



Insight

# Four Areas for Congress to Exercise Trade Policy Oversight

TORI SMITH | JANUARY 19, 2023

## Executive Summary

- U.S. trade policy over the past six years has largely come through executive action to impose new tariffs or initiate trade negotiations through executive agreements.
- Congress has the constitutionally granted power to regulate trade, and the House Ways and Means and Senate Finance Committees should exercise oversight of the administration's trade-related activities.
- Oversight is especially needed in the areas of intellectual property waivers at the World Trade Organization, executive trade frameworks, outbound investment screening, and national security tariff investigations into carbon-intensive goods.

## Introduction

The power to regulate trade rests with Congress, yet the development and execution of U.S. trade policy has largely been carried out by the executive branch over the last six years. That trade policy has involved unilaterally erecting new barriers that make it more difficult and expensive for Americans to engage in trade. The amount of tariff revenue collected by the government more than doubled between 2018 and 2022, even though the total value of goods imported annually has only increased by 25 percent.<sup>[1]</sup> The increase in tariffs paid by Americans is primarily due to tariffs imposed on steel, aluminum, and goods from China in 2018. The tariffs have dramatically increased the cost to import those items.

Since 2020, the Biden Administration has made clear that trade agreements, and working with Congress on trade, are not a priority. Instead, the administration has favored executive agreements, such as the Indo-Pacific Economic Framework and the Global Arrangement on Sustainable Steel and Aluminum. These negotiations have focused on trade issues that the administration believes do not require a change in U.S. law and are ostensibly meant to sidestep congressional oversight.

The congressional committees with jurisdiction over trade – namely the House Ways and Means and the Senate Finance Committees – can and should exercise oversight of the administration's trade-related activities. While it does not provide an exhaustive list, this paper addresses four major areas of trade policy where congressional oversight is needed: (1) intellectual property (IP) waivers for COVID-19 diagnostics and therapeutics; (2) executive trade frameworks; (3) outbound investment screening; and (4) national security tariff investigations into carbon-intensive goods.

## TRIPS Waiver for COVID Diagnostics and Therapeutics

The United States backed a partial waiver of IP protections for COVID-19 vaccines at the World Trade Organization (WTO) in 2022. According to American Action Forum Data and Policy Analyst Tom Lee, the IP rules that were waived under the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights

(TRIPS) “removed the requirement that foreign vaccine manufacturers apply for a voluntary license before applying for a compulsory license in an effort to make it easier for a foreign manufacturer to receive a compulsory license.”<sup>[2]</sup> Lawmakers on both sides of the aisle opposed this move in the previous Congress, but the Biden Administration chose to allow IP protections for vaccines to be waived.

The WTO is now debating the merits of similarly waiving IP protections for COVID-19 diagnostics and therapeutics. WTO members had agreed to determine by December 2022 whether to extend a waiver to diagnostics and therapeutics, but that deadline was extended. Debate will continue on the issue at the WTO’s 2023 General Council meeting in early March. The United States has not staked out an official position on whether to expand the TRIPS waiver, but U.S. Trade Representative Katherine Tai requested a study by the International Trade Commission (ITC) on a wide range of issues related to COVID-19 diagnostics and therapeutics. The study is expected to be finished by October 17, 2023.

The ITC will likely hold public hearings in 2023 as part of its investigation and it will be crucial for members of Congress, especially those on the committees of jurisdiction, to participate in this process. According to the ITC, the results of these investigations are submitted to the requester and generally released to the public. The committees of jurisdiction should also make certain that the ITC’s report is made public and ensure that the United States protects IP rights for innovative medical products and therapies.

## **Executive Trade Frameworks**

The last trade agreement to be debated in Congress was the United States –Mexico Canada Agreement (USMCA) in 2020, which was an update to the North American Free Trade Agreement. Since then, the United States has announced several new trade forums and frameworks, including the Indo-Pacific Economic Framework (IPEF), the U.S.-Taiwan Initiative for 21st Century Trade, the Americas Partnership for Economic Prosperity, the U.S.-E.U. Trade and Technology Council, and countless others. What these initiatives have in common, principally, is that negotiations are being conducted by federal agencies without congressional input. Moreover, the administration has not sought a renewal of Trade Promotion Authority, a law that allows for expedited procedures for the consideration of trade agreements.

In the last Congress, it was debated whether any agreement reached during negotiations, such as IPEF, would require congressional consent. A bipartisan group of senators sent a [letter](#) to the Biden Administration on December 1, 2022, contending that “the use of sole executive agreements to reshape trade relations confuses the implementation of an agreement – which may not require congressional action because no domestic laws need to be altered – and the ability to enter into a binding agreement with other sovereign nations without congressional approval.” A similar [letter](#) was sent to the president from 12 Democrats on the House Ways and Means Committee in December.

The last IPEF [ministerial](#) that covered trade was in Australia in December 2022. A [ministerial](#) on the three other topics will be held in India in February 2023. It is crucial that the committees of jurisdiction are consulted as USTR and the Commerce Department conduct these negotiations, as well as that these agencies provide substantive testimony during their annual hearings. This is especially important now given that USTR reportedly presented text on trade facilitation, agriculture, and regulatory issues to the other IPEF countries during the Australia ministerial.<sup>[3]</sup>

## **Outbound Investment Screening**

The United States screens inbound capital investment for national security concerns through the Committee on Foreign Investment in the United States (CFIUS). Last Congress, Senators Bob Casey (D-PA) and John Cornyn (R-TX) introduced the [National Critical Capabilities Defense Act](#) (NCCDA). This legislation would have established an interagency committee to review outbound investment, or a “reverse CFIUS.” The bill would have given the committee broad authority to review investment meant for a “country of concern,” and specifically noted the examples of “foreign adversary” and “non-market economy.” While there was bipartisan support for a mechanism to screen outbound investment in 2022, there was a lack of consensus on the scope of such a mechanism.<sup>[4]</sup>

In the 2022 year-end [omnibus spending bill](#), however, Congress included \$10 million for the Commerce Department and \$10 million for the Treasury Department. This funding is intended to facilitate the agencies’ consideration of the “establishment of a program to address the national security threats emanating from outbound investments from the United States in certain sectors that are critical for U.S. national security.”<sup>[5]</sup> The agencies are required to submit a report to Congress within 60 days of enactment of the omnibus bill “describing its efforts and identifying the resources that would be required to establish and implement [an outbound review program].”<sup>[6]</sup> There has been debate on whether such a mechanism should be born of legislation or executive action. The Biden Administration is considering an [executive order](#) to establish a process to screen outbound investment, but this would not be appropriate because the Constitution gives Congress the power to regulate trade, including the regulation of capital into and out of the country.

Members on the committees of jurisdiction will need to be prepared to review the reports from the Commerce and Treasury Departments as they must be submitted to Congress no later than February 27. Before implementing any kind of outbound investment mechanism, it is critical for Congress to clearly identify the problem it is attempting to solve. It should also ensure there is evidence that U.S. outbound investment in critical technologies poses a threat to national security. Further, before Congress—or the Biden Administration—acts, there must be agreement on the specific objective any action is meant to achieve. Whatever the outcome of these discussions, policymakers would be wise to adopt an incremental and targeted approach that protects Americans’ ability to move capital as freely as possible.

## **Section 232 of the Trade Expansion Act of 1962**

In 2018, President Trump unilaterally imposed tariffs on imports of steel and aluminum from nearly every country in the world following an investigation by the Commerce Department under Section 232 of the Trade Expansion Act of 1962. The Commerce Department found that imports of steel and aluminum threatened to impair U.S. national security, the threshold for justifying tariffs under this law. This decision included a very expansive view of national security given that only 3 percent of domestic steel production is consumed by the Department of Defense, and then-Defense Secretary James Mattis indicated that steel and aluminum imports were not a threat to national security.<sup>[7]</sup> The WTO ruled against the United States in four cases in December 2022, where it was determined that U.S. tariffs on steel and aluminum “do not qualify for the national security exception and violate WTO rules.”<sup>[8]</sup>

At the time these tariffs were imposed, trade scholars warned that use of Section 232 in this way would open the door for additional expansive interpretations of national security, primarily for Democratic policy priorities on climate change and carbon emissions. The Biden Administration proposed a Global Arrangement on Sustainable Steel and Aluminum at the same time it reached an agreement with the European Union to change U.S. Section 232 tariffs on steel and aluminum to a tariff-rate quota system.[9] The administration is reportedly signaling it may use Section 232 to investigate the impact of carbon-intensive goods on national security.[10] Such an investigation could give the administration the ability to impose tariffs on these imports.

Lawmakers should be concerned about the prospects of such a broad interpretation of national security. Section 232 is, after all, a trade authority that Congress delegated to the executive branch. Several pieces of legislation were introduced in previous sessions of Congress that would expand congressional oversight of the Section 232 process, including limits on the executive's ability to impose new tariffs without congressional consent.[11] Without new legislation, it would be very difficult for Congress to prevent the Biden Administration from imposing national security tariffs on carbon-intensive goods, as the current law only allows for congressional intervention in the case of an investigation on petroleum or petroleum products.[12]

## Conclusion

The expansive use of executive authority by the Biden Administration on trade is likely to continue during the 118th Congress and the administration seems unlikely to proactively seek congressional input. Without proper oversight of trade policy, which is a power given to Congress by the U.S. Constitution, the executive will not be held accountable for how its policies impact Americans. The House Ways and Means and Senate Finance Committees can and should hold hearings on these matters and consider legislation that ensures congressional oversight of trade policy.

[1] <https://www.cbp.gov/newsroom/stats/trade>

[2] <https://www.americanactionforum.org/insight/the-limited-trips-waiver-covid-19-vaccines-and-intellectual-property/> and <https://www.americanactionforum.org/insight/another-trips-waiver-for-covid-19/>

[3] <https://insidetrade.com/daily-news/senior-administration-officials-us-table-text-host-issues-during-ipef-round>

[4] <https://www.americanactionforum.org/insight/outbound-investment-screening-proposals-should-be-narrow-and-targeted/>

[5] <https://www.appropriations.senate.gov/imo/media/doc/Division%20B%20-%20CJS%20Statement%20FY23.pdf>

[6] <https://www.appropriations.senate.gov/imo/media/doc/Division%20B%20-%20CJS%20Statement%20FY23.pdf>

[7] <https://www.heritage.org/trade/report/fixing-americas-broken-trade-laws-section-232-the-trade-expansion-act-1962>

[8] <https://insidetrade.com/daily-news/wto-panels-reject-us-national-security-claims-section-232-tariffs>

[9] <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2021/october/fact-sheet-us-eu-arrangements-global-steel-and-aluminum-excess-capacity-and-carbon-intensity>

[10] <https://www.nytimes.com/2022/12/07/business/economy/steel-tariffs-climate-change.html>; and <https://www.c-span.org/video/?c5047907/user-clip-pat-toomey-senate-session-december-21-2022>

[11] <https://www.lee.senate.gov/2021/3/sen-lee-reintroduces-global-trade-accountability-act>; <https://www.warner.senate.gov/public/index.cfm/2021/10/warner-toomey-reintroduce-legislation-to-restore-authority-over-national-tariffs>; and <https://www.congress.gov/bill/117th-congress/senate-bill/746/text?r=5&s=1>

[12] <https://www.govinfo.gov/content/pkg/STATUTE-94/pdf/STATUTE-94-Pg229.pdf>