



UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

United States Council for International Business

**STATEMENT
on
China's WTO Compliance**

**Submission to the Office of the United States Trade Representative
(USTR)**

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Docket Number: USTR-2021-0015

Introduction

The United States Council for International Business (USCIB) welcomes the opportunity to provide comments and recommendations on China's compliance with World Trade Organization (WTO) commitments. In this response to the August 17, 2021, Federal Register notice, USCIB provides the Office of the United States Trade Representative with member feedback received to date concerning China's fulfillment of its commitments in several key industry areas and more broadly with regard to regulations related to intellectual property enforcement, transparency, and standards.

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USCIB and its members understand and appreciate that U.S.-China economic relations are complex and multifaceted, and that American business holds a direct and important stake in this relationship and in its success. Due to the size of its economy, China's practices and policies have a significant impact on its trading partners, and engagement with China can be challenging. China's importance in the global economy provides strong incentives for the United States to find ways to promote U.S. interests in a rules-based international trading order; to work with allies to address common challenges with respect to China; and to work together with China to address our common challenges and responsibilities.

USCIB welcomed the "Phase One" trade agreement between the United States and China.¹ If ever fully implemented, the agreement will help address policies and practices maintained by China that undermine the ability of some U.S. businesses to operate, including unfair and discriminatory governmental practices. We note that U.S. tariffs and Chinese retaliatory tariffs imposed as a result of the U.S. Section 301 investigation into China's forced technology transfer, intellectual property, and innovation policies remain disruptive to U.S. business. While the Phase One deal partially addresses some of these tariffs, much more must be done to restore the ability of U.S. business to compete effectively in the global marketplace. It is essential that the United States develop a robust strategy that does not only rely on the use of punitive tariffs to achieve its objectives with China. Tariffs alone have not changed China's economic policies to date and, ultimately, tariffs also increase costs for U.S. consumers and businesses.

Accordingly, high-level bilateral dialogue between the United States and China will be of utmost importance. We also urge both countries to utilize, in addition to the WTO, the full range of formal multilateral fora, including Asia-Pacific Economic Cooperation (APEC) Forum and the Organisation for Economic Co-operation and Development (OECD), to work toward improved commercial relations. Plurilateral dialogues that include U.S.-friendly jurisdictions such as the European Union, Canada or Australia should also be considered.

¹ Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China
(https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf)

On China's fulfillment of its WTO obligations, USCIB members have significant concerns regarding China's actual compliance with its WTO obligations in a number of areas. USCIB notes that its member concerns regarding China's WTO record extend beyond the compliance issues discussed in this paper. For example, USCIB members have significant concerns with China's government procurement policies and consider it critical that China improve the ambition of its offers in WTO Government Procurement Agreement (GPA) negotiations and follow through on its stated commitment to officially accede to and implement the GPA in the near term.

This USCIB submission contains two parts. The first part addresses selected horizontal areas of concern that transcend industry sectors, and the second section includes specific sectoral industry concerns. We have summarized some important horizontal concerns below that are further detailed, with examples, in this document:

- **Digital Measures:** China has enacted a variety of trade-restrictive and overly prescriptive requirements on information technology (IT) under the guise of protecting security that will have widespread impact on companies' operations across different economic sectors. The Cybersecurity Law, which went into effect in June 2017, established a number of burdensome restrictions on the cross-border flow of data and established intrusive security reviews of equipment and services used by network operators and operators of critical information infrastructure (CII). USCIB members urge the U.S. government to continue to press for full suspension of all existing and proposed measures involving trade-restrictive requirements in this area.
- **China's Antimonopoly Law (AML):** China's antitrust enforcement authority, The State Administration of Market Regulation (SAMR) continues to use the AML as a tool to advance industrial policy goals and interests of Chinese national champions rather than to safeguard competition in the Chinese market. While we support China's efforts to address anti-competitive practices, U.S. companies have repeatedly experienced Chinese regulators using AML enforcement absent sufficient economic proof of market power or anti-competitive harm or absent any transparency regarding analyses that may have been conducted. In addition, anecdotal evidence indicates that SAMR often disregards basic norms of fairness, due process, and transparency, and regularly share confidential business information collected by its SAMR with Chinese companies. Such disclosures are made counter to Art. 41 of the AML, and tilt litigation in China against non-Chinese parties, because Chinese law does not include a document discovery mechanism, thus Chinese litigants gain an unfair advantage through such SAMR disclosures. More broadly, AML enforcement appears to be disproportionately used against non-Chinese companies. USCIB members urge the U.S. government to continue to focus on this problem and its significant effects on U.S. companies.
- **Intellectual Property Rights (IPR):** USCIB members urge the U.S. government to continue to press for increased protection of IPR, as well as enhanced and efficient enforcement options, better coordination and enforcement by Chinese authorities, and more severe penalties for infringement of IPR.

- **National Treatment and Non-Discrimination:** Chinese authorities continue to use a variety of policy tools and regulatory measures – including AML enforcement (described above), technology standards policies, IPR enforcement practices, restrictions on the collection and use of genetic/biologic samples and data by foreign entities (human genetic resource regulation), and licensing and investment reviews – to compel transfer of U.S. IP or technologies to Chinese entities at below-market rates and to exclude U.S. companies from full and equal participation in the Chinese market. USCIB members continue to call on China to abide by its WTO commitments of national treatment and non-discrimination and ensure a competitive market that allows for foreign business participation on a level playing field with domestic Chinese firms.
- **Regulatory Environment:** China should fairly and transparently develop, promulgate and enforce regulations and other legal norms. However, USCIB members continue to experience business obstacles related to institutions, rulemaking practices and regulatory enforcement. Acceptance of international standards and practices and improved coordination among regulators in China would create a more transparent and predictable framework. A growing regulator body relating to “Social Organization Standards” is also a source of concern.
- **State-Owned Enterprises (SOEs):** As companies continue to face increasing competition from Chinese SOEs within China, in third markets and in the United States, companies believe it is critical that the U.S. government use all available tools to ensure fair competition through a level playing field. Chinese SOEs receive favorable treatment (e.g. subsidies, credit, regulatory advantages) which distorts competition. In addition, some Chinese national companies that are not formally defined as SOEs receive similar treatment.

As always, USCIB would be pleased to meet with officials at U.S. agencies to discuss recommendations and concerns at greater length.

About USCIB:

USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and regulatory coherence. Its members include U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world, generating \$5 trillion in annual revenues and employing over 11 million people worldwide. As the U.S. affiliate of the International Chamber of Commerce, the International Organization of Employers and the Business and Industry Advisory Committee to the OECD, USCIB has a unique global network through which it provides business views to policy makers and regulatory authorities worldwide and works to facilitate international trade and investment. More information is available at www.uscib.org.

I. CROSS-SECTORAL BUSINESS ISSUES

Anti-Monopoly Law (AML)

China's competition enforcer, the State Administration of Market Regulation (SAMR) continues to use the AML to intervene in the market in an effort to advance industrial policy goals and interests of Chinese national champions. Developments continue to suggest that these efforts are part of broader and coordinated effort by Chinese authorities to use a variety of policy tools – including technology standards policies, IPR enforcement practices, and licensing and investment reviews – to reduce China's perceived dependence on foreign IP while protecting and promoting domestic Chinese companies.

There are concerns that the AML enforcement agency SAMR does not base its enforcement decisions on the sort of detailed economic assessment of the competitive effects of companies' conduct that has become standard in most competition law enforcement regimes around the world; that SAMR procedures are not sufficiently transparent; and that non-Chinese companies are not permitted to adequately and meaningfully defend themselves against allegations of anticompetitive conduct or otherwise to provide justifications for their conduct. Some of the problem stems from the fact that SAMR does not inform investigated companies of the nature of the suspicions against them. SAMR also often employs external experts, whose identity is not disclosed to the target U.S. company, who develop and write the predetermined decision against it, hence the target cannot meet with these experts to put on a defense. In addition, under Chinese legal culture, investigated parties can never be innocent, and are simply expected to confess. It is our members' understanding that Chinese AML enforcers would never fully close an investigation, in order not to "lose face." Instead, investigated parties must always agree to a "settlement" regardless of whether their behavior broke the law. Furthermore, SAMR is known to maintain investigations of non-Chinese companies open for many years (perhaps indefinitely), either before or after a "settlement," as a mechanism for keeping a commercial pressure channel against them to the benefit of changing Chinese companies whenever their commercial need arises for such pressure. Such reality, along with the lack of an independent judiciary, allows China's government to extract concessions from non-Chinese companies without necessarily any legal AML basis. Furthermore, there are concerns that the AML enforcement agencies' practice of consulting with other ministries and agencies, or other stakeholders, regarding specific matters is not transparent to companies that are being investigated. Enforcement, especially in the unilateral conduct area, appears disproportionately targeted towards non-Chinese companies.

Encouragingly, Chinese authorities have also used the AML to prevent undue concentrations of market power, combat cartels and abuse of market dominance, and pursue other legitimate antitrust goals. However, in many cases involving foreign companies, China's AML enforcement agencies have fused China's competition laws and related statutes to advance China's industrial policy goals and extract monetary investment in the Chinese market, including in cases where there was no evidence of abuse of market power or anti-competitive harm from conduct or a merger.

The Chinese companies that benefit from these policies are often national champions in industries that China considers strategic, such as commodities and high technology. Through its AML

enforcement, China seeks to strengthen such companies and, in apparent disregard of the AML, encourages them to consolidate market power, contrary to the normal purpose of competition law. By contrast, the companies that suffer are disproportionately foreign. Moreover, the curtailment of IP rights and related demands that have been imposed on U.S. and other foreign companies in several AML cases and settlements appear designed more to strengthen the bargaining position of domestic licensees than to address any true market distortions or anti-competitive harms. In other words, SAMR enforcement appears aimed at improving commercial terms offered to Chinese companies over terms offered to non-Chinese companies. USCIB welcomes the outcome of previous dialogues, including the 2011 MOU between U.S. and Chinese competition enforcers,² recognizing that the objective of competition policy is key to promoting consumer welfare and economic competition, but it appears that MOU may no longer be relevant now that SAMR has taken over China's AML enforcement in 2018. We encourage continued U.S. government focus on this important issue from multiple angles, perhaps through cooperation with other friendly trading partners.

The following elements of the AML are relevant in this regard:

- **Goals:** The goals of the AML, as defined in Section 1 thereto, are not limited to the safeguarding of competition or enhancing consumer welfare. Instead, the AML lists the additional goals of “safeguarding the...social public interest” and “promoting the healthy development of the socialist market economy.” Similarly, the updated 2019 Anti-Unfair Competition Law (AUCL) goals, as stated in Section 1 thereto, continue to include “safeguarding the healthy development of the socialist market economy.” Hence, both the AML and the AUCL explicitly identify industrial policy goals as the basis for their enactment.
- **Discriminatory Enforcement Targeting Foreign Intellectual Property:** AML investigations by China's competition authorities in areas involving intellectual property, which have been repeatedly identified by SAMR, its predecessors (NDRC, MOFCOM, SAIC) and the NPC as a priority area, appear to exclusively target foreign companies and their proprietary technology, including America's flagship companies. Furthermore, Chinese companies benefiting from AML enforcement cases to date were consistently national champions benefiting from AML investigations that prevented foreign companies from fully asserting their intellectual property against them. In other words, Chinese stakeholders use the umbrella of China's AML enforcement to facilitate lucrative infringement of U.S. companies' intellectual property rights or obtaining them for lower prices than their U.S. competitors pay. Such practice also gains Chinese companies an advantage over U.S. companies overseas because China's AML enforcement results in an effective subsidy whereby Chinese multinationals pay less for technology than non-Chinese multinationals.

² See <https://www.ftc.gov/system/files/110726mou-english.pdf> <https://www.ftc.gov/policy/cooperation-agreements/us-china-memorandum-understanding-antitrust-antimonopoly-cooperation>.

- **New Competition-IP Guidelines:** In August 2020, China issued new Guidelines related to the interface of the AML and intellectual property. The guidelines were issued in an unusual manner through publication in a book and were backdated to January 4, 2019. Their effect remains to be seen. However, especially concerning is Article 27, which suggests that companies' prayer to courts anywhere in the world may be view by China as an illegal abuse of a dominant position.

- **Significant Due Process Inadequacies Facilitate the Discrimination:** The discriminatory enforcement of China's AML against U.S. companies, especially in intellectual property related cases is aided by procedural inadequacies that render defense against such investigations difficult. Furthermore, these inadequacies create a smoke screen that make the discriminatory nature of these enforcement actions difficult to prove. Examples of such procedural challenges include, but are not limited to:
 - Lack of transparency into the agencies' decision-making process, insufficient rules on how investigations are conducted, on the admissibility of evidence, what probative weight is given to specific pieces of evidence, etc.;
 - Not allowing companies to understand the issues for which they are being investigated and the allegations and theories of competitive the agencies;
 - Denial of access to the evidence held by investigators;
 - An absence of a fair and effective opportunity to review and rebut evidence and allegations, or to cross examine witnesses before a decision is taken; this deficiency includes denial of access to the unidentified external experts who develop and write the decisions against the U.S. companies;
 - Misusing the current COVID-19 pandemic as an excuse to further prevent parties from putting on a defense, by refusing to hold teleconferences with investigated U.S. companies (while in-person meetings are not an option);
 - Lack of adequate protection of confidential information submitted by the investigated company, despite the fact that Article 41 of the AML awards such confidentiality. Consequently, there are substantiated concerns that such sensitive information, which often contains proprietary trade secrets, is regularly shared with Chinese companies. Such sharing, in turn, provides Chinese parties with an unfair advantage in Chinese litigation, because China does not have a legal "discovery" process. However, China's AML officials act as "discovery agents" for Chinese companies by providing them with internal documents of U.S. companies being investigated by them. SAMR officials also appear to discuss investigations of U.S. companies in details with Chinese stakeholders who are not related to the investigation (not even as direct third parties);
 - Denial of the right to be represented by outside counsel in hearings and meetings with agency officials, and an implication that the presence of outside counsel will escalate the investigation; and,
 - Threatening and verbally abusing Chinese employees of U.S. companies during dawn raids and approaching such employees directly through social media while the target company is known to be represented by outside counsel.

These procedural challenges facilitate the ability to use antitrust enforcement as an industrial policy tool to devalue U.S. intellectual property and stand in stark contrast to international best practices in this area expressed in documents such as the International Competition Network (ICN) Guidance on Procedural Fairness (2016),³ and the OECD Competition Committee's *Transparency and Procedural Fairness – Key Points* document (2012).⁴

USCIB members are extremely grateful for the U.S. antitrust agencies' formidable efforts in this area, exemplified in the June 2018 introduction of the Multilateral Framework for Procedural Fairness in Antitrust Enforcement (MFP) that morphed into the April 2019 International Competition Network (ICN) Framework for Competition Agency Procedures (CAP), and have expressed their support publicly.⁵ Regrettably, while the CAP is not limited to ICN members, to date, SAMR has still chosen not to join it, which suggests awareness of its strategic procedural deficiencies. Furthermore, the negotiated multilateral nature of the ICN CAP has resulted in language that may be softer than anticipated. USCIB members look forward to continuing to work with U.S. government agencies to develop mechanisms and strategies that would encourage China's AML agency and courts to follow basic due process principles.

It is important to ensure that the AML, AUCL and related AML guidelines are equally enforced against Chinese and non-Chinese companies, and not used to target foreign companies as a policy tool to promote China's national industrial policy objectives and commercial interests of select Chinese companies. The current language of these statutes, their enforcement record, and the broad procedural challenges surrounding their enforcement, suggest that the road to such equal treatment may still be long. It would be helpful for USTR to work together with the DOJ Antitrust Division and FTC on these issues, as many of them are clearly trade issues.

Customs and Trade Facilitation

USCIB encourages China to continue to pursue customs reform, modernization, and simplification to promote the streamlined movement of goods across the border, which provides for the rapid movement of goods throughout the world and global supply chain.

- Continued global ratification of the landmark WTO Trade Facilitation Agreement (TFA) and its robust country implementation continues to be a key priority for USCIB and its members. We commend China for taking necessary steps to ratify the TFA, as well as depositing their instrument of acceptance with the WTO. In February 2017, the TFA entered into force, achieving the two-thirds member ratification threshold. Today, 154

³ ICN Guidance on Investigative Process, <http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf>

⁴ <http://www.oecd.org/competition/mergers/50235955.pdf>

⁵ See USCIB Press Release, Global Business Welcomes New Multilateral Framework on Procedures in Competition Enforcement (June 2018) available at <https://www.uscib.org/global-business-welcomes-new-multilateral-framework-on-procedures-in-competition-enforcement/>; USCIB Press Release, Global Business Endorses the ICN Framework for Competition Agency Procedures (April 10, 2019) available at <https://www.uscib.org/global-business-endorses-the-icn-framework-for-competition-agency-procedures/>

WTO member countries have ratified the Agreement.⁶ The COVID-19 pandemic has highlighted the need for countries to expedite implementation of the TFA. USCIB is dedicated to robust implementation of the TFA down to the best practices, such as customs bonding (Article 7) and ATA Carnet (Article 10 – Temporary Admissions), that underpin the Articles of the Agreement. USCIB encourages China to sign-on to 1) the communication to “support the timely and efficient release of global goods through accelerated implementation of the WTO Trade Facilitation Agreement (TFA);” and 2) U.S. and Norway communication to abolish consularization. Moreover, we encourage China to consider making any COVID related customs and trade facilitation reforms permanent.

- Consultation with industry at an early stage will allow for open discussions on reform measures and the smooth implementation of such measures. While China’s General Administration of Customs (GAC) has met with industry in the past, those meetings usually consist of GAC explaining their policy rather than engaging in dialogue to seek practical solutions.
- Deficiencies in China’s IT systems for customs clearance introduce uncertainty and inefficiencies for the logistics and transportation industry and local customs authorities alike, and do not match China’s economic growth needs. Industry would look forward to engaging with customs authorities to help support reform and modernization and share best practices so that the Chinese economy and society may benefit from fast and efficient trade. Limitations equally apply to the China Inspection and Quarantine (CIQ) agency. In order to have goods cleared through customs, they must also clear through CIQ, so the problem is two-fold.
- China should ensure that annual changes to the domestic HTS (Harmonized Tariff Schedule) are released to the public at least 3 months before the legal effective date to allow sufficient time for industry to implement changes. We commend China for its timely implementation of HS2012 and HS2017. Transparency and predictability through publication, review, and comment of proposed domestic amendments should be provided to members of the trade regarding upcoming HS2022 (and future versions of the HS) implementation domestically.
- Customs Inquiries: For business to respond to information requests, it is important that China Customs allow ample time for response. It takes time to gather information, identify relevant stakeholders, draft responses, and obtain necessary approvals, so that responses are adequate to a government request.
- When and where possible, China Customs should communicate all questions to a company point of contact at one time. This will allow for a streamlined internal process as there will not be a continuous need for internal information requests, additional data mining, etc.

⁶ For the ratifications list, please see www.tfafacility.org/ratifications.

- USCIB members continue to have concerns due to verbal requests from CIQ that companies under audit must reimburse CIQ travel expenses. These concerns include Foreign Corrupt Practice Act (FCPA) violations, as well as fear that audited programs may not be renewed for refusal to comply with request. CIQ was asked to put their request in writing, which CIQ has yet to do.
- USCIB members feel that the returns process into China is unnecessarily cumbersome and lengthy. We understand that all returns require CIQ examination, for which our members do not understand the rationale. It has been noted that the returns process takes at least one month.
- USCIB members encourage the U.S. government to secure a commitment from China to establish a bilateral Customs Dialogue, including industry participation, to address customs bottlenecks in the supply chain, which hamper the growth of U.S. imports to China as well as the development of China's trade facilitation infrastructure. Customs and industry share a common goal of safe, efficient clearance and an open dialogue could help both parties move closer toward that goal. Many issues could be addressed through the dialogue, including such specific issues as:
 - Improvement in the clear definition of parameters for export and import controls criteria for consistent application of compliance requirements;
 - Improved transparency and consistency of customs enforcement across all ports;
 - Work with GAC to build on recent progress that has been made to simplify bonded transfer procedures so that goods to and from locations that are not international gateways can flow smoothly through China's gateway airports into international trade networks. This will help China achieve its goals of developing second-tier cities and expanding foreign trade and help express carriers with hubs in China operate those hubs more efficiently. Current customs procedures conversely create incentives to operate hubs outside of China, which damage the interests of firms and local governments who have invested in hubs in China;
 - Work with GAC to establish low-value and commercially meaningful *de minimis* customs clearance levels and consistent with China's position as one of the world's largest participants in global trade. As a practical matter, China has virtually no effective low-value and/or *de minimis* customs treatment;
 - Address the GAC's four-hour prior to loading advanced commercial information requirement for export goods and standardize China's export requirements with international norms and industry practices;
 - Work with China to explore the benefits of establishing a 24-7 customs handling system similar to that in other advanced trading economies. Customs and other border crossing agencies should commit to building and maintaining IT systems that are available for trade 24-7 with a high degree of reliability. When systems go down, agencies should be encouraged to communicate clearly with traders the reason for the outage, to provide back-up solutions, and to make allowances for delays due to system failures; and

- Explore the value of eliminating ancillary charges levied by local customs or port/airport operators or concessionaires for services such as connection to the customs network, customs forms, and access to customs facilities. Whenever possible, such as when filing declarations through the online customs system, firms should be able to choose to provide such services for themselves or from a number of qualified vendors. Where sole-source charges are necessary, they should be levied strictly on a cost-recovery basis.

Intellectual Property Rights

USCIB and its members acknowledge that, since acceding to the WTO, China has improved most of its key intellectual property rights (IPR) laws and has made limited progress in combating copyright piracy and trademark counterfeiting. However, despite these improvements, USCIB members have observed the following IPR-related concerns.

1. Copyright

- Unlicensed software use and optical media products, CD, VCD and DVD, and counterfeit goods continue to be a major problem. Despite ongoing discussions on legislative amendments to China's civil law, the existing Copyright Law provides inadequate criminal liability for copyright offenses, and high and unrealistic thresholds, which make bringing a criminal copyright case virtually impossible in many cases. Further, actual enforcement in line with international standards is sorely lacking. The Intellectual Property provisions of the Criminal Law should be amended to address this.
- We urge the U.S. government to continue to press the Chinese government to establish reasonable and appropriate thresholds for establishing commercial-scale piracy, consistent with trade-related aspects of intellectual property rights (TRIPS) standards. The problem is particularly acute with digital piracy.
- Also, enterprise end-user unlicensed software use should be clarified as a criminal offense – absent any affirmative showing that the enterprise engaged in the infringement “for profit,” as Chinese law currently requires – in order to allow for prosecutions against unlicensed software use by commercial actors, with adequate penalties to deter further infringement.
- There is a great need for better coordination between various enforcement agencies to protect copyright.
- There is also a need for better coordination between administrative and criminal measures to protect copyright. China's criminal law provisions have rarely been used to prosecute piracy because of the high thresholds for criminal liability established by the People's Supreme Court in its interpretations of the criminal copyright provisions. China should also define criminal violations for circumvention of and trafficking in technological protection measures (TPMS).

- Additionally, both the Copyright Law and the Criminal Code should be revised to be fully compliant with TRIPS, or a new judicial interpretation should be promptly issued to clarify the scope of these laws if amendment is not practicable in the near future. Most importantly, these laws should be revised to provide criminal penalties “that are sufficient to provide a deterrent” (TRIPS, Art. 61) against piracy and counterfeiting.
- Both the civil Copyright Law and the Criminal Code need to be revised to reflect the development of new technologies and international standards/practice of enforcement, especially with respect to digital piracy issues involving copyright.
- Enforcement remains slow, cumbersome, and rarely results in deterrent punishment. Effective enforcement will not become a reality if there is inadequate attention, investment, and training by the Public Security Bureaus (PSB), Prosecutors and Judges. The PSB needs to treat criminal enforcement of IPR offenses as a top priority.
- Despite adopting Copyright Law measures to implement the World Intellectual Property Organization (WIPO) Internet Treaties, current policies fail to adhere to these international standards in several important areas, including but not limited to, failing to include all exclusive rights granted to rights holders by the treaties. The ongoing process to amend the Copyright Law is a positive development, but it is important that the law include mechanisms to enable effective enforcement against websites and apps that are clearly devoted to infringement of the communication to the public right in China, regardless of where the content is actually stored.
- There should be increased criminal actions and sanctions against online infringers (including, but not limited to those who are determined to be repeat infringers) and additional measures for enforcement made available to rights holders. China should also adopt civil law measures similar to the approach of the Digital Millennium Copyright Act (DMCA) and common law secondary infringement principles, against Internet intermediaries and online platforms that knowingly host infringing content or purposefully induce their users to post, disseminate, or access infringing content.
- Right holders should have access to injunctive remedies to prevent third parties from facilitating and supporting piracy activities.

2. Counterfeiting and Trademarks

- Related to counterfeiting, despite recent developments, there still lacks an efficient mechanism in China to curb the widespread counterfeiting of the products of famous U.S. brands. In fact, the OECD estimates that 80% of global counterfeits originate in China (including Hong Kong).⁷ Many U.S. companies continue to suffer from

⁷ OECD/EUIPO (2019), Trends in Trade in Counterfeit and Pirated Goods, Illicit Trade, OECD Publishing, Paris, <https://doi.org/10.1787/g2g9f533-en>, p. 40; European Commission Staff Working Document (2018) *Report on the protection and enforcement of intellectual property rights in third countries*, https://trade.ec.europa.eu/doclib/docs/2018/march/tradoc_156634.pdf

tremendous sales and reputation loss caused by counterfeiting, which has even worsened in recent years due to the rise of internet-based commerce.

- U.S. corporations have been unexpectedly assessed fees for the storage of seized counterfeit goods in which there are no clear guidelines on the circumstances under which such fees will be assessed, no prior arrangement for such assessments, and no indication of when payment of such fees will be required. Uniform requirements in a clear, published form, are essential as the imposition of uncertain storage fees without prior notice or advance agreement undermines the ability of U.S. business to address the Chinese domestic market effectively.
- USCIB encourages the U.S. government to pursue greater IP enforcement actions and elevate the priority of the issue to fight the growing criminality and corruption related to counterfeiting and pirated goods.
- Effective trademark protection is crucial to maintaining high-quality goods and services, which help consumers make purchasing decisions and build and strengthen customer loyalty. Counterfeiting damages the reputation of companies; compromises the safety and quality of products (which affects Chinese as well as foreign consumers); results in the loss of tax revenue to the government; and harms China's reputation among foreign companies as a desirable place to do business.
- Another challenge faced by major U.S. brand holders continues to be the approval and status of certain trademarks in China; China only very rarely grants "well known" or "famous mark" status depriving foreign trademark owners of the ability to fully protect and enforce their trademarks against infringement and piracy in China.
- Areas of concern in China's judicial interpretations related to trademark protections and counterfeiting: lack of clarity regarding valuation of seized goods and liability of accomplices; failure to define adequately key concepts; removal of provisions allowing for criminal prosecution based on repeated administrative offenses; use of overly high numerical thresholds for criminal liability; and differing thresholds for liability of individuals and enterprises.

3. .cn Country Code Top-Level Domain Name (ccTLD)

- China continues to fail to provide adequate protection for .cn ccTLD disputes due to the limited time period (two years) offered to trademark owners to object to .cn infringements. USCIB supports the removal of this time period. The two-year limit is inconsistent with the provisions of GATT-TRIPS, Article 41(2), which prohibits "unreasonable time-limits" that would prevent the fair and equitable enforcement of intellectual property rights.

4. Fraudulent Domain Name and Internet Brand/Keyword Application Notices and Non-Solicited Marketing

- China fails to address Chinese domain name registrars and fraudsters, who, through email scams and marketing ploys, attempt to solicit trademark owners to purchase domain names and Internet brands/keywords at exorbitant registration rates by sending false notices regarding individuals who purportedly are seeking to register the trademark owner's trademarks as domain names and Internet brands/keywords.
- The registrars solicit the trademark owners to register such domain names and Internet brands/keywords. These solicitations attempt to create a false sense of urgency and a need for trademark owners to react because they often set a specific deadline for response.
- These scams are widely directed to many large and small U.S. companies and continue to cause considerable confusion and disruption to business operations. Chinese registrars are even posing as law firms, with a working fraudulent website, soliciting companies to register domain names or keywords.

5. Patent Concerns, Administrative Monopolies, and Essential Technologies

- As part of its 2018 government agencies' reorganization, China has moved its intellectual property agency (previously called SIPO) into a new agency called CNIPA (China National Intellectual Property Administration). CNIPA is organizationally placed under SAMR. Since AML enforcement is also under SAMR there is some concern about the ramifications of having the two reside under the same roof.
- Although China has put into place some components of an effective intellectual property legal and regulatory framework, implementation of those regulations is inadequate and critical gaps remain. Local public officials evince a stronger interest in protecting their local economy than in policing IPRs and have been known to act uncooperatively in patent infringement suits.
- Attempts to enforce patent rights through patent administrative departments are largely ineffective because the administrative agencies only have the power to stop infringements in their local territories and because they act slowly, cannot collect damages, and suffer from a lack of transparency. Enforcement actions through the court system are sometimes more effective in certain jurisdictions, but capacity and effectiveness of the courts varies by province and damages are not calculated in such a way as to compensate for all the actual expenses of a rights-holder in stopping infringing acts. In practice, preliminary injunctions are very difficult – if not impossible – to secure.
- Recently there have been efforts by the China Food and Drug Administration (National Medical Products Administration, NMPA) to establish a patent linkage system to provide for early resolution of patent disputes involving innovative medicines in China.

A September 2020 NMPA draft Measures for the Implementation of the Early Drug Patent Dispute Resolution System, an October 2020 Supreme People’s Court (SPC) draft Judicial Interpretation (JI) on Several Issues Concerning Application of Law in the Trial of Patent Civil Cases Involving Examination and Approval of Drug Marketing and recent amendments to the China Patent Law noted below all contribute toward this effort. However, ambiguities and omissions in the provisions leave significant uncertainties about how patent linkage will be realized in China. In the meantime, NMPA continues to grant marketing approvals, allowing local drug companies to make innovative medicines still subject to patent protection at the expense of U.S. and other foreign pharmaceutical manufacturers who have no proper recourse to obtain preliminary injunctions.

- USCIB members continue to have concerns regarding provisions on the application of the AML to administrative monopolies that could be interpreted to exempt certain SOEs from AML enforcement, which could create a huge loophole given the tremendous power and influence that SOEs have in many sectors of the Chinese economy.
- The Chinese government started introducing intellectual property courts in major cities several years ago. In August 2017 the Standing Committee of the National People’s Congress fully recognized the role of the IP courts by stating “[a]s an institutional arrangement and incentive mechanism, the intellectual property system provides a fundamental driving force for innovation and creativity.” Since then, the establishment of IP tribunals by intermediate people’s courts have been approved in several cities. According to the World Intellectual Property Organization (WIPO), the IP caseload of Chinese courts had grown rapidly in recent years.⁸ On October 26, 2018, the NPC Standing Committee authorized the establishment of a new division of the Supreme People’s Court, the IP Court of the Supreme Court of SPCIP. In December 2018, the SPC released its “Provisions on Certain Issues of the IP Court” and the Standing Committee of the NPC announced a name list of judges for the new IP court. This IP Court is similar to the Federal Circuit in the United States. These provisions and the court went into effect on January 1, 2019. While these additions to the court system should be positive additions, we still look forward to seeing the long-term results and decisions of the body.
- On June 1, 2021, an amendment to the China patent law entered into effect. The revised law addresses patent term adjustment and patent term restoration to restore patent life lost due to regulatory approval delays and to compensate for the extensive development and regulatory approval process. The law also provides for some form of early patent dispute resolution. Unfortunately, some of the provisions are unclear in definition and

⁸ In 2018 alone, Chinese courts received 301,278 new IP cases in the first instance, of which 287,795 were concluded. These figures represent an increase of 41 percent and 42 percent respectively compared to those for 2017.

range, and leave out the period of clinic trials as part of the scope of patent term extensions and do not provide for what defines a “new drug.”

- As parties to patent litigation in Chinese courts, U.S. stakeholders are often disadvantaged because SAMR shares confidential documents collected from them with the Chinese parties in the case (in contravention of Article 41 of the AML). In such cases, Chinese parties effectively enjoy a deep discovery process that is not available to the U.S. party in the case.
- In patent licensing negotiations, SAMR puts its thumb on the scale by working closely with Chinese technology users to pressure patent holders to provide better terms to Chinese licensees than those given to U.S. licensees. This raises costs for U.S. manufacturers vis-a-vis their Chinese counterparts.
- In Chinese patent litigation between Chinese and non-Chinese parties where invalidation proceedings are launched by both parties it appears that, statistically, Chinese parties are far more successful than non-Chinese parties (e.g., none of the Chinese party’s patents are invalidated but all, or almost all of the non-Chinese party’s patents are found invalid).
- In recent years, the U.S. trade pressure seems to have resulted in patent court cases against U.S. companies being put on hold pending the result of a trade deal, and it is our members’ understanding that this court system’s stand still originates in official instructions from China’s central government. Parallel cases against non-U.S. entities continue at the same pace as before.

6. Trade Secrets, Protection of Confidential Test Data, and Regulatory Data Protection

- While China has made significant progress on intellectual property rights, it still lags on enforcement. In particular, significant trade secret cases often languish in court for years, even when there are clear cut cases of Chinese violations of the IP rights of foreign companies. Similarly, Chinese courts have stalled recognition and enforcement proceedings for international arbitration awards obtained by foreign companies against Chinese companies. Delay or denial of prompt and credible enforcement of IP rights’ violations erodes U.S., international and, ultimately, Chinese interests in protecting IP and establishing precedents to prevent further trade secret misappropriation.
- Enforcement of trade secrets is very difficult because the evidentiary burden is very high, ability for discovery is minimal, damages are so low as to lack deterrent value, and local protectionism can be a serious obstacle. Foreign companies are often reluctant to transfer key trade secrets into China because of the serious threat of misappropriation by competitors and employees and the near impossibility of enforcement.
- As a practical matter, proving trade secret misappropriation is extremely difficult and can result in additional damage. Under criminal law, theft is determined not by the conduct

itself, but by the consequences of the loss. Providing the required proof to initiate a criminal investigation may not only be difficult but can require waiting until a more significant and possibly irreparable injury materializes, beyond the initial breach. From a civil perspective, it is unclear whether cyber-attacks, such as hacking, actually constitute misappropriation. Trade secret owners may also face additional hurdles, depending on the individual court, such as the requirement to prove their intellectual property was used in a business undertaking. Such proof is both challenging to obtain and prevents early action by trade secret owner who detect potential issues near the time of the breach.

- The legal infrastructure for the enforcement of trade secrets needs to be significantly strengthened, including by providing effective measures to prevent the leakage of evidence presented during civil enforcement and the availability of damages to trade secret owners when pursuing administrative enforcement.
- The value of trade secrets may also be weakened by Chinese regulations that sometimes require companies to submit technical and functional features of their products, in particular, requiring detailed information on manufacturing processes at the early development phase when such information has not been provided to any other government agencies, as well as confidential test data for recordation with local quality and technical supervision authorities. Failure to provide the information may prevent access to the Chinese market. The information furnished, however, is unprotected from further disclosure. In fact, in many circumstances, local agencies will provide the information to anyone who asks. This requirement and practice should end as it puts trade secrets at significant risk of leaking into the public domain.
- China committed as part of its accession to the WTO to provide a six-year period of regulatory data protection (RDP) against unfair commercial use for clinical test and other data submitted to secure approval of products containing a new chemical ingredient. After Draft Policy Circular 55, the National Medical Products Administration (NMPA), formerly known as the China Food and Drug Administration, issued draft measures on the implementation of drug clinical trial data protection in April 2018 and sought public comment. Although a welcome step, in practice there is no mechanism in China to prevent the unfair commercial use of safety and efficacy data generated by innovative pharmaceutical companies. In addition, key aspects of the RDP provisions are inconsistent with TRIPS Article 39.3, including certain key concepts which are undefined or not in line with international standards. It is now imperative that the proposed policy revisions are transparently and expeditiously implemented in a manner that provides for effective protection for U.S. biopharmaceutical companies and is consistent with international best practices and China's renewed commitment to provide regulatory data protection (RDP) as affirmed in the chapeau to Section C of Chapter One of the Phase One Trade Agreement.

Digital Measures: Cross-Border Data Flows, Data Localization, Cybersecurity

In recent years, a significant number of new Chinese laws, regulations, policies, and proposals have been announced that ostensibly relate to IT security and which have implications for companies across economic sectors that employ digital technologies in their operations and in serving their customers. These measures are having a significant negative effect on U.S. Information Communications Technology (ICT) companies' market opportunities in China, as well as on these companies' customers in China who currently rely on U.S. products and services for their IT systems.

One of the most significant measure that entered into force on June 1, 2017, is China's Cybersecurity Law, a broadly written instrument that imposes significant restrictions on the cross-border flow of data and impose a complex and burdensome cybersecurity review regime on companies integrating new technologies into their internal networks. The data localization provision is especially onerous. Given the broad definition of what constitutes operators of Critical Information Infrastructure, many companies across an array of economic sectors remain subject to the law's very restrictive data localization requirement if they employ cloud computing or big data technologies, for example. Other recent restrictive actions, including adoption of the Personal Information Protection law, are of concern to USCIB companies.

One of the more significant recent impediments to the development of innovative medicines in China has been China's administration of its Human Genetic Resources regulations requiring an additional approval or notification now applicable to all clinical trials conducted in China by foreign companies or their affiliates that collect any samples that contain Chinese human genetic resources, regardless of whether those samples are for genetic testing. As applied, the HGR regulations prohibit human sample collection by foreign parties and restrict the use, analysis, and transfer of such samples and related data except in the context of an approved collaboration with Chinese parties, such as medical institutions or enterprises with no foreign investment. The additional conditions for HGR research by foreign companies, limitations on data transfer and storage, and intellectual property sharing requirements raise serious questions about China's compliance with its international commitments undertaken pursuant to WTO agreements – in particular, TRIPS Articles 2 and 3, GATS Article XVI (as a localization requirement applicable to data processing services and medical services), and Article 2 of the Phase One Trade Agreement.

There is no reason to believe that these measures will serve their claimed purpose of improving IT security in China; on the contrary, because they could restrict the use of certain technologies and exclude or delay many more advanced or secure products from entering into the market, they have the potential to significantly weaken cybersecurity in China across all sectors. They also erect substantial market access barriers by imposing sweeping indigenous technology requirements, data flow restrictions, and other burdens on ICT products.

These measures raise serious questions on China's compliance with its international and bilateral trade commitments. Mandating the use of "secure and controllable" technologies, and then defining this term in ways that disadvantage or even exclude foreign products and suppliers, creates significant market access barriers.

Trade-restrictive technology mandates like the Cybersecurity law and other sector regulations that include measures that require data localization or restrict cross-border transfer are increasingly prevalent. Cross-border flow of data is necessary to companies across all sectors to operate and engage in e-commerce. China's increasingly restrictive and isolationist approach to Internet-based services is negatively impacting the ability of companies to offer online services and negatively impacting companies that rely on the international flow of data to operate. Recent National Trade Estimate reports, released by USTR, highlight the problematic impact of China's Internet restrictions on companies' ability to operate in China. The limitations on the cross-border flow of data also impairs the ability of companies to supply cross-border online services. USCIB members urge the U.S. government to continue to press for full suspension of all existing and proposed measures involving trade-restrictive technology standards and data-related requirements, such as the restrictions of cross-border flow of data, and the establishment of a transparent and consultative mechanism to develop privacy and cybersecurity-related measures that reflect global best practices and disadvantage or otherwise have discriminatory impacts against U.S. suppliers.

China should alter its approach to data and demonstrate its commitment to a rules-based trading order by showing ambition in the ongoing E-Commerce negotiations by the Joint Statement Initiative (JSI) at the WTO. In 2019 76 WTO members, including China, agreed to negotiate a high-standard agreement on trade-related aspects of electronic commerce. Several additional WTO members have joined since the negotiations began, bringing the number of participants to 86. Ambitious provisions on issues like data flows and localization are vital to a successful agreement.

Market Access

Market access restrictions continue to inhibit the ability of USCIB members to access and expand in China's market and build thriving businesses to satisfy consumer demand. In many sectors, as demonstrated in the second part of this submission, USCIB members call on China to open its market to any firm able to meet objective, non-discriminatory criteria. Market access should not be hindered through licensing systems subject to arbitrary government decisions. Previous efforts and initiatives to reduce or make more challenging existing market access for foreign companies are particularly alarming. It is important that market access be promoted for both physical and digital goods and services.

For example, China's filtering and blocking of online services act as a barrier to a trade and investment for foreign firms. The 2021 National Trade Estimate Report, USTR's annual publication highlighting significant foreign barriers to U.S. exports, concluded that "China continues to engage in extensive blocking of legitimate websites and apps, imposing significant costs on both suppliers and users of web-based services and products. According to the latest data, China currently blocks a significant portion of the largest global sites. U.S. industry research has calculated that more than 10,000 foreign sites are blocked, affecting billions of dollars in business, including communications, networking, app stores, news, and other sites."⁹

⁹ 2021 National Trade Estimate Report on Foreign Trade Barriers, USTR, (<https://ustr.gov/sites/default/files/files/reports/2021/2021NTE.pdf>)

The expansion of the Information Technology Agreement (ITA) was a historic and groundbreaking deal, under which participating WTO members, including China, agreed to a list of an additional 201 products to be afforded duty-free treatment under the umbrella of the Information Technology Agreement. ICT is critical in today's digital world, and U.S. technology companies are in a race for global leadership in the digital economy. Further elimination of tariffs in the ICT sector, including another expansion of the ITA, would facilitate the movement of technologies critical for innovation, reduces costs associated with these key technologies making them more accessible by consumers globally and, in some cases, lowering production costs enabling the growth of global value chains.

The market access provided by the WTO ITA is important to USCIB members. We commend China on being party to this landmark agreement. We continue to recommend that China:

- Speed-up early implementation of respective tariff elimination phase in - in other words, we recommend shortening the staging periods for China's expanded tariff reduction commitments, ensuring the swiftest implementation possible;
- Promote the "autonomous immediate elimination of customs duties..." to other ITA participants;
- Encourage other WTO members to become a participant to the ITA;
- Continue work, in cooperation with other governments, on IT non-tariff barriers to trade; and
- Open timely discussion on the list of covered products under review, so as to determine if additional product expansion is warranted due to technological developments.

As another example, China's retaliatory tariffs in response to the U.S. Section 301 investigation into China's forced technology transfer, intellectual property, and innovation policies are inconsistent with its WTO commitments and impede market access for U.S. chemical manufacturers. China does not have WTO authorization for these tariffs. It is pursuing a WTO dispute settlement case regarding the United States' use of Section 301 of the Trade Act of 1974 to levy unilateral tariffs on imports from China. In September 2020, a WTO dispute settlement panel found the U.S. Section 301 tariffs under Lists 3 and 4 to be inconsistent with U.S. WTO commitments. In October 2020, the United States appealed the report of this panel to the Dispute Settlement Body. As the WTO Appellate Body is currently not operational, this appeal may never be heard.

China's retaliatory tariffs in response to U.S. Lists 1, 2, 3, and 4a impact over \$11 billion in U.S. exports of chemicals and plastics. The China tariffs cover 91 percent of U.S. chemicals exports to China and 100 percent of U.S. plastic products exports to China covered.

According to the WTO Tariff Profiles 2021, China's average most-favored nation (MFN) applied tariff rate for chemicals within Chapters 28-39 of the Harmonized System is 6.2 percent. Its average WTO bound rate for chemicals is 6.7 percent. Relative to other large emerging markets, China's average MFN applied and bound rates are low. For example, India's average MFN applied rate is 8.1 percent and its WTO bound rate is 39.6 percent. However, China's average MFN applied

and WTO bound tariff rates for chemicals are higher than the average MFN applied rates for chemicals for the U.S. (2.8 percent), the EU (4.5 percent), and Japan (2.1 percent). China's relatively low rates are the result of China joining the WTO Chemical Tariff Harmonization Agreement as a part of its WTO Accession Protocol. The stability of China's tariff rates for chemicals and plastics had in the past provided U.S. chemical manufacturers certainty when exporting product to China.

China's retaliatory tariffs on U.S. exports of chemicals and plastics, however, obviated the certainty of China's MFN tariff rates, thereby threatening investments in chemical manufacturing in the United States. U.S. chemical manufacturers now face additional tariffs of 5, 10, 20, and 25 percent depending on the product, on top of existing MFN tariff rates. Ideally, U.S. and China would resolve their trade dispute and eliminate these additional tariffs, reverting to the previous status quo of MFN trade.

The U.S. and China should lead a global effort to eliminate chemical tariffs in major chemical producing WTO Members. Zero tariffs for chemicals and plastics trade globally would produce the most significant amount of certainty and predictability for U.S. chemical manufacturers, ultimately benefiting downstream users of chemicals in the United States in key sectors, such as agriculture, automotive, and building and construction. Zero tariffs globally would also leverage the historic competitive advantage the United States currently enjoys in chemical manufacturing, open new markets, and lead to more U.S. exports of chemicals and plastics to the rest of the world.

National Treatment and Non-Discrimination

In accepting the obligations inherent in WTO membership, China agreed to be bound by the principle of national treatment, that is, to treat imported goods no less favorably than goods produced in country. As the WTO Appellate Body has held, national treatment prohibits WTO Members from adopting measures that ““modif[y] the conditions of competition in the . . . market, so that imported products are granted less favorable treatment than like domestic products.””¹⁰ As part of this agreement, China agreed to repeal all rules and regulations that were inconsistent with this obligation and would not adopt requirements that treat imported goods less favorably.

- In fact, however, Chinese authorities continue to use a wide variety of laws, regulations, and other policy tools – including AML enforcement (described above), technology standards policies, IPR enforcement practices, and licensing and investment reviews – to compel U.S. companies to license or otherwise transfer valuable U.S. technologies and know-how to Chinese entities at below-market rates, and to exclude U.S. companies from full and equal participation in the Chinese market. The effect of these measures – both separately and in combination – is to modify the conditions of competition in the Chinese market to the systematic detriment of U.S. suppliers.
- USCIB members call on China to abide by these commitments of national treatment and non-discrimination in order to treat U.S. goods fairly. Moreover, where China has allowed

¹⁰ WT/DS438/AB/R (15 Jan 2015), ¶ 5.205 (quoting panel decision).

foreign business participation in a market currently, China should not reform legislation in a manner that prohibits future participation in that market by foreign-owned enterprises.

Regulatory Environment

China's membership in the WTO has made a measurable impact on its ability to improve accountability at all levels of government, increase the transparency and predictability of rules, rigorously enforce laws and contracts, fully respect property rights, develop and implement more cost-effective regulatory frameworks, and strongly commit to fighting bribe solicitation and corruption. It has increased China's ability to make its proposed regulations more transparent, notify its measures for review by stakeholders, and take the view of stakeholders into account.

In particular, U.S. industry has a significant interest in China's full implementation of the WTO Agreement on Technical Barriers to Trade (TBT Agreement). U.S. industries operate in highly regulated markets all over the world. They benefit from the TBT Agreement obligations, particularly Article 2.9 to allow interested parties opportunities to provide public comment on proposed regulations not based on international standards. We urge the U.S. government to continue working with regulatory agencies and the center of government in China to ensure that all WTO obligations are implemented in full and that China adopts good regulatory practices embodied by the APEC-OECD Integrated Checklist on Regulatory Reform,¹¹ as well as the following:

1. Fair and Independent Regulators

USCIB again commends Chinese government efforts to strengthen frameworks for transparency and uniformity in enforcement practices, as well as Ministry or Agency-specific efforts to increase transparency of enforcement activities. Nonetheless, USCIB members have noted that numerous obstacles remain to achieving uniform practices in the enforcement area in China. We call for resolution and further focus in this area, and expect fair, transparent and independent regulators in China. USCIB members remain concerned regarding an apparent lack of coordination between the central and local authorities. In some cases, inconsistencies in regulations and enforcement exist on a regional basis. Improved coordination among regulators would benefit USCIB and domestic companies, creating a more transparent and predictable framework.

2. Transparency and Notice

- There are both positive and negative signs for transparency in the development of rules and regulations in China. A positive area to note are developments to require that government entities are more transparent in their decision-making process, but in Agricultural Biotechnology, there has been a decrease in transparency with the development of new requirements without consultation, advance notice or documentation, going against China's WTO agreement to allow for a reasonable time period for public comment on new regulations.

¹¹ <https://www.oecd.org/regreform/34989455.pdf>

- China agreed in its accession to the WTO to allow for a reasonable period of time for public comment in most sectors where it adopts new or amends existing laws and regulations relating to foreign trade. It also committed to regularly publish such measures in one or more of the WTO official languages. This commitment strongly reflects that transparency is a crucial element in creating a stable and predictable environment for foreign investment. Working towards this, submitted Chinese WTO notifications are in English.
- While USCIB appreciates the improvement in opportunities to comment on proposed rules, the timeframe is often too short to allow for translation, sometimes offered only by invitation and comments may only be provided at the early stages of the rulemaking process. One improvement to the process would be for agencies to respond to substantive comments made by interested parties.
- USCIB members strongly believe, in order to improve transparency and reduce uncertainty, Chinese government agencies should develop better pre-ruling processes to provide clarifications and adopt feedback on proposed rules and regulations.
- USCIB members ask that China move away from approaches whereby it issues measures and interpretations of those measures on the same date that they enter into effect. We encourage the U.S. government to press for more meaningful and predictable rulemaking notice and comment opportunities. Same-date effectiveness of such measures or related documents reinforces the perception on the part of USCIB members of the regulated community in China that the Chinese government is insensitive to potential compliance preparation and improvement timing needs of the community associated with announced measures and related documents.

3. Consistency of Regulatory Approvals

- USCIB members observe that there is a strong need for consistency among Chinese agencies with respect to the approaches for regulatory approvals of materials used in products.
- Ambiguity in legal measures issued at the national level concerning regulatory approvals can result in problematic misinterpretation at the local level that creates delays in production and loss of sales for companies that must obtain approvals for materials for use in certain products.
- China should be encouraged to adopt policy that is consistent with the approaches of other countries which have established regulations on biotechnology, and which have a record of approvals of biotechnology products such as the United States, Canada, Brazil, Argentina and Japan regarding the regulation and approval of biotech products. Consistency with countries with FFP import regulations is also warranted.

Standards

USCIB recognizes the value of standards in developing technical requirements but continues to be concerned with issues such as the continued rapid proliferation of standards, ambiguities over the applicability of standards, and the varying degree of openness of the standard development process to foreign stakeholders.

We provide examples of these concerns below and call for a dialogue on this issue to help U.S. stakeholders address these concerns, which cover multiple sectors and multiple agencies and affiliated organizations in China. We also continue to recommend Chinese agencies to adopt international standards, such as those of the Institute of Electrical and Electronics Engineers (IEEE), International Electrotechnical Commission (IEC), or International Telecommunication Union (ITU), and to participate in international forums designed to harmonize global regulatory requirements and practices, such as The International Council for Harmonization of Technical Requirements for Pharmaceuticals for Human Use (ICH).

1. Proliferation of Standards at a Rapid Rate

- Standards are generally the most numerous measures, often with legal effect, in markets that involve highly technical products, and are issued with increasing frequency, which often can significantly affect a company's China operations and the China market access of a company's products. It is increasingly important to monitor the development of such measures, covering individual agencies as well as China's primary standard publisher, the Standardization Administration of China (SAC), and WTO notification bodies.
- Tracking standard development is easier in some respects, such as via the SAC web site. However, this only helps monitor certain types of national standards. The lack of transparency into the development and establishment of standards in China, which warrants discussion, necessitates outreach to the Chinese government for solutions.
- The proliferation of standards calls for a mechanism, such as a Chinese government database, to provide comprehensive and timely access to standards of all kinds. Further, high-level dialogue on how existing standards are being implemented can help assess options for developing China's science and technology regulatory foundation in a manner that provides USCIB members with meaningful notice, access to, and understanding of the standards that affect the member operations and their products.

2. Access to Standards

- USCIB commends the improvements to transparency and access to standards in China. Many more standards than in the past are now published for public comment. However, concerns remain. For instance, standard developing agencies in China could make improvements in the regular updating and posting of draft standards for public comment.
- The laws encourage the adoption of international standards where appropriate and possible. This reference is laudable. However, it remains the case that insufficient details

are provided on how international standards should be incorporated into the Chinese standardization regime.

- Also problematic is that some Chinese standard development authorities treat standards as “proprietary” documents, rather than as public laws. Full texts of such standards, or at least texts of recent, national (GB) standards, are not generally accessible in full text on government or other public web sites in China. Such standards, as part of Chinese law, should be as accessible to the public through the appropriate agency to facilitate compliance.

3. Participation by Foreign Stakeholders

- Regulations issued by the Standardization Administration of China provide that foreign-invested enterprises registered in China are qualified to join Chinese standardization bodies and participate in the drafting of standards. However, the decision whether to allow participation by foreign-invested companies is in practice left to individual technical committees (TCs) and technical subcommittees (SCs), some of which do not permit foreign-invested enterprises to participate in the drafting of standards or technical regulations at all, or require overly specific expertise for participation that may create hurdles for some foreign stakeholders with legitimate interests and useful inputs to join the TCs and SCs.
- Others only permit foreign-invested enterprises to be observers or participants without voting rights, and even in cases where foreign-invested enterprises are permitted to join a TC, they often are not notified when new working groups (WG) under a given TC are created to develop a new standard. Through more equal participation by foreign-invested companies, Chinese standards may have a better chance of acceptance in the global marketplace.

4. Mandatory Versus Voluntary Standards

- It is presently still not possible for USCIB members to rely on the alphanumeric designation of a standard as evidence that the standard is mandatory or voluntary in nature. The best approach currently available is to review the content of a standard to determine whether the language therein requires a behavior, or merely suggests such behavior. Where the language is ambiguous, recourse to the drafters of the standard and the agency with interpretive authority for the standard can of course provide insights.
- However, this leaves significant room for variation in the interpretation of whether a standard is voluntary or mandatory. Even though this standard has an alphanumeric designation typically associated with a voluntary standard, Chinese government authorities have nonetheless carried out enforcement actions against products that are not labeled according to this standard. Consistent application of voluntary and mandatory standards that are predictable, transparent, and consistent with the alphanumeric designation of the standard should be supported.

State-Owned Enterprises (SOEs)

One clear reality of international business these days is that U.S. businesses continue to increasingly face competition from Chinese SOEs not only in China but also in important third markets and here in the United States, and in several industries are being negatively impacted by overcapacity resulting from the operation of these entities. Whether state-owned or controlled (at the national or sub-national level) or “state-championed” firms nominally privately-owned, these entities often benefit from preferential treatment by Chinese authorities at the national and sub-national level. It is critical that the U.S. government use all available tools, including the G20 and the WTO, to press aggressively for level playing fields for U.S. companies whenever and wherever they compete with these Chinese entities. U.S. government bilateral and multilateral efforts should be carefully coordinated with other U.S. government efforts regarding SOEs, including any future trade agreement negotiations, in the OECD and in other fora.

We strongly urge the U.S. government to:

- Aggressively press China to come into full compliance with its existing WTO obligations to notify to the WTO all of its subsidies and industrial policies at the national and provincial level which impact trade and investment. State-owned and state-championed firms are certainly not the only beneficiaries of Chinese government preferential treatment but full Chinese notification to the WTO is a clear obligation of their accession. Transparency in the SOE area can be step one.
- Raise U.S. concerns regarding overcapacity and treatment accorded to Chinese SOEs and state-championed enterprises in a high-level dialogue between the United States and China. Seek clear explanations from the Chinese authorities on their policies on the treatment of its SOEs and state-championed enterprises when they compete with private sector companies, including U.S. companies. Obtain concrete, enforceable Chinese government commitments to the principle of a level playing field when these and similar entities are competing in the commercial space with private enterprises.
- Seek binding commitments from the Chinese government on real transparency of Chinese SOEs and state-championed enterprises – including all measures of support from national and provincial government entities, their treatment on tax, regulatory, procurement policies, and other key criteria to assist in international assessment of Chinese practices. This transparency, especially for the largest and most competitive SOEs and state-championed enterprises, should begin immediately.
- Issues including transparency, level playing field/national treatment, and limitations on subsidies and other preferential treatment continue to be very important to business. The United States should seek the strongest possible SOE and state-championed enterprise provisions to address these priorities with China in an agreement, whether in the form of a bilateral investment treaty (BIT) or a larger negotiation like a Phase Two trade agreement.
- Secure commitment from Chinese authorities that appropriate representatives from the Chinese government and Chinese SOEs will participate actively and constructively in

international organizations (e.g., the OECD, WTO) as well as in seminars and research projects organized by U.S. government agencies conducting serious analytical work and policy debates on the global issues related to SOEs and state-championed enterprises.

- U.S. officials should ratchet up their efforts to coordinate closely with other leading market economy governments (e.g., Europe, Canada, Japan, Australia, Korea) to build greater international support for coordinated international efforts on the issue of Chinese SOEs and state-championed enterprises. International support from our key allies in relevant multilateral (e.g., WTO, OECD, IMF) and regional (e.g., APEC) fora as well from key partners in their own high-level dialogues with China is vital to successfully tackle these important SOE issues.

Taxation

Tax laws should be administered in a manner that promotes consistency, certainty, and transparency. China has made significant strides in the taxation area in the recent past but continuing efforts are needed. Further progress and improvements can be made by (i) developing a centralized tax ruling process, (ii) promoting best practices and standards of the State Taxation Administration (STA) (and local tax authorities in developed areas) into the developing regions to leverage significant strengths already in practice, (iii) providing for more open, transparent, and timely consultation in the rulemaking process, (iv) adhering to international tax standards as agreed by the G20, including China, in the OECD's Base Erosion and Profit Shifting initiative (BEPS) and the taxation of the digitalized economy, and (v) establishing a more formalized and tax knowledgeable judicial function to address expected increases in tax dispute.

A centralized tax ruling process, where formal tax guidance would be made publicly available, would be an important step for China to accelerate its progress in tax administration and compliance. Tax rulings would provide certainty on specific tax issues and prevent local administrators from taking a different view of a given transaction. We understand there is a proposal to establish an advance ruling process in the new Tax Administration and Collection Law (TACL); we encourage the development and adoption of published ruling procedures that set common standards in the application of tax rules for taxpayers and tax officials alike.

China already has well-trained, independent tax regulators based in the major cities (primarily Beijing and Shanghai) and staffed at the STA. However, *decentralized* regulation enforcement practices create the risk for inconsistent, unfair, and unlawful practices among tax regulators. In addition to a ruling process, we further encourage the tax authorities to identify the more advanced practices in those more sophisticated localities and to promote those practices and standards to the less developing regions. China has a promising institutional base to build on, but standards can be inconsistent between locations. Certain local tax bureaus seem to concern themselves as much with maintaining or increasing the revenue they receive through tax enforcement, regardless of changes in business models or conditions, and sometimes at the expense of rule-based enforcement. If this is a feature of the system itself, it should be cured.

The rule-making process should be open for affected taxpayers to make comments and the comments period should be adequate and not rushed. Submitted written comments should be made available to the public following the consultation period, if not at the time submitted. In the past, there have been examples of regulations involving changes adverse to USCIB members in the tax area that have been applied on a retroactive basis, which represented additional problems with respect to taxpayer notice and fair application of the law.

We believe China's participation in various international and multilateral tax initiatives, such as the BEPS and related Inclusive Framework projects of the G20/OECD, has facilitated the adoption of international standards domestically. We encourage the further growth of this trend with the caution that China should adopt any changes related to BEPS and the open (as of the date of this paper) Inclusive Framework decisions on a multilateral basis with other countries and not do so unilaterally. China should adhere to the parameters of the BEPS consensus and should not unilaterally go beyond the G20 and Inclusive Framework consensus.

We recommend that China build a tax court system into its tax legislation framework, to provide protection to both revenue authorities and taxpayers and to resolve controversies. China currently has both administrative and judicial processes to resolve tax disputes, but the judicial process is less well known and not focused solely on tax disputes. China should consider establishing a specialized tax judicial body (e.g., a Tax Court) more readily available to taxpayers and with specialized expertise to increase the efficiency of dispute resolution, in anticipation of the increase in international tax disputes from the implementation of the BEPS report recommendations and the anticipated Inclusive Framework agreements on the taxation of the digitalized economy and a global minimum tax standard.

Labor Laws

China should adopt and consistently enforce labor laws that adhere to ILO Fundamental Principles and Rights at Work. While USCIB members implement the highest standards of labor and employment practices, it is clear that inconsistent enforcement by Chinese authorities of existing laws domestically, and apparent active obfuscation of decent work deficits, encourages a culture of lax labor compliance in many parts of the country. Both the U.S. Department of State in its 2020 U.S. Department of State Country Reports on Human Rights in China and the USTR 2019 Report to Congress on China's WTO Compliance highlight the negative consequences of this culture, particularly regarding forced labor, child labor, wage and hour policies, occupational safety and health, non-discrimination in the workplace, and the ability of Chinese workers to form independent unions. The U.S. Department of State has also called on China to respect the human rights and fundamental freedoms of all individuals, including members of its ethnic minority populations. USCIB members urge the U.S. government to continue to deepen dialogue with the U.S. business community to understand the impacts of this issue on U.S. companies, as well as utilize its diplomatic efforts to engage not only in China but also U.S. allies on these issues of shared concern.

II. SECTORAL ISSUES

Agricultural Biotechnology

China is one of the largest markets for U.S. grain exports. However, China's regulatory process for approving agricultural biotechnology products intended for import for food, feed and further processing remains a consistent and recurring barrier to international trade and adoption of climate-friendly technologies outside of China afforded by these innovations. China's regulatory approval process maintains multiple pinch points that regularly requires six to eight years to complete. Specifically, China restricts technology developers from applying for regulatory approval before a product is approved in an exporting country. This means a product approved and legal to plant in the United States cannot be effectively marketed to U.S. farmers because the Chinese approval process is just beginning. This restricts farmers in the United States and around the world from having access to the latest technologies and significantly depresses investment in the sector. In addition, China's system requires a series of in-country tests, including field trials, for products that will not be planted in China – only imported for processing. The system is not fit for purpose and exposes biotechnology companies to a series of tests that are neither necessary nor scientifically justified. The in-country testing also requires companies to blindly transfer sensitive and proprietary materials to Chinese labs to conduct the multi-year tests. These issues are addressed within the U.S.-China Phase One agreement, and if China implements the agreement in good faith, particularly with respect to: 1) achieving approval in 24 months, on average; and, 2) limiting testing and questions to those that are scientifically relevant to the product's intended use, many of the challenges related to the import approval process would be alleviated. To date, however, there is little measurable progress on full implementation of the Phase One Agreement.

1. International Grain Trade and the Regulatory Import Approval Process

- In 2020, the United States exported over \$26 billion worth of agricultural products to China, approximately 65% of which were biotechnology-derived products.¹² However, China maintains a regulatory system that is both opaque and delayed. It is clear that economic and political factors have driven this trend, which calls into question whether China is meeting its obligations under the WTO. China's use of its regulatory process to control imports has led to high-profile trade disruption, and delays U.S. farmer access to new innovations. The U.S. agricultural value chain needs predictable implementation and enforcement of Chinese regulatory decisions to maintain, supply, and grow the China market. Our trade relationship is too important not to resolve this issue effectively and urgently.
- While China's actions can directly and unnecessarily restrict access of U.S. oilseeds and grain to its market, this is only part of the story. China's regulatory delays have widespread impacts that will ripple throughout the U.S. agricultural value chain. For example, delayed approvals in China restrict U.S. farmer access to the latest technologies intended to help increase their efficiencies and yield as market access for exports is unclear. Delays also depress investment in U.S. innovation and overall competitiveness,

¹² <https://apps.fas.usda.gov/GATS/default.aspx>

and finally, every year of delay that results in a product not going to market, translates to the loss of patent life and intellectual property protection for U.S. companies.

- A 2018 analysis found that between 2011 and 2016, delays in China have impacted the U.S. economy by foregoing the creation of 34,000 jobs, \$7 billion in GDP, \$4.6 billion in wage growth, and \$14.8 billion in business sales. If the status quo persists, the United States will forego 19,000 new jobs, \$7.4 billion in GDP, \$4.4 billion in wage growth, and \$14.5 billion in business sales.¹³
- Despite numerous high-level commitments, the regulatory process only became less transparent and predictable, necessitating an overhaul in the system as it applies to imports of products intended only for food, feed, and processing. Implementation of the U.S.-China Phase One Agreement creates the opportunity for such structural change. In particular, China needs to ensure its regulatory approval system for biotech products is “fit for purpose” with the appropriate risk assessment for products intended for import as food and feed, and to revise its in-country study requirements accordingly. Despite commitments in the Phase One Trade Agreement to modify their approval system to assess the safety of a product for its intended use, China continues to implement a singular set of requirements covering both cultivation and feed or further processing, causing delays due to redundant and irrelevant testing requirements.
- In its implementation of the Phase One Agreement, the Chinese government should establish a scientifically rational regulatory process for products only intended for import and not local cultivation. Under such a process, China should: (1) commence risk assessments as soon as submissions are made without preconditions such as a requirement that a product be first approved in an export market; (2) embrace the principle of data portability and not require that risk assessment data be generated in-country; (3) only require in-country environmental trials if the safety assessment identifies environmental risks specific to China; and (4) adhere to its commitment within the Phase-One Agreement to complete approvals within 24 months, on average.
- China should establish a low-level presence (LLP) policy on biotechnology-derived products according to the Codex Alimentarius Commission guidelines to eliminate the risk of import disruptions resulting from asynchronous approvals of biotech products. LLP refers to the potential low-level presence in imports of GM material already authorized and being produced in other countries, but not yet approved in the importing country such as China. Asynchronous approvals will only become more prevalent as more new GM plants are developed, commercialized, and enter into the stream of commerce around the world.

¹³ *The Impact of Delays in Chinese Approvals of Biotech Crops*, Agribusiness Consulting (May 2018): <https://croplife.org/wp-content/uploads/2018/05/Impact-of-Delays-in-Chinese-Approvals-of-Biotech-Crops-05-18-FINAL-1.pdf>

2. Transgenic Seed Business and IPR Protections

- While China has made strides toward strengthening its IP protections, biotechnology companies continue to experience problems with counterfeiting and effective enforcement of intellectual property in certain provinces.
- Intellectual property is fundamental to innovation in the seed industry. Patent and Plant Variety Protection (PVP) requirements and expertise in China are key areas for companies that are trying to enter the market in China. China should further enhance the effective IP protection of plant-related inventions through patents and PVP. Many varieties are not protected under either patent or under PVP.

3. Transgenic Seed Business and the Regulatory Approval Process

- We commend China's moves toward opening up its economy and reforming its foreign direct investment (FDI) rules but urge that the reforms be broad-based and that the definitional scope for FDI be broadened to include all sectors, including agriculture. China's FDI catalogue and prohibition of FDI in the transgenic seed business denies millions of Chinese farmers' access to numerous agricultural biotech products.
- Current FDI regulations should be modified to repeal and lift the prohibition on plant biotechnology so that new technologies can be made available to Chinese farmers more rapidly. Currently in China, each plant variety containing a biotech trait must undergo a separate production approval, resulting in significant redundancy, cost and timing delays. We urge China to adopt a more trait-based approval system to align with global practices and reduce the delays incurred under the current trait-by-variety approach.
- Additionally, China's assessments for seed quarantine are not entirely risk-based, which leads to the hindrance of seed movement both inter-provincial and import/export. The seed restrictions and assessments should be reevaluated based upon up-to-date, science-based criteria to allow for greater movement of seed across borders for breeding and production.

Audiovisual

Intellectual property rights violations and the limitations on market access for providing legitimate product into the market constitute the greatest impediments to the full realization of the Chinese media and entertainment market. Without a proper, functioning market where intellectual property rights are fully respected and international competition is welcomed, the local market will not reach its full potential. The factors cited above contribute to high levels of piracy of foreign audiovisual products in China. It is notable that two of the fastest growing segments of China's media market – online video and theatrical – are also the two segments that have opened the most to foreign competition (although still with significant barriers).

1. Intellectual Property Rights Violations

- Media box piracy continues to be a growing problem and threat to the continued growth and sustainability of a vibrant legitimate TV marketplace that informs and entertains consumers. Two types of devices currently pose grave challenges to copyright owners and licensed providers. The latest device is the Internet-enabled set top boxes or so-called piracy streaming devices sold by resellers in physical marketplaces and online through e-commerce platforms that are typically pre-loaded with apps to unlicensed and illegally pirated content, or are marketed as being capable of accessing pirate content/apps. These devices also enable consumers to access unlicensed online streaming websites and load apps to pirate content. Another device is the illegal free-to-air decoders that facilitate unauthorized access to pay-television service. The illegal decoders essentially gain access to stolen keys that unlock signals via real-time Internet or satellite transmissions, mimicking the services of a legitimate set-top box.
- China remains a hub for manufacturing and distributing these devices and technologies that interfere with the ability of copyright owners to manage a variety of business models that offer consumers innovative and lawful access to products and services. Criminalization as well as targeted, deterrent actions against manufacturers, distributors and facilitators of media box piracy is critical to minimizing the negative impact on the legitimate media sector, including the Chinese media sector, around the world and the global economy.
- Enforcement with respect to all forms of intellectual property theft in China remains inefficient and often ineffectual, with low penalties for violators. However, periodic special campaigns of intellectual property rights enforcement, and high-level public commitments to IPRs have made positive contributions to the enforcement environment. We look forward to ways to cooperate to address areas of mutual concern.
- Despite steps to improve enforcement, piracy persists at very high levels. Piracy promotes a lack of respect for the law and has a negative impact on both U.S. and Chinese creative industries.
- Online infringers have used the Internet to distribute a wide range of illegal products that violate copyright protections, particularly those for films and television shows. Without a comprehensive approach to this problem, China's market will be artificially constrained. The high levels of growth in the market do not undercut this point; studies have shown that online piracy has a significant impact on box office receipts and an even bigger impact on revenue from other "windows." The State Council Legislative Affairs Office should complete its review of the current Copyright Law and prioritize enactment of reforms.
- Necessary elements of this comprehensive approach include implementing principles of liability for secondary infringement (e.g., inducement liability), coupled with a framework which includes conditional safe harbors addressing responsibilities and

limitations of monetary liability for Internet Service Providers (ISPs) for copyright offenses and measures for notice-and-takedown of websites offering pirated material. Additionally, the law should expressly prohibit “camcording” – the use of an audiovisual recording device in a cinema to copy or transmit part or whole of an audiovisual work. There is no legitimate reason to camcord a film.

2. Market Access Restrictions

- Market access restrictions inhibit the ability of content providers to participate fully in the legitimate market, satisfying consumer demand and helping grow the market. Although these restrictions affect each sector differently, the situation is most acute in the sound recording, film, TV, and online media markets.
- Present rules in the music sector prevent the establishment of wholly owned subsidiaries, or even equity joint ventures, for the production, advertising, promotion, and distribution of sound recordings. As a consequence, the infrastructure for the production and distribution of legitimate recordings is severely underdeveloped, greatly exacerbating the piracy situation.
- China’s market access restrictions in the film sector are covered by an MOU between the United States and China. This MOU had a built-in review; both countries should prioritize completion of that MOU review and attendant update to the terms of MOU as envisioned by both countries in the original agreement. Bringing revenue share in line with international norms is a high priority.
- China maintains significant restrictions in its online video sector. Arguably, some of these restrictions violate China’s GATS obligations, which include cross-border delivery of video content. China should allow foreign entities to wholly own curated online video services. It should also rollback content restrictions that discriminate against foreign content. In particular, the 30% quota on foreign content for online video producers should be eliminated or increased. China should also reform the two-window content approval scheme that significantly slows time to market of the most valuable U.S. TV content. These policies result in increased piracy for foreign TV content, creating limited and delayed availability of the content through legitimate means.
- China currently prohibits foreign investors from 100% ownership of film and TV production and distribution entities in China (i.e., for production for the local market). Coupled with other discriminatory limits on TV and online video content, this policy effectively forecloses U.S. companies from participation in a large and growing segment of China’s domestic audio-visual sector, or forces them into *ad hoc* joint ventures to do so. These restrictions are discriminatory and unnecessary. While China has the right to set content standards for its own market – as do all countries – a foreign investment prohibition has no bearing on enforcement of those standards.

- Censorship clearance procedures for films, optical media and on-line distribution should be streamlined and discriminatory treatment toward foreign product abolished. The current system severely restricts the ability to distribute timely and legitimate film, CD, VCD, DVD and online products in China, and provides yet another unfair and unintentional advantage to pirate producers. This process should be transparent and work to establish a transparent and consistent film ratings system. Specifically, eliminate the two-window and entire series requirements for approval of OTT content and replace it with a rolling approval process, subject to the same levels of transparency and timeliness as domestic content.
- China maintains significant market access restrictions on its TV sector, both broadcast and pay TV. Limits on broadcasting foreign television programming during primetime should be eased. Severe limits on distribution of foreign pay TV channels should be curtailed and foreign TV content should be broadened beyond hotels and foreign compounds. Many markets enforce content restrictions without such significant limitations on foreign content including the limit on foreign-produced animation during primetime.
- With respect to sound recordings, the current investment regime greatly restricts the ability of foreign record companies to enter the Chinese market, and USCIB requests that the Chinese government reforms its investment and censorship provisions in the music market to facilitate the growth of a healthy record industry in China. Additionally, China should ensure compliance with the Foreign Investment Law such that any unpublished regulations that impact the foreign media are deemed to lack a legal basis and are not implemented.

Electronic Payment Access

When China joined the WTO in 2001, it committed to allow non-Chinese electronic payment services (EPS) companies to compete and do business in its domestic market on equal terms with Chinese companies, including by processing renminbi-denominated transactions in China. While U.S. EPS suppliers have continued to process “cross-border” transactions in China for decades, which primarily involve purchases by individuals traveling to and from China and take place in a currency other than renminbi (RMB), as of September 2021 only one U.S. EPS supplier is authorized to process RMB-denominated transactions in China.

Under the Phase One agreement, China committed, among other obligations, that it would accept, and make a determination on, any application for a Bank Card Clearing Institution (BCCI) license from a U.S. EPS supplier, within prescribed time limits and without regard for the applicant’s ownership structure. Following the signing of the agreement in January 2020, one U.S. EPS supplier has completed its licensing process while others have applications still under consideration. USCIB welcomes steps taken by China towards fulfillment of its commitments under the Phase One Agreement and the WTO Agreement and encourages USTR to hold China accountable to these commitments until all U.S. EPS suppliers that have applied for a BCCI license are able to process RMB denominated transactions, as contemplated under those agreements.

Express Delivery Services (EDS)

The Chinese government has publicly recognized the importance of Express Delivery Services (EDS) to the Chinese economy by supporting modern supply chains through reliable and highly efficient links between distant producers, suppliers and consumers – both internationally and domestically. A robust, competitive, streamlined EDS industry will help China achieve its goals of promoting domestic consumption and reducing its economic dependence on exports.

Furthermore, customs reform, modernization and simplification promote the fast, streamlined movement of goods across borders necessary in today’s global trade environment. Chinese government policies, however, appear to be designed to split the delivery industry into multiple parts of its value chain – logistics, freight forwarding, express, trucking, and aviation – undermining the benefits realized by the sum of those integrated parts. Moreover, EDS providers face increased, inconsistent regulation that is overly burdensome and fails to strike a necessary risk-based, strategic balance relative to the need for fast, efficient trade.

As the U.S. government evaluates China’s compliance with its WTO commitments, USCIB highlights a longstanding issue dating back to China’s accession to the WTO. We also put forward additional recommendations in policy areas critical to the competitiveness of express delivery services.

1. Foreign EDS Firms’ Access to China’s Domestic Document Market

- China’s Postal Law prohibits foreign EDS firms from competing in China’s domestic document delivery market, broadly interpreting “letters” and “correspondence” to include all documents. USCIB believes this discrimination against foreign firms raises national treatment concerns in the context of China’s WTO commitment to open up Courier Services (CPC 75121) except to the extent those services were specifically reserved to Chinese postal authorities by law at the time of China’s WTO accession. USCIB encourages the U.S. government to address this discriminatory restriction in a high-quality bilateral agreement.

2. Logistics, Postal and Security Regulation

- The EDS industry faces challenges with burdensome regulations promulgated by the State Post Bureau (SPB). Overall, the regulatory structure fails to take a balanced, risk-based approach relative to the importance of moving goods effectively and efficiently throughout the global supply chain. USCIB members request that the U.S. government consider the following related issues:
 - Ensure that any licensing or permitting regulated at the national level remains at the national level such that market players do not face more onerous province-by-province or even city-by-city licensing or permitting requirements. For example, Articles 52 and 53 of China’s Postal Law are inconsistent with the “Business Scope of Express Business Operation Permits.” SPB should clarify the difference and support the broadest possible business scope, aligned with the national network business model of EDS providers and the interests of consumers;
 - Work with SPB to ensure that all proposed regulations are published for comment, that interested parties are provided with at least forty-five (45) days within which

- to provide comments, and that SPB will respond in detail regarding whether the recommendations are being adopted and, if not, the reasons they are being rejected;
- Confirm that China's 2011 Express Service National Standards and subsequent express standards that are recommended industrial standards according to China's Standards Law will not be cited in any postal regulation with compulsory enforcement;
 - Enable EDS providers to contract with Chinese domestic delivery permit holders to provide local pick-up and delivery, trucking and other services related to express delivery;
 - Simplify SPB's current permitting processes and re-evaluate its security measures, in line with the Chinese central government's call for comprehensive governance reforms and to conform such measures to a balanced, risk-based, strategic approach relative to the need for fast and efficient trade;
 - Secure a commitment that security measures and requests for information and access to company IT and other systems be, not only balanced, risk-based, and strategic, but also implemented uniformly. Provincial and local agencies are increasingly requiring companies to provide information and access that is inconsistent, overly burdensome and that raises business confidentiality concerns;
 - SPB currently collects substantial data from firms on shipments, facilities, vehicles, and staff. Other agencies, including local agencies, seeking the same data should obtain that data through the existing SPB reporting systems. Additionally, any requests for new data reporting should be posted for public comment in advance of implementation, providing firms with sufficient time (at least six months) to prepare for implementation;
 - Ensure coordinated and consistent security measures between the SPB and Ministry of Public Security at all levels, national, provincial, and local. China's current import clearance regime, supported by three channels, unnecessarily complicates trade and restricts low-value shipments, including shipments from U.S. small e-commerce businesses, from benefitting from expedited shipments treatment, as envisioned in the WTO Trade Facilitation Agreement. China's import clearance procedures are complex and supported by highly calibrated import duty and tax structures. Imports can be cleared through a choice of three channels: 1) Normal Channel; 2) E-Commerce Channel (GAC announcement No. 194/2018¹⁴); and 3) Postal/Personal Shipments Channel. Due to the burdensome requirements to utilize the e-commerce channel, including retailer commercial presence and registration limited to companies with Chinese affiliates, USCIB members would like to see streamlining and facilitation measures for shipments under the normal channel, based on WCO Immediate Release guidelines. Members also would like to see the clearance "based on value" rather than the various channels discriminating between e-commerce and non-e-commerce goods. Such measures would simplify documentation and applicable taxes, enhance clearance times, and facilitate returns;
 - Also, in line with China's WTO Trade Facilitation Agreement implementation, the United States should call on China to eliminate user fees charged by all agencies at

¹⁴ This replaces GAC 26

each port. In 2015, in response to the Chinese central government's call to relieve the administrative burden on enterprises, and further simplify the process for international trade at the border, China Customs adopted a series of measures, including efforts to reduce or cancel electronic declaration data transmission and inspection fees at different ports. While China Customs has made great strides in eliminating or reducing fees, additional trade costs can be eliminated by other border agencies at each port;

- With regard to China's Cybersecurity Law, which mandates data server localization, data flow restrictions, and security reviews for industries deemed critical information infrastructure (CII), express delivery services do not yet know officially if they will be deemed critical information infrastructure, however their regulator, State Post Bureau (SPB), appears to agree that current security measures, including the vast array of data the bureau already collects from us (on shipments, facilities, vehicles, and staff), meets CII cybersecurity needs. However, other agencies are also expected to roll out their own CII criteria which may impact EDS. For example, China's Civil Aviation Authority has issued draft regulations mandating data localization and certification of IT products and services for those who access and use the China air network system. China's E-Commerce Law went into effect January 1, 2019, and also requires local data storage for e-commerce companies;
- USCIB members would like to secure a commitment that security measures and requests for information and access to company IT and other systems be not only risk-based and balanced, but also implemented uniformly. Provincial and local agencies are increasingly requiring companies to provide information and access that is inconsistent, overly burdensome and that raises business confidentiality concerns. Additionally, any requests for new data reporting should be posted for public comment in advance of implementation, providing firms with sufficient time (at least six months) to prepare for implementation; and
- Finally, the principal unresolved WTO issue relates to China's current prohibition on U.S. express delivery service suppliers entering the domestic letter and document delivery service market.¹⁵ China's WTO GATS schedule indicates that it does not have any limitations specified under Courier Services (CPC 75121), except for those specifically reserved to Chinese postal authorities by law at the time of accession. The Courier Services classified under CPC 75121 include "services consisting of pick-up, transport and delivery services, whether for domestic or foreign destinations, of letters, parcels and packages, rendered by courier and using one or more modes of transport, other than by the national postal administration." USCIB members hope to see China remove this segment from its Negative List.

¹⁵ Although the Chinese term "xinjian" (信件) is defined as "letters and postcards" in the law, it is commonly interpreted by the postal authorities to include any documents other than books and periodicals.

Recoverable Materials

China first announced the intent to prohibit imports of certain recycled materials through a July 2017 notification to the WTO TBT Committee, but subsequent prohibition announcements were never notified. These prohibitions have gone into effect in stages – such as the ban on mixed paper and plastics recovered from households going into effect in 2018, plastics recovered from industrial sources and mixed metals (insulated wires and small electric motors that have significant valuable metal content) in 2019 and additional metal commodities (including stainless steel scrap) in 2020. Additionally, the imposition of tight quality standards on all recyclable materials went into effect in March 2018, and the Chinese government began implementing a parallel standards regime for imports of smelter-ready steel, copper, aluminum, and brass “recycled raw materials” in 2019 and 2020. These standards are not in line with international norms, and they have not been notified to the TBT Committee. Although U.S. exporters have been briefed on these standards, implementation by the Chinese government is often inconsistent and non-transparent, creating tremendous uncertainty in an already constrained marketplace. As a result, U.S. exports of recyclable commodities to China in 2020 totaled barely one-third in value and volume terms when compared to the number of exports in 2016, prior to these measures.

The recycling industry is the latest arena in which we see China’s effort to change the rules of trade. The industry has faced regulatory revisions in a range of key export markets, especially around Asia, where governments are influenced by the changes in China’s import regime. Examples include the setting of new standards for recycled materials, imposition of import licensing requirements and requiring pre- and post-shipment inspections. U.S. exports of recyclable commodities have declined in many of these markets as a result.

Telecommunications (Services and Equipment)

China has failed to open its Telecommunications market in accordance with its WTO commitments. The publication of a new Telecom Services catalog in late 2015 extended telecom regulation with its corresponding foreign equity limitations to new services, including cloud, online platforms, and content delivery services, which are not typically regulated and fall under computer and related services classification. China’s increasing regulation of newer services makes it increasingly difficult for foreign providers of digital services to participate in the Chinese market. In addition, China’s increasingly restrictive approach to the Internet is negatively impacting services that rely on the cross-border flow of data and, as a result, is impeding the operations of foreign companies in China that depend on online communications. China’s WTO commitments to liberalize telecommunications services became effective upon its accession to the WTO on December 11, 2001. These commitments include a six-year schedule, which ended in 2007, for phasing in direct foreign participation in value-added network services and basic telecommunications.

1. Market Access

- China’s updated Telecom Services Catalog incorrectly classifies a wide range of ICT technologies and services as telecom services, when in fact they are computer or business services that utilize the public telecom network as a method of delivery. Examples include:

- Cloud computing is improperly classified as a telecommunication service. While cloud computing services may use telecommunications networks and services, they are supplying computer related services (CRS);
 - Content Delivery Services are classified as a Value Added Service (VAS); and
 - Information Services (including services delivered through online platforms) are classified as a VAS. The broad definition of these services potentially captures many different online services, from social media to online news and other information services.
- China has generally failed to open its telecommunications market for both Basic and VAS. VAS licenses are limited to 50% foreign equity and require a local JV partner. Basic Telecommunications Licenses are even more restrictive, with a 49% foreign equity cap and a requirement that the foreign company partner with one of China's incumbent telecommunications operators.
 - China should eliminate the FDI limits and joint venture requirements for VAS. Moreover, in classifying service characteristics as Basic or Value Added, China should eliminate the intentionally restrictive distinction between international and domestic services as a determinate of whether a service is Basic.¹⁶ It is critical that MIIT interpret the definition of VAS in a manner that is consistent with China's explicit WTO commitment and widely accepted international standards.
 - We continue to urge the U.S. government to encourage China to take the following steps to remove the obstacles to development of VAS in China:
 - Revise its catalog to note regulate information services, cloud computing, content delivery networks and other services that are not typically regulated as telecom services requiring a VAS license (subject to the joint venture requirements);
 - Adjust the list of VAS in the Catalogue to include such services as managed International IP VPN, in conformity with international norms for categorizing basic and VAS;
 - Lift the prohibition on resale, enabling all carriers to acquire capacity at wholesale rates and interconnect their networks to deliver services to a broader reach of the country;
 - Remove remaining caps to Foreign Direct Investment; and
 - Allow full market access for resale of mobile services.

¹⁶ For example, China defines International Virtual Private Line service as a Basic Telecommunications Service, whereas the exact same VPN service provided domestically is defined as Value Added. This distinction is material, because foreign companies are required to partner (50% joint venture) with domestic telecommunications company (that holds a Basic License), as compared to VAS licenses where foreign companies can partner (49% joint venture) with any Chinese company irrespective of whether it holds a Basic Telecommunications license or not.

2. High Capitalization Requirements

- Even if U.S. companies were able to enter China's communications market, they would still face unreasonably high capitalization requirements for basic telecommunications services. USCIB considers the existing capitalization requirement in basic services an excessively burdensome and unjustified restriction that violates Article VI of the GATS. China should take additional steps to reduce the capitalization requirement to a reasonable level.

3. Independent and Impartial Regulator

- USCIB encourages the U.S. government to place a high priority on working with China to establish a regulatory body that is separate from, and not administratively joined to, any basic telecoms supplier, and that is capable of issuing impartial decisions and regulations affecting the telecoms sector. In this context, it is important that the regulatory body adopts the following:
 - Transparent processes for drafting, finalizing, implementing and applying telecom regulations and decisions;
 - Appropriate measures, consistent with the Reference Paper, for the purpose of preventing major suppliers from engaging in or continuing anti-competitive practices;
 - A defined procedure – as it has done for interconnection – to resolve commercial disputes in an efficient and fair manner between public telecom suppliers that are not able to reach mutually acceptable agreements;
 - An independent and objective process for administrative reconsideration of its decisions; and
 - Appropriate procedures and authority to enforce China's WTO telecom commitments, such as the ability to impose fines, order injunctive relief, and modify, suspend, or revoke a license.
- USCIB encourages the U.S. government to continue to encourage China to provide reasonable notice and the opportunity for public comment on proposed regulations.

4. State-Owned Enterprise – Joint Venture Partnership Requirement

- The requirement that a foreign company must select a state-owned and licensed telecom company as a joint venture partner to obtain a Basic Telecom License is a significant market access barrier. Incumbent licensees have only limited incentive to partner with foreign competitors. It is not an ideal model for promoting competition to require foreign telecom service providers to partner with a company that may also be a horizontal competitor of their joint venture. Allowing foreign parties to partner with new entrant Chinese firms would create new opportunities for creative investment in telecom infrastructure and foster the type of competition that would benefit Chinese customers with better service and competitive pricing. China should eliminate this requirement.

5. Geographic Restrictions

- Notwithstanding the business model of the Internet, MIIT has at times suggested that a commercial presence must be established in each city where customers will be located, and that an inter-regional service, based in one city but serving customers in another, is not permitted. Such an interpretation is inconsistent with the global model of how value-added, non-facilities based Internet service providers are structured, and imposes geographical restrictions that make an inter-regional, or national scaled business model non-viable. The impact of this interpretation is to negate the benefits accorded to foreign value-added telecommunications providers under the WTO agreement. This interpretation, if implemented, will also greatly impact the cost to local Chinese businesses adding an unnecessary burden to them as they wish to become more robust and increase their participation in a broader geographic market.

6. Cyber Security Product Requirements

- China's broad and non-international approach towards cyber security technical standards has created serious market access barriers for foreign IT firms in the China market. The CCCi China Mandatory Certification for Information Security Products, and the Ministry of Public Security (MPS) administered Multi-Level Protection Scheme (MLPS), are clear examples of China adopting these non-standard approaches.
- China's implementation of the Cyber Security Law lacks objective standards and criteria to determine compliance. Rather, companies are subjected to "inspections," including review of source code where compliance is determined on a case-by-case basis.
- ICT suppliers rely on global standards and norms that allows for a high degree of reliability, interoperability, and compatibility that is required to ensure that the Internet delivers goods and services to users worldwide. The U.S. government should strongly encourage China to adopt international norms and approaches in the area of information security.