2018 Report to Congress On China's WTO Compliance

United States Trade Representative
February 2019

2018 Report to Congress
On China's WTO Compliance

United States Trade Representative
February 2019

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

ABBREVIATIONS

ACFTU	All China Federation of Trade Unions
APEC	Asia-Pacific Economic Cooperation
AQSIQ	State Administration of Quality Supervision, Inspection and Quarantine
BOFT	Bureau of Fair Trade for Imports and Exports
CAC	Cyberspace Administration of China
CBRC	China Banking Regulatory Commission
CFDA	China Food and Drug Administration
CIRC	China Insurance Regulatory Commission
CNCA	National Certification and Accreditation Administration
GAPP	General Administration of Press and Publication
IBII	Bureau of Industry Injury Investigation
ISO	International Organization for Standardization
JCCT	U.S.-China Joint Commission on Commerce and Trade
MIIT	Ministry of Industry and Information Technology
MOA	Ministry of Agriculture
MOC	Ministry of Construction
MOF	Ministry of Finance
MOFCOM	Ministry of Commerce
MOH	Ministry of Health
MOST	Ministry of Science and Technology
NDRC	National Development and Reform Commission
NPC	National People's Congress
OIE	World Organization for Animal Health
PBOC	People's Bank of China
SAC	Standardization Administration of China
SAIC	State Administration for Industry and Commerce
SAMR	State Administration for Market Regulation
SAPPRFT	State Administration of Press, Publication, Radio, Film and Television
SARFT	State Administration of Radio, Film and Television
SASAC	State-owned Assets Supervision and Administration Commission
SAT	State Administration of Taxation
SCLAO	State Council's Legislative Affairs Office
S&ED	U.S.-China Strategic and Economic Dialogue
SPB	State Postal Bureau
SPC	Supreme People's Court
WTO	World Trade Organization

FOREWORD

This is the 17th report prepared pursuant to section 421 of the U.S.-China Relations Act of 2000 (P.L. 106-286), 22 U.S.C. § 6951 (the Act), which requires the United States Trade Representative (USTR) to report annually to Congress on compliance by the People's Republic of China (China) with commitments made in connection with its accession to the World Trade Organization (WTO), including both multilateral commitments and any bilateral commitments made to the United States. The report covers calendar year 2018. It also incorporates the findings of the Overseas Compliance Program, as required by section 413(b)(2) of the Act, 22 U.S.C. § 6943(b)(2).

In preparing this report, USTR drew on its experience in overseeing the U.S. Government's monitoring of China's WTO compliance efforts. USTR chairs the Trade Policy Staff Committee (TPSC) Subcommittee on China, an inter-agency body whose mandate is, *inter alia*, to assess China's efforts to comply with its WTO commitments. This TPSC subcommittee is composed of experts from USTR, the Departments of Commerce, State, Agriculture and Treasury, and the U.S. Patent and Trademark Office, among other agencies. It works closely with State Department economic officers, Foreign Commercial Service officers, Enforcement and Compliance officers and Intellectual Property Attachés from the Commerce Department, Foreign Agricultural Service officers, Customs and Border Protection attachés and Immigration and Customs Enforcement attachés at the U.S. Embassy and Consulates General in China, who are active in gathering and analyzing information, maintaining regular contacts with U.S. industries operating in China and maintaining a regular dialogue with Chinese government officials at key ministries and agencies. The subcommittee meets in order to evaluate and coordinate U.S. engagement of China in the trade context.

To aid in its preparation of this report, USTR published a notice in the Federal Register on August 24, 2018. The notice asked interested parties to submit written comments and testimony and scheduled a public hearing before the TPSC. A number of written submissions were received from interested parties. The public hearing took place on October 3, 2018.

EXECUTIVE SUMMARY

This report is divided into two parts. Part 1 provides the Administration's assessment of China's WTO membership, the unique and very serious challenges that China's trade policies and practices pose for the multilateral trading system and the effectiveness of the strategies that have been pursued to address the China problem. Part 2 examines China's trade regime in detail and catalogues the United States' persistent efforts to resolve the many concerns that have arisen.

In Part 1, the report begins with an analysis of China's record of compliance with WTO rules, which is poor. The report then describes China's continued embrace of a state-led, mercantilist approach to the economy and trade, despite WTO members' expectations – and China's own representations – that China would transform its economy and pursue the open, market-oriented policies endorsed by the WTO. The report next identifies the substantial costs borne by WTO members as a result of China's problematic trade regime. Part 1 concludes with a discussion of the bilateral and multilateral efforts pursued by the Administration and other WTO members to address the unique challenges presented by China's WTO membership. This discussion also highlights the need for new and more effective strategies – including taking actions outside the WTO where necessary – to address the problems presented by China's non-market economic system.

Part 2 of this report is a detailed analysis of China's trade regime from a WTO perspective. It identifies and explains numerous policies and practices pursued by China that disadvantage or harm U.S. companies and workers, often severely. Despite persistent efforts by the United States to address these issues, many of them reflect longstanding U.S. concerns, dating back a decade or more. As we catalogued in last year's report, a consistent pattern exists where the United States has raised a particular concern, China has specifically promised to address that concern – and China's promise has not been fulfilled.

A small sampling of bilateral and multilateral commitments unfulfilled by China includes the following examples:

- Despite repeated commitments to refrain from forcible technology transfer from U.S. companies, China continues to do so through market access restrictions, the abuse of administrative processes, licensing regulations, asset purchases, and cyber and physical theft.

- China committed to open the electronic payment services market in 2006. This commitment was confirmed in a 2012 ruling by the WTO's dispute settlement body resulting from a U.S. legal challenge. Today, the reality remains that no foreign electronic payment services companies conduct business in China's domestic market.

- China's use of export and import substitution subsidies has been ubiquitous throughout the past two decades in sectors as diverse as automobiles, textiles, advanced materials, medical products and agriculture, despite explicit prohibitions in the WTO Agreement.

- China has repeatedly committed to review applications of agricultural biotechnology products in a timely, ongoing and science-based manner. However, the Chinese regulatory authorities continue to review applications slowly and without scientific rationale, while Chinese companies continue to build up their own capabilities in the area of agricultural biotechnology.

- China has repeatedly deployed illegal export restraints, such as export quotas, export licensing, minimum export prices, export duties and other restrictions, on scores of raw material inputs, as determined in multiple WTO cases brought by the United States and other WTO members. China has used these illegal export restraints to provide substantial cost advantages to a wide range of downstream producers in

China at the expense of foreign producers, while creating pressure on foreign producers to move their operations, technologies and jobs to China.

Any review of China's trade regime also shows that China's regulatory system is so opaque that it is often difficult for U.S. companies – or even the U.S. government – to fully understand China's legal requirements in a particular area of the economy. This problem is exacerbated by China's extremely poor record of adhering to its transparency obligations as a WTO member. These shortcomings create their own trade barriers and undermine the competiveness of China's trading partners.

To address the unique and very serious challenges presented by China's trade regime, the Administration is pursuing the following approach:

The United States will defend U.S. companies and workers from China's unfair trading practices and will seek to restore balance to the trade relationship between the United States and China. As part of these efforts, the United States will take all appropriate actions to ensure that the costs of China's non-market economic system are borne by China, not by the United States. The United States also will continue to encourage China to make fundamental structural changes to its approach to the economy and trade consistent with the open, market-oriented approach pursued by other WTO members, which is rooted in the principles of non-discrimination, market access, reciprocity, fairness and transparency. As China should recognize, these changes will do more than simply ease the growing trade tensions with its trading partners. These changes will also benefit China, by placing its economy on a more sustainable path, and will contribute to the growth of the U.S. economy and the global economy.

At its core, this approach is based on the following assessment: (1) WTO membership comes with expectations that an acceding member not only will strictly adhere to WTO rules, but also will support and pursue open, market-oriented policies; (2) China has failed to comply with these expectations; (3) in recent years, China has moved further away from open, market-oriented policies and has more fully embraced a state-led, mercantilist approach to the economy and trade; and (4) China's market-distorting policies and practices harm and disadvantage its fellow WTO members, even as China reaps enormous benefits from its WTO membership.

The United States' approach to China is more aggressive than in the past. Out of necessity, the United States is now using all available tools – including domestic trade remedies, bilateral negotiations, WTO litigation and strategic engagement with like-minded trading partners – to respond to the unique and very serious challenges presented by China. But the goal for the United States remains the same. The United States seeks a trade relationship with China that is fair, reciprocal and balanced.

PART 1

U.S. Assessment of China’s WTO Membership

OVERVIEW

The founding members of the WTO expressly embraced and endorsed the pursuit of open, market-oriented policies rooted in the principles of non-discrimination, market access, reciprocity, fairness and transparency. China voluntarily sought to join the membership of the WTO. Over the course of many years, China made representations that it was committed to increasing the market-orientation of its economy and trading system, reforming state-owned enterprises so that they operate independently and in accordance with market principles and introducing a pricing system that reflects supply and demand. When China acceded to the WTO in 2001, it voluntarily agreed to embrace the WTO's open-market-oriented approach and embed it in its trading system and institutions. Through China's commitments and representations, WTO members understood that China intended to dismantle existing state-led, mercantilist policies and practices, and they expected China to continue on its then-existing path of economic reform and successfully complete a transformation to a market-oriented economy and trade regime.

This did not happen. China became a WTO Member but did not internalize the open-market norms of the WTO community. China retains its non-market economic structure and its state-led, mercantilist approach to trade, to the detriment of its trading partners. At the same time, China has used the benefits of WTO membership – including its guarantee of open, non-discriminatory access to the markets of other WTO Members – to become the WTO's largest trader, while resisting calls for further liberalization of its trade regime by claiming to be a "developing" country.

There are tangible costs associated with China's substantial presence in the multilateral trading system. For example, as this report sets forth in detail, China's non-market economic system and the industrial policies that flow from it have systematically distorted critical sectors of the global economy such as steel and aluminum, devastating markets in the United States and other industrialized countries. In addition, China's industrial policies are increasingly responsible for displacing companies in new, emerging sectors of the global economy, as the Chinese government and the Chinese Communist Party powerfully intervene on behalf of China's domestic industries. Companies in economies disciplined by the market cannot effectively compete with both Chinese companies and the Chinese state. At the same time, China continues to block valuable sectors of its economy from foreign competition.

Last year, we reported that the United States had erred in supporting China's entry into the WTO on terms that have proven to be ineffective in securing China's embrace of an open, market-oriented approach to the economy and trade. The events of the past year have provided no reason to change this analysis. Indeed, it seems increasingly clear that China's actions have done severe harm to other WTO members and the multilateral trading system, which was never designed to deal with a non-market economy of China's size.

Faced with these challenges, the United States is committed to the defense of U.S. companies and workers from China's unfair trading practices and to the restoration of balance to the trade relationship between the United States and China. As part of these efforts, the United States will take all appropriate actions to ensure that the costs of China's non-market economic system are borne by China, not by the United States. The United States will also continue to encourage China to make fundamental structural changes to its approach to the economy and trade consistent with the open, market-oriented approach pursued by other WTO members, which is rooted in the principles of non-discrimination, market access, reciprocity, fairness and transparency. As China should recognize, these changes will do more than simply ease the growing trade tensions with its trading partners. These changes will also benefit China, by placing its economy on a more sustainable path, and will contribute to the growth of the U.S. economy and the global economy.

In the past year, the United States has taken decisive action under domestic law to address a particularly serious manifestation of China's state-led, mercantilist trade regime. At the direction of President Trump, under the authority of Section 301 of the Trade Act of 1974, USTR conducted a wide-ranging investigation into China's forcible transfer of technology. USTR concluded that China was responsible for: (1) pressuring the transfer of technology through the abuse of administrative processes and other means; (2) using discriminatory regulations to force non-market licensing outcomes for U.S. businesses; (3) leveraging state capital to acquire U.S. high-technology assets for transfer to Chinese companies in accordance with China's industrial policy objectives; and (4) obtaining U.S. intellectual property and sensitive business information through cyber theft for the commercial benefit of Chinese industry.

In response, the United States: (1) imposed duties on $250 billion dollars' worth of Chinese imports; and (2) initiated dispute settlement at the WTO challenging China's discriminatory technology licensing regulations. The United States also began implementing the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) to protect critical American technology and intellectual property from potentially harmful foreign acquisitions. In addition, the United States brought indictments against individuals engaging in cyber and physical theft of trade secrets for or on behalf of China.

Separately, the United States continues to defend U.S. trade remedy laws from attack by China in the WTO. These laws are critical to ensure that the costs associated with China's non-market policies and practices are not borne by U.S. companies and workers. The United States is working closely with the European Union (EU) to oppose China's unfounded WTO challenge against the use of non-market economy methodologies in antidumping proceedings.

The United States also seeks to work with trading partners that share our vision to take effective action to address market-distorting practices in China. We urge other WTO members to join us in this critical effort. Currently, the United States is working with the EU and Japan as part of a new high-level trilateral partnership to address directly the systemic distortions caused by China's non-market economic system. This partnership coordinates joint actions and examines potential rules where existing rules are ineffective.

As a result of these actions, it appears that China may have begun to take our concerns more seriously. During a meeting in Buenos Aries, Argentina, in December 2018, China's President Xi agreed with President Trump to begin negotiations on structural changes in China with respect to forced technology transfer, intellectual property protection, non-tariff barriers, cyber intrusions and cyber theft, services and agriculture.

One final point should be emphasized. As noted above, the market-based reforms that we seek in China will help not only the United States and China's other trading partners, but also China itself. Chinese businesses and entrepreneurs will benefit from reforms that encourage true market competition. Chinese innovators will benefit from reforms that protect intellectual property. Chinese consumers will benefit from reforms that allow improved access to high quality U.S. goods and services. Chinese workers will benefit from reforms that can lead to improved economic conditions and higher living standards, both in China and elsewhere. In short, by promoting market-based reforms the U.S. government hopes to build a stronger global economy for everyone's benefit.

In the sections that follow, we make the following assessments as we more closely analyze China's record as a WTO member: (1) WTO membership comes with expectations that an acceding member not only will strictly adhere to WTO rules, but also will support and pursue open, market-oriented policies; (2) China has failed to comply with these expectations; (3) in recent years, China has moved further away from open, market-oriented policies and has more fully embraced a state-led, mercantilist approach to the economy and trade; and (4) China's market-distorting policies and practices harm and disadvantage its fellow WTO members, even as China reaps enormous benefits from its WTO membership. We then discuss the bilateral and multilateral strategies pursued by the Administration and other WTO members to address the unique challenges presented by China's WTO membership. This discussion also highlights the need for new and more effective strategies – including taking actions outside the WTO where necessary – to address the problems presented by China's non-market economic system.

EXPECTATIONS OF WTO MEMBERSHIP

For all WTO members, the expectations of WTO membership are clearly set forth in the Marrakesh Declaration issued in April 1994 at the conclusion of the Uruguay Round negotiations. There, WTO members expressly affirmed their view that the establishment of the WTO ushers in a "new era of global economic cooperation" that "reflect[s] the widespread desire to operate in a fairer and more open multilateral trading system." WTO members further made clear their determination that their economies would participate in the international trading system based on both "open, market-oriented policies *and* the commitments set out in the Uruguay Round Agreements and Decisions." (Emphasis added.)

As this language makes clear, it clearly was not contemplated that any WTO member would reject market-based policies in favor of a state-led trade regime. It also was not contemplated that any WTO member would pursue mercantilist outcomes instead of policies promoting a fairer and more open multilateral trading system. Rather, it was expected that each WTO member would pursue open, market-oriented policies designed to achieve more efficient outcomes. The pursuit of open, market-oriented policies means not only strictly adhering to the agreed rules but also observing in good faith the fundamental principles that run throughout the many WTO agreements, which include non-discrimination, openness, reciprocity, fairness and transparency.

In the case of China, its protocol of accession to the WTO sets out China's obligations under the WTO agreements as well as numerous additional China-specific commitments made necessary because of China's incomplete transition to a market economy. China's protocol also reflects an understanding that China would need to, and had agreed to, transform its approach to the economy and trade. China itself acknowledged "the evolving nature of its economy," and it confirmed that at the time of China's accession to the WTO "a socialist market economy system was applied" in China. Similarly, WTO members highlighted that "China was continuing the process of transition towards a full market economy." WTO members also noted, for example, that "the special features of China's economy, in its present state of reform, still created the potential for a certain level of trade-distorting subsidization."

For these reasons, it was agreed that special safeguard-like provisions would be included among the terms of China's protocol of accession as protective measures while China completed its transformation into a market economy. For example, China's protocol of accession included a China-specific safeguard mechanism, special antidumping rules and special methodologies for identifying and measuring subsidy benefits. It also created a unique, 10-year review mechanism designed to monitor China's progress in implementing its many WTO commitments and to secure updated information on the use of industrial plans by China.

Unfortunately, China has a poor record when it comes to complying with WTO rules and observing the fundamental principles on which the WTO agreements are based. Too often, China flouts the rules to achieve industrial policy objectives. In addition, and of more serious concern to the United States and other WTO members, China has not made sufficient progress in transitioning toward a market economy. China continues to embrace a state-led, non-market and mercantilist approach to the economy and trade. This approach results in sophisticated and expansive policies and practices that often evade WTO disciplines and cause serious harm to markets, industries and workers in the United States and other WTO Members.

CHINA'S RECORD OF COMPLIANCE WITH WTO RULES

While China appeared to revise numerous laws and regulations to bring them into conformity with its WTO obligations in the first few years after its WTO accession, China's trade regime nevertheless generated many WTO compliance concerns. Too often, WTO members have had to resort to the WTO's dispute settlement mechanism to change problematic Chinese policies and practices. The United States, for example, has brought 23 challenges at the WTO against China covering a wide range of important policies and practices. Among other matters, these cases have taken on the following WTO-inconsistent activities pursued by China: (1) local content requirements in the automobile sector; (2) discriminatory taxes in the integrated circuit sector; (3) hundreds of prohibited subsidies in a wide range of manufacturing sectors; (4) inadequate intellectual property rights (IPR) enforcement in the copyright area; (5) significant market access barriers in copyright-intensive industries; (6) severe restrictions on foreign suppliers of financial information services; (7) export restraints on numerous raw materials; (8) a denial of market access for foreign suppliers of electronic payment services; (9) repeated abusive use of trade remedies; (10) excessive domestic support for key agricultural commodities; (11) the opaque and protectionist administration of tariff-rate quotas for key agricultural commodities; and (12) discriminatory regulations on technology licensing. Even though the United States has routinely prevailed in these WTO disputes, they take years to litigate, consume significant resources and often require further efforts when China resists complying with panel or Appellate Body rulings.

One conspicuous ongoing example of non-compliance involves electronic payment services. China still blocks major U.S. suppliers such as Visa and MasterCard from its market despite the fact that (1) it committed to open its market to foreign suppliers by 2006 and (2) a WTO dispute settlement panel confirmed this commitment in a case brought by the United States. As has become clear, China's industrial policy objective is to protect its national champion, China Union Pay, from competition in China so that it can use the revenues from a captive domestic market to fund its own global expansion. This non-market behavior, which is ongoing, harms U.S. companies and their workers.

China has been a particularly bad actor when it comes to trade remedies. While the use of trade remedies in a manner consistent with WTO rules is an important tool for protecting domestic industries from unfair and injurious trade practices, China has made a practice of launching antidumping (AD) and countervailing duty (CVD) investigations that appear designed to discourage its trading partners from the legitimate exercise of their rights under WTO rules. This type of retaliatory conduct is not typical of WTO members, nor is it a legitimate basis for seeking AD and CVD relief. Moreover, when China has pursued AD and CVD investigations under these circumstances, it appears that its regulatory authorities have tended to move forward with the imposition of duties regardless of the strength of the underlying legal claims and evidence. The United States' three successful WTO cases challenging the duties imposed by China on imports of U.S. grain-oriented electrical steel (GOES), U.S. chicken broiler products and U.S. automobiles offer telling examples of this problem. Indeed, China's poor behavior does not always stop after an adverse WTO ruling. In two of the three WTO cases brought by the United States on trade remedies, China did not comply with the WTO's rulings, and the United States was forced to bring Article 21.5 compliance proceedings to secure China's compliance.

China's retaliatory use of trade remedies highlights another unique issue that WTO members face when dealing with China – the threat of reprisal. It is no secret that foreign companies are hesitant to speak publicly, or to be perceived as working with their governments to challenge China's trade policies or practices, because they fear retaliation from the Chinese state. A study by one U.S. industry association noted that foreign companies confidentially have reported receiving explicit or implicit threats from Chinese government officials – typically made orally rather than in writing – about possible retaliatory actions that could have severe repercussions for a company's business prospects in China. At the same time, it also is no secret that China threatens more vulnerable WTO members to dissuade them from speaking publicly against China.

A further persistent problem is China's inadequate regulatory transparency. China disregards many of its WTO transparency obligations, which places its trading partners at a disadvantage and often serves as a cloak for China to conceal unfair trade policies and practices from scrutiny.

For example, for years, China failed to notify its fellow WTO members of any sub-central government subsidies, despite the fact that most subsidies in China emanate from provincial and local governments. In fact, it took China 15 years before it notified its first sub-central government subsidy, and even then its notification was confined largely to subsidies that China had terminated after the United States had challenged them in a WTO case. The magnitude and significance of this problem is illustrated by the five WTO cases that the United States has brought challenging prohibited subsidies maintained by China. While those cases involved hundreds of subsidies, most of the subsidies were provided by sub-central governments. The United States was able to bring those cases only because of its own extensive investigatory efforts to uncover China's opaque subsidization practices. Of course, most other WTO members lack the resources to conduct the same types of investigations.

Today, China continues to shield massive sub-central government subsidies from the scrutiny of WTO members. Together with other non-market practices, these subsidies contribute to the serious excess capacity problems that plague industries like steel, aluminum, solar panels and fishing and devastate global markets and foreign competitors. Industrial plans such as *Made in China 2025*, which reportedly targets 10 advanced manufacturing sectors in China with hundreds of billions of dollars in subsidies, inevitably will create a new wave of industries with severe excess capacity, to the detriment of China's trading partners.

China also conceals information about state trading enterprises. Since China's WTO accession in 2001, the United States and other WTO members repeatedly have sought information from China on the pricing and purchasing practices of state trading enterprises, principally through the transitional reviews at the WTO. However, China only provided general information, which did not allow a meaningful assessment of China's compliance efforts. China also did not make regular notifications of its state trading enterprises, as required by the General Agreement on Tariffs and Trade 1994 (GATT 1994). China submitted its first notification in 2003 and then stopped. China did not submit another notification until 2015, and it did so only because the United States had submitted a counter notification identifying 44 state trading enterprises not previously notified by China. Even so, China's 2015 notification did not include much of the detailed information envisioned by the GATT 1994's requirement.

In addition, China often frustrates the intended functioning of WTO committees and councils and other WTO bodies. These WTO bodies should provide a forum for monitoring a member's compliance with its WTO obligations and for discussing and resolving specific concerns that may arise. However, China does not have a record of taking this type of work seriously, and it frequently undercuts the utility of these consultative bodies.

One longstanding example involves the Transitional Review Mechanism, a special, China-specific mechanism established by China's protocol of accession. For the first ten years after China's accession, this mechanism called for review meetings before each of 16 WTO committees and councils. Throughout the 10-year life of this mechanism and the 16 review meetings that took place each year, China refused to respond to WTO members' written questions in writing in advance of relevant review meetings and confined its participation to oral statements, contrary to the agreed procedures. This behavior made it difficult for concerned members to ask probing follow-up questions and fully understand the policies and practices under review.

Similarly, in the Subsidies Committee, not only does China have a poor record of adhering to its notification obligations, but it also fails to cooperate when other members make requests for information pursuant to the rules in the Agreement on Subsidies and Countervailing Measures (Subsidies Agreement). For example, China repeatedly has failed to provide substantive answers to the United States' requests for information about China's subsidy practices. In addition, when the United States itself has submitted information identifying subsidies that China apparently has not reported, China regularly does not respond with any additional substantive information, contrary to the procedures envisioned by Subsidies Agreement rules.

Remarkably, China has still not completed its update to its Harmonized System (HS) 2002 tariff schedule. Although WTO members approved a final HS 2002 tariff schedule for China in March 2017 after 12 years of negotiation, China continues to withhold its schedule for certification, claiming that its domestic approval process, which so far has lasted 18 months, is not yet completed. China has not even begun the process of certifying its HS 2007, HS 2012 and HS 2017 tariff schedules. Accordingly, WTO members today do not have accurate, current information on all of China's tariff schedules and tariff bindings.

When China does take the initiative to engage in WTO bodies, it typically is not seeking to find ways to further liberalize trade. Too often, China is seeking to move in the opposite direction. In the WTO's Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS Council), for example, China has pursued discussion topics or has backed proposed amendments to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) that would weaken the obligations that members took on in the TRIPS Agreement.

For years, the United States has urged China to change the behaviors described above and become a responsible member of the WTO. In the future, the United States will continue this effort. The United States also will continue to use the WTO dispute settlement mechanism as an enforcement tool as appropriate and will continue working through WTO committees and councils and other WTO bodies to seek effective actions to curb problematic Chinese policies and practices.

However, it is unrealistic to believe that actions at the WTO alone would ever be sufficient to force or persuade China to make fundamental changes to its trade regime. The WTO system was designed for countries that are truly committed to market principles – not for an enormous country determined to maintain a state-led, non-market system. No matter how many cases are brought at the WTO, China can always find a way to engage in market-distorting practices. Furthermore, as we discuss below, given the extent to which China has benefited from the current state of affairs, it is not likely to agree to effective new WTO disciplines on its behavior. Given these facts, it seems clear that relying solely on the WTO and its mechanisms to address China's unfair trade practices is a recipe for failure. Accordingly, while the United States will use the WTO where possible – and will continue efforts to encourage other countries to work with us at the WTO – the United States must also take action outside the WTO to encourage China to move in a more open and market-oriented direction.

CHINA'S RECORD IN TERMS OF ITS TRANSITION TO A MARKET ECONOMY

Today, almost two decades after China pledged to support the WTO's multilateral trading system, China has not embraced open, market-oriented policies. The state remains in control of China's economy, and it heavily intervenes in the market to achieve industrial policy objectives.

China pursues a wide array of continually evolving interventionist policies and practices aimed at limiting market access for imported goods and services and restricting the ability of foreign manufacturers and services suppliers to do business in China. At the same time, it offers substantial government guidance, resources and regulatory support to Chinese industries. The principal beneficiaries of China's policies and practices are China's state-owned enterprises and numerous other significant domestic companies, sometimes referred to as "national champions," that are attempting to move up the economic value chain.

The benefits that Chinese industry realizes largely come at the expense of China's trading partners and their companies and workers. As a result of China's industrial policies, markets all over the world are less efficient than they should be, and the playing field is heavily skewed against foreign companies that seek to compete against Chinese companies, whether in China's market or markets outside of China.

This situation has worsened in recent years. While some of the legislative and regulatory changes that China made in the years immediately following its WTO accession offered the potential for China's fuller embrace of market principles, these efforts stalled and stagnated. Since new leaders assumed power in China in 2013, the state's role in the economy – effectuated by the Chinese government and, increasingly, the Chinese Communist Party – has grown. Similarly, the depth and breadth of concerns facing U.S. and other foreign companies doing business in China – or competing with favored Chinese companies markets outside of China – also have increased.

Despite this reality, China repeatedly signals that it is pursuing what it calls "economic reform." For example, in November 2013, at the Third Plenary Session of the 18th Central Committee of the Chinese Communist Party, China issued a number of seemingly favorable pronouncements, including calling for making the market "decisive" in allocating resources and reducing Chinese government intervention in the economy. More recently, in May 2018, China reminded WTO members at a General Council meeting that 2018 marks the 40th anniversary of China's self-described "reform and opening up" policy. However, China's use of the term "economic reform" differs from the type of change that a country would be pursuing if it were embracing open, market-oriented principles. For China, "economic reform" appears to mean perfecting the management of the economy by the Chinese government and the Chinese Communist Party and strengthening the state sector, particularly state-owned enterprises.

China's Non-market Economic System

To fully appreciate the challenges presented by China's non-market economy, it is vital to understand the extent to which – almost two decades after China joined the WTO – the Chinese state still maintains control over economic decision-making in that country. A thorough examination of

China's Constitution, relevant directives and pronouncements by China's leadership, legislative and regulatory measures issued by the Chinese government, China's industrial plans and the actions of the Chinese government and the Chinese Communist Party leaves no doubt that the Chinese state maintains a tight grip on virtually all economic activity.

At its core, the framework of China's economy is set by the Chinese government and the Chinese Communist Party, which exercise control directly and indirectly over the allocation of resources through instruments such as government ownership and control of key economic actors and innumerable government directives. The government and the Party have constitutional mandates to develop a "socialist market economy with Chinese characteristics." Article 6 of the Constitution of the People's Republic of China provides that, "[i]n the primary stage of socialism, the state upholds the basic economic system in which public ownership is dominant and diverse forms of ownership develop side by side . . . ." Article 7 provides that "[t]he state-owned economy, that is, the socialist economy with ownership by the whole people, is the leading force in the national economy. The state ensures the consolidation and development of the state-owned economy." Similarly, the Constitution of the Chinese Communist Party provides: "The Communist Party of China leads the people in developing the socialist market economy. It unwaveringly consolidates and develops the public sector of the economy and unswervingly encourages, supports and guides the development of the non-public sector."

To fulfill these mandates, the government and the Party direct and channel economic actors to meet the state's planning targets. The government and the Party permit market forces to operate only to the extent that they accord with the objectives of national economic and industrial policies. When there is conflict between market outcomes and state objectives, the government and the Party intervene to ensure that the state's objectives prevail.

This past year, China indicated that it has no plans to significantly change its basic approach to the economy. As China explained in the report that it circulated in connection with its July 2018 trade policy review at the WTO, "[w]hile socialism with Chinese characteristics has entered a new era, the basic dimension of the Chinese context – that China is still and will long remain in the primary stage of socialism – has not changed." China added that it is committed to a "socialist market economy" and to improving "the relationship between the government and the market." In China's view, an improved relationship appears to mean that the state plays its role better in managing the economy, not that the state ceases to intervene and allows market forces to determine outcomes.

Aside from the role of the government and the Party in managing the economy, there are also serious concerns over how they exercise influence over the operations and investment decisions of both state-owned enterprises and private companies, including foreign-invested enterprises. This influence appears to be growing, as the Party is increasing its control over key actors in China's economy and not, as hoped, enabling China's transition to a market economy.

China claims that its state-owned enterprises make business decisions independently of the state and based on market principles. However, the government and the Party continue to exercise control over state-owned enterprises. Among other things, they appoint and control key executives through the Chinese Communist Party Organization Department. They also provide state-owned enterprises with preferential access to important inputs (such as land and capital) and other competitive advantages unavailable to non-state-owned companies. State-owned enterprises, in turn, play an outsized role in China's economy. For example, state-owned enterprises outstrip private Chinese companies in terms of their share of total credit, their market dominance in key industries and their share of total market capitalization on China's stock market.

At the 2017 Central Economic Work Conference, a high-level annual meeting on economic policy, China's leaders made clear the importance of state-owned enterprises. They stated that one of six priorities for China's economy in 2018 was to promote stronger, better and bigger state-owned enterprises, and they explained that the means for achieving this priority was to strengthen Party leadership and Party infrastructure in state-owned enterprises.

Indeed, both state-owned enterprises and private Chinese companies host internal Party committees capable of exercising government and Party influence over their corporate governance and business decisions. This arrangement is actually codified in Chinese law under Article 19 of the *Company Law*, which applies to both state-owned enterprises and private Chinese companies. Recently, moreover, the Party has taken further steps to increase the strength and presence of Party committees within all of these companies. As part of these Party building activities, state-owned enterprises and private Chinese companies are being pressured to amend their articles of association to ensure Party representation on their boards of directors, usually as the Chairman of the Board, and to ensure that important company decisions are made in consultation with Party committees.

Recent reports indicate that the Party also is now looking to influence the managerial and investment decisions of foreign-invested enterprises in China through the insertion of Party committees. The Federation of German Industries stated in its 2019 Policy Paper: "The direct influence of the state or the party in corporate decisions is being expanded through a political upgrading of party cells. These intervene not only in the decision-making processes of state-owned enterprises but also in joint ventures and private enterprises." This warning follows a statement by the Delegations of Germany Industry and Commerce in November 2017 pushing back against attempts by the Party to strengthen its influence in wholly German-owned companies in China. In November 2017, the European Union Chamber of Commerce in China expressed similar concerns. It noted that China's efforts to codify Party influence in joint ventures between Chinese companies and foreign companies significantly changes the joint venture's governance and undermines the authority of the joint venture's board of directors. The Chamber of Commerce added that it is unaware of any legal basis for the insertion of Party committees into joint ventures.

Further reinforcing the Party's influence is the *Social Credit System*, a new tool endorsed by the Party that the government will be using to monitor, rate and condition not only the conduct of all individuals in China, but also all domestic and foreign companies in China. This system is expected to become fully operational in 2020. While details are still emerging, it appears that the government will use the *Social Credit System*, among other things, to ensure that economic actors follow industrial plans.

Separate from these various mechanisms used to control company behavior, the government and the Party continue to control or otherwise influence the prices of key factors of production. The result is that the means of production in China are not sufficiently allocated or priced according to market principles.

For example, all land in China is property of the state, as either state-owned urban land or collectively owned rural land. Because the state controls rural land acquisition and monopolizes the distribution of urban land-use rights, the state remains the final arbiter of who uses the land and for what purpose. Land-use rights holders, in turn, face limits with respect to the tenure and the scope of use. The result of these dynamics is an inefficient land market in which large swathes of land are misallocated either to small farm plots or to underutilized urban infrastructure.

In addition, there are significant institutional constraints on the extent to which wage rates are determined through free bargaining between labor and management. China denies workers the right of association and the right to organize and collectively bargain. China prohibits the formation of independent trade unions to represent workers, and workers do not have the legal right to strike, which is an important lever in collective action and negotiation with management over wages in market economies. Labor unions in China are under the control and direction of the All-China Federation of Trade Unions (ACFTU), a government-affiliated and Party organ. While China has implemented legislation such as the *Labor Contract Law* and the *Labor Dispute Law* that appears to provide employees with a cause of action to challenge particular aspects of an employee's labor contract, these laws in reality do not advance the fundamental rights of freedom of association and collective bargaining. In addition, government restrictions on labor mobility continue to inhibit and guide labor flows, causing distortions on the supply side of the labor market.

The state also exerts a high degree of control over energy and other input prices. In the electricity sector, for example, the government owns the largest power generation and grid operating companies, controls downstream prices and employs differential pricing as a policy tool to achieve capacity shedding and other industrial policy objectives.

The influence of the government and the Party is particularly acute in the financial sector. Five large commercial banks that are majority state-owned operate large branch networks on a nationwide basis and account for nearly half of total bank assets. There are also three large state-owned policy banks, as well as scores of city commercial banks and credit unions under local government control. In addition to the ownership of these banks by the government, the state exercises other forms of influence over banking decisions. The Party, through its Organization Department, appoints executives in state-owned banks and other state-owned financial institutions. China's central bank, the People's Bank of China (PBOC), also meets frequently with large banks in China to ensure that their lending decisions align with PBOC and government objectives. In addition, the *Law on Commercial Banks* provides that "commercial banks are to conduct their business of lending in accordance with the needs of national economic and social development and under the guidance of the industrial policies of the state."

Similarly, China's legal system continues to function as an instrument by which the government and the Party can secure discrete economic outcomes, channel broader economic policy and pursue industrial policy objectives. Key legal institutions, such as the courts, are structured to respond to the Party's direction, both broadly and on a case-specific basis. As a general matter, to the extent that companies and individuals seek to act independently of government or Party direction, the legal system does not provide a venue for them to achieve these objectives on a systemic or consistent basis. In addition, companies and individuals continue to face challenges in obtaining impartial outcomes, either because of local protectionism or corruption.

The larger issue of China's restrictions on the freedom of information also impacts China's economic system. For example, while China's Internet firewall and the Party's regular censorship of audio-visual and print media have many negative effects outside China's economic system, they also create distortions in China's economy, and these distortions affect the ability of foreign companies to operate and compete effectively in China's market.

In recent years, China also has been exporting its non-market economic model to other countries through its *Belt and Road Initiative*. As is now well known, China invokes this initiative and offers to build large infrastructure projects in countries throughout Asia and other parts of the world, especially in strategically located or developing countries. China claims that the *Belt and Road Initiative* is open to all, but virtually all projects are financed by Chinese banks, run by Chinese state-owned enterprises and built by Chinese workers.

The *Belt and Road Initiative* is especially important to the Chinese Communist Party, which has incorporated the *Belt and Road Initiative* into its Constitution and has called for using this initiative to develop relations with surrounding countries through discussion, collaboration and unity. However, *Belt and Road Initiative* projects are often opaque, one-sided and divisive. These projects generally ignore market principles and fail to adhere to internationally accepted best practices in financing, infrastructure development and government procurement. Too often, these projects also create unsustainable debt burdens for the recipient countries.

China's State-led, Mercantilist Approach to Trade

In China's economic framework, state planning through industrial policies conveys the state's instructions regarding sector-specific economic and trade objectives. While some sectors are deemed strategic and fundamental and therefore receive more attention and resources, no sector of the economy escapes the oversight of the government and the Party.

China is currently in its 13th five-year planning cycle, a hallmark of a planned economy that has become more, not less, salient over the past 18 years of China's WTO membership. China retains formal mechanisms of plan formulation, tasking and review, and over the years it has expanded the scope and specificity of its industrial plans, which span all sectors of China's economy. Various institutions participate in plan formulation and execution, including central government bodies with legislative and regulatory authority, thousands of local government authorities, various organs of the Party and key Chinese companies.

As one example, a number of official publications of the government and the Party set out China's ambitious technology-related industrial policies. The industrial policies reflect a top-down, state-directed approach to technology development, and are founded on concepts such as "indigenous innovation" and "re-innovation" of foreign technologies. The government and the Party regard technology development as integral to the economic development of Chinese industry and seek to attain its domestic dominance and global leadership in a wide range of technologies. In pursuit of these overarching objectives, China has issued a large number of industrial policies, including, among many others, the *National Medium- and Long-Term Science and Technology Development Plan Outline (2006-2020)* in 2005, the *Decision on Accelerating and Cultivating the Development of Strategic Emerging Industries* in 2010 and the *Made in China 2025* industrial plan, launched in 2015.

Increasingly, China also has used new types of state-controlled financial institutions, such as the National Integrated Circuit Fund, to implement its industrial policies. This fund for the integrated circuit industry was established under the guidance of two government ministries and funded by several prominent state-owned enterprises and state-owned financial institutions. The objectives are to achieve breakthroughs in cutting-edge core technologies and to establish "secure and controllable" information technology systems. Unfortunately, "secure and controllable" is a euphemism used for excluding foreign products and services from many sectors of China's economy.

When compared to the industrial policies of other WTO members, China's industrial policies are fundamentally different. In several significant ways, China's industrial policies go well beyond traditional approaches to guiding and supporting domestic industries.

First, adherence to the objectives of China's industrial policies is effectively mandatory. Chinese companies have little discretion to ignore them, even when market forces would dictate different commercial behavior.

Second, the financial support that the state provides to domestic industries in support of China's industrial policies is significantly larger than in other countries, and it is not limited to funding for research and development. The state also provides massive, market-distorting financial support to the ongoing operations of China's domestic industries. This support often leads to severe excess capacity in China – followed by China's widespread dumping of the inevitable excess production into the markets of other WTO members. This assault on global markets can cause serious harm to other WTO members' industries and workers. The WTO does not provide effective mechanisms for addressing this problem.

Third, China actively seeks to help its domestic producers through myriad additional policies and practices that impede, disadvantage and harm the foreign competition and skew the playing field against imported goods and services and foreign manufacturers and services suppliers. For example:

- China seeks to manage the export of many primary, intermediate and downstream products by strategically raising or lowering the value-added tax (VAT) rebate available upon export, typically with the objective of making large quantities of primary and intermediate products in a particular sector available domestically at lower prices than in the rest of the world. This practice gives China's downstream producers using these inputs a significant competitive advantage over foreign producers.

- China employs extensive and varied market access prohibitions and limitations designed to protect domestic manufacturers and services suppliers from competition in many sectors of China's market.

- China employs investment restrictions designed to protect domestic manufacturers and services suppliers from foreign competitors and to encourage technology transfer.

- China imposes unique national standards strategically, both to promote the dominance of China's market by Chinese companies and to serve the interests of Chinese companies seeking to compete globally.

- China pursues forced technology transfer through joint venture requirements and administrative approval processes.

- State-sponsored, cyber-enabled theft of intellectual property, trade secrets and know-how is conducted for the commercial benefit of Chinese companies.

- China continues to insist upon a large role for state-owned enterprises, and accords them numerous competitive preferences, to the detriment of foreign companies, both in China's market and abroad.

- Chinese government officials routinely intervene on an *ad hoc* basis when market-based outcomes conflict with China's industrial policy objectives.

- China conditions subsidies, regulatory preferences and government procurement preferences on the localization of technology in China.

- China uses competition law enforcement to achieve industrial policy objectives.

- China uses cybersecurity as a pretext to discriminate against foreign information communications technology (ICT) products and services and to promote the substitution of domestic ICT products and services in sectors throughout the Chinese economy.

- As described above, China inserts Party committees into Chinese companies and, increasingly, foreign companies operating in China, with the objective of ensuring that important company decisions are made in accordance with government policy objectives.

- The Party has effective authority to determine the result of legal challenges in China's courts as necessary in order to achieve the state's industrial policy objectives.

- China's regulatory regime in many respects remains opaque, which enables the government to pursue other problematic policies and practices that are difficult to uncover.

When combined with China's large size and large share of global trade, these policies and practices transform China into a unique and pressing problem for the WTO and the multilateral trading system.

Meanwhile, new mechanisms to maintain and enhance the state's control over the economy continue to emerge. For example:

- China is beginning to deploy cross-border data restrictions and data localization requirements that will severely limit how foreign companies can do business in China.

- As described above, China is developing its new *Social Credit System*, which apparently will be used to monitor, rate and condition the conduct of all companies in China, including foreign companies, and to ensure that all companies operate in accordance with China's industrial policy objectives.

COSTS OF CHINA'S ECONOMIC SYSTEM TO WTO MEMBERS

There are many ways in which China's approach to the economy and trade harms its trading partners and their industries and workers. Some of these examples are described in more detail below.

Forced Technology Transfer

Last year, as part of its Section 301 investigation, USTR issued two detailed factual reports that illustrate how China has pursued unreasonable and discriminatory acts, policies and practices that harm U.S. intellectual property rights, innovation and technology development. The first report was issued in March 2018, and the second report was issued in November 2018.

The March 2018 report highlighted industrial plans like *Made in China 2025* and detailed how the Chinese government uses foreign ownership restrictions, such as formal and informal joint venture requirements, to require or pressure technology transfer from U.S. companies to Chinese entities. The report also explained how China imposes substantial restrictions on, and intervenes in, U.S. companies' investments and activities, including through restrictions on technology licensing terms. In addition, the report analyzed how the Chinese government directs and unfairly facilitates the systematic investment in, and acquisition of, U.S. companies and assets by Chinese entities to obtain cutting-edge technologies and intellectual property and to generate large-scale technology transfer in industries deemed important by state industrial plans. Finally, the report illustrated how the Chinese government has conducted or supported cyber intrusions into U.S. commercial networks, with the targets being intellectual property and sensitive commercial information held by U.S. firms.

In the November 2018 report, USTR reviewed developments over the preceding several months and examined, in particular, whether China had responded constructively to USTR's March 2018 report. The second report found that China had not fundamentally altered the unfair, unreasonable and market-distorting policies and practices that were the subject of the first report.

While these reports focused on the harm caused to U.S. interests, it is not a problem borne solely by the United States. China's unfair acts, policies and practices relating to forced technology transfer also impact other WTO members whose companies have developed or are developing advanced technologies.

Excess Capacity

One significant result of China's non-market economic system is the creation of excess capacity – that is, capacity that would not persist if market forces were operating properly. Excess capacity is a sign that resources are not being allocated in an efficient manner. According to a 2016 report by the European Union Chamber of Commerce, key recurring factors in the creation of excess capacity in China include the protection of local industries, weak enforcement of regulations, price controls for significant inputs and fiscal imbalances that create a perverse incentive to attract excessive investment.

Even though the state's management of the economy largely is responsible for excess capacity in China, the state often uses excess capacity as an excuse for further government control. For example, in 2017, the Chinese government issued guiding measures to reduce severe excess capacity in the steel and coal industries. These measures essentially endorse China's so-called "supply-side structural reform" initiative as the solution – even though that initiative calls for further state intervention and financial support, rather than a fuller embrace of market-based principles. Unsurprisingly, these measures have proven to be ineffective.

Excess capacity in China harms U.S. interests and the interests of other WTO members in numerous ways. First, it leads to injury in the markets of China's trading partners due to direct exports of excess production from China. Many WTO members, including Canada, Australia, India and the EU, have responded to the trade-distortive effects of China's excess capacity by imposing trade remedies such as antidumping and countervailing duties in response to petitions from their domestic industries. Second, excess capacity in China hurts the global economy because lower global prices and a glut of supply make it difficult for even the most competitive producers outside China to remain viable. For example, China's excess capacity in solar panels was a key reason why U.S. imports of solar cells and modules from China increased by 500 percent from 2012 to 2016, while prices for solar cells and modules fell by 60 percent. Conditions deteriorated to a point where most U.S. producers ceased domestic production, moved their facilities to other countries or declared bankruptcy. By 2017, the U.S. solar manufacturing industry had almost disappeared, with 25 companies closing since 2012. Similar effects were felt in the EU, which also used to be a world leader in the solar sector. These facts led the United States to impose safeguard measures on imports of solar cells and modules in early 2018.

China today is the primary cause of excess capacity in a number of key sectors of the global economy. For example, China's large increases in steel capacity since it joined the WTO in 2001 have led to extraordinary increases in steel production. China's steel capacity rose from 160 million metric tons (MT) in 2001 to 1,048 million MT in 2017. Correspondingly, China's annual steel production rose from 151 million MT in 2001 to 832 million MT in 2017, by far the largest in the world. China's steel industry now accounts for about 50 percent of global steel capacity and global steel production. Because China had created a global crisis in steel, the United States was forced to adopt a global response, in the form of tariffs under Section 232 of the Trade Expansion Act of 1962.

In its *Guiding Opinions on Resolving the Conflict of Serious Overcapacity*, issued in 2013, China itself acknowledged excess capacity in several industries, including steel, cement, electrolytic aluminum, flat glass and shipbuilding. Examples of numerous other excess capacity industries are discussed in a 2016 study issued by the European Union Chamber of Commerce in China entitled "Overcapacity in China: An Impediment to the Party's Reform Agenda." Remarkably, however, no practical steps were taken to address this problem until the United States acted to insulate critical industries like steel and aluminum from the harmful effects of global oversupply.

Looking ahead, some of the Chinese industries most likely to inflict the disastrous consequences of severe excess capacity on the world in the future can be found in the *Made in China 2025* industrial plan. Through that industrial plan, the Chinese government is seeking to create dominant companies in 10 advanced manufacturing sectors, which include advanced information technology, robotics and automated machine tools, aircraft and aircraft components, maritime vessels and marine engineering equipment, advanced rail equipment, new energy vehicles, electrical generation and transmission equipment, agricultural machinery, new materials and pharmaceuticals and medical devices. By some estimates, the Chinese government is making available more than $500 billion of financial support to these sectors, both through *Made in China 2025* and related industrial plans. Based on the recent history of the steel and aluminum industries, China's non-market distortions in these newer sectors will likely result in oversupply, leading to loss of jobs and production in market economies.

Distorted Markets

Even in the absence of forced technology transfer or severe excess capacity, China's non-market economic system causes serious harm to industries and workers in the United States and other WTO members. This harm occurs because Chinese companies use the artificial competitive advantages provided to them by the interventionist policies and practices of the Chinese state to undersell their foreign competition.

The extent of this harm to foreign manufacturers is reflected in the very large number of antidumping and countervailing duty investigations that have been initiated against China by the investigating authorities of WTO members. Since China joined the WTO in 2001, it has been the number one target of WTO members' investigating authorities for both antidumping and countervailing duty investigations. Since 2001, WTO members have initiated 1,268 antidumping investigations of exports from China. No other country has faced even one third as many antidumping investigations during that time.

One key reason why exports from China are subject so often to investigations by other WTO members' antidumping authorities is China's economic system, which is fundamentally different from the open, market-oriented economic systems found in other WTO members. When a sectoral industrial plan directs China's domestic companies to produce certain types of products or products in certain quantities or allocates billions of dollars of financial support to manufacture advanced, new products, price distortions are inevitable.

The relationships that a government tolerates among domestic businesses also can create market distortions. For example, when a government tolerates conduct that leads to widespread, competition-inhibiting behavior or cross-subsidization among companies in a domestic industry (as in Chinese industries dominated by state-owned enterprises), it can provide the domestic companies with unfair advantages over their foreign counterparts.

BENEFITS OF WTO MEMBERSHIP TO CHINA

China has not transformed its economic system to embrace open, market-oriented principles, nor has it abandoned its state-led, mercantilist trade regime in favor of a cooperative approach that promotes a multilateral trading system that is more fair and more open. Nevertheless, China has used WTO membership to develop rapidly.

In 2001, when China acceded to the WTO, China's economy was the sixth largest in the world. Today, China's economy is now four times larger than it was in 2001. Overall, China is now the largest goods trader among WTO members, accounting for almost 14 percent of total global exports and almost 11 percent of total global imports in 2017.

In 2001, China was the world's sixth-largest goods exporter. By 2013, it ranked number one, and it currently exports about the same value of goods as all of North America combined. In terms of goods imports, China was the world's sixth largest importer in 2001, and today it is the second largest importer in the world.

In short, there can be no doubt that China has benefited enormously from its WTO membership even though, as shown throughout this report, China has not sought to transform its economic system or its trade regime as had been expected, and it has never fully complied with WTO rules.

Exacerbating this unfortunate situation is the fact that China also has generally refused to take on more responsibilities at the WTO. Instead, China claims that it is a "developing" country, and it uses that claim to justify maintaining policies and practices that protect its domestic industries. However, China's claim of developing country status is disingenuous and inconsistent with the terms of its Protocol of Accession to the WTO.

When China joined the WTO more than 17 years ago, WTO members made clear that they did not consider China to be a developing country. At that time, members of the Working Party on China questioned China's claim to be a developing country and expressly denied China's right to self-elect developing country status under several WTO agreements. China's Protocol of Accession expressly took away the right of China to self-elect developing country status under the Subsidies Agreement, the Customs Valuation Agreement, the Agreement on Trade-Related Investment Measures, the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement). Most of the remaining WTO agreements either do not have a right of self-election, or the decision whether or not to accord China developing country status is left to another WTO member's investigating authorities, as in the case of the Antidumping Agreement.

In 2001, when China acceded to the WTO, the facts supported the approach taken by WTO members to deny China developing country status. As explained above, the facts continue to support that approach today.

U.S. EFFORTS TO ADDRESS TRADE DISTORTIONS CAUSED BY CHINA

As China's role in global trade has grown, its non-market economic system and state-led, mercantilist trade regime increasingly have disrupted international trade to the detriment of the United States and other WTO members. Rather than allow this harm to continue, the United States has pursued both bilateral and multilateral mechanisms in response. Through these efforts, the United States has sought to encourage China to fundamentally change its approach to the economy and trade. Over the past year, the United States also has taken corrective actions to limit the adverse effects of China's harmful practices. These efforts are described in more detail below.

Bilateral Engagement

Since China's accession to the WTO, the United States has repeatedly tried to work with China in a cooperative manner. Through many years of intensive, high-level dialogues, the United States urged China to pursue market-based policies and practices and to become a more responsible member of the WTO. As detailed in last year's report, these efforts largely failed because the Chinese government and the Chinese Communist

Party were not sufficiently committed to adopting a true market economy or taking on a more responsible role at the WTO.

The United States has pursued various formal, high-level dialogues with China over the years, including previous dialogues like the U.S.-China Joint Commission on Commerce and Trade (JCCT), the U.S.-China Strategic Economic Dialogue (SED) and the U.S.-China Strategic and Economic Dialogue (S&ED) and a new dialogue known as the U.S.-China Comprehensive Economic Dialogue (CED), which was launched under this Administration in April 2017. While the United States approached these dialogues in good faith and put a great deal of effort into them, they only achieved isolated, incremental progress. At times, the United States did secure broad commitments from China for fundamental shifts in the direction of Chinese policies and practices, but China repeatedly failed to follow through on those commitments.

For example, at the 2010 S&ED meeting, the 2012 S&ED meeting, the 2012 summit meeting between President Obama and President Xi and the 2014 JCCT meeting, China committed that foreign companies are free to base technology transfer decisions on business and market considerations and to independently negotiate and decide whether and under what circumstances to assign or license intellectual property rights to affiliated or unaffiliated enterprises. But China did not follow through on these commitments. China's regulatory authorities do not allow U.S. companies to make their own decisions about technology transfer and the assignment or licensing of intellectual property rights. Instead, they continue to require or pressure foreign companies to transfer technology as a condition for securing investment or other approvals.

In short, while China has sometimes shown a willingness to take modest steps to address isolated issues, it has consistently failed to follow through on significant commitments or to make fundamental changes to its trade regime.

With these dialogues proving to be largely ineffective, in August 2017, in response to direction from President Trump, USTR initiated an investigation under Section 301 of the Trade Act of 1974 to address and limit the adverse effects of certain state-led, mercantilist and non-market policies and practices of the Chinese government. Specifically, this investigation was initiated to focus on policies and practices related to technology transfer, intellectual property and innovation.

Subsequently, when President Trump met with President Xi in Beijing in November 2017, four months after the CED meeting, the U.S. side explained that the United States had no interest in dialogues that go nowhere. The U.S. side also made clear that it was incumbent upon China to take action, not make more promises, and reiterated that the core problem with China's approach to trade lies in the state-led, mercantilist industrial policies that have continued to dominate China's non-market economy.

In March 2018, after a thorough review and analysis of the evidence, USTR issued a detailed report of its findings in the Section 301 investigation. With regard to each of the four categories of policies and practices under investigation, USTR found that China had engaged in a range of unfair and harmful conduct.

First, USTR found that China uses foreign ownership restrictions, including joint venture requirements, equity limitations and other investment restrictions, to require or pressure technology transfer from U.S. companies to Chinese entities. USTR also found that China uses administrative review and licensing procedures to require or pressure technology transfer, which, *inter alia*, undermines the value of U.S. investments and technology and weakens the global competitiveness of U.S. firms.

Second, USTR found that China imposes substantial restrictions on, and intervenes in, U.S. companies' investments and activities, including through restrictions on technology licensing terms. These restrictions deprive U.S. technology owners of the ability to bargain and set market-based terms for technology transfer. As a result, U.S. companies seeking to license technologies must do so on terms that unfairly favor Chinese recipients.

Third, USTR found that China directs and facilitates the systematic investment in, and acquisition of, U.S. companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property and to generate large-scale technology transfer in industries deemed important by Chinese government industrial plans.

Fourth, USTR found that China conducts and supports unauthorized intrusions into, and theft from, the computer networks of U.S. companies. These actions provide the Chinese government with unauthorized access to intellectual property, including trade secrets, and confidential business information, such as technical data, negotiating positions and sensitive and proprietary internal business communications. The purpose of these actions is to support China's strategic development goals, including its science and technology advancement, military modernization and economic development.

Based on these findings, the President instructed the U.S. Trade Representative to pursue a dispute settlement case at the WTO to address certain discriminatory technology licensing measures maintained by China. This case was launched in March 2018, and the proceedings are ongoing.

The President also instructed the U.S. Trade Representative to impose an additional tariff of 25 percent on approximately $50 billion worth of Chinese imports containing industrially significant technologies, including those related to China's *Made in China 2025* industrial plan. These additional tariffs were imposed in two tranches, with $34 billion becoming effective in July 2018 and a further $16 billion becoming effective in August 2018. In a supplemental action under Section 301, following China's imposition of retaliatory tariffs, the U.S. Trade Representative imposed additional tariffs on a further $200 billion in Chinese imports, with the rate set at 10 percent effective in September 2018 and originally scheduled to rise to 25 percent in January 2019.

Finally, the President instructed the Secretary of the Treasury to address concerns about investment in the United States directed or facilitated by China in industries or technologies deemed important to the United States. Subsequently, in August 2018, FIRRMA was signed into law by the President. FIRRMA modernizes the tools for protecting the United States' critical technologies from harmful foreign acquisitions. It also strengthens the existing mechanism – administered by the Committee on Foreign Investment in the United States (CFIUS) – for reviewing foreign investment in the United States for national security purposes and establishes a process for identifying emerging and foundational technologies that should be added to existing U.S. export controls. The Administration is now implementing this legislation with a view toward addressing the concerns regarding state-directed investment in critical technologies identified in the Section 301 investigation.

The Section 301 investigation and remedies prompted numerous high-level discussions between the United States and China. In May 2018, the United States proposed specific structural changes for China to become more open and market-oriented. These structural changes included actions not only in the area of forced technology transfer, but also in areas such as trade deficit reduction, tariffs, non-tariff barriers, intellectual property rights protection and enforcement, services market access and agricultural market access, among other areas.

China did not take any of the actions called for by the United States, nor did it commit that it would take any of those actions in the future. China did offer to make minor changes and modest increases in its purchases of U.S. goods and services, but even this offer was heavily conditioned. Accordingly, the United States continued to pressure China to make more significant structural changes.

On December 1, 2018, President Trump and China's President Xi met in Buenos Aires, Argentina, following a meeting of the G20 leaders. At the Presidents' meeting, it was agreed that the United States would suspend raising the tariff rate from 10 percent to 25 percent on $200 billion of Chinese goods, while the two sides engaged in negotiations for 90 days on the structural changes needed in China's trade regime and discussed China's additional purchases of U.S. goods and services. Absent a resolution within 90 days, the United States indicated that the 10 percent tariff rate would be raised to 25 percent on March 2, 2019. These discussions are ongoing.

WTO Dispute Settlement

The United States has actively pursued WTO dispute settlement cases involving China. To date, the United States has brought 23 WTO cases against China and has routinely prevailed in these disputes. However, the dispute settlement mechanism is of only limited value in addressing a situation where a WTO member is dedicated to a state-led trade regime that prevails over market forces. The WTO's dispute settlement mechanism is designed to address good faith disputes in which one member believes that another member has adopted a measure or taken an action that breaches a WTO obligation. This mechanism is not designed to address a trade regime that broadly conflicts with the fundamental underpinnings of the WTO system. No amount of WTO dispute settlement by other WTO members would be sufficient to remedy this systemic problem. Indeed, many of the most harmful policies and practices being pursued by China are not even directly disciplined by WTO rules.

Under these circumstances, it is striking that China has recently indicated its support for proposals that would give more power to the WTO's Appellate Body. In other words, China has apparently concluded that the Appellate Body is more likely to protect China's non-market economic system than to pressure China to change that system. From this perspective, it is absurd to pretend that the challenges presented by China could be effectively resolved by increased reliance on the very process that China seeks to empower. Any suggestion that the United States or other WTO members could address the numerous problems outlined in this report solely by relying on the WTO dispute settlement mechanism is naïve in theory, and likely to prove downright harmful in practice.

New WTO Rules

In theory, the WTO membership could adopt new rules requiring members like China to abandon non-market economic systems and state-led, mercantilist trade regime. For several reasons, however, it is unrealistic to expect success in any negotiation of new WTO rules that would restrict China's current approach to the economy and trade in a meaningful way.

First, new WTO rules disciplining China would require agreement among all WTO members, including China. However, China has shown no willingness to make fundamental changes to its economic system or trade regime, and it is therefore highly unlikely that China would agree to new disciplines targeted at its trade policies and practices. Indeed, in connection with ongoing discussions at the WTO relating to needed WTO reform, China has stated that it would not alter its non-market economic system.

Second, China has a long record of not pursuing ambitious outcomes at the WTO. Past agreements, even relatively narrow ones, have been difficult to achieve, and when an agreement is achieved, it is significantly less ambitious because of China's participation.

One relatively recent example is the negotiation to expand the Information Technology Agreement. This negotiation was launched in June 2012 by the United States and five other WTO members, with the hope of concluding an agreement to eliminate tariffs on a large number of additional information technology products by the time of the WTO Ministerial meeting in Bali, Indonesia, in December 2013. China joined the negotiation about six months after its launch and offered a much shorter, less ambitious list of products for coverage than had been under consideration. It also insisted on lengthy phase-in periods for approximately one-half of the products on its list. Because of China's intransigence, the negotiation stalled in November 2013. Eventually, the negotiation restarted, and an agreement was concluded in December 2015 at the WTO Ministerial meeting in Nairobi, Kenya. WTO members accounting for more than 90 percent of trade in information technology products signed on to the agreement. However, the product coverage was significantly reduced from what had been under consideration before China's involvement. In addition, China would only commit to lengthy phase-ins of its tariff-elimination commitments, and as a result China will not fully implement the agreement until July 2023, nearly 10 years after it originally joined the negotiation.

Other negotiations do not even lead to an agreement. Rather, they simply reach an impasse once China intervenes.

The attempt to negotiate an Environmental Goods Agreement (EGA) is one example. This negotiation began in July 2014 with 14 WTO members, accounting for more than 90 percent of global trade in environmental goods. Its objective was to eliminate tariffs on a number of important environment-related products. The negotiation made considerable progress until China expressed its views on an acceptable list of products to be covered. China's proposed list was much less ambitious than the list of products that the other participants had been considering. It also seemed designed to scuttle the negotiation by including products known to be off-limits for other participants. With China intransigent, all attempts to complete the negotiation of the EGA were abandoned one year later.

Another example is the negotiation of new WTO disciplines on fisheries subsidies, where the first draft of an agreement was presented in November 2007. A key reason why this negotiation has been unsuccessful is China's insistence on special and differential treatment as a developing country. In fact, China's fishing fleet is by far the largest in the world, China's annual fisheries harvest is more than double that of all other top producers, and China appears to provide substantial subsidies to its fisheries sector. As a result of China's participation, expectations for any agreement on effective disciplines are low.

Finally, as should be clear, China's continued insistence that it is a developing country significantly hinders the chances of meaningful progress in any type of WTO negotiation. In the unlikely event that members were able to reach a trade liberalizing agreement at the WTO, it likely would not significantly constrain China, as China would insist on availing itself of the "special and differential" treatment incorporated for the benefit of true developing country members. Moreover, because China refuses to recognize differentiation between varying levels of development among developing countries, true developing country members likely would not benefit from the most helpful treatment, as China would reject provisions crafted to make "special and differential" treatment available in ways targeted to address the difficulties that different types of developing country members confront when attempting to implement new obligations.

Effective Strategies

In the United States' view, like-minded WTO members should focus their efforts on developing and implementing effective strategies for fixing the unique and very serious problems posed by China and its trade regime. Given the limits of the current WTO rules and mechanisms, these strategies initially must include actions not currently set out in the WTO agreements, given the serious trade distortions and harm currently being caused by China's approach to the economy and trade. Until the United States and other WTO members are able to successfully persuade China to make the needed fundamental changes to its trade regime, the serious harm caused by China's approach to the economy and trade will persist and grow.

Faced with these facts, the United States intends to hold China accountable not only for strict adherence to the existing WTO rules, but also – out of necessity – for any unfair and market-distorting trade practices that hurt U.S. workers, businesses, farmers or ranchers. The United States will not allow the interventionist policies and practices of the Chinese state to continue harming this country. Until China transforms its approach to the economy and trade, the United States will take all appropriate actions to ensure that the costs of China's non-market economic system are borne by China, not by the United States.

The United States also will continue working with the EU and Japan in an important trilateral partnership focused on finding ways to address the systemic trade distortions caused by China's non-market economic system. Currently, among other things, the three partners are considering effective actions that can be taken in the near term. The three partners also are examining possible model rules for disciplining a state-led, mercantilist trade regime. As this work progresses, the three partners intend to reach out to other like-minded WTO members.

Meanwhile, the recent proposals by various WTO members for WTO reform seem only marginally focused on the China problem. While those reform proposals potentially could address some behaviors that make China an irresponsible member of the WTO, they do not directly address the serious threat that China and its state-led, mercantilist trade regime poses for individual WTO members and the multilateral trading system.

The United States is currently pursuing its many concerns bilaterally with China as part of the discussions established by President Trump and President Xi in Buenos Aries on December 1, 2018. Our hope is that China will take our concerns seriously and engage with us on a productive and comprehensive basis. If it does so, it will benefit not only the United States, but also China itself and the rest of the WTO membership.

PART 2

Detailed Analysis of China’s Trade Regime

CHINA'S WTO ACCESSION

In July of 1986, China applied for admission to the WTO's predecessor, the General Agreement on Tariffs and Trade (GATT). The GATT formed a Working Party in March of 1987, composed of all interested GATT contracting parties, to examine China's application and negotiate terms for China's accession. For the next eight years, negotiations were conducted under the auspices of the GATT Working Party. Following the formation of the WTO on January 1, 1995, pursuant to the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), a successor WTO Working Party, composed of all interested WTO members, took over the negotiations.

Like all WTO accession negotiations, the negotiations with China had three basic aspects. First, China provided information to the Working Party regarding its trade regime. China also updated this information periodically during the 15 years of negotiations to reflect changes in its trade regime. Second, each interested WTO member negotiated bilaterally with China regarding market access concessions and commitments in the goods and services areas, including, for example, the tariffs that would apply on industrial and agricultural goods and the commitments that China would make to open up its market to foreign services suppliers. The most trade liberalizing of the concessions and commitments obtained through these bilateral negotiations were consolidated into China's Goods and Services Schedules and apply to all WTO members. Third, overlapping in time with these bilateral negotiations, China engaged in multilateral negotiations with Working Party members on the rules that would govern trade with China. Throughout these multilateral negotiations, U.S. leadership in working with China was critical to removing obstacles to China's WTO accession and achieving a consensus on appropriate rules commitments. These commitments are set forth in China's Protocol of Accession and an accompanying Report of the Working Party.

WTO members formally approved an agreement on the terms of accession for China on November 10, 2001, at the WTO's Fourth Ministerial Conference, held in Doha, Qatar. One day later, China signed the agreement and deposited its instrument of ratification with the Director-General of the WTO. China became the 143rd member of the WTO on December 11, 2001.

China's Protocol of Accession, accompanying Working Party Report and Goods and Services Schedules are available on the WTO's website (www.wto.org).

To accede to the WTO, China agreed to take concrete steps to remove trade barriers and open its markets to foreign companies and their exports from the first day of accession in virtually every product sector and for a wide range of services. Supporting these steps, China also agreed to undertake important changes to its legal framework, designed to add transparency and predictability to business dealings.

Like all acceding WTO members, China also agreed to assume the obligations of more than 20 existing multilateral WTO agreements, covering all areas of trade. Areas of principal concern to the United States and China's other trading partners, as evidenced by the accession negotiations, included the core principles of the WTO, including most-favored nation treatment, national treatment, transparency and the availability of independent review of administrative decisions. Other key concerns arose in the areas of agriculture, SPS measures, technical barriers to trade, trade-related investment measures, customs valuation, rules of origin, import licensing, antidumping, subsidies and countervailing measures, trade-related aspects of intellectual property rights and services. For some of its obligations in these areas, China was allowed minimal transition periods, where it was considered necessary.

Even though the terms of China’s accession agreement are directed at the opening of China’s market to WTO members, China’s accession agreement also includes provisions designed to address issues related to any injury that U.S. or other WTO members’ industries and workers might experience based on import surges or unfair trade practices. These mechanisms include (1) a special textile safeguard mechanism (which expired on December 11, 2008, seven years after China’s WTO accession), (2) a unique, China-specific safeguard mechanism allowing a WTO member to restrain increasing Chinese imports that disrupt its market (which expired on December 11, 2013, 12 years after China’s WTO accession), (3) an expression of the ability of WTO members to use an antidumping methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product and (4) an expression of the ability to use methodologies for identifying and measuring subsidy benefits to Chinese enterprises that are not based on terms and conditions prevailing in China.

With China’s consent, the WTO also created a special multilateral mechanism for reviewing China’s compliance on an annual basis. Known as the Transitional Review Mechanism, this mechanism operated annually for eight years after China’s accession. A final review, looking back over the first 10 years of China’s WTO membership, took place in 2011.

SUMMARY OF KEY CONCERNS

At present, China's trade policies and practices in several specific areas cause particular concern for the United States and U.S. stakeholders. The key concerns in each of these areas are summarized below. More details are provided in subsequent sections of this report, which describe U.S. engagement of China in more detail and provide a more detailed analysis of individual issues.

In considering the analysis below, the following points should be kept in mind:

First, many of the issues discussed below reflect longstanding U.S. concerns. Indeed, the United States has been pressing China to resolve a number of them for more than a decade.

Second, there are numerous examples of issues where the United States has raised a particular concern and China has specifically promised to address that concern, but China's promise has not been fulfilled.

Third, China's regulatory system is so opaque that it is often difficult for U.S. stakeholders – or even the U.S. government – to fully understand China's legal requirements in a particular issue area. This problem is exacerbated by China's extremely poor record of adhering to its transparency obligations as a WTO member.

Fourth, faced with almost two decades of Chinese intransigence, the United States has adopted a new and more aggressive strategy. As described in Part 1 of this report, the United States is now using all available tools – including domestic trade remedies, bilateral negotiations, WTO litigation and strategic engagement with like-minded trading partners – to respond to the challenges presented by China.

Finally, many of the issues discussed below are currently part of the ongoing negotiations between the United States and China. As the United States has made clear, we are looking for China to make significant structural changes to address the types of unfair trading practices described throughout this report.

Industrial Policies

Overview

China continued to pursue a wide array of industrial policies in 2018 that seek to limit market access for imported goods, foreign manufacturers and foreign services suppliers, while offering substantial government guidance, resources and regulatory support to Chinese industries. The beneficiaries of these constantly evolving policies are not only state-owned enterprises but also other domestic companies attempting to move up the economic value chain.

Technology Transfer

At the beginning of 2017, longstanding and serious U.S. concerns regarding technology transfer remained unaddressed, despite repeated, high-level bilateral commitments by China to remove or no longer pursue problematic policies and practices. At the same time, new concerns continued to emerge. In August 2017, as discussed above, USTR initiated an investigation under Section 301 of the Trade Act of 1974, as amended, focused on policies and practices of the Government of China related to technology transfer, intellectual property and innovation. Specifically, in its initiation notice, USTR identified four categories of reported Chinese government conduct that would be the subject of its inquiry, including but not limited to: (1) the use of a variety of tools to require or pressure the transfer of technologies and intellectual property to Chinese companies; (2) depriving U.S. companies of the ability to set market-based terms in licensing negotiations with Chinese companies; (3) intervention in markets by directing or unfairly facilitating the acquisition of U.S. companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property; and (4) conducting or supporting unauthorized intrusions into U.S. commercial computer networks or cyber-enabled theft for commercial gains. In March 2018, USTR issued a report supporting findings that the four categories of acts, policies and practices covered in the investigation are unreasonable or discriminatory and burden and/or restrict U.S. commerce. In November 2018, USTR issued an updated report that found that China had not taken any steps to change its problematic policies and practices. On the basis of USTR's investigation, the United States has imposed additional tariffs on $250 billion worth of Chinese imports.

Made in China 2025 Industrial Plan

In May 2015, China's State Council released *Made in China 2025*, a 10-year plan spearheaded by the Ministry of Industry and Information Technology (MIIT) and targeting 10 strategic advanced manufacturing sectors, including advanced information technology, automated machine tools and robotics, aviation and spaceflight equipment, maritime engineering equipment and high-tech vessels, advanced rail transit equipment, new energy vehicles (NEVs), power equipment, farm machinery, new materials, biopharmaceuticals and advanced medical device products. While ostensibly intended simply to raise industrial productivity through more advanced and flexible manufacturing techniques, *Made in China 2025* is emblematic of China's evolving and increasingly sophisticated approach to "indigenous innovation," which is evident in numerous supporting and related industrial plans. Their common, overriding aim is to replace foreign technologies, products and services with Chinese technologies, products and services in the China market through any means possible so as to ready Chinese companies for dominating international markets.

Made in China 2025 seeks to build up Chinese companies in the 10 targeted, strategic sectors at the expense of, and to the detriment of, foreign industries and their technologies through a multi-step process over 10 years. The initial goal of *Made in China 2025* is to ensure, through various means, that Chinese companies develop, extract or acquire their own technology, intellectual property and know-how and their own brands. The next goal of *Made in China 2025* is to substitute domestic technologies, products and services for foreign technologies, products and services in the China market. The final goal of *Made in China 2025* is to capture much larger worldwide market shares in the 10 targeted, strategic sectors.

Many of the policy tools being used by the Chinese government to achieve the goals of *Made in China 2025* raise serious concerns. These tools are largely unprecedented and include a wide array of state intervention and support designed to promote the development of Chinese industry in large part by restricting, taking advantage of, discriminating against or otherwise creating disadvantages for foreign enterprises and their technologies, products and services. Indeed, even facially neutral measures can be applied in favor of domestic enterprises, as past experience has shown, especially at sub-central levels of government.

Made in China 2025 also differs from industry support pursued by other WTO members by its level of ambition and, perhaps more importantly, by the scale of resources the government is investing in the pursuit of its industrial policy goals. Indeed, by some estimates, the Chinese government is making available more than $500 billion of financial support to the *Made in China 2025* sectors, both through the *Made in China 2025* industrial plan and related industrial plans. Even if China fails to achieve fully the industrial policy goals set forth in *Made in China 2025*, it is still likely to create or exacerbate market distortions and create severe excess capacity in many of the targeted sectors as well as do long-lasting damage to U.S. interests, as China-backed companies increase their market share at the expense of U.S. companies operating in these sectors.

As discussed above, USTR's Section 301 investigation and resulting tariff and other actions seek to address China's forced technology transfer regime. This regime is one of the instruments through which China intends to meet its *Made in China 2025* targets.

Indigenous Innovation

Policies aimed at promoting "indigenous innovation" continue to represent an important component of China's industrialization efforts. Through intensive, high-level bilateral engagement with China since 2010, the United States has attempted to address these policies, which provide various preferences when IP is owned or developed in China, both broadly across sectors of China's economy and specifically in the government procurement context.

For example, at the May 2012 S&ED meeting, China committed to treat IP owned or developed in other countries the same as IP owned or developed in China. The United States also used the 2012 JCCT process to press China to revise or eliminate specific measures that appeared to be inconsistent with this commitment. Throughout 2013 and 2014, the United States and China intensified their discussions. At the December 2014 JCCT meeting, China clarified and underscored that it will treat IP owned or developed in other countries the same as domestically owned or developed IP. Once again, however, these commitments were not fulfilled. China continues to pursue myriad policies that require or favor the ownership or development of IP in China.

The United States secured a series of similar commitments from China in the government procurement context, where China agreed to de-link indigenous innovation policies at all levels of the Chinese government from government procurement preferences, including through the issuance of a State Council measure mandating that provincial and local governments eliminate any remaining linkages by December 2011. Many years later, however, this promise had not been fulfilled. At the November 2016 JCCT meeting, in response to U.S. concerns regarding the continued issuance of scores of inconsistent measures, China announced that its State Council had issued a document requiring all agencies and all sub-central governments to "further clean up related measures linking indigenous innovation policy to the provision of government procurement preference." Again, the United States should not have to seek the same promises over and over through multiple negotiations. Meanwhile, as time passes, the underlying thrust of China's indigenous innovation policies remains unchanged.

Investment Restrictions

China seeks to protect many domestic industries through a restrictive investment regime, which adversely affects foreign investors in key services sectors, agriculture, extractive industries and certain manufacturing sectors. Many aspects of China's current investment regime continue to cause foreign investors great concern, including a lack of substantial liberalization, evidenced by the continued application of foreign equity caps and joint venture requirements, the maintenance of a case-by-case administrative approval system for a broad range of investments, the evolving potential for a new and overly broad national security review mechanism, and the increasingly adverse impact of China's *Cybersecurity Law* and related implementing measures, including ones that restrict cross-border data flows and impose data localization requirements.

In addition, foreign enterprises report that Chinese government officials may condition investment approval on a requirement that a foreign enterprise transfer technology, conduct research and development in China, satisfy performance requirements relating to exportation or the use of local content or make valuable, deal-specific commercial concessions. The United States has repeatedly raised concerns with China about its restrictive investment regime. To date, this sustained bilateral engagement has not led to a significant relaxation of China's investment restrictions, nor has it appeared to curtail ad hoc actions by Chinese government officials. Shortly after President Trump's visit to Beijing in November

2017, China did announce that it would be relaxing certain restrictions on foreign investment in banking services, life insurance services and securities and asset management services in the future, and China took some steps in that direction in 2018.

Given that China's investment restrictions place pressure on U.S. companies to transfer technology to Chinese companies, they have been a focus of USTR's Section 301 investigation. The responsive actions taken by the United are intended in part to address this concern.

Secure and Controllable ICT Policies

In 2018, China continued to issue measures intended to implement the *Cybersecurity Law* adopted in November 2016, and global concerns regarding China's invocation of national security as a basis for these measures increased. As demonstrated in the implementing measures, China's approach is to impose severe restrictions on a wide range of U.S. and other foreign ICT products and services with an apparent goal of supporting China's technology localization policies by encouraging the replacement of foreign ICT products and services with domestic ones. Stakeholders and governments around the world expressed serious concerns about requirements that ICT equipment and other ICT products and services in critical sectors be "secure and controllable," as these requirements are used by the Chinese government to disadvantage non-Chinese firms in multiple ways.

Separate from the *Cybersecurity Law*, China has referenced its "secure and controllable" requirements in a variety of measures dating back to 2013. Through these measures, China has mandated that Chinese information technology users purchase Chinese products and favor Chinese service suppliers, has imposed local content requirements, has imposed domestic research and development (R&D) requirements, has considered the location of R&D as a cybersecurity risk factor and has required the transfer or disclosure of source code or other intellectual property.

In addition, in 2015, China enacted a *National Security Law* and a *Counterterrorism Law*, which include provisions citing not only national security and counterterrorism objectives but also economic and industrial policies. The State Council also published a plan in 2015 that sets a timetable for adopting "secure and controllable" products and services in critical government ministries by 2020.

Meanwhile, sector-specific policies under this broad framework continue to be proposed and deployed across China's economy. A high profile example from December 2014 was a proposed measure drafted by the China Banking Regulatory Commission (CBRC) that called for 75 percent of ICT products used in the banking system to be "secure and controllable" by 2019 and that would have imposed a series of criteria that would shut out foreign ICT providers from China's banking sector. Not long afterwards, a similar measure was proposed for the insurance sector.

In 2015, the United States, in concert with other governments and stakeholders around the world, raised serious concerns about China's "secure and controllable" regime at the highest levels of government within China. During the state visit of President Xi in September 2015, the U.S. and Chinese Presidents committed to a set of principles for trade in information technologies. The issue also was raised in connection with the June 2015 S&ED meeting and the November 2015 JCCT meeting, with China making a series of additional important commitments with regard to technology policy. China reiterated many of these commitments at the November 2016 JCCT meeting, where it affirmed that its "secure and controllable" policies are not to unnecessarily limit or prevent commercial sales opportunities for foreign ICT suppliers or unnecessarily impose nationality-based conditions and restrictions on commercial ICT purchases, sales or uses. China also agreed that it would notify relevant technical regulations to the WTO Committee on Technical Barriers to Trade (TBT Committee).

Again, however, it appears that China does not intend to honor its promises. The numerous draft and final cybersecurity implementation measures issued by China in 2017 and 2018 raise serious questions about China's approach to cybersecurity regulation. China's measures do not appear to be consistent with the non-discriminatory, non-trade restrictive approach to which China has committed, and global stakeholders have grown even more concerned about the implications of China's ICT security measures across the many economic sectors that employ digital technologies. Accordingly, throughout the past year, the United States conveyed its serious concerns about China's approach to cybersecurity regulation through written comments on draft measures, bilateral engagement and multilateral engagement at WTO committee and council meetings in an effort to persuade China to revise its policies in this area to ensure that they are consistent with its WTO obligations and bilateral commitments. These efforts are ongoing.

Encryption

Use of ICT products and services is increasingly dependent on robust encryption, an essential functionality for protecting privacy and safeguarding of sensitive commercial information. Such functionality is particularly important in China, given the high incidence of cyber theft in this market. Onerous requirements on the use of encryption, including intrusive approval processes and, in many cases, mandatory use of indigenous encryption algorithms (e.g., for WiFi and 4G cellular products), continue to be cited by stakeholders as a significant trade barrier. The United States will continue to monitor implementation of existing rules, and will remain vigilant toward the introduction of any new requirements hindering technologically neutral use of robust, internationally standardized encryption.

Subsidies

China continues to provide substantial subsidies to its domestic industries, which have caused injury to U.S. industries. Some of these subsidies also appear to be prohibited under WTO rules. To date, the United States has been able to address some of these subsidies through countervailing duty proceedings conducted by the Commerce Department and dispute settlement cases at the WTO. The United States and other WTO members also have continued to press China to notify all of its subsidies to the WTO in accordance with its WTO obligations while also submitting counter notifications listing hundreds of subsidy programs that China has failed to notify. Since joining the WTO 17 years ago, China has not yet submitted to the WTO a complete notification of subsidies maintained by the central government, and it did not notify a single sub-central government subsidy until July 2016, when it provided information largely only on sub-central government subsidies that the United States had challenged as prohibited subsidies in a WTO case.

Together with the EU, the United States is defending the ability to apply non-market economy methodologies to China in order to counter the effects of China's trade distortive policies and practices. The United States also is working with the EU and Japan to identify further effective action and potential rules that could address problematic subsidies practices not currently covered by existing obligations.

Excess Capacity

Because of its state-led approach to the economy, China is the world's leading offender in creating non-economic capacity, as evidenced by the severe and persistent excess capacity situations in several industries. China also is well on its way to creating severe excess capacity in other industries through its pursuit of industrial plans such as *Made in China 2025*, pursuant to which the Chinese government is doling out hundreds of billions of dollars to support

Chinese companies and requiring them to achieve preset targets for domestic market share – at the expense of imports – and global market share in each of 10 advanced manufacturing industries.

In manufacturing industries like steel and aluminum in particular, China's economic planners and their government actions and financial support have contributed to massive excess capacity in China, with the resulting over-production distorting global markets and hurting U.S. producers and workers in both the United States and third country markets, where U.S. exports compete with Chinese exports. While China has publicly acknowledged excess capacity in these industries, among others, it has yet to take meaningful steps to address the root causes of the problem in a sustainable way.

From 2000 to 2016, China accounted for 75 percent of global steelmaking capacity growth, an increase well in excess of the increase in global and Chinese demand over the same period. Currently, China's capacity represents about one-half of global capacity and twice the combined steelmaking capacity of the EU, Japan, the United States and Russia. Meanwhile, China's steel exports grew to be the largest in the world, at 91 million MT in 2014, a 50-percent increase over 2013 levels, despite sluggish steel demand abroad. In 2015, Chinese exports reached a historic high of 110 million MT, causing increased concerns about the detrimental effects that these exports would have on the already saturated world market for steel. China's steel exports continued to grow in the first half of 2016, before beginning to decline in the second half of the year, a trend that continued into 2017 and 2018.

Similarly, primary aluminum production capacity in China increased by more than 50 percent between 2011 and 2015, despite a severe drop in global aluminum prices during that period. China's capacity has continued to grow in subsequent years. Large new facilities have been built with government support, and China's primary aluminum capacity now accounts for more than one-half of global capacity. As a consequence, China's capacity and production have contributed to imbalances and price distortions in global markets, harming U.S. plants and workers.

Excess capacity in China – whether in the steel industry or other industries such as aluminum – hurts U.S. industries and workers not only because of direct exports from China to the United States, but also because its impact on global prices and supply make it difficult for even the most competitive producers to remain viable. Domestic industries in many of China's trading partners continued to petition their governments to impose trade measures to respond to the trade-distortive effects of China's excess capacity. In addition, the United States has taken action under Section 232 of the Trade Expansion Act of 1962 to increase duties on steel and aluminum products after finding that excessive imports are a threat to U.S. national security.

Export Restraints

China continues to deploy a combination of export restraints, including export quotas, export licensing, minimum export prices, export duties and other restrictions, on a number of raw material inputs where it holds the leverage of being among the world's leading producers. Through these export restraints, it appears that China is able to provide substantial economic advantages to a wide range of downstream producers in China at the expense of foreign downstream producers, while creating pressure on foreign downstream producers to move their operations, technologies and jobs to China.

In 2013, China removed its export quotas and duties on several raw material inputs of key interest to the U.S. steel, aluminum and chemicals industries after the United States won a dispute settlement case against China at the WTO. In 2014, the United States won a second WTO case, focusing on China's export restraints on rare earths, tungsten and molybdenum, which are key inputs for a multitude of U.S.-made products, including hybrid automobile batteries, wind turbines, energy-efficient lighting, steel, advanced electronics, automobiles, petroleum, and chemicals. China removed those export restraints in May 2015. In July 2016, the United States launched a third WTO case challenging export restraints maintained by China. The challenged export restraints include export quotas and export duties maintained by China on various forms of 11 raw materials, including antimony, chromium, cobalt, copper, graphite, indium, lead, magnesia, talc, tantalum and tin. These raw materials are key inputs in important U.S. manufacturing industries, including aerospace, automotive, construction and electronics. China appears to have removed the challenged export restraints, as the United States continues to monitor the situation. It is deeply concerning that the United States has been forced to bring multiple cases to address the same obvious WTO compliance issues.

Value-added Tax Rebates and Related Policies

As in prior years, in 2018, the Chinese government attempted to manage the export of many primary, intermediate and downstream products by raising or lowering the VAT rebate available upon export. China sometimes reinforces its objectives by imposing or retracting export duties. These practices have caused tremendous disruption, uncertainty and unfairness in the global markets for some products, particularly downstream products where China is a leading world producer or exporter, such as products made by the steel, aluminum and soda ash industries. These practices, together with other policies, such as excessive government subsidization, also have contributed to severe excess capacity in these same industries. An apparently positive development took place at the July 2014 S&ED meeting, when China committed to improve its VAT rebate system, including by actively studying international best practices, and to deepen communication with the United States on this matter, including regarding its impact on trade. Once more, however, this promise remains unfulfilled. To date, China has not made any movement toward the adoption of international best practices.

Import Ban on Remanufactured Products

China prohibits the importation of remanufactured products, which it typically classifies as used goods. China also maintains restrictions that prevent remanufacturing process inputs (known as cores) from being imported into China's customs territory, except special economic zones. These import prohibitions and restrictions undermine the development of industries in many sectors in China, including mining, agriculture, healthcare, transportation and communications, because companies in these industries are unable to purchase high-quality, lower-cost remanufactured products produced outside of China. Nevertheless, China is apparently prepared to pay this price in order to limit imports of remanufactured goods.

Import Ban on Recyclable Materials

In 2017 and 2018, China issued several measures that would limit or ban imports of numerous scrap and recovered materials, such as certain types of plastic, paper and metals. Similar restrictions do not appear to apply to domestically sourced scrap and recovered materials. The United States, together with other trading partners, have raised their concerns about this matter in several WTO committee meetings.

Standards

Currently, China is in the early stages of implementing a large-scale reform of its standards system. As part of this reform, China is seeking to incorporate a "bottom up" strategy in standards development in addition to the existing "top down" system. In September 2017, China published a revised draft version of a new *Standardization Law* on which the United States submitted written comments. This draft of the law introduced a serious new concern with regard to preferences for Chinese technologies in standards development and failed to address other concerns detailed in U.S. written comments on the previous draft. The September 2017 draft, with only minor revisions, became final in November 2017 and went into effect in January 2018. At the same time, existing technical committees continue to develop standards, and more foreign participation is being allowed. For example, while the United States' substantive concerns with China's cybersecurity standards have not been addressed, the technical committee for cybersecurity standards has begun allowing foreign companies to participate in standards development and setting, with several U.S. and other foreign companies being allowed to vote and to participate at the working group level in standards development. Nevertheless, the United States remains very concerned about China's policies with regard to standards, as China prepares to develop implementing regulations for the *Standardization Law*.

In recent years, two principal types of Chinese policies have been causing harm to U.S. companies in the standards area. First, Chinese government officials in some cases reportedly have pressured foreign companies seeking to participate in the standards-setting process to license their technology or intellectual property on unfavorable terms. Second, China has continued to pursue unique national standards in a number of high technology areas where international standards already exist. The United States continues to press China to address these specific concerns, but to date this bilateral engagement has yielded minimal progress.

Notably, U.S. concerns about China's standards regime are not limited to the implications for U.S. companies' access to China's market. China's ongoing efforts to develop unique national standards aims eventually to serve the interests of Chinese companies seeking to compete globally, as the Chinese government's vision is to use the power of the large China market to promote or compel the adoption of Chinese standards in global markets.

Government Procurement

China made a commitment to accede to the WTO Agreement on Government Procurement (GPA) and to open up its vast government procurement market to the United States and other GPA parties. To date, however, the United States, the EU, and other GPA parties have viewed China's offers as highly disappointing in scope and coverage. China submitted its fifth revised offer in December 2014. This offer showed progress in a number of areas, including thresholds, entity coverage and services coverage. Nonetheless, it fell short of U.S. expectations and remains far from acceptable to the United States and other GPA parties as significant deficiencies remain in a number of critical areas, including thresholds, entity coverage, services coverage and exclusions.

China's current government procurement regime is governed by two important laws. The *Government Procurement Law*, administered by the Ministry of Finance, governs purchasing activities conducted with fiscal funds by state organs and other organizations at all levels of government in China. The *Tendering and Bidding Law* falls under the jurisdiction of the National Development and Reform Commission (NDRC) and imposes uniform tendering and bidding procedures for certain classes of procurement projects in China, notably construction and works projects, without regard for the type of entity that conducts the procurement. Both laws cover important procurements that GPA parties would consider to be government procurement eligible for coverage under the GPA.

Trade Remedies

China's regulatory authorities in some instances seem to be pursuing antidumping and countervailing duty investigations and imposing duties – even when necessary legal and factual support for the duties is absent – for the purpose of striking back at trading partners that have exercised their WTO rights against China. To date, the U.S. response has been the filing and prosecution of three WTO disputes. The decisions reached by the WTO in those three disputes confirm that China failed to abide by WTO disciplines when imposing the duties at issue.

Intellectual Property Rights

Overview

After its accession to the WTO, China undertook a wide-ranging revision of its framework of laws and regulations aimed at protecting the intellectual property rights of domestic and foreign rights holders, as required by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement). Currently, China is in the midst of an extended round of revisions to these laws and regulations. Despite various plans and directives issued by the State Council, inadequacies in China's IPR protection and enforcement regime continue to present serious barriers to U.S. exports and investment. As a result, China was again placed on the Priority Watch List in USTR's 2018 Special 301 report. In addition, in January 2018, USTR announced the results of its 2017 Out-of-Cycle Review of Notorious Markets, which identifies online and physical markets that exemplify key challenges in the global struggle against piracy and counterfeiting. Several Chinese markets were among those named as notorious markets.

Trade Secrets

Serious inadequacies in the protection and enforcement of trade secrets in China have been the subject of high-profile attention and engagement between the United States and China in recent years. Thefts of trade secrets for the benefit of Chinese companies have occurred both within China and outside of China. Offenders in many cases continue to operate with impunity. Particularly troubling are reports that actors affiliated with the Chinese government and the Chinese military have infiltrated the computer systems of U.S. companies, stealing terabytes of data, including the companies' intellectual property (IP), for the purpose of providing commercial advantages to Chinese enterprises.

In an effort to address these problems, the United States secured commitments from China to issue judicial guidance to strengthen its trade secrets regime. The United States also secured commitments from China not to condone state-sponsored misappropriation of trade secrets for commercial use. In addition, the United States urged China to make certain key amendments to its trade secrets-related laws and regulations, particularly with regard to a draft revision of the *Anti-unfair Competition Law*. The United States also urged China to take actions to address inadequacies across the range of state-sponsored actors and to promote public awareness of trade secrets disciplines.

At the November 2016 JCCT meeting, China confirmed that it is strengthening its trade secrets regime and plans to bolster several areas of importance, including the availability of evidence preservation orders and damages based on market value as well as the issuance of a judicial interpretation on preliminary injunctions and other matters. In addition, in 2016 and 2017, China circulated proposed revisions to the *Anti-unfair Competition Law* for public comment. China issued the final measure in November 2017, effective January 2018. Despite improvements in the protection of trade secrets relative to prior law, the final measure reflects a number of missed opportunities for the promotion of effective trade secrets protection.

Furthermore, as discussed above, the United States continues to have significant concerns about IP protection in China, including with regard to trade secrets. Thus, the protection of trade secrets and IP more broadly represents yet another area where China has failed to comply with its promises for a more market-oriented system, particularly to the extent that the state itself sponsors the theft of trade secrets or actively frustrates the effective protection of trade secrets.

Through USTR's Section 301 investigation of China's technology transfer policies and practices, the United States is seeking to address many of the problems being encountered in the area of trade secrets. This investigation and its responsive actions focus on, among other things, the forced disclosure of trade secrets through unwanted joint ventures and the abuse of administrative processes as well as state-sponsored, cyber-enabled theft of trade secrets.

Bad Faith Trademark Registration

Of particular concern is the continuing registration of trademarks in bad faith. At the November 2016 JCCT meeting, China publicly noted the harm that can be caused by bad faith trademarks and confirmed that it is taking further steps to combat bad faith trademark filings. Nevertheless, U.S. companies across industry sectors continue to face Chinese applicants registering their marks and "holding them for ransom" or seeking to establish a business building off of U.S. companies' global reputations.

Pharmaceuticals

For several years, the United States has pressed China on a range of pharmaceuticals issues. These issues have related to matters such as overly restrictive patent application examination practices, regulatory approvals that are delayed or linked to extraneous criteria, weak protections against the unfair commercial use and unauthorized disclosure of regulatory data, and the need for an efficient mechanism to resolve patent infringement disputes.

Four years ago, at the December 2014 JCCT meeting, China committed to significantly reduce time-to-market for innovative pharmaceutical products through streamlined processes and additional funding and personnel. Nevertheless, time-to-market for innovative pharmaceutical products in China remains a significant concern.

Another serious ongoing concern stems from China's proposals in the pharmaceuticals sector that seek to promote government-directed indigenous innovation and technology transfer through the provision of regulatory preferences. For example, in August 2015, a State Council measure issued in final form without having been made available for public comment created an expedited regulatory approval process for innovative new drugs where the applicant's manufacturing capacity had been shifted to China. The United States has urged China to reconsider this approach.

In April 2016, China's Food and Drug Administration (CFDA) issued a draft measure that effectively would require drug manufacturers to commit to price concessions as a pre-condition for securing marketing approval for new drugs. Given its inconsistency with international regulatory practices, which are based on safety, efficacy and quality, the draft measure elicited serious concerns from the United States and U.S. industry. Subsequently, at the November 2016 JCCT meeting, China promised not to require any specific pricing information as part of the drug registration evaluation and approval process and, in addition, not to link pricing commitments to drug registration evaluation and approval. Given China's lack of follow through in other areas, as discussed in this report, the United States remains concerned about whether these promises will be regularly fulfilled in practice. Accordingly, the United States remains in close contact with U.S. industry and has been examining developments carefully in this area.

In April 2017, in response to sustained U.S. engagement, China issued amended patent examination guidelines that required patent examiners to take into account supplemental test data submitted during the patent examination process. However, to date, it appears that patent examiners in China have been either unduly restrictive or inconsistent in implementing the amended patent examination guidelines, resulting in rejections of supplemental data and denials of patents or invalidations of existing patents on medicines even when counterpart patents have been granted in other countries.

CFDA also issued several draft notices in 2017 setting out a conceptual framework to protect against the unfair commercial use and unauthorized disclosure of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products. This proposed framework also sought to promote the efficient resolution of patent disputes between right holders and the producers of generic pharmaceuticals. However, in 2018, CFDA's successor agency, the State Drug Administration (SDA), issued draft drug registration regulations and implementing measures on drug trial data that would preclude or condition the duration of regulatory data protection on whether clinical trials and first market approval occur in China. It remains unclear, therefore, how China will proceed and whether China finally intends to comply with its commitments in these areas. Accordingly, the United States will remain in close contact with U.S. industry, actively examine developments and work to ensure that appropriate and non-discriminatory changes are made to the anticipated implementing measures in the areas of patent linkage, regulatory data protection and clinical trials.

Online Infringement

Online piracy continues on a large scale in China, affecting a wide range of industries, including those involved in distributing legitimate music, motion pictures, books and journals, software and video games. While increased enforcement activities have helped stem the flow of online sales of some pirated offerings, much more sustained action and attention is needed to make a more meaningful difference for content creators and rights holders, particularly small and medium-sized enterprises.

The United States has urged China to consider ways to create a broader policy environment that helps foster the growth of healthy markets for licensed and legitimate content. The United States also has urged China to revise existing rules that have proven to be counterproductive. For example, rules on the review of foreign television content present a serious concern for the continued viability of licensed streaming of foreign television content via online platforms. These rules are disrupting legitimate commerce while inadvertently creating conditions that allow for pirated content to displace legitimate content online.

At the November 2016 JCCT meeting, China agreed to actively promote e-commerce-related legislation, strengthen supervision over online infringement and counterfeiting, and to work with the United States to explore the use of new approaches to enhance online enforcement capacity. In December 2016 and November 2017, China published drafts of a new *E-Commerce Law* for public comment. In written comments, the United States stressed that the final version of this law should not undermine the existing notice-and-takedown regime and should promote effective cooperation in deterring online infringement. In August 2018, China adopted its new *E-Commerce Law*, which enters into force in January 2019. This law was an opportunity for China to institute strong provisions on IPR protection and enforcement for its $900 billion e-commerce market. However, as finalized, the law instead introduced provisions that weaken the ability of rights holders to protect their rights online and that alleviate the liability of Chinese e-commerce platforms for selling counterfeit and other infringing goods.

Counterfeit Goods

Although rights holders report consistent enforcement efforts by Chinese government authorities, and high-level officials continue to express their steadfast commitment to curtailing IPR infringement, counterfeiting in China remains widespread and affects a wide range of goods. One of many areas of particular U.S. concern involves medications. Despite years of sustained engagement by the United States, China still needs to improve its regulation of the manufacture of active pharmaceutical ingredients to prevent their use in counterfeit and substandard medications. At the July 2014 S&ED meeting, China committed to develop and seriously consider amendments to the *Drug Administration Law* that will require regulatory control of the manufacturers of bulk chemicals that can be used as active pharmaceutical ingredients. At the June 2015 S&ED meeting, China further committed to publish revisions to the *Drug Administration Law* in draft form for public comment and to take into account the opinions of the United States and other relevant stakeholders. In October 2017, China published limited draft revisions to the *Drug Administration Law* and stated that future proposed revisions to the remainder of this law would be forthcoming. Although many elements of the October 2017 draft revisions appear to be positive, the United States remains in close contact with U.S. industry and will continue to examine developments vigilantly in this area.

Services

Overview

The prospects for U.S. service suppliers in China should be promising, given the size of China's market. Nevertheless, while the United States maintained a $38.5 billion surplus in trade in services with China, the U.S. share of China's services market remained well below the U.S. share of the global services market.

In 2018, numerous challenges persisted in a range of services sectors. As in past years, Chinese regulators continued to use case-by-case approvals, discriminatory regulatory processes, informal bans on entry and expansion, overly burdensome licensing and operating requirements, and other means to frustrate the efforts of U.S. suppliers of services to achieve their full market potential in China. These policies and practices affect U.S. service suppliers across a wide range of sectors, including banking, securities and asset management, insurance, electronic payments, cloud computing, telecommunications, online video and entertainment software, film production and distribution, express delivery and legal services. In addition, China's *Cybersecurity Law* and related draft and final implementing measures include mandates to purchase domestic ICT products and services, restrictions on cross-border data flows and requirements to store and process data locally, all of which undermines U.S. services suppliers' ability to take advantage of market access opportunities in China. China also has failed to fully address U.S. concerns in areas that have been the subject of WTO dispute settlement, including electronic payment services and theatrical film importation and distribution.

Electronic Payment Services

In 2018, China continued to place unwarranted restrictions on foreign companies, including major U.S. credit and debit card processing companies, which have been seeking to supply electronic payment services to banks and other businesses that issue or accept credit and debit cards in China. In a WTO case that it launched in 2010, the United States argued that China had committed in its WTO accession agreement to open up this sector in 2006, and a WTO panel agreed with the United States in a decision issued in 2012. China subsequently agreed to comply with the WTO panel's rulings in 2013, but China did not take needed steps even to allow foreign suppliers to apply for licenses until June 2017, when China's regulator – the PBOC – finalized the establishment of a two-step licensing process in which a supplier must first complete one year of preparatory work before even being able to apply for an actual license. To date, however, no foreign suppliers have been able to secure licenses to supply electronic payment services in China. Indeed, one major U.S. supplier submitted its application to begin its preparatory work in November 2017, and more than one year later the PBOC still has not even accepted that application for consideration. Another major U.S. supplier faces a similar situation with the application that it filed in April 2018. Throughout the time that China has actively delayed opening up its market to foreign suppliers, China's national champion, China Union Pay, has used its exclusive access to domestic currency transactions in the China market, and the revenues that come with it, to support its efforts to build out its electronic payment services network abroad, including in the United States. In one telling example, China Union Pay reportedly has reached 100 percent penetration at U.S. automated teller machines and between 80 and

90 percent penetration at U.S. stores that accept credit cards. This history shows how China has been able to maintain market-distorting practices that benefit its own companies, even in the face of adverse rulings at the WTO. USTR continues to work to bring China into WTO compliance and to obtain market access for U.S. stakeholders in China.

Internet-enabled Payment Services

The PBOC first issued regulations for non-bank suppliers of online payment services in 2010, and it subsequently began processing applications for licensees in a sector that previously had been unregulated. Regulations were further strengthened in 2015, with additional provisions aimed at increasing security and traceability of transactions. According to a U.S. industry report, of more than 200 licenses issued as of June 2014, only two had been issued to foreign-invested suppliers, and those two were for limited services. This report provides clear evidence supporting stakeholder concerns about the difficulties they have faced entering the market and the slow process foreign firms face in getting licensed. In addition, as with other ICT sectors, PBOC has required suppliers to localize data and facilities in China. The United States will continue to closely monitor developments in this area.

Theatrical Films

In February 2012, the United States and China reached an alternative resolution with regard to certain rulings relating to the importation and distribution of theatrical films in a WTO case that the United States had won. The two sides signed a memorandum of understanding (MOU) providing for substantial increases in the number of foreign films imported and distributed in China each year, along with substantial additional revenue for U.S. film producers. However, China has not yet fully implemented its MOU commitments, including with regard to critical commitments to open up film distribution opportunities for imported films. As a result, the United States has been pressing China for full implementation of the MOU.

In 2017, in accordance with the terms of the MOU, the two sides began discussions regarding the provision of further meaningful compensation to the United States. These discussions continued until March 2018, when China embarked on a major government reorganization that involved significant changes for China's Film Bureau. As of December 2018, the discussions had not yet resumed.

Audio-visual and Related Services

China's restrictions in the area of theater services have discouraged investment by foreign suppliers, and China's restrictions on services associated with television and radio greatly limit participation by foreign suppliers. For example, China prohibits retransmission of foreign TV channels, prohibits foreign investment in TV stations and channels in China and imposes quotas on the amount of foreign programming that can be shown on a Chinese TV channel each day. In addition, a draft measure issued in September 2018 would prohibit foreign TV shows in prime time. China also prohibits foreign companies from providing film production and distribution services in China. In addition, the United States remains very concerned about the impact of online publishing rules issued by State Administration of Press, Publication, Radio, Film and Television (SAPPRFT) and MIIT in February 2016 on the ability of foreign companies to engage in the online distribution of videos and entertainment software, as these rules prohibit foreign companies from operating online distribution platforms in China. More recently, the National Radio and Television Administration's (NRTA) issued a concerning draft measure that would impose new restrictions in China's already highly restricted market for foreign creative content by requiring that spending on foreign content account for no more than 30 percent of available total programs in each of several categories, including foreign movies, TV shows, cartoons, documentaries and other foreign TV programs, made available for display via broadcasting institutions and online audiovisual-content platforms.

Banking Services

China has largely refused to open its banking sector to significant non-Chinese competition. Although China has opened its banking sector to foreign competition in the form of wholly foreign-owned banks, China has maintained restricted access in other ways that have kept foreign banks from obtaining significant market share in China. The most recently available data shows that the foreign share of banking assets in China actually has declined since China joined the WTO. China has imposed various discriminatory and non-transparent regulatory requirements that have made it more difficult for foreign banks to establish and expand their market presence in China.

One problematic area involves the ability of U.S. and other foreign banks to participate in the domestic currency business in China. This is a market segment that foreign banks are most eager to pursue in China, particularly with regard to Chinese individuals. Under existing governing regulations, only foreign-funded banks that have had a representative office in China for one year and that have total assets exceeding $10 billion can apply to incorporate in China. In addition, China imposes some asset and capital requirements on foreign banks that it does not apply to domestic banks, and it is slow to act upon the applications of foreign banks to set up new internal branches. Furthermore, China restricts the scope of activities that can be conducted by foreign banks seeking to operate in China through branches instead of through subsidiaries. Discriminatory and non-transparent regulations also have limited foreign banks' ability to participate in China's capital markets.

For years, China has limited the sale of equity stakes in existing Chinese-owned banks for a single foreign investor to 20 percent, while the total equity share of all foreign investors is limited to 25 percent. In February and August 2018, China issued measures that remove these equity caps. However, the measures do not clearly set out a path for U.S. investors to obtain the necessary licenses. In addition, the measures are vague in important respects and it is not yet clear whether, in practice, China will be providing meaningful, non-discriminatory market access for foreign banks.

Insurance Services

China's regulation of the insurance sector has resulted in market access barriers for foreign insurers, whose share of China's market remains very low. In the life insurance sector, China only permits foreign companies to establish as Chinese-foreign joint ventures, with foreign equity capped at 50 percent. The market share of these joint ventures is about five percent. For the health and pension insurance sectors, China also caps foreign equity at 50 percent. While China allows wholly foreign-owned subsidiaries in the non-life (i.e., property and casualty) insurance sector, the market share of foreign-invested companies in this sector is only about two percent. China's market for political risk insurance remains closed to foreign participation. Although China's *Negative List for Foreign Investment* indicates that China has liberalized insurance brokerage services, China in practice seems to continue to restrict the scope of insurance brokerage services that foreign companies can provide. Meanwhile, some U.S. insurance companies established in China encounter difficulties in getting the Chinese regulatory authorities to issue timely approvals of their requests to open up new internal branches to expand their operations. In November 2017, China announced that it would be easing certain of its foreign equity restrictions in the insurance services sector. In May 2018, China issued a draft measure that would raise the foreign equity cap for life, pension and health insurance to 51 percent. However, this draft measure provides no pathway for full removal of the cap on foreign equity investment.

Securities and Asset Management Services

In the securities and asset management services sectors, China only permits foreign companies to establish as Chinese-foreign joint ventures, with foreign equity capped at 49 percent. Recently, however, China reportedly licensed one foreign company to establish as majority foreign-owned joint venture. In addition, China has started to license a small number of wholly foreign-owned companies to provide certain private fund management services to high-wealth individuals, but these services represent only a subset of the services normally provided by securities and asset management companies. In November 2017, China announced that it would be removing certain of its foreign equity restrictions in the securities and asset management services sectors over time. In April 2018, China issued a measure that immediately raises the foreign equity cap for the securities and asset management sector to 51 percent and, in three years, removes the cap on foreign investment entirely. However, other concerns remain, including with regard to the ability of foreign companies to pursue a broad scope of business.

Telecommunications Services

China's restrictions on basic telecommunications services, such as informal bans on new entry, a 49-percent foreign equity cap, a requirement that foreign suppliers can only enter into joint ventures with state-owned enterprises and exceedingly high capital requirements, have blocked foreign suppliers from accessing China's basic telecommunications services market. China recently issued draft regulations that propose to allow domestic and foreign suppliers to obtain licenses to supply mobile telecommunications resale services. However, the terms and conditions applicable to foreign suppliers remain unclear, and it is too early to tell whether any meaningful market access would be provided. Since China acceded to the WTO almost two decades ago, not a single foreign firm has succeeded in establishing a new joint venture to enter this sector.

Restrictions maintained by China on less highly regulated value-added telecommunications services also have created serious barriers to market entry for foreign suppliers seeking to enter this sector. These restrictions include opaque and arbitrary licensing procedures, foreign equity caps and periodic, unjustified moratoria on the issuance of new licenses. As a result, only a few dozen foreign-invested suppliers have secured licenses to provide value-added telecommunications services, while there are thousands of licensed domestic suppliers.

Internet Regulatory Regime

China's Internet regulatory regime is restrictive and non-transparent, affecting a broad range of commercial services activities conducted via the Internet, and overseen by multiple agencies without clear lines of jurisdiction. China's Internet economy has boomed over the past decade and is second in size only to that of the United States. Growth in China has been marked in service sectors similar to those found in the United States, including retail websites, search engines, online education, travel, advertising, audio-visual and computer gaming services, electronic mail and text, online job searches, Internet consulting, mapping services, applications, web domain registration and electronic trading. However, in the China market, Chinese companies dominate due in large part to restrictions imposed on foreign companies by the Chinese government. At the same time, foreign companies continue to encounter major difficulties in attempting to offer these and other Internet-based services on a cross-border basis.

China continues to engage in extensive blocking of legitimate websites, imposing significant costs on both suppliers and users of web-based services and products. According to the latest data, China currently blocks 12 of the top 30 global sites, and U.S. industry research has calculated that up to 3,000 sites in total are blocked, affecting billions of dollars in business, including communications, networking, app stores, news and other sites. Even when sites are not permanently blocked, the often arbitrary implementation of blocking, and the performance-degrading effect of filtering all traffic into and outside of China, significantly impair the supply of many cross-border services, often to the point of making them unviable.

Cross-border Data Transfers and Data Localization

Various draft and final measures being developed by China's regulatory authorities to implement China's *Cybersecurity Law*, which took effect in June 2017, and China's *National Security Law*, which has been in effect since 2015, would prohibit or severely restrict cross-border transfers of information that are routine in the ordinary course of business and are fundamental to any business activity. These measures also would impose local data storage and processing requirements on companies in "critical information infrastructure sectors," a term that the *Cybersecurity Law* defines in broad and vague terms. Given the wide range of business activities that are dependent on cross-border transfers of information and flexible access to global computing facilities, these developments have generated serious concerns among governments as well as among stakeholders in the United States and other countries, particularly among services suppliers.

Cloud Computing Services

Especially troubling is China's treatment of foreign companies seeking to participate in the development of cloud computing services, including computer data and storage services and software application services provided over the Internet. China prohibits foreign companies from directly providing any of these services. Given the difficulty in providing these services on a cross-border basis (largely due to restrictive Chinese policies), the only option a foreign service supplier has to access the Chinese market is to establish a contractual partnership with a Chinese company, which is the holder of the necessary Internet data center license, and turn over its valuable technology, IP, know-how and branding as part of this arrangement. While the foreign service supplier earns a licensing fee from the arrangement, it has no direct relationship with customers in China and no ability to independently develop its business. It has essentially handed over its business to a Chinese company that may well become a global competitor. This treatment has generated serious concerns in the United States and among other WTO members as well as U.S. and other foreign companies.

In major markets, including China, cloud computing services are typically offered through commercial presence in one of two ways. They are offered as an integrated service in which the owner and operator of a telecommunication network also offers computing services, including data storage and processing function, over that network, or they are offered as a stand-alone computer service, with connectivity to the computing service site provided separately by a telecommunications service supplier. Although China's General Agreement on Trade in Services (GATS) commitments include services relevant to both of these approaches, neither one is currently open to foreign-invested companies.

China also is proposing to severely restrict the ability of foreign enterprises to offer cloud computing services into China on a cross-border basis. In 2017, China's regulator issued a circular, entitled *On Cleaning up and Regulating Internet Access Services Market*, which prohibits Chinese telecommunication operators from offering consumers leased lines or virtual private network (VPN) connections reaching overseas data centers – which could restrict a key access mechanism companies use to connect to foreign cloud computing service providers and related resources.

Online Video and Entertainment Software Services

China restricts the online supply of foreign video and entertainment software through measures affecting both content and distribution platforms. With respect to content, the most burdensome restrictions are implemented through exhaustive content review requirements, based on vague and otherwise non-transparent criteria. In addition, with respect to online video, SAPPRFT has required Chinese online platform suppliers to spend no more than 30 percent of their acquisition budget on foreign content. With respect to distribution platforms, SAPPRFT has instituted numerous measures, such as requirements that video platforms all be state-owned, that prevent foreign suppliers from qualifying for a license. At the same time, several Chinese companies (including Alibaba) appear exempt from these requirements. SAPPRFT and other Chinese regulatory authorities also have taken actions to prevent the cross-border supply of online video services, which may implicate China's GATS commitments relating to video distribution.

Voice-over-Internet Protocol (VOIP) Services

While computer-to-computer VOIP services are permitted in China, China's regulatory authorities have restricted the ability to offer VOIP services interconnected to the public switched telecommunications network (i.e., to call a traditional phone number) to basic telecommunications service licensees. There is no obvious rationale for such a restriction, which deprives consumers of a useful communication option, and thus the United States continues to advocate for eliminating it.

Express Delivery Services

The United States continues to have concerns regarding China's implementation of the 2009 *Postal Law* and related regulations through which China prevents foreign service suppliers from participating in the document segment of its domestic express delivery market. In the package segment, China applies overly burdensome and inconsistent regulatory approaches, including with regard to security inspections, and reportedly has provided more favorable treatment to domestic service suppliers when awarding business permits.

Legal Services

China restricts the types of legal services that can be provided by foreign law firms, including through a prohibition on foreign law firms hiring lawyers qualified to practice Chinese law. It also imposes lengthy delays for the establishment of new offices.

Agriculture

Overview

China was the second largest agricultural export market for the United States in 2017, with more than $19 billion in U.S. agricultural exports, down from $21 billion in 2016. Notwithstanding these exports, China remains a difficult and unpredictable market for U.S. agricultural exporters, largely because of inconsistent enforcement of regulations and selective intervention in the market by China's regulatory authorities. The failure of China's regulators to routinely follow science-based, international standards and guidelines further complicates and impedes agricultural trade.

Agricultural Domestic Support

For several years, China has been significantly increasing domestic subsidies and other support measures for its agricultural sector. China maintains direct payment programs, minimum support prices for basic commodities and input subsidies. China has implemented a cotton reserve system, based on minimum purchase prices, and cotton target price programs. In 2016, China established subsidies for starch and ethanol producers to incentivize the purchase of domestic corn, resulting in higher volumes of exports of processed corn products from China in 2017 and 2018.

China submitted a notification concerning domestic support measures to the WTO in May 2015, but it only provided information up to 2010. In December 2018, China notified domestic support measures for the period 2011-2016. This notification showed that

China had exceeded its *de minimis* level of domestic support for soybeans (in 2012, 2014 and 2015), cotton (from 2011 to 2016), corn (from 2013 to 2016), rapeseed (from 2011 to 2013) and sugar (2012). The situation was likely even worse, as the methodologies used by China to calculate domestic support levels result in underestimates. The notification also identified changes to its domestic support programs for cotton and corn.

In September 2016, the United States launched a WTO case challenging China's government support for the production of rice, wheat and corn as being in excess of China's commitments. The United States is pursuing this case aggressively. The WTO panel hearing this case is expected to issue its decision in early 2019.

Tariff-rate Quota Administration

Market access promised through the tariff-rate quota (TRQ) system set up pursuant to China's WTO accession agreement has yet to be fully realized. China's TRQs for rice, wheat and corn do not fill each year. In December 2016, the United States launched a WTO case challenging China's administration of TRQs for rice, wheat and corn, and it is pursuing this case aggressively. The WTO panel hearing this case is expected to issue its decision in mid-2019.

Agricultural Biotechnology Approvals

The number of products pending Chinese regulatory approval continues to increase, causing uncertainty among traders and resulting in an adverse trade impact, particularly for U.S. exports of corn and alfalfa. In addition, the asynchrony between China's biotech product approvals and the product approvals made by other countries has widened considerably over the past three years. Following a commitment made to President Trump by Chinese President Xi during their April 2017 meeting, China's National Biosafety Committee (NBC) met in May and June 2017 and issued four product approvals (two after each meeting), while not approving four other products that were subject to NBC review. Following the meeting between Presidents Trump and Xi in Buenos Aires in December 2018, China issued five additional product approvals. Many other products remain pending at the final approval stage of NBC review.

Food Safety Law

China's ongoing implementation of its 2015 *Food Safety Law* has introduced a myriad of new regulations. These regulations, many of which were notified to the WTO TBT Committee but not the WTO SPS Committee, include exporter facility and product registration requirements for goods such as dairy, infant formula, seafood, grains, animal feed, pet food and oilseeds. Additionally, despite facing strong international opposition and agreeing to a two-year implementation delay, Chinese authorities are still considering the implementation of a burdensome and unnecessary measure requiring official certification of all food products, including low-risk food exports. These and other new measures continue to place excessive strain on Chinese agencies' resources, traders and exporting countries' competent authorities, with no apparent added benefit to food safety, yet they seemingly provide China a tool to control the volume of food trade as desired.

Poultry

China is the last remaining major trading partner of the United States to maintain a ban on imports of U.S. poultry due to a previous outbreak of high pathogenicity avian influenza (HPAI) in the United States, even though the outbreak was resolved in 2017 in accordance with the guidelines of the World Organization for Animal Health (known by its historical acronym, OIE). China's continuing import ban therefore is unwarranted and unscientific and remains in place despite many exchanges between U.S. and Chinese regulators and repeated demonstrations that U.S. poultry is safe. Separately, the United States has sought China's agreement that it will follow OIE guidelines in the case of future outbreaks of HPAI by only banning imports of poultry from regions in the United States affected by the disease rather than impose a nationwide ban like the one currently in place. To date, however, China has shown no willingness to consider this regionalization approach, despite its endorsement by the OIE and China's WTO obligations.

Beef

In May 2017, China committed to allow the resumption of U.S. beef shipments into its market consistent with international food safety and animal health standards. However, China back-tracked one month later and insisted that it would retain certain conditions relating to veterinary drugs, growth promotants and animal health that were inconsistent with international food safety and animal health standards. For example, China insisted on maintaining a zero-tolerance ban on the use of beta-agonist and synthetic hormones commonly used by global cattle producers under strict veterinary controls and following Codex Alimentarius (Codex) guidelines. Only about three percent of U.S. cattle qualify for importation into China under these conditions.

Pork

China maintains an approach to U.S. pork that is inconsistent with international standards, limiting the potential of an important export market given China's growing meat consumption and China's recent shortages of domestic pork due to African swine fever. Specifically, China bans the use of certain veterinary drugs and growth promotants instead of accepting the maximum residue levels (MRLs) set by Codex. China also enforces a zero tolerance standard for the detection of salmonella in imported pork, which is unnecessarily prohibitive and generally unachievable. China does not apply the same standard to domestic pork.

Horticultural Products

China has not approved longstanding market access requests for a variety of U.S. horticultural products, despite having received sufficient technical and scientific data justifying market access. Affected products include potatoes, nectarines, blueberries and avocados, among others.

VAT Rebates and Related Policies

The Chinese government attempted to manage imports of primary agricultural commodities by raising or lowering the VAT rebate to manage domestic supplies. China sometimes reinforces its domestic objectives by imposing or retracting VATs. These practices have caused tremendous distortion and uncertainty in the global markets for corn and soybeans, as well as intermediate processed products of these commodities.

Transparency

Overview

One of the core principles reflected throughout China's WTO accession agreement is transparency. Unfortunately, there remains a lot more work for China to do in this area.

Publication of Trade-related Measures

In its WTO accession agreement, China committed to adopt a single official journal for the publication of all trade-related laws, regulations and other measures. China adopted a single official journal, to be administered by the Ministry of Commerce (MOFCOM), in 2006. Many years later, however, it appears that some but not all central-government entities publish trade-related measures in this journal, and these government entities tend to take a narrow view of the types of trade-related measures that need to be published in the official journal. These government entities more commonly (but still not regularly) publish trade-related administrative regulations and departmental rules in the journal, but it is less common for them to publish other measures such as opinions, circulars, orders, directives and notices, even though they are in fact all binding legal measures. In addition, China rarely publishes certain types of trade-related measures in the journal, such as subsidy measures, and seldom publishes sub-central government trade-related measures in the journal.

Notice-and-comment Procedures

In its WTO accession agreement, China committed to provide a reasonable period for public comment before implementing new trade-related laws, regulations and other measures. While no progress has been made in implementing this commitment at the sub-central government level, the National People's Congress (NPC) instituted notice-and-comment procedures for draft laws in 2008, and shortly thereafter China indicated that it would also publish proposed trade- and economic-related administrative regulations and departmental rules for public comment. Subsequently, the NPC began regularly publishing draft laws for public comment, and China's State Council often (but not regularly) published draft administrative regulations for public comment. In addition, many of China's ministries were not consistent in publishing draft departmental rules for public comment. At the May 2011 S&ED meeting, China committed to issue a measure implementing the requirement to publish all proposed trade- and economic-related administrative regulations and departmental rules on the website of the State Council's Legislative Affairs Office (SCLAO) for a public comment period of not less than 30 days. In April 2012, the SCLAO issued two measures that appear to address this requirement. Currently, despite continuing U.S. engagement, China still needs to improve its practices relating to the publication of administrative regulations and departmental rules for public comment. China also needs to formalize and improve its use of notice-and-comment procedures for so-called "normative documents," which are regulatory documents that do not fall into the category of administrative regulations or departmental rules but still impose binding obligations on enterprises and individuals.

Translations

In its WTO accession agreement, China committed to make available translations of all of its trade-related laws, regulations and other measures at all levels of government in one or more of the WTO languages, i.e., English, French and Spanish. Prior to 2014, China had only compiled translations of trade-related laws and administrative regulations (into English), but not other types of measures, and China was years behind in publishing these translations. At the July 2014 S&ED meeting, China committed that it would extend its translation efforts to include not only trade-related laws and administrative regulations but also trade-related departmental rules. Subsequently, in March 2015, China issued a measure requiring trade-related departmental rules to be translated into English. This measure also provides that the translation of a departmental rule normally must be published before implementation. This measure, even if fully implemented, is not sufficient to bring China into full WTO compliance in this area, as China does not publish translations of trade-related laws and administrative regulations in a timely manner (i.e., before implementation), nor does it publish any translations of trade-related measures issued by sub-central governments at all.

Legal Framework

Overview

In addition to the area of transparency, several other areas of China's legal framework can adversely affect the ability of U.S. industry to access or invest in China's market. Key areas include administrative licensing, competition policy, the treatment of non-governmental organizations (NGOs), commercial dispute resolution, labor laws and laws governing land use. Corruption among Chinese government officials, enabled in part by China's incomplete adoption of the rule of law, is also a key concern.

Administrative Licensing

U.S. companies continue to encounter significant problems with a variety of administrative licensing processes in China, including processes to secure product approvals, investment approvals, business expansion approvals, business license renewals and even approvals for routine business activities. While there has been an overall reduction in license approval requirements and a focus on decentralizing licensing approval processes, U.S. companies report that these efforts have only had a marginal impact on their licensing experiences so far.

Competition Policy

China's implementation of the *Anti-monopoly Law* poses multiple challenges. One key concern relates to how the *Anti-monopoly Law* will be applied to state-owned enterprises. While Chinese regulatory authorities have clarified that the *Anti-monopoly Law* does apply to state-owned enterprises, to date they have brought enforcement actions primarily against provincial government-level state-owned enterprises, rather than central government-level state-owned enterprises under the supervision of the State-owned Assets Supervision and Administration Commission (SASAC). In addition, provisions in the *Anti-monopoly Law* protect the lawful operations of state-owned enterprises and government monopolies in industries deemed nationally important. Overall, many U.S. companies cite selective enforcement of the *Anti-monopoly Law* against foreign companies seeking to do business in China as a major concern, and they have highlighted the limited enforcement of this law against state-owned enterprises.

Another concern relates to the procedural fairness of *Anti-monopoly Law* investigations of foreign companies. U.S. industry has expressed concern about insufficient predictability, fairness and transparency in the investigative processes of the NDRC. For example, through the threat of steep fines and other punitive actions, NDRC has pressured foreign companies to "cooperate" in the face of unspecified allegations and has discouraged or prevented foreign companies from bringing counsel to meetings. In addition, U.S. companies continue to report that the Chinese authorities sometimes make "informal" suggestions regarding appropriate company behavior, strongly suggesting that a failure to comply may result in investigations and possible punishment.

In March 2018, as part of a major government reorganization, China announced the creation of the State Administration for Market Regulation (SAMR), a new agency that now houses the anti-monopoly enforcement authorities from the NDRC, MOFCOM and the State Administration of Industry and Commerce (SAIC) in one of its bureaus. It would be a positive development if centralized anti-monopoly enforcement leads to policy adjustments that address the serious concerns in this area.

OVERVIEW OF U.S. ENGAGEMENT

BILATERAL ENGAGEMENT

As explained in last year's report, in April 2017, at a summit meeting in Mar-a-Lago, Florida, President Trump and China's President Xi agreed to the establishment of a new high-level dialogue structure for the United States and China, which included the Comprehensive Economic Dialogue (CED), the Diplomatic and Security Dialogue, the Law Enforcement and Cybersecurity Dialogue and the Social and Cultural Dialogue. It was agreed that trade and investment issues would be addressed through the CED, whose mandate also extended to macroeconomic policy, financial stability, currency and energy. The CED was chaired on the U.S. side by the Commerce Secretary and the Treasury Secretary and on the Chinese side by a Vice Premier. It supplanted two other high-level dialogues, the JCCT and the S&ED (see Box 1).

Staff-level discussions under the auspices of the CED began shortly after the Mar-a-Lago summit meeting. One month later, in May 2017, the two sides agreed to certain initial results, which included five outcomes for the U.S. side. These outcomes focused primarily on overdue actions by Chinese regulatory authorities, rather than any fundamental changes to China's trade regime. Specifically, China committed to (1) resume imports of U.S. beef and beef products on conditions consistent with international food safety and animal health standards, (2) conduct science-based evaluations of eight long-pending U.S. biotechnology product applications, (3) allow wholly foreign-owned financial services firms in China to provide credit rating services and to begin the licensing process for credit investigation services, (4) allow wholly U.S.-owned suppliers of electronic payment services (EPS) to begin the licensing process and (5) issue bond underwriting and settlement licenses to two qualified U.S. financial institutions.

By the time of the first plenary meeting of the CED, chaired by the U.S. Commerce and Treasury Secretaries and a Chinese Vice Premier, in July 2017, China's implementation of the commitments that it had made in May 2017 was already problematic. Despite having committed to market access for U.S. beef consistent with international food safety and animal health standards, China back-tracked one month later and insisted that it would retain certain conditions relating to veterinary drugs and hormones that were inconsistent with international food safety and animal health standards. In addition, by the time of the CED meeting, China had approved only four of the eight long-pending biotechnology product applications on which it had promised to take action. At the time, it appeared that China was reserving action on the remaining four applications for strategic purposes, and that view proved to be correct. Meanwhile, it remained unclear whether China would be willing to follow through with its commitment to allow U.S. EPS suppliers to begin the licensing process. In fact, as of December 2018, China still had not followed through. Even though two major U.S. EPS suppliers have submitted applications to begin the licensing process, the Chinese regulator continues to delay its formal acceptance of their applications for consideration.

Under these circumstances, it is not surprising that the CED meeting in July 2017 proved unsuccessful. Despite extensive discussion of a number of additional issues during the run-up to that meeting, the two sides made no progress on any of those issues, and no outcomes were achieved.

When President Trump met with President Xi in Beijing in November 2017, the U.S. side explained that it had no interest in continuing to engage in the types of discussions pursued in the CED or in previous dialogues like the JCCT, the SED and the S&ED. The U.S. side explained that, despite the intensity of engagement in those many dialogues, they had only achieved isolated, incremental progress on problematic Chinese trade and investment barriers. The U.S. side made clear that it is seeking fundamental changes to China's trade regime, including to the problematic industrial policies that have continued to dominate China's state-led, mercantilist economy. As the U.S. side noted, these unacceptable industrial policies persist and continually evolve, as China seems determined to maintain the state's leading role in the economy and to continue to pursue policies and practices that promote, guide and support domestic industries while simultaneously and actively seeking to impede, disadvantage and harm their foreign counterparts. The U.S. side emphasized that China's approach is incompatible with the open, market-oriented approach expressly envisioned by WTO members and contrary to the fundamental principles running throughout the many WTO agreements.

Box 1: **Previous U.S.-China Dialogues**

JCCT: In 1983, the United States and China founded the JCCT as a government-to-government consultative mechanism between the U.S. Department of Commerce and a MOFCOM predecessor, the Ministry of Foreign Economic Relations and Trade. It was designed to provide a forum for discussing trade concerns and pursuing bilateral commercial opportunities. In 2003, President Bush and Premier Wen agreed to elevate the JCCT, with the Commerce Secretary and the U.S. Trade Representative chairing the U.S. side and a Vice Premier chairing the Chinese side. From 2004 through 2016, the JCCT held annual plenary meetings, while numerous JCCT working groups and sub-dialogues met throughout the year in areas such as industrial policies, competitiveness, intellectual property rights, structural issues, steel, agriculture, pharmaceuticals and medical devices, information technology, insurance, tourism, environment, commercial law, trade remedies and statistics.

SED: In 2006, President Bush and President Hu agreed to create a Strategic Economic Dialogue between the United States and China. The objectives of the SED were to help to ensure leaders of the two countries could address critical economic challenges facing their economies, have a forum for discussing cross-cutting issues and can make the most productive use of the existing bilateral commissions and dialogues. President Bush designated the Treasury Secretary to lead the U.S. side of this dialogue, with participation by Cabinet members from other U.S. agencies. President Hu designated a Vice Premier to lead the Chinese side, with participation from various ministers. The SED convened semi-annually from 2006 through 2008.

S&ED: In 2009, the U.S.-China Strategic and Economic Dialogue was established by Presidents Obama and Hu. The S&ED included separate strategic and economic tracks and held plenary meetings annually. In the Economic Track, the two sides focused on four pillars of engagement: (1) promoting a strong recovery and achieving more sustainable and balanced growth; (2) promoting more resilient, open and market-oriented financial systems; (3) strengthening trade and investment; and (4) strengthening the international financial architecture. The S&ED convened annually from 2009 to 2016.

During the course of 2018, periodic high-level discussions took place between the United States and China. By May 2018, the United States had proposed specific structural changes that China needed to make to re-orient its state-led, mercantilist trade regime and become more open and market-oriented. These included actions not only in the area of forced technology transfer, but also in areas such as trade deficit reduction, tariffs, non-tariff barriers, intellectual property rights protection and enforcement, services market access and agricultural market access, among other areas.

For a long time, China did not respond constructively to the United States' proposal. China did not take any of the actions called for by the United States, nor did it commit that it would take any of those actions in the future. China's position is essentially that the United States should accept as sufficient China's past "reform and opening up" measures and China's plans for future "reform and opening up" measures. China did offer to make minor changes and modest increases in its purchases of U.S. goods and services, but this offer contained many conditions.

On December 1, 2018, President Trump and China's President Xi met in Buenos Aires following a meeting of the G20 leaders. At this meeting, the Chinese side seemed to show more willingness to seriously engage with the United States. It was agreed that the United States would suspend raising the tariff rate from 10 percent to 25 percent on $200 billion of Chinese goods on January 1, 2019, while the two sides engaged in intensive negotiations for 90 days on the entire range of structural changes needed in China's trade regime as well as China's additional purchases of U.S. goods and services. Absent a resolution within 90 days, the United States indicated that the 10 percent duty rate would be raised to 25 percent on March 2, 2019. These discussions are ongoing.

MULTILATERAL MEETINGS

In 2018, as in prior years, the United States actively participated in meetings at the WTO addressing China and its adherence to its WTO obligations. Throughout the year, the United States raised China-related issues at regular meetings of WTO committees and councils. The United States also brought its concerns about China to the attention of the WTO's General Council, during meetings in April and July 2018. At the July 2018 meeting, the United States presented a paper for WTO members' consideration that set forth in detail how China's trade-disruptive economic model works, the costs that it exacts from other WTO members and the benefits that China receives from it.

The United States also played an active role in the WTO's sixth Trade Policy Review of China (see Box 2), held in July 2018. The United States intervened to present a critical evaluation of China's conduct as a WTO member and submitted more than 200 written questions probing various aspects of China's trade regime.

In 2018, the United States also continued to participate actively in the Global Forum on Steel Excess Capacity, along with other G-20 members and interested members of the Organization for Economic Cooperation and Development (OECD). The mission of the Global Forum is to enhance information-sharing among Global Forum members and to take steps to address the challenge of excess capacity in the steel sector. In the first two years of its initial three-year mandate, the Global Forum has sought to identify subsidies and other types of government support measures that cause market distortions and contribute to global excess capacity. China, which accounts for about one-half of global capacity and production, has been a heavy focus of the Global Forum's discussions. Unfortunately, real progress on addressing the challenges of excess steel capacity has not been achieved.

Box 2: **Trade Policy Review Mechanism**

The Trade Policy Review Mechanism (TPRM) was created by the WTO Agreement to facilitate the smooth functioning of the multilateral trading system by enhancing the transparency of WTO members' trade policies. All WTO members are subject to review under the TPRM. The four WTO members with the largest shares of world trade (currently, the European Union, the United States, Japan and China) are reviewed every two years, the next 16 largest are reviewed every four years, and all others are reviewed every six years (except that a longer period may be fixed for least-developed country members of the WTO). Effective January 1, 2019, these review cycles will be three, five and seven years, respectively. The reviews are conducted by the Trade Policy Review Body (TPRB) on the basis of a policy statement by the WTO member under review and a report prepared by economists in the Secretariat's Trade Policy Review Division. In preparing its report, the Secretariat seeks the cooperation of the Member, but has the sole responsibility for the facts presented and views expressed about the member's trade policies. During a meeting that takes place over two days, the TPRB's debate is stimulated by a discussant, selected beforehand for this purpose. Members also make their own observations, while the member under review is required to respond orally and in writing to written questions that have been submitted by other members. The Secretariat's report and the member's policy statement are published after the review meeting, along with the minutes of the meeting.

ENFORCEMENT

U.S. Laws

In August 2017, in response to a Presidential memorandum, USTR initiated an investigation under Section 301 of the Trade Act of 1974, as amended, focused on policies and practices of the Government of China related to technology transfer, intellectual property and innovation. USTR identified four categories of conduct subject to investigation. USTR explained that: (1) the Chinese government reportedly uses a variety of tools (including opaque approval processes, joint venture requirements, foreign equity limitations and other mechanisms) to require or pressure the transfer of technologies and intellectual property to Chinese companies; (2) the Chinese government reportedly deprives U.S. companies of the ability to set market-based terms in licensing negotiations with Chinese companies; (3) the Chinese government reportedly intervenes in markets by directing or unfairly facilitating the acquisition of U.S. companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property; and (4) the Chinese government reportedly conducts or supports unauthorized intrusions into U.S. commercial computer networks or cyber-enabled theft. The notice invited written comments and information from interested parties and scheduled a public hearing, which was held in October 2017.

After thoroughly analyzing the available evidence, USTR issued a detailed report in March 2018. With regard to each of the four categories of policies and practices under investigation, USTR found ample support for concluding that China had engaged in unfair and harmful conduct. Specifically, USTR found, first, that China uses foreign ownership restrictions, including joint venture requirements, equity limitations, and other investment restrictions, to require or pressure technology transfer from U.S. companies to Chinese entities. USTR also found that China uses administrative review and licensing procedures to require or pressure technology transfer, which, inter alia, undermines the value of U.S. investments and technology and weakens the global competitiveness of U.S. firms. Second, USTR found that China imposes substantial restrictions on, and intervenes in, U.S. firms' investments and activities, including through restrictions on technology licensing terms. These restrictions deprive U.S. technology owners of the ability to bargain and set market-based terms for technology transfer. As a result, U.S. companies seeking to license technologies must do so on terms that unfairly favor Chinese recipients. Third, USTR found that China directs and facilitates the systematic investment in, and acquisition of, U.S. companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property and to generate large-scale technology transfer in industries deemed important by Chinese government industrial plans. Fourth, USTR found that China conducts and supports unauthorized intrusions into, and theft from, the computer networks of U.S. companies. These actions provide the Chinese government with unauthorized access to intellectual property, trade secrets or confidential business information, including technical data, negotiating positions and sensitive and proprietary internal business communications. These actions support China's strategic development goals, including its science and technology advancement, military modernization, and economic development.

Based on these findings, the President directed that a range of responsive actions be taken. Specifically, the President instructed the U.S. Trade Representative to commence Section 301 procedures for imposing additional tariffs on imports of Chinese goods. The President also instructed the U.S. Trade Representative to initiate a WTO case to address certain discriminatory technology licensing measures maintained by China. In addition, the President instructed the Treasury Secretary to address concerns about investment in the United States directed or facilitated by China in industries or technologies deemed important to the United States.

In March 2018, as directed by the President, USTR initiated a WTO case challenging Chinese measures that deny foreign patent holders the ability to enforce their patent rights against a Chinese joint-venture partner after a technology transfer contract ends and that impose mandatory adverse contract terms that discriminate against and are less favorable for imported foreign technology as compared to Chinese technology. Consultations took place in August 2018, and a panel was established to hear the case at the United States' request in November 2018

In May 2018, following the submission of written comments by interested parties and a public hearing on the proposed additional tariffs, the President instructed the U.S. Trade Representative to impose an additional duty of 25 percent on approximately $50 billion worth of Chinese imports containing industrially significant technologies, including those related to China's *Made in China 2025* industrial plan. These additional tariffs were imposed in two tranches, with $34 billion becoming effective in July 2018 and a further $16 billion becoming effective in August 2018. Instead of eliminating its unfair and harmful policies and practices, China decided without justification to impose additional tariffs on imports of U.S. goods, with $34 billion becoming effective in July 2018 and a further $16 billion becoming effective in August 2018. At the direction of the President, in a supplemental action under Section 301, the U.S. Trade Representative imposed a further $200 billion in additional tariffs on Chinese imports, with the duty set at 10 percent effective in September 2018 and rising to 25 percent in January 2019.

With regard to U.S. concerns relating to Chinese investment in technology-intensive sectors, the President announced in June 2018 that Congress had made significant progress toward passing legislation that would modernize the tools for protecting the United States' critical technologies from harmful foreign acquisitions. Indeed, this legislation not only strengthened the existing mechanism – administered by the Committee on Foreign Investment in the United States (CFIUS) – for reviewing foreign investment in the United States for national security purposes, but also created a process for identifying emerging and foundational technologies that should be added to existing U.S. export controls. The President accordingly directed the Administration to implement this legislation, once enacted, promptly and to enforce it rigorously, with a view toward addressing the concerns regarding state-directed investment in critical technologies identified in the Section 301 investigation.

In November 2018, USTR issued another detailed section 301 report, which examined whether China had decided to respond constructively to the United States' initial report. USTR found that China had not fundamentally altered the unfair, unreasonable and market-distorting policies and practices that were the subject of the March 2018 report. Instead, China's responsive actions had been confined to imposing tariffs on U.S. goods in retaliation for the United States' efforts to address the harm caused by China's extensive unreasonable policies and practices designed to force or pressure the transfer of technology from U.S. companies to Chinese companies.

In December 2018, at the meeting between President Trump and President Xi in Buenos Aires, the United States agreed to hold off on raising the duty rate on $200 billion of Chinese goods from 10 percent to 25 percent on January 1, 2019, while the two sides engaged in intensive negotiations for 90 days on the entire range of structural changes needed in China's trade regime. Absent a resolution within 90 days, the 10 percent tariff rate would be raised to 25 percent.

WTO Litigation

Separate from enforcement actions under U.S. law, the United States continued to pursue litigation at the WTO to hold China accountable for adherence to WTO rules in 2018. Key WTO cases being pursued by the United States are discussed below.

In December 2016, the United States launched a WTO case challenging China's administration of tariff-rate quotas for rice, wheat and corn. Due to China's poorly defined criteria for applicants, unclear procedures for distributing TRQ allocations, and failure to announce quota allocation and reallocation results, traders are unsure of available import opportunities and producers worldwide have reduced market access opportunities. Consultations took place in February 2017. A WTO panel was established to hear the case at the United States' request in September 2017, and 17 other WTO members joined as third parties. Hearings before the panel took place in July and October 2018, and the panel is expected to issue its decision in mid-2019.

In September 2016, the United States initiated another agriculture-related case against China, challenging excessive government support for the production of rice, wheat and corn by farmers in China. Like other WTO members, China committed to limit its support for producers of agricultural commodities. China's market price support programs for these agricultural commodities appear to provide support far exceeding the agreed levels. This excessive support creates price distortions and skews the playing field against U.S. farmers. In October 2016, consultations took place. In January 2017, a WTO panel was established to hear the case at the United States' request, and 27 other WTO members joined as third parties. Hearings before the panel took place in January and April 2018, and the panel is expected to issue its decision in early 2019.

In a WTO case initiated in September 2011, the United States successfully challenged China's imposition of antidumping and countervailing duties on imports of certain U.S. chicken products known as "broiler products." In the course of its AD and CVD investigations, China's regulatory authorities imposed the duties at issue without necessary legal and factual support and without observing certain transparency and procedural fairness requirements, in violation of various WTO obligations under the AD Agreement and the Subsidies Agreement. Consultations were held in October 2011. A WTO panel was established to hear this case at the United States' request in January 2012, and seven other WTO members joined the case as third parties. Hearings before the panel took place in September and December 2012, and the panel issued its decision in August 2013, finding in favor of the United States on all significant claims. China decided not to appeal the panel's decision and subsequently agreed to come into compliance with the WTO's rulings by July 2014. China issued a redetermination in July 2014 that left the duties in place, but it appeared to be inconsistent with the WTO's rulings. In May 2016, the United States launched a challenge to China's redetermination in a proceeding under Article 21.5 of the WTO's Dispute Settlement Understanding (DSU). A hearing before the panel took place in April 2017, and the panel issued its decision in January 2018, ruling that China had failed to comply with the findings made by the panel in August 2013. China removed its duties in February 2018.

In a WTO case initiated in September 2010, the United States challenged China's restrictions on foreign suppliers of electronic payment services. Suppliers like the major U.S. credit card companies provide these services in connection with the operation of electronic networks that process payment transactions involving credit, debit, prepaid and other payment cards. China's regulatory regime places severe restrictions on foreign suppliers of electronic payment services. Among other things, China prohibits foreign suppliers from handling the typical payment card transaction in China, in which a Chinese consumer is billed and makes payment in China's domestic currency, known as the *renminbi* (RMB). Instead, China has created a national champion, allowing only one domestic entity, China Union Pay, to supply these services. Consultations were held in October 2010. A WTO panel was established to hear this case at the United States' request in March 2011, and six other WTO members joined the case as third parties. Hearings before the panel took place in October and December 2011, and the panel issued its decision in July 2012. The panel ruled that China's commitments under the GATS required China to allow foreign suppliers to provide electronic payment services for payment card transactions denominated in RMB through commercial presence in China on non-discriminatory terms. China decided not to appeal the panel's decision and subsequently agreed to come into compliance with the WTO's rulings by July 2013.

To date, however, China has failed to come into compliance. In October 2014, China's State Council announced that China would be opening its market to foreign suppliers of electronic payment services, but delayed the issuance of a formal decision. In April 2015, the State Council finally issued the formal decision setting forth the terms on which China would be opening its market to foreign suppliers of electronic payment services. In August 2015, the regulator, PBOC, issued draft licensing regulations, but it did not issue those regulations in final form until June 2016, during the S&ED meeting. PBOC followed up with the issuance of additional guidance for potential applicants in October 2016 and June 2017. Two major U.S. suppliers subsequently filed applications to begin preparatory work, the first of two required steps in the licensing process, but to date PBOC has not yet taken action even to accept their applications for consideration. Consequently, as of December 2018, over five years after China had promised to comply, these U.S. suppliers remained blocked from entering China's market. The United States continues to press this issue in its ongoing negotiations with China.

Another WTO case active in 2018 involved U.S. challenges to market access restrictions maintained by China that restricted the importation and distribution of copyright-intensive products such as books, newspapers, journals, theatrical films, DVDs and music. In this case, hearings before a WTO panel took place in 2008, and the panel issued its decision in August 2009, ruling in favor of the United States on every significant claim in the case. China appealed the panel's decision in September 2009. The WTO's Appellate Body rejected China's appeal on all counts in December 2009. China agreed to come into compliance with the WTO's rulings by March 2011. China subsequently issued several revised measures, and repealed other measures, relating to the market access restrictions on books, newspapers, journals, DVDs and music. As China acknowledged, however, it did not issue any measures addressing theatrical films. Instead, China proposed bilateral discussions with the United States in order to seek an alternative solution.

After months of negotiations, which included discussions between the two sides' Vice Presidents, the United States and China reached agreement in February 2012 on an MOU providing for substantial increases in the number of foreign films imported and distributed in China each year, substantial additional revenue for foreign film producers and the opening up of film distribution opportunities for imported films. To date, however, China has not yet fully implemented its MOU commitments, including with regard to critical commitments to open up film distribution opportunities for imported revenue-sharing films. In addition, U.S. industry reports that China has been imposing an informal quota on the total number of U.S. revenue-sharing films and flat-fee films that can be imported each year, which, if true, would undermine the terms of the MOU. As a result, the United States has pressed China for full implementation of the MOU.

The MOU provided that it would be reviewed in calendar year 2017 in order for the two sides to discuss issues of concern, including additional compensation for the U.S. side. At the November 2016 JCCT meeting, China agreed to begin discussing an updated MOU promptly in 2017. China further promised that those discussions will seek to increase the number of revenue-sharing films to be imported each year and the share of gross box office receipts received by U.S. enterprises as well as seek to address outstanding U.S. concerns relating to other policies and practices that may impede the U.S. film industry's access to China's market, such as importation rights, the number of distributors of imported films and the independence of distributors, among other issues.

In 2017, in accordance with the terms of the MOU, the two sides began discussions regarding the provision of further meaningful compensation to the United States in an updated MOU. These discussions continued until March 2018, when China embarked on a major government reorganization that involved significant changes for China's Film Bureau. The discussions have not yet resumed. The United States will continue pressing China to fulfill its obligations.

CHINA'S WTO COMPLIANCE

Set forth below is a detailed analysis of the commitments that China made in specific areas of trade upon acceding to the WTO on December 11, 2001, the trade policies and practices pursued by China in those areas and the United States' efforts to address concerns that have arisen as of December 2018.

TRADING RIGHTS

Within the context of China's WTO commitments, the concept of "trading rights" includes two elements, i.e., the right to import goods (into China) and the right to export goods (from China). It does not include the right to sell goods within China, as that right is governed by separate commitments principally relating to "distribution services" set forth in China's Services Schedule (see the Distribution Services section below). Together with China's distribution services commitments, China's trading rights commitments call for the elimination of significant barriers to a wide range of U.S. and other foreign industries doing business, or seeking to do business, in China.

Until shortly before its WTO accession, China severely restricted the number and types of enterprises that could import or export goods, and it also restricted the goods that a particular enterprise could import or export. For the most part, China confined trading rights to certain state-owned manufacturing and trading enterprises, which could import or export goods falling within their approved scopes of business. China also granted trading rights to certain foreign-invested enterprises, allowing them to import inputs for their production purposes and export their finished products.

In its accession agreement, China committed to substantial liberalization in the area of trading rights. Most importantly, China agreed to eliminate its system of examination and approval of trading rights and make full trading rights automatically available for all Chinese enterprises, Chinese-foreign joint ventures, wholly foreign-owned enterprises and foreign individuals, including sole proprietorships, within three years of its accession, or by December 11, 2004, the same deadline for China to eliminate most restrictions in the area of distribution services. The only exceptions applied to products listed in an annex to China's accession agreement, such as grains, cotton and tobacco, for which China reserved the right to engage in state trading.

As previously reported, the National People's Congress (NPC) issued a revised *Foreign Trade Law*, which provided for trading rights to be automatically available through a registration process for all domestic and foreign entities and individuals, effective July 2004, while MOFCOM issued implementing rules setting out the procedures for registering as a foreign trade operator.

Books, Movies and Music

Under the terms of China's accession agreement, trading rights for copyright-intensive products such as books, newspapers, journals, theatrical films, DVDs and music should have been automatically available to all Chinese enterprises, Chinese-foreign joint ventures, wholly foreign-owned enterprises and foreign individuals as of December 11, 2004. These products are not included in the list of products for which China reserved the right to engage in state trading. Nevertheless, China did not liberalize trading rights for these products. China continued to reserve the right to import these products to state trading enterprises, as reflected in a complex web of measures issued by numerous agencies, including the State Council, the State Administration of Radio, Film and Television (SARFT), MOFCOM, the NDRC, the Ministry of Culture, the General Administration of Press and Publication (GAPP) and the General Administration of Customs.

As previously reported, the United States initiated a WTO dispute settlement case against China in April 2007, challenging China's restrictions on the importation and distribution of copyright-intensive products such as books, newspapers, journals, theatrical films, DVDs and music. The WTO panel established to hear this case issued its decision in August 2009, ruling in favor of the United States on all significant claims. China appealed the panel's decision in September 2009, and the WTO's Appellate Body rejected China's appeal on all counts in December 2009. China agreed to comply with these rulings by March 2011. China subsequently issued several revised measures, and repealed other measures, relating to the importation restrictions on books, newspapers, journals, DVDs and music. However, China did not issue any measures addressing theatrical films and instead proposed bilateral discussions with the United States in order to seek an alternative solution.

After months of negotiations, the United States and China reached agreement in February 2012 on an MOU providing for substantial increases in the number of foreign films imported and distributed in China each year, substantial additional revenue for U.S. film producers and the opening up of film distribution opportunities for imported films. The MOU provides that it will be reviewed after five years in order for the two sides to discuss issues of concern, including additional compensation for the U.S. side.

To date, China has not yet fully implemented its MOU commitments, including with regard to critical commitments to open up film distribution opportunities for imported revenue-sharing films. In addition, U.S. industry reports that China has been imposing an informal quota on the total number of U.S. revenue-sharing films and flat-fee films that can be imported each year, which, if true, would undermine the terms of the MOU.

The films MOU provided that it would be reviewed in calendar year 2017 in order for the two sides to discuss issues of concern, including additional meaningful compensation for the U.S. side. At the November 2016 JCCT meeting, China pledged that those discussions would seek to increase the number of revenue-sharing films to be imported each year and the share of gross box office receipts received by U.S. enterprises as well as seek to address outstanding U.S. concerns relating to other policies and practices that may impede the U.S. film industry's access to China's market, such as importation rights, the number of distributors of imported films and the independence of distributors, among other issues.

In 2017, in accordance with the terms of the MOU, the two sides began discussions regarding the provision of further meaningful compensation to the United States. These discussions continued until March 2018, when China embarked on a major government reorganization that involved significant changes for China's Film Bureau. The discussions have not yet resumed. The United States will continue pressing China to fulfill its obligations.

IMPORT REGULATION

Tariffs

During its bilateral negotiations with interested WTO members leading up to its accession, China agreed to increase market access for U.S. and other foreign companies by reducing tariff rates on industrial goods over a period of years running from 2002 through 2010. The agreed reductions are set forth as tariff "bindings" in China's Goods Schedule, meaning that while China cannot exceed the bound tariff rates, it can decide to apply them at a lower rate, as many members do when trying to attract particular imports.

Despite the significant reductions in China's tariffs that WTO members were able to negotiate with China in connection with its accession to the WTO, China retains the right to impose relatively high tariffs on some products that compete with sensitive domestic industries. For example, the tariff on most automobiles is 15 percent, and most audio and video recorders still face 30 percent tariffs.

In 2018, China imposed additional tariffs on certain U.S. products in excess of China's bound rates. China took these actions in retaliation for tariffs imposed by the United States on national security grounds under Section 232 of the Trade Expansion Act of 1962 and tariffs imposed by the United States under Section 301 of the Trade Act of 1974 in response to numerous unfair and harmful policies and practices of the Government of China related to technology transfer, intellectual property and innovation. In addition, there are credible reports that officials at China's ports from the General Administration of Customs are now assessing duties on U.S. products based on higher "reference prices," rather than the declared value, effectively resulting in even higher tariffs. There is no legitimate basis for these actions.

Customs and Trade Administration

Like other acceding WTO members, China agreed to take on the WTO obligations set forth in three agreements that address the means by which customs and other trade administration officials check imports and establish and apply relevant trade regulations. These agreements cover the areas of customs valuation, rules of origin and import licensing.

CUSTOMS VALUATION

The WTO Agreement on the Implementation of GATT Article VII (Agreement on Customs Valuation) is designed to ensure that determinations of the customs value for the application of duty rates to imported goods are conducted in a neutral and uniform manner, precluding the use of arbitrary or fictitious customs values. Adherence to the Agreement on Customs Valuation is important for U.S. exporters, particularly to ensure that market access opportunities provided through tariff reductions are not negated by unwarranted and unreasonable "uplifts" in the customs value of goods to which tariffs are applied. China agreed to implement its obligations under the Agreement on Customs Valuation upon accession, without any transition period. In addition, China's accession agreement reinforces China's obligation not to use minimum or reference prices as a means for determining customs value. It also called on China to implement the *Decision on Valuation of Carrier Media Bearing Software for Data Processing Equipment* and the *Decision on Treatment of Interest Charges in Customs Value of Imported Goods* by December 11, 2003.

In September 2015, China accepted the WTO Trade Facilitation Agreement (TFA), which includes provisions for expediting the movement, release and clearance of goods, including goods in transit. It also sets out measures for effective cooperation between customs and other appropriate authorities on trade facilitation and customs compliance issue. By its terms, the TFA enters into force after two-thirds of the WTO membership have accepted it, a level that was reached in February 2017.

Notwithstanding these various commitments, the United States continues to have significant concerns, as discussed below.

Customs Clearance Procedures

U.S. exporters continue to be concerned about inefficient and inconsistent customs clearance procedures in China. These procedures vary from port to port, lengthy delays are not uncommon, and the fees charged appear to be excessive, giving rise to concerns about China's compliance with its obligations under Article VIII of GATT 1994.

Tariff Classifications

U.S. industry notes that Chinese customs officers appear to have wide discretion in classifying goods for tariff purposes, and their classifications sometimes appear to be arbitrary. This lack of uniformity and predictability creates unnecessary challenges for U.S. and other foreign companies seeking to export their goods to China.

Customs Valuation Determinations

China has still not uniformly implemented the various customs valuation measures issued following its accession to the WTO. U.S. exporters continue to report that they are encountering valuation problems at many ports.

According to U.S. exporters, even though the General Administration of Custom's measures provide that imported goods normally should be valued on the basis of their transaction price, meaning the price the importer actually paid, many Chinese customs officials are still improperly using "reference pricing," which usually results in a higher dutiable value. Indeed, it appears that the practice of using reference prices is increasing. Imports of information technology products reportedly are often subjected to reference pricing, as are other imported products, such as wood products.

In addition, some of China's customs officials are reportedly not applying the rules set forth in the General Administration of Custom's measures as they relate to software royalties and license fees. Rather, following their pre-WTO accession practice, these officials are still automatically adding royalties and license fees to the dutiable value (for example, when an imported personal computer includes pre-installed software), even though the rules expressly direct them to add those fees only if they are import-related and a condition of sale for the goods being valued.

U.S. exporters also have continued to complain that some of China's customs officials are assessing duties on digital products based on the imputed value of the content, such as the data recorded on a floppy disk or CD-ROM. China's own regulations require this assessment to be made on the basis of the value of the underlying carrier medium, meaning the floppy disk or CD-ROM itself.

U.S. exporters also have complained about the General Administration of Custom's use of outdated and arbitrary pricing methodologies that do not take account of modern, complex supply chain models. In particular, according to these exporters, China's customs officials do not seem to understand transfer pricing, inbound and outbound bonded zone valuation, and customer rebates and sales discounts associated with modern supply chains.

The United States first presented its concerns about the customs valuation problems being encountered by U.S. companies several years ago. At that time, China indicated that it was working to establish more uniformity in its adherence to WTO customs valuation rules. Since then, the United States has sought to assist in this effort in part by conducting technical assistance programs for Chinese government officials on WTO compliance in the customs area. The United States has also raised its concerns about particular customs valuation problems before the WTO's Committee on Customs Valuation and during the WTO's biannual Trade Policy Reviews of China, the most recent of which was held in July 2018. At present, China still needs to improve its adherence to applicable customs valuation measures.

RULES OF ORIGIN

Upon its accession to the WTO, China became subject to the WTO Agreement on Rules of Origin, which sets forth rules designed to increase transparency, predictability and consistency in both the establishment and application of rules of origin, which are necessary for import and export purposes, such as determining the applicability of import quotas, determining entitlement to preferential or duty-free treatment and imposing antidumping or countervailing duties or safeguard measures, and for the purpose of confirming that marking requirements have been met. The Agreement on Rules of Origin also provides for a work program leading to the multilateral harmonization of rules of origin. This work program is ongoing, and China specifically agreed to adopt the internationally harmonized rules of origin once they were completed. In addition, China confirmed that it would apply rules of origin equally for all purposes and that it would not use rules of origin as an instrument to pursue trade objectives either directly or indirectly.

As previously reported, it took China nearly three years after its accession to the WTO for China's State Council to issue the regulations intended to bring China's rules of origin into conformity with WTO rules for import and export purposes. Shortly thereafter, the General Administration of Customs issued implementing rules addressing the issue of substantial transformation. U.S. exporters have not raised concerns with China's implementation of these measures.

IMPORT LICENSING

The Agreement on Import Licensing Procedures (Import Licensing Agreement) establishes rules for all WTO members, including China, that use import licensing systems to regulate their trade. Its aim is to ensure that the procedures used by members in operating their import licensing systems do not, in themselves, form barriers to trade. The objective of the Import Licensing Agreement is to increase transparency and predictability and to establish disciplines to protect an importer against unreasonable requirements or delays associated with the licensing regime. The Import Licensing Agreement covers both "automatic" licensing systems, which are intended only to monitor imports, not regulate them, and "non-automatic" licensing systems, which are normally used to administer import restrictions, such as tariff-rate quotas, or to administer safety or other requirements, such as for hazardous goods, armaments or antiquities. While the Import Licensing Agreement's provisions do not directly address the WTO consistency of the underlying measures that licensing systems might implement, they do establish the baseline of what constitutes a fair and non-discriminatory application of import licensing procedures. In addition, China specifically committed not to condition the issuance of import licenses on performance requirements of any kind, such as local content, export performance, offsets, technology transfer or research and development, or on whether competing domestic suppliers exist.

Shortly after China acceded to the WTO, the Ministry of Foreign Trade and Economic Cooperation (MOFTEC), the predecessor to MOFCOM, issued regulations revising China's automatic import licensing regime, and it later supplemented these regulations with implementing rules. MOFTEC also issued regulations revising China's non-automatic licensing regime.

Nevertheless, a variety of specific compliance issues continue to arise. In 2018, these included an import ban on recyclable materials (discussed below in the section on Standards, Technical Regulations and Conformity Assessment Procedures), the administration of the tariff-rate quota system for fertilizer (discussed below in the section on Tariff-rate Quotas on Industrial Goods), the administration of the tariff-rate quota system for certain agricultural commodities (discussed below in the section on Tariff-rate Quotas on Bulk Agricultural Commodities), various SPS measures (discussed below in the section on Sanitary and Phytosanitary Issues) and inspection-related requirements for soybeans, meat, poultry, pork and dairy products (discussed below in the section on Inspection-Related Requirements).

Non-tariff Measures

In its WTO accession agreement, China agreed that it would eliminate numerous trade-distortive non-tariff measures (NTMs), including import quotas, licenses and tendering requirements covering hundreds of products. Most of these NTMs had to be eliminated by the time that China acceded to the WTO. China committed to phase out other NTMs, listed in an annex to the accession agreement, over a transition period ending on January 1, 2005.

Import Ban on Remanufactured Products

China prohibits the importation of remanufactured products, which it typically classifies as used goods. China also maintains restrictions that prevent remanufacturing process inputs (known as cores) from being imported into China's customs territory, except special economic zones. These import prohibitions and restrictions hurt Chinese businesses and consumers who are unable to purchase high-quality, lower-cost remanufactured products produced outside of China.

China's import prohibitions and restrictions remain a serious problem and U.S. companies' activities remain severely restricted. To help address this problem, the United States has convened annual U.S.-China Remanufacturing Dialogues, which include relevant government and industry stakeholders from both countries as participants. In addition, the United States has continued to press China to lift its import prohibitions and to expand the scope of remanufacturing activity allowed to be conducted in China through other bilateral engagement.

Tariff-rate Quotas on Industrial Products

In its WTO accession agreement, China agreed to implement a system of tariff-rate quotas (TRQs) designed to provide significant market access for three industrial products, including fertilizer, a major U.S. export. Under this TRQ system, a set quantity of imports is allowed at a low tariff rate, while imports above that level are subject to a higher tariff rate. In addition, the quantity of imports allowed at the low tariff rate increases annually by an agreed amount. China's accession agreement specifies detailed rules, requiring China to operate its fertilizer TRQ system in a transparent manner and dictating precisely how and when China is obligated to accept quota applications, allocate quotas and reallocate unused quotas.

As previously reported, since China began implementing its TRQ system for fertilizer in 2002, it has not functioned smoothly. Despite repeated bilateral engagement and multilateral engagement at the WTO, including formal consultations with China in Geneva, concerns about inadequate transparency and administrative guidance have persisted. U.S. fertilizer exports to China declined sharply after China acceded to the WTO, as separate Chinese government policies promoting domestic fertilizer – including export duties (discussed below in the Export Regulation section) and discriminatory internal taxes (discussed below in the Taxation section) – appear to have made it difficult for foreign producers to compete in China's market.

Other Import Regulation

ANTIDUMPING

At the time of its accession to the WTO, China agreed to revise its regulations and procedures for AD proceedings to make them consistent with the AD Agreement. That agreement sets forth detailed rules prescribing the manner and basis on which a WTO member may take action to offset the injurious dumping of products imported from another WTO member. China also agreed to provide for judicial review of determinations made in its AD investigations and reviews.

Currently, China has in place 109 AD measures, affecting imports from 17 countries or regions. China also has 15 AD investigations in progress. The greatest systemic shortcomings in China's AD practice continue to be in the areas of transparency and procedural fairness. In addition, as discussed below, in recent years, China has invoked AD and CVD remedies under troubling circumstances. In response, the United States has pressed China both bilaterally and in WTO meetings to adhere strictly to WTO rules in the conduct of its AD investigations, and the United States has consistently pursued WTO dispute settlement where necessary.

Legal Regime

Under China's AD regime, until 2014, MOFCOM's Bureau of Fair Trade for Imports and Exports (BOFT) was charged with making dumping determinations, and MOFCOM's Bureau of Industry Injury Investigation (IBII) was charged with making injury determinations. In 2014, MOFCOM consolidated

BOFT and IBII into a new entity, the Trade Remedy and Investigation Bureau (TRIB), which makes both dumping and injury determinations. In cases where the subject merchandise is an agricultural product, the Ministry of Agriculture and Rural Affairs also may be involved in the injury investigation. The State Council Tariff Commission continues to make the final decision on imposing, revoking or retaining AD duties, based on recommendations provided by the TRIB.

China continues to add new regulations and rules to its AD legal framework, although not all of these measures have been notified to the WTO in a timely manner. In July 2009, MOFCOM solicited public comments on draft revisions of its rules on new shipper reviews, AD duty refunds and price undertakings. In May 2013, MOFCOM solicited public comments on rules concerning the implementation of WTO rulings in trade remedy cases. While these rules entered into effect in July 2013, China did not notify them to the WTO until May 2017. In August 2015 and April 2017, MOFCOM solicited public comments on draft revisions of its rules regarding AD and CVD investigation hearings, interim reviews of AD margins and AD investigation questionnaires. To date, however, China still has not finalized revisions to any of these rules. Once finalized, China is obligated to notify these revised rules to the WTO so that all Members have an opportunity to review the rules for compliance with the AD Agreement and seek any needed clarifications.

Conduct of Antidumping Investigations

In practice, it appears that China's conduct of AD investigations continues to fall short of full commitment to the fundamental tenets of transparency and procedural fairness embodied in the AD Agreement. In 2018, respondents from the United States and other WTO members continued to express concerns about key lapses in transparency and procedural fairness in China's conduct of AD investigations. The principal areas of concern include the inadequate disclosure of key documents placed on the record by domestic Chinese producers, insufficiently detailed disclosures of the essential facts underlying MOFCOM decisions, such as dumping margin calculations, evidence supporting injury and dumping conclusions, and MOFCOM not adequately addressing critical arguments or evidence put forward by interested parties. These aspects of China's AD practice have been challenged by the United States in the WTO cases involving GOES, chicken broiler products and automobiles. In each of the cases, the WTO has upheld U.S. claims relating to transparency and procedural fairness.

The United States and other WTO members have also expressed serious concerns about China's evolving practice of launching AD and CVD investigations that appear designed to discourage the United States or other trading partners from the legitimate exercise of their rights under WTO AD and CVD rules and the trade remedy provisions of China's accession agreement. Further, when China has pursued investigations under these circumstances, it appears that its regulatory authorities have tended to move forward with the imposition of duties regardless of the strength of the underlying legal and factual support. The United States' successful WTO cases challenging the duties imposed by China on imports of U.S. GOES, U.S. chicken broiler products and U.S. automobiles offer telling examples of this problem.

The United States initiated the GOES WTO case in September 2010, claiming that China's regulatory authorities appeared to have imposed the duties at issue without necessary legal and factual support and without observing certain transparency and procedural fairness requirements, in violation of various WTO obligations under the AD Agreement and the Subsidies Agreement. Consultations were held in November 2010. A WTO panel was established to hear this case at the United States' request in March 2011, and eight other WTO members joined the case as third parties. Hearings before the panel took place in September and December 2011. The panel issued its decision in June 2012, finding in favor of the United States on all significant claims. China appealed the panel's decision in July 2012. The WTO's Appellate Body rejected China's appeal in October 2012, and China subsequently agreed to come into compliance with the WTO's rulings by July 2013. China issued a redetermination in July 2013, but it appeared to be inconsistent with the WTO's rulings. In January 2014, the United States launched a challenge to China's redetermination in a proceeding under Article 21.5 of the DSU. This compliance challenge was the first one that any WTO member had initiated to challenge a claim by China that it had complied with adverse WTO findings. A hearing before the panel took place in October 2014. MOFCOM terminated the duties at issue in April 2015, and the panel issued its decision in July 2015, confirming, as the United States had argued, that MOFCOM's redetermination did not comply with the WTO's rulings.

In September 2011, the United States initiated a WTO case challenging the antidumping and countervailing duties that China imposed on imports of certain U.S. chicken products known as "broiler products." Once again, in the course of its AD and CVD investigations, China's regulatory authorities appeared to have imposed the duties at issue without necessary legal and factual support and without observing certain transparency and procedural fairness requirements, in violation of various WTO obligations under the AD Agreement and the Subsidies Agreement. Consultations were held in October 2011. A WTO panel was established to hear this case at the United States' request in January 2012, and seven other WTO members joined the case as third parties. Hearings before the panel took place in September and December 2012, and the panel issued its decision in August 2013, finding in favor of the United States on all significant claims. China decided not to appeal the panel's decision and subsequently agreed to come into compliance with the WTO's rulings by July 2014. China issued a redetermination in July 2014 that left the duties in place, but it appeared to be inconsistent with the WTO's rulings. In May 2016, the United States launched a challenge to China's redetermination in a proceeding under Article 21.5 of the DSU. A hearing before the panel took place in April 2017, and the panel issued its decision in January 2018, ruling that China had failed to comply with the findings made by the panel in August 2013. China removed its duties in February 2018.

In July 2012, the United States initiated a WTO case challenging China's imposition of antidumping and countervailing duties on imports of certain U.S. automobiles. Again, China's regulatory authorities appeared to have imposed the duties at issue without necessary legal and factual support and without observing certain transparency and procedural fairness requirements, in violation of various WTO obligations under the AD Agreement and the Subsidies Agreement. Consultations took place in August 2012. A WTO panel was established to hear this case in October 2012, and eight other WTO members joined the case as third parties. Hearings before the panel took place in June 2013 and then in October 2013. Two months later, in December 2013, China terminated the duties at issue. In May 2014, the panel issued its decision, finding in favor of the United States on all significant claims.

Throughout 2018, the United States continued to work closely with U.S. companies subject to Chinese AD investigations to help them better understand China's trade remedy system and practices. In addition, the United States advocated on their behalf in connection with ongoing AD investigations, with the goal of obtaining fair and objective treatment for U.S. companies, consistent with the AD Agreement.

In addition, the United States continued to engage China vigorously on the various concerns generated by China's AD practices, including systemic concerns in the areas of transparency and procedural fairness. The United States also raised concerns about China's apparent decisions to use AD and CVD remedies against U.S. imports as a means to discourage the United States from the legitimate exercise of its rights under WTO AD and CVD rules and the trade remedy provisions of China's accession agreement. In addition to pursuing litigation at the WTO to address these concerns, as discussed above, the United States has engaged China during meetings before the WTO's AD Committee.

Meanwhile, as China's AD regime has matured, many of China's AD measures have reached the five-year mark, warranting expiry reviews. MOFCOM is currently conducting 21 expiry reviews, four of which involve products from the United States. Every expiry review involving U.S. products to date has resulted in the measure at issue being extended.

Evasion of Duties

In past years, the United States has raised concerns before the WTO Antidumping Committee about the proliferation of so-called "evasion services." These services are offered to exporters and importers to assist them with evading the application of antidumping duties and countervailing duties imposed by WTO Members. Many of the businesses providing these services are Chinese companies seeking to assist exporters and importers evade the application of antidumping duties and countervailing duties imposed by the United States. Efforts to evade the application of antidumping duties and countervailing duties undermine the effectiveness of the WTO Antidumping Agreement and Subsidies Agreement and, more generally, erode confidence in the international trading system.

In February 2016, the United States enacted legislation establishing a new, enhanced mechanism in the United States for investigating claims of duty evasion. U.S. Customs and Border Protection followed up with the issuance of implementing regulations in August 2016.

Going forward, the United States will continue to raise awareness of this problem at the WTO. It also will continue to seek the cooperation of other WTO members, including China, to help counter and eliminate this problem.

COUNTERVAILING DUTIES

In its WTO accession agreement, China committed to revising its regulations and procedures for conducting CVD investigations and reviews by the time of its accession to make them consistent with the Subsidies Agreement. The Subsidies Agreement sets forth detailed rules prescribing the manner and basis on which a WTO member may take action to offset the injurious subsidization of products imported from another WTO member. Although China did not separately commit to provide judicial review of determinations made in CVD investigations and reviews, Subsidies Agreement rules require independent review.

China initiated its first CVD investigations in 2009. Each of these investigations involved imports of products from the United States – GOES, chicken broiler products and automobiles – and were initiated concurrently with AD investigations of the same products. As discussed above in the Antidumping section, China initiated these CVD investigations under troubling circumstances. China also appears to have committed significant methodological errors that raise concerns, in light of Subsidies Agreement rules. In addition, many of the concerns generated by China's AD practice with regard to transparency and procedural fairness also apply to these CVD investigations. In response, the United States has pressed China both bilaterally and in WTO meetings to adhere strictly to WTO rules in the conduct of its CVD investigations, and the United States has pursued WTO litigation to address the problems with China's imposition of duties on imports of GOES, chicken broiler products and automobiles from the United States, as discussed below.

Legal Regime

As previously reported, China has put in place much of the legal framework for its CVD regime. Under this regime, like in the AD area, MOFCOM's TRIB is charged with making both subsidy and injury determinations.

China's regulations and procedural rules generally track those found in the Subsidies Agreement, although there are certain areas where key provisions are omitted or are vaguely worded. Since China's accession, the United States and other WTO members have sought clarifications on a variety of issues concerning China's regulatory framework and have pressed China for greater transparency both during regular meetings and the annual transitional reviews before the WTO's Subsidies Committee. The United States will continue to seek clarifications as needed in 2019.

Conduct of Countervailing Duty Investigations

MOFCOM initiated China's first CVD investigation in June 2009. This investigation addressed alleged subsidies being provided to the U.S. GOES industry, concurrently with MOFCOM's AD investigation of imports of GOES from the United States. Later that year, MOFCOM initiated additional CVD investigations involving imports of chicken broiler products and automobiles from the United States, along with concurrent AD investigations.

These three CVD investigations, along with two additional ones involving imports of U.S. polysilicon initiated in July 2012 and imports of U.S. dried distillers' grains initiated in January 2016, make clear that, as in the AD area, China needs to improve its transparency and procedural fairness when conducting these investigations. In addition, the United States has noted procedural concerns specific to China's conduct of CVD investigations. For example, China initiated investigations of alleged subsidies that raised concerns, given the requirements regarding "sufficient evidence" in Article 11.2 of the Subsidies Agreement. The United States is also concerned about China's application of facts available under Article 12.7 of the Subsidies Agreement. In addition, as in the AD area, the United States has expressed serious concerns about China's pursuit of AD and CVD remedies that appear intended to discourage the United States and other trading partners from the legitimate exercise of their rights under WTO AD and CVD rules and the trade remedy provisions of China's accession agreement.

As discussed above in the Antidumping section, in September 2010, the United States initiated – and later won – a WTO case challenging the final AD and CVD determinations in China's GOES investigations because China's regulatory authorities appeared to have imposed the duties at issue without necessary legal and factual support and without observing certain transparency and procedural fairness requirements, in violation of various WTO obligations under the AD Agreement and the Subsidies Agreement. For similar reasons, the United States initiated a second WTO case in September 2011 challenging the final AD and CVD determinations in China's chicken broiler products investigations and won that case, too. The United States initiated a third WTO case in July 2012 challenging the final AD and CVD determinations in China's automobiles investigations. Again, the United States won.

In addition to pursuing WTO dispute settlement, the United States has raised its concerns bilaterally with MOFCOM as well as at the WTO in meetings before the Subsidies Committee. The United States also has actively participated in MOFCOM's CVD investigations and will continue to do so, as envisioned by WTO rules, in order to safeguard the interests of U.S. industry. Going forward, the United States will continue to impress upon China the importance of strictly adhering to WTO rules when conducting CVD investigations and imposing countervailing duties.

SAFEGUARDS

In its WTO accession agreement, China committed to revising its regulations and procedures for conducting safeguard investigations by the time of its WTO accession in order to make them consistent with the WTO Agreement on Safeguards (Safeguards Agreement). That agreement articulates rules and procedures governing WTO members' use of safeguard measures.

Legal Regime

While the provisions of China's regulations and procedural rules generally track those of the Safeguards Agreement, there are some potential inconsistencies, and certain omissions and ambiguities remain. In addition, some provisions do not have any basis in the Safeguards Agreement. In earlier transitional reviews before the WTO's Committee on Safeguards, the United States noted several areas of potential concern, including transparency, determination of developing country status, treatment of non-WTO members, protection of confidential data, access to non-confidential information, refunding of safeguard duties collected pursuant to provisional measures when definitive measures are not imposed, and the conditions governing the extension of a safeguard measure.

Conduct of Safeguards Investigations

To date, China has completed two safeguard proceedings. Both of these proceedings resulted in the imposition of import relief.

In November 2002, China imposed tariff-rate quotas on imports of nine categories of steel products from various countries, including the United States. Although U.S. companies exported little of this merchandise to China, there were complaints from interested parties that China's process for allocating quotas under the safeguard measures was unclear, making it difficult for them to determine the quota available and obtain a fair share. China terminated the safeguard measures in December 2003.

In September 2016, China launched a safeguard investigation of sugar imports. According to some reports, the Chinese government set minimum prices at which it would purchase sugar from Chinese farmers under its market price support program too high in recent years, causing Chinese prices to climb above international price levels and leading to a strong flow of imports. China appears to have timed its safeguard investigation so that it would be able to impose import relief before the government unloads the excessive sugar reserves that it has built up. The United States has expressed concern that this investigation could set a precedent for strategically important grains, where China is struggling to reduce large reserves accumulated over the past few years as the government bought at above-market prices. China imposed import relief in May 2017, as it adjusted its existing TRQ for sugar by nearly doubling the out-of-quota tariff rate.

EXPORT REGULATION

Upon acceding to the WTO, China took on the obligations of Article XI of the GATT 1994, which generally prohibits WTO members from maintaining export restraints (other than duties, taxes or other charges), although certain limited exceptions are allowed. China also agreed to eliminate all taxes and charges on exports, including export duties, except as included in Annex 6 to its WTO accession agreement or applied in conformity with Article VIII of GATT 1994. Article VIII of GATT 1994 only permits fees and charges limited to the approximate cost of services rendered and makes clear that any such fees and charges shall not represent an indirect protection to domestic products or a taxation of exports for fiscal purposes.

As in prior years, China maintains numerous export restraints despite the prohibitions set forth in the GATT 1994 and the specific commitments that China made in its WTO accession agreement. These export restraints distort trade in raw materials as well as intermediate and downstream products.

Export Restraints on Raw Materials

Following its accession to the WTO, China continued to impose restraints on exports of raw materials, including export quotas, related export licensing and bidding requirements, minimum export prices and export duties, as China's economic planners continued to guide the development of downstream industries. These export restraints were widespread. For example, China maintained some or all of these types of export restraints on antimony, bauxite, coke, fluorspar, indium, lead, magnesium carbonate, manganese, molybdenum, phosphate rock, rare earths, silicon, silicon carbide, talc, tin, tungsten, yellow phosphorus and zinc, all of which are of key interest to U.S. downstream producers.

These types of export restraints can significantly distort trade, and for that reason WTO rules normally outlaw them. In the case of China, the trade-distortive impact can be exacerbated because of the size of China's production capacity. Indeed, for many of the raw materials at issue, China is the world's leading producer.

China's export restraints affect U.S. and other foreign producers of a wide range of downstream products, such as steel, chemicals, hybrid and electric cars, energy efficient light bulbs, wind turbines, hard-disk drives, magnets, lasers, ceramics, semiconductor chips, refrigerants, medical imagery, aircraft, refined petroleum products, fiber optic cables and catalytic converters, among numerous others. The export restraints can create serious disadvantages for these foreign producers by artificially increasing China's export prices for their raw material inputs, which also drives up world prices. At the same time, the export restraints can artificially lower China's domestic prices for the raw materials due to significant increases in domestic supply, enabling China's domestic downstream producers to produce lower-priced products from the raw materials and thereby creating significant advantages for China's domestic downstream producers when competing against foreign downstream producers both in the China market and in other countries' markets. The export restraints can also create pressure on foreign downstream producers to move their operations, technologies and jobs to China.

As previously reported, the United States began raising its concerns about China's continued use of export restraints shortly after China's WTO accession, while also working with other WTO members with an interest in this issue, including the EU and Japan. In response to these efforts, China refused to modify its policies in this area. In fact, over time, China's economic planners expanded their use of export restraints and made them increasingly restrictive, particularly on raw materials.

In June 2009, the United States and the EU initiated a WTO case challenging export quotas, export duties and other restraints maintained by China on the export of several key raw material inputs for which China is a leading world producer. The materials at issue include bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus and zinc. Mexico became a co-complainant in August 2009.

At the time of the initiation of this case, China's treatment of coke, a key steel input, provided a clear example of the trade distortions engineered by China's export restraints. In 2008, China produced 336 million MT of coke, but it limited exports of coke to 12 million MT and additionally imposed 40 percent duties on coke exports. The effects of the export restraints on pricing were dramatic. In August 2008, the world price for coke reached $740 per MT at the same time that China's domestic price was $472 per MT. This $268 per MT price difference created a huge competitive advantage for China's downstream steel producers over their foreign counterparts, as coke represents about one-third of the input costs for integrated steel producers.

A WTO panel and the Appellate Body rejected China's defenses, which had attempted to portray China's export restraints as conservation or environmental protection measures or measures taken to manage critical shortages of supply, and found in favor of the United States and its co-complainants on all significant claims, ruling that the export restraints at issue were inconsistent with China's WTO obligations. China subsequently agreed to come into compliance with the WTO's rulings by the end of December 2012. China took timely steps to remove the export quotas and export duties on the raw materials at issue, while imposing export licensing requirements on a subset of those materials. Since then, the United States has been closely examining China's export licensing regime to ensure that it operates automatically and does not distort trade.

While the United States was prosecuting this first WTO case on export restraints, China's export restraints on rare earths – a collection of 17 different chemical elements used in a variety of green technology products, among other products – began to generate significant concern among China's trading partners. At the time, China controlled about 97 percent of the global rare earths market and had been imposing increasingly restrictive export quotas and export duties on rare earth ores, oxides and metals.

In March 2012, when it had become clear that China would not abandon its use of export restraints on rare earths and certain other raw materials in the face of further U.S. engagement, the United States, joined by the EU and Japan, initiated a WTO case challenging export quotas, export duties and other restraints maintained by China on the export of rare earths, tungsten and molybdenum. These materials are key inputs in a multitude of U.S.-made products, including not only a variety of green technology products, such as hybrid car batteries, wind turbines and energy-efficient lighting, but also steel, advanced electronics, automobiles, petroleum and chemicals. The export restraints appeared to be inconsistent with China's obligations under various provisions of the GATT 1994 and China's accession agreement.

As in the first WTO case on export restraints, a WTO panel and the Appellate Body rejected China's defenses and found in favor of the United States and its co-complainants on all significant claims, ruling that the export restraints at issue were inconsistent with China's WTO obligations. China subsequently agreed to come into compliance with the WTO's rulings by May 2015, and it later announced that it had eliminated the export quotas and export duties at issue by that deadline.

In July 2016, the United States, joined by the EU, initiated a third WTO case challenging export quotas and export duties maintained by China. This case addresses the export of various forms of 11 raw materials, including antimony, chromium, cobalt, copper, graphite, indium, lead, magnesia, talc, tantalum and tin. These raw materials are key inputs in important U.S. manufacturing industries, including aerospace, automotive, construction and electronics. The export restraints at issue appear to be inconsistent with China's obligations under various provisions of the GATT 1994 and China's accession agreement. Joint consultations took place in September 2016. A WTO panel was established to hear the case at the complaining parties' request in November 2016, and 14 other WTO members joined the case as third parties. Subsequently, China removed the export restraints on the challenged materials.

Border Tax Policies

China's economic planners attempt to manage the export of many primary, intermediate and downstream products by raising or lowering the VAT rebate available upon export and sometimes by imposing or retracting export duties. With VAT rebates ranging from zero to 17 percent and export duties typically ranging from zero to 40 percent, these border tax practices have caused tremendous disruption, uncertainty and unfairness in the global markets for the affected products – particularly when these practices operate to incentivize the export of downstream products for which China is a leading world producer or exporter such as steel, aluminum and soda ash.

Typically, the objective of China's border tax adjustments is to make larger quantities of primary and intermediate products in a particular sector available domestically at lower prices than the rest of the world, giving China's downstream producers of finished products using these inputs a competitive advantage over foreign downstream producers. To accomplish this objective, China discourages the export of the relevant primary and intermediate products by reducing or eliminating VAT rebates and perhaps also imposing export duties on them, resulting in increased domestic supply and lower domestic prices. China's downstream producers, in turn, benefit not only from these lower input prices but also from full VAT rebates when they export their finished products.

In some situations, China uses border taxes to encourage the export of certain finished products over other finished products within a particular sector. For example, in the past, China targeted value-added steel products, particularly wire products and steel pipe and tube products, causing a surge in exports of these products, many of which ended up in the U.S. market.

For several years, the United States and other WTO members have raised broad concerns about the trade-distortive effects of China's VAT export rebate and export duty practices, including through each of the biannual Trade Policy Reviews of China at the WTO, including the most recent one held in July 2018, as well as through many of the annual transitional reviews before the Committee on Market Access and the Council for Trade in Goods. Bilaterally, the United States also has raised broad concerns about the trade-distortive effects of China's variable VAT export rebate practices in connection with multiple JCCT and S&ED meetings. Through this engagement, the United States highlighted in particular the harm being caused to specific U.S. industries, including steel, aluminum and soda ash.

China has long claimed that its eventual goal is to provide full VAT rebates for all exports like other WTO members with VAT systems. In addition, at the December 2012 JCCT meeting, China agreed to begin holding serious discussions with the United States in order to work toward a mutual understanding of China's VAT system and the concepts on which a trade-neutral VAT system is based. Subsequently, at the July 2014 S&ED meeting, China pledged to improve its value-added tax rebate system, including by actively studying international best practices, and to deepen communication with the United States on this matter, including regarding its impact on trade. Despite these commitments, China has taken no steps to abandon its use of trade-distortive VAT export rebates and to adopt a trade-neutral VAT system.

INTERNAL POLICIES AFFECTING TRADE

Non-discrimination

In its WTO accession agreement, China agreed to assume the obligations of GATT 1994, the WTO agreement that establishes the core principles that constrain and guide WTO members' policies relating to trade in goods. The two most fundamental of these core principles are the most-favored nation (MFN), or non-discrimination, rule – referred to in the United States as "normal trade relations" – and the rule of national treatment.

The MFN rule (set forth in Article I of GATT 1994) attempts to put the goods of all of an importing WTO member's trading partners on equal terms with one another by requiring the same treatment to be applied to goods of any origin. It generally provides that if a WTO member grants another country's goods a benefit or advantage, it must immediately and unconditionally grant the same treatment to imported goods from all WTO members. This rule applies to customs duties and charges of any kind connected with importing and exporting. It also applies to internal taxes and charges, among other internal measures.

The national treatment rule (set forth in Article III of GATT 1994) complements the MFN rule. It is designed to put the goods of an importing WTO member's trading partners on equal terms with the importing member's own goods by requiring, among other things, that a WTO member accord no less favorable treatment to imported goods than it does for like domestic goods. Generally, once imported goods have passed across the national border and import duties have been paid, the importing WTO member may not subject those goods to internal taxes or charges in excess of those applied to domestic goods. Similarly, with regard to measures affecting the internal sale, purchase, transportation, distribution or use of goods, the importing WTO member may not treat imported goods less favorably than domestic goods.

In its WTO accession agreement, China agreed to repeal or revise all laws, regulations and other measures that were inconsistent with the MFN rule upon accession. China also confirmed that it would observe this rule with regard to all WTO members, including separate customs territories, such as Hong Kong, Macau and Taiwan. In addition, China undertook to observe this rule when providing preferential arrangements to foreign-invested enterprises within special economic areas. With regard to the national treatment rule, China similarly agreed to repeal or revise all inconsistent laws, regulations and other measures. China also specifically acknowledged that its national treatment obligation extended to the price and availability of goods or services supplied by government authorities or state-owned enterprises, as well as to the provision of inputs and services necessary for the production, marketing or sale of finished products. Among other things, this latter commitment precludes dual pricing, i.e., the practice of charging foreign or foreign-invested enterprises more for inputs and related services than Chinese enterprises. China also agreed to ensure national treatment in respect of certain specified goods and services that had traditionally received discriminatory treatment in China, such as boilers and pressure vessels (upon accession), after sales service (upon accession), and pharmaceuticals, chemicals and spirits (one year after accession).

As previously reported, China reviewed its pre-WTO accession laws and regulations and revised many of those which conflicted with its WTO MFN and national treatment obligations in 2002 and 2003. Since then, however, concerns have arisen regarding China's observation of MFN and national treatment requirements in some areas.

Made in China 2025 Industrial Plan

In May 2015, China's State Council released *Made in China 2025*, a 10-year plan spearheaded by the MIIT and targeting 10 strategic industries, including advanced information technology, automated machine tools and robotics, aviation and spaceflight equipment, maritime engineering equipment and high-tech vessels, advanced rail transit equipment, new energy vehicles (NEVs), power equipment, farm machinery, new materials, biopharmaceuticals and advanced medical products. While ostensibly intended simply to raise industrial productivity through more advanced and flexible manufacturing techniques, *Made in China 2025* is emblematic of China's evolving and increasingly sophisticated approach to "indigenous innovation," which is evident in numerous supporting and related industrial plans. The common, overriding aim of these plans is to replace foreign technology with Chinese technology in the China market through any means possible to help Chinese companies dominate international markets.

Made in China 2025 seeks to build up Chinese companies in the 10 targeted, strategic sectors at the expense of, and to the detriment of, foreign industries and their technologies through a multi-step process over 10 years. The initial goal of *Made in China 2025* is to ensure, through various fair and unfair means, that Chinese companies develop, extract or acquire their own technology, IP and know-how and their own brands. The next goal of *Made in China 2025* is to substitute domestic technologies, products and services for foreign technologies, products and services in the China market. The final goal of *Made in China 2025* is to capture much larger worldwide market shares in the 10 targeted, strategic sectors.

Many of the policy tools being used by the Chinese government to achieve the goals of *Made in China*

2025 raise serious concerns. These tools are largely unprecedented, as other WTO members do not use them, and include a wide array of state intervention and support designed to promote the development of Chinese industry in large part by restricting, taking advantage of, discriminating against or otherwise creating disadvantages for foreign enterprises and their technologies, products and services. Indeed, even facially neutral measures are likely to be applied in favor of domestic enterprises, as past experience has shown, especially at sub-central levels of government.

Made in China 2025 also differs from industry support pursued by other WTO members by its level of ambition and, perhaps more importantly, by the scale of resources the government is investing in the pursuit of its industrial policy goals. Indeed, by some estimates, the Chinese government is making available more than $500 billion of financial support to the *Made in China 2025* sectors, both through the *Made in China 2025* industrial plan and related industrial plans. Even if China fails to achieve fully the industrial policy goals set forth in *Made in China 2025*, it is still likely to create or exacerbate market distortions and create severe excess capacity in many of the targeted sectors as well as do long-lasting damage to U.S. interests, as China-backed companies increase their market share at the cost of U.S. companies operating in these sectors.

China's government has many other industrial plans like *Made in China 2025*. Examples include the *Integrated Circuit Industry Plan* issued in 2014, the *13th Five-Year Plan* issued in 2016, the *National Informatization Development Plan* issued in 2016 and the *Artificial Intelligence Plan* issued in 2017, among others.

All of these plans have their roots in *China's National Medium- and Long-Term Plan for the Development of Science and Technology (2006-2020)* (MLP), issued in 2006, which is China's state planners' key blueprint for ensuring that China's policies and practices inure mainly to China's advantage, not to other countries. It followed soon after the Communist Party Central Committee's elevation of "indigenous innovation" to a strategy level, equal to Deng Xiaoping's "reform and opening up" policy. The MLP set in motion a web of laws, policies and actions intended to create Chinese indigenous intellectual property and technology by introducing, digesting, absorbing and re-innovating foreign intellectual property and technology through measures like the *Several Opinions on Encouraging Technology Introduction and Innovation and Promoting the Transformation of the Growth Mode in Foreign Trade*.

Strategic Emerging Industries

One of the key ongoing initiatives from which *Made in China 2025* evolved was unveiled by China's state planners in 2010. In the *Decision of the State Council on Accelerating the Cultivation and Development of Strategic Emerging Industries*, China announced a new high-level government plan to rapidly spur innovation in seven high-technology sectors dubbed the strategic emerging industries (SEIs). This measure established an early, broad framework for "developing and cultivating" innovation in energy efficient environmental technologies, next generation information technology, biotechnology, high-end equipment manufacturing, new energy, new materials and NEVs. The subsequently issued *National 12th Five-year Plan for the Development of Strategic Emerging Industries* defined SEI sectors, set priorities, and recommended fiscal and taxation policy support.

By 2012, China had issued additional policy documents and catalogues explaining the development priorities for key technologies and products considered to be SEIs, identifying specific sub-sectors, technologies and products in each SEI sector, and setting forth a variety of specific policies and support measures designed to spur development in each sub-sector. One of these documents, a catalogue issued by MIIT, instructed sub-central government authorities to identify firms, technologies and measures supporting the central government's SEI initiative, listed relevant companies and research and development units for each sub-sector and further indicated that the list should be used by other Chinese government ministries to "issue targeted supporting fiscal and taxation policies." Only a very small number of companies listed had any foreign investment, as the list was dominated by Chinese-invested companies, particularly state-owned enterprises and domestic national champions.

By January 2013, China had created a central government-level support fund for SEI development while encouraging local governments to establish their own local SEI support funds. Sub-central government transparency varies greatly, and in many provinces very limited information on the SEI initiative is publicly available.

Since the unveiling of China's SEI plan in 2010, the United States has voiced strong concerns over the direction of some of China's SEI policy development, particularly with regard to policies that discriminate against U.S. firms or their products, encourage excessive government involvement in determining market winners and losers, encourage technology transfer, are targeted at exports or tied to localization or the use of domestic intellectual property, or could lead to injurious subsidization.

In January 2015, China announced a new SEI development fund that raised concerns about procurement preferences for both Chinese government agencies and state-owned enterprises, as well as strong support for national champions and the inclusion of Chinese IP or R&D localization requirements. This new fund and other new policies direct billions of dollars of investment into key Chinese industries. At the June 2015 S&ED meeting, China committed that its industry development plans and investment funds for SEIs are available on an equal basis for foreign-invested enterprises, and that China will strengthen the transparency of these plans and funds. Since then, however, little has changed.

In September 2018, the NDRC requested public comment on amendments to its *Guiding Catalogue for Strategic Emerging Industries' Key Products and Services* (SEI Guiding Catalogue), which continued to reflect troubling correlations between the products and services listed in the proposed amendments to the catalogue and the industries targeted by China's problematic *Made in China 2025* industrial plan. The United States laid out its concerns in written comments submitted in October 2018.

In the meantime, the United States has continued to press China about its problematic policies. For example, the United States has continued its efforts to address problems that had begun to arise after China's economic planners decided that the Chinese auto industry should focus on developing expertise in manufacturing NEVs, which include alternative fuel vehicles such as electric, fuel cell and bio-diesel vehicles. As discussed below in the Investment section, China has pursued policies in support of both NEVs and NEV batteries that, among other things, appear to discriminate against imported NEVs and NEV batteries and have generated serious concerns.

National Integrated Circuit Fund

China continues to increase its efforts to develop and expand an indigenous semiconductor, or integrated circuit (IC), industry. Through the *Integrated Circuit Promotion Guidelines* announced in June 2014, China began moving aggressively to implement a comprehensive plan, which calls for government-directed funding in the tens of billions of dollars. This funding includes an initial $21 billion National Integrated Circuit Fund, significant amounts of additional funding in several dozen regional IC investment funds, and state-owned bank loan financing to domestic Chinese semiconductor firms. The funds appear largely directed at the subsidization of Chinese-owned companies and the acquisition of foreign semiconductor companies and assets throughout the supply chain in order to increase Chinese industry's competitiveness and control over key technologies. Even though these funds have become increasingly active in the past several years, China has publicly disclosed very few details regarding the funds' investment policies, governance structures, funding sources, relationships with central and sub-central government authorities or the criteria for investing in or receiving investment from the funds.

The United States pressed China at the November 2015 JCCT meeting, the June 2016 S&ED meeting and the November 2016 JCCT meeting to ensure that China's various industry development funds for semiconductors operate in a transparent, nondiscriminatory and market-based manner free from government intervention. The United States also sought assurances from China that it would not impose compulsory technology or IPR transfer conditions on participation in the funds' investment projects. While China provided the United States with the requested commitments and assurances, little seems to have changed in the operation of the funds. In addition, in 2018, China announced plans for significant additional funding of $47 billion for a second fund, according to news reports and industry stakeholders.

Other Areas

U.S. industries report that China continues to apply the value-added tax in a manner that unfairly discriminates between imported and domestic goods, both through official measures and on an *ad hoc* basis, as discussed below in the Taxation section. In addition, China's industrial policies on automobiles, including NEVs, and steel call for discrimination against foreign producers and imported goods, as discussed below in the Investment section. It also appears that China has applied sanitary and phytosanitary measures in a discriminatory manner since it acceded to the WTO, as discussed below in the Agriculture section, while concerns about discriminatory treatment also remain prevalent in a variety of services sectors, as discussed below in the Services section. Additionally, various aspects of China's legal framework, such as China's extensive use of administrative licensing, create opportunities for Chinese government officials to treat foreign companies and foreign products less favorably than domestic companies and domestic products, as discussed below in the Other Legal Framework Issues section. The United States has raised these and other MFN and national treatment issues with China, both bilaterally and in WTO meetings, and will continue to do so.

Taxation

China committed to ensure that its laws and regulations relating to taxes and charges levied on imports and exports would be in full conformity with WTO rules upon accession, including, in particular, the MFN and national treatment provisions of Articles I and III of GATT 1994.

Since China's WTO accession, certain aspects of China's taxation system have raised national treatment concerns under Article III of GATT 1994. Some of these taxation issues have been resolved through WTO dispute settlement. Other taxation issues remain, however.

Fertilizer VAT

China has used VAT policies to benefit domestic fertilizer production. In July 2001, the Ministry of Finance (MOF) and the State Administration of Taxation (SAT) issued a circular exempting all phosphate fertilizers except diammonium phosphate (DAP) from a 13 percent VAT. DAP, a product that the United States exports to China, competes with similar phosphate fertilizers produced in China, particularly monoammonium phosphate.

The United States raised this issue bilaterally with China soon after it acceded to the WTO and in many subsequent bilateral meetings, including high-level meetings. The United States has also raised this issue at the WTO in meetings before the Committee on Market Access. To date, China has not eliminated its discriminatory treatment of DAP.

Meanwhile, a larger concern for U.S. fertilizer exporters remains the rapid expansion of China's domestic fertilizer production. This expanded production, which appears to have been brought on in part by China's export duties on phosphate rock, a key fertilizer input, has saturated China's market with low-priced fertilizer and greatly reduced demand for imported fertilizer.

VAT Irregularities

Several U.S. industries have continued to express concerns more generally about the unfair operation of China's VAT system. They report that Chinese producers are often able to avoid payment of the VAT on their products, either as a result of poor collection procedures, special deals or even fraud, while the full VAT still must be paid on competing imports. In discussions with Chinese government officials on this issue, the United States has raised its serious concerns about the *de facto* discriminatory treatment accorded to foreign products, while also continuing to emphasize the value to China of a properly functioning VAT system as a revenue source.

Border Trade

China's border trade policy also continues to generate MFN and other concerns. China provides preferential import duty and VAT treatment to certain products, often from Russia, apparently even when those products are not confined to frontier traffic as envisioned by Article XXIV of GATT 1994. During meetings before the WTO's Council for Trade in Goods, the United States has urged China to eliminate the preferential treatment for all of these products.

Subsidies

Upon its accession to the WTO, China agreed to assume the obligations of the WTO Subsidies Agreement, which addresses not only the use of CVD measures by individual WTO members (see the section above on Import Regulation, under the heading of Countervailing Duties), but also a government's use of subsidies and the application of remedies through enforcement proceedings at the WTO. As part of its accession agreement, China committed that it would eliminate, by the time of its accession, all subsidies prohibited under Article 3 of the Subsidies Agreement, which includes subsidies contingent on export performance (export subsidies) and subsidies contingent on the use of domestic over imported goods (import substitution subsidies). China also agreed to various special rules that apply when other WTO members pursue the disciplines of the Subsidies Agreement against Chinese subsidies, either in individual WTO members' CVD proceedings or in WTO enforcement proceedings. These rules address the identification and measurement of Chinese subsidies and also govern the actionability of subsidies provided to state-owned enterprises in China.

Subsidies Notification

As previously reported, following repeated pressure from the United States and other WTO members, China submitted its first subsidies notification to the WTO's Subsidies Committee in April 2006, nearly five years late. Although the notification reported on more than 70 subsidy programs, it was also notably incomplete, as it failed to notify any subsidies provided by provincial and local government authorities or any subsidies provided by state-owned banks, whether in the form of preferential loans, debt forgiveness or otherwise. In addition, while China notified several subsidies that appear to be prohibited, it did so without making any commitment to withdraw them, and it failed to notify other subsidies that appear to be prohibited.

Following the submission of China's 2006 subsidies notification, the United States devoted additional time and resources to monitoring and analyzing China's subsidy practices, and these efforts helped to identify significant omissions in China's subsidies notification. These efforts also made clear that provincial and local governments play an important role in implementing China's industrial policies, including through subsidization of enterprises, much of which is misdirected into sectors with excess capacity, such as steel and aluminum.

In the ensuing years, the United States repeatedly raised concerns about China's incomplete subsidies notification and identified numerous unreported subsidies both in bilateral meetings and in meetings before the Subsidies Committee as well as during the WTO's Trade Policy Reviews of China. At the October 2009 meeting of the Subsidies Committee, China indicated that it would finalize a second subsidies notification in the coming months while noting that this notification would again not include any subsidies provided by provincial and local government authorities. China reiterated this same pledge a year later at the October 2010 meeting of the Subsidies Committee.

In response to these unfulfilled promises from China, the United States pressed China on this issue through the filing of a "counter notification" under Article 25.10 of the Subsidies Agreement in October 2011. In this counter notification, the United States identified more than 200 unreported subsidy measures that China maintained, including many emanating from provincial and local government authorities. Shortly after the United States filed its counter notification, China finally submitted the new subsidies notification that it had been promising. Unfortunately, China's new notification covered only the period from 2005 to 2008, and it again failed to notify a single subsidy administered by provincial or local governments. In addition, the central government subsidies included in the new notification were largely the same partial listing of subsidies as those notified in China's 2006 notification. The new notification also did not include any significant programs related to key industries, such as steel and aluminum, and only included a small number of the more than 200 subsidy measures identified in the U.S. counter notification. As a result, China's new notification was again far from complete.

In 2012, the United States continued to highlight China's failure to abide by its important transparency obligations under the Subsidies Agreement. For example, both bilaterally and before the Subsidies Committee, the United States regularly noted that China should have submitted its subsidies notification for the period 2009-2010 in July 2011 and its subsidies notification for the period 2010-2012 in July 2013. In addition, in connection with the October 2012 meeting of the Subsidies Committee, the United States submitted a written request for information pursuant to Article 25.8 of the Subsidies Agreement in which it provided evidence of 110 central government and sub-central government subsidy measures that China had not yet notified, including, for example, various stimulus programs for steel, non-ferrous metals, semiconductors, aircraft and fish implemented in response to the global financial crisis in 2008.

In April 2014, the United States submitted another request for information pursuant to Article 25.8. This request covered extensive subsidies provided by China in support of its so-called "strategic emerging industries," including over 60 subsidy measures at the central, provincial, county and city levels of government, covering industries such as electric vehicles, specialized steel, semiconductors, high-end equipment manufacturing and medical technology.

Despite the obligation of WTO members to answer questions posed pursuant to Article 25.8 "as quickly as possible and in a comprehensive manner," China failed to provide substantive answers to the questions set forth in the United States' 2012 and 2014 Article 25.8 requests for information. Accordingly, in October 2014, the United States submitted a counter notification under Article 25.10 of the Subsidies Agreement. This counter notification addressed the same 110 Chinese subsidy measures that were the subject of the United States' 2012 Article 25.8 submission. Similarly, after China failed to answer the United States' 2014 Article 25.8 questions on its strategic emerging industries programs, the United States submitted a counter notification in October 2015. This counter notification addressed the same 60 subsidy measures that were the subject of the United States' 2014 Article 25.8 submission.

In 2015, the United States submitted another written request for information pursuant to Article 25.8 of the Subsidies Agreement. This submission addressed fisheries subsidies provided by China at central and sub-central levels of government. The subsidies at issue were set forth in nearly 40 measures and included a wide range of subsidies, including: fishing vessel acquisition and renovation grants; a 100-percent corporate income tax exemption; grants for new fishing equipment; subsidies for insurance; subsidized loans for processing facilities; fuel subsidies; and the preferential provision of water, electricity and land. Once again, when China did not respond to these questions, the United States was compelled to submit a counter notification covering the same measures. China's refusal to fulfill its notification obligations in this sector is particularly troubling, given the role that harmful fisheries subsidies play in the devastating trend of overfishing and overcapacity that threatens global fish stocks. Indeed, in the years since its WTO accession, China has built up its fishing fleet through subsidies and other market-distorting means so that it is now the largest in the world. Its annual fisheries harvest has grown to almost triple that of other top producers. At the same time, Chinese-flagged fishing vessels repeatedly have been reported to have engaged in illegal, unreported and unregulated (IUU) fishing in distant waters, including in areas under the jurisdiction of other WTO members.

In October 2015, China did submit a new subsidies notification, covering the period from 2009 to 2014. As in its two previous subsidy notifications, this notification was far from complete, and it included numerous programs that should not have been notified as subsidies, such as programs for poverty alleviation, the disabled and HIV medication.

In July 2016, China submitted its first subsidy notification that included sub-central government subsidy programs since becoming a WTO member in 2001. Unfortunately, the number and range of sub-central government subsidy programs covered represent a very small sample of the programs administered at the sub-central levels of government. Moreover, notifying a program several years after its implementation, or after a program has been terminated, as is the case with most of the reported sub-central government subsidy programs, contributes little to the transparency of China's subsidies regime.

In April 2017, the United States submitted another counter notification under Article 25.10 of the Subsidies Agreement. This counter notification addressed China's Internationally Well-Known Brand program, pursuant to which China has provided subsidies that appear to be contingent upon exportation and therefore prohibited under Article 3.1(a) of the Subsidies Agreement.

In total, taking into account all of the U.S. counter notifications, the United States has now submitted counter notifications of approximately 500 Chinese subsidy measures. While China notified some subsidy measures for the period 2015-2016 in July 2018, China has included in its subsidy notifications to date only a small number of the subsidy programs identified in those counter notifications, and China has refused to engage in bilateral discussions to address the subsidy measures that it has failed to notify.

In 2018, the United States continued to research and analyze the various forms of financial support that China at all levels of government provides to manufacturers and exporters in China, including in the steel, aluminum, green technology, fisheries and semiconductor sectors, among other sectors, and assess whether the support being provided is consistent with WTO rules. The United States also continued to raise its concerns with China's subsidies practices in bilateral meetings with China. In addition, before the WTO's Subsidies Committee, the United States continued to press China to submit more complete and timely subsidies notifications.

Prohibited Subsidies

Immediately after China submitted its first subsidies notification in April 2006, the United States began seeking changes to China's subsidies practices. As previously reported, after bilateral dialogue failed to resolve the matter, the United States, together with Mexico, initiated WTO dispute settlement proceedings against China in February 2007, challenging tax-related subsidies that took the form of both export subsidies, which make it more difficult for U.S. manufacturers to compete against Chinese manufacturers in the U.S. market and third-country markets, and import substitution subsidies, which make it more difficult for U.S. manufacturers to export their products to China. China subsequently agreed to and did eliminate all of the subsidies at issue by January 2008.

After bringing the WTO case challenging China's tax-related prohibited subsidies, the United States developed information that appeared to show that China may have been attempting to use prohibited subsidies outside its taxation system in an effort to increase the market share of numerous Chinese brands in markets around the world. Many of these subsidies appeared to be provided by provincial and local governments seeking to implement central government directives found in umbrella programs, such as the "Famous Export Brand" program and the "World Top Brand" program. These subsidies appeared to offer significant payments and other benefits tied to qualifying Chinese companies' exports. The United States also developed information about several other export subsidies apparently provided by sub-central governments independent of the two brand programs. As previously reported, after unsuccessfully pressing China to withdraw these subsidies, the United States, together with Mexico, initiated a WTO dispute settlement proceeding against China in December 2008. Guatemala became a co-complainant in January 2009. Joint consultations were held in February 2009, followed by intense discussions as China took steps to repeal or modify the numerous measures at issue. In December 2009, the parties concluded a settlement agreement in which China confirmed that it had eliminated all of the export-contingent benefits in the challenged measures.

In December 2010, following an investigation in response to a petition filed under section 301 of the Tariff Act of 1974, as amended, USTR announced the filing of a WTO case challenging what appeared to be prohibited import substitution subsidies being provided by the Chinese government to support the production of wind turbine systems in China. Specifically, the United States challenged subsidies being provided by the Chinese government to manufacturers of wind turbine systems that appeared to be contingent on the use of domestic over imported components and parts. Consultations were held in February 2011. Following consultations, China issued a notice invalidating the measures that had created the subsidy program at issue.

In September 2012, the United States initiated a WTO case challenging numerous subsidies provided by the central government and various sub-central governments in China to automobile and automobile-parts enterprises located in regions in China known as "export bases." These subsidies appeared to be inconsistent with China's obligation under Article 3 of the Subsidies Agreement not to provide subsidies contingent upon export performance. In addition, the United States challenged the apparent failure of China to abide by WTO transparency obligations requiring it to publish the measures at issue in an official journal, to make translations of them available in one or more WTO languages and to notify them to the Subsidies Committee. Consultations were held in November 2012. The two sides subsequently engaged in further discussions, as China began to take steps to address U.S. concerns.

In February 2015, the United States launched a further WTO case challenging numerous Chinese central government and sub-central government export subsidies provided to manufacturers and producers across seven industries located in designated clusters of enterprises called "Demonstration Bases." These subsidies operated in a similar way to the subsidies at issue in the export bases case and therefore appeared to be inconsistent with China's obligation under Article 3 of the Subsidies Agreement not to provide subsidies contingent upon export performance. Consultations took place in March 2015. In April 2015, a WTO panel was established to hear the case at the United States' request, and the two sides subsequently engaged in further discussions exploring steps for China to take to address U.S. concerns. In April 2016, the United States announced that China had terminated the subsidies at issue pursuant to a memorandum of understanding.

U.S. CVD Investigations

Concerns about China's subsidies practices led the U.S. paper industry to file a petition with the Commerce Department in October 2006 requesting the initiation of a CVD investigation based on allegations of subsidized imports of coated free sheet paper from China causing injury in the U.S. market. As previously reported, in the ensuing investigation, the Commerce Department changed its longstanding policy of not applying U.S. CVD law to China or any other country considered a "non-market economy" for AD purposes. The Commerce Department began applying U.S. CVD law to China after finding that reforms to China's economy in recent years had removed the obstacles to applying the CVD law that were present in the "Soviet-era economies" at issue when the Commerce Department first declined to apply the CVD law to non-market economies in the 1980s.

Since then, many other U.S. industries, including the steel, textiles, chemicals, solar panels, tires and paper industries, among others, have expressed concern about the injurious effects of various Chinese subsidies in the U.S. market as well as in China and third-country markets, leading to the filing of additional CVD petitions, together with companion AD petitions. In response, the Commerce Department has initiated CVD investigations of imports of numerous Chinese industries, including passenger vehicle and light truck tires, dry 53-foot containers, boltless shelving, chlorinated isocyanurates, calcium hypochlorite, tetrafluoroethane, off-road tires, oil country tubular goods and various other types of steel pipe, laminated woven sacks, magnets, thermal paper, citric acid, kitchen racks and shelves, lawn groomers, pre-stressed concrete wire strand, steel grating, wire decking, narrow woven ribbons, carbon bricks, coated paper for high-quality print graphics, steel fasteners, phosphate salts, drill pipe, aluminum extrusions, multilayered wood flooring, steel wheels, galvanized steel wire, high pressure steel cylinders, photovoltaic cells and modules, wind towers, drawn stainless steel sinks, plywood, frozen warm water shrimp, melamine, GOES, non-oriented electrical steel, cold-rolled steel, corrosion-resistant steel, cut-to-length steel plate, integral geogrid products, ammonium sulfate, 1-hydroxyethylidene-1, 1-diphosphonic acid, amorphous silica fabric, stainless steel flanges, cold-drawn mechanical tubing, aluminum foil, fine denier polyester staple fiber, tool chests and cabinets, cast iron soil pipe fittings and forged steel fittings. The subsidy allegations investigated have involved preferential loans, income tax and VAT exemptions and reductions, the provision of goods and services on non-commercial terms, among other subsidies provided by the central government, along with a variety of provincial and local government subsidies. The United States remains committed to strict enforcement of its CVD laws to discourage this type of harmful behavior.

Price Controls

In its WTO accession agreement, China agreed that it would not use price controls to restrict the level of imports of goods or services. In addition, in an annex to the agreement, China listed the limited number of products and services remaining subject to price control or government guidance pricing, and it provided detailed information on the procedures used for establishing prices. China agreed that it would try to reduce the number of products and services on this list and that it would not add any products or services to the list, except in extraordinary circumstances.

Notwithstanding these commitments, in 2018, China continued to maintain price controls on several products and services provided by both state-owned enterprises and private enterprises. Published through the China Economic Herald and NDRC's website, these price controls may be in the form of either absolute mandated prices or specific pricing policy guidelines as directed by the government. Products and services subject to government-set prices include pharmaceuticals, tobacco, natural gas and certain telecommunications services. Products and services subject to government guidance prices include gasoline, kerosene, diesel fuel, fertilizer, cotton, edible oils, various grains, wheat flour, various forms of transportation services, professional services such as engineering and architectural services, and certain telecommunications services.

The United States obtained additional information about China's use of price controls in connection with the Trade Policy Reviews of China at the WTO, held in 2006, 2008, 2010, 2012, 2014, 2016 and 2018. The United States will continue its efforts to persuade China to eliminate price controls.

Medical Devices

Beginning in 2006, NDRC released proposals for managing the prices of medical devices, with the stated objectives of avoiding excessive mark-ups by distributors and reducing health care costs. Among other things, the proposals would impose limits on the allowable mark-ups on medical devices. The proposals also would require manufacturers to provide sensitive pricing information.

Since 2006, the United States and U.S. industry have raised their concerns about NDRC's proposals. In particular, U.S. industry was able to engage in an informal dialogue with NDRC, and the United States pressed China in this area using the JCCT process. While acknowledging China's legitimate concerns regarding the need to provide effective and affordable medical devices to patients and the need to address inefficiency, excessive mark-ups and irregular business practices among wholesalers and distributors of medical devices, the United States and U.S. industry urged China to develop an approach that would not inhibit increased imports of the same innovative and effective health care products that China is seeking to encourage.

In 2012, NDRC released an updated draft of a pricing proposal, which would impose price mark-up controls on six major categories of implantable medical devices, with the potential to significantly discriminate against foreign manufacturers. To date, it appears that NDRC has not finalized this proposal. The United States is working to ensure that NDRC and provincial government authorities seek input from U.S. industry stakeholders in a transparent and meaningful way as China develops new policies and measures.

Separately, in 2008, China's Ministry of Health (MOH) published procedures for the centralized tender of certain medical devices. These tendering procedures built on a 2007 MOH measure establishing a centralized procurement system for medical devices for the stated purposes of reigning in escalating healthcare costs and ensuring high-quality healthcare. The United States and U.S. industry immediately expressed concern to the Chinese government that MOH's tendering procedures could operate to unfairly disadvantage high-quality, advanced technology products, a large proportion of which are made by U.S. companies. In response to these concerns, at the September 2008 JCCT meeting, China agreed to hold discussions with the United States and U.S. industry to discuss tendering policies that are fair and transparent and that given adequate consideration in purchasing decisions to the quality and innovation of medical devices. MOH subsequently entered into discussions directly with U.S. industry.

During the run-up to the December 2010 JCCT meeting, U.S. industry presented a risk-based approach to medical device classification based on Global Harmonization Task Force principles. Since then, the United States has worked closely with U.S. industry and to promote a cooperative resolution of U.S. concerns.

At the December 2012 JCCT meeting, China committed that any measures affecting the pricing of medical devices will treat foreign and domestic manufacturers equally. China further committed that it will take into account comments that it receives from the United States, including on the issue of how to improve transparency.

Since then, the United States has been engaging China on its proposals to centralize pricing and tendering procedures. At the same time, provincial governments have begun pushing for consolidated tendering of medical devices for purchase by public hospitals and clinics within their territories. While provincial governments' centralized purchasing plans vary widely, many of them contain requirements that unfairly disadvantage foreign manufacturers.

According to reports from U.S. industry, some plans impose ceiling prices for tenders to be determined in a manner that is unfair and discriminates against imported medical technology products, and some plans require the manufacturers to disclose sensitive data. Certain provincial government plans also impose controls on imported products or limit certain procurements to only domestically manufactured products, and some provincial governments directly subsidize the purchase of domestically manufactured products. Furthermore, the *Made in China 2025* industrial plan announced by the State Council in 2015 seeks to elevate the competitiveness of China's domestic medical device manufacturing capacity through a series of support policies, including targeted funds and procurement policies, in order to increase significantly the market share of domestically owned and produced medical devices by 2025.

The United States and U.S. industry have expressed concerns to the Chinese government about developments in this area, and continue to press the relevant government regulatory authorities to develop sound payment systems that adequately reward research and development and not to require foreign companies to transfer manufacturing activities to China in order to receive preferential benefits. At the November 2015 JCCT meeting, China committed that, in the area of market access, it will give imported medical devices the same treatment as those manufactured or developed domestically. This promise has not been fulfilled.

In September 2017, China's National Health and Family Planning Commission (NHFPC) issued the *Notice on Company Applications for National Price Negotiation for High-Value Medical Consumables*. This measure required a significant amount of extensive, complex and sensitive data translated into Chinese and notarized within six days from the measure's publication. In addition, the measure omitted critical details, such as the evaluation criteria and the designated authority to manage price negotiations upon submission of this data. The United States immediately raised concerns with NHFPC, which agreed to delay the measure's implementation. Since then, however, NHFPC has not provided any additional information about how it plans to implement this measure. Without the measure's official withdrawal, the United States remains concerned about this measure and NHFPC's plans with regard to the management of price negotiations for medical devices.

In August 2015, China's State Council issued a normative document entitled *Opinions of the State Council on Reforming the Review and Approval System for Drugs and Medical Devices*, which outlined the State Council's guidance for wide-ranging reforms relating to China's drug and medical devices registration review and approval systems. Two years later, in October 2017, the State Council and the General Office of the Communist Party issued the *Opinions on Deepening Reform of the*

Review and Approval System and Encouraging the Innovation of Drugs and Medical Devices, which outlined many additional policies at a high level with the potential to improve China's approach to the regulation of medical devices. While several promising draft measures subsequently have been issued, the United States remains concerned about how China plans to approach pricing and tendering procedures as other reforms progress. In 2019, the United States therefore will continue to closely examine developments in this area.

Standards, Technical Regulations and Conformity Assessment Procedures

With its accession to the WTO, China assumed obligations under the Agreement on Technical Barriers to Trade (TBT Agreement), which establishes rules and procedures regarding the development, adoption and application of standards, technical regulations and the conformity assessment procedures (such as testing or certification) used to determine whether a particular product meets such standards or regulations. Its aim is to prevent the use of technical requirements as unnecessary barriers to trade. The TBT Agreement applies to all products, including industrial and agricultural products. It establishes rules that help to distinguish legitimate standards and technical regulations from protectionist measures. Among other things, standards, technical regulations and conformity assessment procedures are to be developed and applied transparently and on a non-discriminatory basis by WTO members and should be based on relevant international standards and guidelines, when appropriate.

In its WTO accession agreement, China also specifically committed that it would ensure that its conformity assessment bodies operate in a transparent manner, apply the same technical regulations, standards and conformity assessment procedures to both imported and domestic goods and use the same fees, processing periods and complaint procedures for both imported and domestic goods. China agreed to ensure that all of its conformity assessment bodies are authorized to handle both imported and domestic goods within one year of accession. China also consented to accept the Code of Good Practice (set forth in Annex 3 to the TBT Agreement) within four months after accession, which it has done, and to speed up its process of reviewing existing technical regulations, standards and conformity assessment procedures and harmonizing them with international norms.

In addition, in the Services Schedule accompanying its WTO accession agreement, China committed to permit foreign service suppliers that have been engaged in inspection services in their home countries for more than three years to establish minority foreign-owned joint venture technical testing, analysis and freight inspection companies upon China's accession to the WTO, with majority foreign ownership no later than two years after accession and wholly foreign-owned subsidiaries four years after accession. China further agreed that qualifying joint venture and wholly foreign-owned enterprises would be eligible for accreditation in China and accorded national treatment.

REGULATORY REFORMS

In October 2001, China announced the creation of the Standardization Administration of China (SAC) under the State Administration of Quality Supervision, Inspection and Quarantine (AQSIQ). SAC is charged with unifying China's administration of product standards and aligning its standards and technical regulations with international practices and China's commitments under the TBT Agreement. SAC is the Chinese member of the International Organization for Standardization and the International Electrotechnical Commission.

U.S. industry has concerns about significant conformity assessment and testing-related issues in China. For example, U.S. exporters representing several sectors continue to report that China's regulatory requirements are not enforced as strictly or uniformly against domestic producers as compared to foreign producers. In addition, in some cases, China's regulations provide only that products will be inspected or tested upon entry into China's customs territory, without any indication as to whether or how the regulations will be applied to domestic producers.

SAC released a standardization reform plan in March 2015 entitled the *Reform Plan on Further Improving Standardization Work*. This plan was supposed to streamline standards and reduce government involvement in standards-setting by reducing the number of government-set mandatory and voluntary standards, fostering the development of non-governmental standards-setting organizations and encouraging companies to set their own standards.

Since then, the Chinese government has taken a series of steps at the central and provincial government levels to implement this plan. For example, SAC issued draft *Association Standardization – Part 1: Guidelines for Good Practice* and accepted public comments on these draft national standards. The American National Standards Institute and other U.S. stakeholders commented on these draft national standards.

In March 2016, the State Council Legislative Affairs Office circulated proposed amendments to China's *Standardization Law* for public comment. China's stated objectives for reforming its standardization system included the creation of a system in which the private sector would play a greater role in standards development. In response to China's solicitation of public comments, the United States expressed its view that China should carefully evaluate its obligations under the TBT and SPS Agreements as it revises the draft law and that China should ensure that the final version of the law conforms to both the letter and the spirit of the TBT Agreement. For example, the United States urged China to ensure that the final law sets an open policy for participating in the development of draft standards, including by persons of other countries. Additionally, the United States expressed concerns about provisions in the draft law that appear to create tension with laws designed to protect the intellectual property incorporated into standards.

In May and September 2017, China issued two subsequent drafts of the *Standardization Law*, and the United States continued to engage China on its draft provisions. China modified and clarified some provisions in these drafts in response to U.S. and other stakeholders' written comments. However, the September 2017 draft of the law introduced a serious new concern with regard to preference for Chinese technologies in standards development and failed to address other concerns detailed in prior written comments by the United States. The September 2017 draft, with only minor revisions, became final in November 2017 and went into effect in January 2018.

U.S industry noted disappointment that China did not take the opportunity of revising the *Standardization Law* to incorporate China's WTO TBT Agreement obligations, to mandate fair and open participation in standards development activities for foreign parties or to address the issue of a voluntary standard becoming mandatory, among other concerns. U.S. industry also has articulated significant concerns about disclosure requirements in the revised law that would appear to impair the ability of foreign companies to protect their intellectual property.

Meanwhile, existing technical committees continue to develop standards, and more foreign participation is being allowed. For example, while the United States' substantive concerns with China's cybersecurity standards have not been addressed, the technical committee for cybersecurity standards has begun allowing foreign companies to participate in standards development and setting, with several U.S. and other foreign companies being allowed to vote and to participate at the working group level in standards development. Nevertheless, the United States remains very concerned about China's policies with regard to standards, as China prepares to develop implementing regulations for the *Standardization Law*.

STANDARDS AND TECHNICAL REGULATIONS

Shortly after its accession to the WTO, China began the task of bringing its standards regime more in line with international practice. One of its first steps was AQSIQ's issuance of rules designed to facilitate China's adoption of international standards. China subsequently embarked on the task of reviewing all of China's existing 21,000 standards and technical regulations to determine their continuing relevance and consistency with international standards. During transitional reviews before the TBT Committee, China has periodically reported on the status of this review process and the number of standards and technical regulations that have been nullified, but it remains unclear whether these actions have had a beneficial impact on U.S. market access.

Concern has grown over the past few years that China seems to be actively pursuing the development of unique requirements, despite the existence of well-established international standards, as a means for protecting domestic companies from competing foreign standards and technologies. Indeed, China has already adopted unique standards for digital televisions, and it is trying to develop unique standards and technical regulations in a number of other sectors, including, for example, autos, telecommunications equipment, Internet protocols, wireless local area networks, radio frequency identification tag technology, audio and video coding and fertilizer as well as software encryption and mobile phone batteries. This strategy has the potential to create significant barriers to entry into China's market, as the cost of compliance will be high for foreign companies, while China will also be placing its own companies at a disadvantage in its export markets, where international standards prevail.

In 2018, as in prior years, the United States raised concerns at the WTO TBT Committee regarding several Chinese measures. These measures covered banking sector ICT rules, insurance sector ICT rules, cosmetics labeling, processed products certification, infant formula registration rules, fuel requirements for new energy vehicles and rules regarding recyclable materials. The United States will continue pressing these concerns in 2019.

Wi-Fi Standards

Since shortly after its accession to the WTO, China has pursued unique standards for encryption over Wireless Local Area Networks (WLANs), applicable to domestic and imported equipment containing WLAN (also known as Wi-Fi) technologies, despite the existence of well-established international standards. These efforts appear designed to protect Chinese companies from competing foreign standards and technologies.

As previously reported, China's initial focus was on the WLAN Authentication and Privacy Infrastructure (WAPI) encryption technique for secure communications. China eventually moved forward with plans to mandate the use of the WAPI standard in mobile handsets, despite the growing commercial success of computer products in China complying with the internationally recognized ISO/IEC 8802-11 WLAN standard, otherwise known as "Wi-Fi," and despites serious concerns raised by the United States, both through the JCCT process and in meetings of the TBT Committee.

A new issue related to Wi-Fi standards arose in 2011, after China published a proposed voluntary wireless LAN industry standard known as the "UHT/EUHT standard." China's UHT/EUHT standard appears to be an alternative to the international standard IEEE 802.11n, which is the wireless LAN industry standard currently used throughout the world in Wi-Fi networks. The Chinese UHT/EUHT standard was released for only a 15-day public comment period on September 20, 2011. U.S. industry groups submitted comments, arguing, among other things, that there are technical compatibility concerns regarding the interoperability of the UHT/EUHT standard with the existing Chinese national standard (WAPI) and with the most widely used and recognized WLAN industry standard (IEEE 802.11). Separately, the United

States expressed concerns to China that, if China integrates standards such as the UHT/EUHT standard into its certification or accreditation schemes, these standards would become *de facto* mandatory and therefore would raise questions in light of China's obligations under the WTO TBT Agreement. In February 2012, MIIT approved the UHT/EUHT standard as a voluntary standard, but U.S. industry has expressed concern that the unusual approval process for UHT/EUHT may reflect a desire within the Chinese government to promote this indigenous standard, despite technical concerns raised by industry participants in the technical committee relating to its compatibility and co-existence with 802.11 products. Since then, the United States has raised its concerns about the *de facto* mandating of voluntary standards like UHT/EUHT via certification or accreditation schemes, and the United States will continue to do so.

Telecommunications Standards

The United States elevated another standards issue to the JCCT level beginning in 2004. The U.S. telecommunications industry was very concerned about increasing interference from Chinese regulators, both with regard to the selection of 3G telecommunications standards and in the negotiation of contracts between foreign telecommunications service providers and their Chinese counterparts. The United States urged China to take a market-based and technology neutral approach to the development of next generation wireless standards for computers and mobile telephones. At the April 2004 JCCT meeting, China announced that it would support technology neutrality with regard to the adoption of 3G telecommunications standards and that telecommunications service providers in China would be allowed to make their own choices about which standard to adopt, depending on their individual needs. China also announced that Chinese regulators would not be involved in negotiating royalty payment terms with relevant intellectual property rights holders.

By the end of 2004, it had become evident that there was still pressure from within the Chinese government to ensure a place for China's home-grown 3G telecommunications standard, known as TD-SCDMA. In 2005, China continued to take steps to promote the TD-SCDMA standard. It also became evident that they had not ceased their attempts to influence negotiations on royalty payments. Then, in February 2006, China declared TD-SCDMA to be a "national standard" for 3G telecommunications, heightening concerns among U.S. and other foreign telecommunications service providers that Chinese mobile telecommunications operators would face Chinese government pressure when deciding what technology to employ in their networks.

The United States again raised the issue of technology neutrality in connection with the April 2006 JCCT meeting. At that meeting, China restated its April 2004 JCCT commitment to technology neutrality for 3G telecommunications standards, agreeing to ensure that mobile telecommunications operators would be allowed to make their own choices as to which standard to adopt. China also committed to issue licenses for all 3G telecommunications standards in a technologically neutral manner that does not advantage one standard over others.

Throughout 2008, China's test market for its TD-SCDMA standard continued to grow, and widespread test networks were put in place in time for the August 2008 Summer Olympics in Beijing. In January 2009, China's MIIT issued 3G licenses based on the three different technologies, with a TD-SCDMA license for China Mobile, a W-CDMA license for China Unicom and a CDMA2000 EV-DO license for China Telecom. However, despite the issuance of licenses for all three standards, the Chinese government continued to heavily promote, support and favor the TD-SCDMA standard. For example, China's economic stimulus-related support plan for Information Technology and Electronics, approved by the State Council and published in April 2009, specifically identifies government support for TD-SCDMA as a priority.

In March 2010, U.S. concerns over China's preferential treatment of TD-SCDMA were exacerbated by the inclusion of products based on this technology in the *Opinions on Advancing Third-Generation Communications Network Construction*, issued by MIIT, NDRC, the Ministry of Science and Technology (MOST), MOF, the Ministry of Land and Resources, the Ministry of Housing and Urban-Rural Development (MOHURD) and SAT. Specifically, the United States was concerned that this measure would lead to these products being entitled to government procurement preferences.

Meanwhile, China's insistence on promoting TD-SCDMA discouraged further innovation. For example, China was reluctant to permit operators to deploy alternative technologies, including 4G technologies.

Throughout 2010, the United States continued to press China to reaffirm the principle of technology neutrality for current and future services and technologies. In an important development at the December 2010 JCCT meeting, China committed to technology neutrality for 3G networks and future networks based on new technologies, allowing operators to choose freely among those technologies and without the Chinese government providing any preferential treatment based on the standard or technology used by an operator.

In subsequent years, the United States carefully reviewed developments in this area, stressing to China in bilateral meetings the importance of a continuing commitment to technology neutrality in line with China's JCCT commitments, both for 3G standards and for emerging 4G standards issues. In November 2013, however, China licensed 4G spectrum in a manner that is not technology neutral, as it licensed only the domestically favored Long-Term Evolution (LTE) standard known as LTE-TDD and not the other common standard known as LTE-FDD.

In July 2014, the U.S. government, under the framework of the JCCT Information Industry Working Group, organized a U.S.-China Spectrum Roundtable to discuss spectrum allocation issues. The Spectrum Roundtable included participants from U.S. and Chinese industry as well as government representatives. China subsequently agreed to an additional roundtable discussion of this issue, which took place in an August 2016 meeting. At that meeting, and in other subsequent bilateral engagements, the United States urged China to work to identify spectrum for auction and set eligibility rules that make clear that foreign-invested enterprises may participate in any future spectrum auctions with domestic competitors on an equal basis. Nevertheless, China failed to satisfy U.S. concerns.

ZUC Encryption Algorithm Standard

Beginning in late 2011, China moved ahead with the rollout of a Chinese government-developed 4G LTE encryption algorithm known as the ZUC standard. The European Telecommunication Standards Institute (ETSI) 3rd Generation Partnership Project (3GPP) had approved ZUC as a voluntary standard in September 2011. According to U.S. industry reports, MIIT, in concert with the State Encryption Management Bureau, informally announced in early 2012 that only domestically developed encryption algorithms, such as ZUC, would be allowed for 4G TD-LTE networks in China, and it appeared that burdensome and invasive testing procedures threatening companies' sensitive intellectual property could be required.

In response to U.S. industry concerns, the United States urged China not to mandate any particular encryption standard for 4G LTE telecommunications equipment, in line with its bilateral commitments and the global practice of allowing commercial telecommunications services providers to work with equipment vendors to determine which security standards to incorporate into their networks. Any mandate of a particular encryption standard such as ZUC would contravene a commitment that China made to its trading partners in 2000, which clarified that foreign encryption standards were permitted in the broad commercial marketplace and that strict "Chinese-only" encryption requirements would only be imposed on specialized IT products whose "core function" is encryption. Additionally, a ZUC mandate would contravene China's 2010 JCCT commitment on technology neutrality, in which China had agreed to take an open and transparent approach with regard to operators' choices and not to provide preferential treatment based on the standard or technology used in 3G or successor networks, so that operators could choose freely among whatever existing or new technologies might emerge to provide upgraded or advanced services.

The United States pressed China on this issue throughout the run-up to the December 2012 JCCT meeting. At that meeting, China committed that it will not mandate any particular encryption standard for commercial 4G LTE telecommunications equipment.

In 2013, the United States worked to ensure that MIIT's voluntary testing and approval process for the ZUC 4G telecom equipment standard fully protects applicants' intellectual property by not requiring source code or other sensitive business confidential information to be provided during the approval process. At the December 2013 JCCT meeting, China committed that it will not require applicants to divulge source code or other sensitive business information in order to comply with the ZUC provisions in the MIIT application process for 4G devices. To date, the United States continues to press China with regard to this sensitive issue.

Mobile Smart Device Regulations

In 2012, MIIT began to develop a new draft regulatory framework for the mobile smart device market. MIIT's stated objective was to help protect consumer interests relating to the privacy of users and the security of their personal information in connection with the operation of their mobile smart devices.

In April 2012, MIIT shared a draft *Notice Regarding Strengthening Management of the Network Access for Mobile Smart Devices* with select foreign companies for informal comments. It appeared that the draft measure would impose numerous new obligations and technical mandates on information technology and telecommunications hardware, operating systems, applications, application stores and other related services. The draft measure also could impose, by reference, mandatory technical regulations and testing requirements on these same goods and services, as well as on the mobile smart devices themselves. In addition, the China Communications Standardization Association was in the process of developing numerous "industry standards" relating to smart terminal requirements, which appeared to be linked to the development of the draft measure.

The United States expressed its concerns to MIIT and requested that China notify the measure to the WTO TBT Committee. The United States also offered to work with MIIT on best practices for addressing privacy and security associated with mobile smart devices. In response, in June 2012, MIIT published the draft measure on the MIIT website and asked for public comments within 30 days. In addition, in November 2012, China notified the draft measure to the WTO TBT Committee and indicated that it would accept comments for a 60-day period.

The United States and U.S. industry were concerned because the far-reaching regulatory approach embodied in the draft measure – which is exclusively oriented toward government mandates rather than voluntary private sector-developed global standards and public-private cooperation – is unprecedented among the leading markets for mobile smart devices and could create significant trade barriers. Furthermore, the potential inclusion of numerous voluntary standards relating to smart terminal requirements could create further trade barriers, as it could readily lead to these voluntary standards becoming mandatory standards within MIIT's testing and certification process. Unfortunately, in

November 2013, MIIT finalized and began implementing this measure, along with two associated voluntary standards. From that date until now, the United States has continued to express concerns about what a process that appears to put non-Chinese companies at an unfair disadvantage.

Patents Used in Chinese National Standards

China has prioritized the development of Chinese national standards in documents such as the *Outline for the National Medium to Long-Term Science and Technology Development Plan (2006-2020)*, issued by the State Council in February 2006, and amplified shortly thereafter in the *11th Five-year Plan (2006-2010) for Standardization Development*, issued by SAC. More recently, China has also publicly expressed its resolve to rely on either non-patented technology or patented technology made available at prices lower than those that patent owners would otherwise seek to charge when developing standards. As a result, China's treatment of patents in the standard setting process has garnered increasing attention and concern around the world, including in the United States.

Over the years, the United States has engaged repeatedly with China on issues relating to the use of national standards. This engagement has included the submission of extensive written comments on draft measures.

In July 2014, the United States provided written comments on the eighth draft of the *Rules of the Administration for Industry and Commerce on the Prohibition of Abuses of Intellectual Property Rights for the Purposes of Eliminating or Restricting Competition*. In April 2015, SAIC adopted the final version of this measure. A key U.S. industry concern in the measure is that Article 13 suggests that a patent holder is subject to a commitment to license its patent on fair, reasonable and non-discriminatory (FRAND) terms merely because its patent has been incorporated into a standard.

In September 2014, the United States provided written comments on the draft *Interpretations of the Supreme People's Court on Certain Issues Concerning the Application of Law in the Trial of Patent Infringement Cases II*. Article 27 of this draft measure addressed disputes between patent holders and potential licensees relating to non-compulsory national, industrial or local standards. The United States recommended that Article 27 be modified in several ways, including to clarify that Article 27 should apply only to patents that the patent holder has committed voluntarily, and without coercion by government or quasi-government entities, to license on FRAND terms as part of its participation in a standards-setting process. The United States also recommended that Article 27 be modified to clarify the circumstances under which a patent holder may be found to have violated FRAND principles by negotiating in bad faith and also make clear that an alleged infringer should have an opportunity to assert non-infringement and that patent holders are entitled to FRAND compensation where infringers are permitted to continue to use a patented invention. The United States further recommended that, where courts must determine an appropriate FRAND royalty, they should take into account that patent holders in China face challenges in enforcing their patents and securing appropriate compensation for the use of their patents and, in addition, take steps to avoid outcomes that under-compensate patent holders or undermine incentives to innovate.

As in-depth discussion of these issues continued into 2015 and beyond, the United States has repeatedly expressed concern because China's standard setting rules do not ensure that participation in the standards development process is open to all persons. Indeed, reports from U.S. industry indicate that even foreign enterprises with operations in China are unable to participate in many standards-setting activities on a non-discriminatory basis. The United States continues to press China to take further steps to ensure that standards development processes are open to all interested parties, both within the context of China's implementation of its revised *Standardization Law* and the functioning of China's current standardization system.

Information Security Standards

Beginning in 2010 and continuing through 2012, both bilaterally and during meetings of the WTO's TBT Committee, the United States raised its concerns with China about framework regulations for information security in critical infrastructure known as the Multi-Level Protection Scheme (MLPS), first issued in June 2007 by the Ministry of Public Security and MIIT. The MLPS regulations put in place guidelines to categorize information systems according to the extent of damage a breach in the system could pose to social order, public interest and national security. The MLPS regulations also appear to require, by reference, purchasers' compliance with certain information security technical regulations and encryption regulations that are referenced within the MLPS regulations.

Among other things, the MLPS regulations bar foreign products from information systems graded level 3 and above, because all products deployed must be developed by Chinese information security companies and must bear Chinese intellectual property in their key components. Additional troubling product testing provisions for level 3 and above require companies to disclose product source code, encryption keys and other confidential business information. To date, hundreds of request for proposals (RFPs) incorporating MLPS requirements have come from government agencies, the financial sector, telecommunications companies, the power grid, educational institutions and hospitals in China. These RFPs cover a wide range of information security software and hardware, and many of them exclude the purchase of foreign products by incorporating level-3 requirements.

If implementing rules for the MLPS regulations are issued and apply broadly to commercial sector networks and IT infrastructure, they could have a significant impact on sales by U.S. information security technology providers in China. The United States therefore has urged China to notify any MLPS implementing rules laying down equipment-related requirements in accordance with China's obligations under the TBT Agreement.

At the December 2012 JCCT meeting, China indicated that it would begin the process of revising the MLPS regulations. It also agreed that, during that process, it would enter into discussions with the United States regarding U.S. concerns. Throughout 2013 and 2014, using the JCCT process, the United States pressed China to fully and quickly implement its JCCT commitment to revise the MLPS regulations. To date, however, China has not yet revised those regulations.

In 2015, concerns about the MLPS regulations were heightened in light of provisions contained in the draft *Administrative Regulations on the Informatization of Insurance Institutions* that mandate compliance with MLPS requirements. At the November 2015 JCCT meeting, China agreed to strengthen exchange and dialogue with the United States in this area.

In 2016, however, concerns about China's MLPS regulations were amplified as China adopted new measures, such as the *Cybersecurity Law*. These measures appear to create an analogous or overlapping "cybersecurity multi-level protection scheme." These concerns were heightened even more in January 2018, when China issued a proposed measure, the *Cybersecurity Classified Protection Regulations*, which appears to expand existing requirements in the MLPS regulations. As discussed in the section below on Secure and Controllable ICT Policies, the United States actively engaged China when it was drafting the *Cybersecurity Law* while also continuing to press China on its overall approach with regard to regulation in the area of cybersecurity, and these efforts continued in 2018.

Secure and Controllable ICT Policies

Since 2015, concerns about China's regulations addressing information security have heightened as China has pursued a series of measures that would impose severe restrictions on a wide range of U.S. and other foreign ICT products and services with an apparent long-term goal of replacing foreign ICT products and services. These measures include provisions relating to standards and conformity assessment procedures as well as provisions relating to intellectual property ownership and research and development requirements. These provisions stem from a May 2014 announcement by the Cyberspace Administration of China (CAC) that it would implement a broad-reaching "Cybersecurity Review Regime" focused on ensuring that technology in China is "secure and controllable." This policy direction was affirmed in November 2016 with China's passage of a *Cybersecurity Law*, which puts in place an overarching statutory framework for the regulation of cybersecurity in China.

In July 2015, the National People's Congress passed a *National Security Law* with a stated purpose of safeguarding China's security. However, this law included sweeping provisions addressing economic and industrial policy.

In December 2015, the National People's Congress passed a *Counterterrorism Law*. Leading up to the passage of this law, the United States and numerous stakeholders around the world had expressed serious concerns about the then-draft *Counterterrorism Law*, particularly with regard to provisions that seemed to extend far beyond the law's general objective of reinforcing the government's authority to investigate and prevent terrorism. Especially troubling trade-related concerns in the original draft law included in-country data storage requirements and restrictions on cross-border data flows for "all telecom and Internet businesses," as well as requirements for telecommunications and Internet service providers to pre-install cryptographic solutions in their equipment. The final version of the law removed those requirements and restrictions, but it remains unclear whether they will nevertheless be included in subsequent implementing measures. Additionally, new obligations in the *Counterterrorism Law* requiring companies in the telecommunications and Internet-related services sectors to "provide technical support and assistance, including handing over access or interface information and decryption keys," to proactively monitor their networks for terrorism information and to disclose any discovered terrorism information to the regulatory authorities could present undue burdens on foreign companies.

In November 2016, the National People's Congress passed the *Cybersecurity Law*, which became effective in June 2017. Leading up to the passage of this law, the United States and numerous other WTO members had expressed serious concerns to China about the contents of two circulated drafts of the law, as did private sector stakeholders. For example, in August 2016, 46 global industry groups signed a letter to China's Premier Li describing their serious concerns. Confirming WTO member and private sector concerns, the final version of the law imposes far-reaching and onerous trade restrictions on imported ICT products and services in China. Among other things, the law requires testing for products sold into "critical information infrastructure," which is vaguely and broadly defined.

China's implementation of its "secure and controllable" policies extended beyond the pursuit of these new laws. Over the past four years, China has adopted a large number of other measures incorporating the concept of "secure and controllable." Particular areas of concern include the vague definition of "secure and controllable" and its potential implications for discrimination against foreign firms, cross-border data flow restrictions and requirements for in-country storage of data, as well as encryption requirements.

To date, Chinese legislators and regulators have never publicly defined the term "secure and controllable." The United States has expressed its strong concern that the term appears to mean products and technologies with domestically owned and registered intellectual property or conforming to other localization requirements and that this term will be interpreted to mean products, technologies or intellectual property of domestic origin. Numerous global technology stakeholders and governments have expressed similar concern that the lack of a concrete definition of "secure and controllable" allows Chinese regulators to interpret the term in a discriminatory fashion.

Requirements in various "secure and controllable" measures to use domestically owned and registered intellectual property call into question China's prior bilateral commitments to treat intellectual property owned or developed in other countries the same as intellectual property owned or developed in China. In addition, these requirements undermine the flexibility needed by domestic and foreign companies to make their own ICT product procurement decisions on the basis of their unique business considerations and as dictated by any legal or fiduciary responsibilities to protect their customers' information. These requirements also could impair the ability of companies to quickly and effectively respond to new cybersecurity risks. Furthermore, these requirements could result in companies needing to operate different ICT platforms for different markets, which would increase costs prohibitively and detract from business efficiencies without any guarantee of more or enhanced security. These requirements also raise serious questions and concerns by associating intellectual property rights with national security.

China's numerous "secure and controllable" measures also have included potential generally applicable restrictions on cross-border data flows and requirements for in-country storage of data, which have been criticized by the United States and numerous other WTO members and by the private sector. Given the international nature of the modern economy, a company's ability to transfer data across borders to its headquarters or other locations is important for conducting data analysis to improve the quality of its risk management. Cross-border data transfers also can be necessary for international businesses to meet regulatory obligations in their home countries or other jurisdictions. Similarly, requirements for in-country storage of data would not appear to further data security and integrity, but instead would impose restrictions that could unduly raise the cost for international companies doing business in China, as well as for Chinese companies that have global operations. These requirements also run counter to trends in most major economies, where efforts are expended not in restricting data transfers or requiring local data storage, but rather in ensuring that appropriate protections are in place once information has been transferred. Unfortunately, the data localization provision in the *Cybersecurity Law* entered into effect on December 31, 2018, potentially subjecting many companies across an array of economic sectors to the law's very restrictive data localization requirements if they employ cloud computing or big data technologies.

With regard to encryption requirements in China's numerous "secure and controllable" measures, the United States has emphasized to China the importance of China's acknowledgement at the November 2015 JCCT meeting of its prior bilateral commitment that it would only regulate encryption technologies that, "at their core, are dedicated to encryption and decryption operations." Numerous references in recent Chinese measures to "domestic" cryptography create concern that they may refer to various measures related to cryptography that set goals of applying domestic cryptography requirements across China's financial services sector and other sectors. Accordingly, the United States has urged China to live up to its commitment not to mandate in generally applicable measures the use of domestic encryption technologies, so as to ensure that companies are free to utilize the encryption technologies most appropriate for their needs, regardless of their country of origin.

In 2017, China's Office of State Commercial Cryptography issued a draft *Cryptography Law* for public comment. The draft law raises serious questions and concerns, particularly given that passage of this law in final form would codify potentially far-reaching, highly trade restrictive cryptography-related constraints on foreign ICT products. The draft law potentially could sweep widely sold technologies and products using encryption into more restrictive policies, given the almost ubiquitous use of encryption technologies in today's commercial products. The draft law also would establish licensing requirements and a cryptography accreditation, testing and certification system, which could require applicants to divulge source code and other sensitive design information, an issue of enormous concern to global industry, particularly to the extent that encryption requirements are expanded beyond the current "core function" encryption products. The United States also is concerned that new testing and certification requirements could discriminate against foreign products and services and put foreign companies at a severe disadvantage.

Given all these concerns, the United States has identified the issue of technology policy as a top U.S. priority. Over the past few years, China has committed that generally applicable measures to enhance ICT cybersecurity in commercial sectors should be consistent with WTO rules, be narrowly tailored, take into account international norms, be non-discriminatory and not impose nationality-based conditions or restrictions on the purchase, sale or use of ICT products by commercial enterprises unnecessarily. In addition, China has expressly confirmed that its prior commitments relating to information security measures apply to its "secure and controllable" policies. China also agreed that it would notify relevant "secure and controllable" technical regulations to the WTO TBT Committee.

Despite the apparent progress represented by these various commitments, China has continued to issue numerous draft and final cybersecurity measures that raised serious questions about China's approach to cybersecurity regulation. Key measures of concern include the *Cybersecurity Classified Protection Regulations*, *Security Assessment of Cross-Border Transfer of Personal Information and Important Data*, the *Catalogue of Network Critical Equipment and Cybersecurity Products*, numerous sector-specific cybersecurity requirements and a series of cybersecurity-related national standards, including a series of 24 draft standards published in June 2018. These measures do not appear to be consistent with the non-discriminatory, non-trade restrictive approach to which China has committed.

Accordingly, throughout the past year, the United States has strongly conveyed serious concerns to China about its approach to cybersecurity regulation. The United States used written comments on draft measures, bilateral engagement under the auspices of the CED and multilateral engagement at WTO committee meetings in an effort to persuade China to revise its policies in this area to ensure that they are consistent with its WTO obligations and bilateral commitments.

Secure and Controllable ICT Standards

In November 2016, the National Information Security Standardization Technical Committee, chaired by the Cyberspace Administration of China (CAC), released a series of proposed cybersecurity standards for public comment. Included among the standards were proposed "secure and controllable" product standards for central processing units (CPUs), operating systems (OS) and office software suites, as well as standards on testing specifications for "secure and trustworthy" office information systems. Seven standards relating to the MLPS also were released, covering cloud computing, mobile Internet and other applications. In 2017 and 2018, the technical committee released an additional six tranches of cybersecurity standards for public comment.

Throughout the past two years, working closely with U.S. industry stakeholders, the United States expressed serious concerns about stringent requirements laid out in many of the draft standards, which would make it difficult for foreign technology companies to comply. In addition, it appears that many Chinese enterprises switched to purchasing Chinese products instead of foreign products based on the draft standards. The United States submitted written comments on the various iterations of the draft standards and followed up with meetings in Beijing with Chinese regulatory authorities. In 2019, the United States will continue to press China to take steps to ensure that its policies in this area are consistent with its WTO obligations and bilateral commitments.

Import Ban on Recyclable Materials

In July 2017, China notified to the WTO's TBT Committee two measures issued by China's Ministry of Environment and Protection (MEP), known as the Ministry of Ecology and Environment (MEE) after the March 2018 government reorganization. These measures would limit or ban imports of certain scrap and recovered materials, such as plastic bottles and unsorted paper. However, the comment periods provided by China were less than the 60 days required by the TBT Agreement, and the timeframe for implementation was less than six months.

In January 2018, China banned imports of 24 kinds of "solid wastes" under four classes, including "plastic wastes," "unsorted waste paper," textile remnants and vanadium slag. Additionally, effective September 2017, China began enforcing new import standards for the identification of solid waste utilizing a broad definition that includes substances that have lost their original production or functional value, various manufacturing and agricultural by-products, environmental control by-products and other substances identified by MEE as solid waste.

These measures represent the first of a series of anticipated actions outlined in the State Council's *Implementing Plan for Banning the Entry of Overseas Garbage and Promoting the Reform of the Management System for Solid Waste Imports*. This plan calls for, among other things, a comprehensive ban on the import of "heavily polluting solid wastes" by the end of 2017 and a more gradual phase out of scrap and recovered materials in order to advance a policy of local substitution. Consistent with this plan, it does not appear that similar restrictions, including thresholds for contaminants, apply to domestically sourced scrap or recovered materials.

In 2018, China issued additional catalogues and measures to further restrict the importation of recyclable materials. In April 2018, MEE announced additional materials to be added to the import ban, effective in 2018 and 2019. In June 2018, the State Council's *Opinions on Strengthening Ecological Environmental Protection* set a target of reducing imports of scrap and recovered materials to zero by 2020. In July 2018, MEE issued a draft *Law on the Prevention and Control of Environmental Pollution by Solid Waste*, which would mandate a complete ban on the importation of "solid waste."

U.S. exports to China of the scrap and recovered materials covered by the measures totaled $479 million in 2016. U.S. stakeholders have reported significant negative impact on those exports.

Shortly after China notified the measures at issue to the TBT Committee, the United States began raising its serious concerns about the measures and urged China to halt its implementation of these measures. In 2019, the United States will continue to urge China to reverse its approach to the treatment of imported recyclable materials and to apply the same standards to both imported and domestically sourced materials.

CONFORMITY ASSESSMENT PROCEDURES

China's regulatory authorities appear to be turning more and more to in-country testing for a broader range of products. This policy direction is troubling, as it is inconsistent with common international conformity assessment practices, which favor processes that accept test results from internationally recognized laboratories, the concept of a "supplier's declaration of conformity" and other similar trade-facilitating conformity assessment mechanisms.

The United States is unaware of any meaningful efforts by China to move toward a system that recognizes test results or conformity assessment certifications from bodies other than Chinese government-run testing, certification, or accreditation entities. Instead, China has developed plans to expand the China Compulsory Certification Mark (CCC Mark) scheme and its mandatory testing requirements to information security, an area in which most countries do not engage in government certification. China also continues to prepare to implement in-country government testing for compliance with its new regulations on hazardous substances in electronic information products. Working with U.S. industry, the United States will continue to urge China in 2019 to reverse this trend and move in the direction of more globally recognized conformity assessment practices.

Telecommunications Equipment

The product testing and certification processes in China for mobile phones have been significantly more burdensome and time-consuming than in other markets, which increases the costs of exporting products to China. China's three main type approval certification processes for mobile phones are the Network Access License (NAL), the Radio Type Approval (RTA), and the CCC Mark. While each one represents a different certification process, there are overlapping testing requirements among them, particularly between the NAL and the RTA with regard to radio telecommunications testing requirements for electromagnetic interference and between the NAL and the CCC Mark with regard to electromagnetic compatibility and product safety. In addition to redundancy, China's testing requirements are often unclear and subject to change without written notification and adequate time for companies to adjust. Companies must often determine what testing requirements are applicable by communicating directly with the relevant regulatory body, rather than by having access to a comprehensive, published list of testing requirements. The WAPI mandate in MIIT's approval certification process for mobile phones represents a clear example of unpublished requirements. Companies have also reported that, in some cases, testing requirements for products can change on an almost monthly basis.

In bilateral meetings in 2010, the United States and China discussed testing and certification redundancies in the area of telecommunications equipment. As a result of these meetings, China's MIIT and U.S. regulatory officials, together with global industry stakeholders, conducted a one-day workshop in May 2010 to discuss prevalent concerns about telecommunications testing and certification requirements from a technical perspective. China also committed, at the December 2010 JCCT meeting, that it would develop a one-stop shopping mechanism for telecommunications network access license and radio type approval. At the November 2011 JCCT meeting, China agreed to publish the procedures for this new mechanism by the end of 2011. In December 2011, MIIT announced the implementation of its December 2010 JCCT commitment through the establishment of a single application window for both RTA and NAL testing and certification. In February 2012, a one-stop-shopping mechanism became operational on MIIT's website, with MIIT's Telecommunications Equipment Certification Center being appointed to process applications for both testing and certification processes.

Based on industry's experience to date, it does not appear that MIIT's approach is meaningful in terms of streamlining the MIIT processes. The United States remains concerned that it does not actually eliminate any redundancies or unnecessary elements of the testing and certification processes. It also does not appear to address a fundamental concern that unnecessary functionality testing is a major cause of the burdensome nature of these processes. In addition, the lack of transparency in the NAL testing and certification process remains a concern, as NAL requirements are not readily available to the public.

CCC Mark System

As previously reported, CNCA regulations establishing a new Compulsory Product Certification System, issued in December 2001, took full effect in August 2003. Under this system, there is now one safety mark – the CCC Mark – issued to both Chinese and foreign products. Under the old system, domestic products were only required to obtain the "Great Wall" mark, while imported products needed both the "Great Wall" mark and the "CCIB" mark. Despite the changes made by the regulations, U.S. companies in some sectors continue to express concerns about duplication in certification requirements, particularly for radio and telecommunications equipment, medical equipment and automobiles.

Meanwhile, to date, China has granted more than 150 Chinese enterprises accreditation to test and at least 14 Chinese enterprises accreditation to certify for purposes of the CCC Mark. Despite China's commitment that qualifying majority foreign-owned joint venture conformity assessment bodies would be eligible for accreditation and would be accorded national treatment, China so far has only accredited six foreign-invested conformity assessment bodies. It is not clear whether these six foreign-invested conformity assessment bodies play a sizeable role in accrediting products sold in China. China has also not developed any alternative, less trade-restrictive approaches to third-party certification, such as recognition of a supplier's declaration of conformity. As a result, U.S. exporters to China are often required to submit their products to Chinese laboratories for tests that may be unwarranted or have already been performed abroad, resulting in greater expense and a longer time to market. One U.S.-based conformity assessment body has entered into an MOU with China allowing it to conduct follow-up inspections (but not primary inspections) of manufacturing facilities that make products for export to China requiring the CCC Mark. However, China has not been willing to grant similar rights to other U.S.-based conformity assessment bodies, explaining that it is only allowing one MOU per country. Reportedly, Japan has MOUs allowing two conformity assessment bodies to conduct follow-up inspections, as does Germany.

In 2018, China made updates to the CCC system. It removed existing CCC requirements for several product categories and developed a "self-declaration" process for others, which is intended to shorten time to market for the product categories identified.

Going forward, the United States will remain in close contact with U.S. industry. The United States also will continue working to further expand the scope of testing and certification activities available to U.S. providers in China.

Medical Devices

China's regulatory requirements applicable to medical devices, such as requirements for country of origin approval and in-country clinical trials, hamper the ability of U.S. medical device manufacturers to get their products to market in China in a timely manner, delaying U.S. medical devices reaching Chinese patients by as much as five years or more depending on the product. The medical device industry's innovation cycle moves quickly, so China's regulatory delays often can result in medical devices only reaching Chinese patients once there is already a newer, more efficient version of treatment available in other major markets. Additionally, China maintains policies that attempt to drive down the costs of U.S. medical devices and that state clear preferences for the procurement of domestic medical devices when that alternative is available.

When issued in 2014, the State Council's Order No. 650, the *Regulations for the Supervision and Administration of Medical Devices*, was expected to result in the creation and update of numerous rules and requirements pertaining to clinical trials, testing, inspections, evaluations, re-registration and post-market surveillance. Unfortunately, China did not notify it to the WTO's TBT Committee in advance, or otherwise seek public comment on it. Since then, the United States and U.S. industry have raised concerns relating to Order No. 650 and the various implementing measures with the relevant Chinese government authorities, using the JCCT process, meetings of the WTO TBT Committee and other engagement opportunities and venues. Particular provisions of concern included the requirement that a medical device be approved in the country of export before it can obtain approval in China, and remaining local clinical trial requirements. China's slow approval process for new medical devices also continued to create market disruptions for the sector.

When the United States raised concerns about the requirement that a medical device must be approved in the registrant's country of origin before it can begin clinical trials or submit an application for approval in China, CFDA assured the United States that implementation would be effectively the same as the prior requirement, so that marketing authorization from the country of origin would satisfy the requirement under Order No. 650. However, the United States remains concerned that this requirement places unnecessary market entry delays on imported medical devices, while offering no actual assurance regarding the safety and efficacy of the medical devices in question. The lack of registration in the manufacturer's home country or country of export is not necessarily an indication that a medical device is unsafe. Moreover, since the United States does not have this same requirement, Chinese medical devices can enter the U.S. market months and, in some cases, years before similar U.S. medical devices can enter China's market, putting U.S. industry at a significant disadvantage.

The United States is also concerned about lingering clinical trial requirements that have yet to be abolished that further delay the entry of U.S. medical devices into China's market. For products not listed in the exemption catalogues, foreign manufacturers have limited options and unclear guidance as to how they can demonstrate safety and effectiveness to obtain clinical trial waivers. The United States has urged CFDA to expand the ways that foreign companies can demonstrate eligibilities for these exemptions.

In May 2017, CFDA followed up by issuing three proposed notices, known as Notices 52, 53 and 54, addressing clinical trials and related time-to-market issues. Subsequently, in October 2017, China's State Council and the General Office of the Communist Party released the *Opinions on Deepening Reform of the Review and Approval System and Encouraging Innovation of Drugs and Medical Devices,* which seeks to further advance the policies outlined in Notices 52, 53 and 54. In January 2018, CFDA issued the *Technical Guidelines for the Acceptance of Overseas Clinical Trial Data of Medical Devices*. This measure provides general guidance as to what requirements foreign firms must meet in order to avoid duplicative in-country testing, but implementation of this measure to date remains unclear.

In January 2018, China's Ministry of Science and Technology issued a solicitation for submissions to qualify for the innovative medical devices catalogue. This solicitation states that "priority consideration" would be provided to domestic medical devices.

In June 2018, the Ministry of Justice issued *Draft Amendments to the Regulations of the Supervision and Management of Medical Devices*. This measure provides high-level direction about the requirements for foreign clinical trial data and clinical evaluations, but it also reinforces China's requirement that an applicant seeking to register an imported medical device must submit documentation that the product was approved for sale in the country where the product is manufactured.

Overall, while China's medical device regulatory agency, now called the National Medical Products Administration (NMPA), appears motivated to improve its processes and compete globally, various Chinese regulatory authorities with a role in this area continue to issue measures that either distort previously understood developments or explicitly make it more difficult for U.S. firms to compete with domestic medical device manufacturers. In 2019, the United States will press China to issue final implementing regulations removing country of origin approval requirements, clarifying that overseas clinical trial data for medical devices will be accepted in China, and providing a level playing field for foreign and Chinese manufacturers.

In 2015, China reinstated and increased registration fees for both medical devices and pharmaceutical products. For Class II medical devices, while foreign manufacturers are required to pay a set amount, registration fees for domestic manufacturers are set by the provincial regulatory authorities and can vary. The United States continues to press relevant Chinese regulatory authorities to ensure equitable treatment and access for U.S. medical device manufacturers and to keep the registration fees at a reasonable level. The United States also has pressed China to establish concrete metrics to ensure that the performance of China's regulatory authorities in reducing product approval delays, given the additional resources flowing from the substantial registration fees. At the November 2015 JCCT meeting, China agreed to publish annual reports evaluating how its registration and approval processes for pharmaceuticals and medical devices are performing.

In January 2017, eight Chinese ministries announced a new policy that appears to allow no more than two invoices in the distribution chain for drugs, one from the manufacturer to a distributor and another from the distributor to the end-use hospitals. Although this two-invoice system was only meant to apply to drugs, multiple local authorities in China also applied this same requirement to medical devices. In practice, drug and medical device manufacturers use many distributors for a particular product, depending on geographic location, expertise, competitive pricing and other factors. Meanwhile, to date, China's regulatory authorities have not provided a clear definition of the "two invoices" system, leaving a great deal of misunderstanding among medical device manufacturers and distributors. This policy also causes significant uncertainty in the market, with the potential for creating, among other things, an unfair advantage for a handful of distributors in their dealings with manufacturers.

In September 2017, NHFPC notified medical device manufacturers that they had two weeks to provide a wide range of data in order to participate in China's pricing and reimbursement program for public and military hospitals. The United States and other foreign governments immediately raised serious concerns about this measure with the Chinese authorities. Although NHFPC subsequently extended its deadline by two weeks, U.S. and other foreign companies still encountered significant burdens in providing the vast amount of data required of them, which included data not required to be produced in other countries. In 2019, the United States will continue to monitor China's medical devices pricing policies to ensure that companies have sufficient time to comply with new requirements and that submission requirements do not extend beyond information that is pertinent to a pricing decision.

Cosmetics

In December 2013, CFDA issued a notice requiring foreign cosmetics manufacturers to submit a certificate of free sale (CFS) establishing that an imported product is also being sold in the country of origin. As many cosmetics products are manufactured globally and designed specifically for particular destination markets, this new requirement amounted to an effective ban on many imported cosmetics normally sold in China and contributed to severe time-to-market delays. The United States has raised concerns with China about this requirement in both bilateral meetings and before the WTO TBT Committee.

In November 2014, CFDA released a draft measure, the *Regulations on the Supervision and Administration of Cosmetics*, for public comment. While U.S. industry welcomed China's plan to align with other countries by moving from registration to notification given the lower risk profile of cosmetics versus drugs, concern remained that imported products would be disadvantaged. The draft measure retained the CFS requirement for imported cosmetics. It also was unclear if China would accept international test data for safety assessments and if imported products would still have to provide local animal tests in place of alignment with ISO 22716 on good manufacturing practices (GMP). U.S. industry also wanted assurances as to how confidential business information would be protected.

Later that same month, CFDA issued another draft measure, the *Administrative Measures on Cosmetic Labeling*, for public comment. This draft measure poses many concerns for the U.S. industry, including a blanket ban of over-labels on cosmetics packages, which would require foreign manufacturers to re-design packages specifically for the Chinese market. This requirement could result in high production costs and lengthy time-to-market delays, as well as a loss of brand equity.

In coordination with U.S. industry, the United States engaged with CFDA in order to highlight U.S. industry's concerns regarding the two November 2014 draft measures. It appears that China has since placed the draft *Administrative Measures on Cosmetic Labeling* on hold, allowing U.S. companies to continue to use over-labeling to comply with China's requirements.

In July 2015, the SCLAO released a revised draft of the *Cosmetics Supervision and Administration Regulation* for public comment. The revised draft proposes to adopt a number of practices welcomed by international cosmetics companies, including changes more in line with international practices relating to product safety determinations and the notification of new products, as well as a reduction in the number of cosmetics products classified as special and therefore still requiring registration. However, the revised draft still would retain a number of provisions on claims and labeling, and it is still unclear as to whether international test data would be accepted and as to how confidential business information would be treated. As of December 2018, the *Cosmetics Supervision and Administration Regulation* remains in draft form. When it originally was circulated, China received hundreds of comments from both Chinese and U.S. industry, as well as from the United States and a number of other trading partners, reflecting the importance of this draft measure to China's $40 billion cosmetics industry. It is unclear if or when China intends to issue a new draft or a final measure.

Meanwhile, China's domestic industry has been benefitting from reforms envisioned by the draft *Cosmetics Supervision and Administration Regulation*. Since December 2013, as part of a pilot program, Chinese companies (but not foreign companies) have been able to forgo animal testing by instead certifying good manufacturing practices (GMP). China has sought to justify this apparent national treatment violation by arguing that domestic manufacturing facilities can be inspected in country by CFDA. Among other things, this argument overlooks the fact that other countries address this issue either by allowing companies to self-certify adherence to GMP or by undertaking inspections of overseas facilities, like the U.S. Food and Drug Administration does in China. In addition, in June 2014, Chinese companies were provided an additional advantage with the issuance of the *Notice on Matters Related to the Adjustment of Cosmetics Registration and Filing Management*. This measure allows domestic non-special use cosmetics to change to a notification-based filing system in lieu of registration. The *Notice on the Circulation of Possible Safety Risk Assessment Guidelines for Cosmetics Products*, issued in December 2016, reiterates that domestic companies can self-determine the means by which they assessed the safety of their ingredients, in lieu of China's animal testing requirements. As a result, domestic non-special use cosmetics continue to have an established competitive advantage compared to foreign non-special use cosmetics. Given that many foreign brands choose alternatives to animal testing, and the EU completely forbids animal testing, China's decision only to allow domestic companies to self-determine the means by which they assess the safety of their ingredients not only is discriminatory, but also creates a particularly significant market access barrier for imported products.

In March 2017, in response to concerns expressed by the United States and U.S. industry, China agreed to extend the pilot program to imported non-special use products, not previously registered, until December 2018. In November 2018, the China National Medical Products Administration (NMPA), the successor to CFDA, issued the *Notice on Implementing the Management of Record-Keeping of Imported Non-Special Use Cosmetics Nationwide*. This measure announced that registration of first-imported, non-special cosmetics will be entirely replaced by a nationwide filing management or notification system. Under this new regulatory system, U.S. cosmetics companies designate a domestic contact to file a record via NMPA's online filing system prior to exporting to China. The filing certification can be obtained in approximately five business days, after which time U.S. cosmetics companies can begin exporting their products to China.

Meanwhile, China continues its requirements for local testing, including animal tests for GMP and, on occasion, for product ingredient safety. Until China addresses these requirements, many U.S. companies will be unable to access the China market.

China RoHS

The United States continues to be concerned by China's *Administrative Measures for Controlling Pollution Caused by Electronic Information Products,* issued by MIIT and several other Chinese agencies effective March 2007. This measure is modeled after existing EU regulations that restrict hazardous substances in electronic products and is known as "China RoHS." While both the EU regulations and China's regulations seek to ban lead and other hazardous substances from a wide range of electronic products, there are significant differences between the two regulatory approaches.

Throughout the process of developing the China RoHS regulations, there was no formal process for interested parties to provide comments or consult with MIIT, and as a result foreign stakeholders had only limited opportunity to comment on proposals or to clarify MIIT's implementation intentions. China did eventually notify the regulations to the TBT Committee, but the regulations did not provide basic information such as the specific products for which mandatory testing will be required or any details on the applicable testing and certification protocols, generating concern among U.S. and other foreign companies that they would have insufficient time to adapt their products to China's requirements and that in-country testing requirements would be burdensome and costly.

In July 2012, MIIT posted on its website another draft revision of the China RoHS regulations for public comment, and U.S. industry submitted comments on it. To date, MIIT has not finalized this draft revision.

In January 2016, MIIT announced a new RoHS measure that expands both the set of restricted chemicals as well as the scope of products subject to RoHS restrictions, effective July 2016. This expansion was of serious concern to manufacturers in the United States, given that it requires new labeling and certification procedures for many products. It remains unclear how China will proceed with implementation of the new RoHS measure. Since then, the United States has engaged China, urging it to extend the deadline for manufacturers to comply with the requirements set forth in the new RoHS measure and to take steps to ensure that the new RoHS measure will not disrupt commerce. The United States will continue to actively engage China in this area going forward.

TRANSPARENCY

In the area of transparency, AQSIQ's TBT inquiry point, established shortly after China acceded to the WTO, has continued to be helpful to U.S. companies as they try to navigate China's system of standards, technical regulations and conformity assessment procedures. In addition, China's designated notification authority, MOFCOM, has been notifying proposed technical regulations and conformity assessment procedures to the TBT Committee so that interested parties in WTO members are able to comment on them, as required by the TBT Agreement.

However, in 2018, as in prior years, almost all of the notified measures have emanated from AQSIQ, SAC or CNCA and have rarely included measures from other agencies that appear to require notification, such as MOH, MIIT, the Ministry of Environmental Protection and CFDA. Several years ago, in part to address this problem, China had reportedly formed a new inter-agency committee, with representatives from approximately 20 ministries and agencies and chaired by AQSIQ, to achieve better coordination on TBT (and SPS) matters, but progress has been inconsistent in this area.

As a result, some of China's TBT measures continue to enter into force without having first been notified to the TBT Committee, and without foreign companies having had the opportunity to comment on them or even being given a transition period during which they could make necessary adjustments. In addition, as the United States has consistently highlighted during regular meetings and the annual transitional reviews before the TBT Committee, the comment periods established by China for the TBT measures that have been actually notified continue to be unacceptably brief in some cases. In other cases, some U.S. companies have reported that even when sufficient time was provided, written comments submitted by U.S. and other foreign interested parties seemed to be wholly disregarded. In still other cases, insufficient time was provided for Chinese regulatory authorities to consider interested parties' comments before a regulation was adopted.

In March 2018, China launched a significant restructuring of government agencies, which will impact the Chinese government's standards and conformity assessment activities. AQSIQ and its units, CNCA and SAC, were merged into the State Administration for Market Regulation (SAMR). The United States is closely monitoring the impact that this restructuring may have on U.S. interests in the area of standards and conformity assessment.

Other Internal Policies

STATE-OWNED AND STATE-INVESTED ENTERPRISES

While many provisions in China's WTO accession agreement indirectly discipline the activities of state-owned and state-invested enterprises, China also agreed to some specific disciplines. In particular, it agreed that laws, regulations and other measures relating to the purchase of goods or services for commercial sale by state-owned and state-invested enterprises, or relating to the production of goods or supply of services for commercial sale or for non-governmental purposes by state-owned and state-invested enterprises, would be subject to WTO rules. China also affirmatively agreed that state-owned and state-invested enterprises would have to make purchases and sales based solely on commercial considerations, such as price, quality, marketability and availability, and that the government would not influence the commercial decisions of state-owned and state-invested enterprises.

After China's establishment of SASAC in 2003, it became evident that the Chinese government was intent on heavily intervening in a broad range of decisions related to the strategies, management and investments of state-owned enterprises. SASAC was specifically created to represent the state's shareholder interests in state-owned enterprises, and its basic functions include guiding the reform of state-owned enterprises, taking daily charge of supervisory panels assigned to large state-owned enterprises, appointing and removing chief executives and other top management officials of state-owned enterprises, supervising the preservation and appreciation of value of state-owned assets, reinvesting profits and drafting laws, regulations and departmental rules relating to the management of state-owned assets.

In December 2006, the State Council issued the *Guiding Opinions on Promoting the Adjustment of State-owned Assets and the Restructuring of State-owned Enterprises*, which calls on SASAC to "enhance the state-owned economy's controlling power," "prevent the loss of state-owned assets," encourage "state-owned capital to concentrate in major industries and key fields relating to national security and national economic lifelines" and "accelerate the formation of a batch of predominant enterprises with independent intellectual property rights, famous brands, and strong international competitiveness." The measure identifies seven "strategic" industries, where state capital must play a leading role in every enterprise, including the civil aviation, coal, defense, telecommunications, electric power and grid, oil and petrochemical, and shipping industries. The measure also provides that key enterprises in "pillar" industries must remain under state control. These industries include automotive, chemical, construction, equipment manufacturing, information technology, iron and steel, nonferrous metals, and surveying and design, among others.

Particularly since 2008, state-owned enterprises at the central government level have been aggressively acquiring and merging with other central state-owned enterprises as well as provincial and local state-owned enterprises and private enterprises. According to one Chinese government statement, 82 percent of central state-owned enterprises' assets are concentrated in the petro-chemicals, electric power and grid, defense, telecommunications, transport, mining, metallurgy and machinery sectors. Central state-owned enterprises also supply almost all of the crude oil, natural gas, ethylene and basic telecommunication services for China's economy.

In October 2008, China's National People's Congress passed the *Law on State-owned Assets of Enterprises*, which became effective in May 2009. The objectives of this law are to safeguard the basic economic system of China, consolidate and develop China's state-owned enterprise assets, enable state-owned enterprises to play a dominant role in the national economy, especially in "key" sectors, and promote the development of China's "socialist market economy." The law calls for the adoption of policies to promote these objectives and to improve the management system for state-owned assets. It also addresses SASAC's role, the rights and obligations of state-owned enterprises, corporate governance and major matters such as mergers, the issuance of bonds, enterprise restructuring and asset transfers. The law further stipulates that the transfer of state assets to foreigners should follow relevant government policies and shall not harm national security or the public interest.

In March 2010, SASAC issued the *Interim Provisions on Guarding Central State-Owned Enterprises' Commercial Secrets*, effective as of the date of its issuance. This measure appears to implement the *Law on Guarding State Secrets*, which the National People's Congress amended in 2009. It is unclear why the commercial secrets of state-owned enterprises need to be protected through a measure applicable only to state-owned enterprises, when the commercial secrets of all enterprises in China are already subject to protection.

In July 2010, the Central Committee of the Communist Party and the State Council issued the *Opinions on Further Promoting the Implementation of the "Three-Major One-Large" Decision-making System*. This measure requires state-owned enterprises to establish a collective decision-making system in which the Communist Party plays a significant role in major business decisions, major personnel changes and major project arrangements (known as the "three majors"). It also requires the movement of large amounts of funds (the "one large") to be decided collectively by the leadership team, which includes representatives from the Communist Party.

Separately, the Chinese government also has issued a number of measures that restrict the ability of state-owned and state-invested enterprises to accept foreign investment, particularly in key sectors. Some of these measures are discussed below in the Investment section, and include restrictions on foreign investment not only in the public sector but also in China's private sector.

In November 2013, as previously reported, the *Third Plenum Decision* endorsed a number of far-reaching economic reform pronouncements, which called for making the market "decisive" in allocating resources, reducing Chinese government intervention in the economy, accelerating China's opening up to foreign goods and services, and improving transparency and the rule of law to allow fair competition in China's market. It also called for reforming China's state-owned enterprises. While these pronouncements appeared to signal a high-level determination to accelerate needed economic reforms, which have not materialized, it was clear from the beginning that they were not designed to reduce the presence of state-owned enterprises in China's economy. Rather, in the case of state-owned enterprises, the reform objectives were to consolidate and to strengthen those enterprises and to place them on a more competitive footing, both in China and globally.

Indeed, since the issuance of the *Third Plenum Decision*, new policies have continued to be formulated that further strengthen the power of the Chinese government and the Communist Party in state-owned enterprises. In May 2015, for example, the Politburo of the Communist Party issued a document appearing to require that all organizations (including private companies) have Communist Party organizations so that Communist Party policy can be implemented across society. In August 2015, the Communist Party Central Committee and China's State Council jointly issued the *Guiding Opinions on Deepening the Reform of State-Owned Enterprises*, a measure that requires state-owned enterprises to adhere to the Communist Party's leadership, give full play to the core political role of Communist Party organizations and strengthen the Communist Party's responsibility to select corporate officers.

In September 2016, SASAC and MOF jointly released the reportedly State Council-approved *Implementing Plan for Perfecting Central Enterprise Functional Classification and Performance Evaluation*, which announces that central state-owned enterprises will be categorized as commercially driven enterprises, strategic enterprises or public-interest enterprises, subject to different performance evaluation criteria. While the focus for commercial state-owned enterprises is to be on reasonable returns on capital, this measure also provides that returns will be satisfactory if these enterprises need to, for example, safeguard national security (meaning not only national defense security, but also energy and resource security, food security and cyber and information security), provide public services, contribute to the development of strategic emerging industries or implement major "Going Out" programs. This approach to commercial state-owned enterprises indicates that China likely will not meet its May 2012 S&ED commitment to develop a market environment of fair competition for enterprises of all kinds of ownership and to provide them with non-discriminatory treatment in terms of credit provision, taxation incentives and regulatory policies.

In recent years, China's central and provincial government authorities have sought to reform state-owned enterprises by pressuring private companies to invest in, or merge with, state-owned enterprises. This drive toward "mixed ownership" is seen as a way to inject innovative practices into and create new opportunities for inefficient state-owned enterprises. In October 2017, SASAC's chairman confirmed that mixed ownership is a primary element of SASAC's reform efforts and instructed state-owned enterprises to complete their mixed-ownership reorganizations by the end of 2017. President Xi addressed this same subject in his remarks at the 19th Party Congress, held in October

2017, where he stated that further reform of state-owned enterprises will include the development of mixed-ownership enterprises and will turn these enterprises into world-class, globally competitive enterprises. President Xi added that China will work to increase the value of state-owned enterprises and make them stronger, bigger and better.

At present, the number of troubling issues relating to state-owned enterprises in China is growing. Various actions of the Communist Party, the Chinese government and China's state-owned enterprises continue to impede the ability of U.S. firms to invest in China and compete with China's state-owned enterprises in China and other markets, while true state-owned enterprise reform does not appear to be squarely on China's agenda, even though in October 2018 the PBOC began discussing the possibility of addressing structural issues and made reference to consideration being given to adopting the principle of "competitive neutrality" for state-owned enterprises.

STATE TRADING ENTERPRISES

In its WTO accession agreement, China agreed to disciplines on the importing and exporting activities of state trading enterprises. China committed to provide full information on the pricing mechanisms of state trading enterprises and to ensure that their import purchasing procedures are transparent and fully in compliance with WTO rules. China also agreed that state trading enterprises would limit the mark-up on goods that they import in order to avoid trade distortions.

Since China's WTO accession, the United States and other WTO members have repeatedly sought information from China on the pricing and purchasing practices of state trading enterprises, principally through the transitional reviews at the WTO. However, China has only provided general information, which does not allow a meaningful assessment of China's compliance efforts.

China also has not been making notifications under Article XVII:4(a) of the GATT 1994 and paragraph 1 of the Understanding on the Interpretation of Article XVII of the GATT 1994, which requires China to notify its state trading enterprises. Prior to 2015, China had not submitted a notification since 2003, despite the emergence of new state trading enterprises in subsequent years.

In September 2014, after failing to persuade China to submit an up-to-date notification of its state trading enterprises, the United States submitted a counter notification to the Working Party on State Trading Enterprises pursuant to paragraph 4 of the Understanding on the Interpretation of Article XVII of the GATT 1994. In this counter notification, the United States identified 153 state trading enterprises, including 44 state trading enterprises not previously notified by China, and provided detailed information on the establishment and operations of these enterprises for the benefit of other WTO members and the public.

In October 2015, China finally submitted a notification addressing its state trading enterprises. However, this notification did not include much of the detailed information envisioned by the WTO's notification requirement.

In June 2016, through the Working Party on State Trading Enterprises, the United States submitted numerous follow-up questions seeking to fill in the many gaps in China's notification. In March 2017, China replied to the U.S. questions, stating that much of the information could not be provided because it was business confidential. In November 2017, after having found much of the requested information in public sources, the United States filed a counter-notification that attempts to fill in many of the missing pieces of information for several of the previously notified state trading enterprises. The United States continues to urge China to fulfill its obligations to notify WTO members about its state trading enterprises.

GOVERNMENT PROCUREMENT

The WTO Agreement on Government Procurement or GPA, is a plurilateral agreement that currently covers the United States and 46 other WTO members. The GPA applies to the procurement of goods and services by central and sub-central government agencies and government enterprises specified by each party, subject to specified thresholds and certain exceptions. It requires GPA parties to provide MFN and national treatment to the goods, services and suppliers of other GPA parties and to conduct their procurement in accordance with procedures designed to ensure transparency, fairness and predictability in the procurement process.

China is not yet a party to the GPA. It committed, in its WTO accession agreement, to initiate negotiations for accession to the GPA "as soon as possible." Until it completes its accession to the GPA, China has committed in its WTO accession agreement that all of its central and local government entities will conduct their procurements in a transparent manner. China also agreed that, where it opens a procurement to foreign suppliers, it will provide MFN treatment by allowing all foreign suppliers an equal opportunity to participate in the bidding process.

GPA Accession

At the April 2006 JCCT meeting, China agreed to initiate GPA negotiations no later than December 2007. China subsequently initiated negotiations on its accession to the GPA in December 2007 with the submission of its application for accession and its initial offer of coverage, known as its Appendix I Offer. In May 2008, the United States submitted its Initial Request for improvements in China's Initial Appendix I Offer, and other GPA parties submitted similar requests. In September 2008, China submitted its responses to the Checklist of Lists for Provision of Information Relating to Accession.

In 2009, the United States held three rounds of negotiations with China on the terms and conditions of China's GPA accession. In addition, at the July 2009 S&ED meeting, China agreed to submit a report to the WTO's Government Procurement Committee, before its October 2009 meeting, setting out the improvements that China would make in its revised offer. In October 2009, China submitted the report, which indicated that improvements to its offer would provide for the coverage of more entities, goods and services and lower thresholds. Subsequently, following further bilateral engagement by the United States, China committed during the October 2009 JCCT meeting to submit a revised offer as early as possible in 2010.

In 2010, the United States held three more rounds of negotiations with China on the terms and conditions of China's GPA accession and the development of its government procurement system. In addition, the United States submitted questions to China on its responses to the Checklist of Lists for Provision of Information Relating to Accession. At the May 2010 S&ED meeting, China committed to submit its first Revised Offer in July 2010, as it later did. The United States then submitted its Second Request for improvements in China's proposed coverage of government procurement in September 2010.

At the December 2010 JCCT meeting, the United States obtained China's commitment to accelerate its accession to the GPA, as China agreed to work with provincial and local governments and to submit a robust revised offer of coverage in 2011. During President Hu's January 2011 visit to Washington, China expressly committed that its next revised offer would include sub-central entities. Subsequently, China reiterated that it would submit a second revised offer in 2011, which it did in November 2011.

In 2011, the United States held three rounds of negotiations with China on its accession to the GPA. The negotiations included U.S. experts who explained the U.S. government procurement system and the implementation of U.S. commitments under the GPA. The negotiations also focused on the coverage of government enterprises under the GPA, with the United States requesting that China add state-owned enterprises to its GPA coverage.

At the May 2012 S&ED meeting, China committed to submit "a new comprehensive revised offer that responds to the requests of the GPA parties . . . before the [GPA] committee's final meeting in 2012." China subsequently submitted its third revised offer in November 2012. This revised offer falls short of the coverage provided by the United States and other GPA parties, as China responded to few requests made by GPA parties. These requests had sought to extend coverage to state-owned enterprises, include additional services coverage, eliminate broad exclusions and significantly expand coverage of sub-central entities. The United States, the EU and other GPA parties described the revised offer as highly disappointing, both in terms of scope and coverage. At the December 2012 JCCT meeting, China agreed to engage seriously with the United States on outstanding core issues relating to the scope of projects that qualify as government procurement and the extent to which state-owned enterprises in China engage in government procurement activities.

In 2013, using a new mechanism for technical discussions with China established through the S&ED process, the United States secured two commitments from China in an effort to expedite China's accession to the GPA while continuing to push for robust terms that are comparable to the coverage of the United States and other GPA parties. At the July 2013 S&ED meeting, China agreed to submit by the end of 2013 a new revised offer to join the GPA. China followed through by submitting its fourth revised offer. However, China's revised offer was short of the coverage provided by other GPA parties.

At the December 2013 JCCT meeting, China committed to accelerate its GPA accession negotiations and submit in 2014 an additional revised offer that is on the whole commensurate with the coverage of GPA parties. In December 2014, China tabled a revised offer. The revised offer was not on the whole commensurate with the coverage of GPA parties and remains far from acceptable to the United States and other GPA parties, as significant deficiencies remain in a number of critical areas including thresholds, entity coverage, services coverage and exclusions.

No new offer from China has been received since 2014. In April 2018, a MOFCOM spokesperson announced that China is working on a new offer of coverage and will submit it to the WTO for consideration by GPA parties as soon as possible. To date, however, no new offer has been submitted.

China's Government Procurement Regime

In January 2003, China implemented its *Government Procurement Law*. However, China's *Government Procurement Law* directs central and sub-central government entities to give priority to "local" goods and services, with limited exceptions, as China is permitted to do, because it is not yet a party to the GPA. Since the adoption of the *Government Procurement Law*, MOF has issued various implementing measures, including regulations that set out detailed procedures for the solicitation, submission and evaluation of bids for government procurement of goods and services and help to clarify the scope and coverage of the *Government Procurement Law*. MOF also issued measures relating to the announcement of government procurements and the handling of complaints by suppliers relating to government procurement.

It is notable, however, that the *Government Procurement Law* does not cover most public works projects, which represent at least one-half of China's government procurement market. Those projects are subject to a different regulatory regime, established by China's *Tendering and Bidding Law*, which entered into force in January 2000. In September 2009, the State Council circulated NDRC's draft regulations implementing the *Tendering and*

Bidding Law for public comment. In October 2009, the United States submitted written comments on these draft regulations in which it emphasized, among other things, the need for greater clarification of the relationship between the *Tendering and Bidding Law* and China's *Government Procurement Law*, and the need to define "domestic products." In December 2011, the State Council issued the final implementing regulations for the *Tendering and Bidding Law*, which entered into force in February 2012.

As previously reported, beginning in 2003, the United States expressed concerns about policies that China was developing with regard to government procurement of software. In 2003, the United States specifically raised concerns about MOF implementing rules on software procurement, which reportedly contained guidelines mandating that central and local governments – the largest purchasers of software in China – purchase only software developed in China to the extent possible. The United States was concerned not only about the continuing access of U.S. software exporters to China's large and growing market for packaged and custom software – $7.5 billion when the MOF rules went into effect – but also about the precedent that could be established for other sectors if China proceeded with MOF's proposed restrictions on the purchase of foreign software by central and local governments. At the July 2005 JCCT meeting, China indicated that it would indefinitely suspend its drafting of implementing rules on government software procurement.

Subsequently, in 2007 and 2008, the United States grew concerned with statements and announcements being made by some Chinese government officials indicating that state-owned enterprises should give priority to the purchase of domestic software. In response, at the September 2008 JCCT meeting, China clarified that its formal and informal policies relating to software purchases by Chinese enterprises, whether state-owned or private, will be based solely on market terms without government direction.

Meanwhile, in December 2007, one day before China tabled its Initial Appendix I Offer in connection with its GPA accession, MOF issued two measures that would substantially restrict the Chinese government's purchase of foreign goods and services. The first measure, the *Administrative Measures for Government Procurement on Initial Procurement and Ordering of Indigenous Innovative Products*, was directed at restricting government procurement of "indigenous innovative" products to "Chinese" products manufactured within China. The central government and provincial governments followed up by creating catalogues of qualifying "indigenous innovation products." The second measure, the *Administrative Measures for Government Procurement of Imported Products*, severely restricted government procurement of imported foreign products and technologies. While China may maintain these measures until it completes its GPA accession, the United States has raised strong concerns about them, as they run counter to the liberalization path expected of a WTO member seeking to accede to the GPA.

In 2009, China reinforced its existing "Buy China" measures at the central, provincial and local government levels. For example, in May 2009, MIIT issued a circular entitled *Government Procurement Administration Measures*, which applies to MIIT and its direct subsidiaries. The measure required entities engaging in government procurement to give priority to domestic products, projects and services as well as to indigenous innovation products, except where the products or services cannot be produced or provided in China or are for use outside of China. Similarly, in May 2009, nine central government ministries and agencies jointly issued the *Opinions on Further Strengthening Supervision of Tendering and Bidding Activities in Construction Projects*, which included a "Buy China" directive for all projects under China's stimulus package. This directive specifically requires that priority be given to "domestic products" for all government-invested projects, unless the products are not available in China, cannot be purchased on reasonable commercial terms in China or are for use abroad.

During the July 2009 S&ED meeting, China committed to treat products produced in China by foreign-invested enterprises the same as products produced in China by Chinese enterprises for purposes of its *Government Procurement Law*. China later reaffirmed this commitment and further committed during the October 2009 JCCT meeting to issues rules implementing it. In addition, the United States and China agreed to establish a multi-agency working group to conduct regular discussions addressing issues raised by government procurement and by the purchases of state-affiliated enterprises and organizations and private entities pursuing national strategic objectives.

In 2010, China circulated two draft measures intended to implement its *Government Procurement Law*. The first draft measure, the *Regulations to Implement the Government Procurement Law*, was issued by MOF in January 2010. The United States submitted comments in February, in which, among other things, it expressed concern that the draft measure did not provide a GPA-consistent regime. The United States also expressed concern that the draft measure did not provide more specificity about the conduct of government procurement. The second draft measure, the *Administrative Measures for Government Procurement of Domestic Products*, was issued for public comment in May 2010 by MOF, MOFCOM, NDRC and the General Administration of Customs. In accordance with China's October 2009 JCCT commitment, this draft measure set out the requirements for a product to qualify as a "domestic product." The United States submitted comments on this draft measure in June 2010, in which it expressed concerns about the lack of details regarding how the draft measure would be implemented as well as its broad application.

Separately, in November 2009, MOST, NDRC and MOF issued the *Circular on Launching the 2009 National Indigenous Innovation Product Accreditation Work*, requiring companies to file applications by December 2009 for their products to be considered for accreditation as "indigenous innovation products." This measure provides for preferential treatment in government procurement to any products that are granted this accreditation. Subsequently, the United States and U.S. industry, along with the governments and industries of many of China's other trading partners, expressed serious concerns to China about this measure, as it appears to establish a system designed to provide preferential treatment in government procurement to products developed by Chinese enterprises.

In April 2010, MOST, NDRC and MOF issued a draft measure for public comment, the *Circular on Launching 2010 National Innovation Product Accreditation Work*. The draft measure would amend certain of the product accreditation criteria set forth in the November 2009 measure, but would leave other problematic criteria intact, along with the accreditation principles, application form and link to government procurement. In addition, the draft measure originally was to become effective the day after comments were due. The United States submitted comments in May 2010, in which it asked China to suspend the implementation of the indigenous innovation accreditation system and to engage in consultations with the United States to address U.S. concerns with the system. To date, the draft measure has not been finalized, and the Chinese authorities have not requested or accepted applications for accreditation.

At the December 2010 JCCT meeting, China committed not to maintain any measures that provide government procurement preferences for goods or services based on the location where the intellectual property is owned or was developed. One month later, during President Hu's visit to Washington in January 2011, China went further by agreeing that it would "not link its innovation policies to the provision of government procurement preferences." Subsequently, at the May 2011 S&ED meeting, China also committed to "eliminate all of its government procurement indigenous innovation products catalogues" when implementing the agreement reached during President Hu's visit.

Finally, at the November 2011 JCCT meeting, China announced that the State Council had issued a measure requiring provincial and local governments to eliminate all links between China's innovation policies and government procurement preferences by December 2011. Notwithstanding these repeated promises, recent reports have identified measures that a number of Chinese provincial and local governments have adopted, or have continued to maintain, that call for government procurement preferences for indigenous innovation products.

At the December 2010 JCCT meeting, China also agreed that, in 2011, it would revise a major MIIT catalogue, which covers heavy equipment and other industrial machinery, and that it would not use the revised catalogue for import substitution or the provision of export subsidies or otherwise to discriminate against foreign suppliers. Once again, however, it failed to fulfill this promise. MIIT issued a draft of the revised catalogue for public comment shortly before the November 2011 JCCT meeting, but it has not yet issued a final revised catalogue.

In 2014, the United States engaged with China on the draft *Implementation Rules of the Government Procurement Law* and the draft *Administrative Measures for Government Procurement of Domestic Goods*. The United States recommended that China ensure that the provisions contained in these measures allow enough flexibility for Chinese government agencies to continue to procure high-quality items with complex international supply chains at a reasonable price and to avoid disruptions of trade. In January 2015, China issued the final version of the implementing rules, which took effect in March 2015. Consistent with its commitment at the 2011 S&ED meeting, the implementing rules remove a provision calling for measures that accord preferences to indigenous innovation products. The implementing rules also removed a provision that would have treated all intellectual property as a good. However, they still contain a non-exhaustive list of bases according to which future rules and policies could be adopted that discriminate against foreign goods and services.

In April 2016, the MOF released a draft of the *Administrative Measures for the Bidding and Bids for Government Procurement of Goods and Services*. This draft measure builds on China's *Government Procurement Law* and lays out information that should be made available to bidders in the government procurement process and how procuring agencies and procurement officials should evaluate bids to determine a winning bidder. In May 2016, the United States submitted comments on the draft measure. These comments asked for clarifications and provided comments calling on MOF to increase transparency in procedures and timelines for tendering and bidding, create a domestic review or challenge procedure for bidders to utilize, increase predictability for bidders by turning optional provisions into required ones, and promote consistency with requirements of the GPA in order to provide benefits for potential bidders from the United States. To date, China has not provided any direct reply to these comments.

In September 2016, SASAC and MOF jointly released the *Implementing Plan for Perfecting Central Enterprise Functional Classification and Performance Evaluation*, which divides China's central government level state-owned enterprises into three categories for purposes of regulation, i.e., commercial, strategic and public interest. Ensuring coverage of state-owned enterprises that conduct procurements for governmental purposes is critical to China's successful GPA accession. This issue will continue to receive attention from the United States and others going forward.

In April 2017, MOF issued the *Notice on Further Improving the Information Disclosure Work on Government Procurement*, a measure that seeks to improve transparency. It establishes a single official national government procurement information website, makes provincial government procurement information websites components of the national government website, requires provincial government finance departments to uniformly follow the central domain name system and requires the public disclosure of transaction-specific information. It also calls for the conduct of a third-party assessment of the transparency of the government procurement process.

In May 2018, the Central Government Procurement Center issued a draft *Notice Soliciting Comments on 2018-2019 Central Government Organ Supply and Procurement Agreement Items for the Information Product (Hardware) and Air Conditioner Categories*, which covers products such as servers, computers, printers, exchanges and air conditioners. With regard to servers, only three indigenous Chinese suppliers of central processing units (CPU) for servers are recognized as qualified, meaning that server manufacturers would have to cooperate with the listed Chinese CPU makers to become eligible central government server suppliers if this measure were to become final. Previously qualifying server suppliers used U.S. CPUs.

In June 2018, the Ministry of Finance issued draft *Measures for the Administration of Government Procurement of Services*, which requires service providers to be legally established in China to be eligible. The Chinese government is still to provide a guiding catalogue to define the scope and categories of services covered for procurement purposes.

Going forward, the United States will continue to examine the treatment being accorded to U.S. suppliers under China's government procurement regime. The United States also will continue to urge China to apply its regulations and implementing rules in a transparent, non-discriminatory manner.

INVESTMENT

Upon its accession to the WTO, China assumed the obligations of the Agreement on Trade-Related Investment Measures (TRIMS Agreement), which prohibits investment measures that breach GATT Article III obligations to treat imports no less favorably than domestic products or the GATT Article XI obligation not to impose quantitative restrictions on imports. The TRIMS Agreement thus expressly requires elimination of measures such as those that require or provide benefits for the incorporation of local inputs (known as local content requirements) in the manufacturing process, or measures that restrict a firm's imports to an amount related to its exports or related to the amount of foreign exchange a firm earns (known as trade balancing requirements). In its WTO accession agreement, China also agreed to eliminate export performance, local content and foreign exchange balancing requirements from its laws, regulations and other measures, and not to enforce the terms of any contracts imposing these requirements. In addition, China agreed that it would no longer condition importation or investment approvals on these requirements or on requirements such as technology transfer and offsets.

In recent years, China has repeatedly affirmed its plans to further open China to foreign investment, including in the November 2013 *Third Plenum Decision* and in other key policy documents, such as the November 2015 *Fifth Plenum Decision* and the *13th Five-year Plan*, released in March 2016. China has not taken steps to follow through on these promises, except in limited instances, and in the case of some promises it seems to be going backwards on access. China also has pursued other actions that discriminate against or otherwise disadvantage foreign investors, including an administrative approval system providing a case-by-case review of any foreign investment. Foreign investors also have expressed great concern that draft Chinese laws and policy statements seem to suggest that China intends to pursue a broad definition of "national security," to include "economic security," under its national security review regime.

In addition, China's investment restrictions are often accompanied by other problematic industrial policies, such as the development of China-specific standards (see the Standards and Technical Regulations section above) and the increased use of subsidies. Many of these policies appear to represent protectionist tools created by the Chinese government's industrial planners to shield inefficient or monopolistic enterprises, particularly those in which the Chinese government has an ownership interest, from competition. At the same time, foreign investors in China also continue to voice concerns about lack of transparency, inconsistent enforcement of laws and regulations, weak IPR protection, corruption and a legal system that is unreliable and fails to enforce contracts and judgments.

As discussed below, the United States has raised the need for China to substantially liberalize its investment restrictions and related policies in bilateral fora, such as the JCCT and the S&ED, and multilaterally in WTO meetings. The November 2013 *Third Plenum Decision*, as reinforced by some aspects of the November 2015 *Fifth Plenum Decision*, affirms China's plan to allow the market to play a decisive role and directs the government to broaden foreign investment access in China, including for a number of services sectors, and to explore the possibility of a mechanism for allowing foreign investment under a "negative list" approach. The *13th Five-year Plan* further emphasizes China's plans to expand sector openings, reduce market access barriers and encourage foreign capital. However, for the most part, China has not taken any meaningful steps to implement these pledges.

In January 2015, MOFCOM released a draft *Foreign Investment Law* that potentially would unify China's existing three general laws applying to foreign investment and would specifically provide a framework for providing pre-establishment and post-establishment national treatment for foreign investors under a negative list approach. Although the status of that draft law is not clear, the United States has a number of concerns with it, including the existence of many elements that could be used to prohibit or restrict market access for foreign investors, such as a case-by-case approval system and a new, overly broad national security review.

In October 2015, China's State Council issued the *Opinions on the Implementation of the Market Access Negative List System*, which focuses on the implementation of a negative list under China's investment regime. This measure applies to both domestic and foreign investors and launches negative list pilot programs in select regions in China from December 2015 to December 2017 in order to lay the groundwork for formally introducing a unified nationwide market access negative list system starting in 2018. Of particular concern, the measure also sets forth a broad definition of "national security," which includes factors such as economic, cultural and financial security, for China's regulatory authorities to take into account when implementing the negative list. The United States is also concerned about many other aspects of the proposed national security review, including its application to greenfield investments and the invitation for Chinese competitors to nominate transactions for review.

In July 2017, President Xi stated publicly that China is still planning to enact a new basic law for foreign investment. A 2015 draft of this law had included several elements that could be used to prohibit or restrict market access for foreign investors, such as a case-by-base approval system and a new overly broad national security review. An updated draft of the law was released on December 26, 2018. This new draft dramatically reduces the numbers of articles included in the law, going from 170 to 39 articles. It also preserves the overly broad national security review requirement and provides only general guidelines for the foreign investment approval process. The overall lack of specify in the new draft suggests that more detailed implementing measures will need to be released.

In August 2017, USTR initiated an investigation under Section 301 of the Trade Act of 1974 focused on policies and practices of the Government of China related to technology transfer, intellectual property and innovation. As discussed above, part of this investigation concerns China's use of tools to require or pressure the transfer of technologies and intellectual property to Chinese companies, including China's use of foreign ownership restrictions.

Investment Approvals

Since China's accession to the WTO in December 2001, U.S. and other foreign companies have expressed serious concerns about the administrative licensing process in China, both in the context of the foreign investment approval process currently being used by China (about which the United States has serious concerns) and in myriad other contexts. While China took initial steps to improve administrative licensing in 2004 with the issuance of the *Administrative Licensing Law*, which was apparently designed to improve transparency, create uniformity and streamline the licensing process, significant problems remain. U.S. industry reports that, in practice, many Chinese government bodies at the central, provincial and municipal government levels do not comply with this law. U.S. industry also reports that vague criteria and possibilities for delay in the licensing process provide licensing officials with tremendous discretion, thereby creating opportunities for corruption, and sometimes lead to foreign enterprises and products being treated less favorably than their domestic counterparts.

China's maintenance of any type of formal or informal foreign investment approval process is of great concern. As set forth in an extensive study conducted for a U.S. industry association, confidential accounts from foreign companies indicate that Chinese government officials at times use China's current foreign investment approval process to restrict or unreasonably delay market entry for foreign companies, to require the foreign company to take on a Chinese partner, or to extract valuable, deal-specific commercial concessions as a price for market entry. These same accounts also indicate that the Chinese government officials at times tell the foreign company that it will have to transfer technology, conduct research and development in China or satisfy performance requirements relating to exportation or the use of local content if it wants its investment approved, even though none of these requirements is set forth in Chinese law and China committed in its WTO accession agreement not to impose these requirements.

This situation has been able to persist in part because of the absence of the rule of law in China, which fosters the use of vague and unwritten policies and does not provide for meaningful administrative or judicial review of Chinese regulatory actions, thereby enabling government officials to take unilateral actions without fear of legal challenge. Exacerbating this situation is the fact that foreign companies are hesitant to speak out publicly, or to be perceived as working with their governments to challenge China's foreign investment review practices, because they fear retaliation from Chinese government officials. The U.S. industry association study notes that foreign companies have confidentially reported receiving explicit or implicit threats from Chinese government officials – typically made orally rather than in writing – about possible retaliatory actions that could have severe repercussions for a company's business prospects in China.

In many cases, it appears that Chinese government officials are motivated by China's industrial policy objectives when they use their unchecked power to dictate or influence foreign investment outcomes. With China's state-led economic development model, the government issues five-year plans that set objectives for virtually every sector of the economy. While these plans in broad terms seek to foster national champions, protect state-owned enterprises, promote indigenous innovation and guide the development of Chinese domestic industry up the value chain, they also include specific guidelines addressing matters such as technology transfer and the use of local content, as well as decisions about industry consolidation, production capacity, product lines and similar decisions normally made by the marketplace.

Even though China has revised a number of laws, regulations and other measures on foreign investment, some of the revised measures continue to encourage technology transfer or the use of local content. From the beginning, U.S. companies were concerned that this "encouragement" in practice could amount to a "requirement" in many cases, in light of the high degree of discretion provided to Chinese government officials when reviewing foreign investment applications. Moreover, according to U.S. companies, even without formal encouragement, some Chinese government officials still consider factors such as technology transfer and the use of local content when deciding whether to approve an investment or to take some other action, such as recommend approval of a loan from a Chinese policy bank, which is often essential to the success of a project.

The United States has pressed its concerns with technology transfer through the JCCT and S&ED processes and other avenues. During the February 2012 visit of then-Vice President Xi to the United States, China affirmed that technology transfer and technological cooperation shall be decided by businesses independently and will not be used by the Chinese government as a pre-condition for market access. At the December 2012 JCCT meeting, China also confirmed that it would correct in a timely manner any measures that were inconsistent with this commitment. Unfortunately, these commitments were not fulfilled.

At the July 2014 S&ED meeting, China committed to treat applicants for administrative licenses and approvals under the same rules and standards as the United States with regard to the resources available to accept and process applications and the number of applications permitted at one time from an applicant, and to strictly implement existing laws and regulations to adequately protect any trade secret or sensitive commercial information provided by the applicant during the administrative licensing or approval process, as required by law. However, these commitments did not result in any change to China's overall approach of requiring case-by-case administrative approvals for foreign investments in the restricted category.

Investment Restrictions

The United States and U.S. industry have long been concerned about China's restrictions on investment. Often, these restrictions are accompanied by other problematic industrial policies, such as the increased use of subsidies, preferences for using domestic rather than imported goods, and the development of China-specific standards.

In August 2006, China made a further move toward a more restrictive investment regime when it issued new regulations on mergers and acquisitions (M&A) involving foreign investors. These regulations strengthened MOFCOM's supervisory role over foreign investment, in part by requiring MOFCOM's approval of M&A transactions that it believes impact "national economic security" or involve traditional Chinese brands or well-known Chinese trademarks. Three years later, in July 2009, China issued revised regulations addressing M&A involving foreign investors, without having provided a notice-and-comment period. The revised regulations retain the review criteria from the 2006 regulations.

In December 2006, as discussed above in the State-owned and State-Invested Enterprises section, SASAC, the government entity charged with overseeing China's interests in state-owned enterprises, published a list of key sectors that it deemed critical to the national economy. SASAC committed to restrict foreign participation in these sectors by limiting further foreign investment in state-owned enterprises operating in these sectors.

In August 2007, as discussed above in the State-owned and State-Invested Enterprises section, China enacted its *Anti-monopoly Law*. Among other things, this law called for China to establish a review process to screen inward investment for national security implications. China also passed a *National Security Law* in July 2015. While this law's stated purpose is to safeguard China's security, it includes sweeping provisions addressing economic and industrial policy. It also provides the basis for a more restrictive national security review process and, along with the subsequently enacted *Cybersecurity Law*, provides the underpinnings for other significant restrictions on foreign investment, such as restrictions on the purchase, sale and use of foreign ICT products and services, cross-border data flow restrictions and data localization requirements.

More generally, U.S. industry has expressed serious concerns about China's increasing use of these and other investment restrictions, which are often seen as protectionist tools used by China's economic planners to shield selected Chinese domestic enterprises, including inefficient or monopolistic enterprises, from foreign competition. U.S. industry views China's investment restrictions as deeply worrisome and counter to the market-oriented principles that should govern the behavior of a WTO member. U.S. industry has observed that these investment restrictions are more likely to retard the growth and development of the Chinese economy than to accomplish the state planners' ultimate objective of creating internationally competitive domestic enterprises.

In 2018, as in prior years, the United States raised its concerns about China's investment restrictions on multiple occasions. The United States also raised investment-related concerns in committee and council meetings at the WTO, as it will continue to do in the future.

Foreign Investment Catalogue

For almost two decades, the United States has urged China to liberalize its investment regime and to remove restrictions on industries of key interest to the United States. For the most part, these efforts have yielded little progress.

In 2002 and 2005, the State Council issued revised versions of the *Catalogue Guiding Foreign Investment in Industry* (*Foreign Investment Catalogue*). These versions of the *Foreign Investment Catalogue* generally reflected China's decision to adhere to its commitments to open up certain sectors to foreign investment, although notable exceptions involved the importation and distribution of copyright-intensive products such as books, newspapers, journals, theatrical films, DVDs and music (see the Trading Rights section above). In addition, while China continued to allow foreign investment in a number of sectors not covered by its WTO accession agreement, one notable exception to this progress continued to be the area of production and development of genetically modified plant seeds, which China continued to place in the "prohibited" category.

In 2007, the State Council issued a revised *Foreign Investment Catalogue*. Unfortunately, this revised catalogue placed new restrictions on several industries, including chemicals, auto parts, rare earths processing, biofuel production and edible oil processing, while the prohibitions and restrictions facing copyright-intensive products and genetically modified plant seeds remained in place.

In December 2011, China published another revised *Foreign Investment Catalogue*, which entered into force in January 2012. This revised catalogue made only minor improvements.

China's *Foreign Investment Catalogue*, as revised in March 2015, did not provide liberalization in most of the areas important to foreign investors. In addition, in some cases, it seemed to go backwards on access.

China's *Foreign Investment Catalogue*, as revised in July 2017, did remove certain restrictions on foreign investment, which seem to be represent useful improvements, including for edible seed oil processing, rice, flour, sugar and corn processing, biofuels, credit rating and valuation services, and motorcycle manufacturing. It is not yet clear if these actions will enable foreign investors to secure concrete benefits.

In June 2018, China issued the *Special Management Measures (Negative List) for Foreign Investment*, which entered into force in July 2018. This *Negative List* removed certain restrictions on foreign investment immediately, including for banking acquisitions, and set out a timeframe for removing remaining foreign equity caps for life, health and pension insurance, securities, asset management and futures services. It also removed certain restrictions on foreign investment in the aircraft and shipbuilding industries, the exploration and development of unconventional resources, such as shale gas, and the automotive industry, with some restrictions lifted immediately and others over time.

At the same time, in several of these newly liberalized sectors and industries, other restrictions that China maintains, such as limitations on business scope, continue to impede market access. For example, in the automotive industry, in addition to the easing or removal of foreign equity caps, U.S. industry has been seeking changes such as the removal of distribution restrictions, the elimination of domestic branding requirements, the repeal or modification of subsidies contingent on the purchase of Chinese-made electric vehicles and the elimination of an informal requirement to use Chinese-made batteries in electrical vehicles made in China. All of these barriers remain in place.

In addition, the *Negative List* refers to China's plans to lift the foreign equity cap on the manufacture of traditional (i.e., fuel engine) passenger vehicles in 2022. However, China published a separate measure in December 2018, the *Regulations for the Administration of the Automobile Industry*, which suggests that China has no plans to approve any wholly foreign-owned manufacturers of traditional (i.e., fuel engine) passenger vehicles.

Meanwhile, the *Negative List* leaves in place significant investment restrictions in a number of areas important to foreign investors, such as key services sectors, extractive industries and the agriculture sector. With regard to services sectors in particular, China maintains prohibitions or restrictions in key sectors such as cloud computing services, telecommunications services, film distribution and film production services, and video and entertainment software services. The description of China's restrictions on the telecommunications services sector also could be read as going backwards on the market access that was promised in the March 2015 *Foreign Investment Catalogue*.

Automotive Sector

In a separate commitment, China agreed to revise its *Industrial Policy for the Automotive Sector* to make it compatible with WTO rules and principles by the time of its accession. However, it did not do so, and U.S. industry reported that some local officials were continuing to enforce the WTO-incompatible provisions of the policy. Following repeated engagement by the United States and other WTO members, including the EU, Japan and Canada, China issued its new auto policy in May 2004. This policy included provisions discouraging the importation of automobile parts and encouraging the use of domestic technology. It also required new automobile and automobile engine plants to include substantial investment in research and development facilities, even though China expressly committed in its WTO accession agreement not to condition the right of investment on the conduct of research and development.

In 2005, as previously reported, China began to issue measures implementing the new auto policy. One measure that generated strong criticism from the United States, the EU, Japan and Canada was the *Measures on the Importation of Parts for Entire Automobiles*, issued by NDRC in February 2005. This measure imposed charges that unfairly discriminated against imported automobile parts and discouraged automobile manufacturers in China from using imported automobile parts in the assembly of vehicles. This treatment appeared to be inconsistent with several WTO provisions, including Article III of GATT 1994 and Article 2 of the TRIMS Agreement, as well as the commitment in China's accession agreement to eliminate all local content requirements relating to importation. In 2006, the United States, the EU and Canada initiated WTO cases challenging China's treatment of automobile parts, once it had become clear that dialogue would not lead to a satisfactory resolution. A WTO panel and the WTO's Appellate Body both issued decisions in 2008 in favor of the United States and the other complaining parties, finding that China's treatment of automobile parts was WTO-inconsistent. China repealed its discriminatory rules on automobile parts in 2009.

Additional problems began to arise, however, after China's economic planners decided that the Chinese auto industry should focus on developing expertise in manufacturing so-called new energy vehicles, or NEVs. NEVs include alternative fuel vehicles such as electric, fuel cell and bio-diesel vehicles. In recent years, China has been devoting substantial resources – and creating new policies – to assist Chinese automobile enterprises in developing cutting-edge NEV technologies and building domestic brands that could succeed in global markets.

The most significant policies pursued by China can be traced to regulations issued by NDRC in 2007 and by MIIT in 2009 that required manufacturers of NEVs in China to "demonstrate mastery" over, and hold intellectual property rights in, one of three core NEV technologies: batteries, drive systems or control systems. In 2017, these regulations were replaced by new regulations requiring manufacturers of NEVs in China to "demonstrate mastery" over the development and manufacturing technology of a complete NEV, rather than just one of three core technologies, and to possess key R&D capacities. Because China allows foreign automobile manufacturers to operate in China only through joint ventures with Chinese enterprises, and none of these joint ventures can be majority foreign-owned, this requirement effectively requires foreign automobile manufacturers to transfer their core NEV technologies to their Chinese joint venture partners.

Reportedly, China also is considering additional regulations that would require all NEVs manufactured in China to be sold under Chinese, rather than foreign, brands. These same reports indicate that China's regulators may have already informed foreign automobile manufacturers that their joint ventures must commit to launch Chinese NEV brands in order to get approval for new or expanded production facilities.

China has also pursued related policies apparently designed to promote the development of a Chinese NEV industry at the expense of foreign enterprises. For example, in March 2011, NDRC issued a draft *Foreign Investment Catalogue* that proposes a new limitation on foreign ownership in NEV parts manufacturing facilities in China to no more than 50 percent. Previously, foreign automobile parts manufacturers could establish in China as wholly foreign-owned enterprises. Ultimately, in the *Foreign Investment Catalogue* that went into effect in January 2012, China narrowed the scope of these proposed investment restrictions, and it applied the 50-percent foreign investment cap only to NEV battery manufacturing facilities.

China also has used a catalogue of approved NEV models to determine eligibility for consumer subsidies and other incentive programs maintained by the Chinese government. It appears that to date domestic but not imported NEVs are included in this catalogue.

Similarly, some municipal government-level restrictions allegedly intended to reduce pollution also raise concerns. For example, in November 2013, the Beijing municipal government introduced new license plate restrictions that reserve a proportion of Beijing license plates for Chinese-made NEVs, beginning in 2014. Since then, additional Chinese municipalities have adopted or are considering similar measures.

In 2011, the United States repeatedly raised serious concerns about China's NEV policies in bilateral meetings. The United States also highlighted its concerns about China's NEV policies during the final transitional review before the WTO's TRIMS Committee in October 2011. At the November 2011 JCCT meeting, China committed that it would not require foreign automobile manufacturers to transfer technology to Chinese enterprises or to establish Chinese brands in order to invest in China's market for NEVs. China also committed that foreign-invested enterprises would have equal access to subsidies and other preferential policies for NEVs and that these policies would conform to WTO rules.

Public announcements by several foreign automobile manufacturers indicate that their joint ventures with Chinese enterprises have been approved by NDRC and MIIT to establish new production facilities in China, and these approvals have coincided with public commitments by the foreign automobile manufacturers to launch new Chinese NEV brands and to establish or expand research and development in China. This pattern of investment approvals suggests that Chinese regulators may be pressuring foreign automobile manufacturers to establish Chinese brands and to make additional research and development investments in China as conditions for approving new production facilities. A number of other foreign automobile manufacturers have announced plans to manufacture NEVs in China, and therefore the United States will closely examine developments related to China's commitment not to require technology transfer, as these automobile manufacturers seek regulatory approval for the launch of their NEV models, particularly in light of USTR's Section 301 investigation.

In October 2012, MOF, MIIT and MOST issued two new measures establishing a fiscal support fund for manufacturers of NEVs and NEV batteries. It appears that, in order to qualify for funding under these measures, an enterprise must demonstrate ownership of intellectual property and "mastery" of core NEV technologies and also meet a minimum level of investment in China-based research and development. As foreign automobile manufacturers are required to form 50-percent joint ventures with Chinese partners, these requirements could effectively require them to transfer core NEV technology to their Chinese joint-venture partners in order to receive the available government funding. These measures therefore raise serious questions in light of China's November 2011 JCCT commitment not to mandate technology transfer and China's May 2012 S&ED commitment to treat intellectual property rights owned or developed in other countries the same as Chinese-owned or Chinese-developed intellectual property rights.

In recent years, it appears that China has begun to tie subsidies and other support for manufacturers of NEVs and NEV batteries to lists of qualified manufacturers located in China. For example, the central government and certain local governments provide subsidies in connection with the purchase of NEVs, but they only make these subsidies available when certain Chinese-made NEVs, not imported NEVs, are purchased. China appears to pursue similar policies involving NEV batteries, leading to lost sales by U.S.-based manufacturers. The United States continues to press China to eliminate this discriminatory treatment.

Steel Sector

In July 2005, China issued its *Steel and Iron Industry Development Policy*. As previously reported, this policy contains many government mandates pertaining to the commercial behavior of Chinese steel enterprises. The policy also appears to discriminate against foreign equipment and technology imports. Like other measures, this policy encourages the use of local content by calling for a variety of government financial support for steel and iron projects utilizing newly developed domestic equipment. Despite the commitment that China made in its WTO accession agreement not to condition the right of investment or importation on whether competing domestic suppliers exist, the policy also calls for the use of domestically produced steel-manufacturing equipment and domestic technologies.

China's 2005 steel policy is also striking because of the extent to which it attempts to dictate industry outcomes and involve the government in making decisions that should be made by market participants. This high degree of government direction regarding the allocation of resources into and out of China's steel industry raises concerns not only because of the commitment that China made in its WTO accession agreement that the government would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises, but also more generally because it represents another significant example of China reverting to a reliance on government management of market outcomes instead of moving toward a reliance on market mechanisms.

In June 2010, the State Council published the *Opinions on Strengthening Energy Saving and Emission Reduction and Accelerating Structural Adjustment in the Iron and Steel Sector*. This measure reiterated policies such as controlling steel industry growth, strengthening efforts to eliminate outdated capacity, promoting energy savings and emissions reduction, technical innovation, accelerating mergers, disciplining access to iron ore imports and promoting domestic iron ore mining, and encouraging domestic steel producers to explore mining and steel investments abroad.

In July 2010, MIIT released the *Regulations and Conditions of Production and Operation of the Iron and Steel Industry*. These regulations are intended to support the objectives laid out in the State Council's June 2010 measure. They also indicate that small steel mills will be shut down, establish operating standards for larger steelmakers and address issues such as product quality and environmental protection. At the time, steel analysts viewed these regulations as a prelude to China's next five-year steel plan.

In October 2011, MIIT published China's *12th Five-year Plan* for the steel industry, covering the period from 2011 to 2015. As the plan itself notes, China's steel production grew from 350 million MT in 2005 to 684 million MT in 2011, with the steel industry accounting for 10 percent of national industrial output. Despite China's goal of eliminating inefficient steel capacity, and despite slowing growth in domestic steel demand, stagnant demand in export markets and significant Chinese steel company losses, steel production in China continued to grow throughout the period of the *12th Five-year Plan*. Indeed, the steel industry's rate of growth during this period exceeded the growth rates of the Chinese economy as a whole as well as the global steel industry, and China shifted from being a net importer of steel to being a large net exporter of steel. These developments led many analysts to raise concerns that significant excess capacity in China may cloud the prospects for the steel industry's profitability, both in China and in other economies.

China's *12th Five-year Plan* for the steel industry raised a number of specific concerns. In particular, the plan continued to place the government in the role of closely managing the development of the steel industry. The plan specified where to build, close or relocate steelmaking capacity, how much to spend on research and development, and even what products Chinese steel producers are to make. In addition, the plan continued to emphasize "self-sufficiency" in steel production, setting specific targets for Chinese producers' share of the domestic market in high-grade steel products that were supplied primarily by foreign steelmakers, including U.S. steelmakers. In the case of automotive steel and silicon steel sheets, the plan set a goal of Chinese producers supplying 90 percent of the domestic market by 2015. At the same time, the plan laid out objectives for overseas investment by China's steel producers and explained that incentives will be provided to support investment in foreign iron ore mines and steel plants to create groups with "powerful international competitive strength." Additionally, as envisioned by the plan, China continued to support its largest steel companies through subsidies, raw materials export restrictions and other preferential government policies.

Effective October 2012, MIIT issued the *Iron and Steel Industry Normative Conditions*, which served as the guiding norms for the steelmaking industry in China and contained both incentives for compliance and disincentives for non-compliance. Qualifying enterprises are entitled to preferential support policies, including bank loans and government grants for technology upgrades, while non-qualifying enterprises may be forced to restructure. In 2013, China announced two batches of qualifying steelmaking enterprises that are entitled to government support. While China has heralded the use of industry norms as a move toward a more "market-oriented" approach to guiding the industry, the MIIT norms maintain a high degree of government direction regarding the allocation of resources toward China's steel industry, demonstrating China's continued reliance on government management of market outcomes.

In October 2013, China's State Council issued the *Guiding Opinions on Resolving the Problem of Severe Excess Capacity* to address excess capacity in the steel, cement, electrolytic aluminum, plate glass and shipbuilding industries. As the measure itself noted, China's then-current steel capacity dramatically exceeded market demand. While ostensibly the measure aimed to rein in excess capacity, it raised a number of concerns. For example, it encouraged banks to provide financing for technology upgrades, and it called for policies to encourage Chinese steelmakers with excess capacity to relocate their excess capacity outside China, such as tax rebates for equipment and products used in relocating excess capacity.

In November 2013, MOF issued a new subsidy measure that provides grants for the "transformation and upgrade" of centrally controlled state-owned enterprises in a handful of industries, including steel. This measure provides grants of up to RMB 500 million ($82 million) for large projects.

In February 2016, China's State Council issued another measure directed at the excess capacity problem, the *Opinions on Resolving Overcapacity in the Iron and Steel Industry to Gain Profits and Development*. This measure calls for the reduction of crude steel capacity in China by 100 to 150 MMT within five years, beginning in 2016.

Over the years, throughout the push and pull of these myriad central government policies, sub-central governments often have pursued contradictory efforts, as they typically seek to support and even expand local steel capacity and production regardless of market dynamics because of the tax revenues and jobs that they represent. In any event, China's steelmaking capacity and crude steel production has grown dramatically over the years.

Between 2000 and 2016, China accounted for 75 percent of the growth in global steelmaking capacity, an increase well in excess of the growth in China's domestic demand for steel over the same period. China's capacity reached 1,150 million MT in 2015, a figure that represented just over one-half of global capacity. Although China reportedly eliminated some of its official capacity in 2016 and 2017, China also accounted for the largest share of new capacity additions during this same period. It is also not clear whether and how China's official reporting on capacity accounts for the large number of facilities producing steel in China without official sanction from the central government. Moreover, while China may have achieved modest reductions in its official capacity, its levels of production (and therefore its potential for export) continued to increase into 2018, despite weakening internal demand. Currently, China's steelmaking capacity alone is roughly double the combined steelmaking capacity of the EU, Japan, the United States and Russia, even though China has no comparative advantage with regard to the energy and raw material inputs that make up the majority of costs for steelmaking.

At the WTO, the United States, with support from other WTO members, has pressed its concerns regarding China's steel policies, including in meetings before the Committee on Import Licensing, the TRIMS Committee, the Subsidies Committee and the Council for Trade in Goods. The United States also co-sponsored with the EU sessions examining subsidies that contribute to excess capacity. The United States also has focused intently on China's steel policies in connection with China's first seven Trade Policy Reviews at the WTO, held in 2006, 2008, 2010, 2012, 2014, 2016 and 2018, and in plurilateral fora such as the OECD.

The United States and other WTO members have called for China to eliminate subsidies to its steel industry, to implement steel industry policies that do not discriminate against imports and to allow market forces to determine steelmaking raw material input supply. Several steel industry associations from around the world have expressed similar concerns.

In the past, China has made a series of bilateral commitments to reduce its excess steel capacity. For example, at the July 2014 S&ED meeting, China committed to establish mechanisms that strictly prevent the expansion of crude steelmaking capacity and that are designed to achieve major progress in addressing excess production capacity in the steel sector. Similarly, at the June 2016 S&ED meeting, China committed to take effective steps to address the challenges of excess capacity so as to enhance market function and encourage adjustment. These commitments have not meaningfully impacted the severe excess capacity situation in China's steel sector.

In January 2018, the Secretary of Commerce transmitted to the President a report of his investigation into the effects of imports of steel articles on the national security of the United States pursuant to Section 232 of the Trade Expansion Act of 1962. The Secretary of Commerce found that the quantity and circumstances of steel imports into the United States – including the circumstances of global excess capacity for producing steel – threaten to impair U.S. national security. The President concurred in the Secretary of Commerce's findings and, in March 2018, took action to adjust imports of steel articles into the United States.

Aluminum Sector

Excess capacity in China's aluminum sector contributes to global imbalances and price effects that have harmed U.S. producers and workers. Large new facilities were built in China with government support, while a variety of policy tools promote exports of Chinese value-added aluminum products, including through energy subsidies. As a result of these market-distorting measures, China's aluminum capacity and production have more than doubled in the last decade, and estimates suggest that China's current excess aluminum capacity is equivalent to the entire U.S. demand for aluminum.

The United States' bilateral engagement of China on this issue yielded no progress. In the past, securing commitments from China merely to discuss the severe excess aluminum capacity situation and begin exchanging information required months of haggling, and the responsible Chinese ministries demonstrate no interest in implementing even those commitments.

In January 2018, the Secretary of Commerce transmitted to the President a report of his investigation into the effects of imports of aluminum on the national security of the United States pursuant to Section 232 of the Trade Expansion Act of 1962. The Secretary of Commerce found that the quantity and circumstances of aluminum imports into the United States – including the circumstances of global excess capacity for producing aluminum – threaten to impair U.S. national security. The President concurred in the Secretary of Commerce's findings and, in March 2018, took action to adjust imports of aluminum into the United States.

AGRICULTURE

Upon its accession to the WTO, China assumed the obligations of the WTO Agreement on Agriculture, which contains commitments in three main policy areas for agricultural products: market access, domestic support and export subsidies. In some instances, China also made further commitments, as specified in its accession agreement.

In the area of market access, WTO members committed to the establishment of a tariff-only regime, tariff reduction and the binding of all tariffs. As a result of its accession negotiations, China agreed to significant reductions in tariff rates on a wide range of agricultural products. China also agreed to eliminate quotas and implement a system of TRQs designed to provide significant market access for certain bulk commodities upon accession. This TRQ system is very similar to the one governing fertilizers (discussed above in the Import Regulation section). China's goods schedule sets forth detailed rules intended to ensure appropriate administration of the agriculture TRQ administrator – originally the State Development and Planning Commission (SDPC), which is now called NDRC – and to require it to operate with transparency and according to precise procedures for accepting quota applications, allocating quotas and reallocating unused quotas.

In the area of domestic support, the WTO objective is to encourage a shift in policy to the use of measures that minimize the distortion of production and trade. China committed to a cap for trade- and production-distorting domestic subsidies that is lower than the cap permitted for developing countries and that includes the same elements that developed countries use in determining whether the cap has been reached.

WTO members also committed to avoid the use of export subsidies unless they fall within one of four categories of exceptions. China agreed to eliminate all export subsidies upon its accession to the WTO and did not take any exceptions.

Another important agricultural area is covered by the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). The SPS Agreement establishes rules and procedures regarding the formulation, adoption and application of sanitary and phytosanitary measures, i.e., measures taken to protect against risks associated with plant or animal borne pests and diseases, additives, contaminants, toxins and disease-causing organisms in foods, beverages or feedstuffs. The rules and procedures in the SPS Agreement require that sanitary and phytosanitary measures address legitimate human, animal and plant health concerns, do not arbitrarily or unjustifiably discriminate between WTO members' agricultural and food products, and are not disguised restrictions on international trade. The SPS Agreement requires that the measures in question be based on scientific grounds, developed through risk assessment procedures and adopted with transparency, while at the same time it preserves each member's right to choose the level of protection it considers appropriate with regard to sanitary and phytosanitary risks.

Other WTO agreements also place significant obligations on China in the area of agriculture. Three of the most important ones are GATT 1994, the Import Licensing Agreement and the TBT Agreement, which are discussed above (in the sections on Import Regulation and Internal Policies Affecting Trade).

China also made several additional commitments intended to rectify other problematic agricultural policies, either upon accession or after limited transition periods. For example, China agreed to permit non-state trading enterprises to import specified TRQ shares of certain products that previously had been subject to import monopolies by state trading enterprises, i.e., rice, wheat, corn, cotton, wool and vegetable oil.

Since China's accession to the WTO, a variety of non-tariff barriers continue to impede U.S. agricultural trade with China, particularly in the area of sanitary and phytosanitary measures, where China's actions often have not appeared to be guided by scientific principles, and in the administration of tariff-rate quotas for certain bulk agricultural commodities, where low quota fill persists despite domestic demand for imported products. The United States and China have only been able to resolve some of these issues, and those resolutions have required protracted negotiations.

In 2018, U.S. exporters continued to be confronted with non-transparent application of sanitary and phytosanitary measures, many of which have appeared to lack scientific bases and have impeded market access for many U.S. agricultural products. China's seemingly unnecessary and arbitrary inspection-related import requirements also continued to impose burdens and regulatory uncertainty on U.S. agricultural producers exporting to China in 2018, as did the registration and certification requirements that China imposes, or proposes to impose, on U.S. food manufacturers. Although China finally lifted its illegal AD and CVD duties on imports of U.S. chicken broiler products, trade did not resume because China separately continued to maintain an unwarranted and unscientific avian influenza-related ban on imports of U.S. poultry.

Tariffs

In accordance with the tariff reductions required of China by the terms of its WTO accession agreement, tariffs on agricultural goods of greatest importance to U.S. farmers and ranchers were lowered from a 1997 average of 31 percent to 14 percent, in almost all cases over a period of five years running from 2002 to 2006. The last required tariff reductions on agricultural goods took place in 2008.

In the last few years, China has unilaterally lowered its applied tariffs for many consumer-oriented products, including food and agricultural products. It appears that these actions are intended to spur domestic consumption.

In 2018, China imposed additional tariffs on certain U.S. products, including many agricultural products, in excess of China's bound rates. China took these actions in retaliation for tariffs imposed by the United States on national security grounds under Section 232 of the Trade Expansion Act of 1962 and tariffs imposed by the United States under Section 301 of the Trade Act of 1974 in response to numerous unfair and harmful policies and practices of the Government of China related to technology transfer, intellectual property and innovation. In addition, there are credible reports that officials at China's ports from the General Administration of Customs are now assessing duties on U.S. products based on higher "reference prices," rather than the declared value, effectively resulting in even higher tariffs. There is no legitimate basis for these actions.

Independent of China's retaliatory tariffs, the full market access potential of the tariff cuts that China made pursuant to the terms of its accession agreement has never been realized for some products. As discussed below, a variety of non-tariff barriers continue to impede market access for various U.S. agricultural exports to China, particularly exports of consumer-ready and value-added products.

Tariff-rate Quotas on Bulk Agricultural Commodities

China made WTO accession commitments relating to TRQs on bulk agricultural commodities, which include several commodities of particular importance to U.S. farmers, such as rice, wheat, corn and cotton. Since SDPC (and later NDRC) began implementing these commitments following China's accession, a series of problems have undermined the market access envisioned by WTO members. NDRC's lack of transparency continues to create significant concern.

As previously reported, in 2002, the first year of this TRQ system, it appeared that SDPC had decided to allocate TRQs in a manner that would protect domestic farm interests and maintain the monopoly enjoyed by state trading enterprises. SDPC operated with only limited transparency, refusing to provide specific details on the amounts and the recipients of the allocations. At the same time, SDPC reserved a significant portion of the TRQs for the processing and re-export trade, despite China's commitment to provide market access and national treatment for imported products. SDPC also allocated a portion of the TRQs for some commodities in smaller than commercially viable quantities, and it employed burdensome licensing requirements.

In 2003, NDRC issued new regulations for shipments beginning January 2004. Key changes included the elimination of separate allocations for general trade and processing trade, the elimination of certain unnecessary licensing requirements, and the creation of a new mechanism for identifying allocation recipients. At the same time, transparency continued to be problematic, although some improvement did take place for some of the commodities subject to TRQs.

While these systemic changes were taking place, spurred on by sustained U.S. engagement, exports of some bulk agricultural commodities from the United States showed substantial increases, as changes in market conditions created import demand and the TRQ system, at least in part, was used to facilitate imports.

For example, while U.S. exports of wheat to China totaled an unusually high amount of $495 million in 2004, as the TRQ allocations for wheat did not appear to act as a limiting factor, in subsequent years they declined dramatically. Beginning in 2011, U.S. exports of wheat to China started to climb again, reaching $1.3 billion in 2013 before dropping precipitously in 2014 to $194 million and in 2015 to $160 million, before increasing to $205 million in 2016 and $351 million in 2017. U.S. exports of wheat to China decreased by 70 percent during the first nine months of 2018, compared to the same period in 2017.

U.S. exports of corn to China grew from $11 million in 2007 to $1.3 billion in 2012, before declining to $974 million in 2013. In 2014, due to China's biotechnology policies, and concurrent with China's decision to liquidate substantial domestic corn stocks, corn exports tumbled to $84 million. In 2015, U.S. corn exports to China nearly doubled, but remained relatively low compared to previous years. U.S. corn exports to China dropped to $40 million in 2016 and then rose to $142 million in 2017. Through the first nine months of 2018, U.S. corn exports to China dropped again, decreasing by 64 percent, compared to the same period in 2017.

Exports of U.S. rice to China have long been hampered by the lack of an agreed phytosanitary protocol. Even though the United States and China finally signed a rice protocol in July 2017, China delayed its implementation. Following the meeting between Presidents Trump and Xi in Buenos Aires in December 2018, China began to implement the rice protocol, although the United States remains concerned that market access for U.S. rice will still be hampered by low fill rates for China's rice TRQs.

In February 2016, China submitted its WTO notification on TRQ fill rates for 2013 and 2014. In both 2013 and 2014, China filled less than 50 percent of its TRQ allocation for rice. Currently, the United States does not have market access to fill China's quota for rice. While the United States and China have come to completion of a phytosanitary protocol to allow imports of rice from the United States, China has not given a timeline for signing the protocol, despite numerous high-level requests from the United States.

For several years, the United States raised concerns about NDRC's TRQ administration, both bilaterally and at the WTO. These concerns related to allocation principles and transparency, among other matters. The TRQs for rice, wheat and corn have been of particular concern. Due to China's poorly defined criteria for applicants, unclear procedures for distributing TRQ allocations, and failure to announce quota allocation and reallocation results, traders are unsure of available import opportunities and producers worldwide have reduced market access opportunities.

In order to improve this situation, in December 2016, the United States launched a WTO case challenging China's administration of TRQs for rice, wheat and corn. Consultations took place in February 2017. A WTO panel was established to hear the case at the United States' request in September 2017, and 17 other WTO members joined as third parties. Hearings before the panel took place in July and October 2018, and the panel is expected to issue its decision in mid-2019.

China's Biotechnology Regulations

As previously reported, one of the most contentious agriculture trade issues that arose during China's first year of WTO membership involved new rules implementing June 2001 regulations relating to biotechnology safety, testing and labeling. The implementing rules, issued by China's Ministry of Agriculture (MOA) shortly before China's WTO accession, did not provide adequate time for scientific assessment and the issuance of formal safety certificates for biotechnology products. The U.S. products most affected were soybeans, which had seen exports to China grow to more than $1 billion in 2001, while corn and other products, such as consumer products made from biotech commodities, remained at risk. Following concerted, high-level pressure from the United States, China agreed to issue temporary safety certificates until formal safety certificates could be issued. China subsequently issued a formal safety certificate for a U.S. biotechnology soybean variety known as Roundup Ready soybeans in February 2004. By the time of the April 2004 JCCT meeting, China had also issued formal safety certificates for six corn events, seven canola events and two cotton events. China issued a formal safety certificate for another corn event a few months later, leaving only one corn event still awaiting formal approval. China issued a formal safety certificate for this last corn event at the time of the July 2005 JCCT meeting.

Nevertheless, other U.S. concerns with China's biotechnology regulations and implementing rules remain. For example, China requires a product to be approved in the country of origin before it can be submitted in China for approval, and China's National Biosafety Committee normally reviews new product applications only during at most three meetings each year. In 2014, the United States learned that MOA only will issue regulatory decisions on applications once a year, and that MOA considers factors other than science when evaluating new biotechnology applications. These practices present significant and unnecessary delays for bringing U.S. goods into the China market. China's lack of clarity on the requirements applicable to products stacked with multiple traits is a cause for additional concern, as are China's sometimes duplicative and unprecedented testing requirements.

In 2007, MOA developed, issued and implemented some troubling new regulations without circulating them for public comment in advance or even consulting with relevant stakeholders such as the United States and U.S. industry. For example, in January 2007, MOA added a new requirement that biotechnology seed companies turn over key intellectual property as part of the application process when seeking safety certificates. MOA later dropped this requirement, although it still unnecessarily requires the submission of other intellectual property.

In 2007, MOA halted a pilot program, which had been developed over two years of bilateral discussions, aimed at allowing MOA to review products under development in the United States prior to completion of the U.S. approval process. As a result, the MOA approval process can still only begin after the completion of the U.S. approval process.

China also had imposed a requirement to submit viable biotechnology seeds for testing during the approval process. After intensive discussions, at the December 2007 JCCT meeting, China committed to eliminate this requirement, which the United States viewed as reducing the possibility of illegal copying of patented agricultural materials.

Nevertheless, disruptions to trade continued to be a concern due to China's asynchronous approval process, excessive data requests, duplicative requirements, an onerous process for extension of existing certificates and the potential for low-level presence of an unapproved event. In addition, in 2012, China re-introduced the requirement that biotechnology seed companies must submit viable seed with their biotechnology applications. An apparent slow-down in issuing approvals also generated concern, as approvals were overdue for numerous biotechnology events. At the same time, investment restrictions continued to constrain foreign companies' ability to increase product development in China and to maintain control over important genetic resources.

In 2014, China's regulatory system for biotechnology products became increasingly problematic. For example, China stalled several applications by issuing notices temporarily suspending their approval, citing public opinion and other non-scientific reasons.

At the December 2014 JCCT meeting, the United States and China agreed on a new Strategic Agricultural Innovation Dialogue (SAID), which was intended to implement an agreement reached between President Obama and President Xi regarding agricultural innovation. This new dialogue was designed to bring together a diverse set of Chinese ministries and U.S. agencies at the Vice Minister level and focus on science-based agricultural innovation and the increased use of innovative technologies in agriculture.

In April 2015, China published a draft proposal to revise elements of its biotechnology regulatory process. China's proposed revisions included a reduction in the frequency of regulatory decisions and the use of factors other than science, including politics and public opinion, when evaluating new biotechnology applications. These changes, if made permanent, would further slow the regulatory review process beyond the systemic delay already brought about by China's asynchronous approvals policy.

In 2015, MOA started routinely asking biotechnology seed companies for new data relating to acute oral toxicity studies, even though international best practices as outlined by the OECD recommends that new data should be requested only in exceptional circumstances. To date, in other countries where the regulatory authorities have approved biotechnology products, the regulatory authorities have never asked for new data, which is a particularly onerous requirement.

At the September 2015 summit meeting between President Obama and President Xi, China made significant commitments. Specifically, China committed to review applications of agricultural biotechnology products in a timely, ongoing and science-based manner and to implement specific changes to the review process.

At the November 2015 JCCT meeting, the United States pressed China to reaffirm its commitment to adopt a timely, transparent, predictable and science-based approval process. The United States also pressed China to move expeditiously to approve backlogged biotech event applications. Despite this engagement, delays in China's approvals of agricultural products derived from biotechnology worsened in 2016, creating increased uncertainty among traders and resulting in adverse trade impact, particularly for U.S. exports of corn. In addition, the asynchrony between China's product approvals and other countries' product approvals widened.

In February 2016, China issued safety certificates for only three of the 11 products of agricultural biotechnology under final review. However, China continued to delay approvals for eight other products, with applications dating as far back as 2011, even though more than a dozen other countries previously deemed them to be safe.

At the November 2016 JCCT meeting, China indicated that it would have the opportunity to review the status of its safety evaluation for these products in December 2016. However, China gave no indication as to whether it would issue safety certificates for them.

In May 2017, as part of the initial results of the CED's 100-day action plan, China committed to accelerate its long-delayed review of eight pending U.S. biotechnology product applications. Specifically, China committed to hold frequent meetings of the expert body that reviews biotechnology product applications – the NBC – and to ensure that this body assesses the safety of a product based solely on its intended use. It further committed to ensure that any additional information requested by this body similarly pertains solely to the safety of a product for its intended use. By the time of the CED plenary meeting in July 2017, China had only approved four of the eight applications, and its expert body continued to ask applicants for information unrelated to the intended use of the products. Following the July 2017 CED meeting, work on the remaining four applications stalled, as the expert body did not appear to hold any further meetings in 2017 or most of 2018. In December 2018, following the meeting between President Trump and President Xi in Buenos Aires, China announced that it had granted one of the four remaining applications, plus four other pending applications for product approval. Nevertheless, many other applications remain pending at the final approval stage of NBC review.

Nevertheless, fundamental problems with China's approval process remain. Even though China has repeatedly committed to review applications of agricultural biotechnology products in a timely, ongoing and science-based manner since 2014, China's approval process remains troubling. The Chinese regulatory authorities continue to review applications slowly and without scientific rationale, and many product applications remain pending at the final approval stage of NBC review. Meanwhile, Chinese companies continue to build their own capabilities in the area of agricultural biotechnology.

Sanitary and Phytosanitary Issues

In 2018, SPS measures maintained by China continued to create significant obstacles for U.S. agricultural producers exporting to China. As in prior years, the United States engaged China on a number of SPS issues, both bilaterally and during meetings of the WTO's SPS Committee. Despite these efforts, China did not respond constructively to U.S. concerns, which covered SPS measures on a wide range of products. In many instances, progress was made difficult by China's inability to provide relevant science-based rationales for maintaining its restrictions on U.S.-origin products. For example, China has been unable to provide a science-based rationales for import restrictions on U.S. poultry products and some U.S. beef and pork products, as described below. In addition, China's regulatory authorities continued to issue significant new SPS measures without first notifying them to the SPS Committee and providing WTO members with an opportunity to comment or without taking WTO members' comments into account when it did notify a measure. As a result, traders remain concerned because China's SPS measures often lack clarity and do not appear to be based on risk-based approaches.

BSE-related Import Bans

In December 2003, China and other countries imposed a ban on imports of U.S. cattle, beef and processed beef products in response to a case of BSE found in the United States. Since that time, on numerous occasions, the United States has provided China with extensive technical information on all aspects of its BSE-related surveillance and mitigation measures, internationally recognized by the World Organization for Animal Health (known by its historical French acronym OIE) as effective and appropriate, for both food safety and animal health.

At the April 2006 JCCT meeting, China committed to conditionally reopen the Chinese market to U.S. beef, subject to the negotiation and finalization of a protocol by technical experts. Jointly negotiated protocols, and accompanying export certificates, are normal measures necessary for the export of any livestock products from the United States to any trading partner. However, further negotiations in 2006 and 2007 made it clear that China was only contemplating a limited market opening, rather than displaying a willingness to begin accepting U.S. beef and beef products in a manner consistent with the OIE's classification, and China provided no scientific justification for the limitation.

At the December 2010 JCCT meeting, the United States and China agreed to resume talks on U.S. beef market access. The two sides subsequently held a series of meetings, which did not produce agreement on market access terms.

In May 2013, the United States received the lowest risk status for BSE from the OIE, i.e., negligible risk. Using the JCCT process, the United States again pressed for a science-based market opening by China for U.S. beef, and China agreed to re-engage, and further meetings took place in 2013 and 2014.

In 2014, U.S. officials at all levels pressed China to follow through on its 2013 JCCT commitment. In June 2014, a team of Chinese officials visited the United States to study the BSE issue. Further discussions were subsequently held in October and November 2014 in an effort to reach agreement on the terms and conditions for U.S. beef to access China's market, but these discussions did not yield a positive outcome. China's requirements remained inconsistent with OIE guidelines and continue to contrast sharply with U.S. requirements. At the JCCT meeting in December 2014, the United States continued to press China to re-consider its approach, given the negligible risk status that U.S. beef has obtained from the OIE, and to propose alternative terms and conditions that are consistent with OIE guidelines. However, China remained unwilling to alter its approach.

In 2015 and 2016, the United States continued to urge China to agree to an OIE-consistent market opening for U.S. beef. Despite these efforts, the ban remained in place, and the United States continued pressing its concerns with China.

In September 2016, China's Premier Li stated that China was willing to re-open its market for U.S. beef. This statement was preceded by a Chinese delegation visit to the United States to verify the status of U.S. animal health, food safety and traceability systems. Following Premier Li's statement, MOA and AQSIQ published a joint announcement lifting the ban on bone-in and boneless beef under 30 months, conditioned on the United States meeting certain animal health and traceability requirements. While the announcement removed one regulatory barrier, it did not include other regulatory changes that are necessary for a resumption of market access for U.S. beef, as China's regulatory agencies were demanding that any export protocol include unscientific requirements that deviate from current U.S. government and industry standards.

In May 2017, one month after the April 2017 Mar-a-Lago summit meeting between President Trump and China's President Xi, China committed to allow the resumption of U.S. beef shipments into its market consistent with international food safety and animal health standards as part of the initial results of the CED's 100-day action plan. However, China back-tracked one month later and insisted that it would retain certain conditions that were inconsistent with international food safety and animal health standards. For example, China insisted on limiting market access only to U.S. beef and beef products from cattle less than 30 months of age, and even then it did not allow a full scope of products within that age range, maintaining a ban on certain offal items and processed products. In addition, China continued to maintain non-BSE-related restrictions such as prohibitions on the detection of ractopamine and hormones in U.S. beef and beef products at China's ports of entry. As a result, only about three percent of U.S. cattle qualify for importation into China under these conditions.

In 2018, the United States pressed China to allow full market access for U.S. beef by eliminating age-related, product-scope and veterinary drug restrictions that are not consistent with OIE guidelines and Codex standards. These efforts were unsuccessful.

Pathogen Standards and Residue Standards

Since 2002, as previously reported, China has applied SPS-related requirements on imported raw meat and poultry that are not based on science or current scientific testing practices. For example, China established a zero tolerance limit for the presence of Salmonella bacteria in raw meat and poultry. Similar zero tolerance standards exist for Listeria and other pathogens. China apparently does not apply the same standards to domestic raw meat and poultry.

In 2008, despite assurances from China's regulatory authorities that they were in the process of revising China's pathogen standards, little progress was seen. At the September 2008 JCCT meeting, China did agree to re-list several U.S. poultry plants that had earlier been de-listed for alleged violations of zero tolerance standards for pathogens. Although this step did not address the important underlying need for China to revise its pathogen standards, it did enable some U.S. poultry plants to resume shipment to China.

In December 2008, the United States hosted a team of Chinese government officials and academic experts to observe how the U.S. government and U.S. industry regulate the use of veterinary drugs related to animal health. This visit was intended to address China's continuing ban on ractopamine residue in pork. China maintains that it has serious concerns about the safety of ractopamine, but to date it has not provided any evidence that it has conducted a risk assessment despite repeated U.S. requests.

During several subsequent JCCT working group meetings, the United States requested that China adopt an interim maximum residue level (MRL) for ractopamine in order to address the problems presented by China's current zero-tolerance policy, while China awaited the results of deliberations at the Codex Commission regarding the finalization of international MRLs for ractopamine. However, even though Codex subsequently adopted MRLs for ractopamine in 2012, China has refused to take any steps to address its zero-tolerance policy.

Since July 2014, pork products have been exported from the United States to China under the Never Fed Beta Agonist program of the U.S. Department of Agriculture's Agricultural Marketing Service (AMS). Through this program, the AMS certifies that a pork product has been produced from pigs that have been tested for ractopamine, and the pork product is tracked from plant entry to issuance of an export certificate and shipment to China. While the program description originally discussed with China states that ractopamine test results will not accompany shipments, China has been insisting that shipments include those test results. In addition, in September 2014, China suspended 12 production and cold storage facilities due to ractopamine detections that predated the implementation of the Never Fed Beta Agonist program. In November 2014, China suspended an additional establishment.

In December 2015, China released several hundred new MRLs for horticultural products. In a positive sign, the majority of these limits were adopted at Codex levels. About six months later, China released another set of MRLs, the majority of which also were in line with Codex standards. However, many of these MRLs were set as "temporary" MRLs, and China has indicated that it may change the limits at a later date.

To date, China continues to maintain without scientific justification maximum limits for certain heavy metals, MRLs for veterinary drugs and regulatory action levels for other residues that are inconsistent with Codex guidelines and other international standards. China also enforces a zero tolerance for some residues, even where Codex has adopted guidelines that many of China's major trading partners have adopted. U.S. regulatory officials have encouraged their Chinese counterparts to adopt MRLs that are scientifically based, safe and minimally trade-disrupting.

Avian Influenza Import Suspensions

In January 2015, China announced a suspension of imports of U.S. poultry and poultry products from all U.S. states in response to the U.S. Department of Agriculture's December 2014 notification of the presence of HPAI in several U.S. states. China has been unwilling to follow OIE guidelines and accept poultry from regions in the United States unaffected by this disease.

As of December 2018, China is the only major market that maintained a nationwide suspension of imports of U.S.-origin poultry and poultry products in direct response to the HPAI outbreak, which was eradicated from the United States in 2017. China is the largest of these trading partners, blocking U.S. poultry exports that had totaled as high as $427 million in 2013.

U.S. officials have continued to urge China to take steps to remove or limit the suspension, which remains in place. In this regard, the United States increasingly has stressed the importance of regionalization as a long-term solution in a globalized economy. Avian influenza outbreaks, both low pathogenicity and high pathogenicity, are occurring with greater frequency due to migratory bird movements and globalized trade flows. The United States has continued to press for OIE-approved regionalization measures in cases of isolated outbreaks of HPAI, like those in the United States. To date, although U.S. regulators have met with China to discuss regionalization, China has remained unwilling to adopt regionalization measures. Nevertheless, at the November 2016 JCCT meeting, China agreed to exchange information and collaborate with the United States on efforts to move toward a regionalization approach for HPAI consistent with OIE guidelines in place of the current nationwide ban that China has imposed on the United States.

In July 2017, Chinese regulatory officials from AQSIQ and MOA traveled to the United States and conducted an audit of the U.S. avian influenza regionalization system. In August 2017, the United States notified the OIE that it had fulfilled its requirements and could self-declare freedom from HPAI. Despite the fact that the United States is now recognized as HPAI-free, China continues to maintain its restrictions on U.S. poultry exports without scientific justification.

Separately, the United States also has urged China not to impose import suspensions due to outbreaks of low pathogenicity avian influenza (LPAI), consistent with OIE guidelines. To date, however, China has not been willing to follow OIE guidelines regarding LPAI.

Dairy Certification Requirements

In April 2010, China's AQSIQ notified the United States that it would begin imposing new conditions on the import of dairy products under a December 2009 measure, which was to become effective in May 2010. Of specific concern were requirements that the United States certify on export certificates for dairy shipments that they are free of many diseases that are not of concern in pasteurized milk products. Responding to requests from the United States, China delayed the effective date to June 2010 and subsequently allowed the United States to continue to ship products to China after the new effective date, so long as technical discussions were ongoing. However, this situation was still creating a heightened level of uncertainty for U.S. exporters and their potential Chinese buyers. In December 2012, the United States and China provisionally agreed upon a bilateral certificate, and it was fully implemented in early 2013. Since then, the United States has maintained close contact with U.S. industry, and it appears that the finalized certificate is generally helping to facilitate market access for exports of U.S. dairy products to China.

In June 2017, the United States and China signed an MOU identifying the third-party certification bodies that are authorized to audit U.S. dairy facilities to ensure that they comply with Chinese food safety requirements. This MOU should lead to increased market access for U.S. dairy exporters. Since the signing of the MOU, the United States has been closely examining its implementation, as part of the United States' continuing efforts to ensure the unhindered access of U.S. dairy exports to China's market. To date, China has been slow to certify U.S. dairy facilities, preventing this MOU from reaching its full potential.

Transparency

As in the TBT context, some of China's SPS measures continue to enter into force without having first been notified to the SPS Committee, and without other WTO members having had the opportunity to comment on them, even though they appear to be the type of measures that are subject to the notification requirements of the SPS Agreement. Many of these unnotified measures are of key concern to foreign traders. Examples include unnotified measures implementing important new registration requirements, residue standards, inspection requirements and quarantine requirements, even though these measures constrain U.S. exports of frozen meat, dairy products, grain, poultry, feed, horticultural products, and a variety of processed products and alcoholic beverages.

In 2018, as in prior years, the United States urged China's regulatory authorities to improve the transparency of their SPS regime by notifying more measures. The United States also highlighted this concern during meetings before the WTO's SPS Committee. The United States will continue to seek improvements from China in this area in 2019.

Inspection-related Requirements

In 2009, AQSIQ began implementing new measures imposing various inspection-related requirements. The first of these measures, known as Decree 118, requires all overseas feed and feed ingredients manufacturers shipping to China to undergo facility and product registration. Since then, AQSIQ has implemented additional measures, including a 2012 measure known as Decree 145, which currently extends this registration process to meat, poultry, seafood, dairy and infant formula exporters and which eventually will expand it to include to all overseas food manufacturers. Under Decrees 118 and 145, AQSIQ determines the registration requirements industry-by-industry and announces each industry's registration requirements separately.

This registration process has been extremely onerous and cumbersome for U.S. agricultural exporters. In particular, the requirement for AQSIQ to individually inspect all or most facilities for each product, combined with limited AQSIQ staffing, has resulted in extensive delays. Decree 118 has already resulted in trade disruptions in feed ingredients and additives, and there is currently no process for new feed additives to gain market approval in China. In addition, Decree 145 created a significant backlog in the registration of U.S. dairy products. In response, the United States has urged AQSIQ to limit trade disruptions under Decrees 118 and 145. The United States also has been working closely with U.S. agricultural exporters to facilitate their navigation of the requirements established by these decrees.

In 2016, AQSIQ informed the U.S. Embassy in Beijing about a new requirement that imported foods shipped to China be accompanied by an official certificate. AQSIQ cited Article 92 of China's 2015 *Food Safety Law* and the Codex Guidelines on the General Format Official Certificates as the basis for the new requirement. According to AQSIQ, importers would be required to provide certificates attesting that food shipments comply with the requirements of Chinese laws, regulations and standards. Certificates currently required for certain food products and being issued by countries in accordance with other Chinese legal requirements governing imported food safety or under bilateral agreements would remain valid. AQSIQ explained that this new requirement would take effect beginning in October 2017. The United States raised concerns about this issue with China both bilaterally and in coordination with several other WTO members. The United States requested that China provide additional clarification and scientific justification for the new requirement and that China notify draft implementing measures to the WTO's TBT Committee.

In June 2017, China notified its draft *Measures for the Administration of Certificates Attached to Foods Exported to China* to the TBT Committee. However, the United States and other like-minded WTO members continued to raise concerns with China about the broad scope of and lack of clarity in the certificate requirement. In September 2017, China notified the TBT Committee that it would allow a two-year transitional period for the certificate requirement, as it was changing the enforcement date from October 2017 to October 2019. The United States is using this time period to continue to press China for clarifications regarding the scope of products subject to the certificate requirement and the applicable scientific justifications.

Domestic Support

After its accession to the WTO, China began making significant changes to its domestic subsidies and other support measures for its agricultural sector. China has established direct payment programs, instituted minimum support prices for basic commodities and sharply increased input subsidies. China has implemented a cotton reserve system, based on minimum purchase prices, although, since 2014, facing large stocks of cotton reserves, China has moved away from minimum purchase prices to a target price-based support approach. China also has begun several new support schemes for hogs and pork, along with a purchasing reserve system for pork.

In October 2011, China submitted its overdue notification concerning domestic support measures for the period 2005 through 2008. Even though this notification documented an increase in China's support levels, the United States was concerned that the methodologies used by China to calculate support levels, particularly with regard to China's price support policies and direct payments, resulted in underestimates of those support levels. Indeed, since China's accession to the WTO, it appeared that China's agriculture system had transformed from a system focused on generating tax revenues from agricultural producers into a system that provided substantial net subsidies to agricultural producers, with many of the subsidy mechanisms tied to production incentives and resulting in increased production of Chinese agricultural products that compete with imports from the United States.

In 2015, the United States pressed China to address the mounting concerns about its increased domestic support spending, which are negatively impacting global trade flows. In May 2015, China submitted a notification concerning domestic support measures to the WTO, but it only provided information up to 2010. In December 2018, China notified domestic support measures for the period 2011-2016. Meanwhile, reports commissioned by certain U.S. farm groups to calculate support levels for certain commodities, including rice, wheat, corn and soybeans, concluded that China was substantially exceeding its WTO-agreed domestic support spending limits.

In September 2016, the United States initiated a WTO case against China, challenging government support for the production of rice, wheat and corn as being in excess of China's commitments. Like other WTO members, China committed to limit its support for producers of agricultural commodities. China's market price support programs for these agricultural commodities appear to provide support far exceeding the agreed levels. This excessive support creates price distortions and encourages overproduction. Consultations took place in October 2016. In January 2017, a WTO panel was established to hear the case at the United States' request, and 27 other WTO members joined as third parties. Hearings before the panel took place in January and April 2018, and the panel is expected to issue its decision in early 2019.

Throughout 2018, the United States continued to review closely China's use of domestic subsidies and other support measures for other agricultural commodities. The United States also continued to press China to provide an up-to-date notification of its domestic support measures to the WTO and also to provide more clarity regarding its methodologies for calculating support levels in order to ensure proper reporting and China's adherence to its WTO commitments.

In December 2018, China notified domestic support measures for the period 2011-2016. This notification showed that China had exceeded its *de minimis* level of domestic support for soybeans (in 2012, 2014 and 2015), cotton (from 2011 to 2016), corn (from 2013 to 2016), rapeseed (from 2011 to 2013) and sugar (2012). The situation was likely even worse, as the methodologies used by China to calculate domestic support levels result in underestimates. The notification also identified changes to its domestic support programs for cotton and corn.

Export Subsidies

It is difficult to determine whether or to what extent China maintains export subsidies in the agricultural sector, in part because China has not notified all of its subsidies to the WTO. For example, China has not notified subsidies provided in connection with agricultural export bases, which appear to include subsidies contingent upon export performance. The United States will continue to investigate the Chinese government's subsidization practices in 2019, although China's incomplete subsidy notifications hinder those efforts. The United States will make every effort to ensure that any use of export subsidies is eliminated.

INTELLECTUAL PROPERTY RIGHTS

With its acceptance of the TRIPS Agreement, China agreed to adhere to generally accepted international norms to protect and enforce the intellectual property rights held by U.S. and other foreign companies and individuals. Specifically, the TRIPS Agreement sets minimum standards of protection for copyrights and related rights, trademarks, geographical indications, industrial designs, patents, integrated circuit layout designs and undisclosed information. The TRIPS Agreement also sets minimum standards for IPR enforcement in administrative and civil actions and, in regard to copyright piracy and trademark counterfeiting, in criminal actions and actions at the border. The TRIPS Agreement requires as well that, with very limited exceptions, WTO members provide national and most favored nation treatment to the nationals of other WTO members with regard to the protection and enforcement of intellectual property rights.

Since its accession to the WTO, China has established a framework of laws, regulations and departmental rules relating to its WTO commitments. However, reforms are needed in key areas, including by amending China's laws and regulations in the area of trade secrets, providing regulatory data protection for pharmaceutical products in a manner consistent with international research and development practices and legal standards, improving China's measures for copyright protection on the Internet following China's accession to the World Intellectual Property Organization Internet treaties, and addressing deficiencies in China's criminal IPR enforcement measures. In addition, a growing number of draft and final Chinese measures present market access challenges or otherwise contribute to an uneven playing field in China for U.S. and other foreign intellectual property rights holders.

Even though China's State Council released the *13th National Five-Year Plan for Intellectual Property Right Protection and Utilization* in January 2017 and the State Council Leading Group to Combat Intellectual Property Rights Infringement and the Sale of Shoddy Goods published an *Action Plan on IP Protection of Foreign-Invested Enterprises* in September 2017, effective IPR enforcement remains a serious problem throughout China. There have been individual reports of welcome cooperation between certain rights holders and local authorities, and several court decisions that appear to uphold the rights of U.S. mark holders. Nevertheless, overall IPR enforcement is hampered by gaps in rights protection as well as by civil and administrative recourse mechanisms that fail to deter widespread IPR infringement and by a still insufficient enforcement commitment overall, as demonstrated by resource constraints, lack of training, lack of initiative, lack of transparency in the enforcement process and its outcomes, procedural obstacles to civil enforcement, lack of coordination among Chinese government ministries and agencies, and local protectionism and corruption.

Legal Framework

Overview

As previously reported, at the time of its accession to the WTO, China was in the process of modifying the full range of IPR laws, regulations and departmental rules. Within several months after its accession, China had completed amendments to its *Patent Law*, *Trademark Law* and *Copyright Law*, along with regulations and departmental rules to implement them. China also had issued regulations and departmental rules covering specific subject areas, such as integrated circuits, computer software and pharmaceuticals. U.S. experts, together with experts from other WTO members, subsequently participated in a comprehensive review of these measures as part of the first transitional review before the TRIPS Council in 2002.

As China has continued to issue new IPR measures, there are still instances when it issues measures in final form without having provided an opportunity for public comment. Many of these measures are considered "normative documents" within China's legal system and are styled as "opinions" or "guidance," but they still have a decisive effect on how policies that affect IPR are implemented and therefore should be published in proposed form for public comment. The United States routinely has provided detailed written comments on various draft Chinese measures relating to intellectual property rights. The United States also has followed up with bilateral meetings where necessary.

In addition, the United States repeatedly has urged China to pursue additional legislative and regulatory changes, using both bilateral meetings and the annual transitional reviews before the WTO's TRIPS Council. The focus of the United States' efforts has been to persuade China to improve its laws and regulations across all critical areas, including criminal, civil and administrative IPR enforcement and legislative and regulatory reform. For example, obstacles that have been noted in the area of criminal enforcement include China's high thresholds for criminal prosecution, the lack of criminal liability for certain acts of copyright infringement, the profit motive requirement in copyright cases, the requirement of identical trademarks in counterfeiting cases, and the absence of minimum, proportional sentences and clear standards for initiation of police investigations in cases where there is a reasonable suspicion of criminal activity. The United States also has been pressing China to adopt a variety of improvements to its administrative and civil enforcement regimes. For example, China's failure to clarify that sports broadcasts are eligible for copyright protections is an ongoing concern. While not all of these issues raise specific WTO concerns, all of them will continue to detract from China's enforcement efforts until addressed.

Technology Transfer and Technology Localization

The United States remains concerned about a range of Chinese policies and practices that condition market access or the receipt of government benefits or preferences on relevant intellectual property being owned or developed in China or on key intellectual property being disclosed to Chinese government authorities. These policies and practices are objectionable not only because of their apparently discriminatory treatment of foreign rights holders, but also because they seem to be calculated to pressure foreign companies to transfer their technologies to enterprises in China. These policies and practices also seem to discourage Chinese enterprises from developing their own innovative technologies. Concerns among U.S. and other foreign stakeholders are growing because of new and proposed measures being issued by China in this area.

As previously reported, in prior years, China has made JCCT and S&ED commitments not to maintain any measures that condition eligibility for government procurement preferences for goods or services based on where associated intellectual property is owned or was developed, and to treat IPR owned or developed in other countries the same as IPR owned or developed in China. China also has agreed to revise or eliminate various measures that appeared to be inconsistent with these commitments.

Earlier engagement through the July 2014 S&ED meeting had focused on the need for China to address U.S. concerns about China's pursuit of intellectual property localization. At that time, China committed that its Ministry of Science and Technology would develop a pilot program addressing an eligibility condition for a tax measure requiring high technology enterprises to, as an alternative to IP ownership, hold a global exclusive license to the relevant technology. Nevertheless, this work stream has not resulted in the necessary amendments to the measure at issue, and U.S. concerns therefore remain unaddressed.

Meanwhile, China has continued to issue new and proposed policies and practices discriminating against foreign rights holders and pressuring foreign companies to transfer their technologies to enterprises in China. A number of measures issued in the name of enhancing cybersecurity or protecting national security impose unwarranted IP disclosure conditions and contain provisions requiring related IP rights to be owned and developed in China. Of additional concern are recently issued measures affecting the pharmaceuticals and medical devices industries, including the provision of expedited regulatory treatment for localized manufacturing or owning a Chinese patent.

One example is the *Measures for the Administration of Scientific Data*, issued by the State Council in March 2018 without first providing an opportunity for public comment. The broad scope and vague language used in this measure appears to require the transfer of scientific data under a wide range of circumstances, and it may also require the transfer or licensing of intellectual property that results from research and development activities in China. The measure is gravely concerning because it appears that the requirements relating to the transfer of scientific data and intellectual property apply to all companies operating in China, including foreign companies.

Another technology transfer issue involves the innovation-impeding restrictions relating to the licensing of intellectual property imposed by the State Council's *Regulations on Technology Import and Export*, which went into effect in 2002. Among other things, these regulations appear to impose contractual restrictions on the licensing of foreign technology into China, such as by requiring mandatory indemnities against third party infringement and mandatory ownership of improvements by domestic licensees. At the same time, no similar restrictions appear to apply to license agreements between two Chinese enterprises or when a Chinese enterprise is exporting technology. At the November 2016 JCCT meeting, China committed to actively research how to revise these regulations to address U.S. concerns and to hold a joint seminar with the United States on this topic, but to date China has not published any proposed revisions, and therefore the United States' concerns remain unaddressed. Accordingly, in March 2018, USTR challenged these regulations in the WTO. A dispute settlement panel was established in November 2018, and proceedings are ongoing.

Trade Secrets

In November 2017, China's National People's Congress adopted amendments to the *Anti-unfair Competition Law* that took effect on January 1, 2018. Despite strong encouragement from the United States, China did not take this opportunity to create a stand-alone law governing trade secrets, which could have reduced the existing confusion surrounding the numerous laws and administrative regulations that impact the protection of trade secrets in China. The amended law raises some concerns. For example, it contains a definition of trade secrets that could exclude certain types of proprietary information from its scope of protection, and it continues to limit its application to actions of entities engaged in competitive commercial activity, rather than actions taken by any natural or legal person. The amended law also does not provide for higher damages in cases of willful misappropriation. The United States has provided specific input to China as to the appropriate changes that should be made to improve trade secrets protection.

Online Copyright Protection

Since China acceded to the WTO, U.S. engagement has focused on China's online copyright protection. This engagement has seen important but incomplete steps put forward by China.

In December 2016 and November 2017, China published drafts of a new *E-Commerce Law* for public comment. In written comments, the United States stressed that the final version of this law should not undermine the existing notice-and-takedown regime and should promote effective cooperation in deterring online piracy and counterfeiting. Unfortunately, the law as enacted in August 2018 does not address these concerns.

Progress toward the amendment of the *Copyright Law* appears to have stalled, despite the pressing need to address major gaps in copyright protection, particularly online copyright protection. Reports of a possible intention to move forward with only uncontroversial changes underscore concern of a missed opportunity to address major deficiencies in China's copyright framework.

Trademark Issues

The United States has pressed China to address a variety of weaknesses in China's legal framework that do not effectively deter, and that may even encourage, certain types of infringing activity. For example, U.S. companies continue to face numerous trademark challenges in China, such as unauthorized parties' "squatting" on foreign company names, designs, trademarks and domain names, the registration of other companies' trademarks as design patents and vice versa, the use of falsified or misleading license documents or company documentation to create the appearance of legitimacy in counterfeiting operations, false indications of geographic origin of products, and trademark registrations that are made in bad faith by unscrupulous Chinese registrants. The United States also has raised concerns with China about key unresolved questions, such as the need to clarify the constructive knowledge standard applied in landlord liability proceedings.

Of particular and growing concern is the continuing registration of trademarks in bad faith, as disputes involving bad faith trademark filings persisted in 2018. U.S. companies across industry sectors continue to face Chinese applicants registering their marks and "holding them for ransom" or seeking to establish a business building off of the U.S. company's global reputation. These incidents have caused consumer confusion, commercial harm and costly legal proceedings. While China's National People's Congress amended China's *Trademark Law* in 2013, including through the addition of provisions to combat bad faith trademark filings, expanding protection to sound marks, permitting multi-class registration and streamlining application and appeal proceedings, the amended law has not been sufficient to surmount the great challenges facing rights holders, particularly in curbing bad faith registrations of foreign marks. Indeed, the number of bad faith trademark registrations appears to have grown. At the same time, bad faith trademark owners have grown increasingly aggressive. They sue legitimate brand owners in Chinese courts for trademark infringement, direct China's customs authorities to seize goods of U.S. companies en route to foreign markets and register infringing business names in foreign jurisdictions to support their fraudulent trademark activities in China – all of which expands the economic impact of bad faith trademark registrations well beyond China's borders. This issue continues to be raised with China.

Pharmaceuticals

China's regulatory framework for pharmaceuticals is a continuing major concern for the United States. Despite China's issuance of a number of new and amended measures in recent years, many needed reforms have not yet been implemented.

Beginning in 2015, China embarked on potentially wide-ranging reforms to its regulatory framework for pharmaceuticals. In August 2015, China's State Council issued a normative document entitled *Opinions on Reforming the Review and Approval Systems for Drugs and Medical Devices*, which described a number of reforms. Then, in 2017, China's State Council, jointly with the Communist Party's Central Committee, followed up by issuing the *Opinion on Strengthening the Reform of the Drug and Medical Device Review and Approval Process to Encourage Drug and Medical Device Innovation*, known as Order No. 42. In addition, CFDA subsequently issued several draft implementing measures that outlined a potential pathway for China to adopt significant regulatory reforms. To date, however, many of these measures remain in draft form, and further delay resulted when China ordered a restructuring of many of its regulatory authorities in March 2018. Several aspects of these measures also raise serious concerns for the United States.

Patent application examination guidelines governing information disclosure requirements for pharmaceutical patent applications have undergone various revisions over time. However, the results have been uneven, as applications for pharmaceutical patents too often are denied or invalidated after grant in China, even as U.S. and other leading patenting authorities grant patents for the same pharmaceutical innovations.

In 2016 and 2017, the State intellectual Property Office, since re-named the China National Intellectual Property Administration, issued proposed and then final revisions to its patent examination guidelines requiring patent examiners to take into account supplemental test data. However, there are continuing reports that China's patent examiners apply the new requirement inconsistently at best, resulting in the denial or invalidation of patents whose counterparts are granted in other major patenting jurisdictions.

Meanwhile, even if a pharmaceutical patent is granted, the manufacturer then typically must face long delays in China's review of applications for permission to market new and innovative pharmaceutical products in China, and for these products to be placed on approved reimbursement lists. These unnecessary delays have been the focus of various bilateral meetings between the United States and China. A reduction in regulatory delays would speed access by China's public to potentially life-saving medications and help sustain incentives for further pharmaceutical innovation.

On another front, in April 2016, CFDA issued the draft *Announcement Concerning the Undertaking on the Sales Price of Newly Marketed Drug* without soliciting public comment. This draft measure effectively would require drug manufacturers to commit to price concessions as a pre-condition for securing marketing approval for new drugs. Given its inconsistency with international regulatory practices, which are based on safety, efficacy and quality, the draft measure elicited serious concerns from the United States and U.S. industry. Subsequently, at the November 2016 JCCT meeting, China promised not to require any specific pricing information as part of the drug registration evaluation and approval process and, in addition, not to link pricing commitments to drug registration evaluation and approval. The United States remains concerned and is in close contact with U.S. industry to assess implementation of China's commitment.

The United States also continues to be concerned about the extent to which China provides effective protection against unfair commercial use of, and unauthorized disclosure of, undisclosed test or other data generated to obtain marketing approval for pharmaceutical products. In its WTO accession agreement, China committed to ensure that no subsequent applicant may rely on the undisclosed test or other data submitted in support of an application for marketing approval of new pharmaceutical products for a period of at least six years from the date of marketing approval in China. However, Chinese law does not include an appropriate definition of the term "new chemical entity" for purposes of identifying test or other data entitled to protection. There are reports that, as a result of the definition, generic manufacturers of pharmaceutical products have been granted marketing approvals by China's CFDA prior to the expiration of the six-year protection period and, in some cases, even before the originator's product has been approved.

This concern has remained unresolved despite the issuance of a number of proposed and final measures by Chinese authorities. At the December 2012 JCCT meeting, for example, China committed to define the term "new chemical entity" in a manner consistent with international research and development practices in order to ensure regulatory data of pharmaceutical products are protected against unfair commercial use and unauthorized disclosure. However, in the August 2015 *Opinions on Reforming the Review and Approval System for Drugs and Medical Devices*, China proposed a definition for "new drug" that could significantly affect the introduction of foreign pharmaceuticals into China's market and that would be inconsistent with international best practices. In addition, this measure called for providing accelerated review and approval for innovative new pharmaceuticals where the applicant has shifted manufacturing activities to China. It also called for the expedited review and approval of pharmaceuticals listed in a catalogue determined, in part, by MIIT – an agency without a direct link to determining safety and efficacy or public health priorities.

In May 2017, CFDA issued the draft *Policies Relevant to the Protection of the Rights and Interests and Innovators for the Encouragement of Innovation in Drugs and Medical Devices*, known as draft Notice 55. While draft Notice 55 is conceptual in nature and lacks essential details, the United States is concerned that draft Notice 55 will reduce the duration of data protection to the extent that an application for marketing approval in China has been received more than one year after first approval by regulatory authorities in the United States, the EU or Japan.

In October 2017, China also published limited draft revisions to the *Drug Administration Law* and stated that future proposed revisions to the remainder of this law would be forthcoming. In November 2017, CFDA issued the draft *Drug Registration Regulations*, which purported to promote reform and development, but actually reinforce a dated policy of only providing data protection for drugs first marketed in China. Drugs first marketed outside China would not qualify under CFDA's definition of "new drug" and therefore would not be eligible for data protection. The United States has conveyed its serious concerns about this and other draft measures to China's regulatory authorities.

In general, the numerous draft measures issued by China with regard to pharmaceuticals contain both positive and adverse aspects and often lack critical definitions and other details, which will need to be developed. Accordingly, in 2019, the United States will remain in close contact with U.S. industry and will continue to examine developments carefully and seek to ensure that U.S. interests are protected in this area.

Other Patent Issues

In recent years, China's regulatory authorities have issued draft updates to its *Standardization Law*, as well as proposed and final measures relating to standards that incorporate patents and relating to "secure and controllable" concepts, departmental rules on competition enforcement as it relates to intellectual property from *Anti-monopoly Law* enforcement agencies, draft *Patent Law* amendments, and a judicial interpretation on patent infringement proceedings. Individually and collectively, these proposed and final measures continue to generate concerns among U.S. and other foreign stakeholders. The United States has been carefully examining developments and has raised concerns with China about particular aspects of these various measures in both draft and final form.

Geographical Indications

At the December 2014 JCCT meeting, China agreed that a term, or its translation or transliteration, is not eligible for protection as a GI in its territory where the term is generic in its territory. China also committed that the relationship between trademarks and GIs is to be handled in accordance with relevant articles in the TRIPS Agreement and that legal means are available for interested third parties on the above grounds to object to and to cancel any registration or recognition granted to a GI. In addition, where a component of a compound GI is generic in its territory, China agreed that the GI protection is not to extend to that generic component. At the November 2015 JCCT meeting, China further clarified that these commitments apply to all GIs, including those protected pursuant to international agreements. China also committed to follow transparent procedures for developing cancellation procedures for already-granted GIs and targeted the end of 2016 for publishing these procedures in draft for public comment.

In March 2016, AQSIQ issued the *Measures on Protection of Foreign Geographical Indication Products*, which lists circumstances for the revocation of foreign GIs. The United States has been raising questions and making suggestions to improve this system and continues to work with AQSIQ on ways to help ensure that common names are not disadvantaged in China and to address possible inconsistencies between AQSIQ's treatment of GIs and the trademark and GI systems maintained by SAIC and MOA.

In June 2017, AQSIQ issued a notice listing numerous geographical indications to be considered for potential recognition through a bilateral agreement with the European Union. The announcement offered a 60-day period for interested parties to file oppositions. The United States raised a number of procedural questions regarding this process and encouraged AQSIQ to give full consideration to stakeholder input. The United States also asked AQSIQ to abide by China's existing bilateral commitments to the United States relating to GIs. In 2018, the United States continued to engage China to ensure that China complies with its bilateral and multilateral commitments and adheres to best practice standards.

Enforcement

Overview

The TRIPS Agreement requires China to ensure that enforcement procedures are available so as to permit effective action against any act of IPR infringement covered by the TRIPS Agreement, including expeditious remedies to prevent infringement and remedies that constitute a deterrent to further infringement. Effective IPR enforcement has not been achieved, and IPR infringement remains a serious problem throughout China. IPR enforcement is hampered by insufficient deterrence offered by civil and administrative recourse mechanisms as well as a still insufficient commitment overall, as demonstrated by resource constraints, lack of training, lack of initiative, lack of transparency in the enforcement process and its outcomes, procedural obstacles to civil enforcement, lack of coordination among Chinese government ministries and agencies, and local protectionism and corruption. In particular, in recent years, it appears that the actions of China's IPR enforcement authorities, including China's courts, at times may have been guided by industrial policy objectives, resulting in U.S. companies receiving unfair and biased treatment and often leading to the loss or significant devaluation of a U.S. company's technology, intellectual property or know-how.

Largely as a reflection of enforcement concerns, the United States elevated China to the Special 301

"Priority Watch List" in April 2005, where it has remained through 2018. Challenges have evolved over time, and important new concerns have arisen. The Special 301 Report for 2018 notes that the state of IP protection and enforcement in China reflects the country's failure to implement promises to strengthen IP protection. While some positive developments have emerged, ongoing concerns extend not only to gaps in legal authorities and weak enforcement channels, but also to investment and other regulatory requirements that promote the acquisition of foreign technology by domestic companies at the expense of providing reciprocity, a level playing field, transparency and predictability. The United States, other countries and the private sector have stressed the urgent need for China to embrace meaningful and deep reform as it proceeds with a years-long overhaul of its IP-related legal and regulatory framework.

No longer published concurrently with the Special 301 report, the Notorious Markets List identifies online and physical markets that exemplify key challenges in the global struggle against piracy and counterfeiting. The 2018 Notorious Markets List, as in prior years, included several examples of notorious physical and online markets located in China.

The United States continues to place the highest priority on addressing IPR protection and enforcement problems in China. Nevertheless, it is clear that there will continue to be a need for sustained efforts from the United States and other WTO members and their industries, along with the devotion of considerable resources and political will to IPR protection and enforcement by the Chinese government, if significant improvements are to be achieved.

The United States has worked with central, provincial and local government officials in China in a sustained effort to improve China's IPR enforcement, with a particular emphasis on the need for dramatically increased utilization of criminal remedies as well as the need to improve the effectiveness of civil and administrative enforcement mechanisms. In addition, a variety of U.S. agencies has held regular bilateral discussions with their Chinese counterparts, which have been periodically supplemented by technical assistance programs.

Meanwhile, the United States has continued to pursue a comprehensive initiative to combat the enormous global trade in counterfeit and pirated goods, including exports of infringing goods from China to the United States and the rest of the world. The Intellectual Property Enforcement Coordinator, a White House position, coordinates these and other efforts. U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE) seized a record number of 34,143 shipments of IPR-infringing goods fiscal year 2017. IPR seizures increased 8 percent over fiscal year 2016 and for the second year in a row, CBP and ICE seized more than 30,000 shipments of counterfeit and pirated goods. The total estimated manufacturers' suggested retail price (MSRP) would have been $1.2 billion if the goods had been genuine. The top two economies for seized goods in fiscal year 2017 were China and Hong Kong. Overall, approximately 48 percent of the seizures involved goods originating from China, as CBP seized 16,538 shipments from China with a total estimated MSRP of $554.6 million. Approximately 39 percent of the seizures involved goods originating from Hong Kong, as CBP seized 13,357 shipments from Hong Kong with an estimated MSRP of $386.2 million.

Over the years, China has pursued policies that continue to impede effective enforcement. Several of these policies were the focus of a WTO case initiated by the United States in April 2007, seeking changes to China's legal framework that would facilitate the utilization of criminal remedies against piracy and counterfeiting, enhance border enforcement against counterfeit goods and provide copyright protection for works that have not obtained approval from China's censorship authorities. As discussed above, China did not appeal WTO panel rulings in favor of the United States and subsequently modified the measures at issue, effective March 2010.

At the same time, other changes were needed to address market access concerns. As the WTO ruled in 2009 in a WTO case brought by the United States, China maintains market access barriers, such as import and distribution restrictions, which discourage and delay the introduction of numerous types of legitimate foreign products into China's market. These barriers have created additional incentives for infringement of copyrighted products like books, newspapers, journals, theatrical films, DVDs and music and inevitably lead consumers to the black market, compounding the severe problems already faced by China's enforcement authorities. The United States welcomed the steps that China took in 2011 to comply with the WTO rulings in this case with regard to books, newspapers, journals, DVDs and music. The United States also welcomed the U.S.-China MOU covering theatrical films, which so far has provided significant increases in the number of foreign films imported and distributed in China each year and significant additional revenue for U.S. film producers. Further developments relating to the films MOU are discussed above in the Trading Rights section.

Trade Secrets

The United States remains seriously concerned about continued instances in which the trade secrets of U.S. companies have been stolen by, or for the benefit of, Chinese competitors. U.S. companies investing in research and development in China are particularly at risk that locally hired engineers and other employees with access to their trade secret information will steal that information and transfer it to a competing state-owned enterprise or private Chinese enterprise. It has been difficult for some U.S. companies to obtain legal relief through China's legal system against those who have benefitted from this type of theft, despite apparently compelling evidence demonstrating guilt. The United States is also concerned that many more trade secrets cases involving U.S. companies and Chinese competitors go unreported, both because U.S. companies want to avoid both reputational harm and because they weigh the costs of pursuing legal relief against the likelihood of obtaining no redress through Chinese legal channels and possible commercial repercussions for shining light on the conduct at issue. Largely for these reasons, according to a 2015 industry survey, approximately 50 percent of U.S. companies doing business in China choose not to transfer key technologies into China. The taking of trade secrets is a key concern raised in USTR's Section 301 investigation.

Ensuring that companies are able to protect and enforce their IPR in China effectively, including trade secrets, is essential to promoting successful commercial relationships between U.S. and Chinese companies. In bilateral exchanges, the United States has urged China to take a holistic approach and to address many critically needed elements to strengthen its trade secrets regime, including in the areas of enhancing access to preliminary injunctions and evidence preservation orders, increasing damages, and protecting trade secrets from damaging disclosure by government bodies.

Going forward, protection against trade secret misappropriation in China will continue to be a top priority for the United States. The United States expects China to fully implement its past commitments and to make further needed improvements in its trade secrets regime.

Software Piracy

For several years, the United States has raised serious concerns about software piracy in China. A major focus of the United States' engagement of China in this area has focused on Chinese government agencies and state-owned enterprises.

As previously reported, in response to U.S. concerns about software piracy raised during the run-up to the April 2006 JCCT meeting, China issued rules requiring that computers be pre-installed with licensed operating system software and that government agencies purchase only computers satisfying this requirement, and a series of other JCCT and S&ED commitments relating to software piracy, including ones requiring Chinese government agencies at all levels of government and central state-owned enterprises to purchase and use legitimate software, and to promote the centralized procurement of software.

Nevertheless, the relatively modest progress made by China over the last several years in reducing the rate of end-user business software piracy rates is of continuing concern to the United States and to a variety of software developers. The United States will insist upon timely, meaningful and verifiable implementation of China's JCCT and S&ED commitments to eliminate the use of unauthorized software at all levels of government and to discourage the use of unauthorized software by enterprises, including major state-owned and state-invested enterprises, beginning with pilot projects encouraging automated software asset management and increased deterrent penalties for violators.

China exacerbated the challenges facing U.S. and other foreign suppliers of software in 2013 when the State Council and MOF issued measures that impose price controls and related requirements on software purchases by government entities and possibly state-owned enterprises that appear to promote the purchase of domestic software over foreign software. The United States has raised serious concerns with China about these measures, particularly in light of China's JCCT and S&ED commitments relating to intellectual property localization.

Other Piracy Issues

Despite many special campaigns in China over the years to combat piracy, repeated bilateral commitments by China to increase enforcement and an increase in civil IPR cases, sales of U.S. copyright-intensive goods and services in the China market remain substantially below levels in other markets, measured in a variety of ways, ranging from spending on legitimate music as a percentage of GDP to software sales per personal computer. The United States accordingly has urged China to continue its efforts to improve both protection and enforcement and to ensure that they result in an increase of sales of legitimate goods and services from all sources, including imports.

One problem is that television and radio tariffs for the broadcast of musical works were not adopted in China until January 2010, nine years after it was obligated to do so. These tariffs remain remarkably low.

In addition, piracy of movies (including during the pre-release phase), television programming and music remains widespread, particularly online, as China's Internet users are increasingly turning to streaming media to watch foreign movies and television programming. The encouraging growth of legitimate platforms streaming licensed content experienced a damaging setback when Chinese regulations governing content review imposed procedural obstacles that have resulted in extensive delays in legitimate platforms obtaining broadcast permissions. In 2018, these content-based restrictions increased, further restricting legitimate platforms from offering foreign content to Chinese consumers and further pushing Chinese consumers to illegal and unauthorized online sources. The United States has strongly encouraged China to streamline procedures to avoid impediments to the streaming of licensed content.

An additional growing concern involves illegal online content distribution via over-the-top set-top-boxes, known as media boxes. Not only is this illegal practice widespread in China, but also China is reported to be the source of a substantial share of media boxes pre-adapted to connect the user to online sources providing unlicensed content. China's regulatory authorities have taken some initial enforcement steps, but more steps are needed, as is closer cooperation with their U.S. counterparts.

Counterfeiting Issues

China's widespread counterfeiting not only harms the business interests of rights holders, both foreign and domestic, but also includes many products that pose a direct threat to the health and safety of consumers in the United States, China and elsewhere, such as pharmaceuticals, food and beverages, batteries, auto parts, industrial equipment and toys, among many other products. While the United States has received some positive reports about administrative and criminal enforcement efforts taken against some of the largest and most egregious offenders, it is clear that these efforts collectively have failed to arrest growth of counterfeiting in China, which remains the world's largest counterfeit producer and seller.

A particularly serious ongoing concern involves counterfeit semiconductors. As they enter the supply chain, they create the risk of installation of fake and shoddy semiconductor components in electronic equipment, including in equipment used for critical functions related to agricultural safety and security and a host of industrial sectors.

Over the past few years, several cases involving infringing and adulterated agricultural chemicals have come to light. These cases have caused significant public health, economic and environmental damage in China. At the same time, some trademark holders have reported a reduction in the visibility of counterfeit goods for sale in certain major retail and wholesale markets in China, and at least one trademark holder has reported that good enforcement activity followed its multi-year engagement with local authorities. Reports of improvements could be the result of intensified administrative and criminal enforcement in certain areas. It also may be attributable to steps taken by national and local AICs to target landlords of physical markets as part of a wider effort to promote enforcement of intellectual property rights, as well as court decisions that have found landlords liable for infringement that they knew or should have known was taking place on their premises. However, as noted above, greater clarity and uniformity in standards governing landlord liability is sorely needed, as many markets in China continue to trade in counterfeit and pirated merchandise.

Border Enforcement

With regard to border enforcement, the United States has encouraged China's General Administration of Customs to build on and expand enforcement cooperation relating to counterfeit and pirated goods destined for export. In 2007, the General Administration of Customs entered into a cooperation agreement with U.S. customs authorities to fight exports of counterfeit and pirated goods. To implement the agreement, the two customs authorities established a working group in 2013 and conducted a joint IPR enforcement operation. Since that meeting, the U.S. and Chinese customs authorities have conducted additional working group meetings and joint IPR enforcement operations and have exchanged seizure data for enforcement and targeting purposes. During these operations, the U.S. and Chinese customs authorities have focused on stopping shipments of IPR infringing goods from entering U.S. commerce, with the U.S. customs authorities making seizures at the U.S. border and the Chinese customs authorities interdicting exports of counterfeit goods destined for the United States.

SERVICES

The commitments that China made in the services area begin with the General Agreement on Trade in Services. The GATS provides a legal framework for addressing limitations affecting trade and investment in services, including national treatment, MFN and market access. It includes specific commitments by WTO members to restrict their use of those limitations and provides a forum for further negotiations to open services markets around the world. These commitments are contained in national services schedules, similar to the national schedules for tariffs.

In its Services Schedule, China committed to the substantial opening of a broad range of services sectors over time through the elimination of many existing limitations on market access, at all levels of government, particularly in sectors of importance to the United States, such as banking, insurance, telecommunications, distribution and professional services. At the time, these commitments were characterized as a good start toward opening up China's services sectors.

China also made certain "horizontal" commitments, which are commitments that apply to all sectors listed in its Services Schedule. The two most important of these cross-cutting commitments involve acquired rights and the licensing process. Under the acquired rights commitment, China agreed that the conditions of ownership, operation and scope of activities for a foreign company, as set out in the respective contractual or shareholder agreement or in a license establishing or authorizing the operation or supply of services by an existing foreign service supplier, will not be made more restrictive than they were on the date of China's accession to the WTO. In other words, if a foreign company had pre-WTO accession rights that went beyond the commitments made by China in its Services Schedule, the company could continue to operate with those rights.

In the licensing area, prior to China's WTO accession, foreign companies in many services sectors did not have an unqualified right to apply for a license to establish or otherwise provide services in China. They could only apply for a license if they first received an invitation from the relevant Chinese regulatory authorities, and even then the decision-making process lacked transparency and was subject to inordinate delay and discretion. In its accession agreement, China committed to licensing procedures that were streamlined, transparent and more predictable.

Under the terms of its Services Schedule, China was allowed to phase in many of its services commitments over time. The last of these commitments was scheduled to have been phased in by December 11, 2007.

At present, 17 years after China's accession to the WTO, significant challenges still remain in securing the benefits of many of China's services commitments. Through WTO dispute settlement, the United States was able to fully open China's financial information services sector in 2009, as China followed through on the terms of a settlement agreement requiring China to create an independent regulator and to remove restrictions that had been placed on foreign financial information service suppliers. Similarly, through WTO dispute settlement, the United States was able to secure the removal of importation and distribution restrictions applicable to copyright-intensive products such as books, newspapers, journals, DVDs and music, while also entering into a commercially beneficial MOU with China relating to the importation and distribution of theatrical films.

Beginning in 2017, China introduced a series of measures that would ease or remove foreign equity caps over time in the securities, fund management, futures and life insurance sectors. However, foreign investors continue to face restrictions in these and other financial services sectors due to discriminatory, unpredictable and non-transparent licensing procedures that effectively limit foreign participation.

In addition, strong concerns remain with regard to the implementation of other important services commitments, such as in the area of electronic payment services, where China has not yet opened up its market to permit foreign companies to supply electronic payment services for domestic currency credit and debit card transactions, even though it lost a WTO dispute on this issue and agreed to come into compliance with its GATS commitments by July 2013.

In 2018, China also continued to maintain or erect restrictive or cumbersome terms of entry in some sectors that prevent or discourage foreign suppliers from gaining market access. Many of these actions raise questions about commitments made by China in its Services Schedule. For example, China maintains an informal ban on entry in the basic telecommunications sector, and despite its commitments to open this sector, China has not granted any new licenses since acceding to the WTO on December 11, 2001. The requirement that any joint venture partners for basic telecommunications services be majority government-owned shuts off foreign suppliers from working with Chinese enterprises that are not majority government-owned. China also has issued very few licenses for foreign value-added telecommunications suppliers and continues to seek to regulate this sector according to a very restrictive listing of licenses that does not correspond to the innovative nature of the services involved. In addition, although China announced that it was removing registered capital requirements for many sectors (on a non-discriminatory basis) in 2014, the subsequently issued implementing rules are somewhat vague and the impact on foreign suppliers in many sectors is still not clear. Moreover, in sectors such as banking, insurance and legal services, uneven and sometimes discriminatory application of branching regulations limit or delay market access for foreign suppliers. In other sectors, particularly construction services, problematic measures appear to be taking away previously acquired market access rights.

Overall, the U.S. share of China's services market remains well below the U.S. share of the global services market. Any successes that U.S. services suppliers have experienced in China's market have been attributable largely to the incremental market openings phased in by China pursuant to its WTO commitments, with China providing few additional significant market openings beyond those to which it committed 17 years ago in its WTO accession agreement.

DISTRIBUTION SERVICES

Prior to its WTO accession, China generally did not permit foreign enterprises to distribute products in China, i.e., to provide wholesaling, commission agents', retailing or franchising services or to provide related services, such as repair and maintenance services. These services were largely restricted to Chinese enterprises, although some foreign-invested enterprises were allowed to engage in distribution services within China under certain circumstances.

In its WTO accession agreement, China committed to eliminate national treatment and market access restrictions on foreign enterprises providing these services through a local presence within three years of China's accession (i.e., by December 11, 2004), subject to limited product exceptions. In the meantime, China agreed to progressively liberalize its treatment of wholesaling services, commission agents' services and direct retailing services (except for sales away from a fixed location), as described below.

Overall, China has made progress in implementing its distribution services commitments. As discussed below, however, significant concerns remain in some areas.

Wholesaling Services

China committed that, immediately upon its accession to the WTO, it would begin to eliminate national treatment and market access limitations on foreign enterprises providing wholesaling services and commission agents' services through a local presence pursuant to an agreed schedule of liberalization. Within three years after accession (i.e., by December 11, 2004), almost all of the required liberalization should have been implemented. By this time, China agreed to permit foreign enterprises to supply wholesaling services and commission agents' services within China through wholly foreign-owned enterprises. In addition, exceptions that China had been allowed to maintain for books, newspapers, magazines, pharmaceutical products, pesticides and mulching films were to be eliminated. Exceptions for chemical fertilizers, processed oil and crude oil (but not salt and tobacco) were to be eliminated within five years after accession (i.e., by December 11, 2006).

As previously reported, MOFCOM issued the *Measures on the Management of Foreign Investment in the Commercial Sector* in April 2004. Among other things, these regulations lifted market access and national treatment restrictions on wholly foreign-owned enterprises and removed product exceptions for books, newspapers, magazines, pesticides and mulching films as of the scheduled phase-in date of December 11, 2004. The regulations also required enterprises to obtain central or provincial-level MOFCOM approval before providing wholesale services, and they appeared to set relatively low qualifying requirements, as enterprises needed only to satisfy the relatively modest capital requirements of the *Company Law* rather than the high capital requirements found in many other services sectors. Since the issuance of the regulations, U.S. companies have been able to improve the efficiency of their China supply chain management. In addition, many of them have been able to restructure their legal entities to integrate their China operations into their global business more fully and efficiently, although problems remain in certain areas.

Books, Movies and Music

As in the area of trading rights, China continued to impose restrictions on foreign enterprises' distribution of copyright-intensive products such as books, newspapers, journals, theatrical films, DVDs and music, despite its commitments to remove most market access and national treatment restrictions applicable to the distribution of these products by no later than December 11, 2004. China's restrictions were set forth in a complex web of measures issued by numerous agencies, including the State Council, NDRC, MOFCOM, the Ministry of Culture, SARFT and GAPP.

As previously reported, the United States initiated a WTO dispute settlement case against China in April 2007 challenging the importation and distribution restrictions applicable to copyright-intensive products such as books, newspapers, journals, theatrical films, DVDs and music. As discussed above in the Trading Rights section, a WTO panel issued its decision in August 2009, ruling in favor of the United States on all significant claims, and China appealed. The WTO's Appellate Body rejected China's appeal on all counts in December 2009, and China agreed to come into compliance with these rulings by March 2011. China subsequently issued several revised measures, and repealed other measures, relating to its distribution restrictions on imported books, newspapers, journals, DVDs and music, although these steps have not yet brought China into full compliance with the WTO's rulings, particularly with regard to the online distribution of music.

With regard to theatrical films, China proposed bilateral discussions with the United States in order to seek an alternative solution. After months of negotiations, which included discussions between the two sides' Vice Presidents, the United States and China reached agreement in February 2012 on an MOU designed to provide for substantial increases in the number of foreign films imported and distributed in China each year, substantial additional revenue for U.S. film producers and the opening up of distribution opportunities relating to imported films. The MOU also provided that it would be reviewed after five years in order for the two sides to discuss issues of concern, including additional compensation for the U.S. side.

To date, China has not yet fully implemented certain of its MOU commitments, including a critical commitment to open up film distribution opportunities relating to imported revenue-sharing films. In addition, U.S. industry reports that China has been imposing an informal quota on the total number of U.S. revenue-sharing films and flat-fee films that can be imported each year, which, if true, would undermine the terms of the MOU. As a result, the United States has been pressing China for full implementation of the MOU.

The films MOU provided that it would be reviewed in calendar year 2017 in order for the two sides to discuss issues of concern, including additional meaningful compensation for the U.S. side in terms of the number of revenue-sharing films to be imported each year and the share of gross box office receipts received by U.S. enterprises. At the November 2016 JCCT meeting, China promised that those discussions not only would seek to increase the number of imported revenue-sharing films and the U.S. share of gross box office receipts, but also would seek to address outstanding U.S. concerns relating to other policies and practices that may impede the U.S. film industry's access to China's market, such as importation rights, the number of distributors of imported films and the independence of distributors, among other issues. In 2017, in accordance with the terms of the MOU, the two sides began discussions regarding the provision of further meaningful compensation to the United States. These discussions continued until March 2018, when China embarked on a major government reorganization that involved significant changes for China's Film Bureau. The discussions have not yet resumed.

Pharmaceuticals

China committed to allow foreign suppliers to distribute pharmaceuticals by December 11, 2004, and it began accepting applications from and issuing wholesale licenses to foreign pharmaceutical companies about six months after that deadline. However, many restrictions affecting the pharmaceuticals sector continue to make it difficult for foreign pharmaceutical companies to realize the full benefits of China's distribution commitments. The United States is continuing to engage the Chinese regulatory authorities in these areas as part of a broader effort to promote comprehensive reform and to reduce the unnecessary trade barriers that foreign companies face.

Crude Oil and Processed Oil

China committed to permit foreign enterprises to engage in wholesale distribution of crude oil and processed oil, e.g., gasoline, by December 11, 2006. Shortly before this deadline, as previously reported, China issued regulations that prevent U.S. and other foreign enterprises from realizing the full benefits of this important commitment. In particular, China's regulations impose high thresholds and other potential impediments on foreign enterprises seeking to enter the wholesale distribution sector, such as requirements relating to levels of storage capacity, pipelines, rail lines, docks and supply contracts. It appears that some of these requirements can only be satisfied by China's state-owned enterprises. The United States has raised concerns about these regulations in connection with past transitional reviews before the Council for Trade in Services, while U.S. industry has attempted to compete under difficult circumstances.

Automobiles

China began to implement several measures related to the distribution of automobiles by foreign enterprises in 2005, including the February 2005 *Implementing Rules for the Administration of Brand-Specific Automobile Dealerships,* jointly issued by MOFCOM, NDRC and SAIC. In November 2005, NDRC followed up with the *Rules for Auto External Marks*, and in January 2006 MOFCOM issued the *Implementing Rules for the Evaluation of Eligibility of Auto General Distributors and Brand-specific Dealers*. While U.S. industry has generally welcomed these measures, they do contain some restrictions on foreign enterprises that might not be applied to domestic enterprises. The United States has been closely reviewing how China applies these measures in an effort to ensure that foreign enterprises are not adversely affected by these restrictions.

Retailing Services

China committed that, immediately upon its accession to the WTO, it would begin to eliminate national treatment and market access limitations on foreign enterprises providing retailing services through a local presence pursuant to an agreed schedule of liberalization. Within three years after accession (i.e., by December 11, 2004), almost all of the required liberalization should have been implemented. By this time, China agreed to permit foreign enterprises to supply retailing services through wholly foreign-owned enterprises. In addition, by this time, exceptions that China had been allowed to maintain for pharmaceutical products, pesticides, mulching films and processed oil were to be eliminated. An exception for chemical fertilizers was to be eliminated within five years after accession (i.e., by December 11, 2006).

The April 2004 distribution regulations issued by MOFCOM lifted market access and national treatment limitations on wholly foreign-owned enterprises and removed the product exceptions for pesticides and mulching films as of the scheduled phase-in date of December 11, 2004. These regulations also removed the product exception for chemical fertilizer as of the scheduled phase-in date of December 11, 2006. In addition, in the 2011 *Catalogue Guiding Foreign Investment in Industry*, China removed the retailing of over-the-counter medicines from the "restricted" category of foreign investments. In the 2017 revision of this Catalogue, which includes China's Foreign investment Negative List, China lifted its restrictions on the retailing of pharmaceutical products more broadly. The 2018 version of China's Foreign Investment Negative List maintains this approach by removing all restrictions on wholesale and retail trade (except for wholesale and retail of tobacco and tobacco products).

Processed Oil

China committed to allow wholly foreign-owned enterprises to sell processed oil, e.g., gasoline, at the retail level by December 11, 2004, without any market access or national treatment limitations. However, to date, China has treated retail gas stations as falling under the chain store provision in its Services Schedule, which permits only joint ventures with minority foreign ownership for "those chain stores which sell products of different types and brands from multiple suppliers with more than 30 outlets." This treatment has severely restricted foreign suppliers' access to China's retail gas market, a situation exacerbated by China's restrictions on foreign enterprises that seek to engage in wholesale distribution of crude oil.

Franchising Services

As part of its distribution commitments, China committed to permit the cross-border supply of franchising services immediately upon its accession to the WTO. It also committed to permit foreign enterprises to provide franchising services in China, without any market access or national treatment limitations, by December 11, 2004.

In December 2004, as previously reported, MOFCOM issued new rules governing the supply of franchising services in China, which included a requirement that a franchiser own and operate at least two units in China for one year before being eligible to offer franchises in China. In 2007, China eased the requirement that a franchiser own and operate at least two units in China by allowing a franchiser to offer franchise services in China if it owns and operates two units anywhere in the world.

Direct Selling Services

In its WTO accession agreement, China did not agree to any liberalization in the area of direct selling, or sales away from a fixed location, during the first three years of its WTO membership. By December 11, 2004, however, China committed to lift market access and national treatment restrictions in this area.

Although the business volume of direct sales companies in China continues to grow, the growth potential of this sector remains hindered by restrictions in the regulations governing direct selling services in China. These regulations were issued more than 10 years ago and do not reflect the more relaxed regulatory approach governing emerging models of retailing services, such as online marketing, which are competing directly with direct sales. Problematic provisions in the direct selling regulations include restrictions on the types of products that can be sold, restrictions on compensation methods and onerous requirements regarding service sales centers. All of these restrictions place direct sellers at a competitive disadvantage with new forms of retailing. To date, U.S. engagement has not persuaded China to reconsider the various problematic provisions in its direct selling regulations.

Financial Services

BANKING SERVICES

Prior to its accession to the WTO, China had allowed foreign banks to conduct foreign currency business in selected cities. Although China had also permitted foreign banks, on an experimental basis, to conduct domestic currency business, the experiment was limited to foreign customers in two cities.

In its WTO accession agreement, China committed to a five-year phase-in for banking services by foreign banks. Specifically, China agreed that, immediately upon its accession, it would allow U.S. and other foreign banks to conduct foreign currency business without any market access or national treatment limitations and conduct domestic currency business with foreign-invested enterprises and foreign individuals, subject to certain geographic restrictions. The ability of U.S. and other foreign banks to conduct domestic currency business with Chinese enterprises and individuals was to be phased in. Within two years after accession, foreign banks were also to be able to conduct domestic currency business with Chinese enterprises, subject to certain geographic restrictions. Within five years after accession, foreign banks were to be able to conduct domestic currency business with Chinese enterprises and individuals, and all geographic restrictions were to be lifted. Foreign banks were also to be permitted to provide financial leasing services at the same time that Chinese banks are permitted to do so.

Since its accession to the WTO, China has taken a number of steps to implement its banking services commitments. At times, however, China's implementation efforts have generated concerns, and there are some instances in which China still does not seem to have fully implemented particular commitments.

As previously reported, shortly after China's accession to the WTO, the PBOC issued regulations governing foreign-funded banks, along with implementing rules, which became effective February 2002. The PBOC also issued several other related measures. Although these measures appeared to keep pace with the WTO commitments that China had made, it became clear that the PBOC had decided to exercise significant caution in opening up the banking sector. In particular, it imposed working capital requirements and other requirements that exceeded international norms and made it more difficult for foreign banks to establish and expand their market presence in China. Many of these requirements, moreover, did not apply equally to foreign and domestic banks.

For example, China appears to have fallen behind in implementing its commitments regarding the establishment of Chinese-foreign joint banks. In its Services Schedule, China agreed that qualified foreign financial institutions would be permitted to establish Chinese-foreign joint banks immediately after China acceded, and it did not schedule any limitation on the percentage of foreign ownership in these banks. Until recently, China limited the sale of equity stakes in existing state-owned banks to a single foreign investor to 20 percent, while the total equity share of all foreign investors was limited to 25 percent. In August 2018, the China Banking Insurance Regulatory Commission finalized rules that remove this limit on foreign equity stakes in Chinese banks.

Another problematic area involves the ability of U.S. and other foreign banks to participate in the domestic currency business in China, the business that foreign banks were most eager to pursue in China, particularly with regard to Chinese individuals. As previously reported, despite high capital requirements and other continuing impediments to entry into the domestic currency business, participation of U.S. and other foreign banks in the domestic currency business expanded tremendously after China acceded to the WTO on December 11, 2001, first with regard to foreign-invested enterprises and foreign individuals and later with regard to Chinese enterprises, subject to geographic restrictions allowed by China's WTO commitments. China had committed to allow foreign banks to conduct domestic currency business with Chinese individuals by December 11, 2006, but it was only willing to do so subject to a number of problematic restrictions.

In November 2006, the State Council issued the *Regulations for the Administration of Foreign-funded Banks*. Among other things, these regulations mandated that only foreign-funded banks that have had a representative office in China for two years and that have total assets exceeding $10 billion can apply to incorporate in China. After incorporating, moreover, these banks only become eligible to offer full domestic currency services to Chinese individuals if they can demonstrate that they have operated in China for one year and have had two consecutive years of profits. The regulations also restricted the scope of activities that can be conducted by foreign banks seeking to operate in China through branches instead of through subsidiaries. In particular, the regulations restricted the domestic currency business of foreign bank branches. While foreign bank branches can continue to take deposits from and make loans to Chinese enterprises in domestic currency, they can only take domestic currency deposits of RMB 1 million ($164,000) or more from Chinese individuals and cannot make any domestic currency loans to Chinese individuals. In addition, unlike foreign banks incorporated in China, foreign bank branches cannot issue domestic currency credit and debit cards to Chinese enterprises or Chinese individuals.

Other problems arose once the *Regulations for the Administration of Foreign-funded Banks* went into effect in December 2006. For example, Chinese regulators did not act on the applications of foreign banks incorporated in China to issue domestic currency credit and debit cards, or to trade or underwrite commercial paper or long-term listed domestic currency bonds.

Since 2007, China has made various bilateral commitments to implement incremental improvements in the access of U.S. banks to its market. Significant market openings have been elusive, however.

For example, in 2007, China committed to act on the applications of foreign banks incorporated in China seeking to issue their own domestic currency credit and debit cards. However, the PBOC insists as a condition of its approval that the banks move the data processing for these credit and debit cards onshore, a costly step that has limited foreign participation in the market to date.

In 2011, China's interbank bond market oversight body issued qualifying criteria for underwriters and opened up a window for applications. Many U.S. and other foreign institutions subsequently applied, although the application procedures were discriminatory and non-transparent, and initially only one foreign bank was approved to underwrite. Years later, during the run-up to the July 2017 CED meeting, China issued bond settlement Type A licenses and "sub" underwriting licenses to two qualified U.S. financial institutions. However, U.S. financial institutions continue to face restrictions in terms of acquiring "lead" underwriting licenses.

In 2011, China committed to allow locally incorporated U.S. and other foreign banks in China to distribute mutual funds, act as custodians for mutual funds, and serve as margin depository banks for qualified foreign institutional investors engaging in financial futures transactions. However, there does not appear to be an open and transparent process that would allow U.S banks to obtain this license.

In 2013, China pledged that locally incorporated foreign banks and securities firms will be able to directly trade government bond futures, but has not yet allowed domestic or foreign banks to trade these hedging instruments. China also has not followed through on a commitment to implement measures to recognize the enforceability of close-out netting, and as a result financial institutions continue to incur sharply increased costs.

The continued existence of these various formal and informal barriers to foreign participation in the Chinese banking sector has disadvantaged foreign banking institutions. Indeed, it has contributed, in part, to a decline in foreign banking assets' share of overall Chinese banking system assets since 2006.

In November 2017, immediately after President Trump's visit to Beijing, China unilaterally announced that it would be taking steps to ease restrictions on foreign banks' access to China's market, including by lifting the equity caps on single and multiple foreign investors in existing Chinese-owned banks and financial asset management companies and by beginning to apply the same set of rules for domestic and foreign investment in these banks. In 2018, China issued measures that remove these foreign equity caps and that remove some market access limitations and ease some regulatory requirements for foreign banks. However, the measures do not clearly set out a path for U.S. investors to obtain licenses needed to serve their clients effectively. The United States continues to press these issues with China.

SECURITIES AND ASSET MANAGEMENT SERVICES

Over the years, the United States has pressed China for further liberalization of its securities and fund management services sector beyond its original WTO commitments, where China capped foreign ownership interests in securities firms at 33 percent and in asset (i.e., fund) management firms at 49 percent. Following a commitment made at the May 2012 S&ED meeting, China raised permissible foreign ownership in securities firms from 33 percent to 49 percent. Later, at subsequent S&ED meetings, China committed to gradually raise the permitted equity holding of qualified foreign financial institutions in securities and fund management companies. China also committed to allow wholly foreign-owned qualified foreign financial institutions to apply for registration of private fund management entities to engage in private securities fund management business. Since then, China has taken limited steps to follow up on these commitments. As of December 2018, China had approved two foreign companies to establish a majority (i.e., 51 percent) foreign-owned joint venture in the securities sector, and applications from other foreign companies reportedly are under consideration. In addition, China has licensed more than a dozen wholly foreign-owned companies to provide private fund management services to high-wealth individuals and large institutional investors, although these services represent only a subset of the services normally provided by securities and asset management companies.

Notably, foreign equity caps are not the only restrictions that China imposes on foreign securities firms and fund management firms. China also maintains non-transparent, burdensome and discriminatory licensing practices that limit foreign participation in these sectors.

In November 2017, immediately after President Trump's visit to Beijing, China unilaterally announced that it would phase out existing foreign equity caps for securities, fund management and futures companies over the next three years to allow access for wholly foreign-owned companies. With regard to securities, in April 2018, China issued an implementing measure that immediately raises the foreign equity cap to 51 percent and, in three years, removes the foreign equity cap and scope of business restrictions. However, other concerns remain, including with regard to the ability of foreign companies to obtain necessary licenses. With regard to fund management, China has not yet issued an implementing measure. With regard to futures, in May 2018, China issued a draft implementing measure that states, in an explanatory note, that China plans to allow 51 percent foreign equity ownership immediately and to remove the foreign equity cap in three years. Since then one foreign company has received approval to establish a majority-owned securities company in China and other companies' applications have been accepted for review.

MOTOR VEHICLE FINANCING SERVICES

In its WTO accession agreement, China agreed to open up the motor vehicle financing sector to foreign non-bank financial institutions for the first time, and it did so without any limitations on market access or national treatment. These commitments became effective immediately upon China's accession to the WTO. As previously reported, China finally implemented the measures necessary to allow foreign financial institutions to obtain licenses and begin offering auto loans in October 2004, nearly three years after its accession to the WTO.

At the May 2012 S&ED meeting, China committed to approve applications by qualified auto financing companies (AFCs), including foreign-invested entities, to issue financial bonds in China, so that they have regular access to financing in the interbank bond market. In addition, China committed that foreign-invested and Chinese-invested AFCs would enjoy the same treatment in issuing asset-backed securities during the trial period of asset securitization in China.

INSURANCE SERVICES

Prior to its accession to the WTO, China allowed selected foreign insurers to operate in China on a limited basis and in only two cities. Three U.S. insurers had licenses to operate, and several more were either waiting for approval of their licenses or were qualified to operate but had not yet been invited to apply for a license by China's insurance regulator, the China Insurance Regulatory Commission.

In its WTO accession agreement, China agreed to phase out existing geographic restrictions on all types of insurance operations during the first three years after accession. It also agreed to expand the ownership rights of foreign companies over time. Specifically, China committed to allow foreign life insurers to hold a 50-percent equity share in a joint venture upon accession. China also committed to allow foreign property, casualty and other non-life insurers to establish as a branch or as a joint venture with a 51-percent equity share upon accession and to establish as a wholly foreign-owned subsidiary two years after accession. In addition, foreign insurers handling large scale commercial risks, marine, aviation and transport insurance, and reinsurance were to be permitted to establish as a wholly foreign-owned subsidiary five years after accession. China further agreed to permit all foreign insurers to expand the scope of their activities to include health, group and pension/annuities lines of insurance within three years after accession.

China also made additional significant commitments relating specifically to branching. China committed to allow non-life insurance firms to establish as a branch in China upon accession and to permit internal branching in accordance with the lifting of China's geographic restrictions. China further agreed that foreign insurers already established in China that were seeking authorization to establish branches or sub-branches would not have to satisfy the requirements applicable to foreign insurers seeking a license to enter China's market.

As previously reported, the China Insurance Regulatory Commission (CIRC) issued several new insurance regulations and implementing rules after China acceded to the WTO. These measures implemented many of China's commitments, but they also created problems in the critical areas of capitalization requirements, branching and transparency, and foreign insurers have often faced restrictions or obstacles that hinder them from expanding their presence in China's market.

Since China's accession to the WTO, U.S. engagement has led to improvements with regard to capital requirements and licensing, although many other needed improvements remain. For example, China continues to use formal and informal policies and practices to maintain market access barriers that limit the market share of foreign-invested insurance companies in China following China's accession to the WTO. At present, in the life and pension insurance sectors, where China only permits foreign companies to participate in Chinese-foreign joint ventures, with foreign equity capped at 50 percent, the market share of these foreign-invested companies is about seven percent. China also caps foreign equity at 50 percent in the health insurance sector. The market share of foreign-invested companies in the non-life (i.e., property and casualty) insurance sector is only two percent, despite the absence of foreign equity caps. In addition, although China's *Foreign Investment Catalogue* indicates that China has liberalized its insurance brokerage services sector, China has not provided clarification to confirm that foreign insurance brokers will be subject to the same rules as domestic insurance brokers, which is necessary to enable foreign brokers to take advantage of the promised market opening. Meanwhile, China has entirely closed its market for political risk insurance to foreign participation.

Over the years, the United States has pressed China regarding the need for CIRC to follow non-discriminatory procedures to approve U.S. companies for internal branches and sub-branches, following established regulatory time frames and recognizing the right to obtain approval for multiple, concurrent branches. The United States also has pressed CIRC to further open up the life, health and pension insurance, insurance brokerage and other insurance sectors, and to follow non-discriminatory procedures when approving new licensing requests and internal branching requests. At the July 2013 S&ED meeting, China announced that it planned to expand its pilot projects for tax-deferred insurance pension products to additional regions and that it would treat domestic enterprises and foreign-invested enterprises equally with regard to participation and any future expansion, but it has not followed through on this commitment. At the July 2014 S&ED meeting, China announced that it welcomes foreign companies to submit applications for internal branches and that it would follow the timeframes set forth in its own regulations in reviewing and approving those applications.

In November 2017, immediately after President Trump's visit to Beijing, China unilaterally announced that it would allow foreign investors to hold up to 51 percent equity in the life insurance sector in three years, with this cap removed entirely in five years, in order to allow access for wholly foreign-owned companies. In May 2018, China issued a draft measure that would raise the foreign equity cap for life, pension and health insurance to 51 percent. However, this draft measure provides no pathway for full removal of the cap on foreign equity investment.

ENTERPRISE ANNUITIES SERVICES

China maintains a complex approval process for the licensing of suppliers of enterprise annuities services, and China's regulatory authorities – which include the Ministry of Human Resources and Social Security as well as the China Banking Regulatory Commission, the China Securities Regulatory Commission and CIRC – have not granted any new licenses in more than seven years. Even under previous licensing windows, China licensed very few foreign suppliers, and only for limited elements of enterprise annuities services. The United States has urged China to re-open its licensing process for suppliers of enterprise annuities services and to ensure that its licensing procedures are transparent and do not discriminate against qualified foreign suppliers.

AUTO INSURANCE SERVICES

For years, the United States had sought the opening of China's mandatory third party liability auto insurance services sector to foreign-invested insurance companies. During the May 2011 S&ED meeting, China pledged to "actively study and push forward the opening of" mandatory third party liability auto insurance in China to foreign-invested insurance companies, even though China was not required to open this services sector by its GATS commitments. At the May 2012 S&ED meeting, China noted that it had amended its regulations to allow foreign-invested insurance companies to sell mandatory third party liability auto insurance in China. The United States continues to monitor China's opening of mandatory third-party auto insurance to ensure that foreign-invested companies are able to compete on a fair and effective basis.

FINANCIAL INFORMATION SERVICES

In its WTO accession agreement, as noted above, China committed that, for the services included in its Services Schedule, the relevant regulatory authorities would be separate from, and not accountable to, any service suppliers they regulated, with two specified exceptions. One of the services included in China's Services Schedule – and not listed as an exception – is the "provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services."

As previously reported, following its accession to the WTO, China did not establish an independent regulator in the financial information services sector. Xinhua, the Chinese state news agency, remained the regulator of, and became a major market competitor of, foreign financial information service providers in China. In addition, in 2006, a major problem developed when Xinhua issued a measure that precluded foreign providers of financial information services from contracting directly with or providing financial information services directly to domestic Chinese clients. Instead, foreign financial information service providers were required to operate through a Xinhua-designated agent, and the only agent designated was a Xinhua affiliate. These new restrictions did not apply to domestic financial information service providers and, in addition, contrasted with the rights previously enjoyed by foreign information service providers since the issuance of the 1996 rules, well before China's accession to the WTO in December 2001.

In March 2008, after it had become clear that sustained bilateral engagement of China would not resolve the serious WTO concerns generated by Xinhua's restrictions, the United States and the EU initiated WTO dispute settlement proceedings against China. Canada later joined in as a co-complainant in September 2008. In November 2008, an MOU was signed in which China addressed all of the concerns that had been raised by the United States, the EU and Canada. Among other things, China agreed to establish an independent regulator, to eliminate the agency requirement for foreign suppliers and to permit foreign suppliers to establish local operations in China, with all necessary implementing measures issued by April 2009, effective no later than June 2009. Subsequently, China timely issued the measures necessary to comply with the terms of the MOU.

ELECTRONIC PAYMENT SERVICES

In the Services Schedule accompanying its Protocol of Accession, China committed to remove market access limitations and provide national treatment for foreign suppliers of payment and money transmission services, including credit, charge and debit cards. This commitment was to be implemented by no later than December 11, 2006.

In the years leading up to 2006, China's regulator, the PBOC, placed severe restrictions on foreign suppliers of electronic payment services, like the major U.S. payment card companies, which process electronic transactions involving credit, debit, prepaid and other payment cards. However, the PBOC prohibited foreign suppliers from processing the typical payment card transaction in China, in which a Chinese consumer makes a payment in China's domestic currency, the RMB. Instead, through a variety of measures, the PBOC created a national champion, allowing only one domestic entity, China Union Pay, a state-owned entity created by the PBOC and owned by participating Chinese banks, to provide these services.

Beginning in 2006, as the deadline for implementation of China's commitments approached, a number of troubling proposals were attributed to China Union Pay and apparently supported by the PBOC. The common theme of these proposals was that China Union Pay would continue to be designated as a monopoly supplier of electronic payment services for domestic currency transactions involving Chinese consumers, and that no other suppliers would be able to enter this market. Through a series of bilateral meetings beginning in September 2006, the United States cautioned China that none of the proposals being attributed to China Union Pay seemed to satisfy the commitments that China had made to open up its market to foreign providers of electronic payment services. The United States reinforced this message during the transitional reviews before the Committee on Trade in Financial Services, held in November 2006. The United States also raised this issue on the margins of the first SED meeting, held in December 2006.

After China's deadline of December 11, 2006, which passed without any action having been taken by China, the United States again pressed China. The United States raised its concerns in connection with SED meetings and other bilateral meetings in 2007 and 2008 as well as at the WTO during the transitional reviews before the Committee for Trade in Financial Services in 2007, 2008 and 2009 and China's second and third Trade Policy Reviews, held in 2008 and 2010, without making progress.

In September 2010, the United States brought a WTO case challenging China's various restrictions on foreign suppliers of electronic payment services in an effort to ensure that U.S. suppliers would enjoy the full benefits of the market-opening commitments that China made in its Services Schedule. Consultations were held in October 2010. At the United States' request, a WTO panel was established to hear this case in March 2011, and six other WTO members joined the case as third parties. Hearings before the panel took place in October and December 2011, and the panel issued its decision in July 2012. The panel found the challenged restrictions to be inconsistent with China's commitments under the GATS. China decided not to appeal the panel's decision and subsequently agreed to come into compliance with the WTO's rulings by July 2013. China did take some steps toward complying with the WTO's rulings. China repealed certain challenged measures, but imposed a new licensing requirement for foreign suppliers to be able to supply electronic payment services, without also taking the critical step of establishing a process for foreign suppliers to obtain the needed licenses.

In October 2014, China's State Council announced that China would be opening its market to foreign suppliers of electronic payment services, but it did not issue an official decision confirming the opening until April 2015. In that decision, the State Council set out various requirements that must be satisfied by a company in order to receive a license, including a two-step application process, and authorized the PBOC to issue regulations to implement this licensing process.

In August 2015, the PBOC issued draft licensing regulations for public comment, and the United States and U.S. stakeholders submitted comments. However, it was not until June 2016 during the S&ED meeting that the PBOC issued final licensing regulations. The PBOC followed up with the issuance of additional guidance for potential applicants in October 2016 and June 2017. Through these measures, the PBOC created a two-step licensing process, with a supplier first being required to secure approval to begin one year of preparatory work before it can even apply for a license to supply electronic payment services in China's market.

To date, no foreign supplier has been able to secure a license, as the PBOC continues to delay. Indeed, one major U.S. supplier submitted its application to begin its preparatory work in November 2017, and more than one year later the PBOC still had not even accepted that application for consideration. Another major U.S. supplier faces a similar situation with the application that it filed in April 2018.

Throughout the time that China has actively delayed opening up its market to foreign suppliers, China's national champion, China Union Pay, has used its exclusive access to domestic currency transactions in the China market, and the revenues that come with it, to support its efforts to build out its electronic payment services network abroad, including in the United States. In one telling example, China Union Pay reportedly has reached 100 percent penetration at U.S. automated teller machines and between 80 and 90 percent penetration at U.S. stores that accept credit cards. This history shows how China has been able to maintain market-distorting practices that benefit its own companies, even in the face of adverse rulings at the WTO. The United States continues to raise its serious concerns about this matter with China.

Telecommunications Services

In the Services Schedule accompanying its WTO accession agreement, China committed to permit foreign suppliers to provide a broad range of telecommunications services through joint ventures with Chinese companies, including domestic and international wired services, mobile voice and data services, value-added services (such as electronic mail, voice mail and on-line information and database retrieval) and paging services. The foreign equity stake permitted in the joint ventures was to increase over time, reaching a maximum of 49 percent for basic telecommunications services and 50 percent for value-added services. In addition, all geographical restrictions were to be eliminated within two to six years after China's WTO accession, depending on the particular services sector.

Importantly, China also accepted key principles from the WTO Reference Paper on regulatory principles. As a result, China became obligated to separate the regulatory and operating functions of the telecommunications regulatory agency in China (now known as MIIT), which was the operator of China Telecom at the time of China's accession to the WTO. China also became obligated to adopt pro-competitive regulatory principles, such as cost-based pricing and the right of interconnection, which are necessary for foreign-invested joint ventures to compete with incumbent suppliers such as China Telecom, China Unicom and China Mobile.

Even though China appears to have nominally implemented its WTO commitments on schedule, no meaningful market-opening progress has taken place in the telecommunications services sector through 2017. As previously reported, with regard to basic services, MIIT's imposition of informal bans on new entry, limitations on foreign suppliers' selection of Chinese joint venture partners and high capital requirements, have continued to present formidable barriers to market entry for foreign suppliers. In addition, the approach that China has taken to regulating value-added services, including its insistence on classifying certain value-added services as basic services when provided by foreign suppliers, and other uncertainties presented by China's classification of value-added services, have presented similarly formidable barriers to foreign entry.

In March 2016, China issued a revised *Catalogue of Telecommunications Services*. Among other things, the catalogue seeks to expand the scope of value-added telecommunications services to include a range of Internet-related services, including cloud computing services, thereby subjecting them to the foreign equity caps that apply to the telecommunications sector, even though these services are not telecommunications services, as discussed in the Internet-related Services section below. In addition, the catalogue continues to maintain for licensing purposes a rigid and overly specific classification of what is understood as value-added telecommunications services instead of adopting a broad, functional definition of these services that better supports innovation.

As China completes its 17th year as a WTO member, the United States is unaware of any domestic or foreign application for a new stand-alone license to provide basic telecommunications services that has completed the MIIT licensing process, even in commercially attractive areas such as the re-sale of basic telecommunications services, leased line services or corporate data services. At present, the number of suppliers of basic telecommunications services appears to be frozen at three Chinese state-owned enterprises, limiting the opportunities for new joint ventures and reflecting a level of competition that is extraordinarily low given the size of China's market. Meanwhile, with regard to value-added services, the Chinese regulator – MIIT – had licensed more than 29,000 domestic suppliers as of November 2013, but only 41 foreign suppliers.

With regard to satellite services, such as video transport services for Chinese broadcasters or cable companies, U.S. satellite operators remain severely hampered by Chinese policies that prohibit foreign satellite operators from obtaining licenses to provide these services in China and that instead only allow a foreign satellite operator to use a licensed Chinese satellite operator as an agent to provide these services. These policies have made it difficult for foreign satellite operators to develop their own customer base in China, as Chinese satellite operators essentially have a "first right of refusal" with regard to potential customers.

Many of the difficulties faced by foreign suppliers in accessing China's telecommunications market seem directly attributable to the actions of MIIT, China's telecommunications regulator. While MIIT is nominally separate from China's telecommunications firms, it maintains extensive influence and control over their operations and continues to use its regulatory authority to disadvantage foreign firms.

The United States continues to raise its many telecommunications concerns with China, using bilateral engagement and WTO meetings, including the annual transitional reviews before the Council for Trade in Services and China's Trade Policy Reviews, where the United States has received support from other WTO members. These efforts, however, achieved virtually no progress.

Audio-visual and Related Services

As discussed in the Distribution Services section above, in 2011, China removed various importation and distribution restrictions affecting books, newspapers, journals, sound recordings and DVDs in response to a successful WTO case brought by the United States. China also entered into an MOU with the United States in 2012 providing increased and improved market access for imported theatrical films. At the same time, China's regulation of other audiovisual and related services, including services associated with theatres (where China made a WTO commitment to allow 49 percent foreign ownership) as well as television and radio stations, production and programming (for which China made no commitments), has remained highly restricted.

With regard to theatres, China's ownership restrictions have made it unattractive for foreign companies to enter into joint ventures with Chinese partners. Currently, no U.S. company is involved in the ownership or operation of a Chinese theatre. In addition, China prohibits foreign investment in the production and distribution of theatrical films. In contrast, all of these sectors in the United States are open to foreign investment, and Chinese companies own both large film production companies and film distributors in the United States.

The restrictions applicable to China's television and radio sectors are myriad. China does not permit private capital, whether domestic or foreign, to be used to establish or operate a television station or a radio station. It similarly closes private capital out of radio and television signal broadcasting and relay stations, satellite networks and backbone networks. For television production, Chinese-foreign joint ventures must have a minimum capital requirement of RMB 2 million (approximately $330,000), foreign ownership is capped at 49 percent, and two-thirds of the programs of the joint venture must have Chinese themes.

With regard to television programming generally, China imposes highly restrictive quotas. The *Administrative Measures on the Import and Broadcast of Extraterritorial Television Programs*, effective since 2004, restricts foreign television drama and film programming to no more than 25 percent of total airtime, and other foreign programming to no more than 15 percent of total air time. Foreign programming, including animated programs, is banned between 7:00 p.m. and 10:00 p.m. on terrestrial stations, which are Chinese-owned. In addition, Chinese cable operators are effectively prohibited from carrying foreign channels, as these channels only can be accessed in hotels and other areas inhabited by foreigners. An additional concern arose in October 2014, when China started restricting foreign content on Chinese streaming sites, which is the fastest growing means for Chinese consumers to access television shows. U.S. industry estimates that, as of October 2015, U.S. content is limited to 12 percent of all content on Chinese streaming sites. In a related restriction, China now requires an entire season of a TV series to be submitted for content approval before a single episode can be made available. This restriction encourages the pirating of individual episodes as they are aired during the season.

In September 2018, the NRTA issued a concerning draft measure that would impose new restrictions in China's already highly restricted market for foreign creative content. Specifically, it would require that foreign content account for no more than 30 percent of available programming in each of several categories, including foreign movies, TV shows, cartoons, documentaries and other foreign TV programs, made available for display via broadcasting institutions and online audiovisual-content platforms.

Internet Regulatory Regime

China's Internet regulatory regime is restrictive and non-transparent and impacts a broad range of commercial services activities conducted via the Internet. While China is experiencing rapid development in online businesses such as retail websites, search engines, network education, online advertisements, audio-video services, paid electronic mail, short messages, online job searches, Internet consulting, mapping services, applications, web domain registration, electronic trading and online gaming, Chinese companies dominate the China market, due primarily to restrictions imposed on foreign companies by the Chinese government.

China continues to engage in extensive blocking of legitimate websites, imposing significant costs on both suppliers and users of web-based services and products. According to the latest data, China currently blocks 12 of the top 30 global sites, and U.S. industry research has calculated that up to 3,000 sites in total are blocked, affecting billions of dollars in business, including communications, networking, app stores, news and other sites. While becoming more sophisticated over time, the technical means of blocking, dubbed the Great Firewall, still often appears to affect sites that may not be the intended target, but that may share the same Internet Protocol address. In addition, there have been reports that simply having to pass all Internet traffic through a national firewall adds delays to transmission that can significantly degrade the quality of the service, in some cases to a commercially unacceptable level, thereby inhibiting or precluding the cross-border supply of certain services. In the past, consumers and business have been able to avoid government-run filtering through the use of VPN services, but a crackdown in 2017 has all but eliminated that option, with popular VPN applications now banned. This development has had a particularly dire effect on foreign businesses, which routinely use VPN services to connect to locations and services outside of China, and which depend on VPN technology to ensure confidentiality of communications.

U.S. and other foreign stakeholders also continue to express concern over rules proposed in 2016 to regulate Internet Domain Names, a critical input into many web-based services offered in China. While China explained that initial fears that the rules sought to block access to any website not registered in China were based on a misreading of the intent of the proposed rules, concerns remain with regard to how China intends to implement requirements for registering and using domain names and other Internet resources.

In a development of concern relative to China's GATS commitments, China issued draft *Network Publishing Service Management Regulations* in December 2012. This draft measure would prohibit Chinese-foreign contractual joint ventures, Chinese-foreign cooperative joint ventures and wholly foreign-owned enterprises from engaging in "network publishing services," which China appears to have defined broadly to cover a wide range of Internet-based distribution services. The United States submitted written comments on the draft measure in January 2013. The final version of this measure, issued in February 2016, did not respond to any of the United States' concerns.

Overall, while the Chinese government recognizes the potential of electronic commerce to promote exports and increase competitiveness, a variety of Chinese government policies and practices impede progress toward establishing a viable commercial environment, adversely affecting both Chinese companies and foreign companies. For example, several Chinese ministries have jurisdiction over electronic commerce and impose a range of burdensome restrictions on Internet use (such as registration requirements for web pages and arbitrary and nontransparent content controls), stifling the free flow of information and the consumer privacy needed for electronic commerce to flourish. Encryption is also regulated, and the frequent blocking of websites (including those of a commercial nature) inhibits the predictability and reliability of using electronic networks as a medium of commerce.

A number of technical problems also have inhibited the growth of electronic commerce in China over the years. Examples include the rates charged by Chinese government-approved ISPs, slow connection speeds and relatively low Internet penetration in China, although these problems are being addressed.

With regard to content control, Chinese government officials from as many as 12 separate agencies, led by CAC, closely monitor and routinely filter Internet traffic entering China, focusing primarily on the content that they deem objectionable on political, social, religious or other grounds. During politically sensitive periods, such as surrounding meetings of the National Party Congress or the National People's Congress, the restrictions typically increase significantly. Specific foreign websites can be completely blocked, while overall Internet access can be extremely limited, and Virtual Private Networks, on which many foreign firms rely to conduct their online functions, can be largely blocked. While the purpose of the Internet restrictions purportedly is to address public interest concerns enumerated in Chinese law, China's regulatory authorities frequently take actions that appear to be arbitrary, rarely issue lists of banned search terms or banned sites and provide little or no justification or means of appeal when they block access to all or part of a website, putting providers of Internet-enabled services in a precarious position, as they attempt to comply with Chinese law that can seem arbitrary.

This extensive regulatory regime for content control directly and indirectly affects the range of foreign suppliers seeking to deliver online services. It also squarely affects foreign news agencies, which operate in a services sector in which China made no GATS commitments. China actively restricts who may report news and what may be reported. These restrictions also can interfere with the normal business reporting operations of non-news organizations, such as multinational corporations, if they use the Internet to keep clients, members, their headquarters or others informed about events in China.

Cross-border Data Transfer Restrictions and Data Localization Requirements

Various draft and final measures being developed by China's regulatory authorities to implement China's Cybersecurity Law, which took effect in June 2017, and China's National Security Law, which has been in effect since 2015, would prohibit or severely restrict cross-border transfers of information that are routine in the ordinary course of business and are fundamental to any business activity. These measures also would impose local data storage and processing requirements on companies in "critical information infrastructure sectors," a term that the Cybersecurity Law defines in broad and vague terms. Given the wide range of business activities that are dependent on cross-border transfers of information and flexible access to global computing facilities, these developments have generated serious concerns among governments as well as among stakeholders in the United States and other countries, particularly in services sectors.

Cloud Computing Services

In major markets, including China, cloud computing services are typically offered through commercial presence in one of two ways. They are offered as an integrated service in which the owner and operator of a telecommunication network also offers computing services, including data storage and processing function, over that network, or they are offered as a stand-alone computer service, with connectivity to the computing service site provided separately by a telecommunications service supplier.

China also is proposing to severely restrict the ability of foreign enterprises to offer cloud computing services into China on a cross-border basis. In 2017, China's regulator issued a circular entitled *On Cleaning up and Regulating Internet Access Services Market*, which prohibits Chinese telecommunication operators from offering consumers leased lines or VPN connections reaching overseas data centers – eliminating the key access mechanism companies use to connect to foreign cloud computing service providers and related resources. The United States is evaluating this restriction in the context of China's WTO GATS obligation to ensure access to and use of leased lines for cross-border data processing services. The United States will work to ensure that legitimate cross-border services can continue to be offered into China.

Online Video and Entertainment Software Services

China restricts the online supply of foreign video and entertainment software through measures affecting both content and distribution platforms. With respect to content, the most burdensome restrictions are implemented through exhaustive content review requirements, based on vague and non-transparent criteria. In addition, with respect to online video, the State Administration of Press, Publication, Radio, Film and Television (SAPPRFT) has required Chinese online platform suppliers to spend no more than 30 percent of their acquisition budget on foreign content. With respect to distribution platforms, SAPPRFT has instituted numerous measures, such as requirements that video platforms all be state-owned, that prevent foreign suppliers from qualifying for a license. At the same time, several Chinese companies (including Alibaba) appear exempt from these requirements. SAPPRFT and other Chinese regulatory authorities also have taken actions to prevent the cross-border supply of online video services, which may implicate China's GATS commitments relating to video distribution.

Voice-over-Internet Protocol (VOIP) Services

While computer-to-computer VOIP services are permitted in China, China's regulatory authorities have restricted the ability to offer VOIP services interconnected to the public switched telecommunications network (i.e., to call a traditional phone number) to basic telecommunications service licensees. There is no obvious rationale for such a restriction, which deprives consumers of a useful communication option, and thus the United States continues to advocate for eliminating it.

Educational Services

In its accession agreement, China made limited GATS commitments relating to educational services. Currently, China only permits foreign educators and trainers to engage in nonprofit educational activities that do not compete with the Ministry of Education-supervised nine years of compulsory education, thereby inhibiting much-needed foreign investment in this part of the education sector. Foreign universities may set up nonprofit operations, but must have a Chinese university host and partner to ensure that programs bar subversive content and that imported informational material is adapted to suit local conditions. In addition, China bans foreign organizations and companies from offering educational services via satellite networks.

Legal Services

Prior to its WTO accession, the Chinese government had imposed various restrictions in the area of legal services. The Chinese government maintained a prohibition against representative offices of foreign law firms practicing Chinese law or engaging in profit-making activities of any kind. It also imposed restrictions on foreign law firms' formal affiliation with Chinese law firms, limited foreign law firms to one representative office and maintained geographic restrictions.

China's WTO accession agreement provides that, upon China's accession to the WTO, foreign law firms may provide legal services through one profit-making representative office, which must be located in one of several designated cities in China. The foreign representative offices may act as "foreign legal consultants" who advise clients on foreign legal matters and may provide information on the impact of the Chinese legal environment, among other things. They may also maintain long-term "entrustment" relationships with Chinese law firms and instruct lawyers in the Chinese law firm as agreed between the two law firms. In addition, all quantitative and geographic limitations on representative offices were to have been phased out within one year of China's accession to the WTO, which means that foreign law firms should have been able to open more than one office anywhere in China beginning on December 11, 2002.

As previously reported, the State Council issued the *Regulations on the Administration of Foreign Law Firm Representative Offices* in December 2001, and the Ministry of Justice issued implementing rules in July 2002. While these measures removed some market access barriers, they also generated concern among foreign law firms doing business in China. In many areas, these measures were ambiguous. Among other things, these measures could be interpreted as imposing an economic needs test for foreign law firms that want to establish offices in China, which raises WTO concerns. In addition, the procedures for establishing a new office or an additional office seem unnecessarily time-consuming. For example, a foreign law firm may not establish an additional representative office until its most recently established representative office has been in practice for three consecutive years. Furthermore, new foreign attorneys must go through a lengthy approval process that can take more than one year.

These measures also include other restrictions that make it difficult for foreign law firms to take advantage of the market access rights granted by China's WTO accession agreement. For example, foreign attorneys may not take China's bar examination, and foreign law firms may not hire registered members of the Chinese bar as attorneys to provide advice on Chinese law, nor may foreign attorneys working in China otherwise provide advice on Chinese law to clients. Foreign law firms have also reported that they are not given the uniform right to attend or provide consultancy services to clients during regulatory proceedings administered by Chinese government agencies and that at times they are barred from accompanying their clients to certain government meetings, raising concerns in light of China's GATS commitments. In addition, foreign law firms are subject to taxes at both the firm and individual levels, while domestic law firms are only taxed as partnerships.

The United States has raised its concerns in this area both bilaterally and at the WTO during meetings before the Council for Trade in Services and China's Trade Policy Reviews, with support from other WTO members. To date, although a number of U.S. and other foreign law firms have been able to open additional offices in China, little progress has been made on the other issues affecting access to China's legal services market.

Construction and Related Engineering Services

Upon its WTO accession, China committed to permit foreign enterprises to supply construction and related engineering services through joint ventures with foreign majority ownership, subject to the requirement that those services only be undertaken in connection with foreign-invested construction projects and subject to registered capital requirements that were slightly different from those of Chinese enterprises. China agreed to remove those conditions within three years of accession, and it also agreed to allow wholly foreign-owned enterprises to supply construction and related engineering services for four specified types of construction projects, including construction projects wholly financed by foreign investment, within three years of accession.

As previously reported, in 2002, the Ministry of Construction (MOC), re-named the Ministry of Housing and Urban-Rural Development in 2008, and MOFTEC jointly issued the *Rules on the Administration of Foreign-invested Construction Enterprises* (known as Decree 113) and the *Rules on the Administration of Foreign-invested Construction Engineering Design Enterprises* (known as Decree 114). These decrees provide schedules for the opening up of construction services and related construction engineering design services to joint ventures with majority foreign ownership and wholly foreign-owned enterprises. Implementing rules for Decree 113 were issued in 2003, but Decree 114 implementing rules were delayed until 2007.

Decrees 113 and 114 created concerns for U.S. firms by imposing new and more restrictive conditions than existed prior to China's accession to the WTO, when U.S. firms were permitted to work in China on a project-by-project basis pursuant to MOC rules. In particular, these decrees for the first time require foreign firms to obtain qualification certificates. In addition, the decrees for the first time require foreign-invested enterprises to incorporate in China. The decrees also impose high minimum registered capital requirements as well as technical personnel staff requirements that are difficult for many foreign-invested enterprises to satisfy.

With regard to the Decree 113 regulatory regime for construction enterprises, the United States has actively engaged China, both bilaterally and at the annual transitional reviews before the Council for Trade in Services, in an effort to obtain needed improvements. In particular, the United States has urged China to maintain non-discriminatory procedures under Decree 113 to enable foreign-invested enterprises to carry out the same kinds of projects that domestic companies can provide. The United States also has sought a reduction in the registered minimum capital requirements under Decree 113 or the use of other arrangements, such as bonds or guarantees in lieu of the capital requirements. In practice, China restricts wholly owned foreign-invested enterprises to undertaking foreign-funded construction projects, except in cases where Chinese enterprises are not able to provide the necessary construction services. The United

States and U.S. industry have urged China to end this discrimination.

With regard to the Decree 114 regulatory regime for construction engineering design enterprises, the United States generally welcomed the implementing rules issued by MOC in 2007, as they temporarily lifted foreign personnel residency and staffing requirements imposed by Decree 114, and recognized the foreign qualifications of technical experts when considering initial licensing. The United States has since continued to press China to make these improvements permanent, using both the March 2008 U.S.-China Best Practices Exchange on Architecture, Construction and Engineering and the transitional reviews before the Council for Trade in Services in 2007, 2008 and 2009. Separately, the United States also has urged China to give foreign construction engineering design companies the right to immediately apply for a comprehensive “Grade A” license, like domestic design companies can do. Under existing rules, set forth in Circular 202, the *Implementation of the Administrative Provisions on the Qualification of Construction and Engineering Supervision and Design*, issued by MOC in August 2007, foreign companies are subjected to more restrictive licensing procedures than domestic companies. China also needs to clarify its licensing requirements relating to partnerships by confirming that investors other than individuals, such as foreign design companies, can act as partners.

Meanwhile, in the area of project management services, the conflicting regulatory regimes of NDRC and MOHURD have allowed market access barriers for foreign-invested enterprises to persist. In 2004, MOC issued the *Provisional Measures for Construction Project Management*. Known as Decree 200, this measure requires, among other things, local establishment and the possession of separate qualifications in the area of construction, engineering or design. In contrast, a measure issued by MOC and MOFCOM in 2007 – the *Regulations on the Administration of Foreign-invested Construction and Engineering Service Enterprises* – appears to allow foreign-invested enterprises to provide project management services without possessing separate construction, engineering or design qualifications, but the absence of implementing rules has resulted in inconsistent interpretations of this measure. The United States and U.S. industry have been urging China to clarify the requirements that must be satisfied by enterprises that do not hold construction or engineering and design licenses if they seek to provide project management services.

Express Delivery Services

The specific commitments that China made in the area of express delivery services did not require China to take implementation action upon its accession to the WTO. Basically, China agreed to increase the stake allowed by foreign express delivery companies in joint ventures over a period of years, with wholly foreign-owned subsidiaries allowed within four years of accession.

Since its WTO accession, foreign express delivery companies have continued to operate in China’s express delivery sector, and China has implemented its commitment to allow wholly foreign-owned subsidiaries. However, China still needs to expand the scope of access for foreign-invested companies for domestic express delivery to include the delivery of documents.

In addition, over the years, China has issued a variety of measures that have appeared to undermine market access for foreign companies and have raised questions in light of China’s WTO obligations. As previously reported, through sustained and high-level engagement, the United States was able to persuade China to forego a series of restrictive measures.

In August 2006, the State Council finalized its *Postal Reform Plan*, which called for the separation of China’s postal operations from the administrative function of regulating China’s postal system, with the State Postal Bureau (SPB) to serve as the regulator and a new state-owned enterprise – the China Post Group Corporation – to be set up to conduct postal business. China promptly put this plan into effect, and since then the United States has been regularly reviewing how SPB has been exercising its new authority to license and regulate the express delivery sector.

In August 2008, the draft of a problematic new *Postal Law* went before the National People's Congress. This draft excluded foreign suppliers from the document segment of China's domestic express delivery market and also contained other troubling provisions. Despite extensive engagement by the United States, the National People's Congress approved this law, effective October 2009, without significant changes.

The United States has worked intensively with China to alleviate problems that foreign companies have encountered when trying to obtain permits under a new permitting system that SPB imposed for all suppliers of domestic express package delivery services in China. In May 2012, China committed that it would take specific steps to provide fair access to its market for foreign suppliers of these services and that it would protect existing operations as that process unfolded. Since then, the Chinese regulator, SPB, has moved forward with the issuance of more permits. The United States has pressed SPB to quickly review and approve any new permits that U.S. companies request, and the United States will continue to do so for as long as is needed.

SPB's regulation of the express delivery sector in China has been problematic in other ways. For example, China imposes overly burdensome and inconsistent regulatory approaches, including with regard to security inspections. In addition, China prevents foreign suppliers from performing any sorting of packages within China, making the hubs that U.S. companies have invested much less valuable. In addition, while China does allow one U.S. company the ability to pick up and deliver packages from domestic legs of a trip with an international start or endpoint for certain routes (known as co-terminalization routes), China refuses to approve any additional co-terminalization routes for this company and refuses to approve any co-terminalization routes at all for other U.S. companies. The United States continues to press its concerns in this sector.

Logistics Services

Logistics services include a number of the services sectors listed in China's GATS Schedule, including road transport services, rail transport services and freight forwarding agency services, among others. Generally, at this time, foreign suppliers should be permitted to supply these services in China without geographic limitations or restrictions on the percentage of foreign ownership.

Over the years, the Ministry of Transport has been slow to approve applications by foreign companies seeking to supply road transport and related logistics services and has been unwilling to issue nationwide trucking licenses, which has limited the ability of foreign companies to build economies of scale. In addition, while regulations issued by almost all major Chinese cities restrict daytime access by trucks, enforcement of these restrictions is often discriminatory. Local regulatory authorities often target their enforcement efforts at foreign companies, while permitting local companies to operate freely.

Separately, the Chinese government has directed that support be provided to the domestic logistics industry as part of various industry revitalization plans. Foreign companies invested in China have raised concerns about inadequate transparency with regard to implementing measures, inequitable treatment of foreign companies and unnecessary industry standardization efforts.

Air Transport and Related Services

WTO members, including China, undertake the vast majority of their international commitments relating to civil air transport, including traffic rights, through bilateral agreements. As previously reported, China made significant commitments in 2004 and 2007 agreements with the United States to increase market access for U.S. providers of air transport services. However, since 2007, China increasingly has constrained this sector and a lack of clarity in China's airport slot allocation process, among other issues, has prevented U.S. airlines from fully exercising rights granted in the 2007 agreement. The United States has made clear that the current operational impediments need to be fixed and that any future expansion of rights would need to be based on mutual benefit.

U.S. and European companies have expressed GATS and other concerns regarding China's regulation of foreign suppliers of global distribution system services. Although China issued new regulations addressing global distribution system services in 2012, these regulations only called for a modest opening to foreign suppliers, as they allow foreign suppliers to handle domestic segments of an international flight but not the most lucrative part of China's market, which is purely domestic travel within China. However, China has since undercut even this modest opening by imposing commercially unattractive requirements on foreign suppliers, including a requirement to partner with Chinese state-owned enterprises. The United States has used bilateral discussions without success to urge China to remove the significant restrictions facing foreign companies in this sector.

Maritime Services

As previously reported, even though China made only limited WTO commitments relating to its maritime services sector, it took a significant step in December 2003 to increase market access for U.S. service providers. The United States and China signed a far-reaching, five-year bilateral agreement, with automatic one-year extensions, which gives U.S.-registered companies the legal flexibility to perform an extensive range of additional shipping and logistics activities in China. U.S. shipping and container transport services companies, along with their subsidiaries, affiliates and joint ventures, are also able to establish branch offices in China without geographic limitation.

Tourism and Travel-related Services

In order to obtain a license, foreign travel agencies doing business in China must register with the China Ministry of Culture and Tourism (CMCT), formerly the China National Travel Administration, and must submit an initial feasibility study and annual reports on future investment and possible expansion to CMCT and MOFCOM. In addition, China continues to impose an annual sales requirement on foreign travel agencies, even though it does not impose the same requirement on domestic travel agencies.

In December 2007, the United States and China signed an MOU to facilitate Chinese group leisure travel to the United States. The MOU permitted marketing and sales activities in a limited number of Chinese provinces to promote U.S. destinations and U.S. travel-related businesses. Subsequent engagement, led to China's agreement to expand the MOU to cover 27 of China's 31 provinces. In 2013, China announced that it had broadened the scope of access under the MOU to include two of the four remaining provinces. As of December 2018, China has not yet expanded the MOU to the two remaining provinces.

LEGAL FRAMEWORK

In order to address major concerns raised by WTO members during its lengthy WTO accession negotiations, China committed to broad legal reforms in the areas of transparency, uniform application of laws and judicial review. Each of these reforms, if fully implemented, will strengthen the rule of law in China's economy and help to address pre-WTO accession practices that made it difficult for U.S. and other foreign companies to do business and invest in China.

Transparency

OFFICIAL JOURNAL

In its WTO accession agreement, China committed to establish or designate an official journal dedicated to the publication of all laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange. China also agreed to publish the journal regularly and to make copies of all issues of the journal readily available to enterprises and individuals.

In 2002, following its accession to the WTO, China did not establish or designate an official journal. Rather, China relied on multiple channels, including ministry websites, newspapers and a variety of journals and gazettes, to provide information on trade-related measures.

As previously reported, following sustained U.S. engagement, the State Council issued a notice in March 2006 directing all central, provincial and local government entities to begin sending copies of all of their trade-related measures to MOFCOM for immediate publication in the *China Foreign Trade and Economic Cooperation Gazette*, known as the *MOFCOM Gazette*. The United States subsequently reviewed the effectiveness of this notice, both to assess whether all government entities regularly publish their trade-related measures in the *MOFCOM Gazette* and whether all types of measures are being published. It appeared that adherence to the State Council's notice was far from complete. As a result, the United States continued to engage China bilaterally on the need for a fully compliant single official journal, and at the December 2007 SED meeting China re-confirmed its WTO commitment to publish all final trade-related measures in a designated official journal before implementation.

The United States has been regularly reviewing the effectiveness of China's official journal commitment since the December 2007 SED meeting. To date, it appears that some but not all central government entities publish trade-related measures in this journal. At the same time, these government entities tend to take a narrow view of the types of trade-related measures that need to be published in the official journal. As a result, while trade-related regulations and departmental rules are often published in the journal, it is less common for other central government measures such as opinions, circulars, orders, directives and notices to be published, even though they are all binding legal measures. Meanwhile, sub-central government measures are rarely published in the official journal.

In the September 2012 WTO case challenging numerous subsidies provided by the central government and various sub-central governments in China to automobile and automobile-parts enterprises located in regions in China known as "export bases," the United States included claims alleging that China had failed to abide by various WTO transparency obligations, including China's obligation to publish the measures at issue in an official journal. Following consultations in this case, the two sides engaged in further discussions as China began to take steps to address U.S. concerns.

In the December 2015 WTO case challenging discriminatory Chinese government measures exempting sales of certain aircraft produced in China, including general aviation aircraft, agricultural aircraft and regional jets, from the VAT while imposing that same tax on sales of imported aircraft, the United States included claims alleging that China had failed to publish the measures at issue as required by China's WTO transparency obligations. Consultations took place in January 2016. In October 2016, the United States announced that it had confirmed that China had terminated the discriminatory tax measures. The United States also made these measures publicly available.

TRANSLATIONS

Another important transparency commitment that China made in its WTO accession agreement involves translations. China agreed to make available translations of all of its laws, regulations and other measures affecting trade in goods, services, TRIPS or the control of foreign exchange into one or more of the WTO languages (English, French and Spanish). China further agreed that, to the maximum extent possible, it would make translations of these laws, regulations and other measures available before implementation or enforcement, but in no case later than 90 days afterwards.

China has a poor record of compliance with its translation commitment. Indeed, after 15 years of WTO membership, China still has not established an appropriate infrastructure to undertake the agreed-upon translations of its trade-related measures in a timely manner. Although China has complained that it is too difficult for it to live up to this commitment, this excuse lacks credibility. As the United States has pointed out, other WTO members translate all of their legal measures. Indeed, one of these members – the EU – publishes its measures in 24 official languages.

Prior to 2015, China had only compiled translations of trade-related laws and administrative regulations (into English), but not other types of measures. In addition, China has remained years behind in actually publishing translations of trade-related laws and administrative regulations.

The United States has raised this issue at the WTO during the annual transitional reviews, including during final transitional reviews before several committees and councils that took place in 2011. In addition, the United States has raised this issue in WTO cases against China. In the December 2010 WTO case challenging what appeared to be prohibited import substitution subsidies being provided by the Chinese government to support the production of wind turbine systems in China, the United States included a claim alleging that China had breached its WTO accession agreement by not translating the measures at issue into a WTO language. China repealed those measures following consultations. In the September 2012 WTO case challenging export base subsidies, the United States included a claim alleging that China had failed to make available translations of the measures at issue into one or more WTO languages. The United States also included a similar claim in the December 2015 WTO case challenging China's discriminatory tax treatment of imported aircraft.

Bilaterally, at the July 2014 S&ED meeting, China committed that it would translate trade-related departmental rules into English within a reasonable period of time. Subsequently, in March 2015, China issued a measure requiring trade-related departmental rules to be translated into English. This measure also provides that the translation of a departmental rule normally should be published before implementation, but no later than 90 days after implementation. Following the issuance of this measure, the United States pressed China to ensure that it similarly publishes translations of trade-related laws and administrative regulations before implementation, as required by China's WTO accession agreement. China has not yet met its commitment on translation.

PUBLIC COMMENT

One of the most important of the transparency commitments that China made in its WTO accession agreement concerned the procedures for adopting or revising laws, regulations and other measures affecting trade in goods, services, TRIPS or the control of foreign exchange. China agreed to provide a reasonable period for public comment on these new or modified laws, regulations and other measures before implementing them, except in certain specific instances, enumerated in China's accession agreement.

As previously reported, in the first few years after China acceded to the WTO, China's ministries and agencies had a poor record of providing an opportunity for public comment *before* new or modified laws, regulations and other measures were implemented. Although the State Council issued regulations in December 2001 addressing the procedures for the formulation of administrative regulations and rules and expressly allowing public comment, many of China's ministries and agencies in 2002 continued to follow the practice prior to China's WTO accession, and no notable progress took place in 2003. Typically, the ministry or agency drafting a new or revised measure consulted with and submitted drafts to other ministries and agencies, as well as Chinese experts and affected Chinese companies. At times, it also consulted with select foreign companies, although it would not necessarily share drafts with them. As a result, only a small proportion of new or revised measures were issued after a period for public comment, and even in those cases the amount of time provided for public comment was generally too short.

In 2004, some improvements took place, particularly on the part of MOFCOM, which began following the rules set forth in its *Provisional Regulations on Administrative Transparency*, issued in November 2003. Nevertheless, basic compliance with China's notice-and-comment commitment continued to be uneven in the ensuing years, as numerous major trade-related laws and regulations were finalized and implemented without the NPC or the responsible ministry circulating advance drafts for public comment.

In numerous bilateral meetings with the State Council, MOFCOM and other Chinese ministries since China's WTO accession, including high-level meetings, the United States emphasized the importance of China's adherence to the notice-and-comment commitment in China's accession agreement, both in terms of fairness to WTO members and the benefits that would accrue to China. Together with other WTO members, the United States also raised this issue repeatedly during regular WTO meetings and as part of the annual transitional reviews conducted before various WTO councils and committees.

At the December 2007 SED meeting, China specifically committed to publish, when possible, proposed trade-related measures and provide interested parties a reasonable opportunity for comment. China also agreed that it would publish these proposed measures either in its designated official journal or on an official website.

At the June 2008 SED meeting, China then committed to publish all proposed trade- and economic-related regulations and departmental rules for public comment, subject to specified exceptions, and to provide a comment period of no less than 30 days. China indicated that it would publish these proposed measures on the Legislative Information Website maintained by the SCLAO.

Two months earlier, in April 2008, the NPC's Standing Committee had instituted notice-and-comment procedures for draft laws. Comments on the draft laws are to be submitted to the NPC's Legislative Affairs Commission, and a new dedicated website provides information about the comments that have been submitted.

Subsequently, while the NPC began regularly publishing draft laws for public comment, and the State Council began regularly publishing draft regulations for public comment, it appeared that China was having more difficulty implementing China's new policy regarding trade- and economic-related departmental rules. After 2008, China did increase the number of proposed departmental rules published for public comment on the SCLAO website. However, a significant number of departmental rules were still issued without first having been published for public comment on the SCLAO website. While some ministries published departmental rules on their own websites, they often allowed less than 30 days for public comment, making it difficult for foreign interested parties to submit timely and complete comments.

In October 2010, the State Council issued the *Opinions on Strengthening the Building of a Government Ruling by Law*. This measure calls on ministries and agencies at the central and provincial levels of government to solicit public comment when developing regulations, rules and normative documents, subject to certain exceptions. However, the measure does not dictate the procedures or time periods to be used.

At the May 2011 S&ED meeting, China committed that it would issue a measure in 2011 to implement the requirement to publish all proposed trade- and economic-related administrative regulations and departmental rules on the SCLAO website for a public comment period of not less than 30 days from the date of publication, subject to certain exceptions. In April 2012, the SCLAO published two measures, the *Interim Measures on Solicitation of Public Comment on Draft Laws and Regulations* and the *Notice on Related Issues Regarding Solicitation of Public Comments on Draft Departmental Rules*, on its website. These two measures provide that, in general, administrative regulations and departmental rules have to be posted on the Legislative Information Website of the SCLAO.

Since the issuance of the two SCLAO measures in 2012, no noticeable improvement in the publishing of departmental rules for public comment appears to have taken place. At the July 2014 S&ED meeting, China confirmed that these two measures are binding on central government ministries, but it remains clear that China needs to make more progress in this area.

For several years, the United States has pressed China to improve its handling of so-called "normative documents," which are regulatory documents that do not fall into the category of administrative regulations or departmental rules but still impose binding obligations on enterprises and individuals. To date, while China continues to consider reforms relating to the handling of normative documents, most normative documents are still not published for public comment. In October 2017, MOFCOM did issue a draft *Measure on the Formulation and Administration of Normative Documents*, which proposes to require the use of notice-and-comment procedures for certain types of normative documents issued by MOFCOM. In April 2018, MOFCOM issued the final measure, which provided that, in general, there should be a 30-day comment period for draft normative documents. However, this measure leaves much to the discretion of agency officials, as it only proposes to require public comment for normative documents issued by MOFCOM that are "binding" and involve "major matters." Subsequently, in May 2018, the State Council issued a notice calling for more public consultation in the drafting process for normative documents and requiring drafts of normative documents that "involve vital interests of the people" or "have significant impact on the rights and obligations of citizens, legal persons, and other organizations" to be published for public comment, subject to certain exceptions. The notice also calls for final normative documents to be published.

ENQUIRY POINTS

Another important transparency commitment in its WTO accession agreement requires China to establish enquiry points, where any WTO member or foreign company or individual may obtain information. As previously reported, China complied with this obligation by establishing a WTO Enquiry and Notification Center, now operated by MOFCOM's Department of WTO Affairs, in January 2002. Other ministries and agencies have also established formal or informal, subject-specific enquiry points. In addition, some ministries and agencies have created websites to provide answers to frequently asked questions, as well as further guidance and information.

Uniform Application of Laws

In its WTO accession agreement, China committed, at all levels of government, to apply, implement and administer its laws, regulations and other measures relating to trade in goods and services in a uniform and impartial manner throughout China, including in special economic areas. In support of this commitment, China further committed to establish an internal review mechanism to investigate and address cases of non-uniform application of laws based on information provided by companies or individuals.

As previously reported, in China's first year of WTO membership, the central government launched an extensive campaign to inform and educate both central and local government officials and state-owned enterprise managers about WTO rules and their benefits. In addition, several provinces and municipalities established their own WTO centers, designed to supplement the central government's efforts and to position themselves so that they would be able to take full advantage of the benefits of China's WTO membership. In 2002, China also established an internal review mechanism, now overseen by MOFCOM's Department of WTO Affairs, to handle cases of non-uniform application of laws, although the actual workings of this mechanism remain unclear.

During 2018, as in prior years, some problems with uniformity persisted. These problems are discussed above in the sections on Customs and Trade Administration, Taxation, Investment and Intellectual Property Rights.

Judicial Review

In its WTO accession agreement, China agreed to establish tribunals for the review of all administrative actions relating to the implementation of laws, regulations, judicial decisions and administrative rulings on trade-related matters. These tribunals must be impartial and independent of the government authorities entrusted with the administrative enforcement in question, and their review procedures must include the right of appeal.

Many U.S. companies continue to express serious concerns about the independence of China's judiciary. In their experience and observation, Chinese judges continue to be influenced or directed by political, government or business interests, particularly outside of China's big cities.

In addition, the United States continues to examine how the courts designated by the Supreme People's Court's *Rules on Certain Issues Related to Hearings of International Trade Administrative Cases*, which went into effect in October 2002, have handled cases involving administrative agency decisions relating to trade in goods or services. So far, however, there continues to be little data, as few U.S. or other foreign companies have had experience with these courts.

Other Legal Framework Issues

Other areas of China's legal framework can adversely affect the ability of the United States and U.S. exporters and investors to enjoy fully the rights to which they are entitled under the WTO agreements. Key areas include administrative licensing, competition policy, commercial dispute resolution, labor laws and laws governing land use. Corruption among Chinese government officials, enabled in part by China's incomplete adoption of the rule of law, is also a key concern.

ADMINISTRATIVE LICENSING

As discussed above in the Investment section, since China's WTO accession in December 2001, U.S. and other foreign companies have expressed serious concerns about the administrative licensing process in China, both in the context of foreign investment approvals and in myriad other contexts. According to U.S. industry, many Chinese government bodies at the central, provincial and municipal government levels do not comply with the procedures mandated by the *Administrative Licensing Law* for acceptance review and approval of administrative licenses. This situation creates opportunities for corruption, and sometimes leads to foreign enterprises and foreign products being treated less favorably than their domestic counterparts.

In response to a 2013 directive from Premier Li to streamline administrative licensing processes, central government authorities eliminated, or delegated to lower levels of government, more than 300 administrative approval requirements in 2013. Additional streamlining took place in 2014. China also announced reductions in administrative approval requirements in the Shanghai Free Trade Zone in 2014. In addition, at the July 2014 S&ED meeting, China committed to treat applicants for administrative licenses and approvals under the same rules and standards as the United States with regard to the resources available to accept and process applications and the number of applications permitted at one time from an applicant, and to strictly implement existing laws and regulations to adequately protect any trade secret or sensitive commercial information provided by the applicant during the administrative licensing or approval process, as required by law.

Nevertheless, despite these changes and continued reform efforts, U.S. companies continue to encounter significant problems with a variety of administrative licensing processes in China, including processes to secure product approvals, investment approvals, business expansion approvals, business license renewals and even approvals for routine business activities. While U.S. companies are encouraged by the overall reduction in license approval requirements and the focus on decentralizing licensing approval processes, U.S. companies report that these efforts have only had a marginal impact on their licensing experiences so far. According to U.S. companies, problems continue to be most prevalent at the central government level and generally involve foreign companies encountering more significant delays and receiving less favorable treatment vis-à-vis domestic companies, raising concerns in light of the WTO rules relating to national treatment.

COMPETITION POLICY

In August 2007, China enacted its *Anti-monopoly Law*, which became effective in August 2008. Pursuant to this law, the State Council established an anti-monopoly commission with oversight and coordinating responsibilities, drawing its members from several Chinese ministries and agencies. Enforcement responsibilities were divided among three agencies. MOFCOM assumed responsibility for reviewing mergers. NDRC assumed responsibility for reviewing cartel activities, abuse of dominance and abuse of administrative power when they involve pricing, while SAIC reviewed these same types of activities when they were not price-related.

After the *Anti-monopoly Law* was enacted, MOFCOM, NDRC, SAIC and other Chinese government ministries and agencies began to formulate implementing regulations, departmental rules and other measures. Throughout this process, the United States urged China to implement the *Anti-monopoly Law* in a manner consistent with global best practices and with a focus on consumer welfare and the protection of the competitive process, rather than consideration of industrial policy or other non-competition objectives. The United States also specifically pressed China to ensure that its implementation of the *Anti-monopoly Law* does not create disguised or unreasonable barriers to trade and does not provide less favorable treatment to foreign goods and services or foreign investors and their investments.

The Chinese government's interventionist economic policies and practices and the large role of state-owned enterprises in China's economy created tensions with the *Anti-monopoly Law*. One provision in the *Anti-monopoly Law* "protects the lawful operations" of state-owned enterprises and government monopolies in industries deemed nationally important, although the meaning of this provision remains unclear. Indeed, China has enforced the *Anti-monopoly Law* against state-owned enterprises. For example, MOFCOM has imposed conditions on at least one state-owned company forming a joint venture, NDRC has conducted an investigation into anti-competitive price discrimination by two large state-owned telecommunications companies and has imposed fines for *Anti-monopoly Law* violations on two state-owned liquor companies, and SAIC has undertaken enforcement against provincial state-owned enterprises. However, some U.S. companies have expressed concerns that enforcement against state-owned enterprises is more limited than against private enterprises.

Provisions on the abuse of administrative (i.e., government) power included in the *Anti-monopoly Law*, which also appeared in NDRC's and SAIC's implementing regulations, are potentially important instruments for reducing the government's interference in markets and promoting the establishment and maintenance of increasingly competitive markets in China. In recent years, NDRC and SAIC took a number of enforcement actions in this area to reduce government restraints on competition.

In June 2016, the State Council issued the *Opinions on Establishing a Fair Competition Review System*, which created a new system that could widen Chinese anti-monopoly enforcement agencies' oversight over undue government restraints on competition and anti-competitive regulation of competition. Given the state-led nature of China's economy, the need for careful scrutiny of anti-competitive government restraints and regulation is high.

In October 2017, NDRC, SAIC, MOFCOM, MOF and SCLAO jointly issued, without a public comment process, the *Provisional Rules for Implementing the Fair Competition Review System*. These rules require issuing agencies at the central and sub-central levels of government to conduct reviews of a relevant proposed measure before introducing it so as to verify that the proposed measure will not limit competition. However, the rules also contain a broad list of exemptions from this restriction, including national economic security, cultural security, national defense construction, poverty alleviation, disaster relief and general "public interest" considerations.

Another tension in China's organizational structure involves trade associations, which in China frequently appear to have strong government ties. The United States has encouraged the Chinese agencies charged with enforcing the *Anti-monopoly Law* to work with Chinese regulatory agencies with sectoral responsibilities to emphasize the importance of trade associations refraining from engaging in conduct that would violate the *Anti-monopoly Law*. For example, while trade associations can usefully function to assist their members with information on opportunities and contacts in different markets, they also can facilitate cartel activity if appropriate guidelines are not followed. In March 2017, NDRC published draft *Guidelines on Trade Association Pricing Activity* for public comment. These draft guidelines address issues that trade association conduct can raise from a competition law perspective but could be clarified and strengthened.

The treatment of intellectual property rights by China's anti-monopoly enforcement agencies is of concern for U.S. and other foreign stakeholders. For example, Article 55 of the *Anti-monopoly Law*, which relates to conduct associated with intellectual property rights that eliminates or restricts competition, has raised questions for U.S. industry about the scope of enforcement since its initial inclusion in the law. In April 2015, SAIC adopted a measure, the *Rules on the Prohibition of Conduct Eliminating or Restricting Competition by Abusing Intellectual Property Rights*, which contains concerning provisions relating to essential facilities and standards-essential patents on which stakeholders have submitted comments. Subsequently, in late 2015, draft versions of *Anti-monopoly Guidelines on Abuse of Intellectual Property Rights* separately prepared by the NDRC and by SAIC became public. China has stated that these drafts, as others, will form the basis for the State Council's Anti-monopoly Commission to adopt guidelines addressing the treatment of conduct involving intellectual property rights under the *Anti-monopoly Law*. In March 2017, the Anti-monopoly Commission published draft *Anti-monopoly Guidelines against Abuse of Intellectual Property Rights* and invited the public to provide comments on them. These draft guidelines would adopt several core principles on competition and intellectual property law similar to principles applied in the United States, but also appear to support the premise that the exercise of intellectual property rights can act as a hindrance to market competition, including through apparent presumptions that certain IP-related conduct harms competition. The draft guidelines also raise concerns regarding the treatment of refusals to license, "excessive" pricing and standard essential patents. U.S. government agencies have been following the development of the draft guidelines closely and engaging China's anti-monopoly enforcement agencies, including through the submission of written comments.

Some U.S. companies have criticized certain MOFCOM decisions for lack of adequate bases to find that a merger has or may have the effect of eliminating or restricting competition, and some U.S. companies have raised concerns with the remedies that MOFCOM has adopted in granting conditional merger approvals. In September 2017, MOFCOM published draft *Measures for the Review of Undertaking Concentrations*. This draft measure has the potential to help clarify MOFCOM's procedures for reviewing concentrations of undertakings by providing guidance on when notifications are required and the procedural steps available during the notification and review process.

While MOFCOM was the regulator, its merger enforcement tended to focus more on transactions involving foreign enterprises. Every transaction that MOFCOM blocked or imposed conditions on involved at least one foreign party. At the same time, MOFCOM imposed penalties for failure to file a required merger notification on more domestic transactions than transactions involving foreign parties. Over time, the percentage of merger notifications in which all parties were Chinese rose from around 15 percent to around 30 percent while MOFCOM remained responsible for reviewing mergers, suggesting increased domestic compliance with the filing requirements of the *Anti-monopoly Law*.

Starting in 2013, NDRC increased its *Anti-monopoly Law* enforcement activity noticeably. While both domestic companies and foreign companies have been targets of these NDRC investigations, U.S. industry asserts that foreign companies appear to have come under increased scrutiny by China's enforcement agencies. In addition, U.S. industry has expressed serious concerns about insufficient predictability, fairness and transparency in NDRC's investigative processes, including NDRC pressure to "cooperate" in the face of unspecified allegations or face steep fines. In some cases, U.S. industry also complained about limitations on their ability to have legal representation before the anti-monopoly enforcement agencies by their non-Chinese counsel. U.S. industry also has highlighted that NDRC has pressured companies either to withdraw IPR enforcement actions against Chinese companies outside China, including ongoing litigation, or face an intrusive anti-monopoly investigation. U.S. industry also has complained that anti-monopoly enforcement is sometimes used against U.S. companies to achieve industrial policy objectives, which U.S. industry attributes to the influence of government ministries that are not supposed to be involved in anti-monopoly enforcement.

At the July 2014 S&ED meeting, China committed to provide any party under an *Anti-monopoly Law* investigation with information about the enforcement agency's concerns and an effective opportunity for the party to present evidence in its defense. In addition, at the December 2014 JCCT meeting, China committed that the Chinese authorities would treat domestic and foreign companies equally in *Anti-monopoly Law* enforcement proceedings. China further committed that the Chinese authorities' normal practice would be to permit an investigated foreign company to have foreign counsel present, to advise it and to provide information on its behalf during the proceedings. At the November 2015 JCCT meeting, China committed that agencies without *Anti-monopoly Law* enforcement authority will not intervene in the enforcement decisions of MOFCOM, SAIC and NDRC. China also clarified that its anti-monopoly enforcement agencies will not disclose confidential business information to other agencies or third parties, except pursuant to a waiver from the submitting party or under circumstances defined by law.

In March 2018, as part of a major government reorganization, China announced the creation of the SAMR, a new agency that now houses the anti-monopoly enforcement authorities from the NDRC, MOFCOM and SAIC in one of its bureaus. The State Council Anti-monopoly Commission also was moved to SAMR. In September 2018, the State Council issued the *Provisions on the Jurisdiction, Department and Staffing of the State Administration for Market Regulation*, which outlines SAMR's organization, functions and division of responsibilities with other ministries and agencies. This measure makes clear that SAMR is responsible for unified anti-monopoly enforcement, coordinating and implementing competition policies, and implementing the fair competition review system against the abuse of administrative power. SAMR is also charged with guiding enterprises to respond to anti-monopoly lawsuits in foreign countries.

At present, China's anti-monopoly enforcement continues to generate serious concerns. One key ongoing concern relates to how the *Anti-monopoly Law* is being applied to state-owned enterprises. Overall, many U.S. companies cite selective enforcement of the *Anti-monopoly Law* against foreign companies seeking to do business in China as a major concern, and they have highlighted the limited enforcement of this law against state-owned enterprises. A further serious and continuing concern relates to China's periodic use of anti-monopoly enforcement against U.S. companies to achieve industrial policy objectives. Additionally, U.S. industry continues to express concern about insufficient predictability, fairness and transparency in *Anti-monopoly Law* investigative processes.

FOREIGN NGO MANAGEMENT LAW

In 2015, China's National People's Congress published a draft *Foreign NGO Management Law* that laid out a series of provisions regulating organizations operating within its borders. The United States and numerous other governments and stakeholders around the world expressed serious concerns about the draft law, as it would have a significant impact on commercial activities, academic exchanges, cooperation on global health matters, rule of law exchanges and shared environmental concerns, as well as serious implications for investment in China by U.S. NGOs and, indirectly, U.S. for-profit companies. In 2016, the National People's Congress passed the final version of the *Foreign NGO Management Law*, which went into effect in January 2017. The new law does not materially differ from the earlier draft, and it therefore continues to generate serious concerns.

Foreign business organizations that must register as NGOs under this law have raised many concerns about its implementation. For example, in order to register, an NGO must first obtain the sponsorship of a "professional supervisory unit" (or PSU) from a list of approved PSUs maintained by the Ministry of Pubic Security. These PSUs are central or sub-central government agencies. To date, many U.S. NGOs have had trouble obtaining the necessary sponsorship, as PSUs often consider sponsorship a political risk and have not been provided with sufficient resources to take on their supervisory responsibilities. In addition, PSUs often impose requirements on the NGOs that they supervise, and some NGOs have found that they must significantly change their activities in order to obtain sponsorship, which is particularly concerning because in many cases a PSU is involved in regulating the sector or subject matter on which the NGO focuses.

COMMERCIAL DISPUTE RESOLUTION

Both domestic and foreign companies often avoid seeking resolution of commercial disputes through the Chinese courts, due to deep skepticism about the independence and professionalism of China's court system and the enforceability of court judgments and awards. There is a widespread perception that judges, particularly outside big cities, are subject to influence by local political or business interests. In addition, many judges are not trained in the law or lack higher education, although this problem decreases at the higher levels of the judiciary. At the same time, the Chinese government is moving to establish consistent and reliable mechanisms for dispute resolution through the adoption of improved codes of ethics for judges and lawyers and increased emphasis on the consistent and predictable application of laws. For example, Supreme People's Court rules provide that when there is more than one reasonable interpretation of a law or regulation, the courts should choose an interpretation that is consistent with the provisions of international agreements to which China has committed, such as the WTO rules.

There is increasing skepticism of the China International Economic and Trade Arbitration Commission (CIETAC) as a forum for the arbitration of commercial disputes. Some foreign companies have obtained satisfactory rulings from CIETAC, but others have raised concerns about restrictions on the selection of arbitrators and inadequacies in procedural rules necessary to ensure thorough, orderly and fair management of cases.

A further problem for commercial dispute resolution in China is that obtaining enforcement has often been difficult in cases where the courts or arbitration panels have issued judgments in favor of foreign-invested enterprises. Chinese government officials responsible for enforcement are often beholden to local interests and unwilling to enforce judgments against locally powerful companies or individuals.

LABOR LAWS

China does not effectively enforce its labor laws and regulations concerning issues such as minimum wages, hours of work, occupational safety and health, bans on child labor, forced prison labor, and participation in social insurance programs. Many foreign-invested enterprises have expressed concerns about their domestic competitors' lack of compliance with labor and social welfare laws due to lax enforcement. Lax enforcement has led to significant increases in labor disputes and unrest in China as well as the arrest and detention of worker rights leaders.

China recently issued two measures intended to improve enforcement of China's labor laws, but they do not go far enough in addressing foreign companies' concerns. The *Measures for Announcing Major Violations of Labor Security*, which entered into force in January 2017, address employers' compliance with China's labor laws by threatening to publicly name employers that commit serious labor violations. The *Measures for the Rating of Enterprises' Labor Security Compliance Credit,* which also entered into force in January 2017, rate employers based on a set of criteria that includes compliance with China's labor laws and subject poorly rated employers to routine inspections. These measures are vague, do not define key terms and leave enforcement to provincial and local administrative authorities, which can result in inconsistent implementation.

In 2017, China introduced two other measures aimed at improving labor dispute arbitration systems. The *Rules on Labor and Personnel Dispute Arbitration Organizations* define the roles of arbitration commissions and courts at the provincial and local government levels, provide dedicated funding and specify qualifications, training and oversight requirements for staff. The *Rules on Handling Labor and Personnel Dispute Arbitration Cases* address the handling of collective labor disputes involving 10 or more workers and collective labor disputes arising from the implementation of collective labor agreements, among other things.

In addition, China's restrictions on labor mobility, which contribute to shortages of skilled workers for foreign companies operating in China, continue to distort labor costs. In part due to the recognition that labor mobility is essential to the continued growth of the economy, China is gradually easing restrictions under the country's *hukou* (i.e., household registration) system, which has traditionally limited the movement of workers within the country.

China continues to maintain other policies that negatively impact foreign companies, including restrictions on hiring contract workers. At present, registered subsidiaries of foreign corporations have two options when hiring workers in China. They can either hire full-time employees directly, or they can hire employees indirectly on contract from temporary placement agencies. These temporary workers are known as "dispatch workers." However, amendments to the *Labor Contract Law* that went into effect in July 2013 add restrictions intended to discourage these companies from using dispatch workers instead of hiring long-term employees. The *Labor Contract Law* amendments limit the use of dispatch workers to periods of less than six months in auxiliary, or non-core, business operations or for the purpose of replacing a permanent employee away on leave. Additionally, the *Interim Provisions on Labor Dispatch*, which entered into force in March 2014, further regulate employment of dispatch workers by limiting the amount of dispatch workers a business can hire to no more than 10 percent of the business' total number of employees. Businesses whose total number of employees comprised over 10 percent of dispatch workers prior to the implementation of the *Interim Provisions on Labor Dispatch* were given until March 2016 to come into compliance.

In addition, and of great concern to the United States, China does not adhere to certain internationally recognized labor standards, including the freedom of association and the right to bargain collectively. Chinese law provides for the right to associate and form a union, but does not allow workers to form or join an independent union of their own choosing. Unions must affiliate with the official All-China Federation of Trade Unions (ACFTU), which is under the direction of the Communist Party of China. The workers at enterprises in China are required to accept the ACFTU as their representative; they cannot instead select another union or decide not to have any union representation.

Once an ACFTU union chapter is established at an enterprise in China, the enterprise is required to pay fees to the ACFTU, often through the local tax bureau, equaling two percent of total payroll, regardless of the number of union members in the enterprise. While China's laws on union formation apply equally to domestic enterprises and foreign-invested enterprises, the ACFTU campaign may be discriminatory, both because it does not appear to be directed at private Chinese companies and because it appears to specifically target Fortune 500 companies, to the disproportionate impact of U.S.-invested companies. The United States continues to monitor this situation and is attempting to assess its effects on U.S.-invested companies and their workers.

LAND LAWS

China's Constitution specifies that all land is owned in common by all the people. In practice, provincial and municipal governments distribute state-owned urban land for industrial and residential use under a variety of terms depending on the type of land, its intended use and the status of the land-use rights "purchaser," while agricultural collectives, under the control of local Communist Party chairmen, distribute collectively owned agricultural land to rural residents in the form of 30-year renewable contracts. Governments and agricultural collectives can transfer or lease land-use rights to enterprises in return for the payment of fees, or other forms of compensation, such as profit sharing.

A major problem for foreign investors is the array of regulations that govern their ability to acquire land-use rights, which are limited to 50 years for industrial purposes in the case of foreign investors. Local implementation of these regulations may vary from central government standards, and prohibited practices may be tolerated in one locality while the regulations are enforced in another. Most wholly foreign-owned enterprises seek land-use rights to state-owned urban land as the most reliable protection for their operations. Chinese-foreign joint ventures usually attempt to acquire land-use rights through lease or contribution arrangements with the Chinese partner.

Chinese law does not currently define standards for compensation when eminent domain supersedes land-use rights. This situation creates considerable uncertainty when foreign-invested enterprises are ordered to vacate premises in the public interest. Moreover, the absence of public hearings on planned public projects can give affected parties, including foreign-invested enterprises, little advance warning. China is aware of this problem, however, and is reportedly revising laws such as the Rural Land Contract Law to address it. At present, it remains unclear how extensive or effective the revisions will be.

Given the scarcity of land resources in China, the price of land-use rights and land allocation are important considerations for purposes of investment, production and trade. It is therefore of some concern to the United States that the Chinese government continues to exercise a strong hand in land-use markets in China, with the objective, in part, to ensure that land use-rights are allocated in accordance with a compulsory national land-use plan aimed at boosting grain production, and state industrial development policies aimed at sustaining urbanization and growth.

CORRUPTION

While WTO membership has increased China's exposure to international best practices and resulted in some overall improvements in transparency, corruption remains prevalent. Chinese officials admit that corruption is one of the most serious problems the country faces, stating that corruption poses a threat to the survival of the Communist Party and the state. China's leadership has called for an acceleration of the country's anti-corruption drive, with a focus on closer monitoring of provincial-level officials.

In the area of government procurement, China has pledged in recent years to begin awarding contracts solely on the basis of commercial criteria. However, it is unclear how quickly, and to what extent, the Chinese government will be able to follow through on this commitment. U.S. companies complain that the widespread existence of unfair bidding practices in China puts them at a competitive disadvantage. It also undermines the long-term competitiveness of both domestic and foreign enterprises operating in China.

China criminalized the payment of bribes to officials of foreign governments and international public organizations, effective in 2011, as required by the United Nations Convention against Corruption, which China ratified in 2006. Although criminalizing foreign bribery represents an important milestone, China has provided little information about how the law is being interpreted and enforced. Accordingly, the United States has continued to review China's anti-corruption efforts and to encourage China to vigorously enforce its laws.