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Hearing on Challenging China's Trade Practices: Promoting Interests of U.S.
Workers, Farmers, Producers, and Innovators

Challenging China's Trade Practices: Promoting Interests of U.S. Workers, Farmers, Producers, and Innovators

Panel II:

Innovation, Technology, and Intellectual Property Concerns

BY

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The author thanks the Commission for the opportunity to provide testimony on China's trade practices, which present serious challenges to the leadership of the United States in key innovation and technology areas. As the prospects for direct negotiation with China on these issues have grown increasingly dim, the United States has leaned more heavily on defensive tools, such as investment screening and export controls, to mitigate the potential national security harms arising from the strategic competition with China. Traditional concepts of what constitutes a national security risk and the frameworks and institutions that the United States uses to manage these risks are no longer sufficient. The United States must strengthen implementation of its own authorities and engage in an intensive diplomatic effort to persuade key likeminded allies to do the same. Noting that an effective response to China's unfair trade practices impacting U.S. innovation, technology, and intellectual property rights will require a broad strategy encompassing many new tools, this testimony focuses on the specific role of export controls and investment screening and the opportunities for stronger collaboration with Europe and other key allies and partners on these specific tools.¹²

I. Summary of Key Recommendations

STRONGER IMPLEMENTATION OF U.S. EXPORT CONTROL AUTHORITIES

- Congress should require that the newly confirmed Under Secretary of Commerce for Industry and Security conduct and report to Congress on the results of a top-to-bottom assessment of the emerging and foundational technology authorities provided under the Export Control Reform Act of 2018.

NEW AUTHORITIES TO REGULATE OUTBOUND INVESTMENT

- Congress should authorize a targeted set of new outbound investment controls, designed to work in tandem with export control authorities, that allow the United States to regulate the flow of U.S. capital into China that supports the development of technology that is against U.S. interests, addressing a gap in current U.S. authorities that focus on the transfer of technologies.

ENHANCED COOPERATION IN THE U.S.-EU TRADE AND TECHNOLOGY COUNCIL (TTC)

- In the TTC, the United States, the European Union (EU), and EU member states should:
 - Intensify work in the TTC export controls working group to develop export controls that extend beyond the traditional objectives of the multilateral export control regimes, leveraging the extraordinary allied coordination on Russia export controls to build momentum for a stronger export control approach to China.
 - Identify critical technologies of shared strategic importance to the United States and Europe, develop a shared understanding of national security risks associated with such technologies, and consider joint guidance for reviewing transactions involving such technologies under the U.S. and EU member state export control and investment screening mechanisms.

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- Develop shared approaches to identifying risks with and solutions to China's practice of abusing its regulatory authorities to extract concessions from firms executing international deals that are also undergoing investment screening reviews in the United States or EU member states.
- Explore EU willingness to establish outbound investment screening controls to accompany a new U.S. authority in this area.

A NEW MULTILATERAL INVESTMENT AND EXPORT CONTROLS REGIME

- The United States should begin the diplomatic process of establishing a new multilateral regime that addresses the reality with Russia and rises to the China challenge, working closely with a tight group of likeminded allies. The objectives of this regime, which would act as a successor to the Wassenaar Arrangement regime on dual-use technology, should include:
 - Promoting international security and **common security** of the member nations;
 - Preventing the **destabilizing accumulations** of conventional or emerging weapons globally and **preventing the transfer** of dual-use technologies important for such weapons to countries of concern;
 - Promoting **technological leadership** in science, technology, engineering, and manufacturing sectors, including in foundational and emerging technology areas, that are material to the national security and foreign policy of the member states; and
 - Supporting the protection of **human rights and democratic institutions**.
- The U.S. objective should be to include export controls and targeted outbound investment controls within the regime mandate, along with a mechanism for stronger coordination and sharing of information relevant to transaction reviews conducted by each member's inbound investment screening mechanism.
- The United States should create a publicly accessible database of statistics that map trade and investment flows against export control classification numbers and encourage all partners to do the same.

II. Full Testimony

Introduction

The U.S. views of China's nonmarket innovation practices are increasingly pessimistic, as these practices persist and the United States and allies and partners have yet to develop fully effective responses to ensure that our companies and workers can compete on a level playing field. Core Chinese practices, such as [forced technology transfer](#), [restrictive market access](#), and [industrial subsidies](#), have been a concern for U.S. policymakers since before China's accession to the World Trade Organization (WTO). Yet, twenty years on, China has intensified rather than modified these practices and has failed to live up to its [WTO accession promise](#) of moving towards a free market economy. It has expanded its nonmarket playbook to include [cyber theft of intellectual property](#), [talent acquisition](#), [exploitation of the open U.S. academic environment](#), and [economic coercion](#). At the same time, China's homegrown technology development presents new challenges to U.S. innovation leadership, particularly in [emerging technology](#) areas where Chinese capabilities are not always dependent upon transfers of technology from the United States.

Against the backdrop of heightened geopolitical tensions between the United States and China, competition in the technology and innovation domains has direct implications for U.S. national security. The [Interim National Security Strategy](#) of the Biden Administration notes that China "is the only competitor potentially capable of combining its

economic, diplomatic, military, and technological power to mount a sustained challenge to a stable and open international system.” It highlights the strategic competition with China, arguing that “economic security is national security” and implicitly bringing longstanding economic concerns with China, such as their nonmarket innovation policies, under the national security umbrella.

As the United States seeks an effective strategy to manage the economic and technological competition with China, it will lean heavily on national security-focused defensive tools, *i.e.*, export controls, inbound investment screening, and potentially new authorities related to outbound investment controls. It is important to recognize the limitations of these tools to address China’s nonmarket innovation practices writ large. The U.S. toolkit of national security-focused defensive tools is designed to address specific risks arising from discrete commercial transactions. These tools set clear rules around the types of technology that may be transferred, either through an export or an investment transaction, but not the commercial terms on which the transfer occurs. In contrast, many of the U.S. concerns about China’s nonmarket innovation practices involve technology that may be legally transferred to China, but U.S. firms are pressured to do so on terms that provide an unfair advantage to their Chinese competitors. The use of an export or investment control may therefore not be wholly responsive to concerns around nonmarket innovation practices in all instances, though they can be an important part of a broader strategy.

Policymakers may want to use national security-focused defensive tools to restrict economic activity in a broader range of sectors, including in sectors that are economically significant or important for U.S. critical supply chains. When the national security tools work well, it is due to predictability in the policy process, a well-defined and bounded concept of what constitutes a national security risk, and buy-in from the private sector, which is ultimately responsible for the first line of compliance. The further the United States strays from a well-defined construct of national security, the higher the risk of engaging in purely protectionist behavior. It is therefore critical that the United States clearly define and bound the appropriate policy objectives of a more aggressive deployment of national security tools. Objectives should include maintaining U.S. technological leadership in domains that are directly or indirectly important for future U.S. military dominance, U.S. intelligence capabilities, and resilient operation of U.S. critical supply chains and physical and digital infrastructure, as well as preventing the use of technology to undermine democratic institutions and human rights. The United States should develop alternative approaches for addressing concerns with China’s nonmarket practices that do not have a connection to this expansive concept of national security and should consider the use of national security tools as just one part of a holistic strategy to address China’s nonmarket innovation practices.

Strategies for addressing China’s nonmarket innovation practices

As the United States moves forward to address the challenges with China’s nonmarket innovation practices, the United States may consider three strategies to manage the economic relationship. The framework provided here is relevant when assessing strategies for any trading relationship, with the emphasis on each piece more or less emphasized depending on the nature of the partner and the ability to work collaboratively together. First, the United States may pursue direct negotiations with China, either bilaterally or in the WTO context, to seek China’s agreement to change its unfair, nonmarket innovation practices. Second, the United States may take defensive measures to mitigate the harm of China’s practices on U.S. technological leadership, economic competitiveness, and national security. Third, the United States may engage with likeminded partners to shape the international and regional economic order in which China operates. With a close democratic ally, such as the European Union (EU), the emphasis should naturally be placed heavily on direct negotiations. The strategy for China, as a nonmarket, nondemocratic strategic competitor, will be almost exactly the opposite.

DIRECT NEGOTIATIONS

Direct negotiations with China are, at this point, unlikely to yield meaningful results. China has little incentive to commit to binding rules that will require structural changes to a system they believe works for their economic and political objectives. For example, U.S. trade negotiators have long recognized that U.S. firms operating in China face pressure to [transfer technology](#) to their Chinese competitors as a condition of market access and that this fundamental characteristic of the Chinese market undercuts the ability of U.S. firms to compete on a level playing field. China's [WTO accession process in 2001 included emphasis on forced technology transfer concerns](#). The [Economic and Trade Agreement](#) (known commonly as the "Phase One Agreement") concluded between the United States and China under the Trump Administration includes [broad prohibitions](#) on China's forced technology transfer practices, among a range of other commitments from China. China has negotiated commitments, varying in specificity and level of ambition, related to forced technology transfer in agreements with other major [trading partners, including the EU and the fifteen members of the Regional Comprehensive Economic Partnership \(RCEP\), in addition to its WTO commitments](#). [Enforcement](#) of these commitments is difficult in practice, as the U.S. and other governments are too often unaware of a violation of China's obligations unless they are informed by the targeted company. Foreign firms operating in China have [strong disincentives from](#) complaining too loudly lest they be targeted for retaliation. The result is that these rules are largely ineffective in disciplining China's practices.

Ambassador Tai, the U.S. Trade Representative, confirmed this sentiment in recent [testimony](#) before the House Ways and Means Committee: "[O]ver time it became clear that the [People's Republic of China (PRC)] would only comply with those trade obligations that fit its own interests. This is a familiar pattern with the PRC – from their actions at the WTO and in various bilateral high-level dialogues. The United States has repeatedly sought and obtained commitments from China, only to find that follow-through or real change remains elusive. While we continue to keep the door open to conversations with China, including on its Phase One commitments, we also need to acknowledge the Agreement's limitations, and turn the page on the old playbook with China, which focused on changing its behavior. Instead, our strategy must expand beyond only pressing China for change and include vigorously defending our values and economic interests from the negative impacts of the PRC's unfair economic policies and practices."

DEFENSIVE MEASURES

In this context of unsuccessful direct engagement with China, the United States will need to rely more heavily on defensive measures to mitigate the harm of China's practices. Defensive tools are attractive, in part, because they do not require the agreement of China or any other country to be implemented and they allow the U.S. government to take direct action to halt – or remedy the damage from – an economic activity that may present concerns. The prior administration intensified the use of existing defensive measures, though this is not exclusively a Trump administration approach. Certain of these tools were becoming more prevalent under the Obama administration and the Biden administration has carried over the use of many of these tools as well. Defensive tools are typically used for two primary purposes: to mitigate specific national security risks associated with a particular economic activity or to remedy economic harm caused by a trading partner's policies or practices.

- **U.S. INVESTMENT SCREENING**

In the United States, export controls and investment screening are the main tools used to mitigate specific national security risks associated with U.S.-China economic activity. The use of [investment screening, as carried out by the Committee on Foreign Investment in the United States \(CFIUS\)](#), to address national security risks associated with Chinese investment in U.S. businesses has grown expansively, both in terms of the [legal framework](#) for reviewing covered transactions and in the [aggressiveness](#) with which [CFIUS implements](#) its authorities. The use of investment screening is a direct response to one of China's nonmarket innovation tactics, the direction of Chinese investment overseas in strategic sectors. CFIUS has largely been effective at [reducing the number of Chinese investments](#) that may present national security risks, in terms of traditional mergers and acquisition activity. [Venture capital flows, however, have not dropped as much as may be desired](#), as data shows that these flows remain roughly at the same level as they were before the 2018 efforts to expand CFIUS jurisdiction to capture these types of investments. This

may be, in part, due to the fact that Chinese venture capital investments tend to be in sectors with lower levels of export controls (*e.g.*, biotechnology) and export controls are used as a gating function for CFIUS jurisdiction over venture capital investments. However, it may equally be due to efforts by investors to structure deals to avoid granting a Chinese investor with rights that would trigger CFIUS jurisdiction (*i.e.*, a Board seat, access to material nonpublic technical information, or involvement in substantive decision-making). This latter explanation is a positive outcome, as it means that start-ups are structuring deals to minimize risks of transferring technology to an outside investor.

- **U.S. EXPORT CONTROLS**

[Export control authorities](#) were also expanded to address concerns related to the transfer of dual-use technology (*i.e.*, technology that has both civil and military applications) to China. The Export Control Reform Act of 2018 ([ECRA](#)), passed in tandem with the investment screening reform in the Foreign Investment Risk Review Modernization Act (FIRRMA), codified U.S. authorities to regulate the export, re-export, and in-country transfer of dual-use items in the furtherance of U.S. national security and foreign policy objectives. A primary objective of U.S. export control authorities is to implement the controls agreed under the multilateral export control regimes and the U.S. system is designed to prioritize multilateral controls, as over the long-term these are [more effective than unilateral controls](#). However, the United States does have authority to implement unilateral controls outside the multilateral process and has used this flexibility more frequently in recent years.

In recognition of the national security risks that may arise in the context of U.S. investments in China, ECRA provided [important new authorities](#) to the Department of Commerce to implement export controls outside of the multilateral regimes. Section 4817 of ECRA on “emerging and foundational technologies” requires the Administration to conduct a “regular, ongoing interagency process to identify emerging and foundational technologies that . . . are essential to the national security of the United States” and not described in any of the existing export control regimes. It is clear from the relevant congressional hearings and the context of the legislation that a primary goal of this provision was to address China-specific issues that are outside the scope of the traditional regime controls.

[Debate](#) continues about whether export controls are being implemented as robustly as they should be. The newly confirmed [Under Secretary of Commerce](#) for Industry and Security should prioritize a top-to-bottom assessment of the emerging and foundational technology authorities and within six months report to Congress on whether:

- Commerce has sufficient resources to implement the emerging and foundational technologies authorities, including both budgetary resources and technical expertise;
- External resources, such as a federally funded research and development center, would provide valuable support in creating the emerging and foundational technologies lists;
- The legal framework for listing emerging and foundational technologies is overly restrictive, taking into consideration the fact that Commerce must consider the foreign availability of an item and that foundational technologies naturally tend to be globally distributed;
- Key allies have existing authorities that may be used more aggressively to join U.S. efforts to list emerging and foundational technologies; and
- A new multilateral export control regime is required to enable stronger multilateral coordination on emerging and foundational technologies.

The emerging and foundational technology authorities could be used to implement controls as part of a broader defensive strategy to respond to China’s nonmarket innovation practices that disadvantage the United States in strategic sectors, but there will be limits to a strategy that leans too heavily on export controls. Export controls are not well suited to address the full range of sectors in which nonmarket innovation practices present concerns, as China uses these practices across its economy including in – but also extending beyond – sectors with strategic importance for the United States. Although the United States has broad authorities, key allies and partners have not yet demonstrated that they have either the legal authority or the political appetite to expand their use of export controls

beyond implementation of the Wassenaar Arrangement to address China-specific concerns. This may limit the effectiveness of any U.S. controls, if such controls are imposed unilaterally outside the regimes.

Finally, using an export control to address forced technology transfer risks confusing a national security concern with a problematic commercial practice. No firm should be transferring controlled technology to China in violation of U.S. export controls, regardless of the pressure placed on them by the Chinese system. That would be illegal and would subject the firm to civil and criminal penalties. In contrast, forced technology transfer involves the transfer of technology that may lawfully be exported. The concern is thus not of the technology transfer itself but in the inability of firms to set commercially based terms for such transfers. A strategy of export controls-led decoupling may be worth considering in a greater number of strategic sectors that present heightened security risks, particularly if the United States can secure support from other major producer nations, but it cannot respond to the entirety of the U.S. concerns with China's state-controlled economic system.

- **NEW TOOLS**

Ambassador Tai has reiterated that new tools will be necessary to protect the domestic U.S. market, though details on the administration's plans remain uncertain. A fresh [Section 301 investigation](#) may be under consideration to focus specifically on China's subsidies practices. Such an effort may be beneficial in building a strong case for engaging with allies and partners on the need to take action against China for its harmful subsidies practices. However, what a remedial action under a new Section 301 investigation would be remains unclear, as there may be little political appetite in either the United States or with our allies for further tariff escalation. One benefit of a new Section 301 investigation may be that it would allow the administration to adjust the tariffs under the existing Section 301 investigation. The U.S. Trade Representative will be forced to issue an opinion this spring on whether or not to [renew](#) the initial tranche of tariffs, which will otherwise automatically expire.

An [affirmative industrial policy](#) is increasingly viewed as a necessary defense against harmful subsidies that the United States does not have another way to neutralize. Most directly, commercial incentives for strategic industries, such as the [CHIPS Act](#), can offset the negative competitive effects of Chinese subsidies that provide an unfair advantage to Chinese firms. Such incentives can also make it more commercially viable for firms to establish or maintain operations in the United States, given the cost differential in operations when compared to other locations. Beyond incentives, a broad range of policies and programs designed to nurture and grow strategic sectors in the United States will also be critical as part of a "[running faster](#)" strategy to competing with China in the innovation and technology spaces.

- **OUTBOUND INVESTMENT CONTROLS**

Both [the Congress](#) and the [Administration](#) have expressed interest in [new authorities](#) to [regulate outbound flows of investment](#) from the United States into China, [renewing](#) and [expanding](#) a debate from the [2018 reforms](#) of the investment screening and export control authorities. A narrowly scoped mechanism that allows the United States to regulate outbound investment flows that make a direct and material contribution to China's growth in strategic sectors should be established. An effective mechanism must be implemented in coordination with allies and partners, as capital can easily move through various jurisdictions to evade a U.S.-only authority. It must also focus on areas of highest risk, which likely means that the capital flow is associated with an additional factor, such as management expertise or intellectual property, beyond what would be available through a passive investment. Finally, an outbound investment mechanism should complement rather than duplicate existing authorities, such as export controls. Even under perfect implementation, export controls would not be well suited to capture the intangible aspects of an investment such as management expertise, that may be critically important to building strategic sector growth and capacity in China. Consideration of an outbound investment mechanism must proceed in tandem with more robust efforts to list emerging and foundational technologies under export controls.

The United States should consider two approaches to using outbound investment regulation to address China's nonmarket innovation practices. The first approach is to use [outbound investment controls](#) to bootstrap export controls and ensure that U.S. capital is not undermining the effectiveness of export controls. An investment control in this context can be considered as adding a fourth prong to the existing three-prong approach to export controls, which includes: 1) [list-based export controls](#), used when the technical specifications of an item have an inherently dual-use application, the item has not yet widely proliferated globally, and imposing a control on the item can effectively impede the transfer of the item to countries of concern; 2) [end-use controls](#), used when the item may not be suitable for a list-based control but a particular application or end use of the item would be contrary to U.S. national security interest (*e.g.*, items destined for end use by the Chinese military); and 3) [end-user controls](#), used when a specific end user is known to be acting against U.S. interests and the United States seeks to prohibit a broad range of controlled or otherwise uncontrolled items from transferring to that end user.

The three-prongs of traditional export controls have been designed to work in tandem, with each being most more or less suited for particular circumstances and allowing for broad coverage when used together. Adding an investment control to this structure can cover important gaps to prevent the *development* of technology that is against U.S. interests but that does not involve *transfer* of a U.S. item and thus cannot be captured under export controls. An investment control could be applied in support of each of the three existing prongs of the export controls system. Specifically, an investment control could prohibit U.S. financial support to: foreign entities developing, producing, or using technology that would be controlled if it were U.S. origin (list-based controls); foreign entities that are likely to use the technology for a prohibited end use (end use controls); or foreign entities that are listed on the Entity List (end user controls). This ability to restrict financing, including to entities listed on the Entity List, does not currently exist outside of U.S. sanction authorities. Additionally, there will be some instances in which an end product does not need to be controlled to China, but the government still has an interest in prohibiting investments into the underlying development of comparable technology in China, so the outbound investment controls must be flexible enough to capture these scenarios as well.

This type of outbound investment controls approach would not necessitate a screening or generally applicable review process, though there may be an argument to create licensing flexibility, if needed. Establishing an outbound investment control provides further teeth to the export control system and leverages the existing institutional processes for identifying technologies that are critical to U.S. national security and foreign policy. Under this approach, the outbound investment controls would largely be limited to sectors involving dual-technology, though policymakers could leverage the existing flexibility of the export control system to implement export controls – and in the future, complementary investment controls – to address a broader range of strategic sectors that are important for U.S. national security and foreign policy objectives.

A second approach could involve a [stand-alone outbound investment screening process](#) (*i.e.*, a “reverse CFIUS”) designed to address broader concerns about U.S. investments that support China's growth in strategically important industries. China's market remains [immensely attractive](#) and individual firm decisions to invest in China, which may be completely rational on an individual basis, may undermine U.S. strategic advantage in the aggregate. An outbound investment screening process may be worth considering in this context, recognizing the immense difficulty in establishing a mechanism that efficiently and proportionately addresses these concerns while still allowing for investment flows that are beneficial to U.S. interests. This type of broader screening mechanism would not necessarily be tethered to those technologies that are or will be controlled under export controls and could be used to address concerns in sectors with purely commercial technologies that are nonetheless important for U.S. strategic interests. A broader screening mechanism could be pursued in tandem with the more targeted approach linked to export controls as described above. It may also be desirable to initially limit a broader screening mechanism to a discrete set of sectors of highest concern, to allow the government sufficient time to build capacity to implement the new authorities effectively. The current [U.S. approach](#) to screening technology imports under the [Executive Order on Securing the Information and Communication Technology and Services Supply Chain](#) should serve as a warning against establishing broad, ill-defined authorities without sufficient attention paid to adequate resourcing.

- **DEFENSIVE ECONOMIC TOOLS**

In addition to the national security-related defensive tools, the United States has also deployed defensive economic tools to remedy the economic harms caused by Chinese policies and practices. This includes [anti-dumping and countervailing duties](#), which will be discussed in detail in another portion of the Commission's hearing. Under the Trump administration, a variety of tariff authorities were used, including [Section 232](#) of the Trade Expansion Act of 1964 related to national security effects of certain imports and [Section 301](#) of the Trade Act of 1974 related to unfair acts, policies, and practices of U.S. trading partners. Of particular relevance to the main topic of this testimony, Section 301 was used to investigate China's forced technology transfer practices, an investigation that was the basis for the "trade war" [tariffs](#) imposed on China during the Trump administration. A full assessment of the efficacy of these particular tools is beyond the scope of this testimony.

SHAPING THE ECONOMIC DOMAIN

Shaping the economic domain to the advantage of the United States and its allies and partners is a necessary third component of an overall strategy to addressing China's nonmarket innovation practices. Global economic integration through the negotiation of binding trade and investment rules has been challenged by China's presence as a major state-controlled economy, primarily because China does not agree to be bound by the rules or the broader ideal of free and open markets. However, the United States should not let the pendulum swing too far in the opposite direction towards autarky. Closer economic integration with likeminded countries who share U.S. values is more important than ever. Indeed, if deriving benefit from the world's second largest economy seems more contested, it is that much more important to [accelerate efforts to integrate](#) with markets of allies and partners. This is important in its own right to bind the economies of likeminded countries more closely together, as well as to ensure that third party markets are developing rules and standards that allows for and accords preference to integration with the United States rather than China. The following section discusses the key efforts that the United States is undertaking to shape the economic domain, along with the views on China of major U.S. partners and allies.

Regional perspectives on economic integration with the United States and China

INDOPACIFIC

Perceptions of China among the IndoPacific countries vary, ranging from close collaboration and alignment with U.S. views from countries like Australia, New Zealand, and Japan to more cautious engagement from countries like South Korea and more difficult prospects with countries like India. An overwhelming theme is that, while IndoPacific countries recognize the challenges that Chinese economic practices present to stability of the global economic order, they equally view it as problematic to be forced to choose between the United States and China as economic partners. This posture is the rational result of their geography, deep economic ties with China, and China's powerful presence in the region. China is the largest trading partner for most IndoPacific countries, complicating efforts of these countries to forcefully denounce China's trade practices. U.S. efforts to collaborate with IndoPacific partners on export controls and investment screening is not nearly as advanced as it is with the EU, outside of the close collaboration that the United States enjoys with Australia and New Zealand. Key partners that they United States will want to engage more closely are all either in the Comprehensive and Progressive Agreement for a TransPacific Partnership (CPTPP) or [seeking to join](#), reflecting the preference from these partners to leverage the CPTPP as the high-standard trade architecture for the region.

In this critical region, China is outpacing the United States. China achieved a significant geopolitical victory with the conclusion of the 15-member Regional Comprehensive Economic Partnership ([RCEP](#)). It also filed formal papers to accede to the CPTPP, in a terribly ironic move to join the pact that was originally envisioned by the United States as a way to counter China's growing economic influence. Rather than reconsider its decision to remain outside of the CPTPP, the United States has begun initial discussions for an IndoPacific Economic Framework ([IPEEF](#)), which is

intended to be a forum to seek closer cooperation with regional partners. The IPEF is not a traditional trade agreement and will instead focus on “[new approaches](#)” for priority trade issues, including labor, environment and climate, digital economy, agriculture, transparency and good regulatory practices, competition policy, and trade facilitation. The IPEF does not appear to have a clear mandate to negotiate on the types of issues most directly implicated by China’s nonmarket innovation practices, including subsidies and forced technology transfer, nor the types of defensive tools that are included in the U.S.-EU Trade and Technology Council, such as export controls and investment screening. Its benefits may thus be limited to closer cooperation with this critical region, rather than an effort to create a new legal architecture in the region that would put pressure on China to reform its own nonmarket practices.

EUROPE

Europe has made substantial changes in its posture towards China, though substantial variation remains at the individual member state level. An important milestone in the evolution of Europe’s position towards China was the publication of the EU [2019 Strategic Outlook](#), which noted that China, in different contexts, is a cooperation partner, a negotiation partner, an economic competitor, and a “systemic rival promoting alternative models of governance.” Under this multifaceted perspective, the EU sought continued engagement with China to address global challenges, not unlike U.S. attempts to carve out climate change as an area of cooperation. It sought direct engagement with China to achieve more balanced and reciprocal conditions in the economic relationship, but also struck a more pessimistic tone by noting the need to “adapt to realities” and strengthen its own domestic policies and industrial base. In the most pointed shift, the reference to contexts in which China may be a systemic rival was an important recognition that China’s state-led, authoritarian political system is inherently at odds with European democratic values.

Europe’s desire to maintain collaboration with China in the economic sphere is driven by the size of the bilateral economic relationship and a (now contested) belief in promoting stability through economic integration. China is the European economy’s [largest trading partner](#), surpassing the United States. EU policy has retained a focus on working directly with China, including in the WTO and bilaterally. EU concluded political negotiations on a [Comprehensive Agreement on Investment \(CAI\)](#) with China in late 2020, handing China a [substantial geopolitical victory](#) for marginal economic gain. The EU justified the CAI, in part, by arguing that they needed to approach coordination with the United States from an equal footing, after the United States concluded its own Phase One Agreement with China. The CAI is now, for all practical purposes, [dead](#) after China imposed disproportionate sanctions on members of the European Parliament as retaliation for European sanctions on Chinese officials connected to human rights abuses of the Uyghur population.

Reflecting Europe’s growing concerns related to China, the EU and member states have proposed or established new mechanisms to deal with discrete problems in the economic relationship. In 2019, the EU enacted regulations on [investment screening](#) that authorize – but do not require – member states to enact national-level mechanisms to review investments for national security and public order purposes. Most member states have [established investment screening mechanisms](#) with varying degrees of coverage and ambition and initial indications are that the levels of Chinese investment into the EU market are [declining](#). The EU has also introduced instruments to deal with China-related challenges that do not yet have a parallel authority in the United States, including its [anti-coercion instrument](#) and an instrument to address [distortions from foreign subsidies](#). The EU has not yet taken strong steps to utilize their [export control](#) system to address China-specific challenges, as their authorities are largely constrained to the implementation of traditional, country-agnostic dual-use controls as determined by the multilateral regimes. There are promising indications in the U.S.-EU Trade and Technology Council that this policy may be evolving, as noted later in this testimony.

Europe views its relationship with China, in part, through the lens of its relationship with the United States. Europeans were shaken by certain decisions of the Trump administration to [downgrade](#) the importance of key transatlantic alliances. Certain European initiatives, such as the drive towards [tech sovereignty](#), are motivated by a

desire for Europe to be less reliant on the transatlantic alliance for its future security and prosperity. Similarly, policies such as the anti-coercion instrument are quite helpful in addressing challenges presented by China but may equally be used to push back against U.S. efforts to assert its policies extraterritorially in Europe, as evidenced by the frequent criticism of [U.S. actions](#) in the public comment process for the anti-coercion instrument. Thus, an increasingly skeptical European view towards China does not inherently guarantee automatic alignment with U.S. policy preferences. The United States must engage proactively with Europe to maintain confidence in the transatlantic alliance, based on both U.S. and European interests.

China's actions to support Russia in the coming days and weeks will be a clarifying moment for Europe, just as the Russian invasion clarified European views on Putin as an irredeemable aggressor. Europe had also believed it could use trade and economic integration as a means to manage the geopolitical relationship with Russia. That strategy has catastrophically failed. European leaders are increasingly concerned that [China will provide material support to Russia](#) as it continues to wage a horrific war in Ukraine and to assist Russia in mitigating the economic damage caused by the allied sanctions. At the April 1, 2022 [EU-China Summit](#), Europeans drew a line in the sand, making clear that China has a responsibility to actively work for peace and that economic consequences would follow if China undermines the allied sanctions. European attitudes have been hardened by the war on their doorstep. Efforts by China to portray the conflict as a U.S.-inflicted crisis will be a grave [miscalculation](#). China's professed neutrality is seen by Europe for the sham that it is. This posture by China is increasingly likely to lead to a more severe rupture in the relationship.

FIVE EYES

Though not a regional grouping that is engaged in trade discussions akin to the IPEF or the U.S.-EU Trade and Technology Council, the "Five Eyes" partners of Australia, Canada, New Zealand, and the United Kingdom will be essential partners in strengthening export control and investment screening cooperation. Indeed, they already are. The United States has assessed that each of these countries has and is effectively utilizing an [investment screening regime](#). Accordingly, CFIUS has granted a waiver to exempt qualified investors from these countries from certain requirements of the CFIUS review process, indicating a high level of [trust and alignment](#) with these partners. These partners have also all joined the United States in imposing [severe export control restrictions](#) on Russia as part of the broader allied response to Russia's invasion of Ukraine. The United States should continue efforts to share information and best practices on both investment screening and export controls with these essential partners. These countries should also be among the first that the United States engages on developing a new multilateral investment and export controls regime, as discussed later in this testimony.

The promise of the U.S.-EU Trade and Technology Council (TTC) in enhancing coordination on export controls and investment screening

The TTC has great promise in developing shared approaches to the use of defensive tools and promoting stronger integration between the U.S. and European economies. Like the IPEF, the TTC is not a comprehensive trade agreement and is instead structured as a series of working groups focused on discrete trade issues of importance to the transatlantic relationship. The United States and the EU have expressed different motivations for engaging in the TTC work, with both sides seeking to repair the transatlantic relationship and the United States placing a heavier emphasis on using the TTC to develop shared approaches to China. Preferred messaging notwithstanding, there is a strong move in the TTC towards greater coordination on key defensive mechanisms, mainly on export controls and to a lesser extent on investment screening, that are central to efforts to deal with China.

TTC EMPHASIS ON NON-TRADITIONAL USES OF EXPORT CONTROLS

The "[U.S.-EU Trade and Technology Council Inaugural Joint Statement](#)" includes a "Statement on Export Control Cooperation." It states that dual-use export controls should be used to address certain policy issues that go beyond the [traditional objectives](#) of the multilateral regime-based dual-use control system, including to:

- respond to human rights abuses;
- support a “global level playing field” and promote a “multilateral rules-based trade and security system founded on transparency, reciprocity, and fairness;”
- address “legal, ethical, and political concerns” about [emerging technologies](#);
- respond to civil-military fusion policies “of certain actors;”
- avoid disruptions to strategic supply chains; and
- respond to “technology acquisition strategies, including economic coercive measures.”

These non-traditional objectives are directly responsive to shared concerns between the United States and Europe about China, though the statement does not single China out by name. The statement is a significant milestone for the two economies in publicly recognizing the need to apply export controls as a tool to manage the strategic relationship with China, as opposed to their traditional use as an arms controls mechanism to prevent the proliferation or destabilizing accumulation of conventional weapons.

At the time of the last TTC Ministerial, the ambitious objectives of the export controls statement were not yet matched by clear legal authorities and political direction to implement more far-reaching controls. While the United States already has broad authority to implement controls to meet these objectives, with limited exceptions there are not established traditions, political cultures, or legal authorities within the EU or EU member states to impose controls for reasons outside of the multinational regimes. Under the EU dual-export control authorities ([EU Regulation 2021/821](#)), individual member states have the ability to impose unilateral list-based controls under certain circumstances, primarily for public security or human rights reasons under Article 9 of EU Regulation 2021/821. Member states may also impose end-use controls under “catch-all” authorities pertaining to arms embargoed destinations. These authorities have only been used in a [small handful of cases](#). Outside the context of EU sanctions authorities, the EU and EU member states do not have authorities to impose end user controls comparable to the U.S. Entity List designations. The existing member state authorities may be used more ambitiously to address the non-traditional objectives of export controls as outlined in the TTC statement but doing so would require a significant shift in existing practice.

In the Russia context, the EU imposed [sweeping export controls](#) that were substantially similar to the [export controls imposed](#) by the United States. These measures largely prohibited the export to Russia of all dual-use items listed under EU export control authorities, along with purely commercial items such as oil refining equipment. The EU implemented these measures pursuant to their sanctions authorities, whereas the United States did so under their export control authorities. The use of such broad export controls as a sanctions tool by both the United States and EU is unprecedented, and agreement to do so was driven by the clarity of purpose provided by the crisis in Ukraine and the existential threat that Europe feels as a result of Russia’s aggression. In addition to the broad scope of the export controls, the level of coordination between the United States, Europe, and other participating economies was also unprecedented. In its export controls, the United States applied its novel foreign direct product rule, which extends the application of its controls extraterritorially if a foreign product is made using U.S. software, tools, or equipment. The United States excluded from the scope of the foreign direct product rule those countries that had implemented substantially similar controls, including the EU member states. This coordination presents a unified front and also ensures that the United States, EU, and other participating economies will be working together on enforcement, rather than the United States seeking to enforce unilateral rules in the jurisdiction of its allies.

The TTC working group was instrumental in building the [relationships](#) and communication channels that enabled swift imposition of these export controls immediately after Russia’s invasion of Ukraine. Despite the tragic circumstances, these are positive signs about the ability of the United States and the EU to work together to use export controls in new ways. Directly transferring the approach on Russia to the China context will present challenges, given the vastly more integrated nature of China with the U.S. and European economies. Imposition of such broad controls, particularly when the controls are based on sanctions rather than export control authorities, may

not be politically acceptable outside of the context of an active war. However, as Europe becomes increasingly alarmed by China's sympathy with Russia, it becomes more likely that they will seek to work with the United States to craft a robust response to China in the export controls space.

TTC WORK ON INVESTMENT SCREENING

The TTC also includes a workstream on investment screening, which to date appears less ambitious than the work on export controls. Investment screening efforts in the TTC focus on information sharing and exchanges of best practices. This builds on existing work ongoing between the United States, the EU, and EU member states to establish and utilize new investment screening regimes. This work is critically important to ensure that the regimes are aligned to the greatest extent possible, in terms of the legal framework and types of transactions covered. However, the collaboration needs to deepen substantially to be truly effective.

The investment screening statement from the first TTC ministerial meeting included a reference to joint identification of critical technologies. Developing a shared understanding of risks associated with particular technologies is necessary to mature the U.S.-EU cooperation. For example, the United States and the EU generally agree that artificial intelligence (AI) is important but do not yet have a clearly articulated and shared understanding of which parts of the AI ecosystem are most sensitive and subject to Chinese exploitation. The TTC work should be used to identify those technologies that: reside predominantly in the United States, Europe, and allies; are fundamental to future technology and innovation leadership of the United States, Europe, and allies; and have relevance to a broadly defined concept of national security, encompassing not just the defense industrial base but also critical physical and digital infrastructure and emerging technologies and applications. The United States, the EU, and the EU member states should agree on general parameters in which transactions involving similar threat actors and similar technologies result in similar outcomes under their respective regimes. This does not mean that the respective review process would have predetermined outcomes, as each transaction would still need to be considered based on the particular facts and circumstances. It would, however, provide more rigor and consistency to an otherwise ad hoc process and allow for more well-informed decisions under each national-level investment screening process.

The TTC should also include work on developing shared approaches to address China's practice of abusing its regulatory authorities to extract concessions from firms executing international deals. Investment transactions are often reviewed by regulatory authorities in multiple jurisdictions, so that CFIUS or an EU investment screening regulator may be reviewing a global merger or acquisition at the same time that the Chinese authorities are reviewing the same transaction. The investment screening authorities must assess how the Chinese authorities may seek to extract concessions as a condition for approval of the deal and assess whether such concessions present national security risks. Conducting this assessment is difficult, as there is not full transparency into the Chinese regulator's actions and the timelines of the various review processes are usually not aligned. CFIUS and the EU investment screening regulators may wish to consider crafting mitigation terms to attach to their own approvals of transactions that allow them the legal ability to require amendments to the deal should Chinese regulators seek concessions that raise national security concerns. This will not be an easy solution, as it will almost certainly result in the United States and the EU member states imposing requirements that contradict those of the Chinese regulator in certain cases, and thus deserves careful consideration by the United States and the EU member states to calibrate an effective strategy.

INTEGRATING EXPORT CONTROLS AND INVESTMENT SCREENING

In addition to the collaboration within the distinct export controls and investment screening categories, the TTC can and should be used as a forum to encourage integration between these mechanisms in both the United States and Europe. Both export controls and investment screening seek to prevent the unfair exploitation of the U.S. and European open innovation ecosystems and transfer of technology that is contrary to U.S. and EU security interests. Just as in the United States there is a need for these tools to work in tandem, the coordination with allies must also ensure that the two types of authorities are reinforcing of each other. There is no indication yet that this sort of cross-pollination between the two workstreams is occurring in the TTC. Identification of shared U.S. and EU technology

advantages would be relevant to both sets of authorities and could be the basis of further work to ensure tight alignment between the export control and investment screening processes.

USING TTC TO EXPLORE EU VIEWS ON OUTBOUND INVESTMENT CONTROLS

The TTC must also become a forum to explore EU appetite for outbound investment screening. A well targeted outbound investment control is a necessary complement to existing authorities, but one that will almost certainly fail if it is done on a unilateral basis. Export controls work best on a multilateral basis, so that all sources of a technology impose the same controls and U.S. exporters are not put at a competitive disadvantage. This dynamic is even more pronounced with capital flows, given the greater ease with which money may be transferred across borders and through complex structures. The United States is significantly further along in its consideration of an outbound investment mechanism than is the EU and the EU is unlikely to agree to a broad-based mechanism intended to pursue a broad decoupling from China. However, with an intense technical and diplomatic effort, the United States may be able to secure support for a targeted mechanism that envisions an outbound investment control as a necessary complement to export controls. Importantly, if the United States and the EU are also agreeing to expand the use of export controls to include non-traditional, China-specific objectives as envisioned by the TTC export controls statement, then the scope of both the export controls and the complementary outbound investment controls will inherently cover a broader range of sectors and economic activity than currently captured under an approach that is based on a traditional, dual-use technology export controls.

The right next step: a new multilateral regime on investment and export controls

The work in the TTC offers a strong foundation for enhancing collaboration on export controls, outbound investment controls, and inbound investment screening. The United States must build upon and expand this work to effectively meet the challenges presented by China. This includes working with the EU but also a broader range of likeminded partners, including at least the Five Eyes partners and Japan. Existing multilateral organizations are ill suited to meet the challenges of the moment. The very concept of multilateralism among a broad group of democratic and nondemocratic stakeholder has been fundamentally shaken by Russia's invasion of Ukraine and China's complicity. Allies have taken important steps to remove Russia from receiving the economic benefits of the international rules-based order, an order which it flagrantly violated with its unprovoked invasion of a sovereign state, including at the [WTO, the World Bank, and the International Monetary Fund](#). Political pressure is rising to expel Russia from key institutions of the [United Nations](#). The right next step is to address Russia's role in the export control multilateral regimes and leverage the intense allied coordination on Russia export controls to launch a new export control regime that reflects the reality of the crisis with Russia and rises to the systemic challenge presented by China.

The structure of the [Wassenaar Arrangement](#), as the primary venue for setting dual-use technology controls, is no longer fully sufficient to meet the needs of the United States and its partners and allies for several reasons. Wassenaar is intentionally a country-agnostic mechanism and its legal framework notes that the regime "will not be directed against any state or group of states and will not impede bona fide civil transactions." This constraint poses obvious difficulties in seeking to impose controls to deal with the unique challenges presented by China. Wassenaar controls only those technologies that have technical attributes that make them suitable for dual-use, *i.e.* for both civil and military purposes. This makes it difficult to list technologies that do not have such attributes but that are nonetheless important for national security or foreign policy objectives, such as emerging technologies the full applications of which are not yet known. The consensus-based process of Wassenaar is not in and of itself problematic, as it is the membership of Wassenaar – which includes Russia although not China – that presents difficulties rather than the decision process. While it may not be possible to expel Russia from Wassenaar, the United States and its partners and allies should strive to establish a new regime that both operates alongside Wassenaar and makes that process ultimately less relevant to the export control strategy of the United States and its partners and allies.

A new regime must provide the United States and its partners and allies with the forum to coordinate export controls for a broader range of strategic objectives, including those that are specific to China, Russia, or other countries of concern as may be identified. The objectives of the new regime should include:

- **PROMOTING INTERNATIONAL SECURITY AND COMMON SECURITY OF THE MEMBER NATIONS.**
 - This would allow the members broad flexibility in setting controls to pursue joint security objectives, including the use of export controls as a sanctioning instrument. Common security of the member nations would be a core focus, but the regime should also facilitate the use of export controls to support non-members if doing so is in the broader interest of international security (*i.e.*, similar to the support that NATO is providing to Ukraine as a non-NATO member).
 - To the extent that members wish to diversify key supply chains away from China or to promote decoupling in strategically sensitive technologies, this objective would permit them to use export controls to do so.
- **PREVENTING THE DESTABILIZING ACCUMULATIONS OF CONVENTIONAL OR EMERGING WEAPONS GLOBALLY AND PREVENTING THE TRANSFER OF DUAL-USE TECHNOLOGIES IMPORTANT FOR SUCH WEAPONS TO COUNTRIES OF CONCERN.**
 - This objective allows for the allies to adopt more expansive dual-use export controls outside of the Wassenaar process, if the Wassenaar process retains some role for export control policy in the future.
 - In a distinct shift from Wassenaar, it also allows for the members to set controls based on an objective of limiting transfers of a technology to a specified destination, in addition to the technical attributes of an item. To achieve this, the new regime would need to establish common licensing or “no undercut” policies.
- **PROMOTING TECHNOLOGICAL LEADERSHIP IN SCIENCE, TECHNOLOGY, ENGINEERING, AND MANUFACTURING SECTORS, INCLUDING IN FOUNDATIONAL AND EMERGING TECHNOLOGY AREAS, THAT ARE MATERIAL TO THE NATIONAL SECURITY AND FOREIGN POLICY OF THE MEMBER STATES.**
 - This objective is explicitly designed to face the strategic challenge presented by China and its range of nonmarket practices that may have negative impacts for U.S. technological leadership in areas important for national security and foreign policy.
 - This also directly addresses one of the stumbling blocks in the U.S. process for establishing more robust emerging and foundational controls, as the United States has been reluctant to impose such controls if partners do not have similar authorities to do so.
- **SUPPORTING THE PROTECTION OF HUMAN RIGHTS AND DEMOCRATIC INSTITUTIONS.**
 - This objective provides the ability to use the new regime to address China’s systemic abuse of human rights, which is enabled by technology.

The members of the new regime should also include outbound investment controls as part of a new regime structure, along with a mechanism for coordination on inbound investment screening. All likely members will have established investment screening mechanisms for inbound investment in their jurisdictions. Inbound investment screening is conducted on a transaction-by-transaction basis, which would make full regime coordination on particular transaction reviews impractical. However, the regime could add value to the national-level investment screening processes by identifying technologies that are of strategic importance to the members as a whole and serving as a basis for shared

analysis of investment-related trends. Creating institutional linkages between the new regime and the national-level investment screening mechanisms also underscores the need to ensure that strategic technologies are protected regardless of the form of commercial transaction that may lead to their transfer, whether it is an export or an investment transaction.

Including outbound investment controls as part of a regime would be novel, particularly since most countries other than [Taiwan and South Korea](#) do not have established outbound investment screening mechanisms, including the United States. Similar to the recommendation for exploring the EU appetite for outbound investment controls under the TTC, including a limited outbound investment control mechanism to a new multilateral regime would add an important complement to the regime's use of export controls for a broader range of strategic objectives. Members could view an investment control as an add-on to any export controls established under the new regime, so that the members could jointly decide on a technology-by-technology basis whether to additionally restrict capital flows that would support the indigenous development of a particular technology in countries of concern. A broad-based, stand-alone outbound investment screening mechanism is likely a bridge too far for most countries and like coordination on inbound investment screening would be impractical to coordinate in the regime context given the transaction-by-transaction nature of that sort of process. However, persuading the members to include a targeted outbound investment control as a complement to export controls would be hugely impactful on its own if implemented across the major producer democracies.

- **BUILDING ANALYTIC CAPACITY**

The objectives of the new regime are ambitious, impacting a broader range of commercial activity than current export controls and investment screening do. Governments must have the ability to analyze the impact of the new controls and model how future controls may effect bilateral, regional, and global trade and investment flows. Today, there is no existing database that allows for government officials or researchers to analyze data that integrates trade and investment flows with export control classifications comprehensively and across various jurisdictions. While it is possible to use proxy indicators, such as broad product categories, this is a poor substitute for disaggregated data that allows for the dynamic tracking of controlled goods at a detailed level.

In the United States, [exporters](#) are required to [report exports](#) of certain items based on their export control classification number or other factors, and this includes a requirement for the export of all items listed on the Commerce Control List to either China or Russia. The United States should assess whether the collected data is comprehensive enough to allow for effective analysis on the expanding use of export controls and whether it can be regularly published, consistent with the need to maintain confidentiality for specific export transactions. Publication of export control data would allow independent researchers a valuable tool in assessing the effectiveness of a new export control regime, including how actors may seek to evade export controls. It would also enhance collaboration with other members of a potential new regime, by establishing a solid analytic foundation to support the establishment of new controls. The United States should also encourage other members of a new regime to collect, share, and publish comparable data.

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