

COUNTERING UNFAIR CHINESE ECONOMIC PRACTICES AND INTELLECTUAL PROPERTY THEFT

RISKS OF INTERDEPENDENCE

Technology is increasingly at the heart of America's many complaints about unfair and illegal Chinese economic practices.³⁹³ For example, Washington argues that Beijing's extensive and opaque subsidy regime—which includes preferential government financing and procurement contracts—has helped Chinese tech giants like Huawei reach their dominant market positions. Another long-standing sore point is Chinese government discrimination against foreign firms in such areas as regulatory enforcement, licensing, and market access; American tech companies are the most likely of all U.S. firms in China to perceive such discrimination.³⁹⁴ Likewise, China's practice of pressuring foreign companies into sharing trade secrets and intellectual property with Chinese corporate partners has disproportionate impact on U.S. companies built around specific technology rights, know-how, and data. And the list goes on.

As these examples illustrate, the technology sector is a major *target* of unfair Chinese economic practices. Technology can also *enable* China to obtain unfair advantages in all sectors. For example, the Chinese government carries out large-scale cyber espionage for the benefit of domestic firms, and it shields Chinese companies from accountability when they conduct their own cyber espionage. The U.S. government classifies these policies as unfair trade practices, and it worries that American technological links to China—for example, through the digital supply chain—provide additional access points for Chinese cyber thefts.

Although “unfairness” may be in the eye of the beholder, Washington sees China as violating specific bilateral and multilateral commitments, including WTO rules—that is, Beijing’s own promises.³⁹⁵ Unfortunately, the United States has had only limited success in resolving these issues via formal trade dispute mechanisms and direct diplomacy. Beijing remains strongly committed to its economic strategies, and international trade obligations are difficult to apply and enforce in these kinds of cases. With frustration mounting, Washington has begun to take more unilateral measures, including curbs on the flow of technology to and from China.

U.S. officials have pointed to several ways that technology controls help combat unfair Chinese practices. First, they can serve as a punishment meant to induce changes in Chinese behavior. When Trump implemented tariffs on large categories of Chinese goods—including tech products like smart devices, flash memory devices, and electronic components—he said he was imposing costs for China’s intellectual property theft and seeking concessions at the bargaining table.³⁹⁶ Second, technology restrictions can aim to counteract the benefits China receives from unfair practices and thus equalize the economic competition, in much the same way that countervailing duties offset foreign subsidies. Commerce Secretary Gina Raimondo once told Congress that the Entity List—which prevents designated Chinese companies from obtaining U.S. technologies, ostensibly for national security reasons—can “level the playing field for the American worker.”³⁹⁷ Finally, technology controls can reduce China’s opportunities to act unfairly. For example, the U.S. government has strongly discouraged American telecoms from using Chinese equipment, in part so that Beijing cannot leverage this equipment to steal U.S. intellectual property.

RISKS AND LIMITATIONS OF DEFENSIVE MEASURES

However, U.S. government tech restrictions can also create risks for Washington’s trade agendas with China and other countries. In particular, U.S. efforts to counter unfair Chinese practices might themselves be deemed unfair or violate international trade rules. Trump’s tariffs offer a recent example. Though he imposed them in the name of countering illegal Chinese intellectual property theft, a WTO panel ruled in 2020 that one large tranche of Trump’s tariffs was itself illegal.³⁹⁸ The United States thus faces a dilemma. If it sticks to formal trade dispute mechanisms and nonconfrontational direct diplomacy, then Beijing’s systemic trade abuses will likely continue. But if Washington reaches instead for more powerful unilateral tools, like tariffs and government tech controls, then it could end up destabilizing the very global trade order that it professes to be enforcing and protecting. And the WTO’s further erosion or collapse might well leave U.S. leaders with less ability than before to curb unfair Chinese practices. Washington has an excellent record of winning WTO cases against China—although the most serious and systemic trade issues, like subsidies and intellectual property theft, have proven hardest to address in that forum.³⁹⁹

Washington's China trade dilemma involves more than just technology, and Trump has not been the only president to face it. The Obama administration took issue with several WTO appellate rulings, including those seen as overly accommodating to China. In response, Obama blocked the appointment of multiple WTO appellate judges—an unprecedented and controversial series of interventions.⁴⁰⁰ Trump escalated this practice, eventually blocking all WTO appellate appointments and thus denying the body a quorum.⁴⁰¹ Biden has affirmed the Trump policy—in effect, halting the appeals process for all countries until the WTO resolves U.S. concerns with the process and substance of dispute settlement.⁴⁰² Washington's goal is to force reforms of what it sees as a broken system that tolerates unfair Chinese practices (among other problems), but its tactics risk weakening the system further.

While the United States plays hardball with the WTO dispute system, its barrage of new China-oriented tech controls may also test the limits of WTO substantive principles. At their core, these principles bar trade barriers that discriminate by national origin.⁴⁰³ Many recent U.S. tech restrictions would seem to clash—in spirit, if

not in letter—with that idea. Consider executive orders or regulatory actions whose terms apply exclusively to China, such as the Non-SDN Chinese Military-Industrial Complex Companies List, the Section 889 blacklist, and Trump's attempted bans on TikTok, WeChat, Alipay, and other Chinese apps. Other U.S. tech controls, like the FCC's Covered List, are technically not focused on any specific country but have so far been used almost exclusively against Chinese firms. The Commerce Department's ICTS supply chain security rule and the Trump Energy Department's bulk power system regulation applied just to China and a handful of other designated "foreign adversaries." Meanwhile, CFIUS and the Entity List are not explicitly tailored to China, yet China has become a primary focus of enforcement. All these tools function as trade barriers by placing substantial limits on Chinese companies' ability to buy technology from, sell technology to, or otherwise transact with Americans.

To U.S. leaders, such policy tools are familiar, accepted, and fully compatible with the international trade system. The United States continues to cite its long-standing position that national security–related restrictions fall outside of WTO scrutiny.⁴⁰⁴ Although most other countries (including U.S. allies) do not accept the existence of such a broad exception, they have traditionally declined to press the point, because the U.S. government historically did not impose many such barriers.⁴⁰⁵ Yet Washington's self-restraint is now loosening, in large part due to concerns about China and its technology. In the tech domain alone, Washington has greatly increased the number and scope of trade, investment, and other economic restrictions in just the last few years. Meanwhile, U.S. officials in both parties flirt openly with an expanded definition of "national security" that encompasses "economic

Nonconfrontational diplomacy probably cannot stop Beijing's systemic trade abuses. But more powerful unilateral tools could destabilize the global trade order.

security.” If the American “national security exception” becomes an “economic security exception,” it would virtually negate the WTO framework.

Already, foreign governments have seized on the precedents created by U.S. actions to assert their own national interests. Since 2016, Japan, Russia, the United Arab Emirates, and Saudi Arabia have all for the first time cited an American-style national security exception in WTO disputes.⁴⁰⁶ Beijing could take the same path, using the United States’ own position to justify Chinese policies (like market access restrictions) that Washington fervently protests.

The United States must think hard about its endgame for bilateral and global trade, in the technology sector and beyond. In a best-case scenario for Washington, its tough tactics somehow push Beijing (and other countries) to accept strong, enforceable new trade rules that rein in unfair Chinese practices. This would be a monumental achievement: negotiations on new WTO trade rules have stalled for the last two decades, and the United States would now be negotiating from a position of reduced global influence, amid heightened tensions with a strategic competitor. In a worst-case scenario, the WTO system collapses under the weight of U.S.-China economic conflict. Although Washington would still have other bilateral and multilateral trade agreements to fall back on, China and other nations would likely institute new economic and national security–related trade barriers that harm the United States.

Some amount of risk-taking by Washington makes sense. The status quo should not be idealized: open trading principles are far from fully implemented and sometimes more honored in the breach, particularly by China. The United States therefore has strong reason to implement measures it thinks will protect American economic interests and add to pressure for structural reforms. It also has reason to believe that the WTO system will merely bend, not break, under this pressure. The system has survived for decades despite numerous international disputes and changing geo-economic and geopolitical dynamics. U.S. tech controls have so far not sent bilateral trade ties with China (let alone the larger WTO system) into a death spiral.

Still, the United States must tread carefully. If present trends continue, American technology restrictions aimed at China will significantly broaden and intensify in the coming years, further raising the stakes. Some of the rhetoric heard in Washington—including limitless notions of “economic security,” or the brute goal of “destroying” China’s most prominent companies—directly contravenes international trading principles and implies a dangerous reckoning in the future. Worse, these risks often go unacknowledged: U.S. officials and analysts are rarely willing to describe America’s China-oriented tech restrictions as trade barriers that skirt the line of national discrimination. By avoiding this issue, they sidestep fundamental questions: Are U.S. actions compatible with today’s international rules? If not, what new rule set would Washington propose? Would other nations agree to these new

rules? And if China and others began to leverage any new rules for their own advantage, would Americans still benefit in the end?

RECOMMENDED POLICIES AND PROCESSES

The use of technology controls to address unfair Chinese economic practices should be nested within a comprehensive U.S. strategy for shaping the international trading system as a whole. China would be a major but not exclusive focus of this strategy. The overall goal would be to describe a desired U.S. end-state for international trade. Fundamental questions include whether Washington should seek to reinforce WTO open trading principles or partially roll them back, and what new kind of rules the United States might prefer instead. For example, what would be the desired parameters of an internationally approved “national security exception”? At its heart, a U.S. strategy should deal with practical questions such as which other major nations could be feasibly brought on board, and what enforcement mechanisms could realistically achieve and sustain the American vision over time.

Due to the complexity of international trade and its sweeping implications for all U.S. interests, the process for developing a comprehensive trade strategy should be inclusive. For example, the NSC might share leadership of this process with the National Economic Council and the Domestic Policy Council to ensure that its outcome serves the domestic needs of the American people. USTR and the State Department would be important but not dominant voices. The Intelligence Community could vet the likelihood of various scenarios, including a successful effort to reform the international trade system, as well as alternative futures such as the unintended degradation or collapse of the system. The final strategy, once ratified by the president, would guide how regulatory bodies such as the Commerce Department, Treasury Department, and CFIUS evaluate the purpose, benefits, and risks of technology controls aimed at combating unfair Chinese economic practices.

CASE STUDIES

The Biden administration has taken some positive steps toward an international trade strategy, but it has not yet publicly addressed the core policy dilemmas. In May 2021, U.S. Trade Representative Katherine Tai delivered a report to Congress articulating Biden’s official trade policy agenda.⁴⁰⁷ It promised a major focus on combating unfair Chinese economic practices, especially those that “threaten our technological edge [and] weaken our supply chain resiliency.” Although Trump’s government had said the same thing, the Biden report rightly called for “a comprehensive strategy and more systematic approach than the piecemeal approach of the recent past.” To that end, it announced that “the Biden

Administration is conducting a comprehensive review of U.S. trade policy toward China as part of its development of its overall China strategy.”

This review culminated in October with a major speech by Tai on China. Tai criticized China for “pour[ing] billions of dollars into targeted industries and continu[ing] to shape its economy to the will of the state”—citing solar cells and semiconductors, among other examples.⁴⁰⁸ She vowed to “directly engage with China on its industrial policies.” Tai addressed the WTO that same month, reaffirming America’s commitment to the body while calling for unspecified institutional reforms in several key areas.⁴⁰⁹

Tai’s report affirmed that “opening markets and reducing trade barriers are fundamental” goals. Yet it made no mention of Chinese tech companies recently cut off from U.S. markets, suppliers, or investors.

Tai’s statements contained laudable objectives and welcome messages. Nevertheless, they still elided basic tensions in the U.S. approach. The report to Congress, for example, affirmed that “opening markets and reducing trade barriers are fundamental to any trade agenda.” Yet it made no mention of the many ways that Washington has sought to curb technology trade with

China. It said nothing about Huawei, ZTE, DJI, Hikvision, or other Chinese tech companies recently cut off from U.S. markets, suppliers, or investors. It was silent on the growing use and expanding scope of restrictive tools like the Entity List, CFIUS, export controls, and IEEPA. It omitted any discussion of America’s position on the WTO national security exception and the rise of copycat claims by other countries.

Such omissions aren’t unusual in public (or even private) U.S. government strategy documents. The Biden administration probably wants to reserve discretion at the negotiating table and to avoid taking controversial stands before they prove necessary. The important thing for now is that senior U.S. officials deliberate on these basic dilemmas in a structured way. While some technology restrictions are appropriate and sustainable responses to unfair Chinese practices, there must be an anticipated stopping point. The Biden administration should fully understand the risks involved, think about its endgame, and eventually signal its intentions to China and other trading partners. Simplistic invocations of “unfairness” or “U.S. national security interests” will no longer suffice to navigate these choppy, uncharted waters.

KEY OFFENSIVE POLICIES

Tech controls or no tech controls, Washington lacks any easy path to stop unfair Chinese economic practices. Such practices are highly beneficial to Beijing and hard for outsiders to monitor, let alone deter. Successive U.S. administrations have protested and pushed back with little success. To change these dynamics, Washington needs to amass significant leverage over China, then use some combination of bilateral and multilateral talks—including at international forums like the WTO—to secure and enforce an agreement with Beijing.

Trump made one attempt to accomplish this, using unilateral tariffs for leverage, but he botched the negotiations by settling for market access concessions rather than seeking major structural reforms. Biden is taking the smarter, albeit slower approach of trying to cultivate a united front among U.S. allies and trade partners (while holding onto Trump's tariffs as a bargaining chip). For example, the recently established U.S.-EU Trade and Technology Council has developed an ambitious multilateral agenda to coordinate policy on a number of key issues relevant to Chinese technology and decoupling.⁴¹⁰ And Washington has been using multilateral fora like the G7, the G20, and the WTO to discuss “market distortions and other unfair trade practices” by China.⁴¹¹

Time will tell whether Biden's approach yields concrete results. America's European and Asian allies have so far proven less inclined than the United States to squarely confront Beijing over its unfair practices. In the end, Washington may need to make concessions of its own to China (and others) as part of the negotiating process. If China remains obstinate, then Washington will face difficult choices about the future of international trade.

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