

WRITTEN TESTIMONY OF JAMIESON L. GREER
BEFORE
THE U.S. HOUSE OF REPRESENTATIVES WAYS AND MEANS
COMMITTEE
SUBCOMMITTEE ON TRADE
“COUNTERING CHINA’S TRADE AND INVESTMENT AGENDA: OPPORTUNITIES
FOR AMERICAN LEADERSHIP”
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Today, I would like to discuss the legal and policy tools at our disposal to counter the negative aspects of China's trade and investment agenda.^{1, 2} It is no secret that tensions between the United States and China are high, with respect to trade and even more serious matters of international security. Analysts generally agree that the next decade will be critical in U.S.-China relations, and the trade and investment relationship is no small part of this. U.S. trade and investment with China must be thoughtfully managed to protect core national interests of the United States while simultaneously ensuring that crises do not lead to conflagrations. From a defense perspective, it is critically important to restore the U.S. manufacturing base to ensure that the U.S. can credibly deter escalation by China and, if necessary, defend its national security interests at home and abroad. When we look back at this time ten or twenty years from now, we must be able to say that we stood firm in defending U.S. workers and our economy.

In dealing with China, my observation has been that it is best to set firm boundaries on unacceptable behavior, take deliberate and strong action, and respectfully consult with the Chinese where possible to manage tensions. I fear that this is not taking place right now for a variety of reasons, and that, as a general matter, hot rhetoric has taken the place of meaningful action. I believe that strong trade enforcement is good medicine for the U.S.-China relationship, as it focuses minds on the most important matters and helps both sides understand issues of national importance. I do not subscribe to the myth that more trade reduces the likelihood of conflict, and continuing the move toward managed trade with China on a sectoral basis will be the most pragmatic way of dealing with its harmful economic behavior. I believe that good fences make good neighbors, and trade enforcement is an important part of establishing those fences.

Below, I first address China's approach to trade and investment, which goes well beyond promoting economic growth. Over many years, Chinese officials have articulated their intent to overtake the United States and dominate global markets in key sectors. I then address how these efforts have already injured U.S. workers and businesses and threaten to cause further deterioration in our industrial base, with disastrous consequences for our economic and national security. Finally, I discuss a number of ways that the United States can use U.S. trade laws and policy, including enforcement and negotiations, to counter China's unfair trading practices and support U.S. businesses and workers. I provide recommendations in a variety of areas for further exploration by Congress and the Administration.

¹ I am appearing today in my personal capacity and not on behalf of any current or former employer or client.

² References to "China" are references to the government of the People's Republic of China ("PRC"), the Chinese Communist Party ("CCP"), or instrumentalities thereof, as appropriate.

What Is China's Trade And Investment Agenda?

The CCP's hold on power in China has been premised on increased economic growth and improved living standards for the Chinese people. China's trade and investment agenda is geared, in part, toward these goals. We often hear rote platitudes from Chinese economic officials and planning documents that China is focused on growing domestic demand, "opening up" their economy, and increasing productivity. Notionally, these goals are not objectionable and are not dissimilar from many governments' stated economic objectives.

But these are not the only economic objectives pursued by the CCP, nor are they the primary goals. Rather, the CCP has consistently stated that its goal is to achieve the "Great Rejuvenation of the Chinese Nation," and to do it by 2049.³ This phrase is shorthand for a number of desired end states, one of which is for China to be the world's uncontested power center. For example, China seeks to dominate global manufacturing and technology to secure CCP leverage and control over the global economy and foreign governments.⁴ China seeks to achieve economic dominance to support its goals of becoming the world's leading superpower that can act with impunity. This economic and technological dominance is expected to support Chinese military superiority through a long-established – and still developing – national strategy of Military-Civil Fusion.⁵ The threat to the United States from China is real, it is acute, and it is existential. And our trade policy should be deployed to address this generational challenge.

These are not simply my personal observations. These are policies and objectives articulated and promoted by CCP officials. Chairman Xi Jinping of the CCP has been very clear that his intention is for Chinese socialism to overtake and subdue Western economies:

Facts have repeatedly told us that Marx and Engels' analysis of the basic contradictions in capitalist society is not outdated, nor is the historical materialist view that capitalism is bound to die out and socialism is bound to win. This is an inevitable trend in social and historical

³ See, e.g., Ken Moritsugu, Analysis: Communist Part Seeking China's 'Rejuvenation,' AP News (Mar. 9, 2021), available at <https://apnews.com/article/technology-legislature-coronavirus-pandemic-china-asia-pacific-562b40c73740d97f8ddd3099f08fa0a4>.

⁴ Stewart Patterson, "For, by, and from the Party: Defining the parameters of Dual Circulation," Hinrich Foundation (Sept. 2021) at 8, available at [https://research.hinrichfoundation.com/hubfs/White%20Paper%20PDFs/Defining%20the%20parameters%20of%20Dual%20Circulation%20\(Stewart%20Paterson\)/Defining%20the%20parameters%20of%20Dual%20Circulation%20-%20Stewart%20Paterson%20-%20Hinrich%20Foundation%20-%20September%202021%20\(1\).pdf?__hstc=251652889.fc5e1f00c449b8ae8f5876032ac43130.1681333173081.1681333173081.1681333173081.1&__hssc=251652889.10.1681333173081&__hsfp=1417353920](https://research.hinrichfoundation.com/hubfs/White%20Paper%20PDFs/Defining%20the%20parameters%20of%20Dual%20Circulation%20(Stewart%20Paterson)/Defining%20the%20parameters%20of%20Dual%20Circulation%20-%20Stewart%20Paterson%20-%20Hinrich%20Foundation%20-%20September%202021%20(1).pdf?__hstc=251652889.fc5e1f00c449b8ae8f5876032ac43130.1681333173081.1681333173081.1681333173081.1&__hssc=251652889.10.1681333173081&__hsfp=1417353920).

⁵ "How Should the U.S. Respond to China's Military-Civil Fusion Strategy?," ChinaFile (May 22, 2021), available at <https://www.chinafile.com/conversation/how-should-us-respond-chinas-military-civil-fusion-strategy>.

development. But the road is tortuous. The eventual demise of capitalism and the ultimate victory of socialism will require a long historical process to reach completion. . . . Then we must diligently prepare for a long period of cooperation and of conflict between these two social systems in each of these domains.

Most importantly, we must concentrate our efforts on bettering our own affairs, continually broadening our comprehensive national power, improving the lives of our people, building a socialism that is superior to capitalism, and laying the foundation for a future where we win the initiative, win the advantage, win the future.”⁶

This Committee is familiar with Chinese initiatives such as the “Made in China 2025” initiative to control key economic sectors (particularly in advanced manufacturing), the CCP’s successive 5-year economic and industrial plans, and other programs to push Chinese economic growth and development regardless of principles of free and fair trade. China has a number of economic tools it employs in pursuit of its goal of becoming the center of global power, including forced technology transfer, import substitution through a “dual circulation” strategy, construction of excess capacity to overwhelm global markets and support domestic employment, massive subsidies for national champions and key industries, discrimination against U.S. goods and services, use of forced labor, currency management, economic coercion of other countries, domination of global shipping, and many other practices.

It should also be noted that it seems like U.S. companies at times enable these practices by using the unfair, non-market practices available in China to out-compete domestic workers and businesses producing in the United States.

How Does China’s Trade And Investment Agenda Impact Americans?

China’s policies and practices have harmed and threaten further injury to U.S. economic security, which in turn affects our national security. The policies and practices noted above – coupled with the permanent normal trade relations (“PNTR”) granted to China in 2000 – have had a number of serious negative effects on the U.S. economy and workers:

- ***Displacement of U.S. manufacturing capacity to China.*** Many U.S. corporations moved their manufacturing operations to China following the United States’ decision to grant China PNTR as part of its accession to the World

⁶ Xi Jinping, “China’s Guiding Ideology: Xi Jinping in Translation,” trans. Tanner Greer, Palladium (May 31, 2019).

Trade Organization (“WTO”). This dramatic policy shift provided certainty of market access for China to the United States, accelerating the country’s establishment as the world’s manufacturing and export hub.⁷

- ***Loss of U.S. manufacturing and related jobs.*** The movement of manufacturing capacity to China led to the “China Shock,” whereby at least 3.7 million U.S. jobs were lost.⁸ The negative effect of the China Shock has persisted, whereby such job losses have proved difficult to undo in the communities hardest hit by trade with China.⁹ This has greatly harmed the American working and middle classes, with some researchers finding that increases in deaths of despair are linked to reduced economic opportunities in regions affected by the China Shock.¹⁰
- ***Elimination or loss of competitiveness in key manufacturing sectors.*** Chinese trading practices have made it very difficult for U.S. workers and producers to compete against Chinese imports, leading to a loss of American leadership in sectors such as solar energy, machine tools, electric batteries, printed circuit boards, pharmaceutical precursors and medical devices, steel, and aluminum.¹¹
- ***Erosion of the defense industrial base.*** As a result of the loss of manufacturing jobs, capacity, and sectors, the U.S. defense industrial base is increasingly dependent on imported materials.¹² In fact, a 2022 Defense Industrial Base Report explained that the United States is reliant on China for critical defense materials such as critical minerals, energy storage, microelectronics, and castings and forgings.¹³
- ***Asymmetric market access between the United States and China.*** The United States progressively opened its market to Chinese goods, services, and investment following normalization of relations, resulting in granting PNTR to

⁷ Justin Pierce & Peter Schott, “The Surprisingly Swift Decline of U.S. Manufacturing Employment,” *American Economic Review* (2016), pp. 1650-1654.

⁸ David Autor, David Dorn, & Gordon Hanson, “The China Shock: Learning from Labor Market Adjustment to Large Changes in Trade,” *Annual Review of Economics* (2016), vol 8(1); Robert E. Scott and Zane Mokhiber, “Growing China Trade Deficit Cost 3.7 Million American Jobs Between 2001 and 2018,” *Economic Policy Institute* (Jan. 2020).

⁹ David Autor, David Dorn, & Gordon Hanson, “On the Persistence of the China Shock,” *Brookings Papers on Economic Activity*, vol 2021(2), pp. 381-476.

¹⁰ *See, e.g.*, Justin R. Pierce & Peter K. Schott, “Trade Liberalization and Mortality: Evidence from U.S. Counties,” *American Economic Review: Insights* (2020), 2 (1): 47-64 (“We find that areas more exposed to a plausibly exogenous change in international trade policy exhibit relative increases in fatal drug overdoses.”).

¹¹ *See, e.g.*, Joel Yudken, “Manufacturing Insecurity: America’s Manufacturing Crisis and the Erosion of the U.S. Defense Industrial Base,” *Cornell University Key Workplace Documents* (Sept. 2010).

¹² *Id.*

¹³ *State of Competition within the Defense Industrial Base*, Office of the Under Secretary of Defense for Acquisition and Sustainment (Feb. 2022), at pp. 18-23, *available at* <https://media.defense.gov/2022/Feb/15/2002939087/-1/-1/1/STATE-OF-COMPETITION-WITHIN-THE-DEFENSE-INDUSTRIAL-BASE.PDF>.

China. China, despite numerous obligations to open its market in a similar way to U.S. economic actors, has failed to provide fair and reliable access to its market over decades.¹⁴ This creates a structural imbalance that has and will continue to lead to enormous U.S. trade deficits with China.

- ***Undermining U.S. intellectual property and trade secrets.*** The 2018 report by the Office of the U.S. Trade Representative (“USTR”), “Technology: Protecting America’s Competitive Edge” (“Section 301 Report”), identified several ways that China effectuates forced technology transfer. These include foreign ownership restrictions and administrative Review and licensing processes, discriminatory licensing restrictions, strategic outbound investment, and intrusion into U.S. commercial computer networks and cyber-enabled theft of intellectual property and sensitive commercial information.¹⁵ China also achieves forced technology transfer through pretextual national security or cybersecurity measures, inadequate intellectual property protection, talent acquisition programs, and abuse of anti-monopoly and standardization laws.¹⁶
- ***Growing domination of traditional U.S. export markets.*** China’s practices do not only harm U.S. businesses and workers by export of unfairly traded goods to this market. Chinese practices such as subsidies and overcapacity have also taken over third-country markets where U.S. producers formerly enjoyed substantial market share. For example, China overtook the United States as Europe’s largest trading partner in 2020.¹⁷
- ***Substantial and persistent U.S. trade deficit.*** Following the imposition of tariffs under Section 301 of the Trade Act of 1974 (“Section 301”), the U.S. trade deficit with China decreased. Our deficit in goods with China was \$418 billion in 2018 and dropped substantially to \$343 billion in 2019. It fell again in 2020 to \$308 billion.¹⁸ This trend was particularly pronounced with respect to those items that were subject to the tariffs, showing that the action effectively reduced reliance on products from China in those sectors targeted for forced technology

¹⁴ See, e.g., 2022 Report to Congress on China’s WTO Compliance, Office of the U.S. Trade Representative (2022), available at <https://ustr.gov/sites/default/files/2023-02/2022%20USTR%20Report%20to%20Congress%20on%20China's%20WTO%20Compliance%20-%20Final.pdf>;

Stephen Ezell, “False Promises II: The Continuing Gap Between China’s WTO Commitments and Its Practices,” Information Technology & Innovation Foundation (July 26, 2021), available at <https://itif.org/publications/2021/07/26/false-promises-ii-continuing-gap-between-chinas-wto-commitments-and-its/>.

¹⁵ Section 301 Report at 5 and 177-180.

¹⁶ *Id.* at 180-182; Jamieson Greer, Written Testimony Before the U.S. House of Representatives Judiciary Committee, Subcommittee on Courts, Intellectual Property, and the Internet (Mar. 8, 2023), available at <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/greer-testimony.pdf>.

¹⁷ “China overtakes US as EU’s Biggest Trading Partner,” BBC News (Feb. 17, 2021), available at <https://www.bbc.com/news/business-56093378>.

¹⁸ “Trade in Goods with China,” U.S. Census Bureau, available at <https://www.census.gov/foreign-trade/balance/c5700.html>.

transfer. However, the goods deficit with China began increasing again in 2021 and 2022, reaching \$353 billion and \$382 billion, respectively.¹⁹ This worrisome imbalance is partially due to China's unfair trading practices and mercantilist approach to trade, although tax and monetary policy certainly play a role. Multinational corporations may not be concerned with trade deficits given their focus on overall profitability, for workers and U.S. domestic manufacturers, trade deficits represent production that, in part, could have been manufactured in the United States had our industrial base not been hollowed out.

It is worth noting that many of these problems are not due solely to trade with China. Many of the challenges we face from China on a large scale are also posed by other countries as well – even those we typically consider allies. Some analysts suggest that defending the U.S. economy from harmful trade policies and practices stops with China, and that we should have “business as usual” with other trading partners in the interest of amorphous concepts of free trade and a “rules-based international order.” But countering Chinese trade practices should occur in the context of countering unfair trade practices from other economies as well, both friend and foe. The responsibility of U.S. policymakers with respect to trade policy toward China and any other country engaged in unfair trade practices is to protect the interests of U.S. economic and national security.

How Can The United States Counter The Negative Impacts Of China's Trade And Investment Agenda?

Understanding the Chinese approach to trade and investment and its impact on the United States leads us to the question at hand: what do we do to counter the negative effects on Americans of China's approach to trade? There are many policy tools at our disposal to address this, including tax policy, energy policy, foreign policy, our education and vocational systems, and of course our defense policy. But I am going to limit my thoughts on this topic to international trade and investment policy, emphasizing that these tools must work together with other smart policies to achieve a level of economic and national security that can withstand Chinese aggression over the coming years.

We often hear about the need for “new tools” to counter Chinese policies and practices. There is some truth to this, but in my experience, we have many existing tools that are underused. Perhaps most importantly, we do not appreciate the enormous value and leverage of access to the U.S. market, which is the prize for all export-driven economies – particularly China. The post-Cold War trade policy worked together with other dynamics to open up the United States market with few conditions and make us the “consumer of last resort.” We are now in a position where we have lost the leverage of

¹⁹ *Id.*

access to our market, and we need to regain leverage if we are to effectively counter unfair Chinese trading practices. I want to highlight the cornerstones of our trade policy architecture and how we can use these tools – including access to the U.S. market – to support U.S. workers and businesses in a world where China is seeking to overtake and subdue U.S. power. An overview of these tools is below.

1. ***Tariff Policy Toward China and PNTR***

The United States should ensure that its tariff policy regarding China is appropriate for the challenge we are facing. To that end, the Committee should strongly consider modifying or revoking PNTR with China.

For much of the nation's history, tariffs served a double purpose of supporting U.S. domestic manufacturing and funding the U.S. government. They were a pragmatic tool to be deployed as appropriate – either to defend U.S. industries and gather revenue or to be reduced or eliminated to obtain goods that can be more competitively obtained elsewhere through fair trade. Following World War II, U.S. policymakers for a variety of reasons pursued tariff liberalization across market economies. After the Cold War ended, this movement accelerated, with the United States liberalizing its tariffs to a huge portion of the world, even where trading partners failed to liberalize to the same degree. China benefitted from this tariff reduction.

However, for many years prior to China's WTO accession, Congress had the option, on an annual basis, to deny "most favored nation" tariff treatment to China. This annual decision occurred pursuant to the Jackson-Vanik amendment. During this time, because it was never quite certain that China would enjoy continued access to the U.S. market on a permanent, preferential basis, it was more difficult for businesses to make the economic case to move production operations to China for export of finished goods to the United States. But once the United States agreed to China's WTO accession and provided it with preferential market access, businesses had certainty that they could now use China as an export hub to target the U.S. market. The results, as described above, were devastating for American manufacturing base and our working class. Moreover, China continues to take advantage of our market while denying reciprocal access to theirs. China attempts to exert economic coercion on the United States and its allies and use its export-driven growth to support its military ambitions. The United States should take strong action to defend U.S. workers and businesses. Starting the process of revoking PNTR for China is a logical and proportionate response to this situation.

Revoking PNTR for China would mean that Chinese imports would no longer receive most favored nation tariff treatment, but would be subject to "Column 2" tariff rates in the Harmonized Tariff Schedule of the United States ("HTSUS"). Other countries subject to this tariff regime include Russia, Belarus, Cuba, and North Korea.

If Congress decides to revoke PNTR, this can be accomplished in a number of ways:

- Congress could eliminate the designation and immediately place China into Column 2 of the HTSUS.
- Congress could remove the “permanent” status of China’s trade benefits and require a yearly reconsideration of China’s tariff treatment, similar to the situation prior to China’s WTO accession.
 - This yearly determination could be structured as an “opt in” or an “opt out,” meaning that upon revocation, China could automatically receive MFN treatment for the year unless disapproved, or it could automatically receive HTSUS Column 2 treatment unless approved.
 - The yearly determination could be determined by a joint resolution of Congress or at the discretion of the President.
- Any annual tariff determination could be dependent on a number of factors, including whether China has ceased its unfair trade practices. Thus, if Congress passes a bill making China’s U.S. tariff treatment subject to yearly approval or disapproval, this puts the onus on China to decide whether it will engage with the United States on a level playing field or not. And if China chooses to continue its approach, the United States can take appropriate action to deny the benefits of preferential duties, which should be reserved for those trading relationships characterized by fair and balance trade.
- A potential revocation of PNTR could also occur over time or in a phased-in way. This could give appropriate time for businesses to realign their supply chains. Many businesses have already been engaged in this work over the past few years due to the imposition of the Section 301 tariffs.
- Revoking PNTR should also be accompanied by some upward adjustment of Column 2 tariffs, which were determined decades ago. Indeed, many Column 2 tariff lines actually remain at zero. Congress could determine tariff lines itself through the bill, or it could delegate that task to the President or the U.S. International Trade Commission.

I recommend that Congress begin the process of revoking PNTR with China.

2. ***Economic and Trade Agreement Between the United States of American and the People’s Republic of China (“Phase One Agreement”)***

This Subcommittee is familiar with the Phase One Agreement and its history. In short, the Agreement was designed to stabilize and improve the U.S.-China trade relationship while maintaining U.S. remedial tariff measures imposed to discipline Chinese unfair

trading practices identified as part of the Section 301 investigation regarding forced technology transfer. The Agreement was signed in January 2020 under the Trump Administration, and the current Administration has indicated that it views the agreement as the framework for U.S. trade relations with the Chinese.²⁰ The Phase One Agreement between the United States and China is historic in many ways:

- First, on a sectoral basis, China agreed to make substantial, favorable regulatory changes in a number of areas where the United States has a comparative advantage, such as agriculture, intellectual property, pharmaceuticals, and financial services. China began to implement many of these changes during the negotiations of the Agreement and in its first year. For example, China implemented dozens of measures to facilitate the import of U.S. agricultural products, including certifying U.S. agricultural facilities for export and approving the sale of many types of commodities into China.²¹
- Second, the Chinese signed on to the Agreement with the Section 301 tariffs largely still in place. In other words, the Chinese agreed to comply with the agreement without the condition that the tariffs be removed. At the same time, the Chinese introduced their own exclusion process to reduce retaliatory tariffs on the United States.²² Maintaining tariffs on Chinese imports not only serves as a remedy for ongoing unfair trading practices by the Chinese, but it also provides an opportunity for enforcement.
- The WTO is poorly equipped to deal with China's global-scale mercantilism. Therefore, the Agreement sets out a unique enforcement mechanism to adjudicate violations of agreement obligations. This is called the Bilateral Evaluation and Dispute Resolution Arrangement. The Agreement requires each party to set up a Bilateral Evaluation and Dispute Resolution Office ("BEDRO"), at USTR and under a designated Chinese Vice Premier. These offices are required to meet at least monthly at the staff level, while high-level meetings between a Deputy USTR and a Chinese Vice Minister are expected to meet quarterly. The USTR and Chinese Vice Premier are to meet twice a year. This mechanism prioritizes open communication and negotiated solutions through consultations that escalate to higher-level officials as necessary. In

²⁰ See, e.g., Remarks As Prepared for Delivery of Ambassador Katherine Tai Outlining the Biden-Harris Administration's "New Approach to the U.S.-China Trade Relationship," (Oct. 4, 2021), *available at* <https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2021/october/remarks-prepared-delivery-ambassador-katherine-tai-outlining-biden-harris-administrations-new>; Background Press Call by Senior Administration Officials on the Administration's Trade Approach to China (Oct. 4, 2021), *available at* <https://www.whitehouse.gov/briefing-room/press-briefings/2021/10/04/background-press-call-by-senior-administration-officials-on-the-administrations-trade-approach-to-china/>.

²¹ See USDA and USTR Announce Continued Progress on Implementation of U.S.-China Phase One Agreement, (May 21, 2020), *available at* <https://www.usda.gov/media/press-releases/2020/05/21/usda-and-ustr-announce-continued-progress-implementation-us-china>.

²² *Id.*

this way, disputes can be resolved before they become unmanageable. If these meetings fail to resolve the problem, the United States is authorized to unilaterally suspend obligations of the Agreement in a way that is proportional to the violation. With respect to U.S. legal process, this suspension of obligations could occur through a modification of the existing Section 301 action, which could mean tariffs, quotas, fees or restrictions on services, and potentially other measures.

To my knowledge, this enforcement mechanism has not recently been used to resolve problems. It is not clear if there has been a formal assessment of China's compliance, although I am aware of specific instances where there have been violations or failure to take the necessary steps required under the agreement. The dispute settlement mechanism was designed to ensure continued discussion between the two parties, and to serve as a political release valve in the event of rising tensions. To be sure, there are many issue areas that fall outside the scope of the Phase One Agreement, including matters such as export controls, forced labor, and of course non-economic issues related to international security. But for some of our most significant economic issues, the Phase One Agreement dispute settlement mechanism can be a critical way to resolve problem. But it appears to be underused.

I recommend that the Committee ask for an assessment of China's compliance with the Phase One Agreement, as well as an accounting of activity under the dispute settlement mechanism. The United States should implement consultations and dispute settlement procedures for some of the most significant issues and, if this does not lead to an acceptable resolution, implement trade measures.

3. ***Trade Remedies***

We should also ensure that the U.S. government provides for strong enforcement of trade remedies such as antidumping and countervailing duty laws. Where courts or agencies have failed to protect domestic industries, Congress should improve the existing legal regime to deter repeat offenders, crack down on duty evasion, and account for market distortions that give foreign producers an edge over U.S. producers. Previously introduced bills such as the Leveling the Playing Field Act are a step in the right direction.

I recommend that Congress introduce and pass legislation strengthening U.S. trade remedy laws.

4. ***Section 301***

As noted above, the Phase One Agreement is premised on a Section 301 action, which authorizes the President to investigate suspected discriminatory, unreasonable, or burdensome trade practices and to impose trade measures in response to such practices. The statute, as amended for the WTO era, requires the USTR to pursue resolution of such issues under WTO or other FTA dispute settlement processes where available. However, where such practices are not subject to WTO or FTA enforcement – which reaches many of China’s practices – the law allows the President to take unilateral responsive measures. The most common remedy under Section 301 is tariffs, but Section 301 also permits the use of other measures such as quotas, fees, or other restrictions, and these can apply to both goods and services. The President can also direct USTR to negotiate for the elimination of such practices, the idea being that the imposition of trade measures or the imposition thereof creates leverage necessary for such negotiations.

Section 301 has a very broad remit and can be used in very creative ways to respond to China. Many analysts suggest there is evidence that Chinese labor and environmental practices violate basic international norms and provide a non-market, artificial advantage for Chinese exporters. The Chinese government also provides enormous subsidies, resulting in many cases in excess capacity and excess production that distorts global markets.

Given the breadth of available remedies, the United States could address these non-market economic practices under Section 301 and take strong responsive actions. Tariffs of course are an option, but the U.S. government could also take steps such as barring certain Chinese services from operating in the United States or assessing fees on such services.

Section 301 has been most recently used to imposed tariffs on billions of dollars in goods imports from China. These were imposed following an investigation by USTR finding that Chinese forced technology transfer practices unreasonably burdens U.S. commerce. These tariffs have been effective in reducing imports goods from China subject to such tariffs and protecting U.S. industries and workers that are vulnerable to forced technology transfer.

I recommend that the Administration maintain the current Section 301 action against China and develop potential additional Section 301 actions for additional Chinese unfair trading practices.

5. ***Section 337 of the Tariff Act of 1930 (“Section 337”)***

Section 337 makes unlawful the importation into the United States of articles that infringe a valid U.S. patent, trademark, copyright, or mask work. This is the most

common use of Section 337, which is enforced by the U.S. International Trade Commission. However, the non-IP provision of section 337 also prohibits “[u]nfair methods of competition and unfair acts in the importation of articles ... into the United States, or in the sale of such articles by the owner, importer, or consignee, the threat or effect of which is –

- i. To destroy or substantially injure an industry in the United States;
- ii. To prevent the establishment of such an industry; or
- iii. To restrain or monopolize trade and commerce in the United States.

Section 337 is very broad and can be used to remedy unfair trade practices outside of the IP issue area. It provides a very strong remedy in excluding offending imports from entry into the United States. However, Section 337 is a private right of action. Thus, it is incumbent upon private actors to take advantage of the broad applicability of Section 337.

6. ***Section 232 of the Trade Expansion Act of 1962 (“Section 232”)***

Under Section 232, the Commerce Department must assess the effect on national security of certain imported articles. The agency investigates whether the article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security. The Commerce Department considers factors such as the impact of foreign competition on the domestic industry; the importation of goods in terms of their quantities, availabilities, character, and use; displacement of domestic products; requirements of defense and essential civilian sector; and growth requirements of domestic industries. If the Commerce Department determines that imports of memory from Saturn pose a threat, the President may “adjust” such imports appropriately. Potential import adjustments are wide-ranging and can include tariffs, import prohibitions, negotiations with foreign governments or parties, studies, recommended legislation, or government legal action under other statutes. There is no need to prove unfair competition or an unfair trade practice; instead, the Commerce Department considers national security criteria, many of which are very relevant to this situation (e.g., impact of foreign competition on the domestic industry, growth requirements of domestic industries, etc.). Section 232 permits robust, flexible remedies with broad Presidential discretion, which has been confirmed by recent judicial rulings.

I recommend that the Administration consider additional Section 232 actions to address national security concerns raised by certain imports from China.

7. *WTO dispute settlement*

Some analysts propose that the United States should “bundle up” all of its many problems with China and bring a massive dispute settlement case to the WTO. This would be a very ineffective way of dealing with the generational challenge of China. Ultimately, this would simply be a signaling effort, and it’s not clear who the audience for this signaling would be. It seems to be an effort to appear to be doing something about the problem without actually making the hard choices and incurring potential costs of action that actually results in discipline on China or changes in our own economic system to reduce dependence on China. But we don’t just need sound bites or moral high ground in dealing with this issue – we need real economic effects that protect out industries and secure our supply chains.

In the first place, many of the issues we are worried about – forced tech transfer, abuse of Chinese domestic legal processes, excess capacity, and labor and environmental practices – simply are not covered by any WTO agreements.

Even if these topics were proper subjects of WTO dispute settlement, WTO dispute settlement has not been an effective way of resolving U.S. market access or other problems. For some of the highest profile cases the United States has won at the WTO – such as EU subsidies for civil aircraft, Chinese discrimination against payment systems and films, and EU prohibitions on genetically-modified beef – the offenders have never made our industries whole or meaningfully changed their practices. The Chinese are not terribly worried about complying with WTO requirements. It is unrealistic to think that on issues of even more fundamental concern the Chinese will decide that this is the time for them to completely alter the basic structure of their economy. And the period of time for resolving such cases extends for many years and even decades, leaving the Chinese ample time to maximize the mercantilist practices and strengthen their drive toward hegemony. This underscores why dispute settlement under the Phase One Agreement is much preferable – it covers commitments on some of our most sensitive issues while empowering the United States to lawfully and unilaterally act as needed.

8. *Enforcement Challenges*

Enforcement efforts should be undertaken in a clear-eyed way, and it is important to acknowledge challenges raised by enforcement. For example, I have found that there is a tendency for businesses or policymakers to advocate conceptually for enforcement of trade laws against China, but there is substantial hesitation to actually implement enforcement measures if consultations or negotiations have been exhausted without resolution. Specifically, many companies do not want to be seen as calling for the imposition of tariffs or other trade measures and do not want China to see them as an antagonistic party. Of course, the premise for calling for enforcement action is Chinese unfair treatment in the first place, and lack of support by industry can make it difficult

for policymakers to take or sustain meaningful enforcement actions. This is not an irrational concern given the possibility of retaliation against specific companies or sectors, whether it is through blocking an industry's imports into China or taking action against company operations and employees in China. During the U.S.-China trade dispute, the U.S. Department of Agriculture used financial transfers to make whole agricultural exporters affected by unlawful Chinese retaliation until such time as the Chinese agreed to exclude agricultural products from additional duties and increase their purchases. In the future, perhaps such transfers could be funded to duties obtained any imported goods that are the subject of trade enforcement action.

This is where the leverage of the U.S. market comes into play. The enormity of the Chinese trade surplus with the United States makes it highly vulnerable to U.S. action. Indeed, it was the Section 301 action that drove the Chinese to the negotiating table for the Phase One Agreement and resulted in meaningful concessions as well as historic imports of U.S. agricultural products.²³

Industry reluctance to support trade actions can also lead to a lack of information that hinders policymakers' enforcement efforts. As a result, it could make sense to require companies to disclose information regarding Chinese unfair trading practices or attempts at economic coercion. This would obligate companies to report such information to the government, while allowing them to point Chinese authorities to U.S. government legal requirements and potentially avoid retaliatory measures.

It should also be noted that there is some economic cost to taking an enforcement action against China, although it may be less than is suggested by certain economists or news outlets. Importantly, tariffs generally were not passed on to consumers, and economic indicators such as unemployment, inflation, and per capita GDP thrived during the height of the "trade war."²⁴ That said, limiting Chinese access to the U.S. market affects companies whose business model relies on Chinese imports. Meaningful enforcement may require supply chain realignment, which can be difficult and take time. But these relatively short-term costs should be understood in the broader context of our strategic competition with China: while an individual business may see a near-term cost or sourcing challenge, policymakers must act in the long-term interest of the country. Enforcement can create conditions for reducing U.S. dependence on China and ensuring that the United States has a robust and resilient manufacturing base for generations to come.

Another challenge involves the unwillingness of other countries to take enforcement action. They are more than willing to benefit from U.S. enforcement actions, but they

²³ See, e.g., Trump's gift to Biden: Record ag exports to China, Politico (Feb. 18, 2021), *available at* <https://www.politico.com/news/2021/02/18/trumps-gift-to-biden-record-ag-exports-to-china-469818>.

²⁴ See, e.g., Josh Zumbrun and Anthony DeBarros, "Trade Ware With China Took Toll on U.S., But Not Big One," Wall Street Journal (Jan. 12, 2020), *available at* https://www.wsj.com/articles/trade-war-with-china-took-toll-on-u-s-but-not-big-one-11578832381?mod=article_inline.

are not inclined to support them for fear of angering China. For example, the Section 301 tariffs on China have contributed to a significant increase in U.S. trade with Southeast Asian countries. A Princeton University study on trade reallocation found that those countries, along with Mexico, were some of the biggest beneficiaries of the U.S. enforcement action as supply chains moved south out of China.²⁵ They now have preferential duty access to the U.S. market relative to their largest economic competitor, China. However, despite this boost to their economies and their already substantial trade surpluses with the United States, we continue to hear that these countries expect even more improved market access to the United States if we expect their cooperation on China issues. Ideally, like-minded countries would also respond to Chinese unfair trading practices by proportionately limiting market access for Chinese goods and services rather than by pushing for even more favorable access to the U.S. market.

Given the above challenges, I recommend that Congress require U.S. companies to report the imposition of unfair trade measures or forced technology efforts by the Chinese government. Congress should consider ways to support companies and workers affected by Chinese retaliation incident to enforcement efforts, such as by using proceeds of tariffs on imports subject to enforcement actions to make whole any U.S. businesses and workers negatively affected by any Chinese retaliation. I also recommend that the U.S. government use diplomatic efforts with allies to encourage enforcement actions to help eliminate unfair trading practices by the Chinese.

9. ***Other Trade-Related Tools***

It is important to note that the trade tools described above can and should be employed along with other tools that have both a trade and national security element. China is approaching its push for hegemony through a whole of government effort – we should be prepared to use this approach as well where it makes sense for our system and objectives.

- ***Export controls***

Congress has provided the Commerce Department and State Department the authority to regulate the export of U.S. commodities, software, services, and technology for defense articles and services as well as dual-use items. During the Obama

²⁵ The US-China Trade War and Global Reallocations, National Bureau of Economic Research (Dec. 2021) (“The authors’ analysis uncovered several countries that managed to be strong substitutes for China’s exports. This includes Mexico, Malaysia, and Thailand, each of which increased exports to both the U.S. and the rest of the world as a result of the trade war.”), available at <https://www.nber.org/papers/w29562>.

Administration, these agencies undertook export control reform which, among other things, removed or reduced restrictions on exports.

We know that the Chinese government is particularly sensitive about export controls, and it is typically on Chinese lists of demands or complaints for the United States.²⁶ Under both the Trump and Biden Administrations, the Commerce Department in particular has become much more strategic in its use of export controls for items destined for China and particular Chinese end-users and end-uses. For example, the Commerce Department under the Trump Administration first used the Entity List in combination with the foreign direct product rule to expand prohibitions on the export of certain foreign-made products that use or incorporate U.S. technology to Entity List entities. Although a more robust approach to export controls can lead to some trial-and-error implementation given the complexity of supply chains, overall this is an effective way to prevent China from exploiting technologies that can further its Military Civil Fusion efforts.

I recommend continued use of export controls, particularly with respect to those items that China can use to fuel its Military Civilian Fusion efforts.

- **Sanctions**

The Treasury Department for many years has led U.S. government efforts to impose and enforce economic sanctions on persons – both individuals and entities. The Treasury Department imposes sanctions for a number of reasons such as national security, human rights, narcotics, cybersecurity incidents, and terrorist financing. The Treasury Department manages its sanctions programs for specific countries and issue areas. The most recent high-profile example of the use of sanctions is the Treasury Department's response to Russia's further invasion of Ukraine, which has largely decoupled the U.S. economy from dealings with the major pillars of the Russian economy. Notably, with the exception of a handful of individuals sanctioned under an Executive Order regarding the repression of democracy in Hong Kong, the Treasury Department does not have a dedicated program for identifying Specially Designated Nationals in China despite extensive and long-standing concerns such as military expansionism in the South China Sea and elsewhere, forced labor, cyberhacking, and other major violations of human

²⁶ “Reality Check: Falsehoods in U.S. Perceptions of China,” Ministry of Foreign Affairs of the People's Republic of China (June 19, 2022), available at https://www.fmprc.gov.cn/eng/wjbxw/202206/t20220619_10706059.html (“While claiming to uphold “peace” and “openness,” the U.S. has been wantonly setting up technological barriers, piecing together the so-called “democratic technology alliance,” politicizing science and technology and turning them into ideological issues, and forming exclusive small circles. Identifying nearly 20 categories as controlled critical technologies, including biotechnology and artificial intelligence, the U.S. has tightened up export control and investment scrutiny. It has also overstretched the concept of national security to contain and even stranglehold the development of high-tech industries in other countries, which severely violates the rights of developing countries in pursuing science and technology advancement.”).

rights and threats to international security.²⁷ China, on the other hand, has imposed sanctions on many U.S. government officials.²⁸ To be sure, the Treasury Department has imposed sanctions on a number of Chinese persons, but this is typically done in the context of other sanctions programs targeting, for example, North Korea or Iran.

This appears to be a substantial means for leverage over unfair trading practices that fit within the International Emergency Economic Powers Act (“IEEPA”), the legal basis for most sanctions programs. There appears to be hesitation on the part of regulators to impose sanctions on Chinese persons even though these could be effective means to effect change and otherwise counter problematic Chinese behavior.

I recommend that the Treasury Department introduce a China-specific sanctions program based on a specific policies and practices related to international security, human rights, and other issues areas.

- ***Investment controls***

The Committee for Foreign Investment in the United States (“CFIUS”) scrutinizes and regulates foreign investment that may raise national security concerns, including from China. CFIUS has become much more aggressive in recent years, due to the passage of the Foreign Investment Risk Review Modernization Act as well as an increase in institutional enforcement efforts and mindset. The most recent statistics issued by CFIUS show that number of filed cases involving Chinese investment increased from 2019 to 2021,²⁹ while analysts report that Chinese foreign direct investment has declined from \$48 billion in 2016 to \$7 billion in 2020.³⁰ Thus, Chinese investment appears to be declining even while CFIUS scrutiny is increasing. I believe this is due to the joint effort of Congress and successive administrations to strengthen foreign investment review.

There has also been legislation pending on Congress to scrutinize outbound investment from the United States, and I understand that the Administration is working on an executive order that would implement an outbound screening program. A key focus of such regulation will be China and sensitive sectors.

²⁷ A minor exception is a non-SDN program prohibiting certain dealings in public securities of a short list of “Chinese Military Companies.” See generally Chinese Military Companies Sanctions, available at <https://ofac.treasury.gov/sanctions-programs-and-country-information/chinese-military-companies-sanctions>.

²⁸ See, e.g., PRC Sanctions on U.S. Officials (Jan. 10, 2011), available at <https://www.state.gov/prc-sanctions-on-u-s-officials-2/#:~:text=The%20People%27s%20Republic%20of%20China%27s,PRC%20affront%20against%20universal%20ri ghts..>

²⁹ CFIUS Annual Report to Congress (August 2022) at 32, available at <https://home.treasury.gov/system/files/206/CFIUS-Public-AnnualReporttoCongressCY2021.pdf>.

³⁰ The U.S.-China Investment Hub, Rhodium Group, available at <https://www.us-china-investment.org/fdi-data>.

substantial access for certain U.S. exports while minimizing liberalization of sensitive U.S. tariffs. This is a model that could be implemented with other countries to seek bilateral, sectoral agreements to improve market access for U.S. companies and workers. Core U.S. interests would need to be treated very carefully, and agreements should prevent regulatory arbitrage that could result in off-shoring. Markets such as the United Kingdom, Kenya, the Philippines, and India may provide meaningful export opportunities for U.S. companies, and sectoral or narrow agreements could lead to mutually beneficial trade if done thoughtfully.

I would also note that the proposition of entering into broad, regional pacts continues to be an impractical approach, as it weakens the U.S. negotiating position to deal with many trading partners at once. It also introduces complex domestic politics as the numerous commitments and topic areas in a comprehensive agreement tend to limit progress and support. Moreover, years of data and results with the WTO demonstrate that the losses associated with such broad trade agreements can be very intense in important economic sectors, particularly where the agreement is with countries with lower labor and environmental standards or with substantial government support and intervention on behalf of manufacturing exports.

I recommend that the United States seek market access in non-Chinese markets in incremental, sectoral, and bilateral agreements with other countries. Focusing on trading partners such as the United Kingdom, Kenya, the Philippines, and India would be a good start.