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The China Challenge: Excluding Mexican/Chinese EVs From the United States

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THE CHINA CHALLENGE: EXCLUDING MEXICAN/CHINESE EVs FROM THE UNITED STATES

DAVID A. GANTZ*

Concerns are growing both within the Biden Administration and in Congress over a potential flood of low-priced electric vehicles (EVs) from China, directly or, more likely, via third countries such as Mexico. BYD, a leading Chinese producer, has announced in spring 2024 that it intends to establish production facilities in Mexico soon, with an initial capacity of 150,000 cars annually, although in August it reportedly deferred those plans until after the U.S. presidential election.¹ While BYD has contended that such production would be for the local Mexican market and for export to the more than fifty countries with which Mexico has free trade agreements, observers believe that the U.S. market is the real prize given its enormous size, with more than 15.5 million auto and light trucks sold in 2023. This article begins with a brief discussion of the current situation and remedial legal and practical measures likely to be applied to trade in passenger vehicles under the United States-Mexico-Canada Agreement (USMCA) and relevant World Trade Organization (WTO) law. This is followed by the rationale for BYD and perhaps other Chinese auto producers to build factories in Mexico, the legal and practical options for BYD and other Chinese autos and SUVs assembled in Mexico to enter the U.S. market, and the trade remedy and national security actions available to the U.S. government to exclude those imports from entering the United States. Finally, this

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1. See *China's BYD Pauses Mexican Factory Plans Until After U.S. Election*, S. CHINA MORNING POST (Sept. 4, 2024, 10:53 AM), <https://www.scmp.com/business/china-business/article/3277112/chinas-byd-pauses-mexico-factory-plans-until-after-us-election>.

article examines the implications of the exclusion policies that appear likely to be followed by either Democratic or Republican administrations in the foreseeable future and offers some recommendations.

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[W]e urge [the Department of Commerce and USTR] to take additional steps to combat the threats posed to domestic automotive manufacturing, American consumers, and U.S. national security interests by EVs made by Chinese automakers . . . [and] focus its investigation on the national security threat posed by the potential import of highly connected Chinese vehicles and high-risk China-controlled connected and autonomous technologies.²

I. INTRODUCTION

Concerns have been growing both within the Biden Administration

2. Letter from Senators Gary C. Peters, Debbie Stabenow, & Sherrod Brown to Gina M. Raimondo, Sec'y of Com. & Katherine C. Tai, U.S. Trade Ambassador (Mar. 7, 2024) [hereinafter EV Letter], https://www.peters.senate.gov/imo/media/doc/section_301_ev_trade_letter.pdf.

and in Congress over a potential flood of low-priced electric vehicles and hybrids (EVs)³ from China, directly or via third countries such as Mexico. BYD, China's leading producer, manufactured 3,045,231 "new energy vehicles" in 2023 for domestic sale and export, a 62.2% increase from 2022.⁴ Increased exports to world markets are likely to continue. Nor is BYD the only Chinese producer interested in the U.S. market; others include Guangzhou Automotive Group, Chery Automobile, and SAIC Motor.⁵ Geely Motors, which controls both the Volvo and Polestar brands along with its own, announced in August 2024 that it would begin assembling the Polestar EV in a new factory in South Carolina, following Volvo's lead.⁶

China became the world's largest exporter of motor vehicles in 2023, with more than 5 million units,⁷ and China is by far the world's largest producer with over 26 million autos in 2022 and a capacity of about 40 million, far more than the combined production of the United States, Japan, India, and South Korea.⁸ While the Chinese auto

3. As used herein, the term "EV" includes full EVs, plug-in hybrids and hybrids, all "new energy vehicles." At this writing in March 2024, U.S. market demand appears to be shifting from EVs to hybrids, although it is presently unclear as to how big a shift will take place in the next year or so. The threats from low-priced, connected Chinese source imports evidently exists in all such categories. See Joseph White, *U.S. Automakers Race to Build More Hybrids as EV Sales Slow*, REUTERS (Mar. 15, 2024, 6:09 AM), <https://www.reuters.com/business/autos-transportation/us-automakers-race-build-more-hybrids-ev-sales-slow-2024-03-15>.

4. See Qian Jin, *BYD Sold 3.02 Million Vehicles in 2023, Up 61.9%*, CARNEWSCHINA.COM (Jan. 1, 2024), <https://carnewschina.com/2024/01/01/byd-sold-3-02-million-vehicles-in-2023> (noting the increase of energy vehicle sales in 2023).

5. See Sean Tucker, *Chinese Auto Makers Inch Closer to American Market*, KELLEY BLUE BOOK (Oct. 10, 2023, 6:48 AM), <https://www.kbb.com/car-news/chinese-automakers-inch-closer-to-american-market> (discussing China's expansive electric vehicle industry).

6. See *Polestar 3: Manufactured in the USA*, POLESTAR (Aug. 14, 2024), <https://www.polestar.com/us/news/polestar-3-manufactured-in-usa>; Marcus Williams, *Volvo to Make Flagship Electric SUV in U.S. and China*, AUTOMOTIVE LOGISTICS (Nov. 15, 2022), <https://www.automotive-logistics.media/electric-vehicles/volvo-to-make-flagship-electric-suv-in-us-and-china/43644.article>.

7. See Edward White & Gloria Li, *China's EV Suppliers Look to Leverage Superior Tech to with West and Drive Expansion*, FIN. TIMES (Feb. 17, 2024), <https://www.ft.com/content/9805c539-a71e-446e-9f0c-f2f57ebaa2ae> (noting China's rise as world's biggest vehicle exporter in 2023, with Japan being second and Germany being third).

8. See generally *China is the Largest Supplier of Cars to Mexico and That Will*

producers such as BYD are experiencing quality control problems and other growing pains as they ramp up production—just as Hyundai did in North America four decades ago⁹—realistically, this is only a temporary problem, as is the fact that most Chinese-made autos are not designed for the U.S. market and consequently do not currently meet U.S. regulatory emission and crash standards.¹⁰ Knowledgeable observers note that Chinese automotive manufacturers have the scale, technology, product line, and low costs to become world leaders.¹¹

Significantly, many officials in the United States see a bitter lesson in how China became globally dominant in the production of solar panels:¹² forcing out higher cost, non-subsidized producers in the United States and the EU, and contributing to capacity far beyond the world's current needs.¹³ Policymakers, industry, and labor stakeholders alike are determined not to let the same blindness occur with the U.S. auto industry, particularly in light of the overwhelming importance of the automotive sector to the U.S. economy, where it is responsible for an estimated 3% to 4% of annual GDP.¹⁴ Significantly,

Not Change This Decade, MEX. DAILY POST (Feb. 12, 2023), <https://mexicodailypost.com/2023/02/12/china-is-the-largest-supplier-of-cars-to-mexico-and-that-will-not-change-this-decade> (asserting how China will remain the main supplier of electric vehicles in Mexico for this decade).

9. See Selina Cheng et al., *Having Overtaken Tesla, BYD Is Running into Problems Overseas*, WALL ST. J. (Mar. 12, 2024), <https://www.wsj.com/business/autos/having-overtaken-tesla-byd-is-running-into-problems-overseas-7d883f02> (noting Hyundai's experience with engine issues in the 1990s leading to recall of certain models).

10. See *As a Federal Agency, NHTSA Regulates the Safety of Motor Vehicles and Related Equipment*, NAT'L HIGHWAY TRAFFIC SAFETY AUTH., <https://www.nhtsa.gov/laws-regulations> (listing the various pertinent regulations).

11. See Wash. Int'l Trade Ass'n, *What's Driving Chinese Investment into the Mexican Automotive Sector*, YOUTUBE, at 7:05–11:41 (Mar. 13, 2024) [hereinafter WITA Seminar], <https://www.youtube.com/watch?v=Bc8GVtXs52c&t=2s> (referencing Michael Dunn's comments on how China is well positioned to maintain automotive industry dominance).

12. See Keith Bradsher, *How China Came to Dominate the World in Solar Energy*, N.Y. TIMES (Mar. 7, 2024), <https://www.nytimes.com/2024/03/07/business/china-solar-energy-exports.html> (noting that “Beijing is set to further increase its manufacturing and installation of solar panels as it seeks to master global markets and wean itself from imports. . .”).

13. See *id.* (stating that China can produce solar panels for almost half the cost of European and American companies).

14. See WITA Seminar, *supra* note 11, at 34:51–35:25 (referencing the

Treasury Secretary Janet Yellen on a visit to China in April 2024 made it very clear that “the U.S. will retain the option to protect new industrial sectors against China,” after what she described as “the Asian nation’s massive state investments in areas including clean energy,” and observed that President Biden had raised “China’s unfair trade policies and non-market economy practices” recently with President Xi.¹⁵ The context confirms that her comments were focused on Chinese support of industries such as EVs, batteries, and renewable energy.¹⁶

U.S. policymakers are also well aware of the results of a reactive, rather than a proactive, approach to Chinese EVs in the EU. Chinese EVs have increased seven-fold from 2020 to 2023, from \$1.6 billion to \$11.5 billion, even with a 10% “most favored nation” (MFN) tariff.¹⁷ The European Commission announced new tariffs on Chinese EVs of up to 38.1%, although as of mid-September 2024 the tariffs had not been finalized.¹⁸ Whether tariffs as low as 18%—in addition to the 10% EU MFN duty—are sufficient to stem the imported EV flow is questionable.¹⁹ However, the China Chamber of Commerce in the EU has suggested that a negotiated solution may be possible (which seems to be taking place), or that China may encourage certain

comments made by Roy Blunt about the importance of the auto sector to U.S. economy).

15. See Christopher Condon & Viktoria Dendrinou, *Yellen Says U.S. Has Option to Shield Industries Against China*, BLOOMBERG (Apr. 3, 2024, 4:33 PM), <https://www.bloomberg.com/news/articles/2024-04-03/yellen-says-us-has-option-to-shield-new-industries-against-china> (quoting Secretary Yellen).

16. See *id.* (discussing how Yellen is focused on pressing Chinese counterparts on industrial overcapacity that threatens the rest of the world’s economies).

17. See Andy Bounds, *EU Would Need 50% Tariffs to Curb Imports of Chinese Electric Cars*, FIN. TIMES (Apr. 29, 2024), <https://www.ft.com/content/8e4a9eb4-cd88-4625-a21b-6378d24c6dad> (noting how imports of electric vehicles from China have increased over the past three years, with numbers including Chinese source vehicles from non-Chinese producers such as Tesla).

18. See *Atlantic Council Experts, Europe is Gearing Up to Hit Chinese EVs with New Tariffs. Here’s Why*, NEW ATLANTICIST (June 12, 2024), <https://www.atlanticcouncil.org/blogs/new-atlanticist/experts-react/europe-is-gearing-up-to-hit-chinese-evs-with-new-tariffs-heres-why>.

19. See Bounds, *supra* note 17 (noting how China-based producers will still be able to generate comfortable profit margins despite high duties because of the substantial costs advantages they enjoy).

EU member states to oppose finalization of the Commission's tariffs.²⁰ BYD is in the process of establishing a production facility in Hungary, with Chery Auto planning a joint venture with Spain's EV Motors for EV production in Spain.²¹ The EU is following all the WTO rules and lacks a Section 301 equivalent, both of which the EU auto industry may live to regret with the growing presence of Chinese EVs in its market.²²

Adding to the sense of urgency felt by many U.S. policymakers, the auto-producing city of Shenzhen announced in early March 2024 that it would provide BYD and other Chinese producers with massive new financial incentives for EV exports, including support for new factories and the opening of new sea transport routes.²³ The city intends to "build an industrial cluster bridging car production, shipping and trade," making Shenzhen "a new world class auto city" at a time when many are concerned that the Chinese industry has badly overbuilt domestic capacity and will, as a result, flood western markets with Chinese-made exports.²⁴ More recently, BYD is engaging in a

20. See Sarah Wu & Philip Blenkinsop, *China Gear Up to Make a Deal With Europe as EV Tariffs Loom*, REUTERS (May 29, 2024, 3:59 AM), <https://www.reuters.com/business/autos-transportation/china-gears-up-make-deal-with-europe-ev-tariffs-loom-2024-05-29> (discussing how China has considered lowering tariffs on EU autos from 15% to 10%).

21. See Brad Anderson, *BYD Could Build Second EV Factory In Europe*, CARSCOOPS (May 10, 2024), <https://www.carscoops.com/2024/05/byd-could-build-second-ev-factory-in-europe> (noting that BYD's first factory in Europe will produce up to 200,000 vehicles per year); see also Joan Faus, *China's Chery Nearing Deal to Manufacture Cars in Spain*, REUTERS (Apr. 9, 2024, 4:02 PM), <https://www.reuters.com/business/autos-transportation/chinas-chery-nearing-deal-manufacture-cars-spain-2024-04-09> (discussing Chery's plans to take over a closed Nissan factory in Barcelona).

22. See *Europe Embraces Chinese EV Makers: A New Opportunity?*, THE CHINA ACADEMY (May 31, 2024), <https://thechinaacademy.org/europe-embraces-chinese-ev-makers-a-new-opportunity> (noting how China's Chery Auto has established a joint venture with Spain's EV Motors, setting up a local manufacturing model and foothold in the EU for Chinese EVs).

23. See Gloria Li & Ryan McMorrow, *Chinese City of Shenzhen Rolls Out Plan to Boost Car Exports*, FIN. TIMES (Feb. 27, 2024), <https://www.ft.com/content/efb4ceb4-6d46-4c2f-abf6-142b3bc5c3b6> (noting Shenzhen's eagerness to increase exports to support local economy, seen through the adoption of twenty-four economic measures).

24. See *id.* (showcasing the different initiatives Shenzhen has created as part of its twenty-four measures).

domestic price war with Tesla and other competitors, lowering the price for its EV hatchback by 12.6% to \$12,485.²⁵

BYD has also announced, as noted earlier, that it intends to establish production facilities in Mexico (date uncertain), with an initial capacity of 150,000 cars annually.²⁶ Other BYD foreign operations are also planned or operational in Thailand, Brazil, Hungary, and Uzbekistan.²⁷ While the company has contended that Mexican EV production would be for the local Mexican market and for export to some of the more than fifty countries with which Mexico has free trade agreements,²⁸ observers believe that the U.S. market is the real prize given its enormous size, with more than 15.5 million auto and light trucks sold in 2023, even if it takes years to fully penetrate.²⁹ BYD has

25. See William Gavin, *Tesla's Chinese Rival Backed by Warren Buffett is Launching More Cheap EVs*, QUARTZ (Mar. 13, 2024), <https://qz.com/byd-china-ev-new-car-cheap-quality-issues-europe-1851331244> (stating how BYD, with Warren Buffet's Berkshire Hathaway as a backer, priced new EV models lower to increase interest).

26. See Daina Beth Solomon, *Chinese Automaker BYD Looking for Mexico Plant Location, Executive Says*, REUTERS (Feb. 28, 2024) [hereinafter Solomon, *BYD Looking for Mexico Location*], <https://www.reuters.com/business/autos-transportation/chinese-carmaker-byd-launches-low-cost-dolphin-mini-ev-mexico-2024-02-28> (noting how BYD Americas' CEO Stella Li has confirmed BYD is scouting for Mexico-manufacturing location).

27. See Zhang Yan & Brenda Goh, *Chinese Automakers Open Factories Abroad as Export Clout Causes Friction*, REUTERS (Mar. 14, 2024), <https://www.reuters.com/business/autos-transportation/chinese-automakers-open-factories-abroad-export-clout-causes-friction-2024-03-14> (discussing how BYD has the capacity to build 4 million cars in China annually, with 150,000 to be produced in Thailand and Brazil each and increase local jobs in Hungary).

28. See *Mexico's Top Free Trade Agreements and Their Impact*, TETAKAWI (May 22, 2020), <https://insights.tetakawi.com/top-free-trade-agreements-with-mexico> (noting how Mexico has access to over 60% of the world's gross domestic product with its 14 FTAs); see also *Mexico Free Trade Agreements (FTAs): A Comprehensive List*, TETAKAWI (June 7, 2024), <https://insights.tetakawi.com/mexicos-free-trade-agreements> (stating how Mexico has more FTA's than any other country).

29. See Mathilde Carlier, *Annual Passenger Car Sales in the United States from 1951 to 2023*, STATISTA (Feb. 28, 2024), <https://www.statista.com/statistics/199974/us-car-sales-since-1951> (citing how inflation has impacted new and used car prices); David A. Gantz, *Excluding Mexican and Chinese EVs from the United States 1* (Rice Univ.'s Baker Inst. for Pub. Pol'y Ctr. for U.S. and Mex. Working Paper, 2024), https://www.bakerinstitute.org/sites/default/files/2024-03/20240319_Excluding-Mexican-Chinese-EVs-From-US_WP.pdf (commenting on how lucrative the U.S. market is for EV and auto sales with 15.5 million being sold in

the luxury of being able to take a long-term view due to Chinese government support. China, led by BYD (and, perhaps surprisingly, General Motors), has rapidly penetrated the Mexican market with exports from China of both EV and combustion engine autos.³⁰ The Chinese share of the Mexican import market has risen from 1.8% in January 2018 to 15.6% in January 2024.³¹ BYD's "Dolphin" Mini EV will be sold in "Mexico for \$21,019, less than half the price of the least expensive Tesla."³² In comparison, the average price for an EV sold in the United States in January 2024 was \$55,353.³³ While total Chinese investment in Mexico in all sectors is estimated at only \$2.5 billion in 2022,³⁴ less than a tenth of total foreign direct investment (FDI), it would increase significantly if BYD and other major Chinese car producers were to construct Mexican factories.³⁵

The U.S. market has been relatively well-protected from direct exports of BYD vehicles from China. Beginning in 2018, under a Trump-era Section 301 action, EVs were subject to a 27.5% import

2023).

30. See *A Chinese Car Boom in Mexico?*, Mar. 14, 2024, FTI CONSULTING STRATEGIC COMM'NS, available at FTIMexico@info.fticonsulting.com (stating that Chinese vehicles sold in Mexico for 2023 increased by 61.5%, accounting for around 10% of total market share in Mexico which would rise to 20% if brands and Chinese-made vehicles, like GM, were included).

31. See *China is the Largest Supplier of Cars to Mexico and That Will Not Change This Decade*, *supra* note 8 (noting that 14,754 vehicles made in China were sold in Mexico in January 2023, causing uptick in market-share percentages).

32. See David Shepardson, *U.S. to Probe If Chinese Cars Pose National Data Security Risks*, REUTERS (Mar. 1, 2024) [hereinafter Shepardson, *U.S. to Probe*], <https://www.reuters.com/business/autos-transportation/us-says-investigate-national-security-data-risks-chinese-vehicles-2024-02-29>.

33. See Justin Fischer, *The Average Price of an Electric Car Keeps Dropping (2024 Update)*, CAREEDGE (May 21, 2024), <https://caredge.com/guides/average-price-of-an-electric-car-2024> (reporting that in the United States, the average price paid for an EV is 17% higher than the overall car market average as of January 2024).

34. See *Could There be a US-Mexico Trade War?*, THE ECONOMIST (Mar. 12, 2024), <https://www.economist.com/the-americas/2024/03/12/could-there-be-a-us-mexico-trade-war?> (reporting China's FDI in Mexico as \$2.5 billion in 2022).

35. See *Why Chinese Companies Are Flocking to Mexico*, THE ECONOMIST (Nov. 23, 2023), <https://www.economist.com/business/2023/11/23/why-chinese-companies-are-flocking-to-mexico> (contrasting levels of investment by China into Mexico with a peak in 2016 of \$6 billion and contemporary amount of \$2.5 billion).

duty, the 2.5% MFN duty, plus the Trump-era 25% penalty duties.³⁶ In May 2024, the Biden Administration announced a prospective increase of the duties on EV imports from China to 100% (plus the 2.5% normal duty.)³⁷ The final tariffs, including increases of duties of 50% on semiconductors and 25% on batteries as well as 100% on EVs, were scheduled to go into effect on September 27, 2024.³⁸ Various batteries and battery parts were also subject to increased tariffs (generally 25%), but some such imports are to remain at the lower tariff rate for up to two years to give U.S. producers time to adjust their supply chains.³⁹ The Biden Administration's action was based on the review of a six-year-old Section 301 case, and did not apply either to imports of gasoline engine vehicles from China or EVs imported into the United States from Mexico. In response, Senator Marcio Rubio (R-FL) immediately protested the exclusion of gasoline-powered vehicles

36. See Miguel Cortina, *U.S. Considers Hiking Up Tariffs on Imported Chinese Cars*, MOTORTREND (Dec. 21, 2023), <https://www.motortrend.com/news/us-trade-tariffs-on-chinese-cars-suvs-2024> (noting the steep tariff of 27.5% on American companies but Chinese-made vehicles). Several models built in China by U.S. producers, such as Lincoln and Buick, are currently imported from China, as will be the electrical Volvo EX30, and will thus be affected by these tariffs. See 19 U.S.C. § 1202 (2024) (authorizing the U.S. International Trade Commission to separately publish harmonized tariff schedule outside of code); U.S. INT'L TRADE COMM'N, HARMONIZED TARIFF SCHEDULE OF THE U.S. ch. 87, heading 8703.40–60 [hereinafter HTSUS], <https://hts.usitc.gov/reststop/file?release=currentRelease&filename=Chapter%2087> (listing tariffs on imported electric vehicles).

37. See Press Release, Off. of the U.S. Trade Representative, U.S. Trade Representative Katherine Tai to Take Further Action on China Tariffs after Releasing Statutory Four-Year Review (May 14, 2024) [hereinafter USTR to Take Further Action on China Tariffs], <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/may/us-trade-representative-katherine-tai-take-further-action-china-tariffs-after-releasing-statutory> (reporting the Biden Administration's initiative to increase Section 301 tariffs from 25% to 100% in order to protect against China's unfair trade practices). Reports suggest that the 100% auto tariffs and many tariffs on batteries and certain solar cells, after an opportunity for public comment, will become effective August 1. See Oliver Ward, *Some Section 301 Tariff Hikes to Kick in Aug. 1 as USTR Seeks Views on Scope, Rates*, WORLD TRADE ONLINE (May 23, 2024), <https://insidetrade.com/daily-news/some-section-301-tariff-hikes-kick-aug-1-ustr-seeks-views-scope-rates>.

38. See David Lawder, *U.S. Locks in Steep China Tariff Hikes, Some Industries Warn of Disruptions* REUTERS (Sept. 13, 2024, 10:51 PM), <https://www.reuters.com/business/us-locks-steep-china-tariff-hikes-many-start-sept-27-2024-09-13>.

39. See *id.* (stating tariff increases and timeline for vehicles and auto-parts under the Biden Administration's new policies).

from China and the failure to close a U.S.-Mexico-Canada “back-door loophole.”⁴⁰ (Canada has closed that “loophole” by imposing its own 100% tariffs on EV imports from China.)⁴¹ The increase in U.S. tariffs obviously has value to the Administration in an election year regarding whether Mr. Biden and Ms. Harris can out-tariff Mr. Trump (or vice versa),⁴² but it could also serve as a useful signal to Chinese auto makers: signaling the extreme difficulties of entering the U.S. auto market directly from China. Given BYD’s efficiencies and Chinese government subsidies, some wondered whether even the previous 27.5% tariff would have been sufficient to restrict imports;⁴³ the new 102.5% tariff probably resolves that issue.

Rules of origin requirements established under the United States-Mexico-Canada Agreement (USMCA)⁴⁴ could allow, under present law and regulations, EVs to enter the United States duty-free. The U.S. Alliance for American Manufacturing has argued that low-cost Chinese cars and auto parts from Mexico could threaten the viability of auto companies in the United States. They, and other industry groups, along with members of Congress, have demanded that the United States bar such imports from Mexico, suggesting there will otherwise be an “extinction-level event” for the U.S. auto sector.⁴⁵

40. See Dan Dupont, *Rubio to Biden: Don't Stop at Tariffs on EVs – Target All Autos From China*, WORLD TRADE ONLINE (May 17, 2024), <https://insidetrade.com/daily-news/rubio-biden-don-t-stop-tariffs-evs-target-all-autos-china> (commenting that the Biden Administration does not go far enough for Senator Rubio).

41. Joao da Silva, *Canada Hits China-Made Electric Cars with 100% Tariff*, BBC (Aug. 27, 2024), <https://www.bbc.com/news/articles/cm2n091v4m5o>.

42. See Trevor Hunnicutt & Steve Holland, *Biden Sharply Hikes U.S. Tariffs on an Array of Chinese Imports*, REUTERS (May 14, 2024), <https://www.reuters.com/markets/us/biden-sharply-hikes-us-tariffs-billions-chinese-chips-cars-2024-05-14> (revealing the back and forth between Biden’s and Trump’s tariff proposals).

43. See *id.* (noting how numerous lawmakers have called for massive hikes on Chinese tariffs or an outright ban).

44. See U.S.-Mex.-Can. Agreement arts. 4.1, 4.7, Nov. 30, 2018, 134 Stat. 11 [hereinafter USMCA] (explaining how non-originating materials may be impacted by duties and tariffs).

45. See Solomon, *BYD Looking for Mexico Location*, *supra* note 26 (noting that BYD’s CEO said Mexican officials were receptive to BYD’s plans); see also Press Release, Josh Hawley U.S. Senator for Missouri, Hawley Introduces New Bill to Raise Tariffs on Chinese Products, Protect American Autoworkers, Feb. 28, 2024, <https://www.hawley.senate.gov/hawley-introduces-new-bill-raise-tariffs-chinese-evs-protect-american-autoworkers> (arguing for new legislation to counter threat to

Calls for remedial actions, including increased tariffs, by the U.S. government have engendered bipartisan support.⁴⁶ Moreover, all are aware that the United States is not alone in its serious concerns, with the EU also imposing penalty tariffs, as noted earlier.⁴⁷ Under those circumstances, even though the current U.S. Section 301 tariffs against China do not apply to autos produced by any Chinese-owned auto factories in Mexico,⁴⁸ it seems highly likely that before BYD or other Chinese auto producers have begun production operations in Mexico (possibly by late 2025 or 2026), the United States will take actions in advance of any such production to prohibit such vehicles from entering the United States under Section 301 or otherwise, as discussed in detail later in this article.⁴⁹

Though widespread U.S. government fears of the impact of Chinese vehicles on the U.S. auto industry and its workers remain, albeit without much analysis of how import restrictions on Mexican/Chinese autos and other products would affect the price of cars for prospective lower income purchasers who are not members of a manufacturing union,⁵⁰ the Biden Administration has initiated an investigation at the

the U.S. auto industry).

46. See David Shepardson, *Hike Tariffs on Chinese EVs, Senate Democrats Urge Biden Administration*, REUTERS (Mar. 7, 2024) [hereinafter Shepardson, *Hike Tariffs on Chinese EVs*], <https://www.reuters.com/business/autos-transportation/senate-democrats-urge-biden-administration-hike-tariffs-chinese-evs-2024-03-07> (stating how Senate Democrats have urged the Biden Administration to hike import tariffs on Chinese electric vehicles).

47. See Zeyi Yang, *Europe is About to Crack Down on Chinese Electric Cars*, MIT TECH. REV. (Sept. 26, 2023), <https://www.technologyreview.com/2023/09/26/1080293/europe-chinese-ev-investigation-subsidy> (citing how the European Commission launched an anti-subsidy investigation into electric vehicles coming from China).

48. See Press Release, Office of the U.S. Trade Representative, USTR Issues Federal Register Notice: Section 301 Proposed Tariff Modifications and Machinery (May 22, 2024), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/may/ustr-issues-federal-register-notice-section-301-proposed-tariff-modifications-and-machinery> (discussing increasing tariffs on specific products in strategic sectors).

49. See USTR to Take Further Action on China Tariffs, *supra* note 36 (discussing how new tariffs confront the PRC's unfair policies and practices).

50. See, e.g., James Bacchus, *The High Price of Buying American*, CATO INST. (June 6, 2023), <https://www.cato.org/policy-analysis/high-price-buying-american> (arguing that the “high price to the American people” of government subsidies and discriminatory trade relationships is ignored).

Commerce Department of the national data security implications of widespread use of Chinese EVs with the integral and remotely-reporting computer/data systems.⁵¹ The probe is considered essential because such vehicles “collect large amounts of sensitive data on their drivers and passengers [and] regularly use their cameras and sensors to record detailed information on U.S. infrastructure,” according to the White House.⁵² The President called the effort an “unprecedented action to ensure that cars on U.S. roads from countries of concern like China do not undermine our national security.”⁵³ The fact that individual cars, including Teslas sold in China, have been constantly transmitting data for at least five years, not only to the manufacturer but also directly to the Chinese government,⁵⁴ is a further basis for concern and suspicion. It is not known whether Volvo or Polestar EVs produced in South Carolina will be subject to this review.

The remainder of this article is divided into four parts. Part II summarizes the rules applicable to trade in passenger vehicles under the USMCA and WTO rules. Part III looks at the rationale for BYD and perhaps other Chinese auto producers to build factories in Mexico. Part IV examines the legal and practical options for BYD, and other Chinese autos and SUVs assembled in Mexico to penetrate the U.S.

51. See Shepardson, *Hike Tariffs on Chinese EVs*, *supra* note 46 (noting how the U.S. Department of Commerce was investigating Chinese vehicle imports amid concerns, including coming from Senate Democrats, about “connectedness” technology).

52. Press Release, White House Briefing Room, FACT SHEET: Biden-Harris Administration Takes Action to Address Risks of Autos from China and Other Countries of Concern (Feb. 29, 2024) [hereinafter Biden-Harris Administration Takes Action], <https://www.whitehouse.gov/briefing-room/statements-releases/2024/02/29/fact-sheet-biden-harris-administration-takes-action-to-address-risks-of-autos-from-china-and-other-countries-of-concern> (providing overview of the Administration’s policies targeting unfair trade practices through import tariffs); *see also id.* (discussing how additional action is required to prevent China’s efforts to infiltrate the U.S. market).

53. Shepardson, *Hike Tariffs on Chinese EVs*, *supra* note 46 (explaining rationale behind investigating Chinese vehicle imports and their collection of data on drivers and passengers as potential security risk).

54. See Erika Kinetz, *In China, Your Car Could Be Talking to the Government*, ASSOCIATED PRESS (Nov. 29, 2018), <https://apnews.com/article/4a749a4211904784826b45e812cff4ca> (noting how Chinese authorities say the data is used for analytics to improve public safety, facilitate industrial development, infrastructure planning, and to prevent fraud in subsidy programs).

market. It also examines the actions available to the U.S. government to exclude those imports from the United States. Part V examines the implications of the exclusion policies for the United States, China, and Mexico that appear likely to be followed by either Democratic or Republican administrations in the foreseeable future. The article concludes with a brief summary and recommendations.

II. TARIFF TREATMENT OF AUTOMOBILES AND SUVs ENTERING THE UNITED STATES

Automobiles and SUVs entering the United States from nations with which the United States does not have a free trade agreement are subject to a “most favored nation” (MFN) tariff of 2.5%.⁵⁵ This contrasts, for example, with the European Union, where the MFN import duty on autos is 10%.⁵⁶ The nations to which the U.S. 2.5% duty is applicable include the United Kingdom, Germany and other EU countries, Japan, and China, although as noted earlier, Chinese imports were subject to an additional penalty tariff of 25% under the Phase One trade agreement, with a tariff increase to 100% proposed in May 2024.⁵⁷ That agreement effectively remains in force with the implicit consent of both parties, despite objections from China.⁵⁸

Imports from South Korea, Canada, and Mexico, which are subject to free trade agreements, enter the U.S. duty-free if the vehicles meet applicable rules of origin.⁵⁹ The rules of origin for U.S. auto imports

55. See HTSUS, *supra* note 36 (noting how these rules only apply to those buying an EV).

56. See *EU TTIP Chapter on Trade in Goods and Customs Duties*, EUR. PARLIAMENT, <https://www.europarl.europa.eu/legislative-train/carriage/ttip-trade-in-goods-and-customs-duties/report?sid=8201> (commenting on the status of import tariffs across multiple parties under MFN regulations).

57. See *Automobile Tariffs by Country 2024*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/automobile-tariffs-by-country>; *Economic and Trade Agreement Between the United States of America and The People’s Republic of China*, OFF. OF U.S. TRADE REPRESENTATIVE (Jan 15, 2020) [hereinafter *Economic Trade Agreement Between the U.S. and China*], https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/US_China_Agreement_Fact_Sheet.pdf.

58. See *Economic and Trade Agreement Between the U.S. and China*, *supra* note 57 (revealing the agreement was signed into effect January 15, 2020, and makes no mention of it being repealed).

59. *United States-Mexico-Canada Trade Fact Sheet: Rebalancing Trade to*

from South Korea are more relaxed than those in the USMCA.⁶⁰ Renault currently has an automotive joint venture in South Korea with a Chinese manufacturer, Geely, although there are currently no imports into the United States.⁶¹ Rather, U.S. imports from South Korea are dominated by Hyundai and Kia, with \$22 billion worth (both gasoline powered and EV) entered in 2022.⁶² This discussion, however, is focused on potential imports of automobiles and SUVs from Mexico, either under USMCA or under the MFN tariffs. Small trucks imported into the United States are subject to the historically high 25% U.S. MFN tariff, and are currently produced in quantity for the U.S. market only in the United States, Canada, and Mexico.⁶³ At the present time, there are no Chinese owned EV producers in Mexico.⁶⁴ BYD was expected to launch its first pickup truck at an

Support Manufacturing, OFF. OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/rebalancing>; *U.S.-Korea Free Trade Agreement*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta>.

60. See Free Trade Agreement, Korea-U.S. annex 6-A § XVII, December 5, 2010, 125 Stat. 428 (outlining the US-Korea rules of origin for automobiles, HTSUS headings 8700–06, require Korean content of only 35% or 45% depending on the calculation method, compared to 62.5% for NAFTA and 75% for the USMCA; however, that agreement does not open the small truck market for several decades).

61. Press Release, Geely Auto. Holdings, Geely Automobile Holdings to Acquire 34.02% of the Shares of Renault Korea Motors (May 10, 2022), <https://global.geely.com/en/news/2022/geely-acquires-shares-renault-korea-motors> (reporting that Geely Auto acquired 34.02% of shares in Renault).

62. See Daniel Workman, *U.S. Imported Cars by Supplier Countries*, WORLD'S TOP EXPORTS, <https://www.worldstopexports.com/us-imported-cars-by-supplier-countries> (listing South Korea as number four in terms of America's top suppliers of imported cars).

63. See Daniel Griswold, *Why Are Pickups So Expensive? Blame the Chicken Tax*, CATO INST. (Mar. 13, 2022), <https://www.cato.org/commentary/why-are-pickups-so-expensive-blame-chicken-tax> (stating that the 25% tax on imported trucks restricts competition and inflates prices); see also *Chicken Tax: What It Is, How It Got the Name*, INVESTOPEDIA, <https://www.investopedia.com/terms/c/chicken-tax.asp> (stating that with manufacturing in Mexico and Canada, autos subject to the 25% tax made be eligible for preferential treatment under the USMCA).

64. Griswold, *supra* note 63 (discussing the trade retaliation against the EU in the 1960s that resulted in the 25% tariff, which remains in force more than fifty years later, largely because small trucks produce most of Ford's and General Motors' profits and assists their dominance in U.S. markets).

event in Mexico in May 2024.⁶⁵

While the North American Free Trade Agreement (NAFTA)⁶⁶ imposed strict rules of origin on automotive trade designed to encourage auto and auto parts production in North America, the USMCA, which was negotiated by the Trump Administration but warmly endorsed by both the Biden Administration and most Congressional Democrats,⁶⁷ further strengthened the rules of origin with an obvious intent of encouraging auto and auto parts production not only in North America, but particularly in the United States.⁶⁸ The most important of the USMCA changes are as follows:

1. North American “regional value content” is increased from 62.5% to 75%;⁶⁹

65. See Ethan Wang and Brenda Goh, *China’s BYD to Launch Its First Truck at Event in Mexico*, REUTERS (May 7, 2024), <https://www.reuters.com/business/autos-transportation/chinas-byd-launch-first-pick-up-truck-event-mexico-2024-05-07> (reporting on unveiling event for BYD in Mexico scheduled for May 14, 2024).

66. See generally North American Free Trade Agreement Implementation, 19 U.S.C. § 3301 *et seq.* (preceding the USMCA, and effectively terminated in 2020 by its implementation, but required 62.5% North American content for vehicles to receive preferential treatment); see also *Automotive Products: Rules of Origin*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/trade/nafta/guide-customs-procedures/provisions-specific-sectors/automotive-products>.

67. See Courtney Vinopal, *These 4 Changes Helped Trump and Democrats Agree to the USMCA Trade Deal*, PBS NEWS (Jan. 16, 2020, 1:43 PM), <https://www.pbs.org/newshour/economy/making-sense/these-4-changes-helped-trump-and-democrats-agree-to-the-usmca-trade-deal> (revealing the negotiations between Democrats, including Pelosi, and the Trump Administration before coming together on the deal); see also Tyler Pager, *Biden Says He Supports USMCA, Citing Provisions for Labor*, BLOOMBERG (Dec. 20, 2019, 4:07 PM), <https://www.bloomberg.com/news/articles/2019-12-20/biden-says-he-supports-usmca-citing-provisions-for-labor> (reporting President Biden’s initial approval stemmed from pro-labor provisions in USMCA deal).

68. See *U.S.-Mexico-Canada Agreement: Autos and Auto Parts*, OFF. OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/sites/default/files/files/Press/fs/USMCA/USMCA-Autos_and_Auto_Parts.pdf (commenting on purpose of USMCA to increase U.S. investments in auto sector).

69. USMCA, *supra* note 44, ch. 4, annex 4-B; see also DAVID A. GANTZ, AN INTRODUCTION TO THE UNITED STATES-MEXICO-CANADA AGREEMENT: UNDERSTANDING THE NEW NAFTA 29 (2020); Report to Congress on the Operation of the United States-Mexico-Canada Agreement with Respect to Trade In Automotive Goods, Office of the United States Trade Representative (July 1, 2024), <https://ustr.gov/sites/default/files/2022%20USMCA%20Autos%20Report%20to%20Congress.pdf> (stating that the USMCA rules of origin require regional value

2. Certain “core” parts, the engine, transmission, body and chassis, axle, suspension system, steering system, and (where applicable) the advanced battery must themselves be originating;⁷⁰
3. 70% of the steel used in auto production after seven years must be “melted and poured” in North America;⁷¹
4. Significantly for Mexico, 40% of the content for cars and 45% of content for light trucks must be produced by enterprises that pay their workers at least \$16 per hour.⁷²

Complex rules govern the treatment of the core parts listed in item 2, above, that are produced in North America from a combination of North American and imported parts.⁷³ If, for example, a transmission worth \$1,000 is produced in Mexico, consisting of \$750 worth of North American components and \$250 worth of imported components, should the entire cost of the transmission be treated as North American regional value, or only 75%?⁷⁴ A dispute over this “rolling up” issue was referred to a USMCA state-to-state dispute settlement panel in early 2022 by Canada and Mexico.⁷⁵ Their interpretation of the rolling up rules prevailed in a unanimous panel decision in December 2022, but as of April 2024 has yet to be implemented by the United States.⁷⁶ The rules, applicable to both

content of 75%, rather than NAFTA’s 62.5%).

70. USMCA, *supra* note 44, annex 4-B, table A.2.

71. *Id.* annex 4-B, arts. 6, 8.

72. *Id.* annex 4-B, art. 7.

73. See Automotive Rules of Origin (U.S.–Mex.–Can.), USA-MEX-CDA-2022-31-01, Final Report, ¶¶ 49–53 (Dec. 14, 2022) [hereinafter Automotive Rules of Origin Arb. Final Report], <https://ustr.gov/sites/default/files/enforcement/FTA/USMCA%2031/USMCAutomotive%20ROO.pdf> (stating the tensions around rules of origin negotiations and importance of article 4.5 in delineating whether a good is considered originating or not).

74. See *id.* ¶¶ 3, 56 (explaining that regional value content (RVC), for an alternative staging regime, must be above 62.5% of net cost and above 75% by January 1, 2025, or five years after entry along with calculations of RVC for parts and labor).

75. See *id.* ¶¶ 106–10; 121–22, 169, 174, 179 (highlighting the differences between parties in calculating regional value content (RVC) based on different understandings of “originating”).

76. *Id.* ¶¶ 204–09; see also United States – Automotive Rules of Origin (U.S.–Mex.–Can.), USA-MEX-CDA-2022-31-01, U.S. Opening Statement, ¶¶ 36–38

combustion engine and EV-powered automobiles, provide that “core components” must be of North American origin.⁷⁷ The EV battery in particular must qualify in order for the vehicle to enjoy USMCA tariff-free entry into the United States.⁷⁸ The core components include advanced batteries, cells, modules/arrays, and assembled packs.⁷⁹ Where the key battery components are primarily sourced from outside North America, as is likely to be the case for most manufacturers at least until 2025 or 2026, the EV will not be able to qualify for duty-free entry.⁸⁰ Qualifying batteries would also avoid the 3.4% U.S. MFN duty on lithium-ion batteries.⁸¹ Additionally, under the “Inflation Reduction Act,” an EV tax credit provides a total of up to \$7,500 for new EV consumer purchases if the EV meets various requirements, including being assembled in North America and having a battery that meets specific sourcing requirements.⁸²

These automotive rules of origin may eventually be revised with more importing and exporting experience, possibly including the rules relating to EVs and EV batteries.⁸³ The USMCA incorporates a “Sunset Clause,” with the first review of the agreement mandated for mid-2026.⁸⁴ After nearly five years of EV and EV battery production

(Aug. 22, 2022), <https://ustr.gov/sites/default/files/enforcement/FTA/USMCA%2031/US.Autos.ROO.OS.8.2.22.pdf> (revealing the U.S. frustration with Canada’s and Mexico’s interpretations and the down-the-line Panel’s decision in their favor regarding RVC and “originating”).

77. USMCA, *supra* note 44, annex 4-B, arts. 1–3, table A.2.

78. *Id.* ch. 4, annex 4-B, table A.1.

79. *Id.* ch. 4, annex 4-B, table A.2.

80. U.S. Trade Representative, Report to Congress on the Operation of the United States-Mexico-Canada Agreement with Respect to Trade in Automotive Goods 13 (2024) [hereinafter Report to Congress on the Operation of the United States-Mexico-Canada Agreement], https://ustr.gov/sites/default/files/2024%20USMCA%20Autos%20Report%20to%20Congress_0.pdf (stating current lack of North American production of lithium-ion batteries and increasing investment that will not be materialized as product until after 2025).

81. See David Hamill et al., *How the USMCA Saves Costs for the Electric Mobility Supply Chain*, ARENTFOX SCHIFF (Jan. 13, 2022), <https://www.afslaw.com/perspectives/alerts/how-the-usmca-saves-costs-the-electric-mobility-supply-chain>.

82. Inflation Reduction Act, 26 U.S.C. § 45W (2022).

83. REPORT TO CONGRESS ON THE OPERATION OF THE UNITED STATES-MEXICO-CANADA AGREEMENT, *supra* note 80, at 17, 28.

84. See USMCA, *supra* note 44, art. 34.7.

in North America, the U.S., Canada, and Mexico (or just the United States) might wish to revisit the applicable rules of origin. If the United States still has not implemented the panel decision noted above,⁸⁵ it might be used as a bargaining chip to partially address Chinese motor vehicles produced or to be produced in Mexico for eventual export to the United States. Given the growing importance of EVs and EV batteries in automotive trade in North America and in world-wide modernization, such issues could well be on the table.⁸⁶

However, the USMCA rules of origin are most strictly applied by the United States to any of its trading partners, including South Korea, as noted above.⁸⁷ The stringent USMCA rules of origin are *not* a loophole. It would be neither wise nor necessary to make the USMCA rules more stringent unless steps are first taken to increase the 2.5% MFN duty to a higher level, an action that would have major adverse implications for North American auto producers and many of its trading partners, not just China.⁸⁸ The 2.5% auto and SUV tariff is simply not a significant trade restraint. The costs of complying with the USMCA rules of origin, including the administrative costs of demonstrating that the \$16 per hour labor cost requirement has been met, are at least as high as payment of the 2.5% duty, which experts have so opined.⁸⁹ Unless the vehicle produced in Mexico fails to meet the U.S. “substantial transformation” test, an unlikely event as discussed in Part IV below, the 2.5% MFN tariff is available to

85. Automotive Rules of Origin Arb. Final Report, *supra* note 73, ¶¶ 204–09; *id.* art. 31.18.

86. INT'L ENERGY AGENCY, GLOBAL EV OUTLOOK 2024 17–18, 26–29, 78–81 (2024), <https://www.iea.org/reports/global-ev-outlook-2024/trends-in-electric-vehicle-batteries>; *see also* Joshua P. Meltzer, *The U.S., Canada, and Mexico Need a More Coordinated Approach to Their Trade Relationships with China*, BROOKINGS (June 7, 2024), <https://www.brookings.edu/articles/the-us-canada-and-mexico-need-a-more-coordinated-approach-to-their-trade-relationships-with-china>.

87. LIANA WONG & KYLA H. KITAMURA, CONG. RSCH. SERV., IF12082, USMCA: AUTOMOTIVE RULES OF ORIGIN 2 (2023), <https://crsreports.congress.gov/product/pdf/IF/IF12082>.

88. *Id.*

89. *See The Costs of Automotive Rules of Origin in the USMCA*, OPPORTIMES (Jan. 9, 2022), <https://www.opportimes.com/the-costs-of-automotive-rules-of-origin-in-the-usmca> (“Other economists [outside the Congressional Budget Office] also argue that it would be more profitable for manufacturers of motor vehicles and auto parts to pay the MFN tariff of approximately 2.5%, rather than meet the cumbersome requirements of rules of origin.”).

traders.⁹⁰

III. RATIONALE FOR ESTABLISHING CHINESE (BYD) AUTO PRODUCTION IN MEXICO

Logical reasons exist for BYD and other major Chinese EV and EV battery manufacturers to establish offshore production facilities, despite the further overcapacity it would create.⁹¹ If one reviews the history of world auto production, it is evident that manufacturers have long followed a practice of building autos in or near major consuming countries.⁹² For example, Ford established its first factory in Europe (Ireland) in 1917.⁹³ Volkswagen has been making autos in Puebla, Mexico since 1967⁹⁴ and constructed its first U.S. facility (which is no longer operating) in 1978.⁹⁵ Honda has been producing autos for the U.S. market in Windsor, Canada since 1985 and in Marysville, Ohio since 1989.⁹⁶ Toyota began auto production in Georgetown, Kentucky in 1988.⁹⁷ Many other non-North American producers like BMW, Mercedes, Nissan, Kia, and Hyundai have decided to produce vehicles in or near the huge U.S. market.⁹⁸ Absent the complicated U.S.-China

90. *Id.*

91. Paul Wiseman, *Prospect of Low-Priced Chinese EVs Reaching U.S. from Mexico Poses Threat to Automakers*, ASSOCIATED PRESS (June 27, 2024, 7:05 AM), <https://apnews.com/article/china-vehicles-mexico-evs-automakers-tariffs-f526c5e52b95b624bb4b15d2038e289a>.

92. S. Simplay & Z. N. L. Hansen, *Offshoring of Engineering Services: A Case Study from the Automotive Industry*, 2014 ENG'G DESIGN PRAC. 1999, 2001.

93. *Ford Company Celebrates 100 Years in Ireland*, IRISH AM. MAG. (Apr. 21, 2017), <https://www.irishamerica.com/2017/04/ford-celebrates-100-years-in-ireland> (celebrating the legacy of the Ford company and its Irish roots).

94. *See The Volkswagen Plant in Puebla, Mexico: An Overview*, TETAKAWI (Aug. 10, 2023), <https://insights.tetakawi.com/volkswagen-plant-in-puebla> (noting the history behind Volkswagen manufacturing in Mexico and the desirability for Mexico as a location).

95. John Holusha, *Japan's Made-In-America Cars*, N.Y. TIMES (Mar. 31, 1985), <https://www.nytimes.com/1985/03/31/business/japan-s-made-in-america-cars.html>.

96. *See generally What We're Made Of and What We Make*, HONDA, <https://www.honda.com/operations/what-were-made-of-and-what-we-make> (noting the opening of the first U.S. Honda plant in 1970, where they assembled motorcycles).

97. *See Toyota Motor Manufacturing, Kentucky (TMMK)*, TOYOTA NEWSROOM, <https://pressroom.toyota.com/facility/toyota-motor-manufacturing-kentucky-tmmk>.

98. *Mexico – Country Commercial Guide: Automotive Industry*, U.S. DEP'T OF COM. INT'L TRADE ADMIN. (July 11, 2023), <https://www.trade.gov/country->

economic, political, and security relationships and almost universal knowledge that China is dumping solar panels, autos, and other products worldwide, the idea of a BYD factory in Mexico would probably have raised only a few eyebrows.⁹⁹

BYD's prospective Mexican facility, which I and many others assume is focused on eventual access to the U.S. market, is affected by many of the same business considerations as other foreign-owned manufacturers, plus several unique ones.¹⁰⁰ The latter—avoiding the 27.5% (or perhaps higher) duties upon entry of the vehicles to the U.S. market—is clearly a major driving force.¹⁰¹ Other incentives include the desirability of benefitting from the \$7,500 IRA U.S. purchaser subsidy for vehicles assembled in North America and which meet the battery and related requirements.¹⁰² Given the limitations of the Inflation Reduction Act, which controversially excludes Korean, Japanese, EU, and other cars not assembled in North America from that subsidy, BYD would only be following a recent decision by Kia/Hyundai in establishing factories in North America to manufacture EVs.¹⁰³

Other benefits that are hardly unique to BYD from Mexican production, particularly where production in the United States is not a viable option legally or politically, include some very limited protections against unfair trade actions, a driving factor for Japanese auto companies decades ago.¹⁰⁴ These include shorter supply chains at

commercial-guides/mexico-automotive-industry.

99. See Wiseman, *supra* note 91.

100. Jim Motavalli, *Are Chinese EVs From Mexico A Threat To The U.S.?*, AUTOWEEK (Mar. 12, 2024, 11:17 AM), <https://www.autoweek.com/news/a60164799/chinese-evs-from-byd-in-mexico>.

101. See Wiseman, *supra* note 91.

102. *China Looking to Build EV Factories in Mexico to Avoid U.S. Tariffs on Its Imports*, INST. FOR ENERGY RSCH. (Feb. 21, 2024), <https://www.instituteforenergyresearch.org/international-issues/china-looking-to-build-ev-factories-in-mexico-to-avoid-u-s-tariffs-on-its-imports>.

103. Umar Shakir, *Kia Plans to Build EVs in the U.S. to Comply with New Federal Tax Credit*, THE VERGE (Sep. 21, 2022, 10:58 AM), <https://www.theverge.com/2022/9/21/23364927/kia-ev-manufacture-us-tax-credit-hyundai> (alleging that Hyundai, Kia's affiliate, is reportedly building an EV and EV battery plant in Savannah, Georgia to open in 2025).

104. Masao Satake, *Trade Conflicts Between Japan and the United States Over Market Access: The Case of Automobiles and Automotive Parts* 12 (Austl. Nat'l

least for shipment of finished vehicles, protection against another catastrophic event such as COVID-19 that closes down China or international shipping for an extended period of time, lower hourly wages in Mexico than in China,¹⁰⁵ and proximity to other major Western hemisphere markets.¹⁰⁶ It is difficult to know in the absence of inside information which of these factors are influencing BYD, but one can reasonably assume that BYD is knowledgeable about what other global auto makers have done in recent decades about diversifying production away from their home countries.

IV. CHALLENGES FOR BYD IN ENTERING THE U.S. MARKET

Under current law and regulations, any attempts by BYD or other Chinese automakers to export cars or SUVs to the United States, whether EV or conventional, are subject to considerable constraints that do not apply to other Mexican auto and auto parts producers.¹⁰⁷ This section examines the options and the current and probable future constraints. Throughout the analysis, it is worth keeping in mind that members of the U.S. government, including both the executive and legislative branches, exhibit a strong desire to devise one or more mechanisms based on both unfair trade and national security concerns to exclude BYD and other Chinese vehicles from the U.S. market.¹⁰⁸

Univ. Pac. Econ. Papers No. 310, 2000), <https://openresearch-repository.anu.edu.au/items/b68b5671-3c54-456e-b60a-cca58e0cf705>.

105. See *Manufacturing Wages in Mexico vs. China*, TETAKAWI (June 7, 2024), <https://insights.tetakawi.com/manufacturing-wages-mexico-vs-china> (suggesting that in 2020, manufacturing labor costs in China averaged \$6.50 per hour while those in Mexico averaged \$4.82 per hour).

106. BERNARD SWIECKI & DEBBIE MARANGER MENK, *THE GROWING ROLE OF MEXICO IN THE NORTH AMERICAN AUTOMOTIVE INDUSTRY 19* (Center for Automotive Rsch. 2016), <https://www.cargroup.org/wp-content/uploads/2017/02/The-Growing-Role-of-Mexico-in-the-North-American-Automotive-Industry-Trends-Drivers-and-Forecasts.pdf>.

107. *China Looking to Build EV Factories in Mexico to Avoid U.S. Tariffs on Its Imports*, *supra* note 102.

108. Biden-Harris Administration Takes Action, *supra* note 52 (revealing the White House's policy towards combatting unfair Chinese trade practices regarding autos); Tom Krisher & Ken Moritsugu, *Small, Well-Built Chinese EV Called the Seagull Poses a Big Threat to the U.S. Auto Industry*, ASSOCIATED PRESS (May 13, 2024, 4:20 PM), <https://apnews.com/article/china-byd-auto-seagull-auto-ev-cae20c92432b74e95c234d93ec1df400>.

A. EXISTING U.S. TARIFF TREATMENT

An auto manufacturer in Mexico would normally have two basic options for exporting its vehicles to the United States. If the vehicle were to meet the stringent USMCA rules of origin as set out in Part II, above, the vehicle would enter the U.S. market duty-free, and if, as an EV, the vehicle and battery complied with the IRA requirements, purchasers would enjoy the U.S. subsidy of up to \$7,500, at least until the IRA is amended to exclude such vehicles.¹⁰⁹ Alternatively, if the vehicle were not fully compliant, either because the requirements for EV batteries and components are not met (as is the case with some other EVs currently being imported into the United States from Mexico) or because of a failure to meet the 75% regional value component and/or the \$16 per hour requirements, the vehicles would normally enter the United States at the 2.5% MFN tariff rate, assuming the manufacturing process resulted in a “substantial transformation.”¹¹⁰ Given the low level of this tariff, BYD or other Chinese vehicles subject to such a tariff would be highly competitive in the U.S. market; the 2.5% tariff is not a significant restraint on U.S. sales of most imported autos and SUVs, whether from China or elsewhere.¹¹¹

This conclusion that a substantial transformation conferring Mexican origin on the autos would have taken place is reinforced by U.S. Customs regulations, which provide in pertinent part:

109. 26 U.S.C. § 45W (2022).

110. See *Substantial Transformation*, U.S. INT'L TRADE COMM'N, <https://www.usitc.gov/elearning/hts/media/2017/SubstantialTransformation.pdf> (“As developed by U.S. courts (see 19 U.S. Code § 1304), the term [substantial transformation] means that the item underwent a fundamental change (normally as a result of processing or manufacturing in the country claiming origin) in form, appearance, nature, or character, which adds to its value an amount or percentage that is significant in comparison to the value which the item (or its components or materials) had when exported from the country in which it was first made or grown. Usually a new article of commerce—normally one with a different name—is found to result from any process that Customs decides has brought about a “substantial transformation” in the pre-existing elements.”).

111. See M. ANGELES VILLARREAL ET AL., CONG. RSCH. SERV., IF11387, USMCA: MOTOR VEHICLE PROVISIONS AND ISSUES 1 (2021), <https://crsreports.congress.gov/product/pdf/IF/IF11387> (analyzing the impact of tariff rates for imported vehicle markets under the USMCA).

Country of origin. “Country of origin” means the country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the “country of origin” within the meaning of this part; however, for a good of a NAFTA or USMCA country, the marking rules set forth in part 102 of this chapter (hereinafter referred to as the part 102 Rules) will determine the country of origin.¹¹²

Also:

The country of origin of the good is “the country or countries of origin of the single material that imparts the essential character to the good,” in the present case the country [Mexico] where the automobile obtains its essential character. . . .¹¹³

Here, the country where the automobile obtains its “essential character,” where a collection of parts and materials becomes an automobile, is Mexico.¹¹⁴ While it is conceivable that Customs and Border Protection would devise an approach that treated an automobile assembled in Mexico primarily from hundreds or thousands of Chinese-origin parts as being of Chinese rather than of Mexican origin, that would probably be limited to a situation where complete knocked down or semi-knocked down automobile kits (CKD) were being imported into Mexico for assembly there (in my view a very unlikely scenario).¹¹⁵ (Since this approach to Chinese vehicle assembly abroad has been strongly urged by the Chinese government, it could, if followed, provide a basis for denying substantial transformation.)¹¹⁶ CBP might take the view, although

112. 19 C.F.R. § 134.1(b) (2024) (in the present example the country (Mexico) is where the automobile obtains its “essential character”).

113. 19 C.F.R. § 102.11(b)(1) (2024).

114. 19 C.F.R. § 102.18(b) (2024).

115. See David Shepardson, *U.S. Should Block Cheap Chinese Auto Imports From Mexico, U.S. Makers Say*, REUTERS (Feb. 23, 2024) [hereinafter Shepardson, *U.S. Should Block Cheap Chinese Imports*], <https://www.reuters.com/business/autos-transportation/us-should-block-low-cost-chinese-automaker-imports-mexico-says-manufacturers-2024-02-23> (discussing industry concerns about Chinese auto imports).

116. *China Warns Carmakers of Risks in Building Plants Overseas, Sources Say*, REUTERS (Sept. 12, 2024, 7:12 AM), <https://www.reuters.com/business/autos-transportation/china-warns-carmakers-risks-building-plants-overseas-sources-say->

questionable if a significant series of operations is being performed, that such kits once assembled do not meet the definition of “substantial transformation,” and thus remain Chinese products for origin purposes.¹¹⁷ Such a conclusion would likely be subject to a successful court challenge in the United States, given the substantial changes that typically take place in automobile assembly factories, but in theory could be sustainable during very early stages of Mexican production if BYD were to follow Chinese government guidance.¹¹⁸ As BYD and other manufacturers develop more sophisticated manufacturing processes in Mexico, relying on a mix of imported and Mexico and Canada and U.S.-produced parts, this approach would likely become untenable for U.S. authorities, absent legislative action.¹¹⁹ More likely, BYD would not seek to initiate export sales to the United States at least until they were satisfied that the Mexican operations met the U.S. substantial transformation test.¹²⁰

B. U.S. (AND MEXICAN) TRADE REMEDIES

In the case of Mexican vehicles assembled, at least initially, from a substantial quantity of Chinese parts and components (as seems likely), the vehicles could be subject to an anti-circumvention action, but only *after* an outstanding U.S. antidumping order or countervailing duty existed.¹²¹ This aspect of U.S. unfair trade laws effectively determines, after investigation, that an auto assembled in a third country, in this instance Mexico, from mostly imported parts and components is not, in this example, a “Mexican” product at all.¹²² Rather, it is treated for U.S. law purposes as if the vehicle were imported directly from China.¹²³ An analogous circumvention action

2024-09-12.

117. See *Substantial Transformation*, *supra* note 110 (providing an analysis on substantial transformation criteria and how that affects imported goods).

118. Cf. Shepardson, *U.S. Should Block Cheap Chinese Imports*, *supra* note 115 (discussing the possible legal challenges and early-stage production issues in auto assembly).

119. See Solomon, *BYD Looking for Mexico Location*, *supra* note 26 (addressing BYD’s plans and the possible effects on U.S. rules).

120. See *id.* (reporting on BYD’s strategy and the importance of U.S. regulatory compliance).

121. 19 U.S.C. § 1673e(a) (1994).

122. 19 U.S.C. § 1677j(b) (1994).

123. *Id.*

was brought several years ago against solar panels produced in Vietnam, Malaysia, Cambodia, and Thailand with primarily Chinese parts and components.¹²⁴ In that case, the Department of Commerce ruled that such solar panels were effectively Chinese and thus subject to the same antidumping and countervailing duties when imported into the United States as if they had been imported directly from China.¹²⁵

At the present time there is *no* outstanding antidumping or countervailing duty order against autos imported into the United States from China, so the anti-circumvention approach probably could not be used until such a case were completed.¹²⁶ Such a proceeding could require extensive time for a final determination, even though demonstrating dumping or subsidization to the satisfaction of the Commerce Department is probably achievable.¹²⁷ One potentially more difficult question would be whether there is currently a sufficient volume of U.S. auto imports from China to meet Commerce Department requirements for assessing the “export price.”¹²⁸ A dumping or countervailing duty action against Chinese vehicles being exported directly to the United States, even if the numbers are currently very small, may still be worth exploring.¹²⁹ For such an

124. See Press Release, U.S. Dep’t of Com., Dep’t of Commerce Issues Final Determination of Circumvention Inquiries of Solar Cells, and Modules from China (Aug. 18, 2023), <https://www.commerce.gov/news/press-releases/2023/08/departments-commerce-issues-final-determination-circumvention-inquiries> (detailing the findings of the Department of Commerce on the circumvention inquiries).

125. See *id.* By Presidential Proclamation of June 6, 2022, collection of duties was stayed until June 2024.

126. See *Data Visualization: ADCVD Proceedings*, U.S. DEP’T OF COM. INT’L TRADE ADMIN., <https://www.trade.gov/data-visualization/adcvd-proceedings> (providing a case example where Chinese components in other countries solar panels are subject to the same duties).

127. See Aarian Marshall & Will Knight, *The White House Warns Cars Made in China Could Unleash Chaos*, WIRED (Feb. 29, 2024), <https://www.wired.com/story/china-cars-national-security-threat-investigation> (quoting Lael Brainard: “For years China has employed an array of subsidies and protections to build massive capacity in EV production.”).

128. See KAREN M. SUTTER, CONG. RSCH. SERV., IF10385, CHINA’S STATUS AS A NONMARKET ECONOMY (NME) 2 (2019), <https://crsreports.congress.gov/product/pdf/IF/IF10385> (discussing related economic implications and asking whether the United States currently meets the “export price” standard).

129. See *Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise*, 72 Fed. Reg. 29302, 29303 (May

action to move forward, a material injury or threat of material injury determination would be required under U.S. law and WTO rules.¹³⁰ U.S. law makes this achievable, as it provides not only for existing material injury as a result of actual imports of unfairly traded products, but also for determining a threat of material injury from such imports, even where U.S. unfair trade of the Chinese imports is not yet significant.¹³¹ Without getting deeper into the intricacies of U.S. antidumping law, it is noted that several methods exist for determining the “normal price,” that is the price that should be the basis for sales in the domestic market, including situations where the domestic price is distorted by sales at below cost of production, permitting a “constructed value” that analyzes the cost of materials, labor, and overhead, as well as normal profit, to determine what the domestic price *should have been*.¹³² Another problem with this approach, but perhaps not a significant one, is that it takes time. While a preliminary dumping determination could be issued within 140 days,¹³³ final determinations require nearly a year and are appealable to the Court of International Trade and the Court of Appeals for the Federal Circuit.¹³⁴ Still, this option is sufficiently promising that initiating it could be considered, as significant volumes of Chinese autos imported into the United States directly or indirectly through Mexico are

25, 2007) (discussing how U.S. antidumping and countervailing duty actions against China are facilitated by the use of “non-market economy” calculations, which make determinations of high dumping margins easier to achieve by U.S. petitioners).

130. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 art. 3.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201, 204; see also 19 U.S.C. § 1677(7) (2017).

131. 19 U.S.C. § 1677(7)(F).

132. See *Antidumping and Countervailing Duty Frequently Asked Questions*, DEP'T OF COM. INT'L TRADE ADMIN., <https://www.trade.gov/antidumping-and-countervailing-duty-frequently-asked-questions?anchor=content-node-t7-field-lp-region-2-3> (explaining the concept of dumping, in that it occurs when a foreign producer sells a product in the United States at a price that is below that producer's sales price in the country of origin (“home market”), or at a price that is lower than the cost of production), and noting that constructed value for determining dumping margins includes certain costs, such as cost of producing the goods, including materials, labor, overhead and a reasonable profit).

133. 19 C.F.R. § 351.204 (2024).

134. 19 C.F.R. § 351.210 (2024).

probably at least several years off under the worst of circumstances.¹³⁵

Recent changes in Department of Commerce anti-dumping and countervailing duty regulations, may, depending on how they are interpreted by Commerce, make it possible to bring a countervailing duty action directly against Chinese autos produced in Mexico without going through the cumbersome, multi-step process described above.¹³⁶ Under the new regulations, a 1988 restriction that has prevented Commerce from initiating a countervailing duty investigation against transnational subsidies has been removed.¹³⁷ In theory at least, such regulations would permit Commerce to initiate a “transnational” subsidy investigation, e.g., Chinese subsidies provided to Chinese auto plants operating in Mexico.¹³⁸

Dumping and countervailing duty actions could also be brought against BYD autos produced in Mexico under Mexico’s antidumping laws by the “interested parties” eligible to bring such an action before Mexican administrative authorities, including other Mexican auto producers and/or groups of workers, if they were so inclined.¹³⁹ Such interested parties might include U.S., European, and other foreign-owned auto producers in Mexico.¹⁴⁰ The petitioners would have to demonstrate that the vehicles were being sold at lower adjusted prices in Mexico than in China, at less than fully allocated cost of production,

135. *Id.*

136. See Regulations Improving and Strengthening the Enforcement of Trade Remedies Through the Administration of Antidumping and Countervailing Duty Laws, 89 Fed. Reg. 20766, 20826 (Apr. 24, 2024) (the final regulations were effective April 24, 2024); see also *id.* at 20841 (listing changes to be made to 12 C.F.R. § 351).

137. See Brett Fortnam, *Commerce Finalizes Sweeping Changes to U.S. Trade Remedy Regulations*, WORLD TRADE ONLINE (May 22, 2024, 9:00 AM), <https://insidetrade.com/daily-news/commerce-finalizes-sweeping-changes-us-trade-remedy-regulations> (discussing the removal of the restriction on countervailing duty investigations).

138. 19 C.F.R. § 351 (2024).

139. See *Compendium of Antidumping and Countervailing Duty Law in the Western Hemisphere – Mexico*, FREE TRADE OF THE AM., www.ftaa-alca.org/Ngroups/NGSU/Publications/english/MEX.asp (explaining that an investigation shall be initiated ex officio or at request of an interested party, meaning a “natural and legal person producing goods identical to or like the subject merchandise”).

140. See *id.* (sharing what parties could bring dumping and countervailing duty actions against BYD autos produced in Mexico).

or below “constructed value.”¹⁴¹ One disadvantage of this option is that while Mexico has historically been a major user of the antidumping laws,¹⁴² the government seldom has brought countervailing duty actions,¹⁴³ presumably because of the administrative complexities of doing so.¹⁴⁴

Alternatively, if the members of the Mexico auto industry choose not to seek Mexican government action, and should the United States believe that Chinese auto parts and components were being exported to Mexico at less than fair value—meaning the adjusted price in China or the cost of production—the United States could request that Mexico, under WTO rules, initiate an antidumping action in Mexico on behalf of the United States.¹⁴⁵ Such actions, however, have been rare under the WTO’s Antidumping Agreement, and are not available under the Agreement on Subsidies and Countervailing Measures.¹⁴⁶ Even should the government of Mexico agree to voluntarily undertake such an investigation, it would require significant time to complete and would be made more difficult by a number of complications, including the fact that automakers in Mexico already import significant quantities of auto parts for use in many different vehicles,

141. See *Antidumping and Countervailing Duty Frequently Asked Questions*, *supra* note 132 (explaining that petitioners must show that vehicles are sold at a lower price in Mexico than in China, below the cost of production).

142. See *Anti-Dumping Investigations by Reporting Member, 01/01/1995 – 30/06/2023*, WTO, https://www.wto.org/english/tratop_e/adp_e/AD_InitiationsByRepMem.pdf (providing historical context on Mexico’s use of anti-dumping laws, 178 since 1995).

143. See *Countervailing Duty Investigations by Reporting Member, 01/01/1995 – 30/06/2023*, WTO, https://www.wto.org/english/tratop_e/scm_e/CV_InitiationsByRepMem.pdf (discussing how, although Mexico is a frequent user of anti-dumping laws, the country rarely initiates countervailing duty actions).

144. Regulations Improving and Strengthening the Enforcement of Trade Remedies Through the Administration of Antidumping and Countervailing Duty Laws, 89 Fed. Reg. at 20826.

145. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, *supra* note 130, art. 14.

146. *Cf. Disputes by Agreement: Anti-Dumping*, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm (explaining how uncommon such actions under the WTO’s Antidumping Agreement are); Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1-A, 1869 U.N.T.S. 14.

with volumes increasing rapidly in recent years.¹⁴⁷ Consequently, this is unlikely to be a viable option for the United States.

A different alternative would be the initiation of a U.S. safeguard investigation. Under the safeguard statute,¹⁴⁸ domestic industries that have been seriously injured or threatened with serious injury by increased imports may petition the U.S. International Trade Commission (USITC) for relief.¹⁴⁹ If the USITC determines that a product is being imported into the United States such as to be a “substantial cause of serious injury, or threat thereof,” it recommends relief to the President, which may include increased tariffs, quotas, or a combination of both. The final decision is up to the President.¹⁵⁰ While the WTO legality of safeguard remedies has been thrown into doubt by a series of WTO Appellate Body cases, the remedies are still frequently used by many members.¹⁵¹ The use of safeguard measures by the USMCA governments under national laws and WTO rules is explicitly authorized by the USMCA.¹⁵² Safeguard actions, unlike those relating to dumping and subsidies, require no demonstration of unfair trade practices, only a finding of injury or, in this instance, threat of serious injury.¹⁵³ While the “serious injury” safeguards standard is stricter than “material injury” under the dumping and countervailing duty laws, demonstrating threat of serious injury in a USITC proceeding should be achievable.¹⁵⁴ Proactive filing of the case

147. See Olivia Tan Jia Yi, *Chinese Auto Firms Follow Tesla to Mexico, and From There to the U.S.*, THE CHINA PROJECT (Jul. 3, 2023), <https://thechinaproject.com/2023/07/03/chinese-auto-firms-follow-tesla-to-mexico> (indicating that Mexican imports of Chinese auto parts increased by 35% from 2020 to 2022, in part to service Chinese-owned Mexican auto parts factories).

148. See *Understanding Safeguard Investigations*, U.S. INT’L TRADE COMM’N, https://www.usitc.gov/press_room/us_safeguard.htm (discussing how an option of initiating a U.S. safeguard investigation would work under the safeguard statute).

149. See *id.* (noting how relief can be petitioned if domestic industries are seriously injured or threatened by increased imports).

150. See *id.* (emphasizing the President has the final say in such situations).

151. See Press Release, WTO, Members Review Safeguard Actions, Address Increased Use of Measures (Oct. 25, 2021), https://www.wto.org/english/news_e/news21_e/safe_25oct21_e.htm (discussing how safeguard remedies are still in frequent use despite concerns about its legality).

152. USMCA, *supra* note 44, art 102.

153. *Id.* art 10.3.

154. See *About Import Injury Investigations*, U.S. INT’L TRADE COMM’N, https://www.usitc.gov/trade_remedy.htm (recognizing the higher standard but

could ensure that it would be concluded in about a year, well before imports of Chinese/Mexican EVs were imminent.¹⁵⁵

C. UNILATERAL INCREASE OF U.S. TARIFFS

Increased U.S. tariffs on vehicles imported from China or Chinese vehicles assembled in Mexico and imported into the United States could be imposed in a relatively brief period of time, without regard to whether any Chinese-owned car producers were currently exporting cars from Mexico in anticipation of possible future imports.¹⁵⁶ Even without new legislation, authority exists to raise tariffs under existing legislation, the 1962 Trade Expansion Act,¹⁵⁷ as discussed in the next subsection. The 100% tariffs imposed by the Biden administration on EV imports directly from China, announced in May 2024,¹⁵⁸ are legally based on Section 301 of the Trade Act of 1974, as amended.¹⁵⁹

The scope of coverage of Section 301 is broad: with Section 301(a), action may be taken against a violation that denies U.S. rights under a trade agreement.¹⁶⁰ Under Section 301(b), coverage extends to an “unjustifiable” action that “burdens or restricts” U.S. commerce or an “unreasonable” or “discriminatory” action that “burdens or restricts” U.S. commerce.¹⁶¹ The statute defines “commerce” to include goods,

noting proving a threat in USITC cases is possible).

155. *See id.* (suggesting that an early filing could lead to a timely conclusion).

156. *See* RACHEL F. FEFER, CONG. RSCH. SERV., IF10667, SECTION 232 OF THE TRADE EXPANSION ACT OF 1962 1 (2022), <https://crsreports.congress.gov/product/pdf/IF/IF10667> (emphasizing the tariffs could be quickly applied to Chinese cars even if they are not yet being imported).

157. *See id.* (noting tariffs can be increased under current law).

158. Press Release, White House Briefing Room, FACT SHEET: President Biden Takes Action to Protect American Workers and Businesses from China’s Unfair Trade Practices (May 14, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/05/14/fact-sheet-president-biden-takes-action-to-protect-american-workers-and-businesses-from-chinas-unfair-trade-practices>.

159. 19 U.S.C. § 2411 (1979); *see also* ANDREE B. SCHWARZENBERG, CONG. RSCH. SERV., IF11346, SECTION 301 OF THE TRADE ACT OF 1974 1 (2020), <https://crsreports.congress.gov/product/pdf/IF/IF11346> (suggesting the Biden Administration’s approach is practical and works well).

160. *See id.* (discussing how Section 301 can be used to address a wide range of violations).

161. *See id.* (showing that Section 301(b) addresses actions that unfairly affect U.S. trade).

services, and investment.¹⁶² Section 301 was used by the Trump Administration in 2017 to impose penalty tariffs of 7.5% to 25%, totaling about \$370 billion, based on a finding that China's intellectual property-related practices are unreasonable or discriminatory and "burden or restrict U.S. commerce."¹⁶³

Given the current political climate in Congress, a tariff increase, either under a new law, existing presidential authority, or Section 301, would likely receive broad bipartisan support; the major issue would probably be "how high?"¹⁶⁴ For example, on April 9, 2024, nine Democratic members of Congress sent a letter to Commerce Secretary Raimondo and U.S. Trade Representative Tai urging the Administration to "take decisive action to block the entry of Chinese automobiles into the American market" through, inter alia, an expedited review of existing Section 301 tariffs on Chinese goods (as noted above).¹⁶⁵ Whether Mr. Trump's threat, if elected, to impose 100% tariffs on Chinese cars made in Mexico and imported into the United States¹⁶⁶ should be taken seriously remains to be seen, but probably cannot be ignored, assuming the Biden administration has not already done so.

While Ford, General Motors, Polestar, and Volvo import a few models for sale in the United States that are produced in China, these imports were obviously insufficient to derail the tariff increase.¹⁶⁷ It is

162. See *id.* (explaining how commerce in this context is specific to terms).

163. See *id.* at 2 (providing an overview of Section 301).

164. See Letter from Senators Jon Ossoff, Sherrod Brown, Marco Rubio, Raphael G. Warnock to President Joseph Biden (Jan. 26, 2024), https://www.brown.senate.gov/imo/media/doc/240126_solar_letterpdf.pdf (indicating bipartisan support for the Biden Administration to increase and enforce tariffs on Chinese solar products under Section 301).

165. See Letter from Congresswoman Debbie Dingell et al. to Secretary Gina Raimondo and Ambassador Katherine Tai (Apr. 9, 2024), https://debbiedingell.house.gov/uploadedfiles/dingell_letter_to_ustr_commerce_on_chinese_vehicles.pdf (indicating Democratic Congressional support for a tariff increase and a recognition of the threat posed by Chinese automotive experts).

166. See Hadriana Lowenkron, *Trump Threatens 100% Tariffs on Chinese Cars Made in Mexico*, BLOOMBERG (Mar. 16, 2024), <https://www.bloomberg.com/news/articles/2024-03-16/trump-threatens-100-tariffs-on-mexican-made-cars-by-china-firms> (outlining a number of Mr. Trump's recent threats against Chinese-manufactured products).

167. See Julie Coleman, *Cramer Says Ford and General Motors are Big Winners After Biden Raises Tariffs on Chinese Imports*, CNBC (May 14, 2024, 7:17 PM),

possible that some would be concerned with the high likelihood of Chinese retaliation against U.S. auto producers making and selling cars in China, such as Tesla, and retaliatory duty increases, as was the case when the Phase One agreement went into effect in 2020.¹⁶⁸ An increase in U.S. auto tariffs applicable only to Chinese products would likely be inconsistent with the MFN requirements applicable to all WTO members, including China.¹⁶⁹

While there are many exceptions to MFN treatment under GATT, tariff increases other than on the basis of an antidumping or countervailing order or safeguards are generally prohibited.¹⁷⁰ The U.S. promised the EU in 2000 that it would no longer use the broad Section 301(b), but only Section 301(a) for violation of trade agreements, and would apply trade sanctions only after the full WTO dispute settlement procedure.¹⁷¹ A challenge by China in the WTO's Dispute Settlement Body might well be brought, but since the WTO's Appellate Body has not been functional since December 2019, as a practical matter a panel decision in favor of China, even if rendered, cannot be implemented with the trade sanctions that would otherwise be authorized by the WTO's Dispute Settlement Body; once a panel report is appealed the action is indefinitely stalled.¹⁷² Reforms have

<https://www.cnbc.com/2024/05/14/cramer-ford-and-gm-are-winner-after-bidens-chinese-import-tariffs.html> (noting that Ford and General Motors are likely to benefit from the Biden Administration's tariff increase on Chinese EVs).

168. See Keith Bradsher, *With Higher Tariffs, China Retaliates Against the U.S.*, N.Y. TIMES (May 13, 2019), <https://www.nytimes.com/2019/05/13/business/trump-trade-china.html> (detailing China's decision to raise tariffs on American goods days after the Trump Administration introduced tariffs on Chinese goods).

169. General Agreement on Tariffs and Trade art. 1(1), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

170. See *id.* art. 6 (preventing the imposition of an antidumping duty greater than the margin of dumping).

171. See generally Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WTO Doc. WT/DS152/R (adopted Jan. 25, 2000) (detailing a dispute between European Communities and the United States over U.S. legislation allowing the USTR to withdraw or suspend concessions and impose duties in response to the imposing of trade barriers).

172. See Understanding on Rules and Procedures Governing the Settlement of Disputes art. 16(4), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 (“If a party has notified its decision to appeal, the report by the panel *shall not be considered for adoption* by the DSB until after completion of the appeal. This adoption procedure is without

been under discussion for several years at the WTO, but to date no progress has been made in resolving the more than four-year-old deadlock.¹⁷³

Increasing the MFN tariff on Chinese company-produced autos imported from Mexico that do not meet USMCA rules of origin—and would thus normally be subject to the 2.5% MFN duty—would also be a violation of Mexico's rights under GATT, and troubling to a country heavily dependent on U.S. exports.¹⁷⁴ However, for political reasons, and due to Mexico's heavy dependence on trade with the United States for its exports,¹⁷⁵ a WTO action brought by Mexico would, in my view, be very unlikely. The U.S. action would also arguably be a violation of the USMCA, which requires national treatment of goods from another party,¹⁷⁶ but it seems no more likely that Mexico would seek remedial action under the USMCA.¹⁷⁷ One could also envision demands by the United States, likely without clear legal justification, that Mexico block all exports of Chinese-made vehicles and possibly key assemblies from entry into the United States, or even that Mexico block new FDI by Chinese-owned auto firms in Mexico, either initially or for expanded production.¹⁷⁸ It is difficult to predict how such requests would be vetted, but it is worth

prejudice to the right of Members to express their views on a panel report.” [emphasis supplied]).

173. See Draft Decision, *Draft Ministerial Decision on Dispute Settlement Reform*, WTO Doc. No. WT/MIN/W/22 (Mar. 1, 2024) (recommitting to a well-functioning and accessible dispute settlement system).

174. See generally GATT, *supra* note 166, art. 1 (conveying treating imports differently would be a violation); see General Agreement on Tariffs and Trade 1994 § 1(a), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 154 (conveying that GATT (1994) adopted the GATT (1947)'s provisions as part of Marrakesh Agreement and that Mexico is a signatory).

175. See *Mexico Exports*, TRADING ECON., <https://tradingeconomics.com/Mexico/exports> (showing that the United States is the major destination of Mexico's exports).

176. USMCA, *supra* note 44, art 2.3.

177. *Id.* art 10.2.

178. See Diego Oré, *Exclusive: Mexico, Facing U.S. Pressure, Will Halt Incentives to Chinese EV Makers*, REUTERS (Apr. 18, 2024, 6:32 AM), <https://www.reuters.com/business/autos-transportation/mexico-facing-us-pressure-will-halt-incentives-chinese-ev-makers-2024-04-18> (reporting on U.S. efforts to pressure Mexico to stop offering incentives to Chinese automakers for EVs).

noting that the Mexican government and state governments, like those elsewhere in the world, have a practice of encouraging new foreign investments that are likely to generate employment, technology transfer, and exports.¹⁷⁹ All of these U.S. actions would presumably be subject to extensive bilateral consultations at the highest levels of the U.S. and Mexican governments.¹⁸⁰

There are, however, reports that Mexico's Lopez-Obrador Government promised the U.S. government that it will not offer fiscal incentives to Chinese automakers such as BYD.¹⁸¹ The intentions of the United States and Mexico, and Canada as well, were indirectly confirmed at a meeting of the USMCA Free Trade Commission on May 22, 2024, where the three parties agreed, *inter alia*:

to jointly expand their collaboration on issues related to non-market policies and practices of other countries, which undermine the Agreement and harm U.S., Canadian, and Mexican workers, including in the automotive and other sectors.¹⁸²

While observers indicate that EV manufacturing in Mexico by Chinese enterprises would be a key issue in the first six-year review of the USMCA (scheduled for 2026),¹⁸³ the seriousness of U.S.

179. See Michael W. Goldman et al., *An Introduction to Direct Foreign Investment in Mexico*, 5 IND. INT'L & COMP. L. REV. 101, 116–17 (1994) (listing a number of limitations foreign investors face when controlling capital stock of a Mexican enterprise).

180. See Oré, *supra* note 178 (reporting that Mexican officials went to Washington to assuage fears over Chinese investment in Mexico, but that Washington remains wary).

181. See Jonathan M. Gitlin, *Chinese EV Makers Won't Get Subsidies From Mexico After U.S. Pressure*, ARSTECHNICA (Apr. 18, 2024, 1:38 PM), <https://arstechnica.com/cars/2024/04/chinese-ev-makers-wont-get-subsidies-from-mexico-after-us-pressure> (reporting that Mexico succumbed to U.S. pressure and will not offer incentives to Chinese automakers).

182. Press Release, Off. of U.S. Trade Representative, United States, Canada, and Mexico Joint Statement of the Fourth Meeting of the USMCA//CUSMA//T-MEC Free Trade Commission (May 23, 2024), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/may/united-states-canada-and-mexico-joint-statement-fourth-meeting-usmca-cusma-t-mec-free-trade-commission>.

183. See Oliver Ward, *Analysts: Chinese EV Investments in Mexico to Feature Prominently in USMCA Review*, WORLD TRADE ONLINE (May 24, 2024, 10:01 AM), <https://insidetrade.com/daily-news/analysts-chinese-ev-investments-mexico-feature-prominently-usmca-review> (suggesting that because of growing U.S.

concerns suggests that the issue will be discussed among government leaders multiple times before 2026. The Mexican President, Claudia Sheinbaum, seems highly likely to continue Lopez-Obrador's policies in many areas, including this one, possibly with new constitutional measures that further reduce the attractiveness of Mexico for direct foreign investment.¹⁸⁴ Such changes could discourage FDI from other sources, but probably not from Chinese enterprises.¹⁸⁵ The content of Lopez-Obrador's conversations with U.S. officials about their concerns with Chinese auto assembly plants in Mexico are confidential.¹⁸⁶ However, President Sheinbaum is well aware that 80% of Mexican exports depend on the continuing goodwill of the United States.¹⁸⁷ Even so, BYD could build the plant without federal government incentives, particularly if they were to receive incentives from a state government.¹⁸⁸

D. NATIONAL SECURITY

Chinese vehicles, whether imported directly from China or indirectly through third countries, could also be banned by the United

concern, the USMCA review will be dominated by a discussion of Chinese EVs).

184. See Natalie Kitroeff, *What to Know About Claudia Sheinbaum, Mexico's Newly Elected President*, N.Y. TIMES (June 3, 2024), <https://www.nytimes.com/2024/06/03/world/americas/mexico-claudia-sheinbaum-president.html> (quoting Sheinbaum: "If you think the same as another person [Lopez Obrador], it's not that you're copying them; you just agree with the ideas.").

185. See Arturo Sarukhán et al., *Why Is Mexico Lagging Behind in Attracting FDI?*, THE DIALOGUE (Sep. 12, 2023), <https://www.thedialogue.org/analysis/why-is-mexico-lagging-behind-in-attracting-fdi> (noting that clean energy setbacks, violence, hydric stress, and rule of law have discouraged further investment in Mexico).

186. See Oré, *supra* note 178 (reporting that Mexico has faced intense pressure from the USTR, to keep China out of the NAFTA free trade zone).

187. See Laura Gottesdiener & Stephen Eisenhammer, *Mexico's Sheinbaum Unlikely to Repeat Mentor's Trump 'Bromance'*, REUTERS (June 4, 2024, 11:13 AM), <https://www.reuters.com/world/americas/mexicos-sheinbaum-unlikely-repeat-mentors-trump-bromance-2024-06-04> (noting that Sheinbaum's governing mandate is to maintain a strong trade relationship with the United States).

188. See *Nuevo León to Offer New Tax Incentives to Encourage Nearshoring*, MEX. NEWS DAILY (Jan. 16, 2024), <https://mexiconewsdaily.com/business/nuevo-leon-to-offer-new-tax-incentives-to-encouragenearshoring> (reporting on Nuevo León's governor providing exceptions to the Value Added Tax and Income Tax for companies investing in border cities).

States on national security grounds.¹⁸⁹ U.S. fears regarding possible use of “connected” vehicles to spy on military installations or powerplants are not irrational.¹⁹⁰ Thus, concerns about the computers in connected EVs using Chinese software and capable of transmitting data remotely are difficult to contest. This is probably a challenge that would be difficult, if not impossible, for BYD to overcome, unless it could figure out a way use U.S.-origin software to operate its electric vehicles instead of the Chinese software that is assumed to be capable of spying in the United States.¹⁹¹ BYD would also need to convince U.S. authorities that such vehicles with modified software pose no security risk, but it would not resolve any of the economic issues discussed earlier. There is, of course, precedent for bans on U.S. imports of Chinese products on national security grounds, such as a ban on use in the United States of Huawei and ZTE communications equipment in 5G cellphone tower installations.¹⁹² Such action was taken by a unanimous Federal Communications Commission in November 2022,¹⁹³ and survived years of lobbying by Huawei to remove the ban.¹⁹⁴

On February 29, 2024, the Biden Administration opened an

189. See Shepardson, *U.S. to Probe*, *supra* note 32 (reporting that while banning all Chinese vehicles, including from indirect third countries, is under consideration, it is too early to know when action may take place).

190. See *id.*

191. See *Biden Administration Will Investigate National Security Risks Posed By Chinese-Made ‘Smart Cars’*, NBC NEWS (Feb. 29, 2024, 7:38 AM), <https://www.nbcnews.com/politics/national-security/biden-administration-will-investigate-national-security-risks-posed-ch-rca141099> (stating that U.S. officials are concerned that some automobile features, such as driver assistance, could be used by China to spy on American citizens).

192. See *U.S. Bans the Sale and Import of Some Tech from Chinese Companies Huawei and ZTE*, NAT’L PUB. RADIO (Nov. 26, 2022, 2:30 AM), <https://www.npr.org/2022/11/26/1139258274/us-ban-tech-china-huawei-zte> (quoting Brendan Carr, a Republican FCC commissioner: “Our unanimous decision represents the first time in FCC history that we have voted to prohibit the authorization of new equipment based on national security concerns.”).

193. See *id.* (quoting President Biden: “China’s policies could flood our market with its vehicles, posing risks to our national security.”).

194. See Todd Shields & Emily Birnbaum, *Huawei Ends U.S. Lobbying Operations After Years of Fighting Ban*, BLOOMBERG (Jan. 10, 2024, 4:53 PM), <https://www.bloomberg.com/news/articles/2024-01-10/huawei-ends-us-lobbying-operations-after-years-of-fighting-ban> (reporting that Huawei’s last two registered lobbyists have left the lobbying shop).

investigation into whether connected technology used in Chinese autos poses a national security risk to the United States, and would thus justify restrictions (read “import bans”) on their importation from China, Mexico, or anywhere else.¹⁹⁵ Since EVs are generally the ones relying on sophisticated computers and related software, they are obviously the principal target of the investigation, but other Chinese vehicles could also be encompassed should an attempt be made to export them directly or indirectly into the United States.¹⁹⁶ There is wide agreement among U.S. policymakers that all Chinese vehicle imports pose national security risks due to concerns about “connected” car technology.¹⁹⁷ The Commerce Department is expected to seek comments on the proposal for sixty days and then draft regulations.¹⁹⁸ The investigation apparently does not include Buick, Polestar 2, and Volvo EX30 vehicles imported from China—even though the latter two are EVs—apparently because administration officials believed earlier in 2024 that “very, very few” are being imported.¹⁹⁹ Presumably, thus approach could change if significant numbers of Volvo and Polestar EVs are made in South Carolina.

The Chinese government has strenuously objected to the probe.²⁰⁰

195. See Shepardson, *U.S. to Probe*, *supra* note 32 (reporting that the U.S. Commerce Department will conduct a probe into the sensitive data that may be collected by Chinese vehicle imports).

196. See Camila Domonoske, *China Makes Cheap Electric Vehicles. Why Can't American Shoppers Buy Them?*, NAT'L PUB. RADIO (May 6, 2024, 5:42 AM) [hereinafter Domonoske, *China Makes Cheap Electric Vehicles*], <https://www.npr.org/2024/05/06/1248065838/cheap-chinese-evs-us-buy-byd-electric-vehicles> (indicating that tariffs on Chinese-made vehicles could increase).

197. See EV Letter, *supra* note 2 (urging the Biden Administration to increase domestic electric vehicle automobile).

198. See Securing the Information and Communications Technology and Service Supply Chain: Connected Vehicles, 89 Fed. Reg. 15066, 15067 (Mar. 1, 2024); Shepardson, *U.S. to Probe*, *supra* note 32 (stating that the Department of Commerce will seek comments for sixty days before considering draft regulations).

199. Jeff Mordock, *U.S. Launches Investigation into Chinese-Made 'Smart Cars' for National Security Threats*, WASH. TIMES (Feb. 29, 2024), <https://www.washingtontimes.com/news/2024/feb/29/us-investigates-chinese-turning-smart-cars-into-sp>.

200. See Shepardson, *U.S. to Probe*, *supra* note 32 (quoting the Chinese foreign ministry: “China urges the U.S. to respect the laws of the market economy and principles of fair competition, stop overstretching the concept of national security, stop its discriminatory suppression of Chinese companies and uphold an open fair and non-discriminatory business environment.”).

However, the White House has observed that China imposes significant restrictions on U.S. autos and other foreign autos operating in China.²⁰¹ “Why should connected vehicles from China be allowed to operate in our country without safeguards?” Biden said.²⁰² Relevant to Mr. Biden’s point, even China has taken action on autos based on alleged national security concerns.²⁰³ Tesla, several years ago, established procedures to establish data storage of its Chinese cars locally, following the Chinese government’s expressed fears about spying, and Teslas have reportedly been banned from Chinese military sites.²⁰⁴

The United States is not alone in recognizing the security risks of widespread use of Chinese EVs. Concerns are growing in Europe as well, where BYD is already constructing a factory in Hungary.²⁰⁵ As one analyst observed:

These are not just cars, and indeed modern cars are not intended to be. They are supposed to be platforms for mobility that engage in a constant flow of communication, entertainment, and data sharing . . . Who controls these data flows and software updates is a far from trivial question, the answers to which encroach on matters of national security, cybersecurity, and individual privacy. For these reasons, policymakers have to treat these new vehicles differently from cars as we once knew them. It is concerning that they are yet to fully do so.²⁰⁶

The U.S. probe offers the U.S. government the quickest and most

201. See *id.* (noting that China also poses restrictions on American automobiles).

202. See *id.*

203. See *China Drafts Rules to Secure Data From Internet-Connected Cars*, REUTERS (Apr. 29, 2021, 5:41 AM), <https://www.reuters.com/article/china-autos-data-idUSL1N2MM000> (conveying the concerns of Chinese officials over Tesla’s data collection practices and the use of vehicle cameras).

204. See James Vincent, *Tesla Will Store Chinese Car Data Locally, Following Government Fears About Spying*, THE VERGE (May 26, 2021, 7:26 AM), <https://www.theverge.com/2021/5/26/22454369/tesla-china-datacenter-process-locally-spying-fears> (reporting that Chinese government officials were concerned that Tesla’s exterior cameras could be used to collect sensitive data).

205. See Zhang & Goh, *supra* note 27.

206. See Janka Oertel, *Security Recall: The Risk of Chinese Electric Vehicles in Europe*, EUR. COUNCIL ON FOREIGN RELS. (Jan. 25, 2024), <https://ecfr.eu/article/security-recall-the-risk-of-chinese-electric-vehicles-in-europe> (criticizing the lack of action taken by European policymakers and offering several suggestions to combat the looming threat of Chinese EVs).

secure legal means of prohibiting the importation of Chinese vehicles:

On May 15, 2019, the President issued E.O. 13873, “Securing the Information and Communications Technology and Services Supply Chain,” pursuant to the President’s authority under the Constitution and the laws of the United States, including the International Emergency Economic Powers Act (IEEPA), the National Emergencies Act (50 U.S.C. 1601, et seq.), and Section 301 of Title 3, United States Code. E.O. 13873 declares a national emergency regarding the ICTS supply chain. . . .²⁰⁷

The Trump-era Executive Order relies, *inter alia*, on the President’s authority under the Constitution and on the IEEPA.²⁰⁸ This is an area where the courts have been reluctant to second-guess the President when he is exercising his constitutional authority for national security and foreign relations.²⁰⁹ Such court restraint seems particularly likely when, as here, the President and Congress are in general agreement on the need to act.²¹⁰ As one prominent scholar suggested:

. . . from the explicit power to appoint and receive ambassadors [under Article II of the Constitution] flows the implicit authority to recognize foreign governments and conduct diplomacy with other countries generally. From the commander-in-chief clause flow powers to use military force and collect foreign intelligence . . . Presidents also draw on statutory authorities. Congress has passed legislation giving the executive additional authority to act on specific foreign policy issues. For instance, the International Emergency Economic Powers Act (1977) authorizes the president to impose economic sanctions on foreign entities.²¹¹

207. Securing the Information and Communications Technology and Service Supply Chain: Connected Vehicles, 89 Fed. Reg. at 15067.

208. Proclamation No. 13873, 84 Fed. Reg. 22689 (May 15, 2019) (identifying and prohibiting the threat of information and communications technology controlled by foreign adversaries).

209. See Jonathan Masters, *U.S. Foreign Policy Powers: Congress and the President*, COUNCIL ON FOREIGN RELS. (Mar. 2, 2017), <https://www.cfr.org/backgrounders/us-foreign-policy-powers-congress-and-president> (citing *United States v. Curtiss-Wright Export Corporation*, in which the court ruled that the president is “the sole organ of the federal government in the field of international relations”).

210. See *id.* (noting that the courts typically decline to rule on a constitutional question if it is best left for Congress or the President).

211. See *id.* (arguing that over the years, Congress has given increasing deference to the executive branch on foreign policy issues).

The Supreme Court has also reaffirmed such powers, albeit not recently, as in *Curtiss-Wright Export Corporation*, where the Court ruled that the President has broad powers in the conduct of foreign affairs.²¹² The other leading case on presidential power, *Youngstown Sheet & Tube Co. v. Sawyer*, also reinforces presidential action in the instant case. There, President Truman was acting, in seeking to nationalize the steel industry during the Korean War, where Congress had explicitly rejected authorizing legislation.²¹³ Here, in contrast, it is virtually certain that Congress would be solidly behind presidential action to restrict or ban Chinese vehicle imports.²¹⁴ Thus, should the President decide to act, it seems highly unlikely that U.S. courts would intervene.

China might bring a case challenging the ban under the WTO's dispute settlement mechanism but, for reasons discussed above, it could not result in an enforceable ruling.²¹⁵ Substantively, the United States has a solid international legal basis, although it is not without controversy,²¹⁶ for avoiding WTO dispute settlement on national security grounds under GATT Article XXI:

Nothing in this Agreement shall be construed . . . (b) to prevent any contracting party from taking any action which *it considers necessary* for the protection of its essential security interests . . . (iii) taken in time of war or other emergency in international relations. . . .²¹⁷ (emphasis supplied.)

In the past, despite a conflicting WTO decision between two other members²¹⁸ and a separate adverse decision against the United States,

212. *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 333 (1936); see Alex McBride, *U.S. v. Curtiss Wright (1936)*, PBS THIRTEEN, https://www.thirteen.org/wnet/supremecourt/capitalism/landmark_wright.html.

213. *Youngstown Sheet & Tube Co. v. Sawyer*, 342 U.S. 579, 586 (1952).

214. See EV Letter, *supra* note 2 (demonstrating widespread Congressional support for a Chinese EV ban).

215. See *China to Challenge Biden's Electric Vehicle Plans at the WTO*, ASSOCIATED PRESS (Mar 26, 2024, 10:31 AM), <https://apnews.com/article/china-us-wto-electric-vehicle-subsidies-5048c991624f7be5e4800490e3b1273d> (noting that the WTO's Appellate Body remains inoperable since 2019).

216. See Jacob Gladys, *The National Security Exception in WTO Law: Emerging Jurisprudence and Future Direction*, 52 GEO. J. INT'L L. 836, 840–42 (2022) (discussing the difficulty in interpreting Article XXI of the GATT).

217. GATT, *supra* note 169, art. 21.

218. See Panel Report, *Russia – Measures Concerning Traffic in Transit*, WTO

the United States has strongly argued that invoking the national security exception is not subject to review by a panel or the WTO's Appellate Body.²¹⁹ As far as Mexico and the United States are concerned, the USMCA explicitly provides that “[n]othing in this Agreement shall be construed to: preclude a Party from applying measures that it considers necessary for the . . . the protection of its own essential security interests.”²²⁰

A principal administrative option to address national security concerns was for the United States to pursue a Section 232 investigation, which was launched in February 2024.²²¹ Section 232 was utilized by the Trump Administration to impose tariffs of 25% on virtually all imported steel and 10% on imported aluminum in 2019, with tariffs or quotas on such imports continuing under the Biden Administration with a few exceptions, including the elimination of such tariffs on steel and aluminum from Canada and Mexico.²²² Action under Section 232 requires a Commerce Department investigation and

Doc. WT/DS512/R (Apr. 5, 2019) (stating that Ukraine alleged Russia violated its obligations under GATT 1994 and Russia asserted that the panel lacked jurisdiction to evaluate the merits of Ukraine's claims); *see also* Charlene Barshefsky et al., *WTO Issues Groundbreaking Decision on GATT National Security Exception*, WILMERHALE (Apr. 11, 2024), <https://www.wilmerhale.com/insights/client-alerts/20190409-wto-issues-groundbreaking-decision-on-gatt-national-security-exception> (stating that the U.S. maintains that a dispute in which Article XXI is invoked is “non-justiciable” because there are no legal criteria by which a Member's consideration of its essential security interests can be judged).

219. *See* Press Release, Off. of the U.S. Trade Representative, Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Office of the U.S. Trade Representative (Jan. 27, 2023), <https://ustr.gov/about-us/policy-office/press-office/press-releases/2023/january/statements-united-states-meeting-wto-dispute-settlement-body> (“For over 70 years, the United States has held the clear and unequivocal position that issues of national security cannot be reviewed in WTO dispute settlement and the WTO has no authority to second-guess the ability of a WTO Member to respond to a wide-range of threats to its security.”).

220. USMCA, *supra* note 44, art. 32.2.

221. *See* Bret Forman, Commerce Proposes Ban on Chinese, Russian Vehicle Technology, world Trade Online (Sep. 23, 2024), <https://insidetrade.com/daily-news/commerce-proposes-ban-chinese-russian-vehicle-technology>; 19 U.S.C. § 1862 (1962) (authorizing the President to determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security).

222. *Id.*; FEFER, *supra* note 156, at 1.

the preparation of a report within 270 days, and the President then has 90 days to take action,²²³ although it is possible for Commerce to issue its report in a shorter period of time and for the President to act within a shorter period of time.²²⁴

While criticism of the high duties on imported steel and aluminum as being at best tangentially for U.S. national security was extensive,²²⁵ neither the Trump nor the Biden Administrations decided to lift the tariffs, although modifications were made with respect to Canada and Mexico in order to obtain their approval of the USMCA,²²⁶ and selectively elsewhere, as with the European Union.²²⁷ Also, as with other so-called “national actions,” U.S. domestic legal challenges by stakeholders to the Section 232 tariffs were rejected by the U.S. Supreme Court²²⁸ and defended by the United States at the WTO on the basis of the GATT Article XXI national security exception.²²⁹ Under these circumstances, China appears far more likely to retaliate against the United States outside the U.S. court system or the WTO

223. 19 U.S.C. § 1862.

224. *Id.*

225. See Alex Durante, *How the Section 232 Tariffs on Steel and Aluminum Harmed the Economy*, TAX FOUND. (Sep. 20, 2022), <https://taxfoundation.org/research/all/federal/section-232-tariffs-steel-aluminum> (highlighting that costs of tariffs are borne by consumers, who face higher prices for goods that used the tariffed goods).

226. See Matt Solomon, *United States Eliminates Section 232 Tariffs on Steel and Aluminum from Canada and Mexico; Canada and Mexico Eliminate Retaliatory Tariffs on U.S. Goods*, WHITE & CASE (May 21, 2019), <https://www.whitecase.com/insight-alert/united-states-eliminates-section-232-tariffs-steel-and-aluminum-canada-and-mexico> (reporting that on May 17, 2019, the U.S. announced that it had reached agreements with Canada and Mexico to remove the U.S. tariffs imposed on steel and aluminum products from those countries pursuant to Section 232).

227. See Richard Newcomb & Matthew Larson, *U.S. Lifts Section 232 Tariffs on Steel and Aluminum From the EU Effective January 1, 2022 – Continues Similar Negotiations with Japan*, DLA PIPER (Nov. 2, 2021), <https://www.dlapiper.com/en-us/insights/publications/2021/11/us-lifts-section-232-tariffs-on-steel-and-aluminum-from-the-eu-effective-january-1-2022> (reporting that on October 21, 2021, the United States lifted its tariffs of 25% on imports of steel and 10% on imports of aluminum from the EU).

228. See *Supreme Court Declines to Hear Challenge to President's Section 232 Authority*, METALS SERV. CTR. INST. (July 1, 2019), <https://www.msci.org/u-s-supreme-court-refuses-to-hear-section-232-tariff-case> (rejecting to hear case against constitutionality of presidential enactments of Section 232 as an improper Congressional delegation of authority).

229. GATT, *supra* note 169, art. 21.

Dispute Settlement Body, with retaliatory tariffs or actions against U.S. auto producers in China.

In September 2024, the Commerce Department issued new regulations that, when finalized later in 2024, would block imports of software and hardware related to “connected vehicle technology” of Chinese (or Russian) origin, capable of collection and transmission of sensitive data, regardless of the country of origin of the affected vehicles. Or means of propulsion. The import bans, which would become effective for software in 2027 and hardware in 2030, would appear to effectively ban new vehicles incorporating such potential spyware in vehicles inter alia imported from China or Mexico, or manufactured in the United States (e.g., Polestar and Volvo).²³⁰

V. IMPLICATIONS IF U.S. IMPORT BANS ARE APPLIED AND ENFORCED

Despite the likelihood and perceived advantages for the United States of banning imports of Chinese vehicles—whether directly from China or indirectly through Mexico—it should be recognized that disadvantages as well as advantages exist for the United States, as well as for Mexico and China, some of which are significant.

A. UNITED STATES AND U.S. STAKEHOLDERS

For the United States, perceived benefits are of two types. The United States would be protected from Chinese espionage or remote interference through the use in the United States of computerized, “connected” Chinese autos, primarily EVs and hybrids with sophisticated onboard computer systems.²³¹ Realistically, BYD, with its heavy reliance on Chinese central and local government subsidies and other export benefits, is not in a position to refuse should the Chinese Communist Party demand that BYD, or other Chinese

230. See Securing the Information and Communications Technology and Services Supply Chain: Connected Vehicles, Dep’t Com., Bureau of Indus. & Sec., 15 CFR § 791 (Sept. 23, 2024), <https://public-inspection.federalregister.gov/2024-21903.pdf>.

231. See Shepardson, *U.S. to Probe*, *supra* note 32 (stating that the U.S. Department of Commerce needs to probe imported Chinese vehicles that collect large amounts of sensitive data on their drivers and passengers (and) regularly use their cameras and sensors to record detailed information on U.S. infrastructure).

manufacturers, participate in espionage activities or disrupt Chinese EVs operating in foreign countries, including self-driving cars on U.S. roads, on behalf of the Chinese government.²³² But the planned exclusion of what would otherwise be a very aggressive group of new competitors is also broadly welcomed by the Biden Administration and U.S. auto producers, including foreign-owned producers such as Kia, Hyundai, Nissan, Toyota, Honda, BMW, and Mercedes, for economic reasons, to preserve auto—particularly EV—production in the United States.²³³ U.S. unions are also supporting the exclusion as a means for maintaining production and employment levels already threatened by the gradual U.S. and worldwide shift to EVs, EV batteries, and plug-in hybrids.²³⁴

On the downside, the exclusion of Chinese EVs from the U.S. market means U.S. consumers will be denied a source of lower-priced EVs that is not offered by any other manufacturers.²³⁵ Inevitably, this means that fewer EVs will be sold in the U.S. in the coming years, particularly to consumers of modest means,²³⁶ further jeopardizing the

232. See Marshall & Knight, *supra* note 127 (emphasizing that as cars become more computerized and connected to the internet, hackers have shown it is possible to disable internet-connected vehicles from afar and automated driving systems can also make them mobile repositories of personal information).

233. See Press Release, White House Briefing Room, FACT SHEET: Biden-Harris Administration Announces New Private and Public Sector Investments for Affordable Electric Vehicles (Aug. 5, 2021) [hereinafter Biden-Harris Administration Announces New Investments], <https://www.whitehouse.gov/briefing-room/statements-releases/2023/04/17/fact-sheet-biden-harris-administratio-n-announces-new-private-and-public-sector-investments-for-affordable-electric-vehicles> (stating that President Biden's Build Back Better Agenda aims to strengthen American leadership in clean cars and trucks by accelerating manufacturing in the domestic auto sector).

234. See Press Release, Int'l Bhd. of Teamsters, Teamsters Applaud Protecting American Autoworkers from China Act (Mar. 6, 2024), <https://teamster.org/2024/03/teamsters-applaud-protecting-american-autoworkers-from-china-act> (stating that unions are fighting for legislation to ensure the number of electric vehicles sold in the United States does not result in unsafe increases to existing weight restrictions on automobile transporters).

235. See Domonoske, *China Makes Cheap Electric Vehicles*, *supra* note 196 (stating that one of the key concerns is that if U.S. consumers do not support U.S. auto manufacturers, then the United States might become dependent for cheap EVs, which will not be sustainable for the country long term).

236. See Bacchus, *supra* note 50 (stating that consumers of modest means may not be able to afford the higher-priced international clean products due to domestic

Biden Administration's goal of 50% of U.S. auto sales being EV or hybrids by 2030.²³⁷ The adverse impact on climate change remedial measures, like the almost complete ban on low priced solar panels,²³⁸ cannot be denied, even if as many believe it is justified on national security and protection of the U.S. industry grounds.²³⁹ And there is a risk that China will retaliate against Tesla and other U.S. auto producers operating in China, even though it might be counterproductive, or with increased tariffs in unrelated product sectors such as U.S. agricultural exports.²⁴⁰

One option that does not appear to have been seriously considered by the Biden/Harris administration is encouraging Chinese auto producers such as BYD to establish auto production facilities in the U.S. rather than Mexico (which Polestar has recently done, as noted earlier). This would largely resolve the issue of lost investment and jobs, although it does not address the national security concerns. Surprisingly, Presidential Candidate Donald Trump has proposed exactly this as a U.S. economic boost, presumably reacting to new stories about BYD's Mexican ambitions.²⁴¹ Whether such actions

content requirements).

237. Biden-Harris Administration Announces New Investments, *supra* note 233.

238. See Bradsher, *supra* note 12 (noting the relation of the ban to Chinese subsidies as well as to imports from the Xinjiang forced labor region).

239. See Stuart Kaplow, *Chinese Solar Panel Tariffs: Protecting U.S. Industry or Hindering Green Growth?*, GREEN BLDG. L. UPDATE (May 19, 2024), <https://www.greenbuildinglawupdate.com/2024/05/articles/solar-panel/chinese-solar-panel-tariffs-protecting-u-s-industry-or-hindering-green-growth> (noting that the significant increase in China's solar energy industry due to its decreased cost of labor has led the U.S. block some shipments of solar panels from China, while the European Union has been considering similar action); Shepardson, *U.S. to Probe*, *supra* note 31.

240. See Yuhen Zhan, *China Is Likely to Hit Back Against U.S. Tariffs on Electric Vehicles*, *Wedbush's Dan Ives Says*, BUS. INSIDER (May 10, 2024, 3:22PM), <https://www.businessinsider.com/china-ev-tariffs-tesla-byd-nio-competition-imports-biden-trade-2024-5> (highlighting that China will likely retaliate against U.S. tariffs on all imported cars into the U.S.); Casey Hal et al., *European Dairy, Pork Producers Wary of Chinese Retaliation for EV Tariffs*, REUTERS (June 13, 2024, 5:45 AM), <https://www.reuters.com/markets/commodities/european-dairy-pork-producers-wary-chinese-retaliation-ev-tariffs-2024-06-13> (stating that China's state media have reported that domestic companies are preparing to request investigations into some EU dairy and pork imports and potentially impose retaliatory tariffs).

241. See *Trump Invites Chinese Automakers to Build Cars in the U.S.—and Says Ones They Build in Mexico Will Be Hit with Tariffs Up to 200%*, FORTUNE (July 19,

would be supported by China-bashers in both political parties is uncertain, although, as noted earlier, many other foreign auto producers have chosen U.S. production as a solution to trade restraints and other problems.

B. CHINA AND CHINESE STAKEHOLDERS

For BYD, other major Chinese automakers, and the government of China, the likely ban on U.S. sales—either direct or indirect—represents the probable long-term loss of one of the world's major automotive markets, potentially worth millions of auto sales and billions of dollars.²⁴² This is particularly troubling for an auto industry that was encouraged by the Chinese government to overbuild and is now heavily dependent on export sales; Chinese export auto sales increased 63.7% in 2023, while domestic sales increased by only 4.2%.²⁴³ The EU, with its investigation of Chinese industrial subsidies to Chinese auto producers beginning in October 2023, which may be partially retroactive, may not be far behind in seeking high penalty tariffs sales, utilizing antidumping and anti-subsidy actions.²⁴⁴ Restrictions on EV auto sales in one or both major markets are also a blow to China's "Made in China 2025" program,²⁴⁵ where world EV

2024), <https://fortune.com/asia/2024/07/19/trump-invites-chinese-carmakers-evs-us-mexico-tariffs-200>.

242. See *SelectUSA, Automotive Industry: Industry Overview*, DEP'T OF COM. INT'L TRADE ADMIN., <https://www.trade.gov/selectusa-automotive-industry> (noting that the United States is the world's second-largest market for vehicle sales and production).

243. Ken Moritsugu, *Chinese Auto Exports Rose 64% in 2023, With Strong Push By EVs, As Makers Expanded Overseas*, ASSOCIATED PRESS (Jan. 11, 2024), <https://apnews.com/article/china-auto-exports-ev-hybrid-7d553c31597125d6702b6691a8542cb1>.

244. See Philip Blenkinsop & Charlotte Van Campenhout, *EU Set to Allow Possible Retroactive Tariffs for Chinese EVs*, REUTERS (Feb. 28, 2024), <https://www.reuters.com/business/autos-transportation/eu-set-allow-possible-retroactive-tariffs-chinese-evs-2024-03-05> (noting that the European Commission intended to carry out an anti-subsidy investigation into Chinese battery EVs to determine whether to impose tariffs to protect EU producers).

245. See James McBride & Andrew Chatzky, *Is 'Made in China 2025' a Threat to Global Trade?*, COUNCIL ON FOREIGN RELS. (May 13, 2019), <https://www.cfr.org/background/made-china-2025-threat-global-trade> (noting that "Made in China 2025" is the government's ten-year plan to update China's manufacturing base by rapidly developing ten high-tech industries).

dominance—which seems well on its way to fruition without the U.S. market—is one of the major objectives for industrial cities such as Shenzhen as well as the central government.²⁴⁶

Even retaliation against Tesla, Volkswagen, and other foreign manufacturers is not a desirable solution for the Chinese government given the economic and worker benefits from foreign auto production in China and anticipated future technology transfers.²⁴⁷ From a Chinese national security perspective, the potential strategic benefits of having thousands of connected vehicles in the United States spying on military installation, power plants, and other sensitive sites cannot be discounted, notwithstanding Chinese government and industry disclaimers.²⁴⁸ However, the increasing opposition to Chinese EV exports has encouraged Chinese automakers to request the Chinese government to “monitor foreign markets’ industrial policy, trade policy, tax policy, and protectionist policies, and provide prediction, information and guidance to export companies,”²⁴⁹ suggesting that further government action to encourage and protect Chinese auto exports could be forthcoming.

C. FOR MEXICO AND MEXICAN WORKERS

For Mexican interests, the economic impact is more difficult to assess. Future BYD and other Chinese-owned production capacity and

246. See Takahashi Kosuke, *Shenzhen, China: The World Pioneer in Electric Vehicles*, THE DIPLOMAT (June 4, 2024), <https://thediplomat.com/2024/06/shenzhen-china-the-world-pioneer-in-electric-vehicles> (noting that Chinese battery and automotive giant BYD, which has overtaken Tesla to become the world’s top EV maker by sales, has its headquarters in Shenzhen).

247. See Gavin, *supra* note 25 (stating that the Shenzhen-based company, which has been backed by the likes of Warren Buffett’s Berkshire Hathaway, looks to retain its dominance in China’s EV market and maintain its aggressive stance against Tesla).

248. See Gabriel Hays & Brian Flood, *China Expert Talks Dark Side of Chinese Auto Industry: Spying, Slave Labor, Killing the U.S. Car Market*, FOX BUS. (Apr. 28, 2024, 9:00 AM), <https://www.foxbusiness.com/media/china-expert-talks-dark-side-chinese-ev-industry-spying-slave-labor-killing-u-s-auto-market> (noting that EVs would be far more effective than spy balloons at collecting important data, and at far lower cost if Americans purchase these vehicles).

249. Huan Zhu, *Chinese Auto Representatives Put Forward Proposals During Two Sessions*, CHINA TRADE MONITOR (Mar. 10, 2024), <https://www.chinatrademonitor.com/chinese-auto-representatives-put-forward-proposals-during-two-sessions>.

demand for parts and components, including EV batteries and their components, will likely be reduced if the U.S., and Canadian, markets are closed.²⁵⁰ Perhaps thousands of jobs will be foregone.²⁵¹ On the other hand, existing Mexican auto production by the U.S. “Big Three” (including Stellantis/Chrysler) and particularly by VW and Kia, among the major Mexican producers of smaller, less expensive cars for both export and domestic markets, is more likely to be preserved, along with the jobs that they have created over the years.²⁵² As long as BYD and other Chinese manufacturers located in Mexico develop new Mexican production for the domestic market and for export to third countries, Mexican consumers could benefit from the availability of inexpensive cars, both gasoline-powered and EV.²⁵³ Workers employed in the expansion of Mexican production of cars, both EVs and gasoline-powered, available at significantly lower prices, could be expected to benefit.²⁵⁴ Also, to the extent Chinese production in Mexico of lower priced automobiles displaces sales by traditional carmakers, those manufacturers could lose sales and be forced to reduce employment.²⁵⁵ The Mexican government, with its heavy dependence on exports to the United States of Mexican autos and auto

250. See Solomon, *BYD Looking for Mexico Location*, *supra* note 26 (noting that multiple countries, including the United States, Australia, Germany, and France are increasing restrictions on China’s trade and investment practices).

251. See *Chinese EV Maker BYD Says Planned Mexico Plant Will Create 10,000 Jobs*, MEX. NEWS DAILY (June 24, 2024), <https://mexiconewsdaily.com/business/byd-mexico-ev-plant-jobs> (stating that BYD’s proposed operations in Mexico anticipated to create around 10,000 jobs).

252. See Luis Feliz Leon, *As Auto Workers Contract Talks Heat Up, Stellantis Threatens to Move South*, THE AMERICAN PROSPECT (Sept. 7, 2023), <https://prospect.org/labor/2023-09-07-auto-workers-contract-talks-stellantis-threatens-move-south> (noting that Stellantis employs over 15,117 workers in Mexico and has a long-term plan to relocate much of its production to Mexico and Canada).

253. See *China’s BYD Confirms Mexico Factory Plan but Rules Out Exports*, ASIA FIN. (Feb. 29, 2024), <https://www.asiafinancial.com/chinas-byd-confirms-mexico-factory-plan-but-rules-out-exports> (noting that BYD executives announced to sell its EV for less than half the price of the cheapest Tesla).

254. *Id.*

255. See Malcolm Scott, et al., *EV Market’s Surge Toward \$57 Trillion Sparks Global Flashpoints*, BLOOMBERG (Nov. 7, 2023, 6:00 PM), <https://www.bloomberg.com/news/features/2023-11-07/the-57-trillion-ev-market-is-a-battleground-for-china-us-eu> (noting that as Chinese investments flood in, car industries built for a bygone era face obsolescence).

parts, is in a weak position to complain about U.S. restrictions on Chinese cars even if the mechanisms used conflict with WTO and/or USMCA rules.²⁵⁶ Although U.S. EV imports of EVs from Mexico are not likely to have a measurable impact on total Mexican exports to the United States in the foreseeable future, increases in the bilateral trade deficit caused by substantial new vehicle exports could eventually be cause for concern, particularly if the then-current U.S. administration is fixated on trade deficits.²⁵⁷ Moreover, the Mexican government's frequent invocation of "national security" as an excuse for its own sovereign actions²⁵⁸ makes it difficult for the government to object persuasively to U.S. measures deemed necessary to protect its own national security.

VI. CONCLUDING OBSERVATIONS

While there are few certainties and frequent surprises in U.S.-China trade relations, it is highly likely in my view that the U.S. government will soon extend its measures now applicable to direct imports under Section 301 to exclude Chinese-made indirect EV exports (principally expected from Mexico), from the U.S. auto market. Current concerns over potential Chinese spying and data theft, along with those relating to protecting U.S. auto producers and their workers from possibly ruinous competition, along with 2024 election politics, are overwhelming.²⁵⁹ While the most direct route to this goal is probably

256. See *Mexico – Country Commercial Guide: Automotive Industry*, *supra* note 98 (noting that 88% of vehicles produced in Mexico are exported, with 76% destined for the United States).

257. See *Why Chinese Companies Are Flocking to Mexico*, *supra* note 35 (noting that Mr. Trump "loathes trade imbalances").

258. See, e.g., Carolina Pulice, *Mexico Declares National Security Protection for Mayan Tourist Train*, REUTERS (May 18, 2023), <https://www.reuters.com/world/americas/mexico-declares-national-security-protection-mayan-tourist-train-2023-05-19> (pointing out that Mexican President Obrador invoked government and national security prerogatives over "the construction, operation, maintenance . . . execution and administration of the transport infrastructure").

259. See Hays & Flood, *supra* note 248 (highlighting concerns from experts such as Gordon Chang that the Chinese electric vehicle industry will bring with it a whole new data collection apparatus to potentially spy on Americans); Stephanie Yang, *China's Highflying EV Industry Is Going Global. Why That Has Tesla and Other Carmakers Worried*, L.A. TIMES (Apr. 19, 2024, 3:00 AM), <https://www.latimes.com/world-nation/story/2024-04-19/china-ev-war-tariffs-tesla>

through national security tools, a variety of trade and tariff tools are also available. In this respect, at least with Chinese-produced autos from Mexico, the United States has at least a year to choose one or more such actions and implement them in the normal manner.²⁶⁰

The President's legal options are multiple and deserve to be exercised wisely. A national security-based action may well be the most effective and quickest approach, under the International Emergency Economic Powers Act (IEEPA) and the National Emergencies Act.²⁶¹ The recently-used trade options—like Section 301 of the 1976 Trade Act—which has provided the United States with at least a colorable basis for the penalty tariffs against China, and/or Section 232 of the 1962 Trade Expansion Act, which is currently being used to protect the U.S. domestic steel and aluminum industries initially including from Mexico, are both options.²⁶² From an objective point of view, Section 232 action seems far better justified for security issues related to Chinese EVs than for protecting the U.S. steel industry. These authorities are, for all practical purposes, judgment-proof given their foreign policy and national security justifications.

Multiple trade and tariff measures also exist. Among them, in my view, a new antidumping and countervailing duty case self-initiated by the Department of Commerce or brought by a group of U.S. auto producers and workers, or a safeguards action, should be considered as a plan of action. Full analysis of the existing data may well justify findings of antidumping duties, countervailing duties and threat of material injury, or threat of serious injury, the latter for safeguards. The new Commerce regulations appear to permit Commerce to bring a countervailing duty action against Chinese auto producers in Mexico based on Chinese subsidization of those auto factories, under a threat

(stating that as tensions between China and the U.S. increase, Chinese imported technology has been subject to greater scrutiny).

260. See Cassandra Garrison, *BYD to Nail Down Mexico Plant Site by Year-End, Americas Head Says*, REUTERS (May 14, 2024, 4:38 PM), <https://www.reuters.com/business/autos-transportation/byd-nail-down-mexico-plant-site-by-year-end-americas-head-says-2024-05-14> (noting that BYD expects to build a plant in Mexico by the end of the 2024).

261. International Emergency Economic Powers Act, 50 U.S.C. § 1702 (2001); National Emergencies Act, 50 U.S.C. §§ 1601, 1621–22, 1631, 1641, 1651 (1976).

262. 19 U.S.C. § 2411 (1979); 19 U.S.C. § 1862 (1962).

of material injury to U.S. producers.²⁶³ This could presumably be taken once BYD and/or other Chinese-owned producers begin auto production in Mexico, presumably in 2025 or 2026, even if at that time production is being allocated to the Mexican domestic market or third country markets. Such an action, if successful, could preclude BYD from even attempting to export its Mexican production to the United States.²⁶⁴ In the longer term, the United States government will have to decide whether to permit Chinese auto and EV battery producers to establish wholly-owned U.S. production facilities or, more likely, to conclude joint ventures with U.S. enterprises. As noted earlier, this seems to be the current approach in Europe, with Chinese plants being established in Hungary, Spain, and perhaps elsewhere.²⁶⁵ In the past, the United States has welcomed dozens of Japanese, German, and Korean-owned auto production plants, all of which create jobs for American workers and other benefits for the cities and states where they are located.²⁶⁶

The data security and spying concerns associated with Chinese EVs operating in the United States, whether assembled in the United States or imported, are serious, but might be addressed in part by paralleling

263. See Regulations Improving and Strengthening the Enforcement of Trade Remedies Through the Administration of the Antidumping and Countervailing Duty Laws, 89 Fed. Reg. at 20766 (“Section 701 of the Act directs Commerce to impose a CVD order when it determines that a government of a country, or any public entity within the territory of a country, is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise that is imported into the United States, and when the ITC finds that material injury or threat of material injury to that industry in the United States.”).

264. *Id.*

265. See Eva Orsolya Papp, *Chinese EV Makers Set Sights on European Production*, REUTERS (May 10, 2024, 9:30 AM), <https://www.reuters.com/business/autos-transportation/chinese-ev-makers-plans-make-cars-europe-2024-05-07>. Chery Auto, China’s largest automaker by export volume, announced that it has signed a joint venture with Spain’s EV Motors to open its first European manufacturing site in Catalonia; BYD announced in late 2023 that it will build its first European electric vehicle production base in Hungary; China’s Leapmotor partnered with Stellantis to produce small EVs in Poland.

266. See Luis Feliz Leon, *The South, Where Automakers Go for a Discount*, LABORNOTES (Feb. 2, 2024), <https://labornotes.org/2024/02/south-where-automakers-go-discount> (noting that in the past the only growth in auto jobs came from foreign-owned transplants that set up shop in the South to exploit cheap non-union labor).

Chinese restrictions on Teslas sold in China. There, under pressure from the Chinese government, Tesla has built a local data center that provides for all data generated by vehicles sold in China to be stored.²⁶⁷ Tesla drivers also report that their vehicles are prohibited from entering certain areas based on alleged security risks.²⁶⁸ It thus seems, technologically if not politically, feasible for the United States to reciprocate these actions regarding Chinese vehicles made in China, Mexico, or other countries imported into the United States. It is also conceivable that such cars could be imported and sold only if they have U.S.-made computer systems replacing those made in China and suspected of spying.²⁶⁹ The 100% tariffs and bans on Mexican/Chinese imports could also be designed as temporary for perhaps five years to give U.S. automakers time to become competitive in EV production without assuring them a permanently protected market. The problem is obvious: unless the U.S. auto producers manage to offer an EV for a reasonable price (below \$35,000) GHG reduction targets in the United States will probably be impossible to meet, even with substantial consumer subsidies, by 2030 or thereafter.²⁷⁰

The greatest tragedy, in my view, would be a repeat of past policies that permitted Chinese producers to completely dominate the U.S. and world markets for solar panels, to the point that even with massive subsidies it is questionable whether the U.S. industry can even

267. See Cheng Ting-Fang & Shunsuke Tabeta, *Tesla Cars Face More Entry Bans in China As 'Security Concerns' Accelerate*, NIKKEI ASIA (Jan. 24, 2024), <https://asia.nikkei.com/Spotlight/Supply-Chain/Tesla-cars-face-more-entry-bans-in-China-as-security-concerns-accelerate> (noting that in August 2023, all data generated by vehicles sold in China will be stored locally).

268. See *id.* (noting that due to ongoing international tensions Tesla drivers in China are facing entry restrictions at more government affiliated venues).

269. See Matthew Daly, *Biden Order U.S. Investigation of National Security Risks Posed By Chinese-Made "Smart Cars"*, ASSOCIATED PRESS (Feb. 29, 2024, 2:31 PM), <https://apnews.com/article/china-electric-vehicles-privacy-personal-data-biden-844f2406512b94212ee1a92a61e5a33a> (noting that Chinese-made "smart cars" that can gather sensitive information about Americans driving them raises serious national security risks).

270. But see Jeff St. John, *U.S. Climate Goals: EVs Are on Track, But Clean Power is Lagging*, CANARY MEDIA (Feb. 21, 2024), <https://www.canarymedia.com/articles/clean-energy/us-climate-goals-evs-are-on-track-but-clean-power-is-lagging> (noting that the Biden Administration is aiming for EVs to make up half of all new vehicle sales by 2030 and to achieve a carbon neutral electricity supply by 2035).

recover.²⁷¹ Moreover, even in this current era of sharply-divided U.S. political parties, promptly addressing the need for such measures to protect the U.S. auto industry, at least for the foreseeable future, from unfair Chinese competition and to address expanded Chinese spying has broad support among members of Congress, the Biden-Harris Administration, Candidate Donald Trump, and the public.²⁷² Such a level of consensus should not be permitted to go to waste or become ineffective for reasons of avoidable delays. Sufficient time exists to devise and implement an action plan, with a series of well-thought-out steps that could be implemented over several years or more. The process has already begun and must continue.

271. See Amanda Chu & Demetri Sevastopolo, *U.S. Solar Manufacturers in "Dire Situation" as Imports Soar*, FIN. TIMES (Mar. 13, 2024), <https://www.ft.com/content/9afeb8a2-ee25-4455-b917-5f06486abe5b> (highlighting that the flood of Chinese-produced solar panels is forcing North American manufacturers to pull back on expansion plans despite lucrative incentives under the Inflation Reduction Act).

272. See Camila Domonoske, *5 Takeaways from Biden's Tariff Hikes on Chinese Electric Vehicles*, NAT'L PUB. RADIO (May 14, 2024, 5:12 PM), <https://www.npr.org/2024/05/14/1251096758/biden-china-tariffs-ev-electric-vehicles-5-things> (addressing that there is a bipartisan concern that Chinese cars are "unfairly underpriced," and therefore catastrophic for American factories).

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