

WRITTEN TESTIMONY OF JAMIESON L. GREER

BEFORE

**THE U.S. HOUSE OF REPRESENTATIVES JUDICIARY COMMITTEE
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE
INTERNET**

“INTELLECTUAL PROPERTY AND STRATEGIC COMPETITION WITH CHINA: PART I”

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I. Introduction

Good morning. I am grateful for the opportunity to appear before this Subcommittee to address one of the most important issues for our U.S. economic and national security: our strategic competition with the People’s Republic of China¹ and the role of intellectual property (“IP”).² Reports and data from the private sector, civil society, and governments document in granular detail how the Chinese government sponsors, directs, and permits forced technology transfer of IP and know-how from the United States and other countries. These practices and policies accelerate China’s push to achieve regional hegemony, undermine U.S. technological, security, and economic leadership, and cost U.S. innovators and workers hundreds of billions of dollars. All of this is happening at a time of increased ambition by China and as part of a generational effort by the Chinese government to support its national champions across all sectors of its economy.

As a former officer in the U.S. armed forces, former Chief of Staff in the Office of the U.S. Trade Representative, and practicing international trade attorney in the private sector, I view these issues through an economic and national security lens. I have heard directly from U.S. businesses and workers on how the Chinese approach to IP has injured their economic prospects, I have worked to develop and implement U.S. policies to counter harmful practices, and I have been part of U.S. teams tasked with negotiating with Chinese officials on these critical issues. These experiences underscore for me the seriousness of this challenge and the continuing and urgent need to take strong action.

It is difficult to overstate the role of IP for the U.S. economy and workers. According to a 2022 report by the U.S. Patent and Trademark Office (“PTO”), IP-intensive industries accounted for 41 percent of domestic output and 44 percent of U.S. jobs in 2019.³ U.S. military superiority – and accelerating Chinese military capability – is driven by IP-intensive technology.⁴ U.S. innovation is one of the crown jewels of our system and must be defended, including through negotiation of concessions by China and other trading partners to protect IP and, where necessary, strong enforcement of agreements and trade rules to obtain compliance. To be sure, there can be short-term costs to strong enforcement efforts, including economic and supply chain realignment resulting from managing or restricting certain types of trade and investment between the United States and China. But the cost of failure in addressing Chinese forced technology transfer is enormous: continued off-shoring of jobs and key industries, a loss in military superiority, and economic dependence on China.

¹ 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.

² I am appearing today in my personal capacity and not on behalf of any current or former employer or client.

³ Intellectual Property and the U.S. Economy: Third Edition, U.S. Patent and Trademark Office (2022), at iii, available at <https://www.uspto.gov/sites/default/files/documents/uspto-ip-us-economy-third-edition.pdf>.

⁴ See, e.g., Jon Bateman, U.S.-China Technological “Decoupling,” Carnegie Endowment for International Peace (2022) at 57, available at https://carnegieendowment.org/files/Bateman_US-China_Decoupling_final.pdf.

The optimal policy prescriptions for dealing with China’s approach to IP are tied to how one views the overall challenge posed by China. As former Deputy National Security Advisor Matt Pottinger often says, we should take Chinese leadership at their word. Chinese military textbooks attribute to Xi Jinping the following statements: “our state’s ideology and social system are fundamentally incompatible with the West. Xi has said ‘This determines that our struggle and contest with Western countries is irreconcilable, so it will inevitably be long, complicated, and sometimes even very sharp.’”⁵

Thus, I view Chinese ambitions – as currently articulated and pursued – as an existential threat to the American way of life: our physical safety, our personal privacy and freedom, our economy and jobs, and even our system of government. I am concerned that a powerful Chinese Communist Party (“CCP”) and a powerful People’s Liberation Army (“PLA”) – fueled by access to Western technology – are using and will continue to use their power not only to limit U.S. influence abroad but also to eliminate our key industries and economic strength here at home. Those who do not share this assessment of the situation obviously will have a different idea as to the appropriate policy response. It is certain that the United States will need to find a constructive way to coexist with China, and this will mean continued trade in some sectors. But everyone needs to work from a set of common facts to develop good policy responses, and I intend to present some of those facts today along with some policy ideas. My hope is that this can inform the conversation and provide some insight into what China does, how it affects the United States, and what we should do.

II. China’s Policies and Practices Regarding Forced Technology Transfer

China has a number of legal regimes and processes related to the administration and enforcement of IP rights. I would like to focus my testimony on China’s efforts to obtain U.S. and foreign IP through nonconsensual means, a practice broadly referred to as “forced technology transfer.” This strategy by the PRC is well-documented, and Chinese efforts to obtain IP through coercion or unfair practices are not new.

There is a very good exposition of Chinese forced technology transfer practices in the 2018 Section 301 Investigation report by the Office of the U.S. Trade Representative (“USTR”) titled “Technology: Protecting America’s Competitive Edge” (“Section 301 Report”). In the Section 301 Report, USTR identified several ways that China effectuates forced technology transfer. These methods include the following:

- a. ***Foreign Ownership Restrictions and Administrative Review and Licensing Processes.*** This includes “opaque and discretionary administrative approval processes, joint venture requirements, foreign equity limitations, procurements, and other mechanisms to regulate or intervene in U.S. companies’ operations in China, in order to require or pressure the transfer of technologies and IP to

⁵ Matt Pottinger, Matthew Johnson, and David Feith, “Xi Jinping in His Own Words,” *Foreign Affairs* (Nov. 30, 2022).

Chinese companies. Moreover, many U.S. companies report facing vague and unwritten rules, as well as local rules that diverge from national ones, which are applied in a selective and non-transparent manner by Chinese government officials to pressure technology transfer.”⁶

- b. ***Discriminatory Licensing Restrictions.*** These restrictions “deprive U.S. companies of the ability to set market-based terms in licensing and other technology-related negotiations with Chinese companies and undermine U.S. companies’ control over their technology in China. For example, the Regulations on Technology Import and Export Administration mandate particular terms for indemnities and ownership of technology improvements for imported technology, and other measures also impose non-market terms in licensing and technology contracts.”⁷
- c. ***Strategic Outbound Investment.*** The Chinese governments “directs and/or unfairly facilitates the systematic investment in, and/or acquisition of, U.S. companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property and generate large-scale technology transfer in industries deemed important by Chinese government industrial plans.”⁸ It also uses subsidies to fuel this strategy of broad, sectoral acquisitions.
- d. ***Intrusion into U.S. Commercial Computer Networks and Cyber-Enabled Theft of Intellectual Property and Sensitive Commercial Information.*** The Chinese government and state actors “conduct{ } or support{ } unauthorized intrusions into U.S. commercial computer networks or cyber-enabled theft of intellectual property, trade secrets, or confidential business information, and whether this conduct harms U.S. companies or provides competitive advantages to Chinese companies or commercial sectors.”⁹
- e. ***Pretextual National Security or Cybersecurity Measures.*** “China increasingly is incorporating into its commercial regulations protections allegedly needed for ‘national security’ or ‘cybersecurity’ purposes. . . . Companies have raised particular concerns about the *Cybersecurity Law of the People’s Republic of China (Cybersecurity Law)*,” China’s Regulations on Classified Protection of Information Security, also known as the Multi-Level Protection Scheme, data localization requirements, China’s encryption regulations, and the China Compulsory Certification testing regime for information security products.”¹⁰ All of these measures require or induce disclosure of information to the Chinese

⁶ Section 301 Report at 5.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 177 – 79.

government or Chinese persons, or otherwise increase the risk of disclosure of information without consent.

- f. ***Inadequate Intellectual Property Protection.*** USTR also identified “inadequate IP enforcement mechanisms available in China {and} . . . substantial obstacles to civil enforcement and ineffective and inconsistent criminal and administrative enforcement by the government of China.”¹¹ Although there have been incremental improvements in the Chinese system over the years, the size of the Chinese economy and China’s role the foremost U.S. competitor makes these issues more severe. Improvements in the Chinese IP system at the margin do little to address the systemic acquisition of U.S. technology on a non-market, nonconsensual basis.
- g. ***China’s Anti-Monopoly Law.*** “China uses the *Anti-Monopoly Law of the People’s Republic of China* as a means to obtain U.S. IP, citing as examples the AML agencies’ multiple draft guidelines. . . . {concern that} certain enforcement actions allegedly addressing abuse of dominance in the exercise of IP rights.” There is also concern regarding “State Administration of Industry Commerce *2015 Rules on the Prohibition of Conduct Eliminating or Restricting Competition by Abusing Intellectual Property Rights* and the March 2017 draft State Council *Anti-Monopoly Commission Guidelines Against Abuse of Intellectual Property Rights.*”¹²
- h. ***China’s Standardization Law.*** China’s *Amendments to the Standardization Law of the People’s Republic of China* raise the possibility that “U.S. companies will be required to transfer valuable IP or license it on non-market terms as a condition of participation in standards setting bodies. Stakeholders assert that the amendments impose unique and potentially damaging requirements on enterprises to publicly disclose functional indicators and performance indicators of their products or services, which may result in unnecessary costs and risks. Furthermore, the Amendments reportedly endorse a preference for indigenous innovation in Chinese standards, to the detriment of U.S. and other non-Chinese companies.”¹³
- i. ***Talent Acquisition.*** The Chinese government and state-owned enterprises have implemented medium- and long-term plans to recruit foreign talent and Chinese persons overseas to boost their national champions. These programs are global but are concentrated in U.S. universities and Silicon Valley. These programs reportedly attract top talent and technology executives “by paying well above

¹¹ *Id.* at 179 – 180.

¹² *Id.* at 180.

¹³ *Id.* at 181.

market compensation—enabled by government financing, direction, and support.”¹⁴

There are also other practices that were not highlighted in the Section 301 Report that bear mentioning. These include the following:

- j. ***Joint Research Efforts with PRC or PLA Officials.*** Recent literature reviews claim that PLA organs and officials have collaborated with Western scientists to conduct research and development.¹⁵ An investigative report in Italy found that over the past twenty years, 3,000 European studies were carried out in collaboration with scientists and institutions “directly linked” to the PLA.¹⁶
- k. ***Anti-Suit Injunctions.*** Chinese courts in some instances have been willing to enjoying foreign litigants from bringing suits in non-Chinese jurisdictions to enforce patent rights. This is often in the context of “standard essential patents,” where companies notionally agree to negotiate IP licensing terms, even while the patents are in use by the licensee. This permits Chinese courts to assert global jurisdiction over such disputes.¹⁷

According to USTR’s most recent review of Chinese IP policies, although there has been some improvement regarding certain of these methods for forced technology transfer, substantial concerns persist.¹⁸ Full implementation of Phase One Agreement commitments, discussed in more detailed below, continues to be lacking. It is yet to be seen whether implementation of written amendments and regulations are carried out by courts and administrative bodies in China with jurisdiction over IP rights and enforcement. Moreover, issues with bad faith trademarks, counterfeit goods, and online piracy continue to fall well short of international norms.¹⁹

III. Effect on the United States

It is difficult to overstate the impact of Chinese forced technology transfer policies. The Section 301 Report provided a conservative figure, estimating the harm to the U.S. economy as approximately \$50 billion in 2018.²⁰ However, the bipartisan Huntsman Commission on the

¹⁴ *Id.* at 182.

¹⁵ *See, e.g.*, Jeffrey Stoff, “Should Democracies Draw Redlines Around Research With China?,” The Center for Research Security & Integrity (2023), available at <https://researchsecurity.org/wp-content/uploads/2023/01/Click-here-to-download-the-full-publication.-Stoff-DrawingRedlinesFINAL.pdf>.

¹⁶ *See* “In the EU, 3,000 Research Projects Develop Technologies with Scientists Linked to the Chinese Army,” Investigative Reporting Project Italy (May 19, 2022), available at <https://irpimedia.irpi.eu/finanziamenti-ricerca-cina-europa-applicazioni-militari/>.

¹⁷ *See, e.g.*, “China Wields New Legal Weapon to Fight Claims of Intellectual Property Theft,” Wall Street Journal (Sept. 26, 2021), available at <https://www.wsj.com/articles/china-wields-new-legal-weapon-to-fight-claims-of-intellectual-property-theft-11632654001>.

¹⁸ *See, e.g.*, 2022 Special 301 Report, USTR (2022) at 44 – 53, available at <https://ustr.gov/sites/default/files/IssueAreas/IP/2022%20Special%20301%20Report.pdf>.

¹⁹ *Id.*

²⁰ *Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 14906, 14907 (Office of the U.S. Trade Rep. Apr. 6, 2018).

Theft of American Intellectual Property (the “Huntsman Commission”) “estimate{s} that the annual cost to the U.S. economy continues to exceed \$225 billion in counterfeit goods, pirated software, and theft of trade secrets and could be as high as \$600 billion. It is important to note that both the low- and high-end figures do not incorporate the full cost of patent infringement—an area sorely in need of greater research.”²¹ In terms of jobs, the Information Technology & Innovation Foundation estimated that forced technology transfer caused 3.4 million lost U.S. jobs between 2001 and 2015.²²

Manufacturing tends to be the hardest hit sector when intellectual property is stolen or otherwise obtained through force or non-market means. Manufacturing and IP go together. Indeed, the U.S. PTO reports that manufacturing is the most patent-intensive industry in terms of employment numbers.²³ It should come as no surprise that, after China joined the WTO in 2001, corporations took advantage of a Chinese economy with permanent access to the U.S. and other Western markets and invested heavily in the country. The Economic Policy Institute reports that United States lost approximately 3.7 million manufacturing jobs to China in the years following China’s accession to the WTO,²⁴ and the towns and regions hardest hit by this have not recovered. And this has impacted American innovation: recent research from MIT and Harvard found that “U.S. patent production declines in sectors facing greater import competition.”²⁵

IV. U.S. Efforts to Combat Chinese Policies and Practices

So what has the United States done to address this persistent threat to our economy and national security? In the same way that Chinese forced technology transfer efforts are not new, U.S. efforts to mitigate this issue have gone on for decades. The administrations of George H.W. Bush and Bill Clinton each made efforts to negotiate improved IP rights and enforcement in China in 1989, 1992, 1995, and 1996, and each of these efforts ended in a bilateral agreement where the Chinese committed to reform.²⁶ But the United States took no enforcement actions in connection with these agreements (or their subsequent violation).

The Clinton Administration laid the foundation for China to join the World Trade Organization in 2000, a policy continued and brought to fruition by the Bush Administration. Accession to the WTO for China also meant membership in the WTO Agreement on Trade-

²¹ Update to the IP Commission Report, Huntsman Commission (2017) at 9, *available at* https://www.nbr.org/wp-content/uploads/pdfs/publications/IP_Commission_Report_Update.pdf.

²² Section 301 Report at Appendix A, p. 10.

²³ Intellectual Property and the U.S. Economy: Third Edition, U.S. Patent and Trademark Office (2022), at 6, *available at* <https://www.uspto.gov/sites/default/files/documents/uspto-ip-us-economy-third-edition.pdf>.

²⁴ Robert E. Scott and Zane Mokhiber, “Growing China Trade Deficit Cost 3.7 Million American Jobs Between 2001 and 2018,” Economic Policy Institute (Jan. 30, 2020), *available at* <https://www.epi.org/publication/growing-china-trade-deficits-costs-us-jobs/>.

²⁵ David Autor, David Dorn, Gordon Hanson, Gary Pisano, and Pian Shu, “Foreign Competition and Domestic Innovation: Evidence from U.S. Patents,” (Jan. 2019), *available at* https://chinashock.info/wp-content/uploads/2020/06/ADHPS_foreign_competition.pdf.

²⁶ *See, e.g.*, Massey, Joseph A., “The Emperor Is Far Away: China’s Enforcement of Intellectual Property Rights Protection, 1986-2006,” *Chicago Journal of International Law*: Vol. 7: No. 1, Article 10 (2006) at 232, nn. 4-7, *available at* <https://chicagounbound.uchicago.edu/cjil/vol7/iss1/10>.

Related Aspects of Intellectual Property (“TRIPS”). TRIPS requires countries to provide for and protect basic IP rights.²⁷ But again, there was a general failure of the Bush administration, and then the Obama administration, to rigorously hold China to account for trade violations, including violations of TRIPS.²⁸ China was violating numerous TRIPS rules and the underlying international treaties on IP during this time. However, the United States was led into repetitive “dialogues” – on China’s terms – to talk about issues rather than resolve them or take appropriate enforcement action. In these discussions, China’s practices and U.S. conditions seem to have been treated with moral equivalence, and developing a positive joint statement with China appears to have been the primary goal of U.S. government officials rather than securing protection for American IP. Below, I have reproduced a chart from the Section 301 investigation showing ten times during just the Obama Administration that China made commitments on forced technology transfer:

²⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights (as amended on 23 January 2017), *available at* https://www.wto.org/english/docs_e/legal_e/31bis_trips_01_e.htm.

²⁸ The Bush Administration brought one WTO case in 2007 against China regarding enforcement of copyright and trademark rights under TRIPS. The United States prevailed in that case, and China claimed to have brought its laws into conformity with the ruling. *See* China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights, DS362, *available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm.

Table I.1 China's Bilateral Commitments Relating to Technology Transfer, 2010 - 2016

Year	Mechanism	Commitment
2010	S&ED	China reaffirmed that the terms and conditions of technology transfer, production processes, and other proprietary information will be determined by individual enterprises.
2011	JCCT	China confirmed that it does not and will not maintain measures that mandate the transfer of technology in the New Energy Vehicles Sector. China further clarified that "mastery of core technology" does not require technology transfer for NEVs.
2012	S&ED	China reaffirmed its commitment that technology transfer is to be decided by firms independently and not to be used by the Chinese government as a pre-condition for market access.
2012	Xi Visit Commitment	China reiterated that technology transfer and technological cooperation shall be decided by businesses independently and will not be used by the Chinese government as a pre-condition for market access.
2012	JCCT	China reaffirmed that technology transfer and technology cooperation are the autonomous decisions of enterprises. China committed that it would not make technology transfer a precondition for market access.
2014	JCCT	China committed that enterprises are free to base technology transfer decisions on business and market considerations, and are free to independently negotiate and decide whether and under what circumstances to assign or license intellectual property rights to affiliated or unaffiliated enterprises.
2014	JCCT	China confirmed that trade secrets submitted to the government in administrative or regulatory proceedings are to be protected from improper disclosure to the public and only disclosed to government officials in connection with their official duties in accordance with law.
2015	Xi Visit Commitment	China committed not to advance generally applicable policies or practices that require the transfer of intellectual property rights or technology as a condition of doing business in the Chinese market.
2015	Xi Visit Commitment	China committed to refrain from conducting or knowingly supporting cyber-enabled theft of intellectual property cyber-enabled theft of intellectual property, including trade secrets or other confidential business information, with the intent of providing competitive advantages to companies or commercial sectors.
2016	Xi Visit Commitment	China committed not to require the transfer of intellectual property rights or technology as a condition of doing business.

Source: USTR, CATALOGUE OF JCCT AND S&ED COMMITMENTS (2016); 2016 USTR REP. TO CONG. ON CHINA'S WTO COMPLIANCE 7.

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Other U.S. government agencies have made substantial efforts to stop forced technology transfer. In 2014, the Department of Justice announced that it had indicted 5 suspected hackers

²⁹ Section 301 Report at 8.

from a Chinese military unit responsible for obtaining technology from U.S. companies' and labor unions' computer systems. While the indictments were important for the United States to signal its displeasure to China and highlight our capability to identify threats, the indictments were largely symbolic, as the 5 hackers were not in the United States and were not extradited by China.³⁰ The indictment was one of the catalysts for further discussions with China on forced technology transfer issues. Following this, General Secretary Xi Jinping himself reportedly promised to change China's policies and practices regarding forced technology transfer. Xi's 2015 commitment to President Obama to stop cyber intrusions was hailed as a breakthrough moment. But this commitment was simply reported in a White House fact sheet following the meeting, and was not echoed in Chinese press releases or put down on paper with wet signatures.³¹ There was no enforcement mechanism for this agreement. It seems impossible to obtain a weaker commitment than this.

Thus, in 2017, the U.S. government found itself again in the situation of needing to address these issues. As noted earlier, at the direction of President Trump, USTR undertook a Section 301 investigation on forced technology transfer covering all of the policies and practices discussed at length above. After more than six months of research, public comment and hearings, analysis, and interagency coordination, USTR released the Section 301 Report in March 2018. At the same time, the President directed the appropriate agencies to take action to obtain the elimination of China's policies and practices. These directives included:

- Imposing tariffs on IP-intensive products from China, including high-tech items linked to the "Made in China 2025" initiative;
- Bringing a WTO dispute settlement case with respect to China's violations of TRIPS obligations regarding licensing; and
- Strengthening investment screening by the Committee on Foreign Investment in United States ("CFIUS") to prevent the strategic acquisition of critical technologies by Chinese actors.³²

With respect to tariffs, USTR imposed 25 percent tariffs on \$50 billion worth of Chinese imports as compensation for the economic harm caused by China's policies and practices. This is the first time the U.S. actually levied a penalty on China after decades of forced technology transfer. Tariffs were initially focused on IP-intensive sectors and sectors where China has articulated a desire to dominate global markets. One key example is a 25 percent tariff on electric vehicles made in China. At the time, there were few imports of such vehicles from

³⁰ "U.S. Charges Five Chinese Military Hackers for Cyber Espionage Against U.S. Corporations and a Labor Organization for Commercial Advantage," May 19, 2014, *available at* <https://www.justice.gov/opa/pr/us-charges-five-chinese-military-hackers-cyber-espionage-against-us-corporations-and-labor>.

³¹ See FACT SHEET: President Xi Jinping's State Visit to the United States, Sept. 25, 2015, <https://obamawhitehouse.archives.gov/the-press-office/2015/09/25/fact-sheet-president-xi-jinpings-state-visit-united-states>.

³² *Actions by the United States Related to the Section 301 Investigation of China's Laws, Policies, Practices, or Actions Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 13099 (Mar. 27, 2018).

China. Now, China has increased its exports to the world of electric vehicles dramatically,³³ but Chinese electric vehicles still take up only a fraction of the U.S. market.³⁴ There is no question that the Section 301 tariffs are partially responsible for this dynamic and continue to defend our IP-intensive industries (and other industries) from unfair competition enabled by forced technology transfer.

USTR also brought a WTO case regarding certain licensing regulations, which China ultimately adjusted to remove patently discriminatory provisions. The case was resolved without full litigation during the course of negotiations with China. And the Administration worked closely with Congress to implement the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”) to strengthen CFIUS review.

But it is important to understand that China’s reaction to the Section 301 investigation began with condemnation and then morphed into disbelief that the United States would take any meaningful action. The Chinese can be forgiven for expecting this because certain U.S. business interests were successful for many years in staving off any serious enforcement efforts against Chinese unfair trading practices and IP theft. In fact, certain U.S. businesses were quite comfortable sharing important technology if it meant getting a foot hold, seeing a jump in quarterly earnings, and potentially accessing the Chinese market. I have heard this same argument from companies in other Western countries. (This is a discussion for another time, but the Chinese market has always been elusive even for companies that are “all in” in China, as China’s primary economic policy has been and continues to be the promotion of indigenous innovation and production, and not free trade.) In 2018, instead of responding positively to the findings of the Section 301 investigation and changing their policies and practices, the Chinese went through the motions of yet more dialogue and changed nothing. Once the United States took the step of imposing tariffs, the Chinese continued to refuse to make any changes, and instead imposed their own tariffs, without any domestic administrative process at all.

Tariffs escalated until the negative economic effects brought the Chinese to the table for discussions on how to deescalate the situation. The ensuing negotiations over several months ended with a “Phase One” agreement between the United States and China. The Chinese were only willing to make limited – but important – commitments on forced technology and intellectual property. Notably, the Agreement did not require the United States to remove the tariffs. Instead, these were kept in place to serve as continuing leverage and a verifying tool to promote compliance and to compensate for China’s unfair practices until they are eliminated.

³³ See Dan Wang, “The EV Export Opportunity,” Gavekal Research (Feb. 9, 2023), *available at* <https://research.gavekal.com/teaser/the-ev-export-opportunity/>; see also “China Has Emerged from the Pandemic as an Auto Export Powerhouse,” Gavekal Research (Feb. 17, 2023), *available at* <https://twitter.com/Gavekal/status/1626512012196081664?lang=en>.

³⁴ Census Bureau data report that in 2022, 3.6 percent of imported electric passenger vehicles, by value, came from China relative to the value of imports from main auto exporting trading partners (*i.e.*, Canada, China, Germany, Japan, Korea, and Mexico). Similarly, for hybrid electric vehicles, Chinese imports made up 0.1 percent, by value, of total imports of such vehicles in 2022. See <https://ustrade.census.gov>.

The Phase One Agreement covered a wide swath of U.S.-China trade, but for purposes of this testimony, I have set out below the key provisions on IP and forced technology transfer:

- a. Chapter 1 of the Phase One Agreement covers IP and Chapter 2 of the Agreement covers technology transfer. While not comprehensive, these chapters commit China to significant changes in IP and technology policies. There is no question that these were the right commitments to obtain from the Chinese government. Of course, no commitments are helpful unless they are implemented and enforced. A review of some of the key obligations demonstrate (1) that the Chinese government is willing
- b. With respect to IP, the agreement required China to address numerous longstanding concerns related to trade secrets, patents, pharmaceutical-related IP issues, geographical indications, and IP enforcement. The IP chapter required China to produce an “Action Plan” for compliance with the Agreement, and the United States and China agreed to cover additional IP issues, data protection, and certain copyright matters in future discussions. Some key examples of Chinese commitments include:
 - expanding the scope of civil liability for trade secret theft beyond entities directly involved in the provision of goods and services to any natural or legal persons, such as former employers or cyber hackers;
 - expanding the definition of trade secret theft to include electronic intrusions and similar activities;
 - shifting the burden of proof to defendants in a trade secret case in appropriate circumstances, and making it easier for trade secret owners to obtain a preliminary injunction;
 - lowering the bar for criminal investigation and enforcement of trade secret theft;
 - providing patent term extension for pharmaceuticals in the event of unreasonable patent and marketing approval delays;
 - invalidating or refusing bad-faith trademark applications;
 - taking action against online infringement using notice and takedown;
 - increasing enforcement actions against counterfeit goods;
 - ensuring that government agencies use only licensed software;
 - establishing deterrent-level civil and criminal penalties for IP theft, such as through increasing the range of minimum penalties;
 - ensuring expeditious enforcement of judgment violations of IP rights;

- streamlining or eliminate authentication practices for foreign litigants seeking to enforce IP rights; and
 - providing an opportunity for witness examination in civil proceedings.³⁵
- c. On technology transfer, Chapter 2 of the Agreement commits China to eliminate the following:
- technology transfer requirements as a condition for obtaining market access, administrative approvals, licenses, or subsidies;
 - investment-related technology transfer requirements in connection with acquisitions, joint ventures, or other investment transactions;
 - indigenous technology requirements, including a requirement for U.S. companies to transfer their technology to Chinese partners so that the technology can qualify as “indigenous;”
 - technology licensing that is not voluntary, mutually agreed, and market-based;
 - support or direction to Chinese companies to make outbound foreign direct investment to acquire foreign technology;
 - discriminatory enforcement of laws and regulations;
 - forced disclosure of unnecessary technical information;
 - ensuring confidentiality of sensitive technical information disclosed during any administrative, regulatory, or other review process; and
 - transparency and due process in administrative proceedings.³⁶

As noted above, China has made some efforts to comply with several provisions of the Phase One Agreement.³⁷ However, the opacity of the Chinese system make it difficult to assess whether such compliance efforts have been effective in eliminating discrimination against U.S. companies and reducing instances of forced technology transfer. The Global Innovation Policy Center reports that despite positive movement by China, including Phase One Agreement

³⁵ See generally ECONOMIC AND TRADE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE PEOPLE’S REPUBLIC OF CHINA FACT SHEET: Intellectual Property, *available at* https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Phase_One_Agreement-IP_Fact_Sheet.pdf.

³⁶ See ECONOMIC AND TRADE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE PEOPLE’S REPUBLIC OF CHINA FACT SHEET: Technology Transfer, *available at* https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Phase_One_Agreement-Technology_Transfer_Fact_Sheet.pdf.

³⁷ Special 301 Report at 44 – 53, *available at* <https://ustr.gov/sites/default/files/IssueAreas/IP/2022%20Special%20301%20Report.pdf>.

reforms, “licensors and rightsholders have continued to face substantive challenges to doing business in China on fair, nondiscriminatory, and equal terms.”³⁸ Strong policy backed by political will is the necessary way forward to defend U.S. innovators.

V. Potential Policy Steps

Chinese efforts to resolve U.S. concerns on forced technology transfer have been slow and inadequate, at best. The United States can implement a number of policies to address this long-standing problem of forced technology transfer that fuels Chinese ambition for military and economic dominance. The following steps are not comprehensive by any means, but I offer them as suggestions for consideration by policymakers as responses to this specific problem:

- a. **Sanctions.** The Administration should impose and enforce sanctions on persons that are instrumental in or benefit from China’s forced labor policies and practices, including companies, government bodies, non-governmental organizations, and individuals – including those outside China. Sanctions are strong medicine, and there is ample authority under the International Emergency Economic Powers Act (“IEEPA”) for such action. In fact, Executive Order 13694 issued in April 2015 specifically authorizes sanctions in many situations, including where a person “caus{es} a significant misappropriation of funds or economic resources, trade secrets, personal identifiers, or financial information for commercial or competitive advantage or private financial gain.”³⁹ Moreover, Congress has provided additional statutory authority for sanctions regarding intellectual property by way of the recently enacted Protecting American Intellectual Property Act.⁴⁰
- b. **Phase One Agreement and Section 301 Enforcement.** The Administration should enforce the Phase One Agreement as promised by the current USTR, Katherine Tai.⁴¹ This means using the dispute settlement structure of the Agreement, escalating issues as appropriate, and then taking action where commitments are not met, up to and including tariffs. As part of this process, USTR should, at a minimum, assess China’s compliance and share that assessment with Congress. I note that USTR is currently undertaking a

³⁸ International IP Index, Global Innovation Policy Center (2023) at 103, *available at* https://www.uschamber.com/assets/documents/GIPC_IPIndex2023_FullReport_final.pdf.

³⁹ Executive Order 13694; Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities, 80 Fed. Reg. 18077 (Apr. 1, 2015); 31 C.F.R. § 578.201(a)(2)(i)(D).

⁴⁰ *See* Protecting American Intellectual Property Act of 2022, P.L. 117-336. It should be noted that the Act unfortunately prohibits a sanction on imports from a party designated as being complicit in abuse of U.S. IP holders’ rights. It is a serious failure in the bill that a party that unfairly obtains or uses a U.S. person’s IP rights can still potentially obtain indirect access to the U.S. market to sell the product of the stolen IP.

⁴¹ *See* 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. 2021) (“As we work to enforce the terms of Phase One, we will raise these broader policy concerns with Beijing.”), *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>.

statutorily-required review of the Section 301 tariffs, and has indicated that it may modify these tariffs to some degree. Although some modifications may be warranted for a variety of reasons, absent meaningful improvement by the Chinese, stopping the Section 301 enforcement action at this time would be a major benefit for China.

- c. ***Export Controls.*** The United States should continue to develop and implement export controls, including with respect to Chinese persons that are complicit in IP theft and forced technology transfer. There have been some examples of this, such as expanded use of the Entity List that prohibits the export of U.S. items to designated persons and creative use of the Foreign Direct Product Rule to capture U.S. content used to make downstream items in third countries for shipment to China. These types of action have had powerful effects and should be a focus for the Bureau of Industry and Security and other export control agencies.
- d. ***Government Incentives.*** It is a positive development that recent funding opportunities under the CHIPs Act and other laws are specifically scrutinizing applicants' involvement with "foreign entities of concern," including with respect to research and development and IP. It seems like common sense, but federal dollars should not fund IP that may be shared with strategic industry players of our main geopolitical competitor. The U.S. government should explore ensuring that federal funding is not benefiting the development or sharing of IP with persons involved in forced technology transfer.
- e. ***U.S. International Trade Commission ("ITC").*** The ITC has a strong tool under Section 337 of the Tariff Act of 1930 to exclude from import items that infringe on IP rights. The Huntsman Commission has issued several interesting recommendations to strengthen this tool that should be considered, including "establish{ing} a quick-response capability within the ITC for sequestering goods that incorporate stolen, pirated, or otherwise illegally procured materials or forms of IP."⁴²
- f. ***Courts.*** Our courts should be empowered, by statute if necessary, to address the unique challenges posed by Chinese anti-suit injunctions.
- g. ***IP agencies.*** Our IP agencies should be empowered, again, by statute if necessary, to assess and scrutinize eligibility of applicants for patents and other IP rights and registrations. Such scrutiny and appropriate action should apply to persons associated with the Chinese government, CCP, PLA, or any instrumentalities thereof. Care should be taken to avoid unintended consequences

⁴² Recommendations Regarding the Trump Administration's Section 301 Investigation, Huntsman Commission (Mar. 2018) at 3 ("Huntsman Commission Comments"), available at https://www.nbr.org/wp-content/uploads/pdfs/publications/IPC_Recommendations_to_Section_301_Investigation_March2018.pdf.

with respect to U.S. persons and the timely and effective granting of patents and recognition of other IP rights.

- h. ***Special 301 Report on IP Rights and Enforcement.*** USTR has repeatedly placed China on its “Priority Watch List” following its annual review of IP protection and enforcement in major U.S. trading partners. However, it could designate China as a “Priority Foreign Country,” which automatically makes such a country subject to a Section 301 investigation.⁴³ This could be an appropriate step given the slow progress of China under the Phase One Agreement commitments.
- i. ***CFIUS.*** The Huntsman Report also recommended ensuring that the CFIUS review process “evaluate{s} major new foreign investments on the basis of the demonstrated level of protection afforded to U.S. companies’ IP, including assessments of a foreign entity’s historical record of IP theft. . . . It should assess whether acquiring companies have damaged or threatened U.S. national security or the national security of U.S. treaty allies through the illegal acquisition of American IP, or other activities against U.S. security policies and interests.”⁴⁴ CFIUS addresses aspects of these recommendations through its normal review processes, including a general focus on “critical technology”⁴⁵ but a dedicated scrutiny on protecting IP and specific questions to transaction parties on the facts of IP protection and access could help assess risks and vulnerabilities.
- j. ***Coordination with Like-Minded Countries to Take Action.*** The United States should push like-minded countries with IP-intensive economies to take action against China beyond disapproving public statements and the occasional trade dispute settlement case. U.S. trading partners should also impose measures – whether they be tariffs, curtailed investment rights, restrictions on services, or other tools – to compensate for economic harm caused to their workers and businesses by China’s practices. Forums like the U.S.-EU Trade and Technology Council may be helpful vehicles to share information and ideas, but they could be transformative if our European allies felt it was in their interest to strongly respond to Chinese government policies and aligned action with U.S. efforts to punish and deter harmful and unfair practices related to IP.
- k. ***Monitoring and reporting.*** It could be helpful to unify monitoring and reporting of forced technology transfer, given that a variety of agencies have tracked this issue and at times provided reports on intelligence. The IP Enforcement Coordinator may be a natural choice for this task, and could serve to centralize the

⁴³ 2022 Special 301 Report, USTR (2022) at 83, *available at* <https://ustr.gov/sites/default/files/IssueAreas/IP/2022%20Special%20301%20Report.pdf>.

⁴⁴ See Huntsman Commission Comments, *available at* https://www.nbr.org/wp-content/uploads/pdfs/publications/IPC_Recommendations_to_Section_301_Investigation_March2018.pdf at 2-3.

⁴⁵ Executive Order 14083; *Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States*, 87 Fed. Reg. 57369 (Sept. 20, 2022).

ongoing monitoring and reporting accomplished by USTR, law enforcement and intelligence agencies, the Commerce Department, and others.

VI. Conclusion

The United States has a number of tools at its disposal to address forced technology transfer by China and other harmful IP-related practices. Additional tools could also be developed. However, underlying the use of any of these tools is a need for political will, across parties and across administrations and – importantly – in the U.S. business community. Absent sustained will, it will be increasingly difficult to protect the U.S. economy and American workers from the negative impact of Chinese policies and practices related to IP.