

FOCUS ON CHINA: THE EXPANSIVE USE OF NATIONAL SECURITY MEASURES TO ADDRESS ECONOMIC COMPETITIVENESS CONCERNS

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INTRODUCTION

There is no internationally agreed-to definition or clear demarcation of what constitutes national security interests and what constitutes purely economic competitiveness concerns. Although

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there has always existed some tension between the protection of national security interests and the promotion of global trade, countries have tended to maintain a respectful distance between the two principles—generally utilizing security-related authorities for issues directly related to military or defense interests, while using trade law authorities to take actions that clearly impact economic well-being.² Indeed, the only situation where the two principles intersected was when security measures were recognized as a narrow exception to international trade and investment treaty obligations.³ And even then, until very recently, this exception was rarely relied upon.⁴

Recently, many government actions have challenged the boundary between security and economic interests, as countries have adopted increasingly broad definitions of national security, and begun utilizing security-related authorities to address what has always been recognized as purely trade or economic competitiveness issues.

Here in the United States, certain actions that were taken by former President Donald J. Trump during his tenure present key examples of how the concept of “national security” has expanded under his “America First” doctrine to include ensuring that the U.S. maintains its economic and trade pole positions in all industries—not just in high tech, but also in manufacturing industries, labor-intensive industries, and energy-intensive industries.⁵ This necessarily resulted in repurposing traditional, narrowly tailored national security authority to maintain the economic well-being of business enterprises. For example, in recommending the imposition of trade restrictions against global imports of steel and aluminum under Section 232 of the Trade Expansion Act of 1962, which was originally intended only to “safeguard[] national security,” the U.S. Department of Commerce’s Bureau of Industry and Security (BIS) confirmed that “national security” under Section 232 is not limited to “national defense,” but can be interpreted much more broadly to

² J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 *YALE L. J.* 1020 (2019).

³ Peter Van den Bossche & Sarah Akpofure, *The Use and Abuse of the National Security Exception Under Article XXI(B)(III) of the GATT 1994*, at 2–3 (World Trade Institute, WTI Working Paper No. 03/2020, 2020).

⁴ *Id.*

⁵ Heath, *supra* note 2, at 1022–5.

“include the general security and welfare of certain U.S. industries, beyond those necessary to satisfy national defense requirements.”⁶

The recent expansion of national security interests to encompass economic well-being has coincided with China’s rise in the global power standing, which several governments (including the U.S. government) have viewed with serious concern.⁷ In the course of expanding the scope of national security, the Trump Administration depicted the rise of China as not only an economic threat, but also as an existential threat to the United States.⁸ Indeed, it often appeared that the Trump Administration went as far as to *equate* economic threats with existential threats.

This rationale was employed to justify a cascade of trade actions promulgated as “national security”-based and other defensive measures. These included imposing tariffs on hundreds of billions of dollars of products from China, imposing extensive new sanctions on Chinese companies, restricting Chinese companies from buying American technology, and barring investments in Chinese firms with military ties.⁹

By adopting an excessively broad definition of national security that encompasses the maintenance of economic advantages, these actions and policies are often ill-tailored to address the actual economic factors giving rise to the problem. They also often fail to

⁶ U.S. DEP’T OF COM., BUREAU OF INDUSTRY AND SECURITY, OFFICE OF TECHNOLOGY EVALUATION, *THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL SECURITY: AN INVESTIGATION CONDUCTED UNDER SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, AS AMENDED 1–5* (Jan. 11, 2018), bis.doc.gov/index.php/documents/steel/2224-the-effect-of-imports-of-steel-on-the-national-security-with-redactions-20180111/file [<https://perma.cc/47U3-P6L7>] [hereinafter “Steel Section 232 Report”].

⁷ Ana Nicolaci da Costa, *How the world is grappling with China’s rising power*, BBC NEWS (Oct. 26, 2018), <https://www.bbc.com/news/business-45948692> [<https://perma.cc/655F-54NF>].

⁸ Ana Swanson, *A New Red Scare is Reshaping Washington*, N.Y. TIMES (July 20, 2019), <https://www.nytimes.com/2019/07/20/us/politics/china-red-scare-washington.html> [<https://perma.cc/9TCR-UBMR>]; Matthew Lee, *Pompeo Brings Anti-China Roadshow to Indian Ocean Islands*, abc NEWS (Oct. 28, 2020), <https://abcnews.go.com/International/wireStory/pompeo-brings-anti-china-roadshow-indian-ocean-islands-73871011> [<https://perma.cc/3MG8-GQEP>].

⁹ See e.g., Exec. Order No. 14,032, 86 Fed. Reg. 30,145 (June 7, 2021); Exec. Order No. 13,959, 85 Fed. Reg. 73,185 (Nov. 17, 2020); *President Trump Announces Strong Actions to Address China’s Unfair Trade*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (Mar. 22, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/march/president-trump-announces-strong> [<https://perma.cc/FN45-C6DS>] (detailing the Trump administration’s changes in Chinese trade policy).

acknowledge China as a legitimate, rising economic competitor. Indeed, these measures do not really address the “national security” threats they purport to target (as the threat is often not even security-based), nor do they effectively increase the competitiveness of the United States *vis-à-vis* China, as they do nothing to help U.S. companies compete fairly. Instead, they unlevel the playing field in favor of the United States so that fair competition cannot occur at all. Ironically, in some circumstances, these measures actually end up hurting U.S. businesses and U.S. competitive interests by limiting sourcing options, raising costs, forcing factories to relocate elsewhere, and giving advantages to companies from other countries *vis-à-vis* China.

To be clear, China’s policies sometimes do raise legitimate national security and defense concerns. National security-based authorities such as Section 232 of the Trade Expansion Act and the International Emergency Economic Powers Act (IEEPA) are properly suited to address such concerns. However, these national security threats should not be confused—either intentionally or unintentionally—with the economic threats posed by China’s increased competitiveness and the general rise in global trading power. Measures that are based on security concerns have traditionally focused on defending against incoming defensive harm, rather than on building economic resilience in the face of heightened global competition. In contrast, dealing with the economic rise of China—including any economic advantage that China has achieved through unfair trade actions and industrial policies—requires the United States to hold China accountable to its international trade treaty obligations, while also continuing to strengthen the competitiveness of its own industries through legitimate government incentives and policies. Addressing economic concerns through national security measures only temporarily masks the core issues that need to be addressed, depriving U.S. industries of evolving in a manner that will allow them to grow and maintain a competitive advantage over China (and other global competitors) beyond the narrow national security concerns posed by another country’s economic rise in stature.

Section I of this article explores the definition and scope of “national security,” discussing its evolution and treatment in international economic law. Section II discusses national security in the context of U.S.-China trade relations, providing historical

context and exploring two specific types of U.S. national security measures that have been used regularly in recent years to address perceived—and sometimes purely economic—threats from China: Section 232 of the Trade Expansion Act and export controls. Section III explores the adverse implications of conflating national security interests with economic competitiveness concerns in U.S. trade policy concerning China.

I. WHAT IS NATIONAL SECURITY

This Section provides historical context regarding the evolution of the U.S. concept of “national security” from narrow and defense-focused to a broad and all-encompassing reading. We then discuss national security specifically in the context of international economic law, exploring the tension between national security and international trade, and how international instruments have sought to reconcile this tension.

A. *Historical Context*

Prior to World War II, the concept of “national interest”—not “national security”—was the primary standard and point of reference for U.S. foreign policy.¹⁰ However, after the attack on Pearl Harbor in 1941, national security replaced national interest as the main defensive, right-of-state in U.S. foreign policy,¹¹ a shift that was codified in the National Security Act of 1947.¹² It was not until after 1945 that a distinctive body of literature exploring the

¹⁰ Douglas Stuart, *The National Security Act of 1947*, OXFORD BIBLIOGRAPHIES (Oct. 25, 2012), <https://www.oxfordbibliographies.com/view/document/obo-9780199743292/obo-9780199743292-0102.xml> [<https://perma.cc/QB5X-QAFS>] (citing CHARLES A. BEARD, *THE IDEA OF THE NATIONAL INTEREST: AN ANALYTICAL STUDY IN AMERICAN FOREIGN POLICY* 524 (1934)).

¹¹ *Id.* (citing GORDON W. PRANGE, *AT DAWN WE SLEPT: THE UNTOLD STORY OF PEARL HARBOR* (1991)).

¹² *Id.* (citing Melvyn P. Leffler, *The American Conception of National Security and the Beginnings of the Cold War, 1945–48*, 89 *Am. Hist. Rev.* 346, 381 (1984); ARNOLD WOLFERS, *National Security as an Ambiguous Symbol*, in *DISCORD AND COLLABORATION: ESSAYS ON INTERNATIONAL POLITICS*, 147–66 (1962); DANIEL YERGIN, *SHATTERED PEACE: THE ORIGINS OF THE COLD WAR AND THE NATIONAL SECURITY STATE* (1977)).

concept of “security” emerged, although its definition has been evolving continuously since.¹³

Until the latter half of the twentieth century, the dominant concept of “national security” focused on physical defense, military power, and political security.¹⁴ This perspective is attributable to the prevalence of military conflict, proliferation of political and military alliances, and raging arms races between ideologically opposed superpowers that dominated foreign policy literature and discourse at the time.¹⁵ Still today, Black’s Law Dictionary defines “national security” consistent with this traditional view: “[t]he safety of a country and its governmental secrets, together with the strength and integrity of its military, seen as being necessary to the protection of its citizens.”¹⁶

However, in the post-Cold War era, the information, technology, and communication revolutions, together with the reduction in imminent military threats and an increase in non-traditional security threats, fueled the evolution of a broader, less defined landscape of “national security.”¹⁷ Issues such as domestic economic prosperity and the promotion of democratic values began to feature more prominently in U.S. national security strategy and rhetoric.¹⁸ This broadening scope of “national security” was rooted in part in seeds planted decades earlier in the National Security Act of 1947.¹⁹ That is, in addition to its primary contributions of significantly restructuring the U.S. government’s foreign policy and

¹³ LUCIA RETTER ET AL., RELATIONSHIPS BETWEEN THE ECONOMY AND NATIONAL SECURITY: ANALYSIS AND CONSIDERATIONS FOR ECONOMIC SECURITY POLICY IN THE NETHERLANDS 16 (2020), https://www.rand.org/content/dam/rand/pubs/research_reports/RR4200/RR4287/RAND_RR4287.pdf [<https://perma.cc/C8MQ-5NQM>].

¹⁴ Kim R. Holmes, *What Is National Security?*, The Heritage Found. (Oct. 7, 2014), <https://www.heritage.org/military-strength-essays/2015-essays/what-national-security> [<https://perma.cc/X5PA-EB4N>].

¹⁵ Michel Gueldry et al., *Introduction: Yesterday’s security debates, today’s realities*, in UNDERSTANDING NEW SECURITY THREATS (2019).

¹⁶ Bryan A. Garner, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹⁷ David Jablonsky et al., *U.S. National Security: Beyond the Cold War*, at 18–19, STRATEGIC STUD. INST., US ARMY WAR COLL. (July 26, 1997), <https://publications.armywarcollege.edu/pubs/1620.pdf> [<https://perma.cc/DA8P-6BWE>].

¹⁸ *Id.* at 22–23.

¹⁹ National Security Act of 1947, 80 Pub. L. 253, 61 Stat. 495 (codified as amended through 116 Pub. L. 283 in scattered sections of 50 U.S.C.); 50 U.S.C. §§ 3001–3240 (1947).

military establishments,²⁰ the National Security Act of 1947 reflected the overarching:

“[I]ntent of Congress to provide a comprehensive program for the future security of the United States, to provide for the establishment of integrated policies and procedures for the departments, agencies, and functions of the Government relating to the national security.”²¹

Notably missing from the text of the legislation, however, was any definition of what constitutes “national security,” thereby leaving the term open to interpretation at a time when a broader conception of national defense was being introduced into U.S. government and public discourse.²²

In the 1990s, the concept of security evolved to embrace a more human-centric focus, influenced by the continued decline in military conflict and a rise in globalization and interdependence between nation-states.²³ The United Nations Development Programme’s (UNDP) influential 1994 *Human Development Report* introduced a formal framework for “human security,” arguing that:

“The concept of security has for too long been interpreted too narrowly: as security of territory from external aggression, or as protection of national

²⁰ Clark A. Murdock et al., *Beyond Goldwater-Nichols: Defense Reform for a New Strategic Era*, CTR. FOR STRATEGIC AND INT’L STUD. 47 (Mar. 2004), [csis-website-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/media/csis/pubs/bgn_ph1_report.pdf](https://perma.cc/DJ7S-6R4Z) [https://perma.cc/DJ7S-6R4Z]; *National Security Act of 1947*, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1945-1952/national-security-act> [https://perma.cc/2Q3D-SA82].

²¹ National Security Act of 1947, *supra* note 5, at § 2.

²² JOSEPH J. ROMM, *DEFINING NATIONAL SECURITY: THE NONMILITARY ASPECTS*, at 2–3 (1993) (“Some would trace the modern etymology of [“national security”] to an August 1945 Senate hearing: ‘Our national security can only be assured on a very broad and comprehensive front,’ Navy secretary James Forrestal told the Senate. ‘I am using the word ‘security’ here consistently and continuously rather than ‘defense.’” Replied Sen. Edwin Johnson, ‘I like your words ‘national security.’”) (internal citations omitted).

²³ RETTER, *supra* note 13, at 18–19, 21.

interests in foreign policy or as global security from the threat of nuclear holocaust.”²⁴

According to the UNDP, human security has two components—freedom from fear and freedom from want—and is therefore not only concerned “with weapons,” but also with “human life and dignity.”²⁵ The UNDP went on to outline seven main categories that form “human security”: economic security, food security, health security, environmental security, personal security, community security, and political security.²⁶

Today, “national security” is arguably still used in the narrow and traditional, defense-focused sense in more established historical literature and policy, but the broader human-centric concept does exist in other documents. It is rarely explicitly defined in any given legal authority, however. As will be discussed in the next section, in the context of international trade law, and similar to the National Security Act of 1947, terms such as “security” or “national security” are often not defined or are defined so broadly that they render untethered any legal mechanism that may be promulgated in their name. When the concept of “national security” is not clearly defined or the “national security” threat at issue is not precisely articulated, trade measures that would not otherwise be covered under the narrow, traditional definition of “national security” could be exploited and used to address not only broader human security issues but even purely competitive and economic issues for which those trade measures were neither designed nor appropriately tailored.

B. National Security in International Economic Law

The tension between national security and international trade law stems from the potentially conflicting interests that the two principles seek to protect. For example, under the United Nations framework, which presents one of the major legal foundations of

²⁴ UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 1994 22, (1994), http://www.hdr.undp.org/sites/default/files/reports/255/hdr_1994_en_complete_nostats.pdf [<https://perma.cc/L6T8-CZNZ>].

²⁵ *Id.* at 22, 24.

²⁶ *Id.* at 24–25.

national security, the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation of States in accordance with the Charter of the United Nations*, promotes the principle that it is the duty of States to not intervene in matters within the domestic jurisdiction of any other State.²⁷ Under the World Trade Organization (WTO) framework, which presents one of the major legal foundations of international economic law, the *Agreement Establishing the World Trade Organization*, states as one of its founding principles the desire to enter into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade.²⁸ In other words, while national security is based on the right of sovereign countries to keep other countries out, international trade is premised on the desire to invite other countries in.

Although international trade law does not include an implicit, open-ended national security exception that applies across all treaties,²⁹ multilateral and bilateral agreements have recognized the inevitable intersection between a country's national security interests and economic interests and have sought to define and reconcile the relationship between the two principles. Most notably, several WTO agreements contain explicit provisions that permit Members to deviate from their international trade obligations under those agreements by reason of national security interests. Article XXI(b) of the *General Agreement on Tariffs and Trade 1994* (GATT 1994), for instance, permits a WTO Member country to take "any action which it considers necessary for the protection of its essential security interests" when certain conditions are met.³⁰ These conditions include when such measures relate to fissionable materials or materials from which they are derived; to traffic in arms, ammunition and the implements of war and to traffic in other goods and materials for the purposes of supplying a military

²⁷ G.A. Res. 2625 (XXV), at 2 (Oct. 24, 1970).

²⁸ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

²⁹ Susan Rose-Ackerman & Benjamin Billa, *Treaties and National Security*, 40 N.Y.U. J. INT'L L. & POL. 437 (2008).

³⁰ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. The "Security Exceptions" of GATT Article XXI are also contained in Article XIV of the General Agreement on Trade in Services and Article 73 of the Agreement on Trade-Related Aspects of International Property Rights.

establishment; or are taken in time of war or other emergency in international relations.

Although the WTO agreements seek to define the circumstances under which the security exception can be invoked, the exception is still worded relatively broadly, permitting WTO Members to take “any action” that they “consider[] necessary.”³¹ In particular, the use of the term “considers” implies that the standard of whether the measure is necessary is left to the subjective discretion (or “consideration”) of the Member implementing the measure, although it should be noted that exceptions are nonetheless to be interpreted narrowly as a general matter, and utilized even more sporadically.³²

In that respect, out of over five hundred cases to date, the WTO has issued only one decision on the application of the security exception.³³ As such, there is limited guidance on the specific contours of the security exception, especially as to which interests would *not* constitute a security interest under the WTO rules. Nonetheless, it is widely viewed that actions commonly taken by countries based on national defense or national security concerns, which would restrict trade in a manner inconsistent with WTO obligations, are taken under the auspices of the national security exceptions.

The negotiating history of the WTO security exception seems to confirm that the negotiating countries themselves did not have a clear consensus on how broadly or narrowly “security interests” should be defined. For example, while negotiating the

³¹ GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994]; GATS: General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) (both explaining that nothing in the agreement should be construed to conflict with legitimate security interests).

³² Consultative Board, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, WTO (Jan. 17, 2005), https://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf [<https://perma.cc/6NCY-5FA6>].

³³ Panel Report, *Russia—Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/7 (adopted Apr. 29, 2019). Although public third-party submissions indicate that the security exception was also invoked in *United Arab Emirates—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, a panel report has not been released in that dispute. See WTO Doc. WT/DS526/6 (Jan. 19, 2021).

terms of the security exception under the International Trade Organization (“ITO”)—the precursor to what would ultimately become the WTO—the Netherlands raised the question of how “essential security interests” of a Member should be defined, noting that such an exception could be “possibly a very big loophole in the whole [ITO] Charter.”³⁴ The response of the United States appears to recognize the challenges of defining “security interests” in a manner that was not overly broad, but afforded some latitude to each country:

We recognized that there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying: “by any member of measures relating to a Member’s security interests”, because that would permit anything under the sun. Therefore, we thought it well to draft provisions which would take care of real security interests and, at the same time, so far as we could, to limit the exception so as to prevent the adoption of protection for maintaining industries under every, conceivable circumstance[T]here must be some latitude here for security measures. It is really a question of balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures, which really have a commercial purpose.³⁵

The Chairman suggested that the spirit in which Members would interpret these provisions was the only guarantee against abuse³⁶—essentially leaving it to future generations to grapple with the issue once the need arose.

The reluctance of WTO Member countries to challenge national security measures ostensibly taken under the security exception have left this ambiguity largely unresolved. In the absence of clear guidelines, WTO provisions that were arguably intended to provide a narrow exception could still be deployed to address broader human security issues or even purely competitive issues, for which they are not appropriately tailored.

³⁴ United Nations Conference on Trade and Employment, Rep. of the Second Session of the Prep. Comm., U.N. Doc. E/PC/T/A/PV/33, at 19 (1947).

³⁵ *Id.* at 20.

³⁶ *Id.* at 3.

However, more recent developments seem to suggest that conditionalities found in provisions such as Article XXI(b) of the GATT 1994 do in fact provide sufficient safeguard against overly broad usage of national security excuses to justify trade actions that violate WTO obligations. For example, although it ultimately found that Russia's actions were justified under the security exception, the panel in *Russia—Traffic in Transit* considered that the traditional, military and defense-related definition of security applies in interpreting the contours of “emergency in international relations” under the WTO security exceptions, stating that the term would:

“[A]ppear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state. Such situations give rise to particular types of interests for the Member in question, i.e. defense or military interests, or maintenance of law and public order interests.”³⁷

The panel also considered that although “it is left, in general, to every Member to define what it considers to be its essential security interests,”³⁸ the principle of good faith “requires that Members not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT.”³⁹ The panel cited as a “glaring example” of such actions:

“[W]here a Member sought to release itself from the structure of ‘reciprocal and mutually advantageous arrangements’ that constitutes the multilateral trading system simply by re-labeling trade interests that it had agreed to protect and promote within the system, as ‘essential security interests,’ falling outside the reach of that system.”⁴⁰

³⁷ *Supra* note 33 at ¶ 7.76.

³⁸ *Id.* at ¶ 7.131.

³⁹ *Id.* at ¶ 7.133.

⁴⁰ *Id.*

The panel's findings imply, at the very least, that a WTO Member cannot adopt a measure that seeks to secure its competitive or economic interest under the guise of a "security interest."

II. "NATIONAL SECURITY" AND U.S.-CHINA TRADE RELATIONS

As explained above, in the absence of clear guidance in multilateral agreements that govern trade relations regarding the parameters of "security interests," countries have been mainly left unfettered in determining their definitions of national security. In the United States, the White House National Security Council has stated that "[t]oday's challenges demand a new and broader understanding of national security—one that facilitates coordination between domestic and foreign policy as well as among traditional national security, economic security, health security, and environmental security."⁴¹ Moreover, as described in Section B below, U.S. laws or regulations relating to "national security" do not clearly define the circumstances under which their legal authorities can be invoked, leaving it to the relevant agencies (or the President) to decide on a case-by-case basis whether the requirements for invocation have been met. Under this backdrop, U.S. laws that ostensibly protect the United States "national security" interests have recently been invoked to address seemingly economic competitive concerns arising from China.

A. *U.S. Policy Regarding China*

China began reforming its economic policies in the late 1970s, opening up to foreign trade and investment and implementing free-market reforms in 1979.⁴² These reforms included price and ownership incentives for farmers that allowed them to sell a portion of their crops in the free market, and the establishment of special economic zones to attract foreign

⁴¹ National Security Council, WHITE HOUSE, <https://www.whitehouse.gov/nsc/> [<https://perma.cc/G9BF-9QTG>].

⁴² Bert Hofman, *Reflections on 40 years of China's reforms*, in CHINA'S 40 YEARS OF REFORM AND DEVELOPMENT: 1978–2018 53, 54 (2018). See also Gregory C. Chow, Economic Reform and Growth in China, 5 ANN. ECON. 127, 132–33 (2004) (discussing that in the late 1970s, the Chinese government began to promote foreign investment and adopt the open-door policy).

investments, boost exports from China, and encourage imports of hi-tech products into China.⁴³ Additional reforms included efforts to decentralize economic policy sectors, and reforming ownership structures to allow enterprises to compete more freely in an open market.⁴⁴ Since then, China's GDP growth has averaged 10% per year, rendering it consistently among the fastest growing economies in the world.⁴⁵ Between 1980 and 2004, U.S.-China trade increased from \$5 billion to \$231 billion, and by 2006, China had surpassed Mexico as the United States' second largest trading partner, after Canada.⁴⁶ In 2008, China surpassed Japan to become the United States' largest foreign creditor, holding U.S. debt of around \$600 billion.⁴⁷ China is now the United States' largest trading partner, as the United States' most significant source of imports and third-largest export market.⁴⁸ Particularly in recent years, China has risen to the status of a legitimate economic competitor and near-peer of the United States, having already overtaken the U.S. in terms of purchasing power parity and with projections estimating that it will overtake U.S. Gross Domestic Product within the next decade.⁴⁹

As China's economy has matured, the Chinese government has announced several large-scale economic planning initiatives such as the "Belt and Road Initiative" (hereinafter BRI) and "Made in China 2025" (hereinafter MIC2025). The BRI, which President Xi Jinping launched in 2013, is an ultra-ambitious expansion project that seeks to achieve economic integration throughout Eurasia and beyond by financing and building a network of railways, energy pipelines, highways, streamlined border crossings, ports, and free

⁴³ *Id.* Hofman, *supra* note 42, at 56–61; Chow, *supra* note 42, at 140–41.

⁴⁴ WAYNE M. MORRISON, CONG. RSCH. SERV., RL33534, CHINA'S ECONOMIC RISE: HISTORY, TRENDS, CHALLENGES, AND IMPLICATIONS FOR THE UNITED STATES 4 (2019).

⁴⁵ *Overview*, THE WORLD BANK (Oct. 12, 2021), <https://www.worldbank.org/en/country/china/overview> [<https://perma.cc/AS82-4XBW>].

⁴⁶ *U.S. Relations with China*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/timeline/us-relations-china> [<https://perma.cc/JBL4-CAMB>].

⁴⁷ *Id.*

⁴⁸ *The People's Republic of China: U.S.-China Trade Facts*, OFF. OF THE U.S. TRADE REPRESENTATIVE., <https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china> [<https://perma.cc/PZ6V-3FP6>].

⁴⁹ Naomi Xu Elegant, *China's 2020 GDP Means It Will Overtake U.S. as World's No. 1 Economy Sooner than Expected*, FORTUNE (Jan. 18, 2021, 5:00 AM), <https://fortune.com/2021/01/18/chinas-2020-gdp-world-no-1-economy-us/> [<https://perma.cc/GE6L-7RZ9>].

trade zones.⁵⁰ In addition to infrastructure-building, other components of the BRI include strengthened regional political cooperation, unimpeded trade, financial integration (including expanding the international use of RMB), and people-to-people exchanges.⁵¹

Alongside the BRI, the Chinese government in 2015 also announced MIC2025—a plan to modernize China’s manufacturing in ten key sectors through extensive government assistance in order to make China a major global player in these sectors.⁵² Under MIC2025, China seeks to raise domestic content of core components and materials to 70% by 2025.⁵³ To achieve these objectives, China imposes tax preferences, joint ventures and partnership requirements, government subsidies, foreign acquisitions, technology licensing and equipment, and talent recruitment, in an effort to promote on-shore manufacturing capabilities in hi-tech industries.⁵⁴

These initiatives by China have raised increasing concerns that China seeks to expand its rising power and use industrial policies to dominate global markets. Although there have been some expressed concerns that these measures can also be used to grow China’s military influence,⁵⁵ concerns regarding China’s economic policies have focused on distortive effects on the global economy, unfair trading practices (such as subsidization and industrial policies), and general concern regarding the overall expansion of China’s government-led market practices.⁵⁶

⁵⁰ Andrew Chatzky & James McBride, *China’s Massive Belt and Road Initiative*, CFR. (Jan. 28, 2020, 7:00 AM), <https://www.cfr.org/backgrounder/chinas-massive-belt-and-road-initiative> [<https://perma.cc/BV6D-RSDL>].

⁵¹ *Belt and Road Initiative (BRI)*, EUR. BANK FOR RECONSTRUCTION AND DEV., <https://www.ebrd.com/what-we-do/belt-and-road/overview.html> [<https://perma.cc/6ZBS-WGWY>]; *The Belt and Road Initiative in the global trade, investment and finance landscape*, in OECD BUS. AND FIN. OUTLOOK 2018 (2018), <https://www.oecd.org/finance/Chinas-Belt-and-Road-Initiative-in-the-global-trade-investment-and-finance-landscape.pdf> [<https://perma.cc/3JLM-NJ9W>].

⁵² James McBride & Andrew Chatzky, *Is ‘Made in China 2025’ a Threat to Global Trade*, CFR. (May 13, 2019, 8:00 AM), <https://www.cfr.org/backgrounder/made-china-2025-threat-global-trade> [<https://perma.cc/K8T2-T4TF>].

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Joshua Andresen, *China’s Military and the Belt and Road Initiative: A View from the Outside*, 5 THE CHINESE J. OF GLOB. GOVERNANCE 122, 123 (2019).

⁵⁶ CONG. RESEARCH. SERV., CHINA’S ECONOMIC RISE: HISTORY, TRENDS, CHALLENGES, AND IMPLICATIONS FOR THE UNITED STATES (June 25, 2019),

Against this backdrop, the U.S. government has often minimized China's role as a rising competitor and instead focused on China as a rival, enemy, and national security threat.⁵⁷ This position—while long-existing—became more prominent during the Trump Administration, as rhetoric that accompanied such position took on a tone of fear and existential threat. For example, in the White House's 2017 National Security Strategy, it described China as “attempting to erode American security and prosperity,” a “revisionist power” seeking to “shape a world antithetical to U.S. values and interests,” and seeking to “displace the United States in the Indo-Pacific region, expand the reaches of its state-driven economic model, and reorder the region in its favor.”⁵⁸ Yet by focusing solely on the purported values behind China's policies, the National Security Strategy and the Trump White House downplayed the economic threat posed by China's increased competitiveness in the global and U.S. domestic markets vis-à-vis the United States. By conflating the national security threat posed by China with economic threat, the United States' China-related policy during the Trump Administration began using trade measures designed to address national security concerns that were short-term, blunt, and discriminatory (as measures arguably should address actual security concerns in their immediacy). The United States thus ignored the need to develop long-term, sophisticated measures that would hold China accountable to its trade obligations, maintain the moral high ground on the importance of the rule of law that the United States had developed over the last seventy years participating in international organizations, and effectively build up the competitiveness of U.S. companies from within against Chinese and other foreign counterparts.

Since then, the United States' policies towards China have not shown a remarkable change under the Biden Administration,

<https://crsreports.congress.gov/product/pdf/RL/RL33534> [HTTPS://PERMA.CC/HC4F-98JJ]; CONG. RESEARCH. SERV., SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS 1 (2021), <https://sgp.fas.org/crs/misc/R45249.pdf> [https://perma.cc/43ZT-G244] [hereinafter Section 232 Investigations].

⁵⁷ Jeffrey Bader, *Meeting the China Challenge: A Strategic Competitor, Not An Enemy*, BROOKINGS (2020) <https://www.brookings.edu/wp-content/uploads/2020/11/Jeffrey-Bader.pdf> [https://perma.cc/H6H4-XLCW].

⁵⁸ *National Security Strategy of the United States of America*, THE WHITE HOUSE (Dec. 2017), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf> [https://perma.cc/P8PE-UDCR].

unfortunately. The Biden Administration has maintained much of the security-based trade measures enacted under the Trump Administration⁵⁹ (possibly left in place simply to provide leverage in future trade negotiations), while at the same time enacting new measures under the auspices of national security (often just in response to domestic political claims that the Biden Administration is “not as tough” on China as the Trump Administration).⁶⁰ The Biden Administration has thus maintained a confrontational approach to relations with China, although with a more nuanced acknowledgment that U.S. policy must account for China as a strategic competitor and important participant in the global economy.⁶¹

Again, to be clear, China continues to pose a variety of challenges to the United States, including legitimate national security and defense threats on which the United States should not compromise. These include credible instances of cyber threats and espionage; regional geographic unrest with respect to the South China Sea, as well as Hong Kong and Taiwan; human rights and forced labor concerns; as well as weapons of mass destruction capabilities.⁶² Yet these are the types of threats that a national security-based authority is meant to address. Taking an overly broad approach and equating national security with economic competitiveness concerns not only compromises the integrity of national security-based measures, but also may result in economic harm to the United States, stifling U.S. industries’ ability to build true and long-lasting comparative advantages to gain a competitive advantage over China’s growing industrial capabilities.

⁵⁹ Asma Khad, *Biden is keeping key parts of Trump’s China trade policy. Here’s why*, NPR (Oct. 4, 2021), <https://www.npr.org/2021/10/04/1043027789/biden-is-keeping-key-parts-of-trumps-china-trade-policy-heres-why> [<https://perma.cc/TQT8-ETTU>].

⁶⁰ Aime Williams, *Biden official says protecting US steel a national security issue*, FIN. TIMES (Oct. 3, 2021), <https://www.ft.com/content/e1f33362-2c36-4f99-9b11-7dcd82ee7c06> [<https://perma.cc/4H4G-DBAF>].

⁶¹ See *supra* note 59.

⁶² *Annual Threat Assessment of the US Intelligence Community*, OFF. OF THE DIR. OF NAT’L INTEL. (2021), <https://www.dni.gov/files/ODNI/documents/assessments/ATA-2021-Unclassified-Report.pdf> [<https://perma.cc/K7B5-TRM2>].

B. Recent National Security Measures Used to Address Economic Concerns

In this section, we discuss the evolution of U.S. national security measures, in particular those that have been used in recent years to address perceived threats from China—including those that are purely economic in nature.

1. Section 232 Measures

Section 232 refers to Section 232 of the Trade Expansion Act of 1962, as amended, which is codified in 19 U.S.C. § 1862. The purpose of a Section 232 investigation, which is conducted by the U.S. Department of Commerce’s BIS, is to determine the effect of imports on national security. Upon completion of the investigation, the Secretary of Commerce is to report BIS’s findings to the President. Section 232 permits the President of the United States to “adjust the imports” based on a recommendation by the Secretary of Commerce if “an article is being imported into the United States in such quantities or under such circumstances as to threaten or impair the national security.”⁶³ Although Section 232 requires the Secretary of Commerce to include recommendations on actions or inactions with respect to the imports at issue, the final decision on whether to take action, and what action to take, is left solely to the President.

Although Section 232 itself does not explicitly define “national security,” it is notable that the statute was passed in 1962, at the height of the Cold War. One can imagine, therefore, that the “national security” threat that Congress had in mind in enacting this statute was to address the threat of over-reliance on foreign sources for certain natural resources—which the United States may be lacking—that could be suddenly cut off, or would be needed, in a potential military conflict.

That the narrow reading of the statute was widely understood is exemplified by the fact that the statute was used sparsely between its enactment in 1962 and President Trump’s first use of the statute against steel and aluminum imports in 2018. Between 1962 and 2018, Section 232 was invoked only twenty-six

⁶³ 19 U.S.C. § 1862(c).

times. Of these investigations, BIS made affirmative findings that the imports in question threatened national security in nine investigations.⁶⁴ In the four years of the Trump Administration, eight Section 232 investigations were initiated—accounting for almost 24% of all Section 232 investigations in history.⁶⁵ The 2017 investigations on steel and aluminum represented the first Section 232 investigations in sixteen years, and the 2018 tariffs resulting from those investigations represented the first time that a President took action under Section 232 since 1983—over ten years before the establishment of the WTO. Moreover, among the eight investigations conducted under the Trump Administration, BIS made positive determinations in six instances⁶⁶ and a negative determination in only one instance.⁶⁷

⁶⁴ *Proclamation 4227—Modifying Proclamation No. 3279, Relating to Imports of Petroleum and Petroleum Products, Providing for the Long-Term Control of Imports of Petroleum and Petroleum Products Through a System of License Fees and Providing for Gradual Reduction of Levels of Imports of Crude Oil, Unfinished Oils and Finished Products*, THE AM. PRESIDENCY PROJECT (Jun. 19, 1973), <https://www.presidency.ucsb.edu/documents/proclamation-4227-modifying-proclamation-no-3279-relating-imports-petroleum-and-petroleum> [https://perma.cc/599K-797M]; *Proclamation 4629—Imports of Petroleum and Petroleum Products*, THE AM. PRESIDENCY PROJECT (Dec. 8, 1978), <https://www.presidency.ucsb.edu/documents/proclamation-4629-imports-petroleum-and-petroleum-products> [https://perma.cc/Y9Y2-3FK2]; *Proclamation 4702—Imports of Petroleum and Petroleum Products From Iran*, THE AM. PRESIDENCY PROJECT (Nov. 12, 1979), <https://www.presidency.ucsb.edu/documents/proclamation-4702-imports-petroleum-and-petroleum-products-from-iran> [https://perma.cc/U8C9-7WVG]; *Proclamation 4907—Imports of Petroleum*, THE AM. PRESIDENCY PROJECT (Mar. 10, 1982), <https://www.presidency.ucsb.edu/documents/proclamation-4907-imports-petroleum> [https://perma.cc/P8YQ-S6M8]; Initiation of Investigation of Imports of Metal-Cutting and Metal-Forming Machine Tools, 48 Fed. Reg. 15174, 15175 (Apr. 7, 1983); U.S. DEP’T OF COMMERCE, BUREAU OF EXP. ADMIN., *The Effect of Imports of Crude Oil and Refined Petroleum Products on the National Security*, at 6 (1994); U.S. DEP’T OF COMMERCE, BUREAU OF INDUS. AND SEC., *The Effect on the National Security of Imports of Crude Oil and Refined Petroleum Products*, 8 (1999).

⁶⁵ Section 232 Investigations, *supra* note 56; Scott Lincicome & Inu Manak, *Protectionism or National Security? The Use and Abuse of Section 232*, CATO INSTITUTE (Mar. 9, 2021), <https://www.cato.org/policy-analysis/protectionism-or-national-security-use-abuse-section-232#background> [https://perma.cc/DR43-VUF9]; Ana Swanson, *Trump to Impose Sweeping Steel and Aluminum Tariffs*, N. Y. TIMES (Mar. 1, 2018), <https://www.nytimes.com/2018/03/01/business/trump-tariffs.html> [https://perma.cc/BK6E-TCGP] (“Our Steel and Aluminum industries (and many others) have been decimated by decades of unfair trade and bad policy with countries from around the world. We must not let our country, companies and workers be taken advantage of any longer.”).

⁶⁶ See Steel Section 232 Report, *supra* note 6, at 5; see also U.S. DEPARTMENT OF COMMERCE, BUREAU OF INDUSTRY AND SECURITY, OFFICE OF TECHNOLOGY EVALUATION, *THE EFFECT OF IMPORTS OF ALUMINUM ON THE NATIONAL SECURITY 5* (2018) [hereinafter “Aluminum Section 232 Report”]; U.S. DEPARTMENT OF COMMERCE, BUREAU OF INDUSTRY

In addition to the number of investigations and positive findings in comparison to prior administrations, the Section 232 actions under the Trump Administrations are also distinguished by their broadened definition of national security.

Because Section 232 provides no definition for “national security,” the statute does not facially restrict an interpretation that is broader than originally intended. Nonetheless, it is notable that the Section 232 reports under the Trump Administration depart from traditional national security concerns. The first Section 232 investigations initiated by the Trump Administration addressed imports of steel and aluminum.⁶⁸ In particular, in the steel Section 232 investigation, BIS noted that “national security” under Section 232 is not limited to “national defense” but can be interpreted more broadly to include the general security and welfare of certain industries, beyond those necessary to satisfy national defense requirements.⁶⁹ Although prior Section 232 reports also refer to economic welfare, there have generally been clear national security hooks *in addition* to ensuring that the economic conditions ensured that the United States was not overly reliant on usually unfriendly foreign sources for critical inputs. For example, Section 232 report on glass-lined chemical processing equipment explicitly recognizes that:

AND SECURITY, OFFICE OF TECHNOLOGY EVALUATION, THE EFFECT OF IMPORTS OF AUTOMOBILES AND AUTOMOBILE PARTS ON THE NATIONAL SECURITY 11 (2018); U.S. DEPARTMENT OF COMMERCE, BUREAU OF INDUSTRY AND SECURITY, OFFICE OF TECHNOLOGY EVALUATION, THE EFFECT OF IMPORTS OF URANIUM ON THE NATIONAL SECURITY 15 (2019); U.S. DEPARTMENT OF COMMERCE, BUREAU OF INDUSTRY AND SECURITY, OFFICE OF TECHNOLOGY EVALUATION, THE EFFECT OF IMPORTS OF TITANIUM SPONGE ON THE NATIONAL SECURITY 18 (2019); U.S. DEPARTMENT OF COMMERCE, BUREAU OF INDUSTRY AND SECURITY, OFFICE OF TECHNOLOGY EVALUATION, THE EFFECT OF IMPORTS OF TRANSFORMERS AND TRANSFORMER COMPONENTS ON THE NATIONAL SECURITY 17 (2020).

⁶⁷ U.S. DEPARTMENT OF COMMERCE, BUREAU OF INDUSTRY AND SECURITY, OFFICE OF TECHNOLOGY EVALUATION, THE EFFECT OF IMPORTS OF VANADIUM ON THE NATIONAL SECURITY 10–11 (2020). One investigation on the effect of imports of mobile cranes was terminated at the request of the petitioner.

⁶⁸ Although the Trump Administration also initiated Section 232 investigations on automobiles, uranium, titanium, transformers and grain-oriented electrical steel parts, mobile cranes, and vanadium, we focus here primarily on the steel and aluminum Section 232 measures as the Trump Administration did not take any action with respect to the remaining Section 232 investigations. CONG. RESEARCH. SERV., SECTION 232 OF THE TRADE EXPANSION ACT OF 1962 (2022), <https://sgp.fas.org/crs/misc/IF10667.pdf> [<https://perma.cc/BB37-UTM3>].

⁶⁹ See Steel Section 232 Report, *supra* note 6, at 13.

“[T]he purpose of a Section 232 investigation is to safeguard the security of the nation, not the economic welfare of a company or an industry, except as that welfare may affect the national security.”⁷⁰

In fact, prior Section 232 investigations often examined the impact of the imports in relation to the United States’ defense capabilities. For example, to examine the national security impact of plastic injection molding machinery imports, the Bureau of Export Administration (the predecessor of BIS) relied upon industrial output requirements in the 1984 National Security Council Stockpile Study, and in accordance with guidance provided in that Study, utilized a scenario of a three-year war, preceded by a one year mobilization effort.⁷¹ Similarly, the 1989 Section 232 report on imports of crude oil and petroleum was premised on the allegation that “imports are weakening the domestic petroleum industry to such an extent that it will not be able to support U.S. security needs in the event of a global conventional war.”⁷² Although the 2018 reports on steel and aluminum examine the need for steel and aluminum for national defense requirements,⁷³ they do not cite to any specific defense needs or describe why such needs must be met by domestic sources. Instead, the steel Section 232 report further emphasizes the economic and commercial nature of the measure, explaining that:

“No company could afford to construct and operate a modern steel mill solely to supply defense needs because those needs are too diverse. In order to supply those diverse national defense needs, U.S. steel mills must attract sufficient commercial (i.e., non-defense) business.”⁷⁴

⁷⁰ Investigation of Imports of Glass-Lined Chemical Processing Equipment, 47 Fed. Reg. 11746, 11747 (Mar. 18, 1982).

⁷¹ U.S. DEPARTMENT OF COMMERCE, BUREAU OF INDUSTRY AND SECURITY, OFFICE OF TECHNOLOGY EVALUATION, THE EFFECT OF IMPORTS OF PLASTIC INJECTION MOLDING MACHINES ON THE NATIONAL SECURITY 1–2 (1989).

⁷² *Id.*

⁷³ See Steel Section 232 Report, *supra* note 6, at 23–24; see also Aluminum Section 232 Report, *supra* note 66, at 23–39.

⁷⁴ See Steel Section 232 Report, *supra* note 6, at 23.

While the aluminum Section 232 report refers to the need for secure aluminum supplies in the event of a war, it does not conduct a wartime scenario as in the plastic injection molding machinery investigation, but rather surmises that:

“There is no assurance that some non-U.S. suppliers such as Russia (the largest supplier of primary aluminum to the U.S. after Canada) will provide all the necessary aluminum products on a timely basis and in the quantities requested, particularly in a time of war or national emergency.”⁷⁵

The departure from prior Section 232 investigations is further evident in that the investigation and resulting measures do not explicitly address the national security threat imposed by the imports. For example, the steel and aluminum Section 232 reports recognize that, although the steel and aluminum imports were purportedly causing the national security threat, the U.S. military only utilizes 3% of the total U.S. steel production,⁷⁶ and a “small percentage” of U.S. aluminum production.⁷⁷ Moreover, the United States’ steel imports originate predominantly from reliable military allies. The circumstances are thus starkly different from prior Section 232 investigations. For example, the investigation on crude oil from Libya in which the U.S. government determined that it could no longer consider Libya to be a reliable supplier of U.S. energy needs in the midst of Libya’s designation as a state sponsor of terrorism⁷⁸ and the Gulf of Sidra Incident.⁷⁹ Despite these facts, unlike prior Section 232 determinations, the Trump Administration applied substantial tariffs globally on essentially all primary steel and aluminum products from around the world, rather than on targeted countries that actually posed threats to the United States. This was a departure from past Section 232 actions, which usually took the form of quotas, license fees, and embargoes on a narrow

⁷⁵ See Aluminum Section 232 Report, *supra* note 66, at 35.

⁷⁶ See Steel Section 232 Report, *supra* note 6, at 23.

⁷⁷ See Aluminum Section 232 Report, *supra* note 66, at 24.

⁷⁸ Presidential Proclamation 4907 on Imports of Petroleum, 47 Fed. Reg. 10507 (Mar. 10, 1982).

⁷⁹ *Id.* In August 1981, two Libyan jets fired on U.S. aircraft and the U.S. jets returned fire and shot down the Libyan jets. Later that same year, the United States invalidated U.S. passports for travel to Libya and advised all U.S. citizens in Libya to leave.

range of products that were explicitly defined to form the target of the threat.

That the Section 232 measures stem from concerns that are far from national security concerns in the traditional sense is also exemplified in how the Trump Administration utilized the import measures. For example, Canada and Mexico's exemptions from the tariffs were made contingent on the conclusion of the renegotiation of a new North American Free Trade Agreement (NAFTA).⁸⁰ Similarly, the Section 232 measures were used to secure certain concessions from the Korean government during the Korea-U.S. trade agreement renegotiation talks that had begun months earlier.⁸¹

Despite early criticisms regarding the Trump Administration's Section 232 tariffs, President Biden has continued the imposition of Section 232 tariffs and has indicated intent to maintain the measures in place. In fact, shortly after his inauguration, President Biden re-imposed Section 232 tariffs on imports of aluminum from the United Arab Emirates, which the Trump Administration had removed.⁸² Biden Administration officials have also made public statements that suggest Section 232 tariffs have been effective at bolstering the United States' competitive position, which again is misaligned with the purpose of the measure.⁸³

⁸⁰ David Lawder, *Trump's Steel, Aluminum Tariffs Exempt Canada, Mexico*, REUTERS (March. 8, 2018), <https://www.reuters.com/article/usa-trade-tariffs-idUKL2N1QQ23U> [<https://perma.cc/WMQ6-JJYM>].

⁸¹ Simon Lester, Inu Manak, and Kyoungwha Kim, *Trump's First Trade Deal: The Slightly Revised Korea-U.S. Free Trade Agreement*, CATO INST. (June. 13, 2019), <https://www.cato.org/free-trade-bulletin/trumps-first-trade-deal-slightly-revised-korea-us-free-trade-agreement> [<https://perma.cc/CF5E-Y3VC>].

⁸² Proclamation No. 10144, 86 Fed. Reg. 8,265 (Feb. 4, 2021).

⁸³ Secretary Raimondo has said that the Section 232 tariffs have helped revitalize domestic steel and aluminum production. As a result, the Biden-Harris Administration does not have plans to remove the steel and aluminum tariffs as part of negotiations with the EU and UK because "simply saying no tariffs is not the solution" "if China is not going to play by the rules."; in an April 2021 press briefing, Secretary Raimondo said: "What we do on offense is more important than what we do on defense. To compete in the long run with China, we need to rebuild America in all of the ways we're talking about today" and stated that tariffs may be a tool to "level the playing field," but also noted "the 232 tariffs on steel and aluminum have, in fact, helped save American jobs in the steel and aluminum industries." *Press Briefing by Press Secretary Jen Psaki and Secretary of Commerce Gina Raimondo*, April 7, 2021, THE WHITE HOUSE (Apr. 7, 2021), <https://www.whitehouse.gov/briefing-room/press-briefings/2021/04/07/press-briefing-by-press-secretary-jen-psaki-and-secretary-of-commerce-gina-raimondo-april-7-2021/> [<https://perma.cc/8G8F-L68M>].

Moreover, the Biden Administration has now initiated a new Section 232 investigation of its own to determine the effects on the national security from imports of neodymium-iron-boron (NdFeB) permanent magnets.⁸⁴ According to the Federal Register notice requesting public comments, BIS explained that “[n]umerous critical national security systems rely on NdFeB permanent magnets, including fighter aircraft and missile guidance systems.⁸⁵ In addition, NdFeB permanent magnets are essential components of critical infrastructure, including electric vehicles and wind turbines.”⁸⁶ As of the time of this writing, BIS has not issued a determination on whether NdFeB permanent magnet imports pose a threat to the national security, and/or what types of recommendations BIS will issue if it does find that imports pose a threat. While the Section 232 report might shed light on whether the Biden Administration is signaling a shift back towards a more traditional definition of national security, hopes are not high given the Administration’s recent efforts to also use this tool for seemingly competitive reasons (i.e., prior to the election, they were critical of its overuse, but as noted have since changed their tune now that they are in power).

2. Export Controls

Like many countries around the world, the United States maintains export controls to advance national security and foreign policy objectives. Export controls generally regulate the international movement of commodities, software, and technology, as well as certain services, for national security and foreign policy purposes. In addition to maintaining unilateral export controls, the United States also participates in multilateral export control regimes,⁸⁷ some of which are established by groups of nations in

⁸⁴ Notice of Request for Public Comments on Section 232 National Security Investigation of Imports of Neodymium-Iron-Boron (NdFeB) Permanent Magnets, 86 Fed. Reg. 53,277 (Sept. 27, 2021).

⁸⁵ *Id.* at 53,278.

⁸⁶ *Id.* at 53,278.

⁸⁷ The United States participates in four multilateral export control regimes: Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, which is focused on promoting transparency and responsibility in transfers of conventional arms and dual-use goods and technologies, and the Nuclear Suppliers Group, Australia Group, and Missile Technology Control Regime, which focus

furtherance of security-related obligations in binding United Nations treaties and resolutions.⁸⁸

The Export Control Reform Act of 2018 (ECRA) is the statutory authority underlying the U.S. export control regime.⁸⁹ Although the ECRA does not include a definition of “national security,” it distinguishes between “national security” and “foreign policy” interests, which it further distinguishes from economic considerations. The ECRA statement of policy provides that it is the policy of the United States to only use export controls to the extent necessary, first, “to restrict the export of items which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States” and, second, “to restrict the export of items if necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations.”⁹⁰ The first is explicitly focused on the narrow, defense-oriented conception of national security, and the second is explicitly and separately focused on foreign policy.

The statement of policy further sets forth seven enumerated reasons for promulgating export controls.⁹¹ Six of these reasons focus on traditional military and defense security-related interests:

on limiting the proliferation of nuclear weapons, chemical weapons, and missiles capable of delivering weapons of mass destruction, respectively. *See Multilateral Export Control Regimes*, BUREAU OF INDUSTRY AND SECURITY, <https://www.bis.doc.gov/index.php/policy-guidance/multilateral-export-control-regimes> [<https://perma.cc/95VL-SZYV>].

⁸⁸ For example, although there is “no formal linkage” between the Missile Technology Control Regime (“MTCR”) and the United Nations, “the activities of the MTCR are consistent with the UN’s non-proliferation and export control efforts. For example, applying the MTCR Guidelines and Annex on a national basis helps countries to meet their export control obligations under UN Security Council Resolution 1540.” *Frequently Asked Questions (FAQs)*, MISSILE TECHNOLOGY CONTROL REGIME, <https://mtcr.info/frequently-asked-questions-faqs/> [<https://perma.cc/S59X-KP2V>]; *see also* S.C. Res. 1540 (Apr. 28, 2004) (deciding, among other things, “all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery”). The Nuclear Suppliers Group Guidelines are also “are consistent with, and complement, the various international, legally binding instruments in the field of nuclear non-proliferation,” including the Treaty on the Non-Proliferation of Nuclear Weapons (NPT).” Nuclear Suppliers Group [NSG], *About the NSG*, [nsg-online.org/en/about-nsg](https://www.nsg-online.org/en/about-nsg); *see also* Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

⁸⁹ Export Control Reform Act, 50 U.S.C. §§ 4801–4852 (2018).

⁹⁰ *Id.* § 4811(1).

⁹¹ *Id.* § 4811(2).

(1) controlling the release of items to prevent use in “the proliferation of weapons of mass destruction or of conventional weapons,” “the acquisition of destabilizing numbers or types of conventional weapons,” “acts of terrorism,” “military programs that could pose a threat to the security of the United States or its allies,” or “activities undertaken specifically to cause significant interference with or disruption of critical infrastructure”; (2) “preserv[ing] the qualitative military superiority of the United States”; (3) “strengthen[ing] the United States defense industrial base”; (4) “carry[ing] out obligations and commitments under international agreements and arrangements, including multilateral export control regimes”;⁹² (5) “facilitate[ing] military interoperability between the United States and its North Atlantic Treaty Organization (NATO) and other close allies”; and (6) “ensure[ing] national security controls are tailored to focus on those core technologies and other items that are capable of being used to pose a serious national security threat to the United States.”⁹³ The seventh reason for imposing export controls is to “carry out the foreign policy of the United States, including the protection of human rights and the promotion of democracy.”⁹⁴ Thus, although the ECRA authorizes the use of export controls for both national security and foreign policy reasons, the authority to promulgate export controls for foreign policy reasons is separately enumerated and distinguished from the other traditional national security (i.e., defense-related) reasons.

The ECRA statement of policy draws a further distinction between national security and foreign policy considerations on one hand and economic considerations on the other, stating that it is the policy of the United States “[t]o use export controls *only after* full consideration of the impact on the economy of the United States.”⁹⁵ This mandate makes clear that it is not the purpose of export controls to promote or enact economic policy. Rather, it explicitly acknowledges that the interests that may properly underlie the promulgation of export controls—national security and foreign

⁹² These multilateral export control regimes focus on traditional military and defense-related national security concerns. *See supra* notes 88, 89.

⁹³ 50 U.S.C. § 4811(2)(A)–(C), (E)–(G).

⁹⁴ *Id.* § 4811(2)(D).

⁹⁵ *Id.* § 4811(1) (emphasis added).

policy—intersect with, and may potentially conflict with and undermine, U.S. economic interests.

Indeed, there are many areas in which U.S. economic interests and national security interests inevitably overlap and are inextricably intertwined. For example, the Biden Administration’s economic agenda features plans to invest in research and development and high-innovation, with the purpose of enhancing U.S. leadership in critical technologies and fields such as semiconductors, advanced computing, and advanced communications technology.⁹⁶ In addition to having meaningful implications for the U.S. economy, these technologies are associated with legitimate national security concerns. For example, semiconductors play an essential role in modern-day military equipment and critical infrastructure, such as telecommunications.⁹⁷ Citing these national security concerns, in 2019 and 2020, the Trump Administration imposed a series of unilateral export control measures restricting exports of U.S. semiconductors and semiconductor technology, with a particular focus on cutting off the supply chain of the Chinese multinational telecommunications giant, Huawei Technologies Co., Ltd (“Huawei”).⁹⁸ Semiconductors, like many other high-technologies, sit at the intersection of economic interests and national security concerns, and can therefore feature legitimately in both the U.S. economic agenda and U.S. defense and national security strategy. The ECRA acknowledges this reality and explicitly requires export control regulators to evaluate and weigh these distinct and competing

⁹⁶ *FACT SHEET: The American Jobs Plan*, THE WHITE HOUSE (Mar. 31, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/> [https://perma.cc/Q9VM-A46A].

⁹⁷ Akinori Kahata, *Semiconductors as Natural Resources—Exploring the National Security Dimensions of U.S.-China Technology Competition*, CTR. FOR STRATEGIC & INT’L STUD. (Feb. 17, 2021), <https://www.csis.org/blogs/technology-policy-blog/semiconductors-natural-resources-%E2%80%93-exploring-national-security> [https://perma.cc/44BX-RP4G].

⁹⁸ *See, e.g.*, Addition of Entities to the Entity List, 84 Fed. Reg. 22,961 (May 21, 2019); Addition of Certain Entities to the Entity List and Revision of Entries on the Entity List, 84 FR 43,493 (Aug. 21, 2019); Addition of Huawei Non-U.S. Affiliates to the Entity List, the Removal of Temporary General License, and Amendments to General Prohibition Three (Foreign-Produced Direct Product Rule), 85 FR 51,596 (Aug. 20, 2020); *see also* Chad P. Bown, *How the United States marched the semiconductor industry into its trade war with China*, PETERSON INST. FOR INT’L ECONOMICS (Dec. 2020), piie.com/sites/default/files/documents/wp20-16.pdf [https://perma.cc/2EKK-FFC6].

interests in implementing export controls, but making clear that the primacy of its analysis is with respect to defense and national security.

Thus, in the context of trade relations with China in particular, U.S. regulators must proceed carefully, deliberately, and transparently in defining China-specific export control policy—using export control tools within their statutory bounds but acknowledging their limitations, and not seeking to use export controls for trade policy or competitiveness issues for which they are not appropriately tailored.⁹⁹ The ECRA’s statutory guardrails support this cause by articulating the relevant application and scope of “national security” and “foreign policy,” including providing specific examples of each. The ECRA also mandates the consideration of collateral economic consequences but addresses these corollary impacts separate and apart from the national security and foreign policy grounds in which the U.S. export control regime may be rooted. This written framework helps ensure that export controls are calibrated primarily to addressing the specific national security and foreign policy objective at issue, while secondarily avoiding unnecessary and unintended negative impacts on the U.S. economy and competitive position. The ECRA’s statutory and policy directives thereby serve to appropriately constrain and guide the use of export control measures as a national security and foreign policy tool, and not as an economic tool.

III. IMPLICATIONS OF CONFLATING NATIONAL SECURITY INTERESTS WITH ECONOMIC COMPETITIVENESS CONCERNS

Applying an excessively broad definition to “national security” unfortunately masks legitimate economic and industrial developments achieved by foreign countries such as China. As

⁹⁹ *Confronting Threats from China: Assessing Controls on Technology and Investment: Testimony Before the S. Comm. on Banking, Hous., and Urb. Affs.*, 116th Cong. (2019) (statement of Kevin Wolf, Partner, Akin Gump Strauss Hauer & Feld LLP) (“Export controls should be used to their fullest possible extent, however, when a specific national security or foreign policy issue pertains to the export, reexport, or transfer of commodities, technologies, software, or services to destinations, end users, or end uses. If the issue pertains to an activity, an investment, or a concern separate from such events or concerns, then one must look to other areas of law, such as sanctions, trade remedies, foreign direct investment controls, intellectual property theft remedies, or counter-espionage laws.”).

indicated above, China's industrial policies and practices do sometimes pose legitimate threats to the United States' national security interests. However, to take the view that everything that China does is of national security concern ignores how best to address some of the key concerns that are in fact economic and competitiveness based.

The Section 232 tariffs on steel, as noted previously, is a prime example. For years, the global steel and aluminum industry has suffered from overcapacity. The Section 232 reports on steel and aluminum recognize as much, finding that "foreign competition is characterized by substantial and sustained global overcapacity and production in excess of foreign domestic demand."¹⁰⁰ Neither the recommended actions nor the actions taken by the President, however, addressed the issue of global overcapacity; there were limited efforts to seriously engage with countries allegedly engaged in over-production or with allies to reform the global supply chain.¹⁰¹ Rather, by framing the problem as a national security issue, the Section 232 measure used a very blunt, short-term instrument that simply made it more expensive for U.S. domestic consumers to purchase both domestic and imported steel. Studies show that most of the Section 232 tariffs were passed through into domestic prices, leaving export prices unchanged.¹⁰² Therefore, rather than addressing overcapacity, the Section 232 measures ended up costing U.S. downstream jobs and loss of export market.¹⁰³

Moreover, the Section 232 measures did not result in a revival or increase the competitiveness of the U.S. steel industry. U.S. Steel, the largest steel company in the United States, recorded losses of \$642 million in 2019, and from November 2019 to

¹⁰⁰ The Effects of Imports of Steel on the National Security, 85 Fed. Reg. 40210 (July 6, 2020) (notice).

¹⁰¹ , *Statement on Meeting of the Global Forum on Excess Steel Capacity*, U.S. TRADE REPRESENTATIVE (Sept. 20, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/september/ustr-statement-meeting-global> [<https://perma.cc/W62F-EMLC>].

¹⁰² Mary Amity, Stephen J. Redding & David E. Weinstein, *The Impact of the 2018 Tariffs on Prices and Welfare*, 33 J. ECON. PERSP. 187, 197 (2019).

¹⁰³ Scott Lincicome & Inu Manak, *Protectionism or National Security? The Use and Abuse of Section 232*, CATO INST., <https://www.cato.org/policy-analysis/protectionism-or-national-security-use-abuse-section-232#assessing-economic-impact-protecting-national-security> [<https://perma.cc/3EGG-59A8>].

February 2020 laid off more than 1,650 workers as it scaled back production and idled facilities in Michigan and Indiana.¹⁰⁴ U.S. company JSW Steel brought a lawsuit against BIS's denial of its product exclusion request, arguing that without an exemption from Section 232 duties, its plants were operating at unprofitable levels.¹⁰⁵

Simply put, the national security measure did not resolve the core issue because there was not a national security problem to resolve. In order to address the global supply issues, it was necessary for the United States to engage with all steel producing countries, including China—the main source of overcapacity. However, by nature, national security measure do not typically seek engagement with the source of the “national security threat.” This is reflected in the language of Section 232, which authorizes the President to take defensive actions to prohibit the decrease or elimination of duties when such reduction or elimination would threaten to impair the national security; and to “adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.” Moreover, national security measures are by nature temporal, intended to be in place only for the time that such security concerns exist, and to be lifted when the concern subsides. In such emergency situations, a blunt instrument is usually needed, and sufficient. Competitiveness issues on the other hand are long-term issues. They require a bit more nuance and sophistication to ensure a long-term solution. Thus, in hindsight, it is clear that the steel and aluminum issues are economic competitiveness issues that require a long-term, sophisticated solution; and not a short term, blunt instrument such as broad punitive import tariffs.

With respect to export controls, as noted above, the ECRA provides meaningful guardrails regarding what is considered to fall within the scope of “national security,” as distinct from other

¹⁰⁴ Joseph S. Pete, *U.S. Steel lays off more workers in third round of cuts*, TIMES NW. IND. (Aug. 28, 2020), https://www.nwitimes.com/business/steel/u-s-steel-lays-off-more-workers-in-third-round-of-cuts/article_74fd78e7-afa9-512a-823f-ea75160a7c7b.html. Steel did not publish the amount of people laid off in February 2020, thus the figure of 1,650 is based on a sum of the November and December 2019 layoffs.

¹⁰⁵ Bryan Gruley & Joe Deaux, *The Biggest Fan of Trump's Steel Tariffs is Suing Over Them*, BLOOMBERG (Feb. 12, 2020, 5:00 AM), <https://www.bloomberg.com/features/2020-steel-tariffs-jsw/> [<https://perma.cc/98WF-Q2QN>].

foreign policy issues and economic considerations. If the United States strays from the traditional, defense-focused notion of national security as it is articulated in the ECRA and deploys export controls for economic ends, it risks delegitimizing its export control regime and the important national security purpose it serves.

If export control measures are not narrowly tailored to the relevant national security concern, they may also give rise to unintended consequences that undermine U.S. national security interests and unintentionally harm the U.S. competitive position. Taking the semiconductor industry as an example, the U.S.-China trade war—including the 2019 and 2020 changes to U.S. export controls aimed at restricting exports of U.S. semiconductors and related technology to Huawei—has been cited as a contributor to declining revenue in the U.S. semiconductor industry.¹⁰⁶ Notably, top U.S. semiconductor companies reported a median revenue decline of between 4% and 9% in each of the three quarters after the May 2019 export control measures restricting exports to Huawei were imposed.¹⁰⁷ Semiconductor industry associations and analysts have highlighted the disruptive consequences of broad restrictions on sales of non-sensitive, commercial semiconductor products to targeted Chinese companies, noting that access to growth markets such as China drive U.S. semiconductor research and development for advanced semiconductors that are critical to meeting U.S. defense needs.¹⁰⁸ Analysts have forecasted that the maintenance of

¹⁰⁶ ANTONIO VARAS & RAJ VARADARAJAN, BOS. CONSULTING GRP., HOW RESTRICTIONS TO TRADE WITH CHINA COULD END US LEADERSHIP IN SEMICONDUCTORS 4 (Mar. 2020), https://web-assets.bcg.com/img-src/BCG-How-Restricting-Trade-with-China-Could-End-US-Semiconductor-Mar-2020_tcm9-240526.pdf [<https://perma.cc/AH3J-TQ8B>].

¹⁰⁷ *Id.*

¹⁰⁸ See, e.g., *SIA Statement on Export Control Rule Changes*, SEMICONDUCTOR INDUS. ASS'N (Aug. 17, 2020), <https://www.semiconductors.org/sia-statement-on-export-control-rule-changes-2/> [<https://perma.cc/E34E-GKGV>] (citing concerns regarding the August 2020 export control rule changes targeting Huawei, the SIA reiterated its “view that sales of non-sensitive, commercial products to China drive semiconductor research and innovation here in the U.S., which is critical to America’s economic strength and national security”); Comments from SEMI on the Interim-Final Rule Amending General Prohibition Three (Foreign-Produced Direct Product Rule) and the Entity List, SEMI (July 14, 2020), https://www.semi.org/sites/semi.org/files/2020-07/July_14_SEMI_FDPR_comments.pdf [<https://perma.cc/N9EH-KBLD>] (highlighting reports from SEMI members of sales losses to “companies in the semiconductor supply chain seeking to avoid the uncertainty the regulation creates for U.S.-origin items”); VARAS & VARADARAJAN, *supra* note 106, at 24 (“[A] dramatically scaled-down US

broad, unilateral restrictions on Huawei and other targeted Chinese companies would result in continued declines in the global share and revenue of U.S. semiconductor companies, with resulting negative impacts to U.S. national security interests.¹⁰⁹

Beyond negative impacts on U.S. industry, overly broad applications of trade measures designed to target national security issues undermines U.S. credibility and rapport with other trading partners. The expansive interpretations of “national security” in the Section 232 context elicited retaliatory tariffs on steel and aluminum not only from China but also from key U.S. trading partners including Canada, the European Union, Mexico, and the United Kingdom.¹¹⁰ In the export control context, the ECRA’s statement of policy explicitly provides that, “[e]xport controls should be coordinated with the multilateral export control regimes,” and “[e]xport controls that are multilateral are most effective.”¹¹¹ Indeed, this reflects the prevailing view of governments and experts given not only the risk of negative impacts to U.S. industry but also the threats that unilateral action may pose to the sovereignty of

semiconductor industry that no longer functioned as a global leader would not be able to fund the level of R&D investment required to fulfill needs for advanced semiconductors for critical defense and national security capabilities”); *SIA Statement on Export Control Rule Changes*, SEMICONDUCTOR INDUS. ASS’N (Aug. Comments of the Semiconductor Industry Association (SIA) on Amendments to General Prohibition Three (Foreign-Produced Direct Product Rule) and the Entity List (July 14, 2020), <https://www.semiconductors.org/wp-content/uploads/2020/07/SIA-Comments-on-Foreign-Direct-Product-July-14-2020.pdf> [<https://perma.cc/K8CG-DYD6>]) (“Over 80 percent of revenue for U.S. semiconductor companies come from sales to foreign markets, making access to global markets critical to our industry’s success.”).

¹⁰⁹ VARAS & VARADARAJAN, *supra* note 106, at 1 (forecasting that “[o]ver the next three to five years, US companies could lose 8% points of global share and 16% of their revenues, if the US maintains the restrictions enacted with the current Entity List,” which includes broad restrictions on Huawei).

¹¹⁰ *Foreign Retaliations Timeline*, Int’l Trade Admin., <https://www.trade.gov/feature-article/foreign-retaliations-timeline> [<https://perma.cc/FV4E-ZZH6>]; *Steel and Aluminum*, Gov’t of Canada, https://www.international.gc.ca/trade-commerce/controls-controles/steel_alum-acier_alum.aspx?lang=eng [<https://perma.cc/DVH3-RTUD>]; Sabrina Rodriguez, *Mexico imposes retaliatory tariffs on dozens of U.S. goods*, Politico (July 5, 2018, 11:38 AM), <https://www.politico.com/story/2018/07/05/mexico-imposes-retaliatory-tariffs-670424> [<https://perma.cc/JMY2-BA2L>]; The United States has since reached agreements with Canada and Mexico to remove the Section 232 tariffs for steel and aluminum. *United States Announces Deal with Canada and Mexico to Lift Retaliatory Tariffs*, Off. Of the U.S. Trade Representatives (May 17, 2019), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/may/united-states-announces-deal-canada-and> [<https://perma.cc/RVL5-UYHR>].Error! Hyperlink reference not valid.

¹¹¹ 50 U.S.C. § 4811(5).

allied nations.¹¹² Accordingly, applying an excessively broad definition of “national security” carries not only negative internal impacts for U.S. industry but also negative external implications affecting trade relations between the United States and its allies.

IV. CONCLUSIONS

The labelling of a large number of trade-related issues concerning China as national security concerns may often be desirable and advantageous to the U.S. Administration and other U.S. policymakers from a political perspective. As discussed above, this allows the United States to utilize national security tools, which have fewer legal constraints in executive power. Moreover, labeling all actions by China as national security threats is an easy way to garner public support through playing the nationalism card.

In reality, using such instruments haphazardly, without the proper legal and factual basis, has resulted in costs that outweigh the benefits. Indeed, as discussed above, the adverse effects of such blunt, sudden instruments have resulted in unintended adverse effects on U.S. companies, U.S. jobs, and the U.S. economy overall. Therefore, rather than taking the overly simplistic approach that out-competing China and addressing national security threats posed by China are synonymous, the U.S. government should clearly articulate and critically examine the nature of the underlying policy issue. What is truly the “national security” issue in a particular context? What is the nature of the national security threat, if any?

¹¹² CONG. RSCH. SERV., EXP. CONTROLS: KEY CHALLENGES (2021), <https://crsreports.congress.gov/product/pdf/IF/IF11154> [<https://perma.cc/YWS2-XA83>] (“Most observers would concur that multilateral controls are more effective than unilateral controls in preventing the unwanted dissemination of strategic goods and technology.”); NAT’L ACAD. SCI., FINDING COMMON GROUND: U.S. EXPORT CONTROLS IN A CHANGED GLOBAL ENV’T, at 19–20 (1991) (“Unilateralism disadvantages the U.S. economy and can rarely be justified in a competitive world economy by security concerns. Unilateral features should be eliminated from U.S. national security export controls except in those rare instances in which such a unilateral action would be effective or holds the prospect of changing the position of other countries within a relatively short time.”); Chad P. Bown, *How Trump’s export curbs on semiconductors and equipment hurt the US technology sector*, PETERSON INST. FOR INT’L ECON. (Sept. 28, 2020, 5:00 AM), <https://www.piie.com/blogs/trade-and-investment-policy-watch/how-trumps-export-curbs-semiconductors-and-equipment-hurt-us> [<https://perma.cc/J8LB-2HNZ>] (“By restricting what foreign companies can do in their home countries, the administration is threatening allied governments’ national sovereignty, setting a dangerous precedent of unilateralism.”).

And is the national security measure being contemplated appropriately tailored to addressing the very concern at issue?

In sum, “national security” should not become a way to avoid such critical analysis. It provides important tools that should be wielded carefully so as to avoid overreach, and to ensure credibility when the tools are actually needed. There is critical value with respect to this last point. Not only does careful use of national security instruments by the United States model the primacy of the rule of law in the global context, it discourages other countries from claiming national or defensive security when there is no such concern, and it helps the United States to maintain the moral high ground in its role as a leader of the world trading community.

Domestically, enacting trade policy and employing trade measures, and clearly distinguishing such actions from more clearly defined terms “national security,” will only create greater predictability, stability, and transparency for the U.S. economy, whereby all will benefit. With respect to how the United States deal with China, clearly delineating between economic competitive concerns and legitimate national security concerns will mitigate adverse consequences associated with conflating the two problems and will not allow the two countries to compartmentalize these issues such that problems can be isolated and dealt with in the appropriate time without fully decoupling the bilateral relationship. Indeed, the Biden Administration has recently signaled that it recognizes the importance of engaging with China as a competitor and peer, as well as the negative consequences of failing to do so.¹¹³

With respect to how best to deal with the economic competitiveness issues, it is our view that the best defense is a good

¹¹³ JOSEPH R. BIDEN JR. & WHITE HOUSE, INTERIM NAT’L SEC. GUIDANCE 21 (Mar. 2021) (stating that it may be in the U.S. interests to work with China “on issues such as climate change, global health security, arms control and nonproliferation”); Anthony J. Blinken, Secretary of State, Department of State, Reaffirming and Reimagining America’s Alliances (Mar. 24, 2021), https://www.state.gov/reaffirming-and-reimagining-americas-alliances/?utm_campaign=Marketing_Cloud&utm_medium=email&utm_source=Washingt+Update+3.25.2021&utm_content=https%3a%2f%2fwww.state.gov%2freaffirming-and-reimagining-americas-alliances%2f [<https://perma.cc/L3NB-QAJP>] (stating to NATO that “[t]he United States won’t force allies to choose our allies into a ‘us or them’ choice with China” and that “[t]here’s no question that Beijing’s coercive behavior threatens our collective security and prosperity . . . [b]ut that doesn’t mean that countries can’t work with China where possible, for example, on challenges like climate change and health security.”).

offense. In other words, the United States must practice what it preaches by competing on a level playing field based on market forces, rather than seek to artificially “contain” or suppress China’s rise.¹¹⁴ And rather than approaching U.S.-China relations from the sole standpoint of a broad, imprecise concept of “national security,” resulting only in the adoption of defensive trade measures intended originally only to diffuse such threats, the United States must acknowledge the complexity of the bilateral relationship, recognize that China is a legitimate economic competitor that needs to be kept accountable, and then utilize legitimate tools to ensure a level playing field and a strong market competitiveness environment to benefit U.S. companies, U.S. consumers, and U.S. interests in the long term.¹¹⁵

¹¹⁴ MICHAEL BROWN, ERIC CHEWNING & PAVNEET SINGH, GLOBAL CHINA, PREPARING THE UNITED STATES FOR THE SUPERPOWER MARATHON WITH CHINA (Apr. 2020), https://www.brookings.edu/wp-content/uploads/2020/04/FP_20200427_superpower_marathon_brown_chewning_singh.pdf [<https://perma.cc/YK6C-2LE2>].

¹¹⁵ Bader, *supra* note 57, at 1 (“While strategic competition with China will be the overall framework for the immediate future, it would be contrary to American interests to treat China as an enemy.”); World Trade Online, *HASC Chairman: U.S. must accept competition with China, not aim for dominance*, WORLD TRADE ONLINE (Mar. 25, 2021, 10:57 AM) <https://insidetrade.com/daily-news/hasc-chairman-us-must-accept-competition-china-not-aim-dominance> (quoting House Armed Services Committee Chairman Adam Smith stating that “[t]here’s going to be peer competitors and we’re going to spend ourselves into the ground if we try to imagine that China can’t ever become a peer with us”).