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September 16, 2020

Mr. Edward Gresser
Chair
Trade Policy Staff Committee
Office of the U.S. Trade Representative
600 17th Street NW
Washington, DC 20510

Re: Request for Comments on China's Compliance with its World Trade Organization Commitments (USTR-2020-0033)

Dear Mr. Gresser:

Please find below comments from the Coalition for a Prosperous America (CPA), a nonprofit organization representing the interests of 4.1 million households engaged in domestic production through our agricultural, manufacturing and labor members.

Thank you for your consideration,

A handwritten signature in black ink that reads 'Daniel DiMicco'.

Daniel DiMicco, Chairman

A handwritten signature in blue ink that reads 'Michael C. Stumo'.

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Introduction

The WTO was designed with western market economies in mind. Many western leaders believed that 1989, when the Berlin Wall fell, was The End of History. In other words, history had judged that democratic capitalism had won over state-directed capitalism, which would and could never rise again. China’s state capitalism with Chinese characteristics could not last. China’s push to get into the WTO was proof of history’s judgment.

We were wrong. Beijing has no intention of moving to a democratic capitalism model. The WTO is not equipped to handle the whole-of-government-and-industry strategy utilized by the Chinese Communist Party to pursue its interests. Beijing’s goal is to bend the WTO and the world to its vision, rather than bend to the western world. Indeed, China’s intent is to reduce the power of the US and the international institutions. As longtime diplomat Michael Pillsbury observed: “[T]hey see a multipolar world as merely a strategic waypoint to a new global hierarchy in which China is alone at the top.”¹

CPA believes the United States must move further in decoupling the U.S. economy from China. We support utilizing leverage to protect our economic, security and geopolitical interests through a whole-of-government effort including a full suite of trade intervention tools. Specifically, CPA supports a U.S. industrial strategy to rebuild a broad array of industrial supply chains through the use of tariffs, quotas, incentives, exchange rate management, capital flow management, domestic infrastructure initiatives, and related tools. These are the same types of tools that are often used by America’s trading competitors as they successfully transfer productive capacity from our

¹ Michael Pillsbury, “The Hundred-Year Marathon,” St Martins Press, p 29, 2016.

shores to theirs. CPA urges that the U.S. relearn these industrial strategy lessons and implement them better than others have done. The WTO, however, often stands in the way of enacting these strategies.

CPA would like to congratulate this Administration for taking seriously the extraordinary challenges brought about by China's disregard for its obligations as a WTO member. Critics of the Section 301 tariffs on imports from China predicted economic disruption, inflation, recession, and job losses resulting from the tariffs. They were wrong.² It took China's export of the SARS-CoV-2 virus to disrupt the gains from our trade remedies. Hopefully those critics of USTR's response to China will show more humility going forward.

Beijing's "Made in China 2025" campaign represents a consistent threat to America's economic, military, and geopolitical leadership. The "2025" program has targeted 10 key sectors for robust competition with the United States: information technology; numerical control tools and robotics; aerospace; ships and ocean equipment; rail products; new energy vehicles; power equipment for electrical infrastructure; advanced materials; medicine and medical devices; and, agricultural machinery.

These are the industries of the future—the ones that the U.S. should be innovating and building here. But instead, America's "jobs of the future"—based upon the predominance of jobs now being created—are in positions like food service and home health care.

Beijing hopes to acquire technical and production dominance in each sector in order to significantly degrade America's industrial might, military strength, and workforce security. In the face of such unilateral ambition, it's clear that America's previous neoliberal trade approach failed to respond adequately—and will fail in the future.

Discussed further below, CPA will focus on one of these ten sectors – 'New Energy Vehicles' – to document the failure of reliance on WTO rules or good faith negotiations.

The historical records show that while the United States, Europe, and Japan tried year after year to get China to honor its automotive trade commitments, and then specifically tackled the New Energy Vehicles policy, China successfully used that time to stall while enlisting global vehicle manufacturers to transfer technology and manufacturing to China.

The United States must increasingly set trade and economic goals not on blind faith that other nations will adopt our values, but based on what is actually happening on the ground year to year.

² Jeff Ferry, CPA Research Director, "The Tariffs Are Working", Dec. 4, 2018, *available at* https://www.prosperousamerica.org/the_tariffs_are_working

Ambassador Lighthizer has correctly diagnosed the incompatibility of normal trade relations with China

The problems with China's compliance with WTO rules stem from the fact that China likely never intended to bend to the spirit or the letter of these rules, which are outlined in the Marrakesh Declaration.

As USTR noted at the outset of its *2017 Report to Congress on China's WTO Compliance*, ("2017 Report"), when China joined the WTO it agreed to a litany of special rules that were supposed to chart the path for China to move from a state capitalist economy to a market economy. Studying the history of attempts to get China to honor its commitments, USTR correctly concluded that "it is now clear that the WTO rules are not sufficient to constrain China's market-distorting behavior."³ And furthermore, that "bilateral efforts largely have been unsuccessful – not because of failures by U.S. policymakers, but because Chinese policymakers were not interested in moving toward a true market economy."⁴

Trade associations representing Stateless Multinational Enterprises do not have a plan

Acknowledging these two plain truths, it is dispiriting that trade associations purporting to represent the interest of American business use this annual report to push China's trade advocacy priorities, undermining U.S. trade policy. For example, the following comments were submitted in response to last year's 2019 report to Congress:

- the U.S. Chamber of Commerce wrote "we reiterate our unequivocal opposition to tariffs as a policy response to legitimate and serious concerns with China"; and
- the U.S. Council on International Business wrote "tariff actions have not to date resolved the underlying issues identified by the United States".

The obvious should be said: these submissions reflect the priorities of multi-national enterprises whose chief priority is their ability to invest in China, procure or produce from there, and export to the United States. They are not the priorities of American producers.

Pointless games of whack-a-mole

There are far too many trade cases for the WTO to plausibly handle in China's non-market economy to move it towards free market capitalism. That approach has been tried and failed.

³ 2017 Report to Congress on China's WTO Compliance, p. 2,

⁴ *Id.*

Additionally, organizations representing stateless multinational corporations have requested that USTR seek far too many promises and commitments than are plausible.

The 2019 submission of the U.S. Chamber of Commerce asked for USTR to “secure a commitment” an astonishing 149 times. Many of these commitments address specific Chinese laws and regulations that discriminate against foreign enterprises.

Your 2019 Report to Congress correctly observed the futility of engaging all these infractions individually:

[In 2017 and 2018 reports], we identified and explained the numerous policies and practices pursued by China that harm and disadvantage U.S. companies and workers, often severely. We also catalogued the United States’ persistent yet unsuccessful efforts to resolve the many concerns that have arisen in our trade relationship with China. **We found that a consistent pattern existed where the United States raised a particular concern, China specifically promised to address that concern, and China’s promise was not fulfilled.** [Emphasis added]⁵

CPA strongly agrees with USTR’s conclusion that “it is simply unrealistic to believe that WTO enforcement actions alone can ever have a significant impact on an economy as large as China’s economy, unless the Chinese government is truly committed to market-based competition.”⁶

Two decades of broken promises on Automotive

The automotive industry is a clear example of China taking advantage of a failed WTO system to move an important industry from the U.S. to China with a dedicated strategy of falsehoods, broken promises and state control.

CPA has many members in the automotive production supply chain, and in this section we will illustrate the conclusions above as they have applied to the Automotive and New Energy Vehicles Sector. This section will have three parts:

- I. The current set of complaints from Automotive OEMs about China;
- II. The specific commitments China undertook for the automotive sector and the history of failed attempts to get China to comply with its WTO commitments in this sector; and
- III. The success of China’s WTO-inconsistent policies in transferring global automotive manufacturing and innovation from the United States to China.

⁵ 2019 Report to Congress on China’s WTO Compliance, p. 2

⁶ 2017 Report, pg. 5

I. Automotive OEMs' current complaints about China

As will be seen in Part II below, automakers' current complaints about China's WTO compliance are precisely the same complaints they have been making since China's Accession in 2001, and things have only gotten worse.

Page 43 of the 2019 submission by the U.S. Chamber of Commerce listed the following requests by automakers to USTR among other issues:

AUTOS

- Secure a commitment from China to ease the conditions required for approval of new WFOEs, JVs, branches, and expansion of both manufacturing and distribution capacity in line with official commitments and timelines (e.g., 80% saturation clause, consolidation requirement, local brand requirement, new energy production requirement, etc.)
- Secure a commitment from China to remove explicit and implicit requirements for participation in the new energy vehicle (NEV) industry that mandate technology "mastery" and creation of new, indigenous brands.
- Secure a commitment from China not to expand restrictive requirements to other participants in the NEV industry.
- Ensure that all qualifying vehicles, regardless of brand or place of manufacture, are afforded equal treatment in awarding of energy saving and other incentives.
- Secure a commitment from China to allow foreign-invested entities, including automotive JVs, to compete for R&D funding, and to conduct one or more workshops on how foreign-invested entities can apply for and participate in R&D funding opportunities for China-based research.

As detailed below, the United States, Europe, and Japan had already secured these commitments specifically for the automotive sector and had them recorded in the Report of the Working Party on China's WTO Accession ("Accession Report"). When the discriminatory measures were never repealed or replaced with new ones (in particular for NEVs), China again specifically promised to remove the restrictions but then never did.

The failure to hold China accountable has led to its policies of technology and manufacturing capacity transfer has been a resounding success.

II. China's promises on the automotive sector when it joined the WTO

The WTO contains a series of agreements that create obligations applicable to all members, most notably the GATT. But when China joined the WTO in 2001, it agreed to a series of extra unilateral commitments to other WTO members given the high degree of state involvement in the economy. These commitments are primarily *China's WTO*

Protocol of Accession supplemented by the more detailed “*Report of the Working Party*”.

In Paragraph 203 of the Report of the Working Party (“Accession Report”), under the section titled Trade-Related Investment Measures, China committed not to condition foreign investment on local content requirements, export performance requirements, or technology transfer requirements.

Paragraph 203 was critical for all sectors interested in investing in China. For the automotive sector, Paragraph 203 benefited from the additional Paragraph 205 which took the broad requirements and reiterated them for the automotive sector:

The representative of China added that amendments would be made to ensure that all measures applicable to motor vehicle producers restricting the categories, types or models of vehicle permitted for production, would gradually be lifted. Such measures would be completely removed two years after accession, thus ensuring that motor vehicle producers would be free to choose the categories, types and models they produced.⁷

China committed to liberalize foreign automotive investment within 2 years of its WTO accession, but this never happened.

III. 2002 – 2020: 18 years of broken promises and failed negotiation.

This section reviews the history of attempts to get China to honor its WTO commitments in the automotive sector.

2002 – First Transitional Review; immediate signs of trouble

October 14, 2002 was China’s First Annual Transitional Review session.⁸ The first sign of trouble was that China had not provided its answers to Committee members’ questions until it showed up at the meeting, and even then only provided answers orally.⁹ The U.S. and Europe expressed their concerns that this made it very difficult to have a productive meeting, but China responded that it was “not bound legally to provide written answers to questions.”¹⁰

⁷ WTO “*Report of the Working Party*” on China’s accession⁷, 2001-10-11, Document WT/MIN(01)/3.

⁸ Committee on Trade-Related Investment Measures - Minutes of the meeting held on 14 October 2002, G/TRIMS/M/15 (“First Review”).

⁹ *Id.* ¶58

¹⁰ *Id.* ¶73-75

Japan concernedly asked why the local content rules, export requirements and mandatory transfer of technology requirements of China's 1994 Automobile Policy had not yet been repealed.¹¹ China said it would remove these requirements soon.¹² The United States noted that forced technology transfers were still happening, and investment decisions were being based on local content.¹³ China said it replaced rules for mandatory tech transfer with language saying it was "encouraged".¹⁴

2003 – Second Transitional Review; no improvement and automotive deadline is less than three months away

The Second Transitional Review was held on October 20, 2003, and China's deadline for removing automotive restrictions (pursuant to Paragraph 205 of the Accession Report) was December 11, 2003, two years after its Accession to the WTO.¹⁵

China told the U.S., EU and Japan that its *Policy on the Development of Automobile Industry* was "in the process of revision" and waiting for approval from the State Council.

In the Executive Summary of USTR's *2003 Report to Congress on China's WTO Compliance*, USTR stated as follows:

- Pg. 3: "Unlike last year, China's uneven and incomplete WTO compliance record can no longer be attributed to start-up problems."
- Pg. 4: "2003 also proved to be a year in which China's WTO implementation efforts lost a significant amount of momentum."
- Pg. 4: "In many instances, China has sought to deflect attention from its inadequate implementation of required systemic changes by managing trade in such a way as to temporarily increase affected imports from vocal trading partners, such as the United States."

Soybeans are mentioned as an example of China temporarily increasing affected imports – the same technique China has used in response to Section 301 tariffs.

Regarding automobiles in particular, the 2003 USTR Report stated that:

¹¹ *Id.* ¶53

¹² *Id.* ¶55

¹³ *Id.* ¶59

¹⁴ *Id.* ¶69

¹⁵ Committee on Trade-Related Investment Measures - Minutes of the meeting held on 20 October 2003, G/TRIMS/M/18 ("Second Review").

The United States is working closely with U.S. industry and is committed to achieving full implementation of China's commitment to make its automobile industrial policy WTO compatible. In a series of bilateral meetings with China, including the Trade Dialogue meetings held in Beijing in November 2003, the United States made clear that discriminatory industrial policies, whether for the automotive or other sectors, are not in keeping with China's WTO commitments and create unacceptable distortions in China's economy.¹⁶

2004 – Third Transitional Review; China's new auto policy still has same WTO-inconsistent requirements

On June 1, 2004, China published its "*Policy on the Development of Automobile Industry*" – also referred to as the "New Automobile Policy". The United States sent written questions to China through the WTO TRIMs Committee noting that the new policy still required new automobile factories to have 50% joint venture partners, mandatory research and development facilities, and other restrictions in violation of Paragraph 7.3 of China's Accession Protocol¹⁷.

At the Third Annual Review on October 26, 2004, China responded to the U.S. written questions saying "[t]he reason why China required foreign technology transfer and contract on technical cooperation was to prevent illegal assembling, to protect intellectual property and to ease up the procedures for product testing and accreditation, but not to force foreign parties to transfer their technologies. Therefore, this practice did not constitute a restriction on investment, nor a violation of the [Accession Protocol]."¹⁸ In USTR's *2004 Report to Congress on China's WTO Compliance*, USTR noted that China had "missed this deadline" referring to reforms of its automotive policy.¹⁹

The 2004 USTR Report recapped the 2003 efforts on automotive and noted that "[t]he United States continued to press China bilaterally on this issue in 2004."²⁰

2005 – New discriminatory auto regulations; China ignores high level engagement

In April, 2005, China issued several "Policy Decrees" under its New Automobile Policy restricting the importation of auto parts. These discriminatory auto parts rules were

¹⁶ USTR, *2003 Report to Congress on China's WTO Compliance*, p. 41

¹⁷ Committee on Trade-Related Investment Measures - Communication from the United States to China, G/TRIMS/W/37, on 21 September 2004, ¶3.

¹⁸ Committee on Trade-Related Investment Measures - Minutes of the meeting held on 26 October 2004, G/TRIMS/M/19 ("Third Review"), ¶21.

¹⁹ USTR, *2004 Report to Congress on China's WTO Compliance*, p. 48

²⁰ *Id.*, p. 49

subject to “[r]epeated and high-level engagement by the United States, including at the July 2005 JCCT meeting”, which [made clear that China was not prepared to address the United States’ concerns and revise the rules on auto parts.”²¹

Ahead of the Fourth WTO Review, on September 12, 2005, the United States sent another written communication to China reiterating its concerns from the previous September about the New Automobile Policy’s illegal requirements, and an explanation of how they violated Paragraph 7.3 of China’s Accession Protocol.²² Europe did the same.²³

The Fourth Transitional Review was held on October 10, 2005. The representative for Europe said “it was unfortunate that most of the questions in his delegation’s present communication had already been raised in the past, and so far had not yet been answered in a fully satisfactory manner in the EU’s view”.²⁴ China reiterated its deflecting answers on the New Automobile Policy.²⁵

2006 – U.S., EU and Canada file WTO dispute against China on exports of auto parts; no movement on China’s discriminatory investment laws at Fifth Review

In March, 2006, the U.S., EU and Canada filed a WTO dispute challenging a number of Chinese “Policy Decrees” that discriminated against automobile parts exports to China. The Panel ruled in favor of the complainants against China in July, 2008, the WTO Appellate Body mostly upheld the Panel Report in December, 2008, and China withdrew the Policy Decrees in August, 2009.²⁶

While the dispute over auto parts exports was ultimately successful in a legal sense, there was no movement on the overarching discriminations that had been raised during the first four annual reviews. At the Fifth Annual Review on October 25, 2006, the United States noted that more than half of China’s required reviews would now be completed with very

²¹ USTR, *2007 Report to Congress on China’s WTO Compliance*, p. 61

²² Committee on Trade-Related Investment Measures - Communication from the United States to China, G/TRIMS/W/42, on 12 September 2005, ¶¶6-9.

²³ Committee on Trade-Related Investment Measures - Communication from the European Communities to China, G/TRIMS/W/41, on 28 July 2005, ¶¶11-17.

²⁴ Committee on Trade-Related Investment Measures - Minutes of the meeting held on 10 October 2005, G/TRIMS/M/22 (“Forth Review”), ¶15

²⁵ *Id.*, ¶¶ 22-30.

²⁶ *Complaint by the European Communities*, WT/DS339/R, 18 July 2008 (the “EC Panel Report”); *Complaint by the United States*, WT/DS340/R, 18 July 2008 (the “US Panel Report”); *Complaint by Canada*, WT/DS342/R, 18 July 2008 (the “Canada Panel Report”).

little progress shown;²⁷ “The United States viewed China’s increasing use of policies that restrict foreign investment while promoting domestic companies as a step backwards and urged China to resume its progress toward the full institutionalization of market mechanisms.”²⁸

In response to complaints that its answers were not satisfactory, China responded that “Paragraph 18 of the [Accession Protocol] did not say that China had to provide an answer in a fully satisfactory fashion to a certain Member.”²⁹

2007 – Sixth Annual Review; China continues to say its requirements are merely ‘guidance’

There is no movement on the foreign investment climate for automobiles, and the WTO dispute regarding exports of auto parts to China continues to play out.

At the Sixth Annual Review, the United States and Europe repeat their calls that China’s Automobile Policy violates Paragraph 7.3 of China’s Accession Protocol and Paragraph 203 of China’s Working Party Report.³⁰ China continues to not provide answers in writing, and states at the meeting that the Policy is merely guidance, not requirements.³¹

While it was not flagged by U.S. trade authorities in 2007, during this year China’s NDRC issued regulations for “New Energy Vehicles” (NEVs) that required manufacturers of NEVs to “demonstrate mastery” and hold intellectual property rights for NEVs in China.³²

2008 – Seventh Annual Review; No change on investment restrictions while auto parts exports dispute proceeds

There is no movement on the foreign investment climate for automobiles, and the WTO dispute regarding exports of auto parts to China continues to play out.

At the Seventh Annual Review in October, 2008, Europe repeats the same communications about foreign investment restrictions from previous years. The EU

²⁷ Committee on Trade-Related Investment Measures - Minutes of the meeting held on 25 October 2006, G/TRIMS/M/25, (“Fifth Review”) ¶8

²⁸ *Id.*, ¶12

²⁹ *Id.*, ¶27 China repeated its answers on automotive, ¶¶31 – 35.

³⁰ Committee on Trade-Related Investment Measures - Communication from the United States to China, G/TRIMS/W/54, on 03 October 2007, ¶¶3-4.

³¹ Committee on Trade-Related Investment Measures - Minutes of the meeting held on 1 November 2007, G/TRIMS/M/26, (“Sixth Review”) ¶24

³² USTR, *2014 Report to Congress on China’s WTO Compliance*, p. 93

representative says they are “well aware of the repetitive nature” of their comments, but they are worth repeating until “answered in a fully satisfactory manner.”³³

China notes at the Review that while the WTO Dispute Panel ruled against it in July 2008, it had appealed to the WTO Appellate Body.

2009 – Eighth Annual Review; China firms up policy to require tech transfer on ‘New Energy Vehicles’

In September, 2009, President Obama announced a safeguard measure against Chinese tire imports.³⁴ China responded two months later announcing three countervailing duties (“CVDs”) investigations, including one against imports of automobiles from the United States.³⁵

In October, 2009, the United States, Europe and Japan reiterated their concerns about foreign investment in the automobile sector, and asked about particular changes to China’s Joint Venture regulation. Europe shared it was still hearing concerns from its automobile OEMs about mandatory technology transfer requirements. China responded that it “had doubts as to whether the specific parties concerned had in reality pursued means available to them to address the problems, for example either administrative review or judicial review procedures”.³⁶

Also in 2009, China’s NDRC and MIIT began informing foreign automobile manufacturers that their Chinese joint ventures create new research and development centers in China regarding New Energy Vehicle (NEVs) and be prepared to produce those NEVs under Chinese brands.³⁷

2010; China takes over Chair of WTO TRIMs Committee; no progress on investment restrictions

In 2010, there was no annual review at the WTO pursuant to paragraph 18 of China’s Accession Protocol. USTR does not document any bilateral engagements on the issue of NEVs during this year.

³³ Committee on Trade-Related Investment Measures - Minutes of the meeting held on 23 October 2008, G/TRIMS/M/27, (“Seventh Review”) ¶13

³⁴ USTR press release, *available at* <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/May/US-Wins-Trade-Enforcement-Case-Against-China-On-Autos>

³⁵ *Id.*

³⁶ Committee on Trade-Related Investment Measures - Minutes of the meeting held on 16 October 2009, G/TRIMS/M/29, ¶60

³⁷ USTR, *2011 Report to Congress on China’s WTO Compliance*, p. 71

2011

In March, 2011, “NDRC issued a draft Foreign Investment Catalogue that proposes a new limitation on foreign ownership in NEV parts manufacturing facilities in China to no more than 50 percent. Previously, foreign automobile parts manufacturers could establish in China as wholly foreign-owned enterprises.”³⁸

In May, 2011, MOFCOM issued final determinations in which it found that imports of American-made automobiles had been sold at less than fair value (i.e., “dumped”) into the Chinese market and had also benefited from subsidies. In December 2011, China began imposing both AD and CVD duties on imports of American-made automobiles. The AD duties ranged from 2.0 percent to 21.5 percent, and the CVD duties ranged from 6.2 percent to 12.9 percent.

In October, 2011, the United States raised the issue of discriminatory measures imposed by China on so-called New Energy Vehicles (“NEVs”) before the WTO Committee on Trade-Related Investment Measures (TRIMs): “The representative of the United States also explained that China had, more recently, taken a series of problematic actions related to the so-called ‘new energy vehicles’ or NEVs.”³⁹

These discriminatory measures included a “requirement that the foreign manufactures’ NEV investments in China be subject to project approval.” The United States cautioned the WTO Committee that:

Through this approval process, foreign manufacturers may be required to transfer sensitive technologies to their joint ventures with Chinese partners - the only investment mechanism through which foreign manufacturers may build vehicles in China - in order for any new NEV manufacturing facilities and new NEV models to be approved, given the regulations’ requirement that the manufacturing entity in China should “hold” and demonstrate “mastery” of certain core NEV technologies. The regulations also required the manufacturers to set up research and development units in China. These aspects of China’s regulations had raised serious concerns in the United States and other Members in light of the commitment that China made not to condition investment on the transfer of technology or the conduct of research and development.

³⁸ *Id.*

³⁹ Committee on Trade-Related Investment Measures - Minutes of the meeting held on 3 October 2011, G/TRIMS/M/31, ¶77

In November, 2011, the United States pressed the issue of the NEV restrictions at the bilateral JCCT meeting. At the meeting, “China committed that it will not require foreign automobile manufacturers to transfer technology to Chinese enterprises or to establish Chinese brands in order to invest in China’s market for NEVs.”⁴⁰ USTR would later in its 2014 Report to Congress call into question whether China had in practice withdrawn these requirements, as it seemed global automakers were still following these WTO inconsistent policies.⁴¹

2012 – China doubles down on transfer of technology for New Energy Vehicles

On September 17, 2012, the United States initiated a WTO dispute against China⁴² concerning export subsidies China was providing to manufacturers of automobile and automobile parts in violation of WTO rules. Consultations were held, and China agreed to not renew these subsidies.

“In October 2012, MOF, MIIT and MOST issued two new measures establishing a fiscal support fund for manufacturers of NEVs and NEV batteries.”⁴³ These measures were issued in final form without public comment. They contained the same “mastery” and IP holding requirements as China had committed not to maintain at the JCCT in 2011:

These measures therefore raise serious questions in light of China’s November 2011 JCCT commitment not to mandate technology transfer and China’s May 2012 S&ED commitment to treat intellectual property rights owned or developed in other countries the same as Chinese-owned or Chinese-developed intellectual property rights.⁴⁴

USTR reported that “[d]uring the run up to the December 2012 JCCT meeting, the United States pressed its concerns about China’s progress in implementing its November 2011 JCCT commitments in numerous bilateral meetings, including the JCCT Industries and Competitiveness Dialogue.”⁴⁵

2013, 2014, 2015 – No apparent compliance with Nov. 2011 JCCT promises

In its 2013, 2014, 2015, and 2016 Reports to Congress, during Michael Froman’s tenure as USTR, USTR repeated the following verbatim:

⁴⁰ USTR, *2011 Report to Congress on China’s WTO Compliance*, p. 72

⁴¹ USTR, *2014 Report to Congress on China’s WTO Compliance*, p. 94

⁴² China — Certain Measures Affecting the Automobile and Automobile-Parts Industries (DS450)

⁴³ USTR, *2014 Report to Congress on China’s WTO Compliance*, p. 94

⁴⁴ USTR, *2014 Report to Congress on China’s WTO Compliance*, p. 94

⁴⁵ *Id.*, p. 95

To date, it has been difficult to assess to what degree China has been implementing its November 2011 JCCT commitments. Public announcements by several foreign automobile manufacturers indicate that their joint ventures with Chinese enterprises have been approved by NDRC and MIIT to establish new production facilities in China, and these approvals have coincided with public commitments by the foreign automobile manufacturers to launch new Chinese NEV brands and to establish or expand research and development in China. This pattern of investment approvals is troubling, as it suggests that Chinese regulators may be pressuring foreign automobile manufacturers to establish Chinese brands and to make additional research and development investments in China as conditions for approving new production facilities. A number of other foreign automobile manufacturers have announced plans to manufacture NEVs in China, and therefore the United States will closely monitor developments related to China's commitment not to require technology transfer, as these automobile manufacturers seek regulatory approval for the launch of their NEV models.^{46 47 48 49}

In the 2016 Report to Congress, USTR added that China had begun making subsidies available exclusively to Chinese manufacturers: “the central government and certain local governments provide subsidies in connection with the purchase of NEVs, but they only make these subsidies available when certain Chinese-made NEVs, not imported NEVs, are purchased. China appears to pursue similar policies involving NEV batteries, leading to lost sales by U.S.-based manufacturers.”⁵⁰

2017 – 2019: USTR looks for ‘results-oriented deal’

Certainly the biggest positive development for U.S. automotive production and China trade came about in Phase One of *the Economic And Trade Agreement Between The Government Of The United States Of America And The Government Of The People's Republic Of China*, dated January 15, 2020.

This agreement requires China to purchase \$127.7 billion in US goods in 2017 to \$191.6 billion in US goods in 2020 (the 2017 baseline plus the first three categories' Year 1

⁴⁶ USTR, *2013 Report to Congress on China's WTO Compliance*, p. 83

⁴⁷ USTR, *2014 Report to Congress on China's WTO Compliance*, p. 94

⁴⁸ USTR, *2015 Report to Congress on China's WTO Compliance*, p. 101

⁴⁹ USTR, *2016 Report to Congress on China's WTO Compliance*, p. 108

⁵⁰ USTR, *2016 Report to Congress on China's WTO Compliance*, p. 108

sales) and \$225.9 billion in 2021. The biggest portion of this spending must be on manufactured goods, including vehicles.

This agreement was only possible due to the Section 301 tariffs opposed by major trade associations.

IV. 2017 – 2020: China’s WTO inconsistent automotive policies yield economic wins for China

What has actually happened in the meantime is that while the U.S. Chamber compiled and carbon-copied complaints from its members, those same multinational enterprises acquiesced to China’s demands.

General Motors

In October, 2017, Mark Reuss, now GM’s President, announced that “General Motors believes in an all-electric future” and that “In the next 18 months, GM will introduce two new all-electric vehicles based off learnings from the Chevrolet Bolt EV. They will be the first of at least 20 new all-electric vehicles that will launch by 2023.”⁵¹

The press release, issued from Detroit, made no mention of China. And yet, China is where GM is developing its electric vehicle fleet. The two vehicles promised within 18 months ended up being made in China by SAIC-GM.⁵² While SAIC-GM began exporting the Buick Envision from China to the United States in 2016, it delayed expanding exports due to this Administration’s Section 301 tariffs.⁵³

GM said in March, 2020, that it anticipates selling 1 million electric vehicles by 2025, supported by a “global platform”.⁵⁴ Reuters reports that the majority of those 1 million electric vehicles will be built in China.⁵⁵

⁵¹ General Motors, “GM Outlines All-Electric Path to Zero Emissions”, October 2, 2017, *available at* <https://media.gm.com/media/us/en/gm/news.detail.html/content/Pages/news/us/en/2017/oct/1002-electric.html>

⁵² Fred Lambert, “GM promised to introduce 2 new EVs by now, where are they?”, ELECTREK, April 2, 2019, *available at* <https://electrek.co/2019/04/02/gm-promised-new-electric-cars/>

⁵³ Bloomberg News, “China’s Biggest Carmaker SAIC Puts U.S. Export Plan on Hold”, April 19, 2017, *available at* <https://www.bloomberg.com/news/articles/2017-04-19/china-s-biggest-automaker-puts-u-s-ambitions-on-hold-on-trump>

⁵⁴ “GM Reveals New Ultium Batteries and a Flexible Global Platform to Rapidly Grow its EV Portfolio”, March 4, 2020, *available at* <https://media.gm.com/media/us/en/gm/home.detail.html/content/Pages/news/us/en/2020/mar/0304-ev.html>

⁵⁵ Paul Lienert, Joseph White, Ben Klayman, “Detroit’s near future based on SUVs, not EVs, production plans show”, REUTERS, March 26, 2020, *available at* <https://www.reuters.com/article/us-autos-emissions-suvs-insight/detroits-near-future-based-on-suvs-not-evs-production-plans-show-idUSKBN21D1KW>

The evidence strongly suggests that if it weren't for tariffs, GM would not be investing in electric vehicle production in America whatsoever.

In November, 2018, “GM said it would close Detroit-Hamtramck for good”.⁵⁶ But a year later, GM agreed to keep its Detroit-Hamtramck plant open in talks with the United Auto Workers and focus on building four of its twenty promised electric vehicles at the location.⁵⁷

While Detroit-Hamtramck built the Chevrolet Impala and Cadillac CT6 sedans, the revised plant is reported to focus on electric pickups, beginning with a GMC Hummer electric pickup followed by electric versions of the GMC Sierra and Cadillac Escalade. Likely not coincidentally, the United States has a 25% tariff on pickup trucks.

Tesla

Tesla CEO Elon Musk has publicly called for the United States to demand tariff reciprocity from China.⁵⁸ Also to Tesla's credit, it resisted China's joint venture investment requirements. However to get around the JV requirements, Tesla was required to build its Chinese factory in a foreign trade zone near Shanghai, meaning it will still face Chinese tariffs.⁵⁹

In July, 2019, *Automotive News* reported that Tesla “agreed to pay China 2.23 billion yuan (\$323 million) in tax every year as part of a deal with local authorities” by the end of 2023 to build its factory. A minimum investment of 14.08 billion yuan (\$2 billion) was also required.⁶⁰

In October, 2019, Tesla finished building its factory inside the Shanghai Free-Trade Zone.

News reports indicate that Tesla has still found itself required to comply with China's indigenous research and development requirements as well as export requirements:

⁵⁶ Jamie L. LaReau, “Peculiar steel beam marks last days at GM's Detroit-Hamtramck plant”, DETROIT FREE PRESS, Feb. 21, 2020, available at <https://www.freep.com/story/money/cars/general-motors/2020/02/21/gm-detroit-hamtramck-electric-cars/4797178002/>

⁵⁷ *Id.*

⁵⁸ Elon Musk Twitter, <https://twitter.com/elonmusk/status/971810418128691200>

⁵⁹ Orange Wang, “China doubles size of Shanghai Free-Trade Zone to include Tesla town in drive to open markets”, SOUTH CHINA MORNING POST, August 6, 2019, available at <https://www.scmp.com/economy/china-economy/article/3021706/china-doubles-size-shanghai-free-trade-zone-include-tesla>

⁶⁰ Angus Whitley, “Tesla to pay China \$323 million a year in taxes for factory site”, AUTOMOTIVE NEWS, July 30, 2019, available at <https://www.autonews.com/china/tesla-pay-china-323-million-year-taxes-factory-site>

- In January, 2020, Tesla announced that it will design an electric car in China for the global market.⁶¹ In June, Tesla released a call for design submissions for the new vehicle, but required that the submitters be Chinese.⁶²
- In September, 2020, Tesla announced that it would export its Made-in-China vehicles to global markets, despite an earlier promise not to.⁶³

Ford

In September 2009, the U.S. Department of Energy issued a direct \$5.9 billion loan to Ford under the Advanced Technology Vehicles Manufacturing Loan Program.⁶⁴

In 2017, Ford announced that it would invest “\$4.5 billion to electrify its most-popular, highest-volume vehicles for customers”, and promised seven “new global electric vehicles” by 2022.⁶⁵ To date, China has been the focus of Ford’s development and production. Ford’s first of the “global seven” was the Ford Territory EV, built in Xialoan, China, in association with Jiangling Motors Corp and now being exported to South America.⁶⁶

Conclusion

It has become clear that the U.S. cannot rely upon the WTO to bring China into compliance with its commitments. China’s broken promises are the rule and the strategy, rather than the exception. Chairman Xi and the Communist Party of China are clearly focused upon increasing, not decreasing, state control of the economy.⁶⁷ Indeed, China is focused upon a long term strategy to take its place as the pre-eminent power in a unipolar world, unburdened by the legacy organizations constructed by last generation western powers. The U.S. must consider whether and to what extent the WTO continues to be relevant to our trade interests or our national and economic security.

⁶¹ Jameson Dow, “Elon Musk: Tesla will design an electric car in China for global market”, ELECTREK, January 7, 2020 *available at* <https://electrek.co/2020/01/07/elon-musk-tesla-will-design-an-electric-car-in-china-for-global-market/>

⁶² Fred Lambert, “Tesla is taking design submissions for its Chinese-made small electric car”, ELECTREK, June 15, 2020 *available at* <https://electrek.co/2020/06/15/tesla-chinese-small-electric-car-design-submission/>

⁶³ Fred Lambert, “Tesla to export Model 3 made-in-China cars, something Elon Musk said they wouldn’t do”, ELECTREK, September 11, 2020 *available at* <https://electrek.co/2020/09/11/tesla-export-model-3-made-in-china-cars/>

⁶⁴ <https://www.energy.gov/lpo/ford>

⁶⁵ <https://media.ford.com/content/fordmedia/fna/us/en/news/2017/04/06/ford-announces-ambitious-china-electrification-strategy.html>

⁶⁶ Dan Mihalascu, “China-Built Ford Territory Goes Global As It Lands In South America”, *available at* <https://www.carscoops.com/2020/08/china-built-ford-territory-goes-global-as-it-lands-in-south-america/>

⁶⁷ “The New State Capitalism: Xi Jinping is trying to remake the Chinese economy,” *The Economist*, August 15, 2020.