THE US-CHINA BUSINESS COUNCIL
美 中 贸 易 全 国 委 员 会

**CHINA'S WTO COMPLIANCE**
**China's Implementation of its World Trade Organization Commitments**
**An Assessment by the US-China Business Council for the Trade Policy Staff Committee**

**Docket Number USTR-2021-0015**

September 15, 2021

In the 20 years since China joined the World Trade Organization (WTO), the global economy has changed significantly. China has fulfilled many of the specific obligations of its WTO accession agreement, including opening some, though not all, of its economy to foreign participation and taking positive steps to strengthen intellectual property rights protections. China has continued to fall short, however, in implementing or adhering to some of the broader WTO principles of national treatment and transparency. As a result, foreign firms continue to face challenges accessing the market and competing on a level playing field.

USCBC noted in its 2002 submission for the first Trade Policy Staff Committee (TPSC) hearing on China's compliance with its WTO commitments that:

> "WTO-relevant issues involving entrenched PRC bureaucratic and domestic commercial interests will likely require particular vigilance by the US government and the American private sector, in the interest of effective encouragement of China to reach the fullest possible realization of [its] WTO commitments."

As advances in technology continue to transform the increasingly interconnected global economy, that vigilance is needed now more than ever. China's WTO accession has benefited the world economy and the US economy in particular, and the WTO has proven a useful framework for the United States and others to address China's unfair trade practices. But the framework needs updating and strengthening to ensure it can continue to hold China accountable to existing commitments, and to address new and emerging challenges as they arise.

**China's WTO accession has benefited the world and the US economy**
In 2000, the year before China's accession, China's gross domestic product (GDP) was approximately $1.2 trillion, ranking as the fifth-largest economy in the world. According to the World Bank, China's GDP was roughly $14.72 trillion in 2020, the world's second largest after the United States' and the only major economy to see growth that year because of its early control of the COVID-19 pandemic. While the United States has remained the largest economy in the world throughout this time, it contracted slightly in 2020 to $20.93 trillion.

China also lays claim to having lifted more than 800 million people out of poverty as a result of its market reforms, a claim supported by the World Bank. Its middle class is now more than twice the size of the entire population of the United States. Before the end of this decade, the Chinese middle class is projected to account for about a quarter of the global middle class, making it overwhelmingly the single most significant driver of global demand for goods and services. According to the Bureau of Economic Analysis, in 2000, US exports of goods and services to China were only $21.9 billion and US company sales in China were roughly $18.5 billion. The United States now exports approximately $165 billion worth of goods and services to China, placing it just behind Canada and Mexico as the United States' third-largest export market. Likewise, as of 2018--the last year of available data--US company sales in China have grown to $392.7 billion, more than 20 times the value of US sales to China at the turn of the century.

As part of its accession agreement, China has lowered its applied import tariffs from a weighted average of 14.7 percent in 2000 to 2.5 percent in 2019. Due to bilateral trade tensions, though, US exports to China are now subject to far higher tariffs than those from the rest of the world. According to the Peterson Institute, China's average tariff rate on US goods stands at 20.7 percent, up from 8 percent in 2018, and compares poorly to a weighted average Chinese tariff rate of just 6.1 percent on rest-of-world exports.

As a member of the WTO, China is subject to the organization's dispute settlement process, a mechanism intended to serve as a de-politicized means of resolving trade disputes. The United States has a positive track record in cases involving China—of the 20 completed cases the United States has filed against China, 11 cases were won by the United States and nine were settled before a ruling was made. None were lost. But the ongoing US blockage of appellate judge appointees currently threatens the effectiveness of this dispute resolution mechanism that has historically served the United States well with respect to China.

On balance, China's WTO entry has been positive for the United States and the world. Notably, China has taken some steps to further open its markets in the last couple of years, particularly in financial services and agriculture, and has strengthened protections for intellectual property rights, improved the approval process for foreign investments, and worked in other areas to address concerns raised by the US government and industry. The US-China Phase One trade agreement played a helpful role in pushing many of these changes forward.

At the same time, however, numerous Chinese policies implemented since the country's WTO accession appear to have been put in place to protect or promote domestic industry at the expense of foreign companies.

The "positive list" approach used in the accession agreement only opened specific sectors. It also meant that new areas of the economy not envisioned at the time of the accession negotiations were not covered by the agreement, including cloud computing, electronic commerce, and other technology services. And while some additional sectors have been opened to foreign participation in the decade since the "roadmap" of obligations expired, the sectors that remain closed are ones that would benefit from liberalization, from both the perspective of foreign companies seeking market access and from those hoping to strengthen the competitiveness of the Chinese economy as a whole.

**National Treatment**

The WTO's requirement that member countries treat domestic and foreign companies on an equal basis, also known as national treatment, is an essential principle for all companies doing business globally. However, USCBC's annual member survey showed again in 2021 that American companies continue to experience problems with discriminatory treatment, primarily in the form of regulatory challenges and preferential treatment for domestic companies. Regulatory and competition challenges are not new for US companies, but they still have a real effect on companies' ability to do business and are among the issues that companies perennially cite as primary restraints on their profitability in China.

China's policymakers should move toward eliminating terminology in laws and regulations that distinguish between domestic and foreign-owned companies, such as the term "foreign-invested enterprises." Continued use of this term invites discriminatory treatment of various types of domestic legal entities based solely on ownership. A better approach would be to treat all companies legally established under China's Company Law equally, regardless of ownership or nationality. China's nationwide negative list makes progress toward this end by increasing transparency on all market access requirements—it applies to both domestic and foreign investors.

Many Chinese companies thrive because they produce competitive, high-quality goods and services. However, numerous Chinese policies and practices continue to provide advantages to both state-owned and private domestic companies over foreign ones, an issue that 38 percent of the respondents to USCBC's 2021 Member Survey say affects their companies. This includes direct benefits and support from various levels of the government, as well as favorable licensing decisions, restrictions on foreign investment, and preferential treatment in enforcement actions—all issues identified among companies' top 10 concerns in 2021 as well as in previous years. Policies to level the playing field for foreign companies should ensure equal treatment of foreign companies regardless of their ownership form.

*National Security and Innovation Policies*
Companies remain concerned about China's invocation of national security to impose measures aimed more at promoting domestic industry than protecting strategic interests. Recent examples include China's 2017 *Cybersecurity Law,* which along with the *Data Security Law and Personal Information Protection Law which were passed this year,* promote data localization and cross-border restrictions. Such conditions tend to impose higher costs on global multinational firms and do little to strengthen security. The 2020 *Cybersecurity Review Measures* also mandate opaque and easily politicized reviews of information and communication technology (ICT) products and services procured by operators of China's critical infrastructure. Many companies also fear China's *Encryption Law* and implementing measures will mandate the use of Chinese encryption algorithms. Additionally, China's *Foreign Investment Law*, passed in 2019, can require national security reviews of foreign investments. These policies take a broad view of national security and contradict the spirit of China's WTO commitments.

Discrimination is also a feature of China's innovation policies. Most of China's innovation measures are taken to promote high-tech industries, but policies favoring the use of domestic technology appear in rules that affect technology users in industries ranging from financial services to healthcare and ecommerce.

Regulations in the areas of technology and innovation should be based solely on commercial and technical factors. Innovation thrives under such conditions but is stifled when a government seeks to limit how and where it occurs, or when it dictates technology choices. To create a fairer legal environment for all companies invested in the market, China—and all governments—should refrain from using national security to discriminate against foreign companies. Measures to protect national security should be narrowly tailored to include only those measures necessary for the protection of genuine security goals.

*Licensing and Approvals*
Over the past decade, licensing has consistently ranked among USCBC member companies' top 10 concerns. Certain regulations require expert panels to be convened for inspection, testing, and quarantine of equipment, facilities, products, and articles that directly concern public security, health, and safety of life and property. There are three major concerns about expert panel reviews among US companies.

First, the government has the authority and tendency to nominate panelists who work for the applicant's Chinese competitors. Second, applicants are often required to report detailed information about confidential and proprietary operations, which many companies consider to be trade secrets, to review panels. Providing such information to anyone outside the company—including government officials, and especially competitors—threatens companies' competitive advantages, profits, and sensitive technologies. Third, experts have unlimited authority to request information from companies, even when the information requested has little or no relation to the panel's decision-making.

In a positive step, China committed in the Phase One trade deal to prohibit third-party reviewers with financial or competitive interests from participating in the administrative review process. China also committed to establishing a mechanism for objecting to the participation of specific third-party reviewers. Recent draft documents promise help in meeting these commitments, but they have yet to be implemented.

The inconsistency of licensing procedures across provinces and government agencies also complicates company operations. Licensing approvals are often made on an ad-hoc basis, and in addition to being unpredictable, they can create significant market access barriers. US companies often face greater challenges obtaining licenses than do their domestic competitors. Depending on the industry sector, companies may need dozens of licenses to do business, and many of these licenses may require frequent renewal.

*China's implementation of TRIPS/Regulatory Data Protection*
As part of its accession to the WTO in 2001, China committed to provide a six-year period of regulatory data protection (RDP) for undisclosed test or other data submitted to obtain marketing approval for pharmaceuticals in accordance with Article 39.3 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). While China's Drug Administration Law Implementing Regulations anticipate a six-year period of protection for test data of products containing a new chemical ingredient, in practice there is no mechanism in China to prevent the unfair commercial use of safety and efficacy data generated by innovative pharmaceutical companies. Moreover, even if there were a mechanism for granting RDP in China, key aspects of the RDP provisions are inconsistent with TRIPS Article 39.3.

First, certain key concepts such as "new chemical ingredient" (sometimes referred to as "new chemical entity") and "unfair commercial use" are undefined or are not in line with international standards. Second, RDP should be granted to any product that is "new" to China, (i.e., has not been approved by China's National Medical Products Administration). Proposals to date, however, suggest that China would only grant RDP to pharmaceutical products that are "new" to the world—in other words, products that make their international debut in China. That is at odds with the approach of other regulatory systems, and even at odds with the approach taken in China for RDP for agricultural chemicals. It also threatens to discriminate in favor of domestic industry and innovation, contrary to China's international obligations.

*China's Human Genetic Resources regulations*
One of the more significant recent impediments to the development of innovative medicines in China has been an additional approval or notification now applicable to all clinical trials conducted in China by foreign companies or their affiliates that collect any samples containing Chinese human genetic resources (HGR), regardless of whether or not 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. As the Pharmaceutical Research and Manufacturers' Association of America noted in its 2021 Special 301 Submission, "By definition, the HGR regulations disproportionately burden US and other foreign companies who may need to export samples and data to complete their clinical trials. This is a significant barrier to timely access to innovation in China."

**Intellectual Property Rights**
Concern around IP protection remains a perennial issue for US companies doing business in and with China, limiting the activities companies are willing to undertake in the Chinese marketplace. Despite a series of positive regulatory reforms, including several taken as part of China's commitments under the Phase One trade agreement, 85 percent of USCBC survey respondents remain apprehensive about China's IPR protection regime. Several recent regulatory developments and the expansion of IP enforcement channels continue to merit at least measured optimism. Administrative agencies, civil courts, criminal courts, special IP courts, and China's Supreme People's Court IP appeals mechanism may improve companies' ability to secure their IP rights. In 2020 and early 2021, China also moved forward with a series of reforms and issued judicial interpretations that reflect progress on numerous IP issue areas, moving China further toward carrying out its IP Action Plan.

Legal reform is a slow process, however, and there remains plenty of room for improvement in enforcement. Significant trade secret cases can languish in Chinese courts for years, even when there are clear cut cases of Chinese violations of the IP rights of foreign companies. Chinese courts also often drag their heels in recognizing and enforcing international arbitration awards obtained by foreign companies against Chinese companies. The delay or denial of prompt and credible enforcement of IPR violations erodes US, international, and, ultimately, Chinese interests in protecting IP and establishing precedents necessary to prevent further trade secret misappropriation.

Additionally, China's evidence-collection requirements for proving IP rights violations remain cumbersome, impacting companies' ability to challenge infringers. Tools that many companies use in the United States and other markets to protect their IP, such as non-compete or other contractual agreements, are largely untested in China, leading to uncertainty about how such provisions would be interpreted by China's courts. Further, China has some policies that could place foreign-owned companies at a competitive disadvantage, such as subsidies offered to Chinese companies for patent prosecution.

China has taken steps to adopt tougher deterrents against piracy, including moves to increase the maximum damages for IP cases, in line with Phase One obligations. In addition, the Foreign Investment Law, which went into effect in January 2020, stipulates that government officials must not reveal sensitive information or trade secrets that they have gained access to in the course of their work. It also stipulates that public officials can be criminally prosecuted for illegally providing others with trade secrets they accessed while performing their administrative duties. These are important steps in the right direction, but the effectiveness of these changes will only be revealed as they are implemented.

Broadening the use of higher penalties, holding both government and commercial infringers criminally liable for IP infringement, and creating stronger deterrents in both civil and criminal cases against all types of IP infringement would benefit everyone doing business in China. This should include adopting WTO-consistent deterrents such as criminal penalties for commercial-scale IP infringement. Continued reform, with follow-through in enforcement, would help to reduce tensions between China and its major trading partners—something that industry would welcome.

**Technology Transfer**

When China joined the WTO, it agreed that it would not require foreign companies to transfer technology as a prerequisite to invest or sell products in China. Tech transfer would be allowed only in situations where a foreign and Chinese company agreed to such a transfer as part of a normal business negotiation. The accession's Working Party Report stipulated that "the terms and conditions of technology transfer, production processes or other proprietary knowledge, particularly in the context of an investment, would only require agreement between the parties to the investment." China's accession protocol also specified that the right to import or invest in China would not be conditioned on "performance requirements of any kind, such as local content [or] the transfer of technology." Despite these commitments, as part of China's drive to become more innovative, foreign companies have been "encouraged" and, in some cases, pressured to transfer technology to their China subsidiaries or Chinese companies.

While only 5 percent of respondents to USCBC's member survey report that they have been explicitly asked to transfer technology to China as a requirement for gaining an investment, project, product, or market entry approval, down from 19 percent in our 2017 survey, implicit tech transfer expectations or perceived expectations continue to play an undeniable role in companies' China market dealings. And while fewer of our member companies have reported technology transfer as an issue affecting their business in China in recent years, for those companies that are affected, tech transfer demands remain an acute business issue.

China has taken some steps to address these concerns, such as committing not to require or pressure foreign companies to transfer technology in the Phase One agreement and through language prohibiting forced technology transfer in the *Foreign Investment Law*. These regulatory changes address some of the top concerns raised in USTR's Section 301 report on restrictions that reduce the ability of foreign companies to negotiate fair, market-based terms for the transfer of their technology into China. Additional reforms to joint venture requirements and administrative licensing requirements would help to better ensure that Chinese protection of companies' trade secrets is both meaningful and dependable.

*Structural Issues Encourage Tech Transfer*
While the above regulatory changes are steps in the right direction, they do not address the structural issues—like JV requirements and foreign equity restrictions in certain industries—at the root of technology transfer issues in China. In sectors where 100 percent foreign ownership is allowed in China, foreign companies are generally not compelled to transfer their technologies to their competitors, since any technology used in their China operations remains in their own hands. In various industries, China imposes equity caps or other restrictions that require foreign companies to not only partner with a domestic company to access the market but also to allow the domestic company to control the technologies and processes, things that many foreign companies consider to be trade secrets.

While many requests for technology transfer might technically be part of a "normal" business negotiation, China's joint venture requirements and foreign equity restrictions create unbalanced negotiations that inherently favor Chinese companies. Consequently, a request for technology transfer made by a Chinese party in a business negotiation can reasonably be interpreted by the foreign party as a requirement for the deal to be successfully concluded.

Certain regulatory approval processes also compel information that is not directly relevant and goes far beyond what is required in other jurisdictions. Examples include agricultural biotechnology and type testing for medical devices. While it is often difficult to draw direct connections to technology being transferred to a competitor, such regulatory requirements indirectly facilitate tech transfers.

To uphold its WTO accession responsibilities, China should eliminate all joint venture requirements and foreign equity limitations and regulate all companies in the market under China's *Company Law*. This would provide meaningful improvements in affected sectors and bring China in line with its commitments.

**Procurement**
China has a variety of procurement-related policies that function as de facto IP or technology transfer requirements. For instance, China's Cybersecurity Law and measures related to the law's implementation include requirements for the use of "secure and controllable" technology in certain industries, which in effect mandates the purchase of such technologies by government or state-owned entities. Qualification for participation in such procurement processes requires sharing source code or other proprietary information.

Some provincial and local procurement policies continue to include preferences for products using "indigenous" innovation, frequently interpreted as meaning products made by Chinese companies. This problem is exacerbated by a lack of clear domestic content regulations, leading some tendering agencies to interpret a country of origin without considering products manufactured in China by foreign-invested firms.

Foreign companies often cannot participate in various procurement processes if they do not comply with technology transfer, encryption, or other requirements that leave their trade secrets and intellectual property vulnerable. The system also lacks a functioning appeals framework which limits bidders from reviewing detailed records of how a tendering decision is made.To address these concerns, it is critical that China's regulations comply with its WTO commitments pertaining to nondiscrimination and national treatment. During its accession to the WTO, China committed that all SOEs would make purchases and sales based solely on commercial considerations, and that foreign companies interested in selling to SOEs would be subject to non-discriminatory terms and conditions. China also promised that it "would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises," including on "the value or country of origin of any goods purchased or sold."

China's own *Foreign Investment Law* promises equal treatment in government procurement to products manufactured or services provided by foreign-invested enterprises and domestic enterprises in mainland China. China should ensure that government procurement policies and decisions are transparent, predictable, and consistent across the central and local levels.

Lastly, China should join the WTO's Government Procurement Agreement (GPA) and ensure that goods and services provided by all legal entities in China are treated equally during procurement processes, regardless of ownership. China committed to joining the GPA as part of its accession to the WTO, and its latest offer to join the GPA in October 2019 makes progress towards this goal by expanding coverage of entities at various levels of government and increasing the number of state-owned enterprises (SOEs) and services subject to GPA compliance. China should further build upon this offer by adding greater coverage of SOEs and limiting transitional measures that would delay full implementation of China's commitments after accession. In advance of joining the GPA, China should designate a formula of "substantial transformation," like those used by the United States to determine a product's national origin.

**Standards**

Chinese standards that diverge from international standards used by companies in other markets can lead to increased costs and delays, require the reengineering of products, and even restrict market access altogether. Increased alignment of international and Chinese standards is in line with China's commitments under the WTO Agreement on Technical Barriers to Trade (TBT). Annex 3 of the agreement, the Code of Good Practice for the Preparation, Adoption, and Application of Standards, stipulates that countries should use international standards as the basis for setting their own. These include international standards drafted with input from Chinese stakeholders.

WTO/TBT recognizes that there are certain cases where it is appropriate to formulate unique domestic standards due to local environmental, safety, or security conditions, but such exceptions should be made sparingly. Standards should not be employed to discriminate against products from other countries or regions, but rather to help facilitate the growth of international trade as we live in a world of interconnected global supply and value chains.

US companies also face challenges with due process and transparency when participating in China's domestic standards setting bodies. While increasing numbers of draft standards are released for public comment for longer periods, and recently released measures on mandatory national standards require a 60-day public comment period, companies continue to report cases where comment periods are far shorter than that, which makes it difficult for multinationals to translate the draft standards, coordinate internally across global operations to provide meaningful input, and retranslate feedback into Chinese. China should ensure 60-day public comment periods for all government-developed standards except in special circumstances, according to China's commitments under WTO/TBT Annex 3.

**Electronic Payment Services**

When China joined the WTO in 2001, it committed to allowing foreign 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 US EPS suppliers have processed "cross-border" transactions in China for decades, which primarily involve purchases by international travelers in a currency other than renminbi (RMB), it was only in 2020 that the first US EPS supplier became authorized to process RMB-denominated transactions in China through a joint venture.

Under the Phase One agreement, China committed to make determinations on any application for a Bank Card Clearing Institution (BCCI) license from a US 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 US EPS supplier has completed its licensing process while others have applications still under consideration. US companies look forward to the processing of RMB-denominated transactions by all US EPS suppliers that have applied for a BCCI license, as contemplated under the Phase One and WTO agreements.

**Antidumping and Countervailing Duties (AD/CVD)**

Industry continues to note issues with procedural fairness and politicization in China's approach to anti-dumping/countervailing duty (AD/CVD) practices. China regularly appears to target key imports of countries when political disputes arise to pressure and damage foreign industry, as well as to support China's domestic industrial development goals. Its AD/CVD investigation processes are non-transparent, unnecessarily burdensome, and overly deferential to unsubstantiated allegations of subsidies or non-market conditions. Ensuring a transparent and WTO-compliant AD/CVD process is critical for a well-functioning trade regime. The Chinese government should make determinations based on the law, substantiated data and facts, and standardized, transparent procedures.

**Opportunity to Lead by Example**

The United States is losing credibility as a leader of the global trading system, and by extension, risks validating controversial Chinese approaches that have used similar justifications. Since 2018, the United States has been the subject of over 20 requests for consultation and dispute settlement—several initiated by China—but complaints have also been filed by Canada, Mexico, South Korea, the European Union, Vietnam, India, Norway, Russia, Switzerland, Venezuela, Turkey, and most recently Hong Kong. In at least two separate instances in 2019, 40 WTO members jointly voiced objections to US tariff plans at the WTO Council on Trade in Goods. These complaints, in addition to others, represent a substantial increase in our global trading partners' perceptions that we, ourselves, are not acting in accordance with our commitments or following WTO rules.

Neither China nor the United States should implement policies that violate the spirit of WTO commitments despite conforming to the letter of the rules. We must push ourselves and encourage our trading partners to implement policies that uphold WTO principles. If existing rules fall short, we should not abandon them, but instead should take the lead to improve them. The WTO's appellate body, which has ceased to function because of US actions, is one example. While the dispute settlement body is not without fault, it remains a central component of the global, rules-based trading system from which the United States benefits. Restoring the body to its full capacity and working with partners to enact reforms will serve the long-term interests of the United States and its companies. It is the only means of ensuring that the WTO continues to provide an active and meaningful mechanism for resolving disputes over China's trade practices. Until the appellate body is restored, dispute settlement decisions at the WTO will not be enforceable.

**Multilateral Cooperation**
Constructively working with like-minded partners has proven to be an effective method to alter adverse Chinese policies. The United States' dispute settlement case filed in March 2018 identifying Chinese laws and regulations that raise tech transfer and IP protection concerns is a good example of how the United States should seek those types of outcomes. USTR's request for consultation to address China's discriminatory technology licensing requirements, based on evidence detailed in the Section 301 investigation report, was joined by five WTO members, and China ultimately revised the regulations in question.

In recent years, the trilateral with the EU and Japan aimed at addressing "non-market-oriented policies and practices" provides another example of constructively working with like-minded partners to address inappropriate Chinese practices. The three countries have held a series of meetings to develop stricter rules governing subsidies and state-owned enterprises, with a longer-term goal of similarly upgrading the WTO's existing rules. This offers a clear indication that like-minded global trading partners are eager to work with the United States in ways consistent with international agreements to address common concerns regarding China's trade and investment policies. USCBC encourages the United States to undertake more actions that include this kind of cooperation.

**Written Testimony Attachments**
USCBC 2021 Member Survey Report
Government Procurement and Sales to State-Owned Enterprises in China