

National Foundation for American Policy

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New Research: U.S. Protectionist Trade Policies Have Hurt American Companies in China

U.S. Retreat From Multinational Bodies Limits Ability to Defend U.S. Companies Against Foreign Government Regulations

Arlington, Va. – China’s regulatory crackdowns have affected U.S. and Chinese companies, but protectionist trade policies implemented by the Trump administration and continued by the Biden administration have severely restricted the ability of the U.S. government to protect U.S. businesses in the Chinese market, according to a [new study](#) from the National Foundation for American Policy (NFAP), a nonpartisan policy research organization.

“Unless the U.S. government changes course, American companies will be increasingly less able to address perceived wrongs in Chinese government policies and will be placed at a significant economic disadvantage in much of Asia,” concluded the study’s author Henry Gao, an Associate Professor of law at Singapore Management University. Gao has law degrees from three continents, including a J.D. from Vanderbilt University, and started his career as the first Chinese lawyer at the WTO Secretariat. He is widely published on issues relating to China and the World Trade Organization (WTO) and has advised many national governments as well as the WTO and World Bank on trade issues.

The study, “China’s Regulatory Crackdowns and U.S.-China Trade and Investment Relations,” can be found at <https://nfap.com/>.

In 2021, China launched regulatory crackdowns in many sectors, including the suspension of an Initial Public Offering (IPO) for Ant Financial, the antitrust investigation of Alibaba, the cybersecurity probe of Didi, restrictions on computer games, and a ban on private tutoring business. While these regulatory actions wreaked great havoc in the market, people normally assumed that they only affect China’s own companies and fail to appreciate the wider implications for foreign businesses. This analysis fills in the gap by discussing the potential effects on the trade and investment activities of foreign firms, especially American firms. It further discusses potential actions the U.S. government and American businesses could take to better protect their interests and minimize the negative impacts.

Chinese government regulatory crackdowns have targeted mainly domestic Chinese companies, and indeed Chinese companies have been their main casualties, as judged by their plummeting share prices. Yet, one often-ignored aspect of China’s regulatory actions is the hidden costs to foreign firms. First, are their investment interests, which could include the inability to invest in a given sector (such as the ban on foreign investment in tutoring business), forced divestment of existing investment (such as existing investors in the tutoring sector forced to sell off their stakes to comply with ban on foreign investment) and a reduction in value of investment and lack of liquidity. Second, are trade and transaction interests, with the suppliers to the affected Chinese firms bearing the brunt.

Even though in recent years many U.S. policymakers have said trade actions taken against China were due to China's treatment of U.S. companies, U.S. protectionist policies have limited the ability of the U.S. government to respond to Chinese government policies that affect U.S. companies. America First trade policies have limited the U.S. ability to seek redress, change or encourage improvement in Chinese regulatory policies that may harm U.S. firms.

Even if the United States were to overcome several hurdles and win a case against China in the World Trade Organization (WTO), it still would not be able to enjoy the fruit of its success due to the paralysis of the WTO Appellate Body, thanks to the persistent blockage of the launch of the appointment process for its judges by both the Trump and Biden administrations. Simply put, even if China loses the case, it could simply "appeal into the void" and turn the hard-won victory of the U.S. into a "waste paper," leaving the U.S. with no recourse.

As the analysis notes, there is currently little the U.S. government can do to protect the interests of U.S. firms amidst the regulatory crackdowns, but such a powerless state is partly of its own making. In addition to the irrational blockage of appointments to the WTO Appellate Body mentioned above, there are at least two other strategic blunders over the past five years that, if rectified, could have put U.S. firms in a better position. The first is the Bilateral Investment Treaty (BIT) negotiation between the U.S. and China, which was launched in 2008 and suspended indefinitely when Trump came into office in 2017. The other is the Trans-Pacific Partnership (TPP) Agreement, which again saw Trump pulling out of the deal when he entered the White House. Both agreements include several useful features for U.S. investors.

First, there are market access commitments which open up more sectors to U.S. investors. More importantly, such investment agreements typically include mechanisms to prevent back-tracking of commitments, such as standstill obligations, which serve to make sure that a Party would not retreat from existing commitments and bind liberalizations at the status quo levels; and ratchet provisions, which goes a step further by binding Parties to any autonomous liberalization they might introduce in the future. As several of China's regulatory crackdowns involve banning previously permitted business activities, these two provisions would come handy.

Second, such agreements typically include substantive obligations protecting the interests of foreign investors, such as minimum standard of treatment or fair and equitable treatment, which could provide useful to the foreign investors dealing with such arbitrary and hapless crackdowns. In particular, these agreements require compensation be paid to foreign investors in cases of expropriation, which covers not only direct nationalization of investment but also indirect expropriation such as regulatory actions which render investments worthless, which is exactly the type of scenario we have here.

Third, and most importantly, both agreements would include Investor-State Dispute Settlement (ISDS) mechanism, which allows affected foreign investors to seek independent arbitration against the Chinese government. In such arbitrations, investors typically stand a much better chance of getting due compensation than in national courts of the host countries.

The United States could at least start the process to return to the CPTPP (successor to the TPP), so that when China also joins the Agreement, U.S. firms would have some leverage against the next wave of regulatory crackdowns. But the U.S. needs to do this fast, as China has already submitted the application to the CPTPP, and it is a very serious bid. The United States has a narrow window of opportunity of two to three years before China's application goes through, but should it procrastinate further, it would be extremely hard, if not impossible, for the U.S. to get in after China's accession is done as China will sure demand its pound of flesh, just like what the U.S. did in China's WTO accession process.

International trade and investment agreements provide many ways to deal with problematic regulatory practices. Unfortunately, many of these tools are not available to the United States,

largely because the U.S. has clipped its own claws under the Trump administration by withdrawing from international agreements which were designed to tackle exactly such problems. It is puzzling that the Biden administration, with its professed affinity to multilateralism, would continue to stay away from international rulemaking efforts. With China's recent regulatory crackdowns, a new sense of urgency is created for the U.S. to return to the international rulemaking arena instead of continuing such a "nationalist approach" that is "ironic and dangerous." But the window of opportunity is rather narrow. If the United States misses the opportunity to do the right thing in the next few years, America might lose its lead in international rulemaking once and for all. If that happens, all the losses suffered by U.S. firms in this round of regulatory crackdowns in China would go in vain, and would be the first of many such losses.

About the National Foundation for American Policy

Established in 2003, the National Foundation for American Policy (NFAP) is a 501(c)(3) non-profit, non-partisan public policy research organization based in Arlington, Virginia focusing on trade, immigration and related issues. The Advisory Board members include Columbia University economist Jagdish Bhagwati, Ohio University economist Richard Vedder, Cornell Law School professor Stephen W. Yale-Loehr and former INS Commissioner James W. Ziglar. Over the past 24 months, NFAP's research has been written about in the *Wall Street Journal*, the *New York Times*, the *Washington Post* and other major media outlets. The organization's reports can be found at www.nfap.com. Twitter: [@NFAPResearch](https://twitter.com/NFAPResearch)

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