

Tariffs and Trade: Tensions with China and the Run-Up to the 2024 US Presidential Election

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Under Trump and Biden, the US trade policy has veered away from its traditional approach, developed since World War II, from multilateralism to focusing primarily on national and unilateral concerns. At the center of this approach have been tensions with China. This includes a renewal of industrial policies, protectionism and, most importantly, reliance on national security, manifested by newer and unexpected geopolitical developments. The discussion of trade policy today has become very toxic, especially during this presidential campaign season, with its renewed focus on tariffs. The trade debate in the US is now entering a new stage with the nomination of Kamala Harris and J.D. Vance. I believe the US drift away from the postwar policies of promoting global trade and investment will continue. Nationalist and protectionist policies will continue as part of a new economic and industrial policy, fused with national security concerns and rhetoric, no matter who wins.

Keywords

Trump's Tariffs, Biden's Tariffs, Harris's Tariffs, Trump–Harris Presidential Election, National Security and Trade, Nippon Steel–US Steel Merger, TikTok and US Ban, De Minimis Imports, Semiconductor Chips and Export Controls

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1. Introduction

Under Trump and Biden, US trade policy has veered away from its traditional approach, developed since World War II, from multilateralism to focusing primarily on national and unilateral concerns. At the center of this approach have been tensions with China. This includes a renewal of industrial policies, protectionism, and most importantly, reliance on national security, manifested by newer and unexpected geopolitical developments. The discussion of trade policy today has become very toxic, especially during this presidential campaign season, with its renewed focus on tariffs.

Illustrating the growing importance of trade issues in US domestic politics today are the following issues, raised most recently, as the country enters the run-up to the presidential election in November: the proposed Nippon Steel-US Steel merger, the proposed forced sale of TikTok, the proposed revocation of the *de minimis* rule concerning tariffs, proposed restrictions on the export of semiconductor chips, new restrictions on the purchase of farmland and real estate by foreign entities and, of course, new tariffs and tariff increases. Other issues of concern include expanding US sanctions, extending export controls and regulating foreign investment into and out of the US.

These issues collectively demonstrate the rise of national security as a critical factor in trade policy formulation generally as well as a focus on reindustrialization and interventionist economic policy. This is all in the context of historical changes in geopolitics, with a focus on trade relations with China.

I then discuss President Trump's time in office and his current trade and tariff positions as well as Vice President Harris's tariff and trade positions to the extent they are known. Most importantly, I conclude that these issues will probably be dealt with, to varying degrees, in the same manner by either a newly elected Trump or President Harris.

2. Proposed Nippon Steel-US Steel Merger

The Biden administration recently granted Nippon Steel additional time to resubmit its filing with the Committee on Foreign Investment in the United States (CFIUS) for approval to purchase US Steel. This will give CFIUS time to review this proposed

merger's national security implications. Needless to say, this proposed merger has taken on great political significance in this election year's swing state politics.

CFIUS will use the additional time to review the deal so that it can better understand the full national security impact of the transaction and how it would impact critical supply chains. The transaction has also become tangled with swing state politics, as US Steel is based in Pennsylvania, which could help determine the outcome of the November presidential election.¹

3. Proposed Forced Sale of TikTok

TikTok has pushed back against a law that would force the video app to sell to a non-Chinese owner. It has brought a legal action opposing a potential ban. Lawmakers and intelligence officials argue that TikTok is a national security threat. However, only a small percentage of US citizens supports a ban.

The proposed forced sale of TikTok is shaping up to be a landmark case. A panel of federal judges made pointed remarks that called TikTok's legal arguments into question. This case could determine whether the Chinese-owned app survives in the country. US lawmakers and intelligence officials have argued that TikTok is a national security threat under ByteDance. The concerns among lawmakers and intelligence officials are at odds with how the US public views TikTok. Only 32% of US citizens support a ban of TikTok.²

4. De Minimis Imports

Recent US trade decisions continue to reflect domestic politics during this election season rather than basic economics. This is evidenced by the proposal to do away with (or extremely limit) the de minimis exception for tariffs on imports from China (primarily impacting low-cost fashions from Temu and Shein). This proposed rule

¹ A. Rappeport, *Biden Administration Extends Review Period for Nippon Takeover of US Steel*, N. Y. TIMES (Sept. 17, 2024), <https://www.nytimes.com/2024/09/17/us/politics/us-steel-nippon-steel-deal.html#:~:text=By%20Alan%20Rappeport.%20Sept.%2017,%202024,%203:53%20p.m.%20ET.%20The>.

² S. Maheshwari & D. McCabe, *Judges Show Some Skepticism of TikTok's Fight Against Potential US Ban*, N. Y. TIMES (Sept. 16, 2024), <https://www.nytimes.com/2024/09/16/technology/tiktok-us-ban-case.html>.

would impact US consumers, particularly younger and less affluent ones. This proposed legislation, if enacted, would provide less competition for high-priced US products. The de minimis exception to tariffs (no tariffs on imports of less than USD 800) was enacted in 1930, during the Great Depression. The newer China model (factory-direct to consumer), unlike the traditional US business model (factory to importer's warehouse to retailer), has taken off since the Trump administration imposed tariffs on Chinese products.³

The White House proposed new rules that would exclude a wide array of goods from being able to claim the exemptions, which extends to shipments of less than USD 800 in value. The proposed regulations will also make claiming duty free status more complex. The US said the number of shipments entering the country via the de minimis rule jumped from about 140mn a year a decade ago to more than 1bn a year today. The Biden administration's proposed rules, which will go through a public comment period before being finalized, will threaten the business model that the Chinese groups have used to undercut and gain market share from the online retailer Amazon. Amazon sellers typically ship their goods in bulk to its warehouses, so they have to pay import taxes, which became more expensive during the Trump administration when a large swath of Chinese imports were hit with higher tariffs. The new US rules are intended to ensure products that ship direct-to-consumer cannot avoid the higher duties.⁴

5. More Export Controls on Semiconductor Chips and Technology

In general, export and re-export controls have been broadly used and are extremely complex. Under the Export Administration Act of 1979 such controls are often applied extraterritorially and to non-US companies for either foreign policy or national security purposes. In particular, pressure has been building recently for even greater control of exports and transshipments of semiconductors and other technologies to China. Now, the US is attempting to negotiate with other countries to collectively impose such restrictions. This would include measures forcing non-US companies to

³ A. Swanson & J. Holman, *New Tariff Rules Could Reverse a 'Paradigm Shift' in Retail*, N. Y. TIMES (Sept. 14, 2024), <https://www.nytimes.com/2024/09/14/business/economy/tariffs-amazon-walmart-china-shein.html>.

⁴ R. McMorrow, *US Targets Trade Loopholes used by Ecommerce Groups Temu and Shein*, FIN. TIMES (Sept. 13, 2024), <https://www.ft.com/content/2f07510b-d2c6-4bae-bae3-aa5dfa8bd796>.

get licenses to sell products to these countries.⁵

The administration has drafted new rules that would limit shipments to China of the machinery and software used to make chips from a number of countries if they are made with US parts or technology. A glaring example of this is the recent sale of chips manufactured by Taiwan's TSMC, incorporating US technology, to China's Huawei. A spokeswoman for the Commerce Department said that it was continually updating export controls to protect US national security. The revised policy would make it harder for US companies to sidestep restrictions by shipping to China from subsidiaries in countries including Israel, Malaysia and Singapore.⁶

6. Restricting Foreign Ownership of Farmland and US Real Estate

Acquiring land is an investment strategy favored by many wealthy US and foreign investors. In general, there is no federal legislation regulating foreign ownership of real estate. However, under CFIUS the U.S. Department of the Treasury has jurisdiction to review foreign purchases of land near military bases. The US Treasury Department's Financial Crimes Enforcement Network (FCEN) now collects information on certain real estate transactions and requires disclosure of beneficial owners of such transactions. This is intended to help restrict money laundering by foreign firms.

In general, regulation of foreign ownership has been historically left to the individual states. A number of states have recently enacted legislation restricting foreign ownership of farmland and real estate, often on the grounds of national security, even though the rate of foreign ownership is very low. This new state legislation is primarily intended to restrict Chinese ownership. This regulation has often been a conservative Republican objective. There is significant bipartisan pressure now for the federal government to comprehensively regulate foreign ownership of US farmland and to restrict Chinese ownership. There is also pressure for new federal regulation and legislation to require LLCs to disclose beneficial owners, in order to accurately identify foreign owners.

⁵ "China's chip industry has attracted US attention as a national security issue. In 2019 the Trump administration persuaded the Netherlands to block a sale by the Dutch firm ASML to SMIC of the most advanced chip-making machine over concerns that it would aid China military." See A. Swanson, J. Liu & P. Mozur, *The Chinese Chipmaker at the Heart of the US-China Tech War*, N. Y. TIMES (Sept. 20, 2024), <https://www.nytimes.com/2024/09/16/technology/smic-china-us-trade-war.html>.

⁶ A. Swanson, *US Vies with Allies and Industry to Tighten China Tech Controls*, N. Y. TIMES (Aug. 9, 2024), <https://www.nytimes.com/2024/08/09/business/economy/china-us-chip-semiconductors.html>.

The U.S. Department of Agriculture (USDA) tracks Chinese and foreign ownership of US farmland and maintains a database of such ownership. Some commentators and members of the 118th Congress have called for increased federal scrutiny of foreign ownership of US land due to concerns over issues including national security, economic competitiveness and the absence of US citizens' reciprocal right to purchase land in some foreign countries. While no federal law comprehensively regulates all foreign purchases of US property there is increasing political pressure to do so.⁷

7. Increasing Import Tariffs

The first question of the televised presidential debate in September concerned tariffs. No surprise there. Harris declared that Trump's excessive tariff proposals would result in a new sales tax, harming US consumers. Tariffs, once an obscure topic even in international-trade classes, are a leading political issue in this campaign season, greatly fostered by Trump. His current proposals include significantly increasing tariffs on allies including the EU and even more so on China, which he accuses of stealing US jobs and technology. Trump declared he would renegotiate the trade and agricultural trade agreement that he concluded with China in 2019. Trump warned he would renegotiate the US-Mexico-Canada trade deal (USMCA) in order to put limits on products made in Mexico by Chinese companies or their foreign subsidiaries and then shipped into the US. He declared he would impose tariffs on Mexico in retaliation for not controlling border crossings. He also declared that tariffs might even replace the federal income tax. It has been more than five years since Trump called himself a "tariff man," but since then, the breadth of his proposals has grown exponentially.⁸

Over the past decade, there has been a much greater willingness to use tariffs as part of industrial and trade policy. There has also been a parallel emphasis on employing subsidies and other forms of state intervention to boost investment in key sectors. This process is being turbocharged by the way that security issues are becoming entrenched in the US government thinking about large segments of

⁷ A. Anderson, J. Hawkins and S. Mulligan, *State Regulation of Foreign Ownership of US Land: January 2023 to July 2024*, CRS Legal Sidebar (Aug. 28, 2024), at 4, <https://crsreports.congress.gov/product/pdf/LSB/LSB11013#:~:text=not%20empower%20the%20federal%20government%20to%20block%20purchases%20or%20require>.

⁸ "If (Trump's current proposals are) enacted they represent a return to an era where substantial chunks of government revenue came from trade tariffs, rather than on taxes on people's income and the Profits of businesses." See C. Jones, C. Smith & J. Politi, *Trumponomics: The Radical Plan that Would Reshape the US Economy*, FIN. TIMES (Sept. 23, 2024), https://www.ft.com/content/f5f60203-176b-4fd8-baa1-03f27afa3482?trk=public_post_comment-text

the economy, from manufacturing to new technologies. The growing intersection of economic policy and national security has many roots. Retaining and restoring US manufacturing competitiveness has come to be seen as a defining geopolitical challenge: “The role of national security in trade and investment policy and strategy is rising everywhere.”⁹

8. My Observations

It has become more accepted in the US trade debate today that trade agreements since 1945 (for example, the WTO and NAFTA) have been a major cause of deindustrialization in the US. The admission of China to the WTO and the subsequent flooding of exports into the US were the leading causes of the plight of labor (the “China shock”). Both political parties have accepted this to various degrees even though manufacturing’s share of nonfarm employment declined significantly from 1947 to 2001 and only slightly from 2001 (China’s entry into the WTO). In the current presidential election, international institutions and international agreements that have emerged since 1945, as supported by the corporate, high-tech and investment sectors, have now become central to that debate. This debate includes, of course, the issue of tariffs and taxes as well as protectionism, industrial incentives (subsidies), isolationism, sanctions and, increasingly, national security.

The issue of the US legislation concerning trade and tariffs is technical and complex. Congress has the exclusive authority to regulate international trade under the US Constitution, but much authority has been delegated to the president. (Surprisingly, calls for Congress to reclaim its trade powers, as a response to Trump’s presidential tariff actions, have actually declined during the Biden administration.) The issue of national security in US trade policy formulation has become the premier issue in trade law today. Combined with the president’s authority in foreign affairs, presidential action concerning international trade has become much more complex in recent history. The interplay among US law (federal and state) and global rules, the increasing complexity of geopolitics and the rise of more diverse national security concerns all foster a very complex new world of international trade policy.

Trump and Vance’s proposals concerning tariffs fail the most basic economics test, and Kamala Harris’s trade policy is not clearly formulated. However, some

⁹ S. Fleming, D. Sevastopulo & C. Jones, *How National Security has Transformed Economic Policy*, FIN. TIMES (Sept. 4, 2024), <https://www.ft.com/content/6068310d-4e01-42df-8b10-ef6952804604>.

political elements are now coming into focus. Democrats and Republicans are voicing somewhat similar support for tariffs and greater export controls. However, Trump's recent proposals on trade and his history on tariffs and trade have been most disturbing.

On his first day in office, Trump withdrew from the Trans-Pacific Partnership.¹⁰ He has continued during this election season to oppose global trade and cooperation with a growing intensity. Simply put, he has shown nothing but contempt and blame for trade and multilateral cooperation. Trump's continuous attacks on and withdrawal from the WHO in the midst of the global pandemic are among his most egregious actions.

From the outset of his presidential administration, Trump imposed unilateral tariffs and trade sanctions, often based on spurious grounds of national security and retaliation. (For example, he imposed tariffs on solar panels and steel and aluminum imports.) He resorted to tariff wars and a broad range of other trade and investment threats against a large number of trading partners, including China, Canada and the EU. His threats have continued during this presidential election year. Most recently, he threatened to impose a 200% tariff on John Deere farm equipment if the company's production is moved from the US to Mexico.¹¹

Trump's default policy actions, based on revenge and perceived grievances, are to complain, reject and withdraw. When in office, he complained about NAFTA, NATO, the EU, the UN, the ICC, the ICJ, and the WTO, among others. He also withdrew from the Iranian nuclear deal, a bilateral agreement with Iran, UNESCO, the UN Human Rights Council, the Paris Climate Accords and the Open Skies Treaty. Such aggressive use and weaponization of treaty termination by the Trump administration had never occurred historically. He terminated or renegotiated agreements with such countries as Japan, Korea and Mexico. Today, Trump continuously complains that China and other countries are destroying US jobs and endangering our national security and now proposes a universal tariff. His foreign policy doctrine today can very well be labeled "rejection and withdrawal." His disdain for international institutions and allies has become even more pronounced during the current presidential campaign. If elected, he will undoubtedly pursue primarily bilaterally-focused trade and foreign policies, regardless of international legal rules.

¹⁰ This discussion of former President Trump's policies draws upon and updates my earlier assessment in my book. See S. Malawer, *Introduction*, in *TRUMP AND TRADE – POLICY AND LAW* (HeinOnline, 2021), https://globaltraderelations.net/images/MALAWER.TRUMP_AND_TRADE_POLICY_2021_.pdf.

¹¹ B. Tita, *Trump Issues Fresh Trade Threats, Targeting Deere*, *WALL ST. J.* (Sept. 23, 2024), <https://www.wsj.com/poltics/policy/trump-issues-fresh-trade-threats-targeting-deere-7aaf16e4>.

Trump's actions and threats concerning tariffs and trade are consistent with his "America first" worldview, which champions US isolationism and unilateralism, as in the 1930s. His recent rally in Madison Square Garden in New York City was an unfortunate reminder of the German-American Bund meeting there in 1939, a few weeks before the outbreak of German aggression in Europe. This worldview from the ashes of an unfortunate era has only made the US less of a world leader and promises more of the same if he is reelected. This policy often places the US in opposition to other nations trying to confront global issues collectively.

Trump's broad view of his trade and foreign powers is that those powers are unlimited. This aggressive view falls under the deeply conservative legal notion that the "administrative state" needs to be restricted and is within the maximalist version of the so-called "unitary executive theory." Since 2000, the great rise in trade and tariffs as a US domestic political issue, especially during the Trump and Biden administrations, is highlighted by the phenomenal rise of lobbying in Washington by foreign and domestic corporations over sanctions and export compliance. For example, in 2000, only a few hundred new sanctions were imposed yearly. In 2023, over 3,000 were authorized and imposed. The Justice Department is now initiating numerous criminal actions concerning national security violations. The Bureau of Industry and Security (Department of Commerce) has increasingly imposed fines on US firms for violating the entity list by selling to foreign companies restricted from purchasing US products without special licenses. During Trump 1.0 tariff exemptions were highly political. Often a result of having the right lawyer and lobbyist. This idiosyncratic situation was corrosive of the policy-making system.

Trump's foreign policy and trade actions while he was in office did not lead to anything good. They only hurt the US economy, farmers and workers. For example, his agricultural subsidies to offset export losses for farmers proved gravely ineffective and his tariffs did not increase manufacturing jobs in the US. In fact, most of the new tariffs collected went to US farmers as subsidies to offset their export losses caused by retaliatory Chinese tariffs. His use of export and investment controls significantly hurt technology and telecommunication firms. His unending and ever-growing animosity toward China, supercharged by his claims regarding the origins of the global pandemic, remains one of his principal if not his central 2024 reelection positions.

The world of the 1930s was much less economically and politically interconnected. If the earlier protectionist, mercantilist and unilateral policies led to global economic chaos and then war, what can Trump's actions lead to if he is reelected today in a time of expanding crises in the Middle East (with Hamas, Hezbollah and Iranian proxies

fighting Israel) and Ukraine (with North Korean troops now involved in combat) and billions more people engaged in global commerce?

Trump's policies during his term in office and as expressed during this presidential campaign season represent an aggressive attack on the post-World War II international order. Most notably, Trump's attack on the judicial system of the WTO, as a derogation of US sovereignty, is hugely baffling. The WTO's dispute resolution system was a US initiative that reflected the core US belief in a rules-based global system and the US value of relying on litigation to provide a fair judicial determination of conflicts. The US has been most successful in cases decided by the dispute resolution system over the last thirty years.

Trump's policies reflected his reliance on unilateral actions, raw power politics, the law of the jungle, bluster and threats. His international actions reflected his domestic politics of grievance and revenge. His reliance on national security as a rationale for trade actions has been seriously questioned in the US courts (although they have been upheld) and recently in the WTO. His disdain for domestic US law and institutions and actions concerning the attack on the US Congress after his defeat in the last election is very distressing. It has only led to needless stress on the US legal system and parallels his low regard for the international legal order.

During his time in office, Trump's attacks on the existing international system significantly diminished the United States' standing in diplomatic relations with our friends and allies and only emboldened others to take unilateral actions. Consequently, over the course of Trump's term in office, the US failed to formulate viable foreign policies and strategies to tackle the multitude of global problems confronting its national interests and security. There is no reason to think his second term in office, if he is reelected, would be any different. He would certainly implement an aggressive tariff and trade policy. The likely return of two former trade advisers, Robert Lighthizer and Peter Navarro, would undoubtedly help implement such policies.

The trade debate in the US entered a new stage with the nomination of Kamala Harris and J.D. Vance. So far, this debate has been particularly toxic despite the significant similarities between Biden and Trump. Vance is a fervent protectionist (as is Trump). Harris's votes on various trade issues when she was a senator, such as her vote against NAFTA, are not too encouraging. She seemingly supported all of Biden's actions of retaining and expanding Trump's tariffs,¹² but her proposals

¹² Biden has recently extended various tariffs on steel and aluminum (to 25%), semiconductors (to 25%), EVs (to 100%), EV batteries (to 25%), and solar cells (to 50%). See Fact Sheet: President Biden Takes Action to Protect American Workers and Businesses from China's Unfair Practices, White House (May 14, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/09/13/fact-sheet-biden-harris-administration-announces-new-actions-to-protect-american-consumers-workers-and-businesses-by-cracking-down-on-de-minimis-shipments-with-unsafe->

today are not as extreme as Trump's. Essentially, she is focusing on revising US manufacturing as part of an industrial policy with a cautious view of tariffs.¹³ The recent vice presidential debate indicates further the Harris-Waltz opposition to the sweeping new tariff proposals by Trump and Vance, which are viewed as nothing more than a national sales tax that raises prices and are inflationary.

The public has become very skeptical of trade and its impact on the US economy. The issues of economic warfare, trade sanctions, tariffs and export controls are now being raised again and with new vigor. Unfortunately, sanctions and tariffs are just not very effective and often cause more problems and retaliation. (The Cuban sanctions have been in place for over 60 years.) The proposals by many in the Republican party (but not all), Trump and now Vance concerning trade and international investment can be unfortunately summarized as the most aggressive rejection of US trade policy since World War II.¹⁴ They propose adopting policies¹⁵ even harsher than those of "America First," similar to what thrived in the 1930s but harsher than those President Taft's administration implemented during the Gilded Age. Taft was often referred to as Mr. Tariff. Trump's and Vance's proposals echo those of the early 1800s, when the US wanted to protect domestic manufacturers from low-cost British imports.

US trade relations remain highly politicized as a domestic issue and have seen greater restrictions that do not help expand trade. These actions are often bipartisan ones and often reflect non-trade issues. They are often based on national security concerns. This has created huge issues for multinational firms formulating corporate strategies and others trying to navigate domestic politics and geopolitics. Nevertheless, US economic policy continues to support greater government subsidies (such as the chip sector) to help increase domestic economic development and employment. Other

unfairly-traded-products/#:~:text=New%20Rulemaking%20to%20Reduce%20De%20Minimis%20Volume%20and%20Strengthen%20Trade.

¹³ J. Stein & C. Zakrzewski, *Harris to Tout US Manufacturing Revival in New Speech*. WASH. POST (Sept. 24, 2024), <https://www.msn.com/en-us/news/politics/harris-to-pitch-us-manufacturing-revival-in-new-economic-speech/ar-AA1r7tz1?ocid=BingNewsSerp>.

¹⁴ "After imposing tariffs on roughly \$380 billion in imports during his presidency, primarily on China, Trump is now calling for import duties of varying levels on all \$3 trillion in US imports ... A handful of Republican senators have expressed their disapproval of Trump's most aggressive trade proposals, but the party's lawmakers overall appear to be hearing what they want to from Trump even as his rhetoric sharply escalates." See J. Stein & M. Sotomayor, *GOP Downplays Trump's Increasingly Aggressive Approach to Global Trade*, WASH. POST (Sept. 19, 2024), <https://www.msn.com/en-us/news/politics/gop-looks-the-other-way-as-trump-pushes-unorthodox-trade-proposals/ar-AA1qTHuZ#:~:text=GOP%20downplays%20Trump%E2%80%99s%20increasingly%20aggressive%20approach%20to%20global%20trade.%20Story>.

¹⁵ "Trump's version of US industrial policy is centered on a promise to cut taxes for companies that manufacture to America and impose tariffs on those that don't." See J. Politi, *Donald Trump Tells Trading Partners They Will Lose Jobs to US*, FIN. TIMES (Sept. 24, 2024), [https://www.ft.com/content/75dcb3a7-3152-4df4-badf-e8239d71838b#:~:text=Trials%20\\$1%20for%204%20weeks.%20Then%20\\$75%20per%20month.%20Complete](https://www.ft.com/content/75dcb3a7-3152-4df4-badf-e8239d71838b#:~:text=Trials%20$1%20for%204%20weeks.%20Then%20$75%20per%20month.%20Complete).

issues remain pressing, such as China's great export machine, China's suppression of the Uyghurs, securing supply chains, adoption of global climate and tax agreements, foreign exchange issues, market status for various countries and withdrawal of most-favored-nation treatment for China.

Yet, there is one issue on which the Democratic and Republican nominees are in sync: protectionism. Trump has proposed sweeping tariffs of 10–20% on the vast majority of goods. Harris has been more critical of across-the-board tariffs. She would nonetheless “employ targeted and strategic tariffs to support American workers, strengthen our economy, and hold our adversaries accountable.” According to Biden, Harris and Trump, such restrictions protect US industries from foreign competition. They argue that tariffs can promote national security, foster economic growth and restore blue-collar jobs.¹⁶

Issues concerning tariffs, unfair trade practices and supply chains continue to dominate trade issues between China and the US. Recently, China brought a WTO case against the US concerning tax credits and subsidies under the Investment Reduction Act that was enacted as a key piece in Biden's economic policy.¹⁷ China has enacted an anti-foreign sanctions law and an entity list (restricting foreign buyers). The Biden administration has continued to roll out new trade initiatives and economic measures, especially those related to and supporting newer US fiscal, tax and subsidy legislation, such as those related to semiconductor chips, EVs and their batteries. The Biden administration's newer and progressive antitrust policy dovetails with its trade policy by emphasizing the concentration of power by countries such as China and companies such as Google and Apple. A new Trump administration would probably reverse Biden's aggressive antitrust policy toward corporations but continue to confront foreign state concentration of power.

9. Conclusion

Last year, I drew the following conclusion regarding the Trump–Biden trade restrictions. There has been a tectonic shift in the trade relationship between the United

¹⁶ N. Bonifai, N. Rudra, R. Ludema & J. Jensen, *America is Fighting the Wrong Trade War*, FOREIGN AFF. (Sept. 12, 2024), <https://www.foreignaffairs.com/united-states/america-fighting-wrong-trade-war>.

¹⁷ China brought a case to the WTO's dispute resolution system contesting the validity of certain subsidies (tax credits) under the Inflation Reduction Act (IRA). See *DS-623 - United States – Certain Tax Credits Under the Inflation Reduction Act*, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds623_e.htm.

States and China. This can be seen in the passage of new US legislation, recent US trade restrictions on exports and investment transactions with China and worsening US relations with the WTO, particularly regarding its dispute resolution system. The Trump administration initiated a haphazard tariff and trade war with China. It reversed decades of the US trade policy pursuant to its long-standing doctrine of supporting free trade, which commenced with the Roosevelt administration's Reciprocal Trade Agreements Act of 1934.

Cordell Hull and his Department of State were in charge of implementing a new free trade policy on a bilateral basis. After World War II this policy became multilateral through the international institutions of the Gatt and international financial organizations. The hope was that free trade would lead to free peoples worldwide and freedom from wars. To the dismay of many in the trade community in the US and globally, the Biden administration significantly extended and broadened the trade actions by President Trump and moved further away from neoliberalism.¹⁸

Keeping in mind the Biden administration essentially kept most of Trump's tariffs in place that were enacted as Section 201, Section 301 and Section 232 tariffs as well as sanctions under the International Emergency Economics Powers Act and a multitude of country-specific legislation (such as on Cuba and Venezuela).¹⁹ Biden added restrictions and expanded federal legislation to include greater support of US industries. Biden was reluctant to engage in newer regional economic arrangements, as was Trump, and similarly reluctant to help rejuvenate the WTO or join the revised TPP (CPTPP). He only joined a weak new regional Indo-Pacific Economic Framework for Prosperity. Earlier this year, Biden imposed a 100% tariff on Chinese electric vehicles. (The EU has now imposed an additional tariff increase on such vehicles, and China has retaliated with counter-restrictions.²⁰) Most recently, Biden proposed a ban on imports of Chinese software used in US autos on the grounds of national security.²¹ Harris has not refuted any of those positions and in fact has announced

¹⁸ S. Malawer, *US-China Trade Relations: Tectonic Changes and Political Risk in the Global System – National Security, Industrial Policy, and Protectionism*, 9 CHINA & WTO REV. 367 (2023), https://cwto.net/index.php/CWR/article/view/80/cwr_v9n2_08.pdf.

¹⁹ "The Trump administration imposed nearly \$80 billion worth of new taxes on Americans by levying tariffs on thousands of products valued at approximately \$380 billion in 2018 and 2019, amounting to one of the largest tax increases in decades." See E. York, *Tariff Tracker: Tracking the Economic Impact of the Trump-Biden Tariffs*, Tax Foundation (June 26, 2024), <https://taxfoundation.org/research/all/federal/trump-tariffs-biden-tariffs/#:~:text=In%20May%202019,%20President%20Trump%20announced%20that%20the%20US%20was>.

²⁰ J. Dahl & K. Verhelst, *Chinese Electric Vehicles Face Possible Extra EU Tariff Hit*, POLITICO (Aug. 8, 2024), <https://www.politico.eu/article/china-electric-vehicle-car-ev-surprise-eu-tariff-hit>.

²¹ D. Sanger, M. Ngo & J. Ewing, *Biden Administration Proposes Ban on Chinese Software on Vehicles*, N. Y. TIMES (Sept. 23, 2024), <https://www.nytimes.com/2024/09/23/us/politics/chinese-software-ban-cars-biden.html>.

a continuation of support for US firms and workers. To me, this suggests that she will essentially follow the Trump–Biden playbook but not as aggressively as Trump’s most recent and extravagant proposals for tariff increases. She will be focused on industrial policy. However, national security will remain a major if not an excessive factor in trade policy formulation.

Having watched President Biden retain most of the tariffs he inherited, the US’s trading partners have been fond of complaining that Biden is “continuity Trump” and wondering whether Kamala Harris will be “continuity Biden.” Trump focused on closing trade deficits and gaining negotiating leverage with China and Biden’s focused mainly on promoting a new industrial policy by providing subsidies and incentives to promote critical industries and help workers. Now, Trump is threatening a massive and damaging escalation of trade protection. Biden’s watchword has been “worker-centered trade policy,” but in practice, that of course means protecting some workers (steel and aluminum, autos) at the expense of others. The consumer-focused critique is not new to the Biden administration. Harris has not repudiated the trade and industrial policy elements of Bidenomics and is unlikely to. In fact, she continues to espouse a “worker-centered” trade policy. But the Democrats are at least charting a steady course that balances their desire to protect industries they deem strategic with the need to hold down economy-wide inflation and to promote employment and national security.²²

The following is my conclusion in an earlier article concerning national security and US trade policy this year.

Geopolitical risk is now among the most important factors in the formulation of multinational corporate strategy and US trade policy. This is most clearly seen in US–China trade relations. The US has aggressively enacted national-security-based trade sanctions, which recently include export controls on semiconductor chips and restrictions on outbound and inbound investment. The US has also adopted major legislation providing historical subsidies and tax breaks, for example, in promoting semiconductor chip manufacturing and supporting advanced battery technology development and production. Congress and the courts have (somewhat unexpectedly) upheld the president’s use of national security as a basis of trade actions and generally supported his protectionist policies.... The growing movement by the US to rely more on national security and protectionism in formulating trade policy is a very worrisome development.²³

²² A. Beattie, *Kamala Harris Remembers the Consumer Cost of Worker-Centered Tariffs*, FIN. TIMES (Aug. 22, 2024), <https://www.ft.com/content/ef9a1221-6ac1-4ea1-9b3c-07cbbc6c72c?desktop=true&segmentId=7c8f09b9-9b61-4fbb-9430-9208a9e233c8#myft.notification:daily-email:content>.

²³ S. Malawer, *Has the US Become a National Security and Protectionist Trading State?*, 17 J. EAST ASIA & INT’L L. 205

So where does this review of Trump's time in office, Biden's tariffs, Harris's acceptance of them, recent statements by the contenders during this election season and the most recent US trade actions during this campaign season lead us?

I believe the US's drift away from the postwar neoliberal policies promoting global trade and investment will continue. Some differences will exist between a Trump and a Harris administration. Although there is some commonality concerning China, the Harris administration would rely on allies and less abrasive diplomacy. The Harris administration would rely somewhat less on new tariffs, but nationalist and protectionist policies would continue as part of a new economic and industrial policy. Both will focus on domestic economic development fused with national security concerns. Indeed, trade policy has evolved from addressing only traditional trade and economic concerns. If re-elected, Trump will dramatically expand the use of trade for non-trade purposes. President Harris would continue to do this also, but less so.

A new Trump administration will be much more confrontational, unpredictable and dangerous to the US constitutional and international legal systems. Under either Harris or Trump, the global rules-based system and multilateralism will remain under scrutiny and challenge. The plight of labor will be focused on. Most of all, in this post-Cold War era US trade policy will continue to be recalibrated in the context of developing domestic politics and geopolitics.

Post Script – Trump 2.0

Donald Trump and the Republicans just achieved a stunning victory in the presidential and congressional elections. Now what? Donald Trump's first term provides a starting point what is to come for the next four years. But it is only a starting point.

Trump will not be hampered by his former advisers who curtailed his excesses. Courts did not restrain his tariff and trade actions then, nor will they do it now. There is no chance that courts will now exercise any real constraint on him whatsoever with his power to appoint new federal judges and Supreme Court justices. His power to make executive and administrative appointments is great and holds the potential of enormous consequences for the functioning of the federal government. I believe he will focus on retaliation and retribution and his actions will amount to a hostile takeover and chaos. The probability of success of court cases contesting new or expanded

tariffs is very low. Federal courts have all upheld presidential tariff actions. No court has found that actions under Section 232 (national security) raised nondelegation issues. However, recent Supreme Court jurisprudence concerning executive orders and the “major questions doctrine” gives some slight hope for reviewing presidential tariff actions.

Most importantly, Trump’s more aggressive tariff and trade policies espoused during this election season were exponentially more aggressive than those during his prior term. This means more confrontation with China and more confrontation with US allies, including the EU, Mexico, Taiwan, Japan and Korea. Much of this confrontation will focus on technology exports to the US, transshipments to the US (circumvention) and US exports and reexports to China.

Trump will quickly threaten and impose new tariffs and trade restrictions on China and others. During the presidential campaign, he threatened to impose 20% on all imports and 60% on those from China. Trump will impose more trade and economic sanctions for national security reasons on Iran and non-economic reasons, such as migration, perhaps on Venezuela, Mexico, and others. He will restrict inward and outward investment and seek newer tax and antitrust rules favorable to business. Trump will continue to pressure the US and the international legal systems. Most worrisome is what happens if Trump could not finish his new term and JD Vance takes over?

Trump’s foreign policies will harken back to the balance of power and national interest-focused realist school of international politics that dominated the 1930s. This approach will now be updated and fused with Trump’s hyper-transactional notion of international relations. This new era of US policy will be chaotic and will not end well for the US or the international system. I predict this will be the legacy of Trump 2.0 sooner than later. However, I believe in the long-run both the US and the international system will survive and prosper.

For now, what is the bottom line? “Buckle up.”

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