



Working Paper

Excluding Mexican and Chinese EVs from the United States

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David A. Gantz*

Abstract

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 also announced that it intends to establish production facilities in Mexico soon, with an initial capacity of 150,000 cars annually. 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 US market is the real prize given its enormous size, with more than 15.5 million auto and light trucks sold in 2023. A brief discussion of the current situation and remedial legal and practical measures likely to be applied to trade in passenger vehicles under the USMCA and relevant WTO law 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 US Market; and the actions available to the US government to exclude those imports from the United States. Finally, I examine the implications of the exclusion policies that appear likely to be followed by either Democratic or Republican administrations in the foreseeable future, and offer 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.¹

Concerns are growing both within the Biden administration and in Congress over a potential flood of low-priced electric vehicles and hybrids (EVs)² 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 over 2022.³ Increased exports are likely to continue. Nor is BYD the only Chinese producer interested in the US market; others include Guangzhou Automotive Group, Chery Automobile and SAIC Motor.⁴ China became the world's largest exporter of motor vehicles in 2023, with more than 5 million units,⁵ and China is by far the world's largest auto producer with over 26 million in 2022 and a capacity of about 40 million, far more

than the combined production of the United States, Japan, India and South Korea.⁶ While the Chinese auto 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 ago,⁷ realistically this is only a temporary problem, as is the fact that most Chinese made autos are not designed for the US market and consequently do not currently meet US regulatory (emission and crash) standards. Knowledgeable observers note that Chinese automotive manufacturers have the scale, technology, product line and low costs to become world leaders.⁸

Significantly, many officials in the US see a bitter lesson in how China became totally dominant in world production of solar panels,⁹ forcing out higher cost, non-subsidized producers in the US and the EU and contributing to capacity far beyond the world's current needs. Policy makers, industry and labor stakeholders alike are determined not to let the same blindness occur with the US auto industry, particularly in light of the overwhelming importance of the automotive sector to the US economy, where it is responsible for an estimate 3-4% of annual GDP.¹⁰

Adding to the sense of urgency felt by many US policymakers, the auto-producing city of Shenzhen announced in early March 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 routes¹¹. 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.¹² More recently, BYD is engaging in a domestic price war with Tesla and other competitors, lowering the price for its EV hatchback by 12.6%, to \$12,485.¹³

BYD has also announced that it intends to establish production facilities in Mexico soon, with an initial capacity of 150,000 cars annually.¹⁴ Other BYD foreign operations are also planned or operational in Thailand, Brazil, Hungary and Uzbekistan.¹⁵ 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,¹⁶ observers believe that US market is the real prize given its enormous size, with more than 15.5 million auto and light trucks sold in 2023,¹⁷ even if it takes years to penetrate. BYD has the luxury of being able to take a long-term view with Chinese government support. China, led by BYD (and General Motors), has rapidly penetrated the Mexican market with exports from China of both EV and combustion engine autos.¹⁸ The Chinese share of the Mexican import market has risen from 1.8% in January 2018 to 15.6% in January 2024.¹⁹ BYD's Dolphin Mini EV will be sold in Mexico for \$21,019, less than half the price of the least expensive Tesla.²⁰ (The average price for an EV sold in the US in January 2024 was \$55,353.²¹) While total Chinese investment in Mexico in all sectors is estimated at only \$2.5 billion in 2022,²² less than a tenth of total DFI, it would increase significantly if BYD and other major Chinese car producers were to construct Mexican factories.

The US market is already somewhat protected from direct exports of BYD vehicles from China, as they are subject to a 27.5% import duty, the 2.5% MFN duty plus the Trump-era 25% penalty duties.²³ However, Given BYD's efficiencies and Chinese government subsidies, many wonder whether even such a high tariff is sufficient to restrict imports. For some observers, the real risk is imports from Mexico, which if meeting standards established under the United States-Mexico-Canada Agreement (USMCA)²⁴ could under present law and regulations enter the United States duty-free. The US 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 U.S. They and other industry groups, along with members of Congress, have demanded that the United States bar such imports from Mexico, suggesting that otherwise there will be an "extinction-level event" for the U.S. auto sector.²⁵ Calls for remedial actions, including increased tariffs, by the US government have engendered bipartisan support.²⁶ Moreover, all are aware that the US is not alone in its serious concerns; The European Commission has launched an anti-subsidy investigation against Chinese automakers, which could also result in much higher import duties.²⁷

Apart from widespread US government fears of the impact of Chinese vehicles on the US auto industry and its workers (with less interest in how import restrictions on Mexican/Chinese autos, auto parts and many other products would affect the price of cars for prospective purchasers who are not members of a manufacturing union),²⁸ the Biden administration has recently initiated an investigation at the Commerce Department of the national data security implications of widespread use of Chinese EVs with the integral and remotely-reporting computer/data systems. 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.²⁹ 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."³⁰ The fact that cars including Teslas sold in China, have been constantly transmitting data for at least five years from individual cars, not only to the manufacturer, but also directly to the Chinese government,³¹ is a further basis for concern and suspicion.

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 US Market. It also examines the actions available to the US government to exclude those imports from the United States. Part V examines the implications of the exclusion policies for the US, China and Mexico that appear likely to be followed by either Democratic or Republican administrations in the foreseeable future. I conclude 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 US does not have a free trade agreement are subject to a "most favored nation" (MFN) tariff of only 2.5%.³² (This contrasts, for example, with the European Union, where the MFN import duty on autos is 10%.)³³ The nations subject to the US 2.5% duty include Germany and other EU countries, the United Kingdom, Japan and China, although as noted earlier China is currently subject to an additional penalty tariff of 25% under the Phase One trade agreement. That agreement effectively remains in force with the implicit consent of both parties.³⁴

Imports from South Korea, Canada, and Mexico, which are subject to free trade agreements, enter the US duty-free if the vehicles meet applicable rules of origin. The rules of origin for US auto imports from South Korea are more relaxed than those in the USMCA.³⁵ Renault currently has an automotive joint venture in South Korea with a Chinese manufacturer, Geely, although there are currently no imports into the US.³⁶ Rather, US imports from Korea are dominated by Hyundai and Kia, with \$22 billion worth entered in 2022.³⁷

This discussion, however, is focused on potential imports of automobiles and SUVs from Mexico, either under USMCA or under the US "most favored nation" (MFN) tariffs applicable to goods imports from most other WTO members. Small trucks imported into the US are subject to the historically high 25% US MFN tariff and are currently produced for the US market only in the US, Canada, and Mexico; at the present time there seems to be no concern that such vehicles will be produced in Mexico by Chinese enterprises.³⁸

While the North American Free Trade Agreement (NAFTA)³⁹ imposed strict rules of origin on automotive trade, designed to encourage auto and auto parts production in North America, the USMCA, negotiated by the Trump administration but warmly endorsed by the Biden administration and by most Democrats in Congress, further strengthened the rules of origin, with the obvious intent of encouraging auto and auto parts production not only in North America but particularly in the United States. The most important of the USMCA changes are as follows:

1. North American "regional value content" is increased from 62.5% to 75%;⁴⁰
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;⁴¹
3. 70% of the steel used in auto production after 7 years must be "melted and poured" in North America;⁴²

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.

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. If for example, a transmission worth \$1,000 is produced in Mexico 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%? A dispute over this “rolling up” issue was referred to a USMCA state-to-state dispute settlement panel in early 2023 by Canada and Mexico; their interpretation of the rolling up rules prevailed in a unanimous panel decision in December 2022, but has yet to be accepted and implemented by the United States.⁴³

The rules, applicable to both combustion engine and EV powered automobiles, provide that “core components” must be of North American origin. The EV battery in particular must qualify for the vehicle to enjoy USMCA tariff free entry into the United States. The core components include advanced batteries, including cells, modules/arrays, and assembled packs.⁴⁴ 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. Qualifying batteries would also avoid the 3.4% US MFN duty on lithium-ion batteries.⁴⁵ Additionally, under the so-called “Inflation Reduction Act,” an electric vehicle tax credit provides a total of up to \$7,500 for new EV purchases if the EV meets various requirements, including being assembled in North America and having a battery that meets specific sourcing requirements.⁴⁶

One can speculate that 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. The USMCA incorporates a “Sunset Clause,” with the first review of the text mandated for 2026.⁴⁷ After nearly five years of EV and EV battery production in North America, the US, Canada, and Mexico might wish to revisit the applicable rules of origin. If the US still has not implemented the panel decision noted above, it might be used as a bargaining chip to partially address Chinese motor vehicle produced or to be produced in Mexico for eventual export to the US. Given the growing importance of EVs and EV batteries in automotive trade in North America and world-wide modernization, such issues could well be on the table.

However, the USMCA rules of origin are the strictest applied by the United States to any of its trading partners, including South Korea as noted above. The stringent USMCA rules of origin are not a loophole. In my view it would be neither wise or 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 our trading partners, not just China. The reason is simple; 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 in particular the

administrative costs of demonstrating that the \$16/hour labor cost requirement has been met, are likely at least as high as payment of the 2.5% duty, and experts have so opined.⁴⁸ Unless the vehicle produced in Mexico fails to meet the US “substantial transformation” test, an unlikely event as discussed in Part IV, below, the 2.5% MFN tariff is available to traders.

III. Rationale for Establishing Chinese (BYD) auto production in Mexico

It was suggested earlier that there are logical reasons for BYD and perhaps other major Chinese EV and EV battery manufacturers to establish offshore production facilities, despite the further overcapacity it would create. 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. For example, Ford established its first factory in Europe (Ireland) in 1917.⁴⁹ Honda has been producing autos for the US market in Ontario, Canada since 1985 and in Marysville, Ohio since 1989.⁵⁰ Toyota began producing autos in Georgetown, Kentucky in 1988,⁵¹ and Volkswagen in Puebla, Mexico in 1967.⁵² Many other non-North American producers, including in the US alone, BMW, Mercedes, Nissan, Kia, and Hyundai, have decided to produce vehicles in or near the huge US market. Absent the complicated US-China economic, political and security relationships, the idea of a BYD factory in Mexico would probably have raised few eyebrows.

BYD’s prospective Mexican facility, which I and many others assume is focused on eventual access to the US market, is affected by many of the same business considerations as other foreign owned manufacturers, plus several unique ones. The latter—avoiding the 27.5% or perhaps higher duties upon entry of the vehicles to the US market—is clearly a major driving force. Other recent incentives include the desirability of benefitting from the \$7,500 IRA US purchaser subsidy for vehicles assembled in North America and meeting the battery and related requirements. 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.⁵³

Other benefits that are hardly unique to BYD from Mexican production (particularly where production in the US is not a viable option legally or politically) include some very limited protection against unfair trade actions (a driving factor for Japanese auto companies decades ago), shorter supply chains at 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 China⁵⁴, and proximity to other major Western hemisphere markets. It is difficult to know in the absence of inside information which of these factors are influencing the BYD decision, 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 US market

Under current law and regulations—which as indicated above are subject to change, perhaps very soon, any attempt 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. 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 US 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 US market.

(A) Existing US 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 US market duty-free, and if as an EV the vehicle and battery complied with the IRA requirements, purchasers would enjoy the US subsidy of up to \$7,500 (at least until the IRA is amended to exclude such vehicles).

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 of failure to meet the 75% regional value component and/or the \$16/hour requirements, the vehicles would normally enter the US at the 2.5% MFN tariff rate assuming the manufacturing process resulted in a “substantial transformation.” Given the low level of this tariff, BYD or other Chinese vehicles subject to such a tariff would be highly competitive in the US market; the 2.5% tariff is not a significant restraint on US sales of most imported autos and SUVs, whether from China or elsewhere.

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

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.⁵⁵ 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.⁵⁶

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”).⁵⁷

Here, the country where the automobile obtains its “essential character,” where a collection of parts and materials becomes an automobile, is Mexico. While it is conceivable that Customs and Border Protection would devise an approach that treated an automobile assembled in Mexico primarily from hundreds of Chinese-origin parts as being of Chinese rather than 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. CBP might take the view, although 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. Such a conclusion would likely be subject to successful court challenge in the US, 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. As BYD and other manufacturers develop more sophisticated manufacturing processes in Mexico, relying on a mix of imported and Mexico-produced parts, this approach would likely become untenable for US authorities absent legislative action. More likely, BYD would not seek to initiate export sales to the US at least until they were satisfied that the Mexican operations met the US substantial transformation test.

(B) Traditional 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 US antidumping order or countervailing duty existed. This aspect of US 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. Rather, it is treated for US law purposes as if the vehicle were imported directly from China.⁵⁸ An analogous circumvention action was brought several years ago against solar panels produced in Vietnam, Malaysia, Cambodia and Thailand with primarily Chinese parts and components. 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 US as if they had been imported directly from China.⁵⁹

However, 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 could not be used until such a case were completed. Such a proceeding could require a year for a final determination, even though demonstrating

dumping or subsidization to the satisfaction of the Commerce Department is probably achievable.⁶⁰ On potentially more difficult question would be whether there is currently a sufficient volume of US auto imports from China (apparently mostly Rivian and a few from US auto producers such as Ford, Stellantis and Volvo) to meet Commerce Department requirements for assessing the “export price.”

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, as noted above.⁶¹ For such an action to move forward, a material injury or threat of material injury determination would be required under US law and WTO rules.⁶² US law makes this achievable, as it provides not only for (existing) material injury as a result of actual imports of unfairly traded products as well as for determining a threat of material injury from such imports, even where US unfair trade the Chinese imports are not yet significant.⁶³ Without getting deeper into the intricacies of US antidumping law, it is noted that several methods exist for determining the “normal value,” 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.⁶⁴

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,⁶⁵ final determinations require nearly a year, and are appealable to the Court of International Trade and the Court of Appeals for the Federal Circuit. Still, this option is sufficiently promising that initiating it could be considered, as significant volumes of Chinese autos imported into the US directly or indirectly through Mexico are probably at least several years off under the worst of circumstances.

Dumping and subsidy 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. Such interested parties would include US, European and other foreign owned auto producers in Mexico. The petitioners would have to demonstrate that the vehicles were being sold at lower adjusted prices in Mexico than in China, or at less than fully allocated cost of production, or below “constructed value.”⁶⁶

Alternatively, should the US believe that Chinese auto parts and components were being exported to Mexico at less than fair value (the adjusted price in China or the cost of production), the US could also request Mexico under WTO rules to initiate an antidumping action in Mexico on behalf of the United States.⁶⁷ Such actions, however, have been rare under the WTO’s Antidumping Agreement. Even should the Government of Mexico agree to voluntarily undertake such an investigation, it would require significant time to complete and 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, with volumes increasing rapidly in recent years⁶⁸. Consequently, this is probably not a viable option for the US.

A further option would be the initiation of a safeguard investigation. Under the safeguard statute,⁶⁹ domestic industries that have been seriously injured or threatened with serious injury by increased imports may petition the US International Trade Commission for relief. If the USITC determines that a product is being imported into the US such as to be a “substantial cause of serious injury, or threat thereof,” it recommends relief to the President, which may be increased tariffs, quotas, or a combination of both. The final decision is up to the President.⁷⁰ While the WTO legality of safeguard remedies have been thrown into doubt by a series of WTO Appellate Body cases, they are still frequently used by many members.⁷¹ The use of safeguard measures by the USMCA governments under national law and WTO rules is explicitly authorized by the USMCA.⁷² 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. 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. Proactive filing of the case could assure that it was concluded in about a year, well before imports of Chinese/Mexican EV were imminent.

(C) Unilaterally Increased US Tariffs

Increased US tariffs on vehicles imported from China, or Chinese vehicles assembled in Mexico and imported into the United States, could be imposed almost immediately, without regard to whether any Chinese-owned car producers were currently exporting cars from Mexico, in anticipation of possible future imports. New legislation would be worth considering, but there are assure that other routes to higher tariffs. Even without new legislation, authority exists to raise tariffs exists under existing legislation, the 1972 Trade Expansion Act.⁷³ Given the current political climate in Congress a tariff increase either under a new law or existing presidential authority, would likely receive broad bipartisan support; the major issue would probably be “how high?” While Ford and General Motors both import a few models for sale in the US that are produced in China, as noted earlier, it seems unlikely that these imports would be sufficient to derail a tariff increase. It is possible that some would be concerned with the high likelihood of Chinese retaliation against US 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.

An increase in auto tariffs applicable only to Chinese products would be inconsistent with the MFN (non-discrimination) requirements applicable to all WTO Members including China.⁷⁴ While there are many exceptions to MFN treatment GATT, tariff increases other than on the basis of an antidumping or countervailing order or safeguards are generally prohibited. 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 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.⁷⁵ Reforms have 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."⁷⁶

Increasing the MFN tariff on certain (Chinese-company-produced) autos imported from Mexico that did 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 US exports. However, for political reasons, and Mexico's heavy dependence on trade with the US for its exports,⁷⁷ a WTO action brought by Mexico would in my view be very unlikely. The US action would also arguably be a violation of the USMCA, which requires national treatment of goods from another party,⁷⁸ but it seems no more likely that Mexico would seek remedial action under the USMCA.⁷⁹ One could also envision demands by the US (without clear legal justification) that Mexico block all exports of Chinese-made vehicles and possibly key assemblies from entry to the United States, or even that Mexico block new DFI by Chinese-owned auto firms in Mexico, either initially or for expanded production. It is difficult to predict how such requests would be vetted, but it is worth noting that the Mexican government and state governments, like those elsewhere in the world, have a practice of encouraging new investments that are likely to generate employment. All of these US actions would presumably be subject to extensive bilateral consultations at the highest levels of the US and Mexican governments.

(D) National Security

Chinese vehicles whether imported directly from China or indirectly through third countries could also be banned by the United States on national security grounds. US fears regarding possible use of connected vehicles to spy on military installations or powerplants are not irrational. 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 they could figure out a way use US origin software to operate their electric vehicles instead of the Chinese software that is assumed to be capable of spying in the US, and convince US 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 US 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. Such action was taken by a unanimous Federal Communications Commission in November 2022.⁸⁰

As noted in the introduction, the Biden administration on February 29, 2024, opened an 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. Since EVs but not generally gasoline engine vehicles are 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 to the US. Many apparently believe that all Chinese vehicle imports pose national security risks due to concerns about “connected” car technology.⁸¹ The Commerce Department is expected to seek comments on the proposal for sixty days and then draft regulations.⁸²

The Chinese government has strenuously objected to the probe. However, the White House has observed that China imposes significant restrictions on U.S. autos and other foreign autos operating in China. “Why should connected vehicles from China be allowed to operate in our country without safeguards?” Biden said.⁸³ Tesla several years ago established procedures to establish data storage of its Chinese cars locally, following Chinese government expressed fears about spying, and Teslas have reportedly been banned from Chinese military sites.⁸⁴

The United States is not alone at 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.⁸⁵ 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.⁸⁶

The US probe offers the US government the quickest and most 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.⁸⁷

The Trump era executive order relies inter alia on the President's authority under the Constitution and on the IEEPA. 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.⁸⁸ Such court restraint seems particularly likely when, as here, the president and the Congress are in general agreement on the need to act. As a prominent scholar has 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.⁸⁹

The Supreme Court has also reaffirmed such powers, albeit not recently, as in *Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936). The other leading case on Presidential Power, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), also reinforces presidential action in the instant case. There, President Truman was acting (seeking to nationalize the steel industry during the Korean War) where the Congress had explicitly rejected authorizing legislation. Here, in contrast, it strongly appears that the Congress would be solidly behind presidential action to restrict or ban Chinese vehicle imports. Thus, should the president decide to act, it seems highly unlikely that US 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 no result in an enforceable ruling. Substantively, the US has a solid international legal basis 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 relations⁹⁰ (Emphasis supplied.)

In the past, the US, despite a conflicting WTO decision between two other members,⁹¹ and a separate adverse decision against the US, the US has strongly argued that invoking of the national security exception is not subject to review by a panel or the appellate body.⁹²

As far as Mexico and the US are concerned, the USMCA explicitly provides that "Nothing 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."⁹³

Another administrative option to address national security concerns would be for the United States to open a section 232 investigation, as mentioned above. 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 tariff or quotas on such imports continuing under the Biden administration with a few exceptions, including the elimination of tariff for tariffs from Canada and Mexico.⁹⁴ Action under section 232 requires a Commerce Department investigation and the preparation of a report within 270 days, and the president has 90 days to take action⁹⁵ although it is presumably 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. Again, if the US acts promptly to initiate a section 232 investigation, ample time exists to complete the analysis well before Chinese EV exports to the US are imminent.

Although criticism of the high duties on imported steel and aluminum as being at best tangentially for US national security was extensive⁹⁶, neither the Trump or the Biden decided to lift the tariffs generally, although modifications were made with respect to Canada and Mexico in order to obtain their approval of the USMCA,⁹⁷ and selectively elsewhere, as with the European Union.⁹⁸ Also, as with other so-called “national actions,” US domestic legal challenges by stakeholders to the section 232 tariffs were rejected by the US Supreme Court⁹⁹ and defended by the US at the WTO on the basis of the GATT Article XXI national security exception.

Under these circumstances, China appears far more likely to retaliate against the US outside the US court system or the WTO dispute settlement body, with retaliatory tariffs or actions against US auto producers in China.

V. Implications if US Import Bans are Applied and Enforced

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

(A) United States and US Stakeholders

For the United States, perceived benefits are basically of two types. The US would be protected from Chinese spying or remote interference through the use in the US of computerized, “highly connected” Chinese autos, primarily EVs and hybrids with sophisticated onboard computer systems. Nor is BYD, with its heavy reliance on Chinese central and local government subsidies and other export benefits, in a position to refuse should the Chinese Communist Party demand that BYD (or other Chinese manufacturers) participate in espionage activities or disrupt Chinese EVs operating in foreign countries, including self-driving cars on US roads, on behalf of the Chinese government.¹⁰⁰

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 US 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 US. US unions are also supporting the exclusion as a means for maintaining production and employment levels already threatened by the gradual US and world-wide shift to EVs and EV batteries and plug-in hybrids.

On the downside, the exclusion of Chinese EVs from the US market means US consumers will be denied a source of lower-priced EVs that is not offered by any other manufacturers. Inevitably, this means that fewer EVs will be sold in the US in the coming years, particularly to consumers of modest means,¹⁰¹ further jeopardizing the Biden administration goal of 50% of US auto sales being EV or hybrids by 2030.¹⁰² The adverse impact on climate change remedial measures, like the almost complete ban on low priced solar panels,¹⁰³ cannot be denied even if as many believe it is justified on national security and protection of the US industry grounds. And there is a risk that China will retaliate against Tesla and other US auto producers operating in China, even though it might be counter-productive as noted below, or with increased tariffs in unrelated product sectors such as US agricultural exports.

(B) China and Chinese Stakeholders

For BYD, other major Chinese automakers and the Government of China, the likely ban on US sales, either direct or indirect, represents the probable long-term loss of one of the world's major automotive markets, potentially worth thousands of auto sales and millions of dollars. This is particularly troubling for an auto industry that was encouraged by the government to overbuild and is now heavily dependent on export sales; Chinese export auto sales increased 63.7 percent in 2023 while domestic sales increased by only 4.2 percent.¹⁰⁴ 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 with high penalty tariffs sales, utilizing anti-dumping and anti-subsidy actions.¹⁰⁵ Restrictions on EV auto sales in one or both major markets are also a blow to China's "Made in China 2025" program¹⁰⁶ where world EV dominance (which seems well on its way to fruition without the US market) is one of the major objectives, for regional cities such as Shenzhen as well as the central government.

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.¹⁰⁷ From a Chinese national security point of view, the potential strategic benefits of having thousands of connected vehicles in the US, spying on military installation, power plants and other sensitive sites cannot be discounted, notwithstanding Chinese government disclaimers. 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,"¹⁰⁸ 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 demand for parts and components, including EV batteries and their components, will likely be reduced if the US (and probably Canadian) markets are closed. Perhaps thousands of jobs will be foregone. On the other hand, existing Mexican auto production by the US "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. 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. 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.

The Mexican government, with its heavy dependence on exports to the US of Mexican autos and auto parts, is in a weak position to complain about US restrictions on Chinese cars even if the mechanisms used are in conflict with WTO and/or USMCA rules. Although US 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 US administration is fixated on trade deficits.¹⁰⁹ Moreover, the Mexican government's frequent invocation of "national security" as an excuse for its own sovereign actions¹¹⁰ makes it difficult for the government to object persuasively to US measures deemed necessary to protect its own national security.

VI. Concluding Observations

While there are few certainties and frequent surprises in US-China trade relations, it is highly likely in my view that the US government will soon choose one or more mechanisms to exclude Chinese-made EV exports, whether direct or indirect, from the US auto market. Current concerns over potential Chinese spying and data theft, along with those relating to protecting US EV producers and their workers from possibly ruinous competition, are overwhelming. While the most direct route to this goal is probably through national security tools, a variety of trade and tariff tools are also available.

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), the National Emergencies Act (50 U.S.C. 1601, et seq.), Section 301 of Title 3, United States (a legal basis for the penalty tariffs against China) and/or section 232 of the 1962 Trade Expansion Act (the latter currently being used to protect the domestic steel and aluminum industries). From an objective point of view, Section 232 action seems far better justified for security issues related to Chinese EVs than for protecting the US steel industry. These authorities are for all practical purposes judgment proof given their foreign policy and national security justification.

Multiple trade and tariff measures also exist as discussed in detail earlier. 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 US auto producers and workers, or a safeguards action, should be considered, as 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 cost in legal and consulting fees would be substantial, but if initiated promptly, final determinations would likely be issued well before significant numbers of Chinese origin EVs could be imported either directly or indirectly into the US. If successful, the actions would provide a strong independent legal basis for acting against such vehicles, and could well result in antidumping and countervailing duty rates, or a combination of safeguard tariffs and quotas, that in the aggregate would make it uneconomical to sell Chinese EVs in the US.

The greatest tragedy in my view would be a repeat of past policies that permitted Chinese producers to completely dominate the US and world markets for solar panels, to the point that even with massive subsidies it is questionable whether the US industry can even recover¹¹. Moreover, even in this current era of sharply divided US political parties, promptly addressing the need for such measures to protect the US auto industry from unfair Chinese competition and expanded Chinese spying has broad support among members of Congress, the Biden administration, and the public. Such a level of consensus should not be permitted to go to waste or to become ineffective for reason 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.

Notes

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¹ Letter of March 7, 2024 from Senators Peters, Stabenow and Brown to Commerce Secretary Raimondo and USTR Tai, available at https://www.peters.senate.gov/imo/media/doc/section_301_ev_trade_letter.pdf (last accessed Mar. 9, 2024 (hereinafter “EV Letter”))

² As used herein, the term “EV” includes full EVs, plug-in hybrids and hybrids, all “new energy vehicles.” At this writing in March 2024, US 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, US Automakers Race to Build More Hybrids as EV Sales Slow,” Mar. 15, 2024, Reuters, available at <https://www.reuters.com/business/autos-transportation/us-automakers-race-build-more-hybrids-ev-sales-slow-2024-03-15/> (last accessed March 15, 2024).

³ Qian Jin, *BYD Sold 3.02 Million Vehicles in 2023, up 61.9%*, Jan. 1, 2024, Carchinanews.com, available at <https://carnewschina.com/2024/01/01/byd-sold-3-02-million-vehicles-in-2023/#:~:text=BYD%20has%20reported%20the%20sale,sales%20record%20of%201%2C863%2C494%20vehicles> (last accessed Mar. 11, 2024).

⁴ Sean Tucker, *Chinese Auto Makers Inch Closer to American Market*, Oct. 10, 2023, Kelly Bluebook, available at <https://www.kbb.com/car-news/chinese-automakers-inch-closer-to-american-market/#:~:text=There%20are%20no%20cars%20built%20by%20Chinese%20automakers,automakers%20are%20planning%20to%20cross%20that%20border%20soon> (last accessed Mar. 8, 2024).

⁵ Edward White and Gloria Le, *China’s EV suppliers look to leverage superior tech to recouple with west and drive expansion*, Feb. 17, 2024, Financial Times, available at <https://www.ft.com/content/9805c539-a71e-446e-9f0c-f2f57ebaa2ae> (accessed Mar. 11, 2024).

⁶ *China is the largest supplier of cars to Mexico and that will not change this decade*, Feb. 12, 2024, Mexico Daily Post, available at <https://mexicodailypost.com/2023/02/12/china-is-the-largest-supplier-of-cars-to-mexico-and-that-will-not-change-this-decade/#:~:text=With%2014%2C754%20vehicles%20assembled%20in%20China%20sold%20in,this%20origin%20represented%2015.6%25%20of%20the%20domestic%20market> (last accessed Mar. 11, 2024).

⁷ See Selina Cheng, River Davis and Raffaele Huang, *Having Overtaken Tesla, BYD Is Running Into Problems Overseas*, Mar. 12, 2024, The Wall Street Journal, Mar. 12, 2024, available at <https://www.wsj.com/business/autos/having-overtaken-tesla-byd-is-running-into-problems-overseas-7d883f02> (last accessed Mar. 14, 2024)(noting inter alia such problems Hyundai experienced in the US market more than thirty years ago).

⁸ Comments of Michael Dunn, WITA Seminar, March 13, 2024 (Hereinafter “WITA Seminar)

⁹ See Keith Bradsher, *How China Came to Dominate the World in Solar Energy*, Mar.7, 2024, New York Times, available at <https://www.nytimes.com/2024/03/07/business/china-solar-energy-exports.html> (last accessed Mar. 12, 2024) (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).

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- ¹⁰ Comments of Roy Blunt, WITA Seminar, *supra* note ____.
- ¹¹ Gloria Li and Ryan McMorrow, *Chinese city of Shenzhen rolls out plan to boost car exports*, Financial Times, Feb. 27, 2024, available at <https://www.ft.com/content/efb4ceb4-6d46-4c2f-abf6-142b3bc5c3b6> (last accessed Mar. 9, 2024).
- ¹² *Ibid.*
- ¹³ William Gavin, *Tesla's Chinese rival backed by Warren Buffett is launching more cheap EVs*, Mar. 13, 2024, Quartz, available at <https://qz.com/byd-china-ev-new-car-cheap-quality-issues-europe-1851331244> (last accessed Mar. 14, 2024) (hereinafter, "Gavin, Tesla's Chinese Rival").
- ¹⁴ Daina Beth Solomon, *Chinese Automaker BYD Looking for Mexican Plant Location, Executive Says*, Feb. 28, 2024, Reuters, available at <https://www.msn.com/en-us/autos/news/chinese-automaker-byd-looking-for-mexico-plant-location-executive-says/ar-BB1j4tNc> (last accessed Mar. 7, 2024).
- ¹⁵ Zhang Yan and Brenda Goh, *Chinese Automakers Open Factories Abroad as Export Clout Causes Friction*, Mar. 14, 2024, Reuters, available at <https://www.reuters.com/business/autos-transportation/chinese-automakers-open-factories-abroad-export-clout-causes-friction-2024-03-14/> (last accessed Mar. 15, 2024) (hereinafter "Zhang and Goh").
- ¹⁶ *Mexico's Top Free Trade Agreements and their Impact*, May 22, 2020, Tetakawi, available at <https://insights.tetakawi.com/top-free-trade-agreements-with-mexico> (last accessed Mar. 11, 2024); *Mexico Free Trade Agreements (FTAs): a Comprehensive List*, Dec. 14, 2022, Tetakawi, available at <https://insights.tetakawi.com/mexicos-free-trade-agreements> (last accessed Mar. 11, 2024).
- ¹⁷ Mathilde Carlier, *Annual Passenger Car Sales in the United States from 1951 to 2023*, Feb. 28, 2024, Statista, available at <https://www.statista.com/statistics/199974/us-car-sales-since-1951/#:~:text=The%20U.S.%20auto%20industry%20sold%20nearly%203.12%20million,were%20approximately%2015.5%20million%20in%20the%20United%20States> (last accessed Mar. 12, 2024).
- ¹⁸ Over 50% of the vehicles imported into Mexico were made by General Motors; others were produced by Ford and Stellantis in China. See *A Chinese Car Boom in Mexico?*, Mar. 14, 2024, FTI Consulting Strategic Communications, available at <FTIMexico@info.fticonsulting.com> (last accessed March 15, 2024).
- ¹⁹ Mexican Daily Post, *supra* note ____.
- ²⁰ David Shepardson, *US to probe if Chinese cars pose national data security risks*, Mar. 2024 Reuters, available at <https://www.msn.com/en-gb/news/world/us-to-probe-if-chinese-cars-pose-national-data-security-risks/ar-BB1jbjYI> (accessed Mar. 7, 2024); hereinafter "US to Probe."
- ²¹ Justun Fischer, *The Average Price of an Electric Car Keeps Dropping (2024 Update)*, Feb. 22, 2024, CarEdge, available at <https://caredge.com/guides/average-price-of-an-electric-car-2024#:~:text=In%20January%202024%2C%20the%20average%20new%20electric%20ca>

[r.higher%20than%20the%20overall%20new%20car%20market%20average](#) (last accessed Mar. 13, 2024).

²² *Could There be a US-Mexico Trade War?*, Mar. 12, 2024, The Economist, available at https://www.economist.com/the-americas/2024/03/12/could-there-be-a-us-mexico-trade-war?utm_content=article-image-5&etear=nl_today_5&utm_campaign=a.the-economist-today&utm_medium=email.internal-newsletter.np&utm_source=salesforce-marketing-cloud&utm_term=3/12/2024&utm_id=1859633 (last accessed Mar. 13, 2024) (Hereinafter “US-Mexico trade War?”).

²³ See Miguel Cortina, *US Considers Hiking up Tariffs on Imported Chinese Cars*, Dec. 21, 2023, Motor Trend, available at <https://www.motortrend.com/news/us-trade-tariffs-on-chinese-cars-suvs-2024/#:~:text=Cars%20made%20in%20China%20and%20sold%20in%20the,worldwide%E2%80%94including%20American%20players%20like%20Ford%20and%20General%20Motors> (last accessed Mar. 8, 2024). Several models built in China by US producers such as Lincoln and Buick are currently imported from China, as will be the electrical Volvo EX30. See HTSUS item 8703, with chapter 99 notes applicable to imports from China.

²⁴ November 30, 2018, full text available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> (last accessed Mar. 15, 2024).

²⁵ Solomon, *supra* note ____; see Josh Hawley (R-MO), *Hawley Introduces New Bill to Raise Tariffs on Chinese Products, Protect American Autoworkers*, Feb. 28, 2024, Josh Hawley US Senator for Missouri, available at <https://www.hawley.senate.gov/hawley-introduces-new-bill-raise-tariffs-chinese-evs-protect-american-autoworkers> (last accessed Mar. 8, 2024).

²⁶ David Shepardson, *Hike Tariffs on Chinese EVs, Senate Democrats Urge Biden Administration*, Mar. 7, 2024, Reuters, available at <https://www.msn.com/en-us/money/markets/hike-tariffs-on-chinese-evs-senate-democrats-urge-biden-administration/ar-BB1jvovj> (last accessed Mar. 8, 2024).

²⁷ See Zeyi Yang, “Europe is about to crack down on Chinese electric cars,” September 26, 2023, *MIT Technology Review*, <https://www.technologyreview.com/2023/09/26/1080293/europe-chinese-ev-investigation-subsidy/>

²⁸ See, e.g., James Bacchus, *The High Price of Buying American*, June 6, 2023, Cato Institute, <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). (hereinafter “Bacchus”)

²⁹ David Shepardson, *supra* note ____.

³⁰ David Shepardson, *supra* note ____.

³¹ See *In China, Your Car Could be Talking to the Government*, Nov. 30, 2018, Driving, available at <https://driving.ca/auto-news/news/in-china-your-car-could-be-talking-to-the-government> (last accessed Mar. 13, 2024).

³² HTSUS, item 8703.

³³ See *Automobile Tariffs by Country 2024*, World Population Review, available at <https://worldpopulationreview.com/country-rankings/automobile-tariffs-by-country> (last accessed Mar. 13, 2024).

³⁴ See *ECONOMIC AND TRADE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE PEOPLE'S REPUBLIC OF CHINA*, Jan. 15, 2020, USTR Fact Sheet, available at https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/US_China_Agreement_Fact_Sheet.pdf (last accessed Mar. 13, 2024); Text, available at https://d3i6fh83elv35t.cloudfront.net/static/2020/01/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf (last accessed Mar. 13, 2024).

³⁵ See Final Text of US-Korea Free trade Agreement as of January 1, 2019, USTR, available at <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> (last accessed Mar. 13, 2024). That agreement does not open the small truck market for several decades. However, the US-Korea rules of origin for automobiles, HTSUS items 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. See US-Korea Free Trade Agreement, Chapter 6, Annex 6-A, at 6-64, available at https://ustr.gov/sites/default/files/Annex_-_A_SPECIFIC_RULES_OF_ORIGIN.pdf.

³⁶ *Geely Automobile Holdings to Acquire 34.02% of the Shares of Renault Korea Motors*, May 10, 2022, Geely, available at <https://global.geely.com/en/news/2022/geely-acquires-shares-renault-korea-motors> (last accessed Mar. 13, 2024).

³⁷ Daniel Workman, *US Imported Cars by Supplier Countries*, Aug. 2023, World's Top Exports, available at https://www.worldstopexports.com/us-imported-cars-by-supplier-countries/?expand_article=1#Where%20Does%20The%20United%20States%20Spend%20Most%20on%20Imported%20Cars? (last accessed Mar. 14, 2024).

³⁸ See Daniel Griswold, *Why Are Pickups So Expensive? Blame the Chicken Tax*, Mar. 13, 2022, Cato Institute, available at <https://www.cato.org/commentary/why-are-pickups-so-expensive-blame-chicken-tax> (last accessed Mar. 13, 2024) (discussing the trade retaliation against the European Union 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 and General Motor's profits).

³⁹ December 15, 1992 [US-Mex.-Can.]; terminated July 1, 2020, full text available at <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/index.aspx?lang=eng> (last accessed Mar. 15, 2024).

⁴⁰ USMCA, chapter 4, annex 4-B; see David A. Gantz, *An Introduction to the United States-Mexico-Canada Agreement: Understanding the New NAFTA* 29-39 (Edward Elgar, 2020).

⁴¹ USMCA, ch.4, annex 4-B, Table A.2

⁴² USMCA, chapter 4, annex 4-B.

⁴³ UNITED STATES – AUTOMOTIVE RULES OF ORIGIN (USA-MEX-CDA-2022-31-01), December 14, 2022, available at <https://ustr.gov/sites/default/files/enforcement/FTA/USMCA%2031/USMCAAutomotive%20ROO.pdf> (last accessed Mar. 12, 2024); See Opening statement of the United

States, August 2, 2022, available at <https://ustr.gov/sites/default/files/enforcement/FTA/USMCA%2031/US.Autos.R00.OS.8.2.22.pdf#:~:text=The%20seven%20defined%20core%20parts%20%E2%80%93%20the%20engine%2C,value%20of%20the%20vehicle%2C%20depending%20on%20the%20mod>el (last accessed Mar. 12, 2024).

⁴⁴ USMCA, Chapter 4, Annex 4-B, Table A.2.

⁴⁵ See *How the USMCA Saves Costs for the Electric Mobility Supply Chain*, Jan. 13, 2022, ArentFoxSchiff, available at <https://www.jdsupra.com/legalnews/how-the-usmca-saves-costs-for-the-4432038/#:~:text=Under%20the%20USMCA%2C%20automotive%20goods%20are%20s>

[ubject%20to,content%20for%20vehicles%20and%20parts%20%28including%20advance](https://www.jdsupra.com/legalnews/how-the-usmca-saves-costs-for-the-4432038/#:~:text=Under%20the%20USMCA%2C%20automotive%20goods%20are%20s)d%20batteries%29 (last accessed Mar. 12, 2024).

⁴⁶ Inflation Reduction Act, P.L. 117-169, August 16, 2022, 136 Stat. 1819, available at <https://www.congress.gov/117/plaws/publ169/PLAW-117publ169.pdf> (last accessed Mar. 11, 2024).

⁴⁷ See USMCA art. 34.7.

⁴⁸ See *The costs of automotive rules of origin in the USMCA*, Jan. 9, 2022, Opportimes, available at <https://www.opportimes.com/the-costs-of-automotive-rules-of-origin-in-the-usmca/#:~:text=In%20addition%2C%20the%20CBO%20estimates%20that%20US%20im>porters,3%20billion%20in%20tariffs%20over%20the%20next%20decade (last accessed Mar. 12, 2024) (“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”).

⁴⁹ Irish America Staff, *Ford Company Celebrates 100 Years in Ireland*, Apr. 21, 2017, Ford, available at <https://www.irishamerica.com/2017/04/ford-celebrates-100-years-in-ireland/> (last accessed Mar. 12, 2024).

⁵⁰ *What we’re Made of and What We Make*, undated, Honda, available at <https://www.honda.com/operations/what-were-made-of-and-what-we-make> (last accessed Mar. 12, 2024). Honda’s first US plant, assembling motorcycles, opened in 1970.

⁵¹ *Toyota Motor Manufacturing, Kentucky (TMMK)*, 2024, Toyota, available at <https://pressroom.toyota.com/facility/toyota-motor-manufacturing-kentucky-tmmk/> (last accessed Mar. 12, 2024).

⁵² *The Volkswagen Plant in Puebla, Mexico: An Overview*, Aug. 10, 2023, Tetakawi, available at <https://insights.tetakawi.com/volkswagen-plant-in-puebla> (last accessed Mar. 12, 2024).

⁵³ Umar Shakir, *Kia Plans to Build EVs in the US to An Comply with New Federal Tax Credit*, Sep. 21, 2022, available at <https://www.theverge.com/2022/9/21/23364927/kia-ev-manufacture-us-tax-credit-hyundai> (last accessed Mar. 12, 2024). Hyundai, Kia’s affiliate, reportedly is building an EV and EV battery plant in Savannah, Georgia, to open in 2025.

⁵⁴ Data suggest that in 2020, manufacturing labor costs in China averaged \$6.50 per hour while those in Mexico averaged \$4.82 per hour. See *Manufacturing Wages in*

Mexico v. China, Sep. 9, 2020, Tetakawi, available at <https://insights.tetakawi.com/manufacturing-wages-mexico-vs-china> (last accessed Mar. 8, 2024).

⁵⁵ “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.” (US International Trade Commission, USITC.gov, chrome-extension://efaidnbnmnnibpcajpcglclefindmkaj/https://www.usitc.gov/elearning/hts/media/2017/SubstantialTransformation.pdf)

⁵⁶ See 19 CFR § 134.1. in the present example the country (Mexico) is where the automobile obtains its “essential character.”

⁵⁷ 19 sec. § 102.11(b)(1).

⁵⁸ See 19 U.S. Code §1677j – Prevention of Circumvention of Antidumping and Countervailing Duty Orders, available at <https://www.law.cornell.edu/uscode/text/19/1677j> (last accessed Mar. 8, 2024).

⁵⁹ See U.S. Dept. of Commerce, *Department of Commerce Issues Final Determination of Circumvention Inquiries of Solar Cells and Modules from China*, Aug. 18, 2023, available at <https://www.commerce.gov/news/press-releases/2023/08/department-commerce-issues-final-determination-circumvention-inquiries> (last accessed Mar. 8, 2024). By Presidential Proclamation of June 6, 2022, collection of duties was stayed until June 2024. *Ibid.*

⁶⁰ See Aarian Marshall and Will Knight, *The White House Warns Cars Made in China Could Unleash Chaos*, Feb. 29, 2024, Wired, available at <https://www.wired.com/story/china-cars-national-security-threat-investigation/> (last accessed Mar. 11, 2024)(quoting Lael Brainard, “For years China has employed an array of subsidies and protections to build massive capacity in EV production”) (hereinafter Marshall and Knight).

⁶¹ US 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 US petitioners. See Department of Commerce, International Trade Administration, *Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise*, undated, available at <https://enforcement.trade.gov/download/prc-nme-status/nme-moe-rfc-frn.pdf> (accessed Mar. 11, 2024); *China’s Status as a Nonmarket Economy (NME)*, Jan. 10, 2019, Congressional Research Service, available at <https://crsreports.congress.gov/product/pdf/IF/IF10385> (last accessed Mar. 11, 2024))noting that when Commerce uses NME methodology it uses surrogate country data to determine “normal value,” which many believe results in higher AD margins than if the producer’s actual prices and costs were used).

⁶² WTO, Antidumping Agreement (Agreement Implementing Article VI of GATT 1994), Article 3; see 19 USC § 1677(7).

⁶³ 19 USC §1677(7)(F).

⁶⁴ See International Trade Administration, Antidumping and Countervailing Duties, “What is dumping? Dumping 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. The difference between the price (or cost) in the foreign market and the price in the U.S. market is called the dumping margin. Unless the conduct falls within the legal definition of dumping as specified in U.S. law, a foreign producer selling imports at prices below those of American products is not necessarily dumping.” Available at

<https://www.trade.gov/antidumping-and-countervailing-duty-frequently-asked-questions?anchor=content-node-t7-field-lp-region-2-3> (Last accessed Mar. 11, 2024).

Constructed value as a means for determining dumping margins contemplates calculating the full cost of producing the goods, including materials, labor, overhead and a reasonable profit, and in my experience as a practical matter is subject to considerable Department of Commerce discretion.

⁶⁵ 19 CFR §351.204.

⁶⁶ See International Trade Administration, *supra* note [63].

⁶⁷ WTO Antidumping Agreement, art. 14, “Anti-Dumping Action on Behalf of a Third Country.”

⁶⁸ See Olivia Tan Jia Yi, *Chinese auto firms follow Tesla to Mexico, and from there to the U.S.*, Jul. 3, 2023, The China Project, available at <https://thechinaproject.com/2023/07/03/chinese-auto-firms-follow-tesla-to-mexico/#:~:text=As%20such%2C%20Mexico%E2%80%99s%20imports%20of%20Chinese%20auto%20parts,Mexico%20as%20an%20end%20market%20for%20Chinese%20auto%20makers> (last accessed Mar. 11, 2024) (indicating that Mexican imports of Chinese auto parts increased by 35% from 2020-22, in part to service Chinese-owned Mexican auto parts factories).

⁶⁹ Section 201 of the Trade Act of 1974, as amended, 19 USC §§2101 et seq.

⁷⁰ See *Understanding Safeguard Investigations*, undated, US International Trade Commission, available at https://www.usitc.gov/press_room/us_safeguard.htm (last accessed Mar. 15, 2024).

⁷¹ *Members Review Safeguard Actions, Address Increased Use of Measures*, Oct. 25, 2021, World Trade Organization, available at https://www.wto.org/english/news_e/news21_e/safe_25oct21_e.htm#:~:text=Under%20the%20WTO%20rules%2C%20a%20member%20may%20apply.to%20cause%20serious%20injury%20to%20its%20domestic%20industry (last accessed Mar. 15, 2021).

⁷² USMCA, ch. 10, sec. A.

⁷³ Section 232 of the Trade Expansion Act of 1962, 2 (19 U.S.C. §1862, as amended) allows any department, agency head, or “interested party” to request that Commerce investigate to ascertain the effect of specific imports on U.S. national security; hereinafter “Section 232.”

⁷⁴ GATT, art. I.

⁷⁵ See WTO Dispute Settlement Understanding, art. 16(4): “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 prejudice to the right of Members to express their views on a panel report.” [emphasis supplied]

⁷⁶ See *Draft Ministerial Decision on Dispute Settlement Reform*, Mar. 1, 2024, available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN24/W22.pdf&Open=True> (last accessed March 15, 2024) (“We instruct officials to accelerate discussions in an inclusive and transparent manner, build on the progress already made, and work on unresolved issues, including issues regarding appeal/review and accessibility to achieve the objective by 2024 as we set forth at MC12”).

⁷⁷ The US is the major destination of Mexico’s exports; see *Mexico Exports, 2023*, Trading Economics, available at <https://tradingeconomics.com/mexico/exports> (last accessed Mar. 14, 2024).

⁷⁸ USMCA, art 2.3.

⁷⁹ Available under USMCA, ch. 31.

⁸⁰ *U.S. bans the sale and import of some tech from Chinese companies Huawei and ZTE*, Nov. 26, 2022, Associated Press, available at <https://www.npr.org/2022/11/26/1139258274/us-ban-tech-china-huawei-zte> (last accessed Mar. 14, 2024).

⁸¹ EV Letter, *supra* note ____.

⁸² US to Probe, *supra* note ____; see Department of Commerce, *Securing the Information and Communications Technology and Services Supply Chain: Connected Vehicles*, Mar. 1, 2024, available at <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3457-2024-02-29-2024-fr-2024-04382-4251333-ppv/file> (accessed Mar. 11, 2024).”

⁸³ US to Probe, *supra* note ____.

⁸⁴ James Vincent, *Tesla Will Store Chinese Car Data Locally, Following Government Fears About Spying*, May 26, 2021, The Verge, available at <https://www.theverge.com/2021/5/26/22454369/tesla-china-datacenter-process-locally-spying-fears> (last accessed Mar. 13, 2024).

⁸⁵ Zhang and Goh, *supra* note ____.

⁸⁶ Janka Ortel, *Security recall: The risk of Chinese electric vehicles in Europe*, Jan. 25, 2024, European Council on Foreign Relations, available at <https://ecfr.eu/article/security-recall-the-risk-of-chinese-electric-vehicles-in-europe/> (last accessed Mar. 14, 2024).

⁸⁷ ICTS Probe, *supra* note ____.

⁸⁸ See Jonathan Masters, *U.S. Foreign Policy Powers: Congress and the President*, Mar. 2, 2017, I, available at <https://www.cfr.org/backgrounder/us-foreign-policy-powers-congress-and-president> (last accessed Mar. 14, 2024); hereinafter “Masters.”

⁸⁹ Masters, *supra* note ____.

⁹⁰ GATT, art. XXI.

⁹¹ *Russia – Measures Concerning Traffic in Transit*, Report of the Panel, WT/DS512/R, Apr. 5, 2019; see Charlene Barshefsky, David J. Ross and Sephanie Hartman, *WTO*

Issues Groundbreaking Decision on GTT National Security Exception, 2019, WilmerHale, available at (last visited Mar. 11, 2024).

⁹² Ambassador Maria Pagan, *Statements by the United States at the Meeting of the WTO Dispute Settlement Body*, Jan. 27, 2023, Office of the US Trade Representative, available at <https://ustr.gov/about-us/policy-office/press-office/press-releases/2023/january/statements-united-states-meeting-wto-dispute-settlement-body> (last accessed Mar. 11, 2024) (“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.”)

⁹³ USMCA, art. 32.2 (emphasis supplied).

⁹⁴ Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. §1862, as amended); See Rachel F. Fefer, *Section 232 of the Trade Expansion Act of 1962*, Apr. 1, 2022, Congressional Research Service, available at <https://crsreports.congress.gov/product/pdf/IF/IF10667> (last accessed Mar. 14, 2024)

⁹⁵ *Ibid.*

⁹⁶ See, e.g., Alex Durante, *How the Section 232 Tariffs on Steel and Aluminum Harmed the Economy*, Sep. 20, 2022, Tax Foundation, available at <https://taxfoundation.org/research/all/federal/section-232-tariffs-steel-aluminum/> (last accessed Mar. 13, 2024).

⁹⁷ See Matt Solomon, *United States Eliminates Section 232 Tariffs on Steel and Aluminum from Canada and Mexico; Canada and Mexico Eliminate Retaliatory Tariffs on US Goods*, May 21, 2019, White and Case, available at <https://www.whitecase.com/insight-alert/united-states-eliminates-section-232-tariffs-steel-and-aluminum-canada-and-mexico#:~:text=In%20accordance%20with%20the%20bilateral%20agreements%2C%20President%20Trump,a.m.%20eastern%20daylight%20time%20on%20May%2020%2C%202019> (last accessed May 11, 2024).

⁹⁸ Richard Newcomb, Nate Bolin and Matthew Larson, *US lifts Section 232 tariffs on steel and aluminum from the EU effective January 1, 2022 – continues similar negotiations with Japan*, Oct. 31, 2022, DLA Piper, available at <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> (last accessed Mar. 11, 2024).

⁹⁹ *U.S. Supreme Court Refuses to Hear Section 232 Tariff Case*, Apr. 3, 2023, Metals Service Center Institute, available at <https://www.msci.org/u-s-supreme-court-refuses-to-hear-section-232-tariff-case/> (last accessed Mar. 11, 2024).

¹⁰⁰ Marshall and Knight, *supra* note ____.

¹⁰¹ See Bacchus, *supra* note ____.

¹⁰² See *FACT SHEET: Biden-Harris Administration Announces New Private and Public Sector Investments for Affordable Electric Vehicles*, Apr. 17, 2023, The White House, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2023/04/17/fact-sheet-biden-harris-administration-announces-new-private-and-public-sector-investments-for-affordable-electric-vehicles/> (last accessed Mar. 15, 2024)(quoting the goal of 50 percent of all new vehicle sales be electric by 2030).

¹⁰³ See Keith Bradsher, *How China Came to Dominate the World in Solar Energy* Mar. 7, 2024, New York Times, available at <https://www.nytimes.com/2024/03/07/business/china-solar-energy-exports.html#:~:text=The%20United%20States%20bans%20imports%20made%20with%20materials,the%20European%20Union%20has%20been%20considering%20similar%20action> (last accessed Mar. 9, 2024)(noting the relation of the ban to Chinese subsidies as well as to imports from the Xinjiang forced labor region).

¹⁰⁴ Ken Moritsugu, *Chinese Auto Exports Rose 64% in 2023, with strong Push by EVs, as Makers Expanded Overseas*, Jan. 11, 2024, Associated Press, available at <https://apnews.com/article/china-auto-exports-ev-hybrid-7d553c31597125d6702b6691a8542cb1> (last accessed Mar. 11, 2024).

¹⁰⁵ Philip Blenkinsop and Charlotte Van Campenhout, *EU Set to Allow Possible Retroactive Tariffs for Chinese EVs*, Feb. 28, 2024, Reuters, available at <https://www.msn.com/en-gb/money/other/eu-set-to-allow-possible-retroactive-tariffs-for-chinese-evs/ar-BB1jplSb> (last accessed Mar. 12, 2024).

¹⁰⁶ James McBride and Andrew Chatzky, *Is 'Made in China 2025' a Threat to Global Trade?*, May 13, 2019, Council on Foreign Relations, available at <https://www.cfr.org/background/made-china-2025-threat-global-trade#:~:text=Released%20in%202015%2C%20Made%20in%20China%202025%20is,and%20telecommunications%2C%20and%20advanced%20robotics%20and%20artificial%20intelligence> (last accessed Mar. 12, 2024).

¹⁰⁷ Geeley raises an even more complicated challenge, since it is owned in part by Berkshire-Hathaway. Gavin, “Tesla’s Chinese Rival,” supra note ____

¹⁰⁸ Huan Zhu, *Chinese Auto Representatives Put Forward Proposals During Two Sessions*, Mar. 10, 2024, China Trade Monitor, available at <https://www.chinatrademonitor.com/chinese-auto-representatives-put-forward-proposals-during-two-sessions/> (last accessed Mar. 12, 2024).

¹⁰⁹ See *US-Mexico Trade War?*, supra note ____ (noting that Mr. Trump “loathes trade imbalances”).

¹¹⁰ See, e.g., Carolina Pulice, *Mexico declares national security protection for Mayan tourist train*, May 18, 2023, Reuters, available at <https://www.reuters.com/world/americas/mexico-declares-national-security-protection-mayan-tourist-train-2023-05-19/#:~:text=In%20a%20decree%20published%20in%20Mexico%27s%20official%20gazette%2C,as%20well%20as%20the%20transoceanic%20freight%20rail%20corridor> (last accessed May 12, 2024).

¹¹¹ See Amanda Chu and Demetri Sevastopolo, *US Solar Manufacturers in “Dire Situation” as Imports Soar*, Mar. 13, 2024, Financial Times, available at <https://www.ft.com/content/9afeb8a2-ee25-4455-b917-5f06486abe5b?shareType=nongift> (last accessed Mar. 15, 2024).