Trump trade policies been reversed.

Not only has the Biden administration followed Trumpian failed trade policies, it also has so far neglected to address the fundamental causes of the trade crisis that inspired Trump's trade wars and protectionist actions. Foremost among such fundamental causes are the China challenge and the ineffectiveness of the WTO. The China challenge concerns statist industrial policies such as (1) subsidies; (2) state-owned enterprises (SOEs); and (3) forced technology transfer. The Trump administration launched a trade war with China, coupled with protectionist tariffs to deal with these problems. Trump's policies failed to achieve their stated goals.⁹ Despite this, the Biden administration's trade policy is in a holding pattern that retains key Trumpian policies by default. Biden is either unwilling or unable to spend any political capital on trade policy. Thus, needed international economic reforms are languishing unaddressed.

B. Globalization

I. Deglobalization

In contrast to the heady days of the 1990s, when globalization and the rule of law in international trade and investment reached its apogee, the first quarter of the twenty-first century is characterized by significant retrenchment of both globalization and the rule of law. Economic welfare, which was paramount in the 1990s, is trumped by momentous international events, such as the Russian invasion of Ukraine, the ever-increasing military assertiveness of China,¹⁰ and the Covid-19 pandemic. New values have come to the fore, such as national security, preventing the eclipse of democracy by autocracy, and maintaining technological superiority. The Biden administration is also hemmed in by domestic economic and political constraints; for the first time in memory a clear majority of both U.S. political parties are opposed to trade and investment liberalization.

II. New International Trade Paradigm

In contrast to the Washington Consensus¹¹ paradigm of the 1990s, a new international economic paradigm reflects current "deglobalization" of the multilateral trading system. The new model of reduced globalization compares each nation-state to a rotating spindle surrounded by multiple, nested hemisphere (whorls), each varying in width and speed of rotation. Each whorl in this model represents one or more international trade partner nation-states. This model reimagines globalization as selective openness to trade and investment. In the first whorl are the most reliable, friendliest nations; in the second whorl additional friendly nations; in the third whorl are various allied nations; and in the fourth whorl are non-allied but unobjectionable nations. This model allows certain nation-states to be excluded altogether from the globalization paradigm.¹²

In the case of the United States, this paradigm puts Canada and Mexico in the first whorl; in the second whorl are nations, such as South Korea and Israel, with which the U.S. has free trade agreements; the EU and certain Asian nations are in the third whorl; and most WTO members reside in the fourth

⁹See Thomas J. Schoenbaum & Daniel C.K. Chow, *The Perils of Economic Nationalism and a Proposed Pathway to Trade Harmony*, 30 STAN. L. & POL'Y REV. 115 (2019).

¹⁰Ellen Nakashima & Cate Cadell, *China Building a Secret Navy Base*, WASH. POST, Jun. 7, 2022, at A1.

¹¹The Washington Consensus emphasized reliance on market forces with little government input and free and open international trade and investment. See John Williamson, *The Strange History of the Washington Consensus*, 27 J. POST-KEYNESIAN ECON. 195, 206 (2004).

¹²Names for this process are "friend-shoring" and "allies-shoring." See Sarah Kessler, *What is 'Friendshoring'?*, N.Y. TIMES (Nov. 18, 2022), <https://www.nytimes.com/2022/11/18/business/friendshoring-jargon-business.html>.

whorl. China has an asterisk signaling that special trade and investment restrictions apply, placing it in whorl 4.5. Excluded altogether are sanctioned nations, such as Russia, Iran, Cuba, and North Korea.

This new globalization paradigm demotes the role of the WTO in the multilateral trading system. No longer does the WTO function as sole engine and arbiter of international trade. Rather, the role of preferential trade agreements is greatly enhanced. Agreements such as the US-Mexico-Canada Agreement, the Comprehensive and Progressive Trans-Pacific Partnership Agreement, the Regional Comprehensive Economic Partnership Trade Agreement, the Mercosur Trade Agreement, and the EU-Japan Economic Partnership Agreement, are now equal partners with the WTO as custodians of the multilateral trading system.

III. Salient Biden Trade Policies

Three salient elements characterize the Biden policies toward international trade. First, like the Trump administration, Biden invokes the myth of a manufacturing comeback in the United States, harkening back to the time when factory jobs were plentiful, labor unions were powerful, and unskilled labor was the norm. As Katherine Tai, U.S. Trade Representative (USTR) under Biden, puts it: Trade policy must be “[American] worker centered.” Trade must benefit “regular Americans, communities, and workers.” Americans are “not just consumers, they are also workers and wage earners.”¹³ In his first week in office, President Biden signed Executive Order 14005, which requires, to the maximum extent feasible, American government entities to “buy American,” to source components and products made in the United States.¹⁴ Executive Order 14017¹⁵ mandates a broad review of supply chains for products and industries vital to United States security and economy. The purpose of this Order is to make sure that “production shortages, trade disruptions, natural disasters, and potential actions by foreign competitors and adversaries never leave the United States vulnerable again.” “Make it in America is no longer just a slogan; it’s a reality in my administration,” brags President Biden.¹⁶ He boasts about “finally bringing home jobs that have been overseas for a while.”¹⁷

While such statements have appeal as political rhetoric, factual truths belie their reality. The author has addressed this issue elsewhere.¹⁸ Suffice it to say that the old days of plentiful manufacturing jobs for unskilled workers are not returning. The U.S. is now a service-based economy. The U.S. manufacturing base now produces as much or more than in days past but with drastically fewer workers. Moreover, manufacturing jobs are still relatively plentiful in the U.S., but for workers highly skilled in technology.¹⁹

Second, the Biden administration views international trade policy as means to address non-trade, societal concerns such as climate change and workers’ rights. The USTR argues that open international trade tends to incentivize downward pressures on environmental protection. Accordingly, the USTR states we must develop trade rules that protect against wildlife trafficking, illegal logging and deforestation, overfishing, and air and water pollution. Trade rules must enhance supplies of environmental goods; trade policy must also be enlisted to tackle climate change.²⁰

¹³United States Trade Representative, *2021 Trade Policy Agenda and 2020 Ann. Rep.* 2 (Mar. 2021).

¹⁴White House, Executive Order on Ensuring the Future of Made in America in All of America by All of America’s Workers (Jan. 25, 2021), Exec. Order 02038, 86 Fed. Reg. 7475 (Jan. 25, 2021).

¹⁵Exec. Order 14017, 86 Fed. Reg. 11849 (Feb. 24, 2021).

¹⁶Catherine Rampell, *The Myth of a Manufacturing Comeback*, WASH. POST, September 20, 2022, at A19 (quoting President Biden).

¹⁷*Id.*

¹⁸Schoenbaum & Chow, *supra* note 9.

¹⁹These three points are elaborated in Schoenbaum & Chow, *supra* note 9.

²⁰Office of United States Trade Representative, *Remarks from Ambassador Katherine Tai on Trade Policy*, the Environment and Climate Change (Jun. 5, 2021), <https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2021/april/remarks-ambassador-katherine-tai-trade-policy-environment-and-climate-change>.

Third, Biden's trade policy is highly cautionary and political. Biden has apparently decided that his administration cannot or should not address trade matters that will raise even minimal opposition or controversy. He apparently believes that any significant trade initiative would fail in the Congress, given the fact that the Republican party under Trump is now overtly protectionist and his Democratic party is split on trade. This means that the Biden administration intends to allow trade policy to drift along without addressing matters that are potentially of benefit to the United States. For example, (1) tariffs and other trade restrictions imposed by the Trump administration pursuant to section 232 of the Trade Expansion Act and sections 201 and 301 of the Trade Act of 1974, will remain, at least for now;²¹ (2) trade and investment sanctions on China will remain and will be legally secured and enlarged;²² (3) although the Biden administration played a key role in the appointment of Ngozi Okonjo-Iweala as new Director General of the WTO, there likely will not be any American-led revival of the WTO; and (4) negotiating new free trade agreements is not a high priority for the Biden administration.²³ President Biden has stated: "I am not going to enter any new trade agreement until we have made major investments here at home and in our workers."²⁴

In this Article I will address in more detail seven components of the Biden policies: (1) buy American; (2) Trump tariffs; (3) WTO; (4) free trade agreements; (5) technology; (6) China; and (7) Russia.

C. Buy American

Like President Trump, one of President Biden's first actions with respect to international trade was to issue an Executive Order mandating "buy American" by federal government entities.²⁵ Two statutes govern federal procurement of foreign origin products. First, the Buy American Act (BAA), 41 U.S.C. §§ 8301-8305, generally requires federal entities to procure articles manufactured in the United States unless the head of department determines that their cost is unreasonable. Second, the Trade Agreements Act (TAA) implements trade agreements entered into by the United States that guarantee signatory countries non-discriminatory treatment in government procurement.²⁶ These two statutes are obviously in tension. TAA eligible contracts (contracts over certain monetary thresholds) benefit from a waiver issued by the USTR.

The BAA applies various legal tests to determine the country of origin of different categories of products. One of the most important tests applies to manufactured products: A manufactured product, to be American in origin, must be manufactured in the U.S and the cost of its components mined, produced, or manufactured in the U.S. must exceed 50 percent of the cost of all its components.²⁷ The latter rule is known as the domestic content test.

The Biden executive order increases the domestic content requirement from 50 percent to 75 percent, and still higher minimums are applied to iron and steel end products. The executive order also increases the price preferences for domestic end products and construction materials. If a domestic end-product is not the lowest price for a government contract, a factor of 20 to

²¹David J. Lynch, *Biden Sticks with Steel Tariffs*, WASH. POST, Apr. 30, 2021, at A18.

²²White House, Executive Order Addressing the Threat from Securities Investments that Finance Certain Companies of the People's Republic of China (Jun. 4, 2021). Exec. Order 14032, 86 Fed. Reg. 30145 (Jun 3, 2021).

²³Guy Erb & Scott Sommers, *Biden's Trade Policy and Free Trade Areas*, WASHINGTON INT'L TRADE ASS'N BLOG (Jun. 5, 2021), <https://www.wita.org/blogs/bidens-trade-policy/>.

²⁴Television Interview with Thomas L. Friedman of the New York Times (Dec. 2, 2020).

²⁵Executive Order 14005, Ensuring the Future is Made in All of America by All of America's Workers. See Exec. Order 14005, 86 Fed. Reg. 7475 (Jan. 25, 2021).

²⁶TAA eligible countries include (1) developing countries under the Generalized System of Preferences; (2) free trade agreement countries; and (3) WTO member countries that have signed the WTO Government Procurement Agreement.

²⁷48 C.F.R. § 25.101(a).

30 percent (depending on whether offer is from a small business concern and whether the construction material is manufactured or unmanufactured) must be added to the price of the foreign low offer to evaluate the relative competitiveness of the offers. The Biden executive order also centralizes the oversight of waivers and the approval process under the TAA in a new Made in America office in the Office of Management and Budget. The Final Rule²⁸ strengthens Buy America Act requirements for US government contractors and their supply chains. All government contractors must undertake a strategic review of supply chain sourcing with a view to complying with the new thresholds.

The Biden administration's "buy American" policy is a key aspect of a new American industrial policy enacted by the Congress in the form of four laws that subsidize key sectors of the U.S. economy. The American Rescue Plan Act (2021) provides some \$40 billion in industrial subsidies; the Infrastructure and Jobs Act (2021) adds some \$1.2 trillion; the Inflation Reduction Act (2022) contains some \$369 billion in subsidies for electric vehicles and renewable energy; and the Chips Act (2022) adds \$252.7 billion in subsidies for semiconductor chips technology. These laws coupled with new "buy American" standards constitute a venture into protectionism and away from free trade ideals.

Critics of the "made in America" Biden policy include Larry Summers, former U.S. Secretary of the Treasury, who maintains the executive order will exacerbate economic problems by driving up prices and fueling labor shortages.²⁹ A legal and political concern is whether these buy America executive orders are compatible with U.S. obligations as a member of the WTO Government Procurement Agreement.³⁰ Due to the Trump and Biden buy America executive agreements, a formal waiver pursuant to the TAA is necessary if an exception must be made to buy America to comply with the GPA. Trading partners of the U.S., particularly the European Union and Canada, should be worried about the new constraints buy America places on the TAA waiver approval process.

D. Tariffs

Using authority delegated by Congress, President Donald Trump took unprecedented advantage of his executive powers by issuing successive proclamations that imposed protectionist tariffs and other barriers on imports. In doing so, Trump ignored international law norms³¹ in favor of acting unilaterally under U.S. law. Trump relied upon authority delegated under section 232 of the Trade Expansion Act of 1962;³² and sections 201³³ and 301³⁴ of the Trade Act of 1974, to levy tariffs on thousands of categories of imported products, including primarily products imported from China.³⁵ But Trump used tariffs largely indiscriminately so the countries most affected were economic and military allies, including the EU and Japan.

²⁸87 Fed. Reg. 12780 (March 4, 2022) (to be codified at 48 C.F.R. pt. 1).

²⁹Tyler Pager & Jeff Stein, *Biden Privately Calls Critics of His Economic Agenda*, WASH. POST, Jun. 4, 2021, at A7.

³⁰The WTO Government Procurement Agreement (GPA) is a plurilateral agreement binding only on those WTO members that specifically sign or accede to it. The GPA was negotiated and approved in 1994, but the current version was concluded March 30, 2012. The text of the GPA is available at the WTO web site, www.wto.org. There are 21 parties to the GPA, including the United States.

³¹Unilateral trade retaliation without authorization from the WTO is inconsistent with GATT norms. See Panel Report, *United States—Sections 301-310 of the Trade Act of 1974*, WT/DS52/R (adopted 22 Dec. 1999).

³²19 U.S.C. § 1862.

³³19 U.S.C. § 2251.

³⁴19 U.S.C. §§ 2411-2420.

³⁵For greater detail about these tariffs, see DANIEL C. K. CHOW & THOMAS J. SCHOENBAUM, *INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS*, 139-143 (4th ed. 2022).

I. Section 301 Investigations

1. Trump Administration Section 301 Investigations

During the Trump administration, the USTR made unprecedented use of the legal authority in the United States known as section 301 of the Trade Act of 1974,³⁶ which permits the United States to take unilateral action against countries whose acts or practices the USTR finds unjustifiably impede or burden the foreign commerce of the United States. From 2001 to 2017, only four section 301 investigations were undertaken, all in full compliance with WTO norms. President Trump's USTR, however, launched six section 301 investigations: (1) against the European Union and the United Kingdom concerning Airbus subsidies;³⁷ (2) against France concerning French taxation of U.S. digital services companies;³⁸ (3) against the EU and additional countries concerning digital services taxes;³⁹ (4) against Vietnam concerning intervention in international currency markets;⁴⁰ (5) against Vietnam concerning alleged illegal timber exports;⁴¹ and (6) against China concerning technology transfer, intellectual property rights, and innovation.⁴²

It is notable that there has been no clash between the policy of the Trump USTR and the Biden USTR concerning these cases. In fact, the two administrations seem in accord. Both administrations have moved to mollify the section 301 contretemps with the European Union (and the UK). USTR Lighthizer first proposed a "truce" on the Airbus dispute in October 2020. On June 15, 2021, the EU and US announced a five-year suspension of the Airbus-Boeing tariffs by both sides for five years. The two sides also formed a working group to find a permanent solution to the dispute.⁴³ Similarly, the EU and the Biden administration have suspended tariff retaliation in the two digital services taxation section 301 cases, with the idea to find a negotiated solution.⁴⁴ No tariffs or punitive measures were declared by either the Trump or Biden USTRs against Vietnam. On July 23, 2021, the United States announced agreement with Vietnam to resolve the international currency dispute;⁴⁵ and on October 1, 2021, the USTR announced agreement with Vietnam ending the timber dispute.⁴⁶

Only against China have both administrations taken a hard line; there is no end in sight for the trade war between the United States and China. In 2018, the Trump administration formally found that "certain acts, policies, and practices of the Chinese government" related to technology

³⁶19 U.S.C. § 1411.

³⁷Initiation of Section 301 Investigation: Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute, 84 Fed. Reg. 15028 (Apr. 12, 2019).

³⁸Initiation of Section 301 Investigation of France's Digital Services Tax, 84 Fed. Reg. 34042 (Jul. 16, 2019).

³⁹Initiation of Section 301 Investigation of Digital Services Taxes, 85 Fed. Reg. 34709 (Jun. 5, 2020).

⁴⁰Initiation of Section 301 Investigation: Vietnam's Acts, Policies, and Practices Related to Currency Valuations, 85 Fed. Reg. 63637 (Oct. 8, 2020).

⁴¹Initiation of Section 301 Investigation: Vietnam's Acts, Policies, and Practices Related to the Export and Related Use of Illegal Timber, 85 Fed. Reg. 63639 (Oct. 8, 2020).

⁴²Initiation of Section 301 Investigation: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 82 Fed. Reg. 40213 (Aug. 24, 2017).

⁴³Office of the United States Trade Representative, *USTR Announces Joint U.S.-E.U. Cooperative Framework for Large Civil Aircraft*, USTR (June 15, 2021), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/jun/ustr-announces-joint-us-eu-cooperative-framework-large-civil-aircraft>. See also Michael Birnbaum, Anne Gearan, & David J. Lynch, *U.S., E.U. End Plane Dispute*, WASH. POST, June 16, 2021, at A16.

⁴⁴On June 5, 2021, the G-7 announced agreement on a minimum 15 percent global tax rate for corporations, setting the stage for negotiation of a treaty on digital taxes and multinational companies. See Jeff Stein & Antonia Noori Farzen, *G-7 Countries Reach Agreement*, WASH. POST, June 6, 2021, at A1.

⁴⁵Office of the United States Trade Representative, *USTR Releases Determination and Ongoing Monitoring Following U.S.-Vietnam Agreement on Vietnam Currency Practices*, USTR (Jul. 23, 2021), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/july/ustr-releases-determination-action-and-ongoing-monitoring-following-us-vietnam-agreement-vietnam>.

⁴⁶Office of the United States Trade Representative, *USTR Announces Agreement Between the United States and Vietnam to Resolve Timber Section 301 Investigation*, USTR (Oct. 1, 2021), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/october/ustr-announces-agreement-between-united-states-and-vietnam-resolve-timber-section-301-investigation>.

transfer, intellectual property, and innovation “are unreasonable or discriminatory and burden or restrict U.S. commerce.”⁴⁷ The USTR then published four lists of products imported from China on which were levied section 301 punitive tariffs:

- List 1 (\$34 billion) effective July 6, 2018
- List 2 (\$16 billion) effective August 23, 2018
- List 3 (\$200 billion) effective September 28, 2018
- List 4 was divided into two tranches; List 4A (\$126 billion) became effective September 1, 2019; List 4B was suspended under the U.S.-China Phase One Trade Agreement, January 15, 2020.⁴⁸

2. WTO Review

U.S. tariffs on Chinese imports were imposed virtually “willy-nilly” against tens of thousands of products by a president, a self-described “tariff man,” without regard to U.S. obligations under international law. The tariffs are facially inconsistent with GATT Article I (most-favored nation); Article II (tariff bindings); Article XI (when turned into quotas); and Article XIX and the WTO Safeguards Agreement. In *China Tariffs*,⁴⁹ a WTO Panel ruled that the section 301 tariffs levied on imports from China violated GATT Articles I and II.

This Panel ruling was not adopted by the WTO Dispute Settlement Body (DSB), nor will it ever be adopted. Thus, the ruling is in this case is non-binding. Article 16.4 of the WTO Dispute Settlement Understanding (DSU) provides that the report of a WTO dispute settlement panel may not be considered by the DSB “until after completion of the appeal.” The U.S. appealed the adverse ruling in the *China Tariffs* case, effectively blocking any DSB action. Because the Appellate Body has not been allowed to function since December 2019, because of the U.S. boycott, the appeal in the *China Tariffs* case cannot be heard.

3. Judicial Review

Section 301 authorizes the President to take “all appropriate and feasible action within his power” to retaliate for four different categories of unfair trade practices.⁵⁰ The President has virtually unfettered discretion in deciding whether to act and in deciding what type of trade action to take. No provision of the statute grants a right of judicial review of the President’s action. The President has plenary authority in foreign affairs, and his power is at its maximum when exercised in accord with Congress, as is the case with section 301.⁵¹ Nevertheless, the President may not contravene clear statutory requirements⁵² or clear procedural norms.⁵³

⁴⁷Office of the United States Trade Representative, *Findings of the Investigation into China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1974* (Mar. 22, 2018), <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF>.

⁴⁸Notice of Modification of Section 301 Action: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 69,447 (Dec. 18, 2019). In this Phase One agreement China commits to structural reforms and changes to its technology policies. The text of this agreement is available at www.ustr.gov.

⁴⁹Panel Report, *United States–Tariff Measures on Certain Goods from China*, WTO Doc. WT/DS543/R, (adopted Sept. 15, 2020).

⁵⁰19 U.S.C. § 2411.

⁵¹*Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 590 (1952) (Jackson, J., concurring).

⁵²*Yoshida Int’l Inc. v. United States*, 378 F.Supp. 1155 (Cust. Ct. 1974), rev’d on other grounds., 526 F.2d 560 (Ct.Cust. App. 1975) (Stating that President Nixon exceeded his authority in proclaiming a tariff surcharge); *National Silver Co. v. United States*, 388 F.Supp. 1391 (Cust. Ct. 1975) (holding that the President could only accept or reject Tariff Commission’s recommendation).

⁵³*Gilda Industries Inc. v. United States*, 625 F.Supp. 2d 1377 (Ct. Int’l Trade. 2009), aff’d 622 F.3d 1358 (Fed. Cir. 2010) (stating that authority for imposition of duties expired by law).

In the case of the section 301 *China tariffs*, over 6,500 importers filed suit to challenge the List 3 and 4A duties. This litigation focused on the role of the USTR in formulating the lists of products subject to duties. In this case, the Court of International Trade rejected plaintiffs' claims that the USTR did not have statutory authority. The court ruled that sufficient authority existed under sections 307(a)(1)(B) and (C) of the Trade Act of 1974.⁵⁴ The court also ruled that the USTR had sufficient authority to modify the original section 301 tariffs in response to China's subsequent behavior.⁵⁵ However, the court agreed with the plaintiffs' claim that the USTR when it issued the duties failed to respond adequately to significant comments filed by importers in violation of the Administrative Procedure Act, 5 U.S.C. § 553(c).⁵⁶ The court remanded the case to the USTR for further explanation and consideration. The court also issued a preliminary injunction that suspends liquidation of plaintiffs' unliquidated entries from China regarding products on Lists 3 and 4A.⁵⁷ At the time of writing, the litigation is continuing.

Although the Biden administration mounted a vigorous defense of the Trump section 301 tariffs, the effect of the Court of International Trade's decision is to compel a wholesale reconsideration of the China tariffs. The court's decision combined with three important factors makes it highly likely the Biden administration will end up imposing a changed and perhaps less burdensome tariff scheme: (1) There is great pressure upon the Biden administration to lift the China tariffs to combat current inflation in the United States;⁵⁸ (2) In October 2021, USTR Katherine Tai, announced a new, targeted tariff exclusion process for the benefit of U.S. importers;⁵⁹ and (3) On May 3, 2022, the USTR began a statutorily mandated four-year review of the section 301 actions taken against China.⁶⁰

These developments make it likely that the Biden administration will develop its own strategy in the rivalry with China. This would be an excellent development as the Trump China policy has demonstrably not worked.

II. Section 232 National Security Tariffs

1. Tariffs on Steel and Aluminum

In his quest for protectionism, President Trump dusted off little used section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862, which confers open-ended authority on the President to take action to protect national security. President Trump conducted eight national security investigations under this authority, but he used this authority to impose tariffs only with respect to imports of steel and aluminum. Beginning on March 23, 2018, President Trump ordered extra tariffs be assessed, 25 percent and 10 percent, respectively on imported steel and aluminum products.

The steel and aluminum tariffs were imposed by the President across the board even on close allies such as the E.U. and Japan. For a time, these tariffs were imposed on imports from Canada and Mexico despite the North American Free Trade Agreement.

The Biden administration has chosen to leave the Trump steel and aluminum tariffs in place despite their high cost. In 2021 Biden replaced the metal tariffs on imports from the E.U. and the

⁵⁴In *Re Section 301 Cases*, 524 F.Supp. 3d 1355 (Ct. Int'l Trade 2021); In *Re Section 301 Cases*, 570 F.Supp.3d 1306 (Ct. Int'l Trade 2022).

⁵⁵In *Re Section 301 Cases*, 570 F.Supp. 3d at 1325–26.

⁵⁶*Id.* at 1337–43.

⁵⁷*Id.* at 1343–45.

⁵⁸David J. Lynch, *White House Split on Lifting China Tariffs to Curb Inflation*, WASH. POST, May 24, 2022, at A17.

⁵⁹Joseph L. Barloon, Brian J. Egan, Michael E. Leiter, Brooks E. Allen & Ariel V. Lieberman, *USTR Restarts Tariff Exclusion Process for Section 301 Duties*, SKADDEN, (Oct. 12 2021), <https://www.skadden.com/insights/publications/2021/10/ustr-relaunches-exclusion-process>.

⁶⁰CONGRESSIONAL RESEARCH SERVICE, IF11582, SECTION 301 TARIFF EXCLUSIONS ON U.S. IMPORTS FROM CHINA 2 (2022).

U.K. with tariff rate quotas.⁶¹ In 2022, Biden negotiated a tariff rate quota on metals with Japan.⁶² Biden removed the tariffs entirely on imports from Ukraine, a largely symbolic gesture.

The economic effect of these tariffs is to raise prices and disrupt supply chains; the American consumer commonly pays millions of dollars, the extra cost they represent. Affected countries have retaliated, raising tariffs on U.S. exports in some cases. The tariffs save some domestic jobs but at great economic cost.⁶³ Moreover, any U.S. job boom in steel has not occurred. Employment in U.S. blast furnaces, mills, and foundries rose before the pandemic to more than 144,000 from 139,200 when Trump imposed the measures, but at this writing, after three years of tariffs, employment stands at 135,000 workers.⁶⁴

The steel sector lobbies to retain the tariffs, citing global excess steel production capacity. Tom Conway, the President of the United Steelworkers Union, says the tariffs were “a ham-fisted approach to the problem of too much global steel supply,” but he argues that the tariffs must remain until there is a global settlement among major steel-producing nations.⁶⁵ The Biden Administration appears to agree with this sentiment.

2. Judicial Review

Numerous importers have challenged Trump’s section 232 national security tariffs in the U.S. Court of International Trade without notable success. In *American Institute for International Steel v. United States*,⁶⁶ the court rejected a challenge to the President’s use of section 232 as an impermissible delegation of statutory authority. In *Universal Steel Products v. United States*,⁶⁷ the court rejected a second broad challenge to the national security tariffs. The court opinion rejects (1) that the Secretary of Commerce violated section 232 procedural requirements; (2) that the President misinterpreted section 232 by failing to base his determination on national security; and (3) that certain mandatory timing and duration requirements were violated.⁶⁸ In *Prime Source Building Products, Inc. v. United States*,⁶⁹ the court considered the validity of Presidential Proclamation 9980, which imposed national security tariffs on certain derivatives of aluminum and steel products. The court rejected the plaintiff’s claims of violation of the Administrative Procedure Act, violation of due process, impermissible statutory delegation, and violations of Commerce Department regulations.

A new challenge to the tariffs was raised in *Thyssenkrupp Materials NA Inc. v. United States*.⁷⁰ In this case the steel importer made two arguments: (1) the proclamation levying tariffs together an exclusion process that relates to specific importers rather than steel products violates the Uniformity Clause (Art. I, sec. 8, cl. 1) of the U.S. Constitution; and (2) the exclusion process is inconsistent with section 232, which by its terms does not contain any exclusion process. The

⁶¹Office of United States Trade Representative, *Fact Sheets*, (Oct. 31, 2021), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets>.

⁶²Office of United States Trade Representative, *Biden Administration Strikes Deal with Japan on Steel Tariffs*, (Feb. 8, 2022), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/march/what-they-are-saying-ambassador-tai-produced-more-wins-american-workers-and-businesses-week>.

⁶³Rampell, *supra* note 16. The cost for every steel industry job saved is estimated by the Petersen Institute of International Economics to be \$650,000. Megan Hogan & Yilin Tan, *To Fight Inflation, Cutting Tariffs is just a Start*, PETERSON INST. FOR INT’L ECON. (June 8, 2022), <https://www.piie.com/blogs/realtime-economic-issues-watch/fight-inflation-cutting-tariffs-china-only-start>.

⁶⁴Lynch, *supra* note 58.

⁶⁵*Id.*

⁶⁶376 F. Supp. 3d 1335 (Ct. Int’l Trade 2019), *aff’d* 806 Fed. App’x 982 (Fed. Cir. 2020).

⁶⁷2021 WL 401283 (Ct. Int’l Trade 2021).

⁶⁸The Federal Circuit Court of Appeals affirmed this decision sub. nom. *USP Holdings, Inc. v. United States*, 36 F. 4th 1359 (Fed. Cir. 2022).

⁶⁹497 F.Supp.3d 1333 (Ct. Int’l Trade 2021).

⁷⁰498 F.Supp.3d 1372 (Ct. Int’l Trade 2021).

Court of International Trade rejected both arguments. The Uniformity Clause only requires Congress to reference a tax in non-geographic terms; and the fact that the statute is silent on exclusions does not bar an exclusion process under an arbitrary and capricious standard of review.

The extent of judicial review of an action taken pursuant to section 232 was addressed by the Court of Appeals for the Federal Circuit in *USP Holdings, Inc. v. United States*.⁷¹ The court affirmed that Presidential action taken is reviewable, but only for violation of an express statutory mandate or clear action outside statutory authority.⁷² However, the President may not be sued directly; the courts have jurisdiction only over subordinate officials who are charged with implementing the President's decision.⁷³ The President may act to impose tariffs or other measures under section 232 only after the Secretary of Commerce has issued a report finding a security threat posed by the relevant imports. The secretary's report is final action that is also reviewable by the court, but only for compliance with the statute.⁷⁴ Under these circumstances, the President's action and the "threat" determination by the secretary must be "reviewed together as a single step using an identical test."⁷⁵ In the *USP Holdings* case, the court found no violation of the statute.

Challenges to section 232 have succeeded only as to marginal legal issues. In *Universal Steel Products v. United States*,⁷⁶ the court granted summary judgment to plaintiff on a claim that the President's proclamation violated a mandatory timing provision of section 232. In a related case, *Transpacific Steel, LLC v. United States*,⁷⁷ the court ruled that the imposition of additional section 232 tariffs on steel imports from Turkey violated a mandatory timing provision of the statute and concluded there was no national security reason for the increases. This ruling was overturned on appeal.⁷⁸

Thus, the court will reject any broad challenge to presidential action invoking section 232 but may hold the executive to account for clear procedural violations. Plaintiffs seeking relief from the section 232 tariffs may apply for an exclusion order from the Department of Commerce. If exclusion is denied, the applicant may seek judicial review. If the requester of exclusion proves that the relevant articles are not immediately available, government may settle, or the court may order relief.⁷⁹

III. Safeguard Tariffs

1. Solar Products and Washing Machines

In early 2018, the Trump administration applied safeguard relief in the form of tariffs in two cases, *Large Residential Washing Machines*⁸⁰ and *Solar Cells and Modules*.⁸¹ This was the first time in sixteen years a president had granted safeguard relief. Both safeguard actions were challenged at the WTO. In *United States—Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products*, WT/DS562/R (Sept 2, 2021)—a WTO panel concluded that China failed to demonstrate that the U.S. acted inconsistently with GATT Article XIX or the WTO Safeguards Agreement. In *United States—Safeguard Measure on Imports of Large Residential Washers*, WT/DS546/R

⁷¹36 F.4th 1359 (Fed. Cir. 2022).

⁷²*Id.* at 1366.

⁷³*Id.*

⁷⁴*Id.* at 1368.

⁷⁵*Id.* at 1369.

⁷⁶497 F. Supp. 3d 1406 (Ct. Int'l Trade 2021).

⁷⁷466 F. Supp. 3d 1246 (Ct. Int'l Trade 2020).

⁷⁸*Transpacific Steel LLC v. United States*, F.4th 1306 (Fed. Cir. 2021).

⁷⁹*See* *JSW Steel (USA) Inc. v. United States*, 466 F. Supp. 3d 1320 (Ct. Int'l Trade 2020); *Boruman Mannesmann Pipe U.S., Inc. v. United States*, Ct. No. 20-00012 (Ct. Int'l Trade 2020).

⁸⁰*Large Residential Washers*, Inv. 82 Fed. Reg. 58026 (Dec. 2017).

⁸¹*Crystalline Silicon Photovoltaic Cells*, Inv. 86 Fed. Reg. 44403 (Nov. 2017).

(Feb. 8, 2022)—the WTO panel ruled that the U.S. had acted inconsistently with Article XIX and the WTO Safeguard Agreement because its report does not contain a reasoned and adequate explanation on “unforeseen developments” and the “obligations incurred.”

Neither safeguard measure accomplished its intended purpose. In the case of large residential washers, the safeguard triggered sharply increased prices and a collapse of domestic sales.⁸²

The solar safeguard failed to raise domestic production of solar cells and created turmoil in the solar panel installation industry by raising prices and creating shortages. The U.S. solar industry incurred chaos when the U.S. Department of Commerce opened an investigation of alleged dodging of tariffs by Chinese solar cell makers.⁸³ The Biden administration is walking a fine line, pushing for immediate deployment of solar energy while trying to incentivize the creation of a robust domestic solar manufacturing industry.

Apparently after a change of heart, President Biden, on June 6, 2022, decided to extend the solar safeguard duties until 2026,⁸⁴ but bifacial solar panels continue to be exempt from the safeguard duties. Biden also ordered two-year pause in levying safeguard duties on imports of solar modules and cells from Cambodia, Malaysia, Thailand, and Vietnam. He invoked the Defense Production Act to accelerate domestic production of clean energy technologies.⁸⁵ Thus, Biden, in a classic case of “having your cake and eating it too,” both extended the Trump tariffs and created some breathing space for more imports and deployment of solar technologies.

Congress also passed the Inflation Reduction Act of 2022, which provides advanced tax credits for manufacturing production of solar technology.⁸⁶ The Biden administration also excluded Canada and Mexico from the safeguard solar tariffs levied by the Trump administration.⁸⁷

2. Judicial Review

In the imposition of safeguard duties under section 201 of the Trade Act of 1974, the President has broad discretion. Although the statute does not provide for judicial review, in *Maple Leaf Fish Co. v. United States*,⁸⁸ the court stated that the scope of review is whether there was a “clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority.” The fact that the President is imbued with foreign relations power means that he is “insulated from judicial review for abuse of discretion.”⁸⁹

Judicial review of the Trump safeguard has centered on follow-on administrative actions by the USTR. The solar products safeguard, Presidential Proclamation 9693,⁹⁰ delegated authority to the USTR to make exclusions from the safeguard duties. After notice and comment, the USTR exempted bifacial solar panels from the safeguard duties. But in October 2019, the USTR abruptly withdrew this exclusion.⁹¹ On judicial review, the Court of International Trade invalidated this withdrawal on the grounds mandatory administrative law procedures were ignored by the

⁸²Jim Tankersley, *How Tariffs Stain the Washing Machine Market*, N.Y. TIMES (Jan. 25, 2019).

⁸³Evan Halper, *White House Takes Measures to Boost the Solar Industry*, WASH. POST, Jun. 7, 2022, at A19.

⁸⁴87 Fed. Reg. 7357 (Feb. 9, 2022).

⁸⁵White House Statement, *Fact Sheet: President Biden Takes Bold Executive Action to Spur Domestic Clean Energy Manufacturing* (Jun. 6, 2022) <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/06/fact-sheet-president-biden-takes-bold-executive-action-to-spur-domestic-clean-energy-manufacturing/>.

⁸⁶Pub. L. No. 117-169 (2022).

⁸⁷Office of the United States Trade Representative, *United States and Canada Announce a Memorandum of Understanding on Trade in Solar Products*, (Jul. 7, 2022), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/july/united-states-and-canada-announce-memorandum-understanding-trade-solar-products>.

⁸⁸762 F.2d 86, 89 (Fed. Cir. 1985).

⁸⁹Motions Systems Corat v. Bush, 437 F.3d 1356, 1361 (Fed. Cir. 2006). See also *Corus Group PLC v. Int’l Trade Com’n*, 352 F.3d 1354 (Fed. Cir. 2003).

⁹⁰83 Fed. Reg. 3541 (Jan. 25, 2018).

⁹¹Withdrawal of Bifacial Solar Panels Exclusion, 84 Fed. Reg. 54244 (Oct. 9, 2019).

USTR.⁹² Following this rebuff, the Trump administration issued Presidential Proclamation 10101 to withdraw the exclusion.⁹³ In a questionable decision, the Court of International Trade was unmoved by the presidential proclamation, interpreting the word “modify” in section 204 of the Trade Act to mean “make less extreme;” thus, the bifacial solar panels exclusion holds firm.⁹⁴

E. Reviving the WTO

The top two functions of the WTO are (1) to service as a forum for multilateral trade negotiations; and (2) the administration of the WTO dispute settlement mechanism. Both functions are seriously impaired.⁹⁵ The WTO has been unable to agree on any significant trade agreement since the Uruguay Round in 1994, and the dispute settlement mechanism, despite a record number of pending cases, is moribund because the Appellate Body has not functioned since December 2019.⁹⁶

Some 42 WTO members and the E.U. have put forward a multi-party interim appeal arrangement in the form of agreements to arbitrate trade disputes as specified in Article 25 of the WTO Dispute Settlement Understanding. This interim arrangement is now functioning for the states accepting it.⁹⁷ This arrangement is an attempt to preserve the two-tier WTO adjudication process in the absence of the Appellate Body.

A key question is: Will the Biden administration take steps to restore these two key functions of the WTO? The USTR Katherine Tai has pledged to reengage with U.S. allies and multilateral institutions, but the way does not seem clear for return to the status quo ante with respect to the WTO.

The United States has little interest in restoring the WTO as a trade agreement negotiation forum. First, the United States has no present interest in any form of comprehensive, multilateral trade agreement. Such an agreement would not have any chance of gaining the approval of Congress. Second, the United States has lost confidence in the ability of the WTO as a negotiating forum. The specialized trade agreements that the U.S. advocates, such as an environmental goods agreement and a digital trade agreement, do not find favor among most WTO members. Thus, the U.S. commonly turns to other negotiating forums, such as the OECD, the G-7, or the State-to-State dispute mechanism of the United States-Mexico-Canada Agreement (USMCA).

The U.S. has no interest in reviving the WTO dispute settlement system or the Appellate Body. There is bipartisan agreement among U.S. policymakers that the Appellate Body has strayed from WTO agreed rules to take an activist stand on many legal and policy issues. The 2020 USTR *Report on the Appellate Body of the World Trade Organization*,⁹⁸ points out that fully one-quarter of all disputes at the WTO have challenged U.S. laws or measures. In total, 155 disputes have been launched against the United States, and some 90 percent of these have led to a finding that a U.S. law or measure was inconsistent with WTO obligations.

⁹²See *Invenenergy Renewables LLC v. United States*, 422 F. Supp. 3d 1255 (Ct. Int'l Trade 2019); *Invenenergy Renewables LLC v. United States*, 552 F. Supp. 3d 1352 (Ct. Int'l Trade 2021).

⁹³85 Fed. Reg. 65639 (Oct. 16, 2020).

⁹⁴*Solar Energy Indus. Ass'n v. U.S.*, 553 F. Supp. 3d 1322, 1340–42 (Ct. Int'l Trade 2021).

⁹⁵At the 12th WTO Ministerial Conference held in Jun. 2022, the WTO members reached agreement on several important issues: trade ministers adopted a partial patent waiver for Covid-19 vaccines; extended duty-free treatment for trade in digital products such as films, computer software, and data, and agreed to curb some fishing subsidies and limit food export restrictions. See Twelfth WTO Ministerial Conference, *MC12 Package of Decisions and Declarations*, Jun. 17, 2022, https://www.wto.org/english/thewto_e/minist_e/mc12_e/documents_e.htm.

⁹⁶See Leonardo Borlini & Giorgio Sacerdoti, *Systemic Changes in the Politicization of the International Trade Relations and the Decline of the Multilateral Trading System*, in this Issue.

⁹⁷At the conclusion of the 12th WTO Ministerial Conference, Jun. 17, 2022, WTO members agreed to update the WTO working practices and to reinvigorate the WTO dispute settlement system, but no details were announced. See *Id.*

⁹⁸Robert E. Lighthizer, *The USTR Report on the Appellate Body of the World Trade Organization*, U.S. MISSION TO INT'L ORG. IN GENEVA, (Feb. 12, 2020), <https://geneva.usmission.gov/2020/02/12/ustr-report-on-the-appellate-body-of-the-world-trade-organization/>.

The *Report* levels three major charges: (1) the Appellate Body ignores or violates numerous procedural rules and deadlines in dispute settlement; (2) the Appellate Body engages in “making law,” issuing rulings that are not to be found in the body of WTO agreements; and (3) the Appellate Body has issued numerous rulings invalidating U.S. domestic trade remedy laws that are essential to U.S. interests. The *Report* contends that the Appellate Body was never intended to serve as a supreme court of international trade, and that, pursuant to the Agreement Establishing the WTO, Article IX.2, only the Ministerial Conference and the General Council may adopt interpretations of WTO agreements.

A prominent example of the Appellate Body’s activism is the rulings on “zeroing” in anti-dumping proceeding. United States law provides for zeroing, which permits, under certain circumstances, the export price to be reduced to zero for purposes of comparison with normal value. The WTO Antidumping Agreement nowhere expressly prohibits zeroing. Yet the Appellate Body, applying the “fair comparison” mandate of Article 2.4.2 of the Antidumping Agreement, condemns this practice, ignoring Article 17.6 of the Antidumping Agreement, which limits the scope of review of findings of national authorities.⁹⁹ A second example is the Appellate Body’s ruling with respect to subsidies received by Chinese exporters from certain Chinese state-controlled enterprises in the form of low-priced raw materials, preferential loans, and tax reductions. Yet the Appellate Body rejects the argument that these government-controlled enterprises are “public bodies” under the WTO Subsidies and Countervailing Measures Agreement. Thus, such subsidies may not be neutralized by countervailing duties.¹⁰⁰

The United States believes the Appellate Body was never intended to function as it does, like a supreme court of international trade, deciding legal questions whose solutions are not clearly stated in the WTO agreements, using recognized tools of interpretation provided by international law.¹⁰¹ The U.S. believes the Appellate Body’s powers should be reduced so that hard cases are referred to the DSB, acting as the WTO Council, or to the Ministerial Conference. Until this happens, the United States will continue to boycott new appointments to the Appellate Body, preventing it from functioning.

The present state of the Appellate Body suits U.S. interests as the target of most WTO dispute settlement actions. So long as the Appellate Body cannot function, the United States is immune from adoption by the DSB of adverse legal rulings. If a WTO panel decides a case adversely to U.S. interests, the U.S. may block its adoption by the DSB, simply by filing an appeal.¹⁰² Thus, the U.S. likely will not readily restore the functioning of the Appellate Body and the WTO dispute settlement mechanism.

Certainly, the performance of the WTO in recent years leaves much to be desired. The WTO with its consensus decision-making is virtually incapable of deciding important matters. The only WTO negotiating round, the Doha Development Agenda, was a failure. There is much to criticize about certain Appellate Body decisions. Yet the WTO, largely an American invention, has accomplished much. The United States Trade Representative still celebrates those WTO decisions where the U.S. view prevails.

The U.S., under both Republican and Democratic administrations, has taken a negative view of the WTO without engaging with other members to negotiate reforms. The WTO will likely play a diminished role in international trade in the future. However, the U.S. should not simply criticize, but should play a constructive role in advocating improvements and even new initiatives in cooperation with like-minded states, especially the E.U. and other allied nations.

⁹⁹E.g., Appellate Body Report, *United States-Continued Existence and Application of Zeroing Methodology*, WTO Doc. WT/DS350/AB/R (adopted Feb. 19, 2009).

¹⁰⁰E.g., Appellate Body Report, *Definitive Antidumping and Countervailing Duties on Certain Products from China*, WTO Doc. WT/DS379/AB/R (adopted Mar. 11, 2011).

¹⁰¹See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969 1155 U.N.T.S. 331, art 31-2.

¹⁰²Understanding on Rules and Procedures Governing the Settlement of Disputes art. 16.4., Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 401.

F. Free Trade Agreements

President Biden has signaled that negotiating new free trade agreements will not be a priority for his administration.¹⁰³ The March 1, 2020, published Trade Policy Agenda¹⁰⁴ lists four notified trade negotiations: U.S.-EU; U.S.-Japan; U.S.-Kenya; and U.S.-U.K.¹⁰⁵ Only the U.S.-Kenya negotiation has succeeded;¹⁰⁶ the Congress in 2022, would not be receptive to approving any important new trade initiative.

Biden's statement with respect to free trade agreements reflects the prevailing political climate in the United States. Free trade agreements are out of favor with the electorate, and free trade agreements do not fit well with Biden's announced "worker-oriented" trade policy.

The Biden administration lavishly praises the USMCA, the major trade initiative of the Trump administration. The Democratic chairman of the powerful House Ways and Means Committee, Richard Neal, has said that the USMCA is the "blueprint" for future trade pacts.¹⁰⁷ USTR Katherine Tai touts the USMCA as a premier bipartisan accomplishment.¹⁰⁸ The United States now chooses to file requests for consultations over trade matters under regional agreements, especially the USMCA, rather than using the dispute resolution mechanism of the WTO.¹⁰⁹

The USMCA updates and replaces the North American Trade Agreement (NAFTA), but the much more stringent rules of origin of the USMCA,¹¹⁰ which are designed to tilt the North American market in favor of American businesses, tend to isolate the North American market and reserve it for relatively high-cost American companies. Because of these rules of origin, the USMCA is more restrictive of trade than its predecessor, NAFTA. The rules of origin are designed to shut out more third-country trade than did NAFTA. The rules were crafted expressly for these purposes with the idea that U.S. workers would benefit.

With its focus on the North American market, U.S. trade negotiators have largely turned a blind eye to what is happening in the rest of the world. Free trade agreements give preferential access to foreign export markets on a reciprocal basis. The U.S. has fallen severely behind other nations of the world with respect to such preferential access. U.S. exporters presently have preferential access only to markets that constitute 9 percent of global GDP. By comparison, Canada maintains preferential access to 57 percent of global export markets; Mexico has access to 56 percent; Japan has access to 31 percent; and the EU has access to 20 percent.¹¹¹

In much of the world massive new free trade and other economic agreements are coming into force. China's Belt and Road Initiative involves some 68 countries, 65 percent of world population,

¹⁰³Patrick Wintour, *Joe Biden warning dashes hopes of early US trade deal*, GUARDIAN (Dec. 2, 2020).

¹⁰⁴USTR, *supra* note 13.

¹⁰⁵These negotiations are all inherited from the Trump Administration.

¹⁰⁶Office Of the U.S. Trade Representative, *United States and Kenya Announce the Launch of the U.S.-Kenya Strategic Trade and Investment Partnership* (Jul. 14, 2022), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/july/united-states-and-kenya-announce-launch-us-kenya-strategic-trade-and-investment-partnership>.

¹⁰⁷Ana Swanson & Emily Cochran, *Ways and Means Chairman Pushes for Reopening Trade Talks with EU*, WASH. POST, Dec. 11, 2020, at A3.

¹⁰⁸Office Of the U.S. Trade Representative, *Remarks of Ambassador Katherine Tai Opening the First USMCA Free Trade Commission* (May 18, 2021), <https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2021/may/remarks-ambassador-katherine-tai-opening-first-usmca-free-trade-commission>. The Biden administration has been active in filing state-to-state disputes under the USMCA. The United States has filed two USMCA disputes against Canada to enforce USMCA dairy commitments. In the first case the U.S. prevailed; the second case is pending. See *Canada – Dairy TRQ Allocation Measures*, Final Panel Report, Dec. 20, 2021. Canada and Mexico have asked for a USMCA panel to rule on a dispute with the United States concerning automotive rules of origin. The U.S. and Mexico have settled the first labor dispute filed under the USMCA; See Steven Overly, *U.S., Mexico Settle First Labor Complaint Under USMCA*, POLITICO (Jul. 8, 2021), www.politico.com/news/2021/07/08/us-mexico-labor-usmca-498901.

¹⁰⁹See Geraldo Vidal, *Regional Trade Adjudication and the Rise of Sustainability Disputes, Korea—Labor Commitments and Ukraine—Wood Export Bans*, 116 AM. J. INT'L L. 567 (2022).

¹¹⁰The origin rules constitute regulatory conditions for products moving in international trade between the three countries.

¹¹¹Erb & Sommers, *supra* note 23.

including many economic and security allies of the U.S. In 2020, China and fourteen other nations signed the Regional Comprehensive Economic Partnership Agreement (RCEP). RCEP nations constitute about 30 percent of global trade and GDP. In 2018, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) entered into force between eleven Asia-Pacific nations that constitute 13.4 percent of global GDP. Other Important free trade agreements are MERCOSUR, between Argentina, Brazil, Paraguay, and Uruguay; the 2020 African Continental Free Trade Agreement between 54 African countries; and the European Economic Area, which includes member states of the EU and several additional European nations.

The Biden administration's answer to these developments is something called the "Indo-Pacific Economic Framework for Prosperity."¹¹² The administration is careful to point out that this "Framework" is not a free trade agreement. Aimed at friendly Asian countries, the Indo-Pacific Economic Framework (IPEF) is a tool to boost U.S. cooperation with its Asian trade partners. The IPEF, therefore, is a trade agreement that does not involve trade liberalization. As Catherine Rampell commented in the *Washington Post*, "the Biden administration has apparently decided to defer to the Trump worldview and assume that tariff [lowering] of any kind is too politically dangerous to attempt."¹¹³ The IPEF is an agreement that rests on four rather vague "pillars:" Supply chain resiliency, digital economy rules, clean energy, and anticorruption.¹¹⁴ What is more—the IPEF is designed so that participating countries may opt out of any "pillar" they do not like. To the chagrin of Asian countries to which the IPEF is being pitched, the IPEF does not offer greater market access to the U.S. or any other nation. As Ms. Rampell puts it, "The only thing that can be reliably counted on . . . is a growing political aversion to anything branded as free trade."¹¹⁵

The United States should use free trade agreements as an engine to grow the economy and as a political weapon to win the competition with China. The way forward is—first—to join the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) that the Obama administration negotiated over several years and that would have substantially increased U.S. economic welfare. Second, the U.S. should come to agreement with the E.U. on a Transatlantic Trade and Investment Partnership (T-TIP).¹¹⁶ These two agreements in addition to the USMCA would constitute a new basis for close political and economic linkages between democratic nations in North America, Asia, and Europe. This trilateral linkage would immediately become the economic standard for the world, leaving behind and isolating nations governed as autocracies. China and other nations would be compelled to change their behavior to come to terms with this trilateral alliance.

Perhaps the greatest mistake Trump made in his tenure as president was his repudiation of the 12-nation Trans-Pacific Partnership Agreement negotiated over six years by the Obama administration. As the *Washington Post* editorial board stated, "What could have created a truly effective counterweight to Beijing was the 12-nation Trans-Pacific Partnership. Mr. Trump spurned it, and Mr. Biden, bowing to protectionist sentiment in his own party, shows no sign of reviving it. The President should change that."¹¹⁷

G. China Challenge

Beginning with its dramatic opening to the world in 1979, China has risen economically, politically, and militarily to become one of the most important countries in the world. For most of the

¹¹²See CONGRESSIONAL RESEARCH SERVICE, IN11814, BIDEN ADMINISTRATION PLANS FOR AN INDO-PACIFIC ECONOMIC FRAMEWORK (Feb. 25, 2022).

¹¹³Catherine Rampell, *Biden Trade Framework Misses Key Points About, well, Trade*, WASH. POST, May 25, 2022, at A21.

¹¹⁴White House, *Fact Sheet: Indo-Pacific Strategy of the United States* (Feb. 11, 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/02/U.S.-Indo-Pacific-Strategy.pdf>.

¹¹⁵Rampell, *supra* note 113.

¹¹⁶A parallel negotiation should be conducted with the U.K. on a U.S.-U.K. Free Trade Agreement.

¹¹⁷Editorial Board, WASH. POST, October 5, 2021, at A21.

past forty years, the rise of China was considered benign by the United States and the West. China was welcomed into international economic institutions such as the WTO after sometimes arduous negotiations. By 2016, China had become the second largest economy in the world and the most important trade partner of the United States. During most of the period of China's rise, U.S. policy makers assumed that China would eventually adopt American values of liberal economics and democracy.¹¹⁸

In the second decade of the century, however, China changed, doubling down on Communist party autocratic rule, state-centered economics,¹¹⁹ and abuses of human rights. China's increasing military power clashed with the U.S. vision of a free and open Indo-Pacific region and threatened the self-governing status of Taiwan. The United States also changed. Liberal values of open trade and democracy were flouted by many important political leaders. Donald Trump, who won the presidency in 2016, installed nationalist, populist international economic and political policies. Trump and his advisors singled out China for opprobrium. A favored line in Trump's political stump speeches was, "We can't continue to allow China to rape our country and that's what they're doing. It's the greatest theft in the history of the world."¹²⁰

Once in power, the Trump administration broke with the bipartisan consensus in favor of engagement rather than confrontation with China. The Trump administration called out China specifically on trade, citing the large deficit with China on trade in goods as well as Chinese discriminatory trade barriers, forced technology transfer, and domination by state-owned enterprises. Trump launched a multi-billion-dollar trade war with China featuring tit-for-tat tariffs. Trump also promoted a limited "decoupling" of the Chinese and U.S. economies especially in the fields of technology and investment.

The reaction of China to Trump's anti-China actions was to double down on aggressive actions toward the United States. China adopted tit-for-tat tariffs on U.S. goods in response to the U.S. tariffs. China also accelerated its military buildup and its militarization of disputed islands in the South China Sea. China cracked down against dissenters in Hong Kong and took threatening actions in the Taiwan Straits.

The culmination of the Trump policy toward China was the conclusion January 15, 2020, of a "Phase One" Trade Agreement¹²¹ that obligated China to cease its predatory practices and to buy American products. Chapters of this trade agreement addresses intellectual property, technology transfer, agriculture, financial services, currency manipulation, and expanding the purchase of U.S. goods. China promised to maintain current purchases of U.S. products and to purchase an additional 200 billion dollars in goods and services from the U.S. in 2020 and 2021, and to continue this trajectory in subsequent years. Essentially China was obligated to buy at least 227.9 billion dollars of U.S. exports in 2020, and 274.5 billion dollars in 2021, for a total of 502.4 billion dollars over the two years.

China never came close to meeting these commitments. China's total purchases of U.S. goods over the two years amounted to 288.8 billion dollars, a shortfall of 57 percent.¹²² On October 1, 2021, Biden's USTR, Katherine Tai, announced that China is not complying with the provisions of

¹¹⁸See PETROS C. MAVROIDIS AND ANDRÉ SAPIR, CHINA AND THE WTO: WHY MULTILATERALISM STILL MATTERS (2021).

¹¹⁹A word of caution must be spent here: As aptly stressed by Ming Du, *Unpacking the Black Box of China's State Capitalism*, 65 STAN. L. REV. 697 (2013). In order to contribute effectively to what trade rules may be needed to counteract China's state capitalism, it is first essential unpacking the black box of China's state capitalism.

¹²⁰Nick Gass, *Trump: 'We Can't Continue to Allow China to Rape Our Country'*, POLITICO (May, 2, 2016), <https://www.politico.com/blogs/2016-gop-primary-live-updates-and-results/2016/05/trump-china-rape-america-222689>.

¹²¹The text of this agreement is available, www.ustr.gov.

¹²²Chad P. Brown, *China Bought None of the Extra \$200 Billion of US exports in Trump's Trade Deal*, PETERSON INST. INT'L ECON. (Jul. 19, 2022), www.piie.com/blogs/realtime-economic-issues-watch/china-bought-none-extra-200-billion-us-exports-trumps-trade?utm_source=update-newsletter&utm_m.

the Phase One deal.¹²³ After four years of a bitter trade war there is little to celebrate on either side. The trade war reduced exports and imports between the two countries and contributed to a global decline in trade and economic slowdown. The U.S. trade in goods deficit with China in 2016, before the trade war, was 346.8 billion dollars. In 2021, the deficit was 353.5 billion dollars. The trade war has negatively affected the U.S. trade surplus in services: there was a decline of 37.3 percent in 2020. Meanwhile both sides continued a modicum of foreign direct investment. In 2020, U.S. foreign direct investment in China totaled 123.9 billion dollars; Chinese foreign direct investment in the U.S. totaled 38 billion dollars.

It is obvious that the entire Trump administration China policy has been a miserable failure from beginning to end. Each side raised tariffs against the other. Average Chinese tariffs on U.S. goods went from 8 percent in 2017 to 21.8 percent in 2022. Average U.S. tariffs on Chinese goods went from 3.1 percent to 21.2 percent in the same period. China and the U.S. are by far the two largest economies in the world, but they remain deeply interdependent despite growing rivalry.

The Biden administration is unclear about its own China policy. On October 4, 2021, USTR Katherine Tai delivered a much-anticipated speech on the Biden administration's "New Approach to the U.S.-China Trade Relationship."¹²⁴ Ambassador Tai outlined the new policy as follows:

First, we will discuss with China its performance under the Phase One Agreement . . . Second, we will start a targeted tariff exclusion process . . . Third, we continue to have serious concerns with China's state-centered and non-market trade practices . . . [W]e will raise these broader policy concerns with Beijing . . . [W]e will use the full range of tools we have and develop new tools as needed to defend American economic interests . . . Finally, . . . we will work with allies to shape the rules for fair trade in the 21st century.

What is this statement? Is this a policy or a strategy? A Washington Post editorial commented: "The more things change . . . the more they will stay the same in terms of U.S. economic policy toward China."¹²⁵ Business groups derided this speech as a continuation of Trump's failed policies. Craig Allen, president of the U.S.-China Business Council, stated that—"Many find it ironic that the Biden administration is following so closely the playbook laid down by the Trump administration on China."¹²⁶ Business has continued to call on Biden to formulate a concrete policy on China trade.

To be fair, Ambassador Tai has convened the Trilateral Meetings of trade ministers of the U.S., E.U., and Japan to discuss China. At the November 2021 Trilateral Meeting, a Joint Statement was adopted calling on China to reform its statist trade policies, such as subsidies, state-owned enterprises, and forced technology transfer.¹²⁷

But much stronger medicine is needed. The Biden administration should take bold moves to (1) negotiate and agree with China to restore tariffs both sides now levy back to 2016–17 levels; (2) become a full member of the CPTPP; (3) conclude comprehensive free trade agreements with both the EU and the UK; and (4) use the WTO constructively to confront Chinese statist trade practices.

¹²³Annika K. Constantino, *Biden Top Trade Advisor will Say China is not Complying with Phase 1 Deal Reached Under Trump*, according to sources, CNBC (Oct. 1, 2021), www.cnbc.com/2021/10/01/china-is-not-complying-with-phase-1-deal-biden-trade-official-will-say-sources.html.

¹²⁴Ambassador Katherine Tai, *Fact Sheet: The Biden-Harris Administration's New Approach to the U.S.-China Trade Relationship*, Oct. 4, 2021, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/october/fact-sheet-biden-harris-administrations-new-approach-us-china-trade-relationship>.

¹²⁵Editorial Board, WASH. POST., October 5, 2021, at A21.

¹²⁶Thomas Kaplan & Alan Rappeport, *Businesses Push Biden to Develop China Policy*, N.Y. TIMES, Nov. 3, 2021.

¹²⁷See Office of the United States Trade Representative, *European Commission Joint Statement of the Trade Ministers of the United States, Japan, and the European Union After a Trilateral Meeting Press Release* (Nov. 30, 2021), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/november/joint-statement-trade-ministers-united-states-japan-and-european-union-after-trilateral-meeting>.

Two substantive issues stand out as disagreements with China: (1) subsidies; and (2) state-owned enterprises (SOEs).¹²⁸ China with its state-directed economy employs both in such a way as to distort international markets. There is a consensus that current WTO rules on both issues are insufficient.¹²⁹ There is a consensus that new, stricter rules are needed.¹³⁰ The best source for formulating the needed rules on SOEs is regional, preferential free trade agreements.¹³¹ For example, the CPTPP, Chapter 17, requires that SOEs are to act in accordance with commercial considerations except when providing a public service; SOEs must buy and sell goods and services in a non-discriminatory manner; and no country is to cause harm to another country through the use of non-commercial assistance provided to its SOEs.¹³²

New rules on subsidies are best negotiated at the WTO, either as amendments to the Subsidies and Countervailing Measures Agreement, or as a plurilateral WTO agreement. Stricter disciplines on subsidies means, at a minimum, expanding the categories of prohibited subsidies to include all government interventions that have a distortive impact on international competitiveness or trade; enhanced remedies; equalized treatment for direct and indirect taxation methods; more effective transparency rules;¹³³ and reversal of the burden of proof for “actionable” subsidies whereby there is a rebuttable presumption that they cause “serious prejudice” to trade partners.

The lesson of the Trump failed policies on China is that U.S. unilateral measures alone will not work to change Chinese behavior in international trade matters. U.S. trade tools will work only if they are deployed in coordination with other powerful economies. The best China strategy would place emphasis on *multilateralism* to confront China with a united front of North American, European, and Asian-Pacific economies to assure that China plays by the rules of international trade.¹³⁴ The U.S. needs urgently to engage with the EU, UK, Japan, Korea, and other Asian-Pacific countries to map out a China strategy and to reform the WTO.¹³⁵

The Biden administration’s answer to the China challenge is, instead, a classic case of —“if you can’t beat ‘em, join ‘em.” While continuing to condemn China’s industrial subsidies,¹³⁶ the Biden

¹²⁸I take issue with the thesis expounded by Professor Howse in Robert Howse, *Making the WTO (Not So) Great Again: The Case Against Responding to the Trump Trade Agenda Through Reform of WTO Rules on Subsidies and State Enterprises*, 23 J. INT’L ECON. L. 371 (2020). Professor Howse believes reform of these rules will only add to WTO incoherence and frustrate needed statist industrial policies. In response—reformed rules can be devised that are clearer and simpler than present rules. It is also surprising that Professor Howse sees the need for more “space” for statist economic policies. The reforms we need should decrease, not increase, government involvement in trade.

¹²⁹Siqi Li & Xinquan Tu, *Reforming WTO Subsidy Rules: Past Experiences and Prospects*, 54 J. WORLD TRADE 853, 854 (2020).

¹³⁰See Leonardo Borlini, *When the Leviathan goes to Market: A Critical Evaluation of the Rules Governing State-Owned Enterprises in Trade Agreements*, 33 LEIDEN J. INT’L L. 313, 323 (2020); Leonardo Borlini & Claudio Dordi, *Deepening International Systems of Subsidy Control: The (Different) Legal Regimes of Subsidies in the EU Bilateral Preferential Trade Agreements*, 23 COL. J. EUR. L. 551 (2017).

¹³¹Both the CPTPP, originally negotiated by the United States, the USMCA, and bilateral preferential trade agreements on the EU have such stricter rules. See *Id.* at 323-28.

¹³²Mitsuo Matsushita, *Interplay of Competition Law and Free Trade Agreements in Regulating State-Owned Enterprises*, in this special issue, attempts to show how the disciplines of FTAs such as CPTPP and the application of competition laws can interact with each other in such a way that their regulatory effects on conducts of SOEs would be more effective.

¹³³See Leonardo Borlini, *A Crisis Looming in the Dark: Some Remarks on the Reform Proposals on Notifications and Transparency*, 69 QUESTIONS INT’L L. 83 (2020); Questions of International Law, “In Clinical Isolation”. Is There a Meaningful Place for the World Trade Organization in the Future of International Economic Law?, 83 QUESTIONS OF INT’L L. 111 (2019). And, for the issues surrounding more specifically subsidies through SOEs, see Robert Wolfe, *Sunshine over Shanghai: Can the WTO Illuminate the Murky World of Chinese SOEs?*, 16 WORLD TRADE REV., 713 (2017).

¹³⁴See PETROS MAVROIDIS & ANDRE SAPIR, CHINA AND THE WTO: WHY MULTILATERALISM STILL MATTERS (2021).

¹³⁵See *A Multilateral and Strategic Response to International Predatory Economic Practices: Hearing Before the Subcomm. on Multilateral Int’l Dev., Multilateral Insts., And Int’l Econ., Energy, And Env’t Pol’y of the Comm. on Foreign Rels. U.S. Senate*, 115th Cong. 8–17 (2018) (Statement of Matthew P. Goodman, Simon Chair in Political Economy, Center for Strategic and International Studies, Washington, DC).

¹³⁶United States Trade Representative, *2021 Report to Congress on China’s WTO Compliance*, 28-29 (Feb. 2022).

administration enacted the Chips Act,¹³⁷ which provides 52.7 billion dollars in emergency supplemental appropriations over five years to develop domestic manufacturing capability and workforce development to greatly expand the production of semiconductor chips in the United States. The Chips Act also provides some 200 billion dollars that are available for the development of new technologies, such as robotics, artificial intelligence, and quantum computing. The Biden administration has chosen to match China's flagrant subsidization with subsidies of its own.

H. Technology Wars

The match that lit the fire still burning in the contretemps between the United States and China is Beijing's launch of "Made in China 2025," a state-led industrial policy that seeks to make China dominant in global high-tech manufacturing. Made in China 2025 (MIC 2025) is a broad industrial policy adopted by China's State Council in 2015. MIC 2015 emphasizes technology advancement and innovation as drivers of economic growth and productivity.¹³⁸ MIC 2025 calls for breakthroughs and further state planning to support ten specific industrial sectors:

- New generation informational technology
- High end computerized machines and robots
- Aerospace
- Maritime equipment and high-tech ships
- Advanced railway transportation technology and equipment
- New energy and energy-saving vehicles
- Energy equipment
- Agricultural equipment and technology
- New materials development
- Biopharma and high-tech medical equipment

These technologies are central to the so-called fourth industrial revolution, the integration of big data, cloud computing, and other emerging technologies into global manufacturing supply chains. With MIC 2025, China seeks to become a world leader in the technologies essential to this revolution. For example, in semiconductors China seeks to create a globally competitive domestic industries that ranges over design, operating systems, manufacturing, packaging, testing, equipment, and materials. By 2049, the 100th anniversary of the founding of the People's Republic of China, China aspires to be a global leader in advanced technology.

MIC 2025 represents longstanding Chinese development goals as China seeks to transition from low-value, low-wage manufacturing of consumer goods to a high-tech, high-productivity economy. To achieve this goal, China intends to (1) set specific targets; (2) provide sufficient state subsidies; and (3) mobilize state-owned enterprises. To acquire technology China relies not only on domestic research, but also on foreign investment acquisitions and requiring joint ventures involving foreign firms to share technology.

MIC 2025 is obviously of high importance and a challenge to the United States. Two questions come to mind: (1) What is the United States' response to MIC 2025? And (2) how should the United States respond to MIC 2025?

The past and current response of the U.S. government with respect to MIC 2025 is a paroxysm of panic and hysteria. The Trump administration's analysis of the problem is typified by President

¹³⁷15 U.S.C. § 4651.

¹³⁸See CONGRESSIONAL RESEARCH SERVICE, IF10964, "MADE IN CHINA 2025" INDUSTRIAL POLICIES: ISSUES FOR CONGRESS (2020).

Trump's cretinesque exclamation: "It's the greatest theft in the history of the world."¹³⁹ The Biden policy with respect to MIC 2025 is simply "more of the same," a continuation of the mindless Trump policy.¹⁴⁰ As journalist Josh Rogin stated in the *Washington Post* in February 2022, "Restraining China is now a multi-administration, bipartisan strategy that stands among the most important foreign policy adjustments since the end of the Cold War."¹⁴¹ This "strategy," if it can be called that, certainly accords with U.S. public opinion: A poll taken in April of 2022 found that two-thirds of Americans now see China as a "major threat."¹⁴²

What this policy means in practical terms is that Katherine Tai's statement that "we will use the full range of tools . . . and develop new tools,"¹⁴³ must be taken literally. Ambassador Tai's policy may be termed a "kitchen sink" statement—the U.S. has sought to block China from technological advancement in every possible way known to man (or woman), using every method including the kitchen sink.

There is no space in this brief Article to list and analyze all the technology restrictions the Trump/Biden administrations have invoked against China. Suffice it to say that these restrictions include export controls, investment restrictions, visa restrictions, import restrictions, technology transaction rules, and law enforcement.¹⁴⁴ The U.S. Department of Commerce's "Entity List" of companies banned from U.S. trade and technology reads like a "who's who" of Chinese technology companies. In 2018, Congress enacted the Foreign Investment Risk Review Modernization Act to place new controls on incoming Chinese foreign investment.¹⁴⁵ Congress also in 2018 enacted an Export Control Reform Act to place special export controls on U.S. "foundational" and "emerging" technology.¹⁴⁶ Not content about merely complaining about Chinese subsidies of technology, the U.S. Congress is considering legislation that would grant 252.7 billion dollars in subsidies for the U.S. semiconductor industry.¹⁴⁷

The U.S. all-out, no holds barred approach to technological and economic competition with China raises several interesting issues. First, is the appropriate response to China's forced technology abuses denial of China's access to legitimate technological business transactions? Is the purpose of American sanctions simply to cripple China's ability to compete technologically? Second, is the American response to MIC 2025 a nationalist move to decouple China's tech sector from U.S. and Western technology?¹⁴⁸ If so, can it succeed? China is in third place behind Canada and Mexico in total trade with the U.S., but effectively the three countries are tie (China's total U.S. trade was 657.5 billion dollars in 2021, compared to first-place Canada's 664.8 billion dollars) as America's most important trade partner.

How should the United States respond to MIC 2025? In my opinion, the most effective U.S. response would be to use multilateral and unilateral trade tools to counter the aspects of MIC 2025 that are clearly legally inconsistent with multilateral trading rules. These are: (1) Subsidies that distort global competition and frequently lead to overproduction of goods and product dumping; (2) The operation of state-controlled companies that act in non-commercial

¹³⁹*Id.*

¹⁴⁰See Ana Swanson & Keith Bradsher, *US Signals No Thaw in Trade Relations with China*, N.Y. TIMES, Oct. 4, 2021; Josh Rogin, *Biden Doesn't Want to Change China, He Wants to Beat it*, WASH. POST, Feb. 13, 2022, at A23.

¹⁴¹*Id.*

¹⁴²James T. Areddy, *More Americans View China as a Threat, Poll Finds*, WALL ST. J. (Apr. 28, 2022), <https://www.wsj.com/articles/more-americans-view-china-as-a-threat-poll-finds-11651154401>.

¹⁴³Kai, *supra* note 124.

¹⁴⁴For a full account of these restrictions, see JON BATEMAN, U.S. TECHNOLOGICAL "DECOUPLING": A STRATEGY AND POLICY FRAMEWORK, Ch. 2 (2022).

¹⁴⁵50 U.S.C. § 4565.

¹⁴⁶50 U.S.C. § 4817.

¹⁴⁷At this writing the Senate has passed the US Innovation and Competition Act, while the House has passed a different version, the America Competes Act. The differing bills are now in conference and the final product has yet to emerge.

¹⁴⁸There is a scholarly debate over which country was the first to adopt nationalism. See ELIZABETH C. ECONOMY, THE WORLD ACCORDING TO CHINA (2022).

ways; (3) Any form of forced technology transfer; (4) Discrimination and lack of reciprocity; and (5) Dual use technologies that have military application.

By targeting legal abuses, the United States can create a multilateral coalition that can effectively counter Chinese abuses under MIC 2025. The U.S. should adopt a three-pronged strategy to counter these Chinese practices. First, the U.S. should raise these concerns in the WTO; second, the U.S. should discuss these issues with China directly in bilateral talks; third, and most importantly, the U.S. should, with allied nations, especially the EU and Japan, craft detailed rules that will become international norms that must be accepted by China.

Forced technology transfer, which is requiring transfer of technology as a condition of market access, is at the heart of China's objectionable technology practices.¹⁴⁹ In the 2020 Phase One Agreement with the United States, China agreed to international rules to stop forced transfer of trade secrets¹⁵⁰ and technology.¹⁵¹ The Biden administration should create a multinational coalition to enforce these rules.

I. Russian Sanctions

The world changed overnight on February 24, 2022, with the unprovoked invasion of Ukraine by the Russian Federation mandated by Vladimir Putin, who fancies himself a twenty-first century Peter the Great. At this writing, there is no end in sight for the war. Russia is freely targeting civilians and wreaking wanton destruction on Ukrainian cities and towns.

The Biden administration, coordinating with the EU, Japan, and other states, has adopted the largest economic sanctions ever on a major nation. These include financial, trade, investment, and technology sanctions.¹⁵² It is beyond the scope of this short Article to elaborate these sanctions and to judge their effectiveness. Suffice it to say that these sanctions have bipartisan political support in the U.S., as do other sanctions programs against Cuba, Iran, North Korea, China, and Central African Republic.¹⁵³

These sanctions are richly warranted. The unprovoked Russian aggression against Ukraine is a blatant violation of the United Nations Charter, Article 2(4) as well as additional "*jus ad bellum*" norms of international law. Russia's targeting of civilians and its prosecution of the war is also a violation of the "*jus in bello*" norms of international law.

J. Conclusions

Times change. The expectation that the Biden administration would take important new initiatives to support the multilateral trading system and the rule of international law in international trade so far has not been realized. The United States no longer plays a leadership role in international economic matters. Those who believed that the Biden administration would result in a return of American leadership and a new era of open trade have been disappointed. Constrained by economic and political considerations and giving priority to urgent domestic concerns, the Biden administration's international trade policy is basically a continuation of

¹⁴⁹Jyh-An Lee, *Forced Technology Transfer in the Case of China*, 26 B.U.J. SCI. & TECH. L. 324 (2020).

¹⁵⁰Economic And Trade Agreement Between The Government Of The United States Of America And The Government Of The People's Republic Of China, Ch.2, China-U.S. Jan. 15, 2020.

¹⁵¹*Id.* at Ch. 2.

¹⁵²At the time of this writing the sanctions are still in progress. For a more thorough accounting of the sanctions, see REBECCA M. NELSON, CHRISTOPHER A. CASEY, & ANDRES B. SCHWARZENBERG, CONG. RSRCH. SERV., IF12062, NEW FINANCIAL AND TRADE SANCTIONS AGAINST RUSSIA (2022). This publication will be updated from time-to-time. See also Note, *United States and Allies Target Russia and Belarus with Sanctions and Other Economic Measures*, 116 (3) AM. J. INT'L L. 614 (2022).

¹⁵³Up to date information on the sanctions programs is available on the websites of U.S. agencies, especially the Department of State, the USTR, the Department of Commerce, and the Department of the Treasury.

the protectionist, nationalist-populist trade policy of its predecessor. Only the strident rhetoric of President Trump is missing.

The Biden administration—rhetorically at least—has embraced multilateralism in trade policy, but by default and political expediency Biden’s trade policy differs little from the Trump administration’s. Except with respect to the Russia sanctions, Biden’s trade policy lacks strategic vision. Trade policy under Biden is adrift and fraught with uncertainty.

Economic and political confrontation with China now dominates American trade policy and actions. The competition with China will play out in now unforeseeable ways for at least the remainder of this century. It is unfortunate that the U.S. under President Biden is still searching for a strategy to meet and ameliorate the China challenge. But the China strategy is flawed. For example, Biden neglects to employ even obvious steps to diminish China’s influence, such as joining the CPTPP and concluding free trade agreements with the U.K. and the E.U.

At the halfway mark, Biden’s trade policy disappoints. However, hope springs eternal: There is still time to develop new and better trade policies that redound to the benefit of the United States and the world.

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