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# **2015 Report to Congress On China's WTO Compliance**



**United States Trade Representative  
December 2015**

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### 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
CFDA	China Food and Drug Administration
CIRC	China Insurance Regulatory Commission
CNCA	National Certification and Accreditation Administration
CNIS	China National Institute for Standards
Codex	Codex Alimentarius
CUP	China UnionPay
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
MOFTEC	Ministry of Foreign Trade and Economic Cooperation
MOH	Ministry of Health
MOST	Ministry of Science and Technology
NCA	National Copyright Administration
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
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
SDPC	State Development and Planning Commission
S&ED	U.S.-China Strategic and Economic Dialogue
SFDA	State Food and Drug Administration
SIPO	State Intellectual Property Office
SPB	State Postal Bureau
SPC	Supreme People's Court
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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### FOREWORD

This is the fourteenth 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 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).

Like the prior reports, this report is structured as an examination of the nine broad categories of WTO commitments undertaken by China. Throughout the report, USTR has attempted to provide as complete a picture of China's WTO compliance as possible, subject to the inherent constraints presented by the sheer volume and complexity of the required changes to China's trade regime and transparency obstacles. The report identifies areas where progress has been achieved and underscores areas of concern, as appropriate, with regard to the commitments that became effective upon China's accession to the WTO as well as those commitments scheduled to be phased in over time.

The focus of the report's analysis continues to be on trade concerns raised by U.S. stakeholders that, in the view of the U.S. Government, merit attention within the WTO context. The report does not attempt to provide an exhaustive analysis of those concerns or the individual commitments made in China's WTO accession agreement that might be implicated by them.

This report also is the one report, from among the various annual reports prepared by USTR, which

provides comprehensive information on the status of the trade and investment commitments that China has made through the U.S.-China Joint Commission on Commerce and Trade and the U.S.-China Strategic and Economic Dialogue.

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 Market Access and Compliance officers 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 also published a notice in the Federal Register on August 10, 2015, asking interested parties to submit written comments and testimony and scheduling a public hearing before the TPSC. The public hearing took place on October 7, 2015. A list of the written submissions received from interested parties is set forth in Appendix 1, and the persons who testified at the hearing before the TPSC are identified in Appendix 2.

## EXECUTIVE SUMMARY

### OVERVIEW

Fourteen years ago, on December 11, 2001, China acceded to the World Trade Organization. The terms of its accession called for China to implement numerous specific commitments over time, with all key commitments phased in by December 11, 2006. The data confirm a dramatic expansion in trade and investment among China and its many trading partners, including the United States, since China joined the WTO:

- U.S. exports of goods to China totaled \$124 billion in 2014, representing an increase of 545 percent since 2001 and positioning China as the United States' largest goods export market outside of North America.
- U.S. services exports reached \$43 billion in 2014, representing an increase of 733 percent since 2001. Services supplied through majority U.S.-invested companies in China also have been increasing dramatically, totaling an additional \$43 billion in 2013, the latest year for which data is available.

As in past years, despite these positive results, the overall picture currently presented by China's WTO membership remains complex.

Many of the problems that arise in the U.S.-China trade and investment relationship can be traced to the Chinese government's interventionist policies and practices and the large role of state-owned enterprises and other national champions in China's economy, which continue to generate significant trade distortions that inevitably give rise to trade frictions. At the same time, the United States notes that China's current leadership has highlighted the need for and has begun to pursue further economic reform in China. If pursued appropriately, this reform effort offers the potential for addressing these problems and for helping to

realize the tremendous potential of the U.S.-China trade and investment relationship.

Indeed, the United States views economic reform in China as a win-win for the United States and China. If China is going to deal successfully with its increasing economic challenges at home, it must allow greater scope for market forces to operate, which requires altering the role of the state in planning the economy. It likewise must reform state-owned enterprises, eliminate preferences for domestic national champions and remove market access barriers currently confronting foreign goods and services. Economic reform in China is also strongly in the United States' interest, not only because the Chinese government's interventionist policies and practices and the large role of state-owned enterprises in China's economy are principal drivers of trade frictions, but also because sustainable Chinese economic growth will lead to increased U.S. exports and a more balanced U.S.-China trade and investment relationship and also will help drive global economic growth.

In 2015, as in past years, when trade frictions arose, the United States pursued dialogue with China to resolve them. However, when dialogue with China has not led to the resolution of key trade issues, the United States has not hesitated to invoke the WTO's dispute settlement mechanism. Since China's accession to the WTO, the United States has brought 17 WTO cases against China, more than twice as many WTO cases as any other WTO member has brought against China. In doing so, the United States has placed a strong emphasis on the need for China to adhere to WTO rules, holding China fully accountable as a mature participant in, and a major beneficiary of, the WTO's global trading system.

China's first 14 years as a WTO member are described below, followed by a review of key developments in 2015. Then, USTR describes its conclusions regarding China's WTO compliance efforts to date, which are subsequently summarized in Table 1 (beginning on page 23).

### CHINA'S FIRST 14 YEARS AS WTO MEMBER

The commitments to which China's leaders agreed when China joined the WTO in 2001 were sweeping in nature and required the Chinese government to make changes to hundreds of laws, regulations and other measures affecting trade and investment. These changes largely coincided with the economic reform goals of China's leaders at the time, which built on the economic reforms that China had begun under Deng Xiaoping in 1978. The Chinese leaders who negotiated the terms of China's WTO accession correctly believed that China's economy needed to rely more on market signals and less on Chinese government economic planners and state-owned enterprises. Indeed, these leaders had initiated a dramatic and rapid reform of state-owned enterprises in the mid-1990s.

Following China's accession to the WTO, the Chinese government took many steps to implement China's numerous commitments. These steps unquestionably deepened China's integration into the WTO's rules-based international trading system, while also strengthening China's ongoing economic reforms.

New leaders took over in China in 2003, two years after China's WTO accession. While the Chinese government continued to take steps to implement China's outstanding WTO commitments, it generally did not pursue economic reforms as aggressively as before. Instead, the Chinese government increasingly emphasized the state's role in the economy, diverging from the path of economic reform that had driven China's accession to the WTO. With the state leading China's economic development, the Chinese government pursued new and more expansive industrial policies, often designed to limit market access for imported goods, foreign manufacturers and foreign service suppliers, while offering substantial government guidance, resources and regulatory support to Chinese industries, particularly ones dominated by state-owned enterprises. This heavy state role in the economy, reinforced by unchecked discretionary

actions of Chinese government regulators, generated serious trade frictions with China's many trade partners, including the United States.

In particular, beginning with the creation of the State-owned Assets Supervision and Administration Commission (SASAC) in 2003, China's new leaders de-emphasized their predecessors' move toward a greater reliance on market forces and a lesser reliance on Chinese government economic planners and state-owned enterprises. Instead, the new leaders set out to bolster the state sector by seeking to improve the operational efficiency of state-owned enterprises and by orchestrating mergers and consolidations in order to make these enterprises stronger. These actions soon led to institutionalized preferences for state-owned enterprises and the creation of national champions in many sectors.

By 2006, when China had taken steps to implement the last of its key WTO commitments, China's policy shift became more evident. It was at this time that USTR began reporting on Chinese government policies and practices that demonstrated a stronger embrace of state capitalism, a trend that continued into 2012, the last full year under the Chinese leaders who had taken over in 2003. USTR also reported that some of these policies and practices suggested that China had not yet fully embraced key WTO principles, such as market access, non-discrimination and transparency. Exacerbating this situation was China's incomplete adoption of the rule of law, including through government officials' abuse of administrative processes.

For example, as we reported in 2012, confidential accounts from foreign enterprises indicate that Chinese government officials, acting without fear of legal challenge, at times require foreign enterprises to transfer technology as a condition for securing investments approvals, even though Chinese law does not – and cannot under China's WTO commitments – require technology transfer. Similarly, in the trade remedies context, China's regulatory authorities at times seem to pursue antidumping and countervailing duty investigations

and impose duties for the purpose of striking back at trading partners that have legitimately exercised their rights under WTO trade remedy rules. As three WTO cases won by the United States confirm, China's regulatory authorities appear to pursue these investigations even when necessary legal and factual support for the duties is absent. In addition, U.S. industry and industries from other WTO Member countries have asserted that China's competition policy enforcement authorities not only are targeting foreign companies, but also at times use *Anti-monopoly Law* investigations as a tool to protect and promote domestic national champions and domestic industries.

By 2013, when China's next leadership transition was complete, some positive signs of a renewed commitment to economic reform in China began to emerge. The new Chinese leaders' focus on economic reform soon led to a Decision reached in November 2013 at the Third Plenum of the 18th Central Committee of the Chinese Communist Party. The Third Plenum Decision endorsed a number of far-reaching economic reform pronouncements, calling for the market to play a "decisive" role in allocating resources, reducing Chinese government intervention in the economy, accelerating China's opening up to foreign goods and services, reforming China's state-owned enterprises and improving transparency and the rule of law to allow fair competition in China's market. Although these important pronouncements continue to face resistance from entrenched interests and have yet to be fully translated into actions that would significantly change China's trade regime, they would provide tremendous benefits not only to China but also to its trading partners if realized.

Another notable development took place in July 2013, when China announced that it was prepared to negotiate a high-standard Bilateral Investment Treaty (BIT) with the United States. Since then, the BIT negotiations have proceeded with China's full engagement, although to date China has decided not to pursue a material reduction of its investment

restrictions in anticipation of the successful conclusion of those negotiations.

Despite China's re-focusing on economic reform, a wide range of Chinese policies and practices continued to generate significant concerns among U.S. stakeholders in 2015. Major areas of specific concern continued to include: serious problems with intellectual property rights enforcement in China, including in the area of trade secrets; the Chinese government's wide-ranging use of industrial policies favoring state-owned enterprises and domestic national champions in many sectors; troubling agricultural policies that block U.S. market access; numerous continuing restrictions on services market access; and inadequate transparency. China's slow movement toward accession to the WTO Government Procurement Agreement (GPA) also hinders development of the U.S.-China trade relationship.

Going forward, as reported in prior years, the United States looks to China to reduce market access barriers, uniformly follow the fundamental principles of non-discrimination and transparency, significantly reduce the level of government intervention in the economy, fully institutionalize market mechanisms, require state-owned enterprises to compete with other enterprises on fair and non-discriminatory terms, and fully embrace the rule of law. Taking these steps is critical to realizing the tremendous potential presented by China's WTO membership, including the breadth and depth of trade and investment – and prosperity – possible in a thriving, balanced global trading system. China's new leaders seem to have embraced many elements of this approach, and the United States will continue to work with China going forward to help make it a reality.

### 2015 DEVELOPMENTS

In 2015, the United States worked hard to increase the benefits that U.S. businesses, workers, farmers, ranchers, service providers and consumers derive

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from trade and economic ties with China. Throughout the past year, the United States focused on outcome-oriented dialogue at all levels of engagement with China, while also taking concrete steps to enforce U.S. rights at the WTO as appropriate in areas where dialogue had not resolved U.S. concerns.

On the bilateral front, the United States and China pursued numerous formal and informal meetings and dialogues throughout the past year, culminating in three high-level meetings. In June 2015, the United States and China met in Washington and held their seventh U.S.-China Strategic and Economic Dialogue (S&ED) meeting. Constructive dialogue also took place in connection with President Xi's state visit to Washington in September 2015. In addition, the United States and China held the 26<sup>th</sup> meeting of the U.S.-China Joint Commission on Commerce and Trade (JCCT) in November 2015. The United States used all of these avenues to engage China's leadership on trade and investment matters and to seek resolutions to a number of pressing issues.

The two sides were able to make significant progress on the following key trade issues through their bilateral engagement in 2015:

- China committed that generally applicable measures to enhance information and communications technology (ICT) cybersecurity in commercial sectors should be consistent with WTO agreements, 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.
- China committed to ensure that ICT-related regulations in the banking sector are non-discriminatory and do not impose nationality-based conditions or restrictions on the purchase, sale or use of ICT products, services or technologies by commercial enterprises. China

further committed that Chinese banks are free to purchase ICT products regardless of the country of origin.

- China agreed to notify the WTO of concerning draft ICT-related regulations in the insurance sector for review by WTO members.
- China confirmed that the policies published by the Chinese government on the development of strategic emerging industries, including industry development promotion guidelines and associated national and sub-national industry development investment funds, are applicable to, and made available, on an equal basis to foreign-invested enterprises. China further committed to enhance transparency by soliciting public comments on drafts of binding policy measures in this area.
- China committed to further improve its agricultural biotechnology approval processes and reaffirmed the importance of implementing timely, transparent, predictable and science-based approval processes for products of agricultural biotechnology, which are based on international standards.
- China announced and clarified its ongoing and intended efforts to revise China's trade secrets system and provide more effective aspects of its civil judicial system to deter and respond to the misappropriation of trade secrets.
- China agreed to participate in a government-industry dialogue to enhance the systems available to address challenges relating to online counterfeiting and to increase information sharing and cooperation on cross-border enforcement.
- China committed to a transparent and expeditious process for developing Geographical Indication-related measures that will help keep this significant market open to U.S. agricultural and other products.

- China committed to ensure that any Chinese enterprise licensed to distribute films in China can distribute imported flat-fee films on their own and without having to contract with or otherwise partner with China Film Group or any other state-owned enterprise. China further committed that the State Administration of Press, Publication, Radio, Film and Television (SAPPRFT), China Film Group or any other state-owned enterprise would not directly or indirectly influence the negotiation, terms, amount of compensation or execution of any distribution contract between a licensed Chinese distributor and a U.S. flat-fee film producer.
- China committed to enhance the participation of foreign financial services firms and investors, including banks, securities companies, private fund management institutions, credit rating agencies, brokers and traders, in China's capital markets through a variety of specified means, such as expansions in the scope of permitted business activities, the lifting of restrictions on currently permitted business activities and increased foreign equity participation.
- China made a series of commitments relating to the *Anti-monopoly Law*, including a commitment that China's anti-monopoly enforcement agencies will conduct enforcement according to the *Anti-monopoly Law* and will be free from intervention by other agencies and that commercial secrets obtained in the process of anti-monopoly enforcement will be protected under the law and generally shall not be disclosed to other agencies. China also recognized the importance of maintaining coherent rules relating to intellectual property rights in the *Anti-monopoly Law* context, including by taking into account the pro-competitive effects of intellectual property licensing.
- China made a series of commitments relating to its national security reviews of foreign investments, including, among other things, to limit the scope of these reviews solely to issues that constitute national security concerns, not to generalize the scope of these reviews to include other broader public interest or economic issues, and to apply the same rules and standards to each investment reviewed, regardless of country of origin.
- The United States and China reaffirmed as a top economic priority the negotiation of a high standard BIT that reflects a shared commitment to the objectives of non-discrimination, fairness and transparency, that effectively facilitates and enables market access and market operation, and that represents on each side an open and liberalized investment regime. During the state visit of President Xi in September 2015, the two sides also committed to intensify their discussions and to work expeditiously to conclude the negotiation of a mutually beneficial treaty that meets these high standards.
- China took steps to address problematic government subsidization involving local content requirements in the manufacture of intelligent manufacturing equipment.
- China committed to investigate carefully the WTO consistency of export-contingent subsidies provided to producers of so-called "International Well Known Brands" as well as the WTO consistency of subsidies provided to agricultural producers that purchase Chinese-made farm machinery or equipment.
- China agreed to hold discussions with the United States in 2016 regarding capacity, production and trade in the steel sector and to provide updates on its progress in implementing its July 2014 S&ED commitment 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 within five years.

- China also agreed to intensify discussions with the United States regarding excess capacity in the aluminum sector.
- China committed that it would increase the transparency of its semiconductor industry development plans and that its National Semiconductor Investment Fund would be managed by professional fund companies in a manner consistent with market-based concepts and free from government intervention into normal operational activities.
- China committed that licensing commitments for patents in voluntary standards will be made voluntarily and without government involvement in negotiations over those commitments, except as otherwise provided by legally binding measures.
- China agreed to closer cooperation with the United States as China's regulatory authorities develop their regulatory and enforcement frameworks for the oversight of manufacturers of bulk chemicals that can be used as active pharmaceutical ingredients (APIs) and further agreed 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 stakeholders.
- Building on prior JCCT commitments, China announced steps to further improve the registration and approval processes for pharmaceuticals and medical devices.
- China agreed that imported medical devices will be treated the same as domestically produced medical devices.

While progress was made on some meaningful issues, as described above, many issues of concern remain. The United States will continue to engage China on important issues in the areas of intellectual property rights enforcement, secure and controllable ICT policies, technology localization, indigenous innovation, investment restrictions, export restraints, government subsidization, excess capacity, state-owned enterprises, strategic emerging industries, administrative licensing, government procurement, taxation, standards development, market access for U.S. beef and poultry, biotechnology product approvals, agricultural support, pharmaceuticals and medical devices, cosmetics, financial services, Internet-related services, film distribution, legal services, telecommunications services, express delivery services, competition policy and transparency, among others.

On the enforcement side, the United States continued to pursue a robust agenda in 2015. The United States brought two new WTO cases against China, while continuing to prosecute six other WTO cases against China.

One of the new cases challenges 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." This case follows a case, launched in 2012, challenging similar 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 second new case challenges discriminatory Chinese government measures exempting sales of certain aircraft produced in China, including general aviation aircraft, business jets, agricultural aircraft and regional jets, from the value-added tax (VAT) while imposing that same tax on sales of imported aircraft. Compounding this problem, it appears that

the Chinese government never published these measures as required by China's WTO commitments.

Over the past year, the United States also continued to work to ensure that China fully complied with the WTO's rulings in a case in which the United States had challenged antidumping and countervailing duties that China had imposed on imports of U.S. grain-oriented electrical steel (GOES), a product used by the power generating industry. In that case, the United States had pursued WTO litigation because of serious concerns that China's Ministry of Commerce (MOFCOM) had imposed the duties in question without regard for applicable legal requirements or the facts. In October 2012, the United States prevailed before the WTO's Appellate Body. Nevertheless, MOFCOM proceeded to issue a redetermination that maintained the duties in place. Because this redetermination appeared to be inconsistent with the WTO's rulings, the United States launched a challenge to it in a proceeding under Article 21.5 of the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (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. In July 2015, the WTO panel hearing the case found that MOFCOM's redetermination did not comply with the WTO's rulings.

Meanwhile, in August 2014, the United States secured a victory in a WTO case challenging highly trade-distortive export quotas, export duties and other restraints maintained by China on the export of rare earths, tungsten and molybdenum, which are key inputs in a multitude of U.S. manufacturing sectors and U.S.-made products, including hybrid car batteries, wind turbines, energy-efficient lighting, steel, advanced electronics, automobiles, petroleum and chemicals. China agreed to comply with the WTO's rulings in this case by May 2015, and it subsequently announced that it had eliminated the export quotas and export duties at issue by that deadline.

Other active WTO cases against China involve challenges to export subsidies being provided to automobile and automobile parts enterprises in China, antidumping and countervailing duties that China had imposed on imports of U.S. chicken broiler products, restrictions that China had put in place to create and maintain a domestic national champion as the exclusive supplier of electronic payment services, i.e., the services needed to process most credit and debit card transactions in China, and importation and distribution restrictions applied to theatrical films. The status of each of these cases is detailed below in the Enforcement section (beginning on page 34).

### **CONCLUSIONS REGARDING CHINA'S WTO COMPLIANCE EFFORTS**

A summary of USTR's conclusions regarding China's WTO compliance efforts is set forth in Table 1. Each of these conclusions is discussed in more detail in subsequent sections of this report, and at the end of each of those sections, the report describes the next steps that the United States intends to take going forward to address shortcomings in China's WTO compliance efforts.

### **PRIORITY ISSUES**

At present, China's trade policies and practices in several specific areas cause particular concern for the United States and U.S. stakeholders, including in relation to China's approach to the obligations of WTO membership. The key concerns in each of these areas are summarized below. In 2016, the United States will continue to pursue vigorous and expanded bilateral engagement to resolve the serious issues that remain in these areas. The United States also will continue to hold China accountable for adherence to WTO rules when dialogue does not resolve U.S. concerns, including through the use of the dispute settlement mechanism at the WTO.



## Intellectual Property Rights

### Overview

Since its accession to the WTO, China has undertaken a wide-ranging revision of its framework of laws and regulations aimed at protecting the intellectual property rights (IPR) of domestic and foreign right holders, as required by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement). However, inadequacies in China's IPR protection and enforcement regime continue to present serious barriers to U.S. exports and investment. China was again placed on the Priority Watch List in USTR's 2015 Special 301 report. In addition, in 2015, USTR announced the results of its 2014 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

The protection and enforcement of trade secrets in China is a serious problem that has attained a higher profile in recent years. Thefts of trade secrets that benefit Chinese companies have occurred both within China and outside of China. Offenders in many cases continue to operate with impunity. Most 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 order to help address these challenges, the United States has won commitments from China not to condone this type of state-sponsored misappropriation of trade secrets and has urged China to update and amend its trade secrets-related laws and regulations, particularly the *Anti-unfair Competition Law*, and to consider issuing judicial guidance to strengthen its trade secrets regime. The United States also has urged China to

take actions to address this problem across the range of state-sponsored actors and to promote public awareness of this issue. At the November 2015 JCCT meeting, China announced that it is in the process of amending this law and intends to issue model or guiding court cases and clarify rules on preliminary injunctions, evidence preservation orders and damages.

### Pharmaceutical Patents and Market Access

The United States continues to engage China on a range of patent and technology transfer concerns relating to pharmaceuticals. At the December 2013 JCCT meeting, China committed to permit supplemental data supporting pharmaceutical patent applications. However, it appears that China has only implemented that commitment in part. In addition, many other concerns remain, including the need to provide effective protection against unfair commercial use of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products, and to provide effective enforcement against infringement of pharmaceutical patents. Additionally, a backlogged drug regulatory approval system presents market access and patient access concerns. 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.

A serious and emerging concern that arose in 2015 emanates from China's recently unveiled proposals in the pharmaceuticals sector that seek to promote government-directed indigenous innovation and technology transfer through the provision of regulatory preferences. For example, a State Council measure issued in final form without having been made available for public comment calls for expedited regulatory approval to be granted to innovative new drugs where the applicant's manufacturing capacity has been shifted to China. The United States is pressing China to reconsider this approach.

The United States is also engaging China's regulatory authorities as they consider amendments to pharmaceutical registration regulations. The United States is working to ensure that these amendments promote the early notification and resolution of patent disputes.

### Software Piracy

Due to the serious obstacles in China to the effective protection and enforcement of IPR in all forms, sales of legitimate IP-intensive goods and services, including software and audiovisual products, remain disproportionately low compared to similar markets with stronger IPR protection and enforcement. The United States continues to work with China on a series of JCCT and S&ED commitments to foster a better IP environment that will facilitate increased sales of legitimate IP-intensive goods and services. For example, sales of legitimate software to the Chinese government by U.S. companies have seen only a modest increase, while losses to U.S. software companies from the use of pirated software by Chinese state-owned enterprises and other enterprises remain very high. The United States continues to call on China to fulfill its existing commitments with regard to software legalization and to urge all levels of the Chinese government, state-owned enterprises and state-owned banks to take necessary steps to ensure the use of legitimate software.

### Online Piracy

Online piracy in China is widespread and continues on a large scale, affecting industries distributing legitimate music, motion pictures, books and journals, software and video games. Increased enforcement activities have yet to slow online sales of pirated goods. At the December 2014 JCCT meeting, China committed to strengthen enforcement against copyright piracy activities in the online environment and to deter the occurrence of copyright piracy through criminal, civil and administrative remedies and penalties. Separately,

new rules on the review of foreign television content present a serious concern for the continued viability of licensed foreign television content, as they are disrupting legitimate commerce while inadvertently creating conditions that allow for pirated content to displace legitimate content online.

### Counterfeit Goods

Although rights holders report increased enforcement efforts by Chinese government authorities, counterfeiting in China, affecting a wide range of goods, remains widespread. One area of particular U.S. concern involves medications. Despite 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 agreed 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 agreed 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. The United States will continue to work with China to ensure that China fulfill its commitments in this important area.

### Industrial Policies

#### Overview

China continued to pursue industrial policies in 2015 that seek to limit market access for imported goods, foreign manufacturers and foreign service suppliers, while offering substantial government guidance, resources and regulatory support to Chinese industries. The principal beneficiaries of these policies are state-owned enterprises, as well as other favored domestic companies attempting to move up the economic value chain.

### Secure and Controllable ICT Policies

In 2015, global concerns heightened over a series of Chinese 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. Concerns centered on requirements that ICT equipment and other ICT products and services in critical sectors be “secure and controllable.”

Some of these policies would apply to wide segments of the Chinese market. For example, in June 2015, China passed a *National Security Law* with a stated purpose of safeguarding China's security, but it included sweeping provisions addressing economic and industrial policy. China also drafted laws relating to counterterrorism and cybersecurity this year which, if finalized in their current form, would also impose far-reaching and onerous trade restrictions on imported ICT products and services in China. Additionally, in September 2015, the State Council published a big data development plan, which for the first time set a time table for adopting “secure and controllable” products and services in critical departments by 2020.

Other policies would apply to specific sectors of China's economy. A high profile example in 2015 is a 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 imposed a series of criteria that would shut out foreign ICT providers from China's banking sector. Other specific sectors currently pursuing “secure and controllable” policies include the insurance sector and the e-commerce sector.

This year, the United States, in concert with other governments and stakeholders around the world, raised serious concerns at the highest levels of government within China. President Obama and President Xi Jinping discussed this issue during the state visit of President Xi in September and agreed

on a set of principles for trade in information technologies. The issue was also raised in connection with the June S&ED meeting and the November JCCT meeting, with China making a series of additional important commitments with regard to technology policy.

### Indigenous Innovation

In 2015, policies aimed at promoting “indigenous innovation” continued to represent an important component of China's industrialization efforts. Through intensive, high-level bilateral engagement, the United States previously secured a series of critical commitments from China that generated major progress in de-linking indigenous innovation policies at all levels of the Chinese government from government procurement preferences, culminating in the issuance of a State Council measure mandating that provincial and local governments eliminate any remaining linkages by December 2011. Since then, the principal challenge has been to address a range of discriminatory indigenous innovation preferences proliferating outside of the government procurement context.

Using the U.S.-China Innovation Dialogue, the United States was able to persuade China to take an important step in this direction at the May 2012 S&ED meeting, where China committed to treat IPR owned or developed in other countries the same as IPR 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, China reviewed specific U.S. concerns, and the United States and China intensified their discussions. At the December 2014 JCCT meeting, China clarified and underscored that it will treat IPR owned or developed in other countries the same as domestically owned or developed IPR, and it further agreed that enterprises are free to base technology transfer decisions on business and market considerations, and are free to independently negotiate and decide whether and under what circumstances to assign or license

intellectual property rights to affiliated or unaffiliated enterprises.

In 2015, China's measures on "secure and controllable" ICT policy (discussed above) included provisions that would create discriminatory indigenous innovation preferences. In addition, China's recent steps to reform its drug review and approval system raised new concerns related to indigenous innovation and technology transfer. For example, in 2015, China's State Council issued a measure that calls for expedited review and approval to be granted to "innovative new drugs with manufacturing capacity shifted to China."

### Technology Transfer

While some longstanding concerns regarding technology transfer remain unaddressed, and new ones have emerged, such as tying government preferences to the localization of technology in China and granting regulatory review and approval preferences to innovative drug manufacturers that shift their production to China, some progress has been made in select areas. For example, China committed at the December 2013 JCCT meeting not to finalize or implement a selection catalogue and rules governing official use vehicles. The catalogue and rules would have interfered with independent decision making on technology transfer and would have effectively excluded vehicles produced by foreign and foreign-invested enterprises from important government procurement opportunities.

### 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, as discussed above, the United States won a second WTO case, where the claims focused 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 agreed to comply with the WTO's rulings in this second case by May 2015, and it subsequently announced that it had eliminated the export quotas and export duties at issue by that deadline.

### Export Subsidies

China has continued to provide a range of injurious subsidies to its domestic industries, some of which appear to be prohibited under WTO rules. The United States has addressed these subsidies both through countervailing duty proceedings conducted by the Commerce Department and through dispute settlement cases at the WTO, including a new one launched in 2015. The United States and other WTO members also have continued to press China to notify its subsidies to the WTO in accordance with its WTO obligations. Since joining the WTO 14 years ago, China has not yet submitted to the WTO a complete notification of subsidies maintained by the central government, and it has not yet notified any of its sub-central government subsidies.

### Excess Capacity

Chinese government actions and financial support in manufacturing industries like steel and aluminum 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 such as Canada and Mexico. While China recognizes the severe excess capacity problem in the steel and aluminum industries, among others, and has taken steps to try to address this problem, there have been mixed results.

From 2000 to 2014, China accounted for more than 75 percent of global steelmaking capacity growth. Currently, China's capacity alone exceeds the combined steelmaking capacity of the European Union (EU), Japan, the United States, and Russia. China has no comparative advantage with regard to the energy and raw material inputs that make up the majority of costs for steelmaking, yet China's capacity has continued to grow exponentially and is estimated to have exceeded 1.4 billion metric tons (MT) in 2014, despite weakening demand domestically and abroad. While China's steel production is slowing and China may produce approximately 2 to 3 percent less steel in 2015 than in 2014, steel demand in China is projected to decrease 5 percent this year. As a result, China's steel exports grew to be the largest in the world, at 93 million MT in 2014, a 50-percent increase over 2013 levels, despite sluggish steel demand abroad. In 2015, there is rising concern that China's steel exports are still growing and may have increased 25 percent in the first ten months of 2015, as compared to the same period in 2014.

Similarly, monthly production of aluminum in China doubled between January 2011 and July 2015 and continues to grow. Large new facilities are being built with government support, including through energy subsidies. China's aluminum excess capacity is contributing to a severe decline in global aluminum prices, harming U.S. plants and workers.

Excess capacity in China – whether in the steel industry or other industries like aluminum – hurts U.S. industries and workers not only because of direct exports from China to the United States, but because lower global prices and a glut of supply make it difficult for even the most competitive producers to remain viable. Domestic industries in many of China's trading partners have continued to

respond to the effects of the trade-distortive effects of China's excess capacity by petitioning their governments to impose trade remedies such as antidumping and countervailing duties.

### **Value-added Tax Rebates and Related Policies**

As in prior years, in 2015, the Chinese government attempted to manage the export of many primary, intermediate and downstream products by raising or lowering the value-added tax 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. A positive development took place at the July 2014 S&ED meeting, when China agreed 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. To date, however, China has not made any movement toward the adoption of international best practices.

### **Strategic Emerging Industries**

In 2010, China's State Council issued a decision on accelerating the cultivation and development of "strategic emerging industries" (SEIs) that called upon China to develop and implement policies designed to promote rapid growth in government-selected industry sectors viewed as economically and strategically important for transforming China's industrial base into one that is more internationally competitive in cutting-edge technologies. China subsequently identified seven sectors for focus under the SEI initiative, including energy-saving and environmental protection, new generation information technology, biotechnology, high-end

equipment manufacturing, new energy, new materials and new-energy vehicles.

To date, import substitution policies have been included in some SEI development plans at the sub-central government level. For example, a development plan for the light-emitting diode (LED) industry issued by the Shenzhen municipal government included a call to support research and development in products and technologies that have the ability to substitute for imports. Shenzhen rescinded the plan in 2013 following U.S. Government intervention with China's central government authorities.

Similarly, some central and sub-central government measures use local content requirements as a condition for enterprises in SEI sectors to receive financial support or other preferences. For example, in the high-end equipment manufacturing sector, China has maintained an annual program that conditioned the receipt of a subsidy on an enterprise's use of at least 60 percent Chinese-made components when manufacturing intelligent manufacturing equipment. Citing WTO concerns, the United States began pressing China in 2014 to repeal or modify these measures. In 2015, China reported that it had decided not to renew this subsidy program.

In addition, an array of Chinese policies designed to assist Chinese automobile enterprises in developing electric vehicle technologies and in building domestic brands that can succeed in global markets continued to pose challenges in 2015. As previously reported, these policies have generated serious concerns about discrimination based on the country of origin of intellectual property, forced technology transfer, research and development requirements, investment restrictions and discriminatory treatment of foreign brands and imported vehicles. Although significant progress has been made in addressing some of these policies, more work remains to be done.

### **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, among others, because companies in these industries are unable to purchase high-quality, lower-cost remanufactured products produced outside of China.

### **Standards and Technology**

In the standards area, two principal types of problems harm U.S. companies. First, Chinese government officials in some instances have reportedly 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, such as 3G and 4G telecommunications standards, Wi-Fi standards and information security standards. To date, bilateral engagement has yielded minimal progress in resolving these matters.

### **Government Procurement**

The United States continues to press China to take concrete steps toward fulfilling its commitment to accede to the 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 of coverage 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, which is 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 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. The United States will continue to work with the Chinese government to ensure that China's future GPA offers include coverage of government procurement regardless of which law it falls under, including procurement conducted by both government entities and other entities, such as state-owned enterprises.

### Investment Restrictions

China seeks to protect many domestic industries through a restrictive investment regime, which adversely affects foreign investors in services sectors, agriculture, extractive industries and manufacturing sectors. In line with its own plans for domestic reform, including as expressed through the Third Plenum Decision, China continues to consider improvements to its foreign investment regime, including through the use of a "negative list" to govern access. However, many aspects of China's

current investment regime, including lack of substantial liberalization, maintenance of a case-by-case administrative approval system and the potential for a new and overly broad national security review, continue to cause foreign investors great concern. 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.

Meanwhile, the United States and China have committed at high levels to seek to conclude a high standard BIT. Building on China's commitment at the July 2013 S&ED meeting to negotiate a BIT that will provide national treatment at all phases of investment, including market access (i.e., the "pre-establishment" phase of investment), and will employ a negative list approach in identifying exceptions (meaning that all investments are permitted except for those explicitly excluded), the United States and China exchanged initial negative list offers in June 2015. Subsequently, as agreed at the June 2015 S&ED meeting, the two sides exchanged revised, improved negative list offers in September 2015. During the state visit of President Xi later that month, the United States and China reaffirmed, as a top economic priority, the negotiation of a high standard BIT that represents on each side an open and liberalized investment regime. Based on the progress made in the negotiations and both sides' improved negative list offers, the two sides also committed to intensify their negotiations and to work expeditiously to conclude the negotiation of a mutually beneficial, high-standard treaty.

### Trade Remedies

China's regulatory authorities in some instances seem to be pursuing antidumping and countervailing duty investigations and imposing duties for the purpose of striking back at trading partners that have exercised their WTO rights against China, even when necessary legal and factual support for the duties is absent. The U.S. response has been the filing and prosecution of three WTO disputes. The decisions reached by the WTO in those three disputes – the most recent of which was issued in July 2015 – confirm that China failed to abide by WTO disciplines when imposing the duties at issue.

### Services

#### Overview

The prospects for U.S. service suppliers in China are promising, given the size of China's market and the Chinese leadership's stated intention to promote the growth of China's services sectors. The United States continues to enjoy a substantial surplus in trade in services with China, as the United States' cross-border supply of services into China totaled \$43 billion in 2014. In addition, services supplied through majority U.S.-invested companies in China totaled \$43 billion in 2013, the latest year for which data are available. This success has been largely attributable to the market openings phased in by China pursuant to its WTO commitments, as well as the U.S. Government's comprehensive engagement with China's various regulatory authorities, including in the pursuit of sector openings that go beyond China's WTO commitments.

Nevertheless, in 2015, numerous challenges persisted in a range of services sectors. As in past years, Chinese regulators continued to use discriminatory regulatory processes, informal bans on entry and expansion, overly burdensome licensing and operating requirements, and other means to frustrate efforts of U.S. suppliers of banking, insurance, telecommunications, Internet-related, audiovisual, express delivery, legal and other

services to achieve their full market potential in China. Some sectors, including electronic payment services and theatrical film distribution, have been the subject of WTO dispute settlement. While China declared an intent to further liberalize a number of services sectors in its Third Plenum Decision, few concrete steps have been taken.

#### Electronic Payment Services

China continued to place unwarranted restrictions on foreign companies, including the major U.S. credit card and processing companies, which supply electronic payment services to banks and other businesses that issue or accept credit and debit cards. The United States prevailed in a WTO case challenging those restrictions, and China agreed to comply with the WTO's rulings by July 2013, but China has not yet taken needed steps to authorize access by foreign suppliers to this market. The United States is actively pressing China to comply with the WTO's rulings and also is considering appropriate next steps at the WTO.

#### Theatrical Film Distribution

In February 2012, the United States and China reached an alternative solution 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 foreign film producers. Significantly more U.S. films have been imported and distributed in China since the signing of the MOU, and the revenue received by U.S. film producers has increased significantly. 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, particularly with regard to films that are distributed in China on a flat-fee



basis rather than a revenue-sharing basis. At the June 2015 S&ED meeting, China committed to ensure that any Chinese enterprise licensed to distribute films in China can distribute imported flat-fee films on their own and without having to contract with or otherwise partner with China Film Group or any other state-owned enterprise. China further committed that SAPPFT, China Film Group or any other state-owned enterprise would not directly or indirectly influence the negotiation, terms, amount of compensation or execution of any distribution contract between a licensed Chinese distributor and a U.S. flat-fee film producer.

### Banking Services

China has exercised significant caution in opening up the banking sector to foreign competition. In particular, China has imposed working capital requirements and other requirements that have made it more difficult for foreign banks to establish and expand their market presence in China. Many of these requirements, moreover, have not applied equally to foreign and domestic banks. For example, China has 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 is limited to 25 percent. Another 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 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 three years and have had two consecutive years of profits. The regulations also restrict the scope of activities that can be conducted by foreign banks seeking to operate in China through branches instead of through subsidiaries.

### 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 participate in Chinese-foreign joint ventures, with foreign equity capped at 50 percent. The market share of these joint ventures is less than 4 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 insurance (i.e., property and casualty) sector, the market share of foreign-invested companies in this sector is only 1 percent. China's market for political risk insurance is completely closed to foreign participation. China has recently modified its treatment of insurance brokerage in the latest version of its Foreign Investment Catalogue, but it is not clear that any liberalization is actually taking place on the ground. Meanwhile, some U.S. insurance companies established in China continue to 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.

### Telecommunications Services

Restrictions maintained by China on value-added telecommunications services have created serious barriers to market entry for foreign suppliers seeking to provide value-added services. In addition, China's restrictions on basic telecommunications services, such as informal bans on new entry, 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 services market. In May 2013, China introduced rules establishing a pilot program for the resale of mobile services, which can increase competitive opportunities in China's heavily concentrated market. The United States is very concerned that foreign firms continue to be excluded from the pilot

program, while China has issued licenses to more than a dozen Chinese suppliers.

### Internet-related Services

China's Internet regulatory regime is restrictive and non-transparent, affecting a broad range of commercial services activities conducted via the Internet. In addition, China's treatment of foreign companies seeking to participate in the development of cloud computing, including computer data and storage services provided over the Internet, raises concerns. For example, China has imposed value-added telecommunications licensing requirements on this sector, including a 50 percent equity cap on investments by foreign companies, even though the services at issue are not telecommunications services.

### Audio-visual Services

China's restrictions in the area of theater services have wholly discouraged investment by foreign suppliers, and China's restrictions on services associated with television and radio greatly limit participation by foreign suppliers.

### Express Delivery Services

The United States continues to raise concerns with China regarding implementation of the 2009 Postal Law and related regulations. China has blocked foreign companies' access to the document segment of China's domestic express delivery market, and it does not have a strong track record of providing non-discriminatory treatment in awarding foreign companies business permits for access to the package segment of China's domestic express delivery market, where it also applies overly burdensome regulatory approaches.

### Legal Services

China has issued measures intended to implement the legal services commitments that it made upon joining the WTO. However, these measures restrict

the types of legal services that can be provided and impose lengthy delays for the establishment of new offices.

## Agriculture

### Overview

China is the largest agricultural export market for the United States, with more than \$24 billion in U.S. agricultural exports in 2014. Much of this success resulted from intensive engagement by the United States with China's regulatory authorities. Notwithstanding this success, China remains among the least transparent and predictable of the world's major markets for agricultural products, largely because of uneven enforcement of regulations and selective intervention in the market by China's regulatory authorities. As in past years, seemingly capricious practices by Chinese customs and quarantine agencies delay or halt shipments of agricultural products into China. Sanitary and phytosanitary (SPS) measures with questionable scientific bases and a generally opaque regulatory regime frequently create difficulties and uncertainty for traders in agricultural commodities, who require as much certainty and transparency as possible. 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. At the same time, China has been steadily increasing domestic support for key commodities, and reports commissioned by certain U.S. farm groups have concluded that China may be exceeding its WTO limits.

### Beef, Poultry and Pork

In 2015, beef, poultry and pork products were affected by questionable SPS measures implemented by China's regulatory authorities. For example, China continued to block the importation of U.S. beef and beef products, more than eight years after these products had been declared safe to trade under international scientific guidelines established by the World Organization for Animal Health (known

by its historical acronym OIE), and despite the further fact that in 2013 the United States received the lowest risk status from the OIE, i.e., negligible risk. China also continued to impose an unwarranted and unscientific Avian Influenza-related import suspension on U.S. poultry due to an outbreak of high-pathogenic Avian Influenza (AI). Specifically, China has been unwilling to follow OIE guidelines and accept poultry from regions in the United States unaffected by this disease. Additionally, China continued to maintain overly restrictive pathogen and residue requirements for raw meat and poultry. Consequently, anticipated growth in U.S. exports of these products was again not realized.

### Biotechnology Approvals

In 2014, delays in China's approvals of agricultural products derived from biotechnology worsened, creating increased uncertainty among traders, resulting in trade disruptions, particularly for U.S. exports of corn and dried distillers' grains with solubles (DDGS), and delaying the adoption of new seed varieties in the United States. In early December 2014, shortly before the JCCT meeting, China announced that it would be issuing import approvals for three outstanding biotechnology products of significant importance to U.S. farmers, including two soybean events and one corn event. In addition, while China still needs to improve its regulatory process and begin reviewing biotechnology products in a transparent and predictable manner, China did agree at the December 2014 JCCT meeting to hold an annual, multi-ministry dialogue with the United States at the Vice Minister level to discuss science-based agricultural innovation and the increased use of innovative technologies in agriculture. In September 2015, using this new dialogue, the United States discussed science-based agricultural innovation with China, including the benefits of increased use of innovative technologies in agriculture. At the same time, however, delays in China's approvals of agricultural products derived from biotechnology

continued throughout 2015. The United States will continue to pursue dialogue with China in this important area in 2016.

### Agricultural Support

Over the past several years, China has been significantly increasing domestic subsidies and other support measures for its agricultural sector. China has established a direct payment program, instituted minimum support prices for basic commodities and sharply increased input subsidies. China has implemented a cotton reserve system, based on minimum purchase prices, and cotton target price programs. China also has begun several new support schemes for hogs and pork, along with a purchasing reserve system for pork. China submitted its most recent notification concerning domestic support measures to the WTO in May 2015, but it only provided information up to 2010. The United States remains concerned that the methodologies used by China to calculate support levels, particularly with regard to its price support policies and direct payments, result in underestimates. Certain U.S. farm groups have commissioned reports to calculate support levels for certain commodities, including corn, wheat and soybeans, and these reports have concluded that China may be substantially exceeding its WTO-agreed domestic support spending limits.

### Transparency

#### Overview

One of the core principles reflected throughout China's WTO accession agreement is transparency. China's WTO transparency commitments in many ways required a profound historical shift in Chinese policies. Although China has made strides to improve transparency following its accession to the WTO, there remains a lot more for China to do in this area.

### Publication of Trade-related Laws, Regulations and Other 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, and China adopted a single official journal, to be administered by MOFCOM, in 2006. To date, 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. As a result, while trade-related administrative regulations and departmental rules are more commonly (but still not regularly) published in the journal, it is less common for other measures such as opinions, circulars, orders, directives and notices to be published, even though they are in fact all binding legal measures. In addition, China does not normally publish in the journal certain types of trade-related measures, such as subsidy measures, nor does it normally publish 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. China has taken several steps related to this commitment. In 2008, the National People's Congress (NPC) instituted notice-and-comment procedures for draft laws, 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. Since then, despite continuing U.S. engagement, little noticeable improvement in the publication of departmental rules for public comment appears to have taken place, even though China confirmed that those two SCLAO measures are binding on central government ministries.

### 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. The United States is pressing 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.

### Legal Framework

#### Overview

In addition to the area of transparency, several other areas of China's legal framework can adversely affect

the ability of the United States and U.S. exporters and investors 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

Despite numerous changes made by the Chinese government since the issuance of the Third Plenum Decision in November 2013, 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.

### Competition Policy

Chinese regulatory authorities' implementation of China's *Anti-monopoly Law* poses multiple challenges. One key concern relates to how the *Anti-monopoly Law* will be applied to state-owned enterprises, given that a provision in the *Anti-monopoly Law* protects the lawful operations of state-owned enterprises and government monopolies in industries deemed nationally important. To date, China has enforced the *Anti-monopoly Law* against state-owned enterprises, and it has stated that this law applies to state-owned enterprises, but U.S. industry continues to express concerns that enforcement against state-owned enterprises will be more limited.

Another concern relates to the procedural fairness of *Anti-monopoly Law* investigations. U.S. industry has expressed concern about insufficient predictability, fairness and transparency in the investigative processes of the National Development and Reform Commission (NDRC), including NDRC pressure to "cooperate" in the face of unspecified allegations or face steep fines and limitations imposed by NDRC on the ability of foreign companies to bring counsel to meetings. Through the S&ED and JCCT processes in 2014, the United States was able to secure commitments from China designed to help address most of these matters, although some concerns remain.

In 2015, the United States secured additional commitments from China relating to *Anti-monopoly Law* enforcement proceedings. These commitments address the protection of confidential business information, the independence of *Anti-monopoly Law* decision making, the jurisdiction of courts reviewing administrative *Anti-monopoly Law* decisions and *Anti-monopoly Law* agencies processes for reconsidering decisions. China also recognized the importance of maintaining coherent rules relating to intellectual property rights in the *Anti-monopoly Law* context, including by taking into account the pro-competitive effects of intellectual property licensing.

### NEXT STEPS

In 2016, as in prior years, the Administration will continue to vigorously pursue increased benefits for U.S. businesses, workers, farmers, ranchers and service providers from our trade and economic ties with China. The Administration will use all available tools to achieve these objectives, including the pursuit of productive, outcome-oriented dialogue in both bilateral and multilateral settings, as well as the vigorous use of enforcement mechanisms, where appropriate.

On the bilateral front, the United States will continue to pursue robust engagement with China at all levels of government focused on producing practical and meaningful outcomes. The United States will also take full advantage of multilateral venues such as the WTO to engage China. Key goals of this engagement will include ensuring that the benefits of China's WTO commitments are fully realized by the United States and other WTO members, and that trade frictions that may arise in the U.S.-China trade relationship are effectively resolved.

At the same time, as the United States has repeatedly demonstrated, when dialogue is not successful in resolving concerns, the United States will not hesitate to invoke the dispute settlement mechanism at the WTO where appropriate. Similarly, the United States will continue to rigorously enforce U.S. trade remedy laws, in accordance with WTO rules, when U.S. interests are being harmed by unfairly traded or surging imports from China.

As part of this upcoming engagement, the United States will continue to focus on China's implementation of the Third Plenum Decision, whose goals include reducing Chinese government intervention in the economy, accelerating China's

opening up to foreign goods and services, reforming China's state-owned enterprises and improving transparency and the rule of law to allow fair competition in China's market. The United States will continue to urge China to speedily implement these promising reforms, which have many similarities with the U.S. trade agenda with China.

In addition, the United States looks forward to intensified negotiations with China in order to reach agreement on a BIT that embraces the principles of openness, non-discrimination and transparency, provides pre-establishment national treatment and employs a negative list approach in identifying exceptions. A high-standard BIT between two of the world's largest economies would not only provide significant benefits to U.S. and Chinese investors but also would have broad significance for the global economy.

Going forward, the Administration will continue to consult closely with the Congress and U.S. stakeholders in order to ensure that the actions being pursued by the United States address their concerns. The Administration remains dedicated to maximizing U.S. stakeholders' opportunities to compete in China and the global marketplace.

Table 1

Summary Conclusions regarding China's WTO Compliance Efforts

TRADING RIGHTS
<p>China appears to be in compliance with its trading rights commitments in most areas. One significant exception involves China's restrictions on the right to import theatrical films, which China reserves for state trading. In 2012, following a successful WTO case brought by the United States challenging these restrictions, the United States and China entered into an MOU providing for substantial increases in the number of U.S. films imported and distributed in China each year and substantial additional revenue for foreign film producers, although China has not yet fully implemented its MOU commitments.</p>
IMPORT REGULATION
<p><b>Tariffs</b></p> <p>China has timely implemented its tariff commitments for industrial goods each year.</p>
<p><b>Customs and Trade Administration</b></p> <p><u>Customs Valuation</u></p> <p>China has issued measures that bring its legal regime for making customs valuation determinations into compliance with WTO rules, but implementation of these measures has been inconsistent from port to port, both in terms of customs clearance procedures and valuation determinations.</p> <p><u>Rules of Origin</u></p> <p>China has issued measures that bring its legal regime for making rules of origin determinations into compliance with WTO rules.</p> <p><u>Import Licensing</u></p> <p>China has issued measures that bring its legal regime for import licenses into compliance with WTO rules, although a variety of specific compliance issues continue to arise.</p>
<p><b>Non-Tariff Measures</b></p> <p>China has adhered to the agreed schedule for eliminating non-tariff measures, but new prohibitions on the import of remanufactured products have generated concerns.</p>
<p><b>Tariff-rate Quotas on Industrial Products</b></p> <p>Concerns about transparency and administrative guidance have plagued China's tariff-rate quota system for industrial products, particularly fertilizer, since China's accession to the WTO.</p>
<p><b>Other Import Regulation</b></p> <p><u>Antidumping</u></p> <p>China has issued laws and regulations bringing its legal regime in the AD area largely into compliance with WTO rules, although China still needs to issue additional procedural guidance such as rules governing expiry reviews. More significantly, China needs to improve its commitment to the transparency and procedural fairness requirements embodied in WTO rules, as the WTO found in three disputes brought by the United States. In addition, China needs to eliminate its apparent use of trade remedy investigations as a retaliatory tool.</p> <p><u>Countervailing Duties</u></p> <p>China has issued laws and regulations bringing its legal regime in the CVD area largely into compliance with WTO rules, although China still needs to issue additional procedural guidance such as rules governing expiry reviews. More significantly, China needs to improve its commitment to the transparency and procedural fairness requirements embodied in WTO rules, as the WTO found in three disputes brought by the United States. In addition, China needs to eliminate its apparent use of trade remedy investigations as a retaliatory tool.</p> <p><u>Safeguards</u></p> <p>China has issued measures bringing its legal regime in the safeguards area largely into compliance with WTO rules, although concerns about potential inconsistencies with WTO rules continue to exist.</p>

Table 1 (cont'd)

### Summary Conclusions regarding China's WTO Compliance Efforts

#### EXPORT REGULATION

China maintains numerous export restraints that raise serious concerns under WTO rules, including specific commitments that China made in its WTO accession agreement. In the two WTO cases decided to date in this area, the WTO found that exports restraints maintained by China on raw material inputs breached China's WTO obligations.

#### INTERNAL POLICIES AFFECTING TRADE

##### Non-discrimination

While China has revised many laws, regulations and other measures to make them consistent with WTO rules relating to MFN and national treatment, concerns about compliance with these rules still arise in some areas.

##### Taxation

China has used its taxation system to discriminate against imports in certain sectors, raising concerns under WTO rules relating to national treatment.

##### Subsidies

China continues to provide injurious subsidies to its domestic industries, and some of these subsidies appear to be prohibited under WTO rules. Although China submitted a long-overdue WTO subsidies notification in 2015 covering subsidies provided during the period from 2009 to 2014, this notification was far from complete. In addition, China continued to have a poor record of responding to other WTO members' questions about its subsidies before the WTO's Subsidies Committee.

##### Price Controls

China has progressed slowly in reducing the number of products and services subject to price control or government guidance pricing.

##### Standards, Technical Regulations and Conformity Assessment Procedures

China continues to take actions that generate WTO compliance concerns in the areas of standards, technical regulations and conformity assessment procedures, particularly with regard to transparency, national treatment, the pursuit of unique Chinese national standards, and duplicative testing and certification requirements.

###### Restructuring of Regulators

China has restructured its regulators for standards, technical regulations and conformity assessment procedures in order to eliminate discriminatory treatment of imports, although in practice China's regulators sometimes do not appear to enforce regulatory requirements as strictly against domestic products as imports.

###### Standards and Technical Regulations

China continues to pursue the development of unique Chinese national standards, despite the existence of well-established international standards, apparently as a means for protecting domestic companies from competing foreign technologies and standards.

###### Conformity Assessment Procedures

China appears to be turning more and more to in-country testing for a broader range of products, which does not conform with international practices that generally accept foreign test results and certifications.

###### Transparency

China has made progress but still does not appear to notify all new or revised standards, technical regulations and conformity assessment procedures as required by WTO rules.

##### Other Industrial Policies

###### State-owned and State-invested Enterprises

The Chinese government has heavily intervened in investment and other strategic decisions made by state-owned and state-invested enterprises in certain sectors.

###### State Trading Enterprises

It is difficult to assess the activities of China's state trading enterprises, given inadequate transparency and China's failure to meet the WTO's detailed reporting requirements for state trading enterprises.



## 2015 USTR Report to Congress on China's WTO Compliance

Table 1 (cont'd)

### Summary Conclusions regarding China's WTO Compliance Efforts

#### Other Industrial Policies (cont'd)

##### Government Procurement

While China is moving slowly toward fulfilling its commitment to accede to the GPA, it is maintaining and adopting government procurement measures that give domestic preferences.

#### INVESTMENT

China has revised many laws, regulations and other measures on foreign investment to eliminate WTO-inconsistent requirements relating to export performance, local content, foreign exchange balancing and technology transfer. However, some of the revised measures continue to "encourage" these requirements. Although China continues to consider reforms to its investment regime, including the use of a "negative list," many aspects of China's investment regime, including lack of a substantially liberalized market, maintenance of administrative approvals and the potential for a new and overly broad national security review system, continue to cause foreign investors great concern. China also has issued industrial plans covering the auto and steel sectors that include guidelines that appear to conflict with its WTO obligations. In addition, China has added a variety of restrictions on investment that appear designed to shield inefficient or monopolistic Chinese enterprises from foreign competition.

#### AGRICULTURE

While China has timely implemented its tariff commitments for agricultural goods, a variety of non-tariff barriers continue to impede market access, particularly in the areas of SPS measures and inspection-related requirements. In addition, China's TRQ system for bulk agricultural commodities does not seem to function entirely as envisioned by China's WTO accession agreement, and reports commissioned by certain U.S. farm groups have concluded that China may be exceeding its domestic support commitments for certain commodities.

##### **Tariffs**

China has timely implemented its tariff commitments for agricultural goods each year.

##### **Tariff-rate Quotas on Bulk Agricultural Commodities**

China's TRQs on bulk agricultural commodities do not seem to be functioning entirely as envisioned in China's WTO accession agreement, due to opaque management practices and low quota fill despite domestic demand for imported products.

##### **China's Biotechnology Regulations**

China's dysfunctional biotechnology approval process continues to affect trade.

##### **Sanitary and Phytosanitary Issues**

China's regulatory authorities continue to impose SPS measures in a non-transparent manner and without clear scientific bases, including BSE-related import bans on U.S. beef and beef products, pathogen standards and residue standards for raw meat and poultry products, and an Avian Influenza-related import suspension on all U.S. poultry products. Meanwhile, China has made some progress but still does not appear to notify all proposed SPS measures as required by WTO rules.

##### **Inspection-related Requirements**

China's regulatory authorities continue to administer inspection-related requirements in a seemingly arbitrary manner.

##### **Domestic Support**

In recent years, China has been significantly increasing domestic subsidies and other support measures for its agricultural sector, including a number of products competing with imports from the United States. Reports commissioned by certain U.S. farm groups have concluded that China may be exceeding its domestic support commitments for certain commodities.

##### **Export Subsidies**

It is difficult to determine whether China maintains export subsidies in the agricultural sector, in part because China has not notified all of its subsidies to the WTO.

Table 1 (cont'd)

### Summary Conclusions regarding China's WTO Compliance Efforts

#### INTELLECTUAL PROPERTY RIGHTS

Despite ongoing revisions of laws and regulations relating to intellectual property rights, and greater emphasis on rule of law and enforcement campaigns in China, key weaknesses remain in China's protection and enforcement of intellectual property rights, particularly in the area of trade secrets. Intellectual property rights holders face not only a complex and uncertain enforcement environment, but also pressure to transfer intellectual property rights to enterprises in China through a number of government policies and practices.

#### SERVICES

While China has implemented most of its services commitments, concerns remain in some service sectors. In addition, challenges still remain in ensuring the benefits of many of the commitments that China has nominally implemented are available in practice, as China has continued to maintain or erect restrictive or cumbersome terms of entry or internal expansion in some sectors. These barriers, often imposed through non-transparent and lengthy licensing processes, prevent or discourage foreign suppliers from gaining market access through informal bans on entry, high capital requirements, branching restrictions or restrictions taking away previously acquired market access rights.

##### Distribution Services

China has made substantial progress in implementing its distribution services commitments, although significant concerns remain in some areas.

##### Wholesaling Services

China has issued regulations generally implementing its commitments in the area of wholesaling and commission agents' services. One significant exception involves China's restrictions on the distribution of imported theatrical films. In 2012, following a successful WTO case brought by the United States challenging these restrictions, the United States and China entered into an MOU providing for substantial increases in the number of U.S. films imported and distributed in China each year and substantial additional revenue for foreign film producers, although China has not yet fully implemented its MOU commitments. Meanwhile, U.S. companies continue to have concerns about restrictions on the distribution of other products, such as pharmaceuticals, crude oil and processed oil.

##### Retailing Services

China has issued regulations generally implementing its commitments in the area of retailing services, although some concerns remain with regard to licensing discrimination. China continues to maintain restrictions on the retailing of processed oil.

##### Franchising Services

China has issued regulations generally implementing its commitments in the area of franchising services.

##### Direct Selling Services

China has issued regulations generally implementing its commitments in the area of direct selling services, although significant regulatory restrictions, including service center requirements imposed on the operations of direct sellers, continue to generate concerns.

##### Financial Services

##### Banking

China has taken a number of steps to implement its banking services commitments, although some of these efforts have generated concerns, and there are some instances in which China still does not seem to have fully implemented particular commitments, such as with regard to Chinese-foreign joint banks and bank branches.

##### Motor Vehicle Financing

China has implemented its commitments with regard to motor vehicle financing.

##### Insurance

China has issued measures implementing most of its insurance commitments, but these measures have also created market access problems and foreign insurers' share of China's market remains very low.

##### Financial Information

In response to a WTO case brought by the United States, China has established an independent regulator for the financial information sector and has removed restrictions that had placed foreign suppliers at a serious competitive disadvantage.

Table 1 (cont'd)

Summary Conclusions regarding China's WTO Compliance Efforts

SERVICES (cont'd)
<p><b>Financial Services (cont'd)</b></p> <p><u>Electronic Payment Services</u></p> <p>China has not yet implemented electronic payment services commitments that were scheduled to have been phased in no later than December 11, 2006. China agreed to implement these commitments by July 2013 in order to comply with the rulings in a WTO case brought by the United States, but it has not yet done so.</p>
<p><b>Legal Services</b></p> <p>China has issued measures intended to implement its legal services commitments, although these measures give rise to WTO compliance concerns because they impose an economic needs test, restrictions on the types of legal services that can be provided and lengthy delays for the establishment of new offices.</p>
<p><b>Telecommunications</b></p> <p>It appears that China has nominally kept to the agreed schedule for phasing in its WTO commitments in the telecommunications sector. However, restrictions maintained by China on value-added services have created serious barriers to market entry for foreign suppliers seeking to provide value-added services. In addition, China's restrictions on basic services, such as informal bans on new entry, a requirement that foreign suppliers can only enter into joint ventures with state-owned enterprises and exceedingly high capital requirements, have totally blocked foreign suppliers from accessing China's basic services market.</p>
<p><b>Audio-Visual and Related Services</b></p> <p>China has taken steps to comply with the rulings in a WTO case brought by the United States with regard to the distribution of DVDs and sound recordings, although more steps are needed. Meanwhile, China's restrictions in the area of theatre services have wholly discouraged investment by foreign suppliers, and China's restrictions on services associated with television and radio greatly limit participation by foreign suppliers.</p>
<p><b>Internet-related Services</b></p> <p>China's Internet regulatory regime is restrictive and non-transparent and impacts a broad range of commercial services activities conducted via the Internet. In addition, China's treatment of foreign companies seeking to participate in the development of cloud computing, including computer data and storage services provided over the Internet, raises concerns in light of China's GATS commitments.</p>
<p><b>Construction and Related Engineering Services</b></p> <p>China has issued measures intended to implement its construction and related engineering services commitments, although these measures are problematic because they also impose high capital requirements and other constraints that limit market access.</p>
<p><b>Educational Services</b></p> <p>China made only limited GATS commitments in the educational services sector, and it has not sought to go beyond those commitments.</p>
<p><b>Express Delivery Services</b></p> <p>China has allowed foreign express delivery companies to operate in the express delivery sector and has implemented its commitment to allow wholly foreign-owned subsidiaries by December 11, 2004. However, China has blocked foreign companies' access to the document segment of China's domestic express delivery market.</p>
<p><b>Logistics Services</b></p> <p>China has generally allowed foreign companies to supply logistics services, but foreign companies can face restrictions that are not applied to domestic companies.</p>

Table 1 (cont'd)

Summary Conclusions regarding China's WTO Compliance Efforts

SERVICES (cont'd)
<p><b>Aviation Services</b> China has provided additional market access to U.S. providers of air transport services through progressive liberalization of a bilateral agreement with the United States.</p>
<p><b>Maritime Services</b> Even though China made only limited WTO commitments relating to its maritime services sector, it has increased market access for U.S. service providers through a bilateral agreement.</p>
<p><b>Tourism and Travel-related Services</b> China treats foreign travel agencies less favorably than domestic travel agencies in some respects, while China's regulation of foreign suppliers of global distribution system services has generated concerns in light of China's GATS commitments.</p>
LEGAL FRAMEWORK
<p><b>Transparency</b></p> <p><u>Official Journal</u> China has re-confirmed its commitment to use a single official journal for the publication of all trade-related laws, regulations and other measures. To date, it appears that some but not all central government entities publish their trade-related measures in this journal, although they take a narrow view of the types of trade-related measures that need to be published.</p> <p><u>Translations</u> China has not yet established an appropriate infrastructure to undertake the agreed upon translations of its trade-related measures into one or more of the WTO languages in a timely manner.</p> <p><u>Public Comment</u> China has adopted notice-and-comment procedures for proposed laws and committed to use notice-and-comment procedures for proposed trade- and economic-related regulations and departmental rules, subject to specified exceptions. However, in practice, many of these measures are not made public prior to implementation.</p> <p><u>Enquiry Points</u> China has complied with its obligation to establish enquiry points.</p>
<p><b>Uniform Application of Laws</b> Some problems with the uniform application of China's laws and regulations persist.</p>
<p><b>Judicial Review</b> China has established courts to review administrative actions involving trade-related matters, but few U.S. or other foreign companies have had experience with these courts.</p>
<p><b>Other Legal Framework Issues</b> Various other areas of China's legal framework can adversely impact 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.</p>

## INTRODUCTION

### CHINA'S WTO ACCESSION NEGOTIATIONS

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](http://www.wto.org)).

### CHINA'S WTO COMMITMENTS

In order to accede to the WTO, China had to agree 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 establishing several mechanisms or other authority, independent of provisions applicable to all WTO members under the WTO Agreement, designed to prevent or remedy 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, 7 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) the authority

for WTO members whose national laws contain market economy criteria as of the date of China's WTO accession to utilize a special non-market economy methodology for measuring dumping in anti-dumping cases against Chinese companies and (4) the authority to use methodologies for identifying and measuring subsidy benefits to Chinese enterprises that are not based on terms and conditions prevailing in China. The Administration is committed to maintaining the effectiveness of these mechanisms, to the extent that they remain available, for the benefit of affected U.S. businesses, workers and farmers.

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 8 years after China's accession. A final review, looking back over the first 10 years of China's WTO membership, took place in year 10, i.e., 2011.

## OVERVIEW OF U.S. ENGAGEMENT

### DIALOGUE

#### Bilateral Engagement

In 2015, the United States continued to pursue intensified, focused bilateral dialogue with China. Throughout the year, the United States and China engaged in a range of formal and informal bilateral meetings, including the U.S.-China Strategic and Economic Dialogue (see Box 1), a Presidential summit and the U.S.-China Joint Commission on Commerce and Trade (see Box 2).

The seventh meeting of the S&ED, which included a Strategic Track and an Economic Track, took place in June 2015 (see Appendix 3). The Economic Track of the S&ED allows U.S. and Chinese officials at the highest levels to work together to address cross-cutting and long-term economic issues through candid and constructive engagement. The S&ED also produces near-term results in the areas of trade and investment.

At this year's S&ED meeting, in the areas of trade and investment, China made a number of commitments, including: (1) a commitment to solicit and take into account opinions from domestic and foreign parties before issuing regulatory measures addressing information security related to ICT products, services or technologies in the commercial and trade spheres; (2) a further commitment to ensure that ICT-related regulations in the banking sector are non-discriminatory and do not impose nationality-based conditions or restrictions on the purchase, sale or use of ICT products, services or technologies by commercial enterprises; (3) confirmation that the policies published by the Chinese government on the development of strategic emerging industries, including industry development promotion guidelines and associated national and sub-national industry development investment funds, are applicable to, and made available, on an equal basis to foreign-invested

enterprises, together with a commitment to enhance transparency by soliciting public comments on drafts of binding policy measures in this area; (4) a commitment to ensure that any Chinese enterprise licensed to distribute films in China can distribute imported flat-fee films on their own and without having to contract with or otherwise partner with China Film Group or any other state-owned enterprise and a further commitment to ensure that SAPPRFT, China Film Group or any other state-owned enterprise do not directly or indirectly influence the negotiation, terms, amount of compensation or execution of any distribution contract between a licensed Chinese distributor and a U.S. flat-fee film producer; (5) a commitment to closer cooperation with the United States as China's regulatory authorities develop their regulatory and enforcement frameworks for the oversight of manufacturers of bulk chemicals that can be used as APIs, including an agreement 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; (6) a commitment to continue to prioritize the combating of copyright piracy and trademark counterfeiting on Internet, to further tighten its oversight and to take stern actions against crimes in this area; and (7) commitments to enhance the participation of foreign financial services firms and investors, including banks, securities companies, private fund management institutions, credit rating agencies, brokers and traders, in China's capital markets through a variety of specified means, such as expansions in the scope of permitted business activities, increased foreign equity participation and the lifting of restrictions on currently permitted business activities.

The United States and China also reaffirmed that their BIT negotiations are a top priority in bilateral economic relations and that the two sides will continue to push the negotiation forward with a view to reaching a mutually beneficial and high-standard treaty. They further agreed to intensify the negotiation and exchange of improved negative list

offers, reflecting the two sides' shared commitment to open investment environments.

In addition, the United States and China welcomed the progress that has been made in negotiating new international guidelines for official export credit support, and reaffirmed their support in those negotiations for guideline coverage that includes official export credit support provided by or on behalf of a government and for new horizontal international guidelines on official export credit support that promote international trade and that, taking into account varying national interests and situations, are consistent with international best practices.

**Box 1: S&ED**

The U.S.-China Strategic and Economic Dialogue was established by Presidents Obama and Hu in April 2009 and represents the highest-level bilateral forum between the United States and China. The S&ED is an essential mechanism for advancing a positive, constructive and comprehensive relationship between the two countries. Treasury Secretary Lew and Secretary of State Kerry, as special representatives of President Obama, and Vice Premier Wang and State Councilor Yang, as special representatives of President Xi, co-chair the S&ED, which includes Strategic and Economic tracks and takes place annually in alternating capitals. In the Economic Track, the two sides have focused on four pillars that have formed the basis of our economic engagement over the course of the Administration: (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.

Constructive discussions also took place when President Obama hosted a state visit for President Xi in Washington in September 2015. This summit produced important results in the economic sphere, including: (1) China made a series of commitments relating to its national security reviews of foreign investments, including, among other things, to limit the scope of these reviews solely to issues that

constitute national security concerns, not to generalize the scope of these reviews to include other broader public interest or economic issues, and to apply the same rules and standards to each investment reviewed, regardless of country of origin; (2) China committed that generally applicable measures to enhance ICT cybersecurity in commercial sectors should be consistent with WTO agreements, 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; (3) China affirmed that states should not conduct or knowingly support misappropriation of intellectual property, including trade secrets or other confidential business information with the intent of providing competitive advantages to their companies or commercial sectors and further affirmed that states and companies should not by illegal methods make use of technology and commercial advantages to gain commercial benefits; and (4) China committed to further improve its agricultural biotechnology approval processes and reaffirmed the importance of implementing timely, transparent, predictable and science-based approval processes for products of agricultural biotechnology, which are based on international standards. The United States and China also committed to conduct high-level and expert discussions commencing in early 2016 to provide a forum to support and exchange views on judicial reform and identify and evaluate the challenges and strategies in implementing the rule of law so as to improve the transparency and predictability of the business environment.

In November 2015, following many months of preparatory meetings, the JCCT met for the 26<sup>th</sup> time (see Appendix 5). Chaired by U.S. Trade Representative Froman and Commerce Secretary Pritzker on the U.S. side and Vice Premier Wang on the Chinese side, the JCCT is a year-long process involving numerous working groups and dialogues that culminates in an annual plenary meeting. The JCCT process focuses on seeking resolutions to



pressing trade and investment issues while also encouraging China to accelerate its movement away from reliance on government intervention and toward full institutionalization of market mechanisms.

### Box 2: JCCT

The United States and China founded the U.S.-China Joint Commission on Commerce and Trade in 1983 as a government-to-government consultative mechanism between the U.S. Department of Commerce and MOFCOM's predecessor, the Ministry of Foreign Economic Relations and Trade, designed to provide a forum for resolving 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. The JCCT holds plenary meetings on an annual basis, while a number of JCCT working groups and dialogues meet 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.

This year's JCCT engagement produced meaningful progress in some key areas, including: (1) China committed to non-discriminatory and transparent policies for ICT information security, including assurances that Chinese banks are free to purchase ICT products regardless of the country of origin, affirmations that encryption regulations are narrow in scope and agreement to notify the WTO of concerning draft insurance ICT-related regulations for review by WTO members; (2) China clarified several ongoing and intended efforts to revise China's trade secrets system and provide more effective aspects of its civil judicial system to deter and respond to the misappropriation of trade secrets; (3) China agreed to participate in a government-industry dialogue to enhance the systems available to address challenges relating to online counterfeiting and to increase information sharing and cooperation on cross-border enforcement; (4) China committed to a transparent

and expeditious process for developing Geographical Indication-related measures that will help keep this significant market open to U.S. agricultural and other products; (5) China made a series of commitments relating to the *Anti-monopoly Law*, including commitments that China's anti-monopoly enforcement agencies will conduct enforcement according to the *Anti-monopoly Law* without intervention by other agencies and that commercial secrets obtained in the process of *Anti-monopoly Law* enforcement will be protected under the law and as a general rule will not be disclosed to other agencies; (6) China also recognized the importance of maintaining coherent rules relating to intellectual property rights in the *Anti-monopoly Law* context, including by taking into account the pro-competitive effects of intellectual property licensing; (7) China took steps to address problematic government subsidization involving local content requirements in the manufacture of intelligent manufacturing equipment; (8) China committed to investigate carefully the WTO consistency of export-contingent subsidies provided to producers of so-called "International Well Known Brands" as well as the WTO consistency of subsidies provided to agricultural producers that purchase Chinese-made farm machinery or equipment; (9) China committed that it would increase the transparency of its semiconductor industry development plans and that its National Semiconductor Investment Fund would be managed by professional fund companies in a manner consistent with market-based concepts and free from government intervention into normal operational activities; (10) China committed that licensing commitments for patents in voluntary standards will be made voluntarily and without government involvement in negotiations over those commitments, except as otherwise provided by legally binding measures; (11) building on prior JCCT commitments, China announced steps to further improve the registration and approval processes for pharmaceuticals and medical devices; and (12) China agreed that imported medical devices will be treated the same as domestically produced medical devices.

In addition, at this year's JCCT meeting, the United States and China agreed to intensify their discussions regarding overcapacity in the steel and aluminum sectors in 2016. The United States and China also agreed to new or enhanced dialogues or information exchanges in the areas of agricultural biotechnology, cosmetics regulation, food safety, illegal, unreported or unregulated fishing, wildlife trafficking and illegal logging.

Despite the progress made through this year's extensive bilateral engagement with China, it is clear that much more work remains to be done to open China's market to trade and investment. In 2016, the United States will continue to use the JCCT and S&ED processes and engagement with China's leaders to remove trade and investment barriers, open China's market further to foreign companies and their exports and accelerate China's movement away from reliance on government intervention and toward full institutionalization of market mechanisms.

### Multilateral Meetings

In 2015, as in prior years, the United States supplemented its bilateral engagement of China with active participation 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. In 2016, the United States will continue to raise China-related issues at WTO meetings. The United States also will actively participate in the WTO's next biannual Trade Policy Review of China (see Box 3), scheduled for 2016.

#### **Box 3: 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). 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

While engaging in intense dialogue with China throughout the year, the United States also continued to hold China accountable for adherence to WTO rules when dialogue did not resolve U.S. concerns. As set out in Table 2 below, the United States brought two new WTO cases against China in 2015, while continuing to prosecute six other WTO cases against China, with support from the Interagency Trade Enforcement Center, created by

Presidential Executive Order in 2012 in order to provide additional resources for ensuring that all of the United States' trading partners adhere to their obligations under international trade agreements.

One of the new cases challenges 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." This case follows a case, launched in 2012, challenging similar 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 subsidies in the two cases appear to be inconsistent with China's obligation under Article 3 of the Agreement on Subsidies and Countervailing Measures (Subsidies Agreement) not to provide subsidies contingent upon export performance. Consultations have taken place in the two cases. Since then, the two sides have been engaging in further discussions exploring steps for China to take to address U.S. concerns.

The second new case, launched in December 2015, challenges discriminatory Chinese government measures exempting sales of certain aircraft produced in China, including general aviation aircraft, business jets, agricultural aircraft and regional jets, from the VAT while imposing that same tax on sales of imported aircraft. Compounding this problem, it appears that the Chinese government never published these measures as required by China's WTO commitments. Consultations are expected to take place in 2016.

In March 2012, 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, which are key inputs in a multitude of U.S.-made products, including hybrid car batteries, wind turbines, energy-efficient lighting, steel, advanced electronics, automobiles, petroleum and chemicals. China is a leading world

producer of these materials, and its export restraints can skew the playing field against the United States and other countries by creating substantial competitive benefits for downstream Chinese producers that use these materials as inputs in the production and export of further processed and finished products. The export restraints also can create substantial pressure on U.S. and other non-Chinese downstream producers to move their operations, jobs and technologies to China. The export restraints 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 April 2012. A WTO panel was established to hear the case at the complaining parties' request in July 2012, and 18 other WTO members joined the case as third parties. Hearings before the panel took place in February and June 2013. The panel issued its decision in March 2014. The panel rejected China's defenses, which had attempted to portray China's export restraints as conservation measures or environmental protection measures, 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 appealed certain aspects of the panel's decision in April 2014, and the WTO's Appellate Body rejected China's appeal in August 2014, confirming 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 subsequently announced that it had eliminated the export quotas and export duties at issue by that deadline.

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. As of December 2015, the United States was evaluating next steps to take in this dispute.

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. They also enable, facilitate and manage the flow of information and the transfer of funds from cardholders' banks to merchants' banks. 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 in and makes a payment in China's domestic currency, known as the renminbi, or RMB. Instead, China has created a national champion, allowing only one domestic entity, China UnionPay (CUP), to provide 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 General Agreement on Trade in Services (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. China took some steps toward complying with the WTO's rulings by that deadline. China repealed certain challenged measures, and it issued new measures that imposed a new licensing requirement for foreign suppliers to be able to provide these services, without also taking the critical step of establishing a process for foreign suppliers actually 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 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, the People's Bank of China (PBOC), issued draft licensing regulations, but as of December 2015 it still had not issued those regulations in final form and U.S. suppliers therefore remained blocked from entering the market. Accordingly, the United States continues to actively press China and is considering additional next steps to ensure that China complies fully with the WTO's rulings.

In another WTO case initiated in September 2010, the United States successfully challenged China's imposition of antidumping and countervailing duties on imports of grain-oriented electrical steel – a soft magnetic material used by the power generating industry in transformers, rectifiers, reactors and large electric machines – from the United States. 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 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, and 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.

The final WTO case active in 2014 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 a Memorandum of Understanding (MOU) providing for substantial increases in the number of foreign films imported and distributed in China each year and substantial additional revenue for foreign film producers. 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, while significantly more U.S. films have been imported and distributed in China on a revenue-sharing basis since the signing of the MOU and the revenue received by U.S. film producers has increased significantly, China has not yet fully implemented its MOU commitments, including with regard to critical commitments to open up film distribution opportunities for imported 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, particularly with regard to films that are distributed in China on a flat-fee basis rather than a revenue-sharing basis. At the June 2015 S&ED meeting, China committed to ensure that any Chinese enterprise licensed to distribute films in China can distribute imported flat-fee films on their own and without having to contract with or otherwise partner with China Film Group or any other state-owned enterprise. China further committed that SAPPRT, China Film Group or any other state-owned enterprise would not directly or indirectly influence the negotiation, terms, amount of compensation or execution of any distribution contract between a licensed Chinese distributor and a U.S. flat-fee film producer.

## 2015 USTR Report to Congress on China's WTO Compliance

Table 2

### Active U.S. WTO Disputes against China in 2015

<b>China – Tax Advantages for Certain Domestically Produced Aircraft</b>	
<u>Initiation:</u>	December 2015
<u>Dispute:</u>	The United States is challenging discriminatory tax measures, pursuant to which China exempts sales of certain domestically manufactured aircraft from the VAT while imposing that same tax on sales of imported aircraft.
<u>Third Parties:</u>	It is not yet clear whether other WTO members will join in as third parties.
<u>Status:</u>	Consultations are expected to take place in 2016.
<b>China – Subsidies for Demonstration Bases and Common Service Platform Programs</b>	
<u>Initiation:</u>	February 2015
<u>Dispute:</u>	The United States is challenging China's provision of what appear to be export subsidies to enterprises located in so-called "demonstration bases" in China.
<u>Third Parties:</u>	Australia, Brazil, Canada, Columbia, Dominican Republic, the European Union, India, Japan, Korea, the Russian Federation, Saudi Arabia, Singapore and Chinese Taipei
<u>Status:</u>	Consultations took place in March and April 2015. Currently, the two sides are engaging in further discussions exploring the steps that China could take to address U.S. concerns.
<b>China – Subsidies for Automobile and Automobile Parts Export Base Enterprises</b>	
<u>Initiation:</u>	September 2012
<u>Dispute:</u>	The United States is challenging China's provision of what appear to be export subsidies to automobile and automobile parts enterprises in China.
<u>Third Parties:</u>	It is not yet clear whether other WTO members will join in as third parties.
<u>Status:</u>	Consultations took place in November 2012. Currently, the two sides are engaging in further discussions exploring the steps that China could take to address U.S. concerns.
<b>China – Export Restraints on Raw Materials II</b>	
<u>Initiation:</u>	March 2012
<u>Dispute:</u>	The United States, the EU and Japan challenged China's export restraints on rare earths, tungsten and molybdenum.
<u>Third Parties:</u>	Argentina, Australia, Brazil, Canada, Colombia, India, Indonesia, Korea, Norway, Oman, Peru, Russian Federation, Saudi Arabia, Chinese Taipei, Turkey and Vietnam
<u>Status:</u>	Hearings before a WTO panel took place in February and June 2013. The panel issued its decision in March 2014, rejecting China's defenses and finding in favor of the United States and its co-complainants on all significant claims. China appealed certain aspects of the panel's decision in April 2014, and the WTO's Appellate Body rejected China's appeal in August 2014. China agreed to come into compliance with the WTO's rulings by May 2015, and it subsequently announced that it had eliminated the export quotas and export duties at issue by that deadline.
<b>China – Antidumping and Countervailing Duties on Chicken Broiler Products</b>	
<u>Initiation:</u>	September 2011
<u>Dispute:</u>	The United States is challenging China's imposition of antidumping and countervailing duties on imports of chicken broiler products from the United States.
<u>Third Parties:</u>	Chile, the EU, Japan, Mexico, Norway, Saudi Arabia and Thailand
<u>Status:</u>	Hearings before a WTO panel took place in September and December 2012. 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. As of December 2015, the United States was evaluating next steps to take in this dispute.

## 2015 USTR Report to Congress on China's WTO Compliance

Table 2 (cont'd)

### Active U.S. WTO Disputes against China in 2015

<b>China – Antidumping and Countervailing Duties on Grain-Oriented Electrical Steel</b>	
<u>Initiation:</u>	September 2010
<u>Dispute:</u>	The United States challenged China's imposition of antidumping and countervailing duties on imports of grain-oriented electrical steel from the United States.
<u>Third Parties:</u>	Argentina, the EU, Honduras, India, Japan, Korea, Saudi Arabia and Vietnam
<u>Status:</u>	Hearings before a WTO 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, 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. MOFCOM terminated the duties at issue in April 2015.
<b>China – Electronic Payment Services</b>	
<u>Initiation:</u>	September 2010
<u>Dispute:</u>	The United States challenged China's restrictions on foreign suppliers of electronic payment services like the major U.S. credit card companies.
<u>Third Parties:</u>	Australia, Ecuador, the EU, India, Japan and Korea
<u>Status:</u>	Hearings before a WTO panel took place in October and December 2011. The panel issued its decision in July 2012, ruling that China made GATS commitments 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, and finding specific measures challenged by the United States to be inconsistent with those commitments. China decided not to appeal the panel's decision and agreed to come into compliance with the WTO's rulings by July 2013. China took some compliance steps by July 2013. However, China has not yet taken the critical step of issuing regulations establishing a needed licensing process for foreign suppliers so that they can provide electronic payment services for payment card transactions denominated in RMB through commercial presence in China as contemplated by the WTO's rulings. As of December 2015, the United States continues to actively press China and is considering additional next steps to ensure that China complies fully with the WTO's rulings.
<b>China – Market Access for Books, Movies and Music</b>	
<u>Initiation:</u>	April 2007
<u>Dispute:</u>	The United States challenged China's barriers to importing and distributing books, newspapers, journals, theatrical films, DVDs and music in China.
<u>Third Parties:</u>	Australia, the EU, Japan, Korea and Chinese Taipei
<u>Status:</u>	A WTO panel 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. The WTO's Appellate Body rejected China's appeal in December 2009. China agreed to come into compliance with the WTO's rulings by March 2011. Since then, China has taken compliance steps with regard to the market access barriers on books, newspapers, journals, DVDs and music. With regard to theatrical films, the United States and China concluded an MOU providing for substantial increases in the number of foreign films imported and distributed in China each year and substantial additional revenue for foreign film producers. To date, while significantly more U.S. films have been imported and distributed in China on a revenue-sharing basis since the signing of the MOU and the revenue received by U.S. film producers has increased significantly, China has not yet implemented critical commitments to open up film distribution opportunities for imported films.

## CHINA'S WTO COMPLIANCE

Set forth below is a detailed analysis of the commitments that China made upon acceding to the WTO on December 11, 2001, the progress that China has made in complying with those commitments and the United States' efforts to address compliance concerns that have arisen as of December 2014. As noted above, a summary of China's WTO compliance efforts is reproduced in Table 1.

### TRADING RIGHTS

*China appears to be in compliance with its trading rights commitments in most areas. One significant exception involves China's restrictions on the right to import theatrical films, which China reserves for state trading. In 2012, following a successful WTO case brought by the United States challenging these restrictions, the United States and China entered into an MOU providing for substantial increases in the number of U.S. films imported and distributed in China each year and substantial additional revenue for foreign film producers, although China has not yet fully implemented its MOU commitments.*

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). Nevertheless, 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 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. U.S. companies have reported few problems with this trading rights registration process.

### 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, 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 and substantial additional revenue for foreign film producers. 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, while significantly more U.S. films have been imported and distributed in China on a revenue-sharing basis since the signing of the MOU and the revenue received by U.S. film producers has

increased significantly, China has not yet fully implemented its MOU commitments, including with regard to critical commitments to open up film distribution opportunities for imported 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, particularly with regard to films that are distributed in China on a flat-fee basis rather than a revenue-sharing basis. At the June 2015 S&ED meeting, China committed to ensure that any Chinese enterprise licensed to distribute films in China can distribute imported flat-fee films on their own and without having to contract with or otherwise partner with China Film Group or any other state-owned enterprise. China further committed that SAPPFT, China Film Group or any other state-owned enterprise would not directly or indirectly influence the negotiation, terms, amount of compensation or execution of any distribution contract between a licensed Chinese distributor and a U.S. flat-fee film producer.

## IMPORT REGULATION

### Tariffs

*China has timely implemented its tariff commitments for industrial goods each year.*

During its bilateral negotiations with interested WTO members leading up to its accession, China agreed to greatly 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. As previously reported, each year, China implemented its scheduled tariff reductions on January 1 as required.

The annual tariff changes that China made following its WTO accession significantly increased market access for U.S. exporters in a range of industries, as China reduced tariffs on goods of greatest importance to U.S. industry from a base average of 25 percent (in 1997) to approximately 7 percent, while it made similar reductions throughout the agricultural sector (see the Agriculture section below). In addition, U.S. exports have benefited from China's ongoing participation in the Information Technology Agreement (ITA), which requires the elimination of tariffs on computers, semiconductors and other ICT products. U.S. exports also have continued to benefit from China's ongoing adherence to another significant tariff initiative, the WTO's Chemical Tariff Harmonization Agreement, completed in 2005. Overall, U.S. exports to China continued to increase in 2014, rising approximately two percent from the level in 2013, although exports declined by four percent from January through October 2015, when compared to the same time period in 2014, as China's economy slowed.

A breakthrough in the plurilateral negotiations to update and expand the coverage of the ITA, achieved during the run-up to the November 2014 summit meeting between President Obama and President Xi, led to the participants in the ITA expansion negotiations agreeing on product coverage in July 2015. In December 2015, at the WTO Ministerial Conference in Nairobi, Kenya, the participants announced final agreement on ITA expansion, with an agreed timetable for eliminating tariffs for the covered products. This expansion of the ITA should lead to significant additional benefits for U.S. manufacturers and exporters in the future. According to U.S. industry estimates, expansion of the ITA's coverage will eliminate tariffs on approximately \$1 trillion in annual global sales of ICT products and increase annual global GDP by an estimated \$190 billion. In addition, because the United States is a global leader in high-technology manufacturing, U.S. industry also estimates that the expanded ITA will support up to 60,000 additional U.S. jobs.

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 and through plurilateral initiatives like the ITA, 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 25 percent, and most audio and video recorders still face 30 percent tariffs.

### Customs and Trade Administration

Like other acceding WTO members, China agreed to take on the WTO obligations 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

*China has issued measures that bring its legal regime for making customs valuation determinations into compliance with WTO rules, but implementation of these measures has been inconsistent from port to port, both in terms of customs clearance procedures and valuation determinations.*

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.

As previously reported, in 2002, shortly after China acceded to the WTO, China issued regulations addressing the inconsistencies that had existed between China's customs valuation methodologies and the Agreement on Customs Valuation. China's Customs Administration subsequently issued rules that were intended to clarify provisions of the regulations addressing the valuation of royalties and license fees. In addition, China issued a measure on interest charges and a measure requiring duties on software to be assessed on the basis of the value of the underlying carrier medium, meaning, for example, the CD-ROM or floppy disk itself, rather than based on the imputed value of the content, which includes, for example, the data recorded on a CD-ROM or floppy disk.

### 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 Customs Administration'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 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 Customs Administration'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 have also 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.

When the United States first presented its concerns about the customs valuation problems being

encountered by U.S. companies several years ago, 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 2014. At present, China still needs to improve its adherence to applicable customs valuation measures.

### **RULES OF ORIGIN**

*China has issued measures that bring its legal regime for making rules of origin determinations into compliance with WTO rules.*

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 Customs Administration 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**

*China has issued measures that bring its legal regime for import licenses into compliance with WTO rules, although a variety of specific compliance issues continue to arise.*

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 the 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 regulate, 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) 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. In 2014, as in prior years, the United States continued to monitor implementation of these regulations by MOFTEC's successor, MOFCOM.

### Iron Ore

In 2005, China began imposing new import licensing procedures for iron ore, a key steel input, for which Chinese steel producers are dependent on foreign suppliers. China restricted the number of licensed importers, but did not make public a list of the qualified enterprises or the qualifying criteria used.

The WTO's Import Licensing Agreement calls for import licensing procedures that do not have a restrictive effect on trade. However, procedures that direct iron ore imports toward certain producers significantly distort trade, particularly because China is by far the largest iron ore importer in the world, and global prices for iron ore have reached historically high levels, led by Chinese demand. China's procedures also set a troubling precedent for the handling of imports of other raw materials. Indeed, when viewed in light of Chinese measures to restrict exports of other steelmaking raw materials and Chinese government involvement in iron ore contract negotiations, the licensing system for iron ore appears to be part of a program to control raw material prices to provide an unfair advantage to Chinese steel producers.

In the years after 2005, China further reduced the number of licensed importers. China also issued a stimulus plan to revitalize its steel industry which

provided that the Chinese government would regulate iron ore imports to ensure market order and that Chinese steel producers and iron ore suppliers would establish a mutually beneficial import pricing mechanism and long-term cooperation relationship. In addition, China reportedly temporarily suspended the issuance of licenses to importers of Australian iron ore in 2008 in an effort to limit price increases being negotiated between foreign exporters of iron ore and Chinese steelmakers.

In response, the United States raised its concerns about China's restrictive iron ore licensing procedures bilaterally, such as through U.S.-China Steel Dialogue meetings. The United States also raised its concerns in meetings before the WTO's Committee on Import Licensing and Council for Trade in Goods as well as during the June 2012 Trade Policy Review of China at the WTO.

In June 2013, MOFCOM issued the *Notice Regarding Implementing Online Registration for Iron Ore and Aluminum Oxide Automatic Import Licensing*, which purports to establish an automatic online import licensing system for iron ore (and aluminum oxide). While this measure does not on its face impose any qualification requirements for importers, it is not yet clear how the new import licensing procedures will be administered. Currently, it appears that the number of iron ore importers is increasing.

In 2016, the United States will continue to monitor China's iron ore import licensing system procedures closely. The United States also will examine other Chinese government actions that may seek to influence iron ore prices.

### Other Issues

The United States has focused considerable attention on import licensing issues that have arisen in a variety of other specific contexts since China's WTO accession. In 2015, these included 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

*China has adhered to the agreed schedule for eliminating non-tariff measures, but new prohibitions on the import of remanufactured products have generated concerns.*

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, including, for example, the NTMs covering chemicals, agricultural equipment, medical and scientific equipment and civil aircraft, 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. These other NTMs included import quotas on industrial goods such as air conditioners, sound and video recording apparatuses, color TVs, cameras, watches, crane lorries and chassis, and motorcycles as well as licensing and tendering requirements applicable to a few types of industrial goods, such as machine tools and aerials.

As previously reported, China's import quota system was beset with problems, despite consistent bilateral engagement by the United States. Some of the more difficult problems were encountered with the auto import quota system, resulting at times in

significant disruption of wholesale and retail operations for imported autos. However, China did fully adhere to the agreed schedule for the elimination of all of its import quotas as well as all of its other NTMs, the last of which China eliminated in January 2005. In some cases, China even eliminated NTMs ahead of schedule, as it did with the import quotas on crane lorries and chassis, and motorcycles.

### 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, among others, because companies in these industries are unable to purchase high-quality, lower-cost remanufactured products produced outside of China.

Despite these import prohibitions and restrictions, China does permit foreign companies to participate with domestic companies in pilot programs, which allow them to engage in a limited way in the manufacture and sale of remanufactured goods in China. However, overall China's import prohibitions and restrictions remain a serious problem and U.S. companies' activities remain severely restricted. To help address this problem, since 2011, 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, including both the JCCT and the Asia-Pacific Economic

Cooperation (APEC) forum, where the United States has urged China to join the APEC Pathfinder Initiative on Facilitating Trade in Remanufactured Goods.

### Tariff-rate Quotas on Industrial Products

*Concerns about transparency and administrative guidance have plagued China's tariff-rate quota system for industrial products, particularly fertilizer, since China's accession to the WTO.*

In its WTO accession agreement, China agreed to implement a system of 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 under the headnotes in China's Goods Schedule, concerns about inadequate transparency and administrative guidance have persisted. Meanwhile, U.S. fertilizer exports to China have declined sharply since 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

*China has issued laws and regulations bringing its legal regime in the AD area largely into compliance with WTO rules, although China still needs to issue additional procedural guidance such as rules governing expiry reviews. More significantly, China needs to improve its commitment to the transparency and procedural fairness requirements embodied in WTO rules, as the WTO found in three disputes brought by the United States. In addition, China needs to eliminate its apparent use of trade remedy investigations as a retaliatory tool.*

By the time of its accession to the WTO, China agreed to revise its regulations and procedures for AD proceedings, in order 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.

China has become a leading user of AD measures since its accession to the WTO. Currently, China has in place 95 AD measures, affecting imports from 16 countries or regions. China also has 11 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 litigation where necessary.

### Legal Regime

As previously reported, China has put in place much of the legal framework for its AD regime. Under this 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 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, although its authority relative to MOFCOM has not been clearly defined in the regulations and rules since MOFCOM was established.

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 August 2015, 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. Meanwhile, another area generating concern involves expiry reviews. China has still not issued any regulations specifically establishing the

rules and procedures governing expiry reviews. In May 2013, MOFCOM solicited public comments on rules concerning the implementation of WTO rulings in trade remedy cases. While purportedly final, these rules have not yet been notified to the WTO.

### Conduct of Antidumping Investigations

In practice, it appears that China's conduct of AD investigations in many respects continues to fall short of full commitment to the fundamental tenets of transparency and procedural fairness embodied in the AD Agreement. In 2014, 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 the results of on-site verification, dumping margin calculations and 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. This type of retaliatory conduct is not typical of WTO members, and it may have its roots in China's *Foreign Trade Law* and AD and CVD implementing regulations, which authorize "corresponding countermeasures" when China believes that a trading partner has discriminatorily imposed antidumping or



countervailing duties against imports from China. 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. As of December 2015, the United States was evaluating next steps to take in this dispute.

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.

The United States and U.S. industry also have been concerned about the antidumping and countervailing duties that China imposed on imports of U.S. polysilicon in 2014, about 13 months after the United States imposed antidumping and countervailing duties on imports of Chinese solar modules and cells. The United States has been engaging with China, including at high levels, in an effort to address the trade distortions in the solar supply chain exacerbated by China's duties on U.S. polysilicon.

Throughout 2015, the United States also continued to work closely with U.S. companies subject to Chinese AD investigations in an effort to help them better understand the Chinese system. 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 them, 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. The United States also has engaged China bilaterally through the Trade Remedies Working Group, which was established under the auspices of the JCCT in 2004. This working group has given U.S. AD experts a dedicated forum to speak with China's AD authorities directly and in detail on issues facing U.S. exporters subject to Chinese AD investigations. The working group has held several meetings since its creation in April 2004, including a meeting in October 2015. In between meetings, U.S. experts also have frequent informal exchanges with China's AD authorities, which are

intended to promote greater accountability in China's AD regime.

Meanwhile, as China's AD regime has matured, many of the AD orders put in place have reached the five-year mark, warranting expiry reviews. MOFCOM is currently conducting 9 expiry reviews, three 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. In addition, several of China's AD measures are due to expire in 2016, including ones covering U.S. products. Given the problems that respondents have encountered in China's AD investigations, it is critical that China publish rules and procedures specifically governing the conduct of expiry reviews, as required by the AD Agreement. The United States has repeatedly pressed China to issue regulations governing expiry reviews and will continue to do so.

Finally, it appears that no interested party from the United States or any other WTO member to date has filed for judicial review of a Chinese AD proceeding. However, as China continues to launch AD investigations and apply AD measures against imports, the opportunity for interested parties to seek judicial review will become more critical.

### **Evasion of Duties**

In 2015, the United States raised concerns before the WTO Antidumping Committee about the proliferation of so-called "evasion services," which are services offered to exporters and importers to assist them with evading the application of antidumping duties and countervailing duties. 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 rules-

based multilateral trading system. Going forward, the United States will continue to raise awareness of this problem and will seek the cooperation of other WTO members, including China, to help counter and eliminate this problem.

### COUNTERVAILING DUTIES

*China has issued laws and regulations bringing its legal regime in the CVD area largely into compliance with WTO rules, although China still needs to issue additional procedural guidance such as rules governing expiry reviews. More significantly, China needs to improve its commitment to the transparency and procedural fairness requirements embodied in WTO rules, as the WTO has found in three disputes brought by the United States. In addition, China needs to eliminate its apparent use of trade remedy investigations as a retaliatory tool.*

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, in order 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.

It appears that China has attempted to conform its CVD regulations and procedural rules to the provisions and requirements of the Subsidies Agreement and the commitments in its WTO accession agreement. 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. In addition, China has not yet issued regulations specifically establishing the rules and procedures governing expiry reviews.

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 2016.

### 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 a fourth one involving imports of U.S. polysilicon initiated in July 2012, 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, principally through the JCCT Trade Remedies Working Group, as well as at the WTO in meetings before the Subsidies Committee. The United States has also actively participated in MOFCOM's ongoing 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

*China has issued measures bringing its legal regime in the safeguards area largely into compliance with WTO rules, although concerns about potential inconsistencies with WTO rules continue to exist.*

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

As previously reported, it appears that China has made an effort to establish a WTO-consistent safeguard regime through the issuance of regulations and procedural rules that became effective in January 2002. While the provisions of these measures 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, as previously reported, China has conducted only one safeguard proceeding, which resulted in the imposition of tariff-rate quotas on imports of nine categories of steel products from various countries, including the United States, in November 2002. 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.

## EXPORT REGULATION

*China maintains numerous export restraints that raise serious concerns under WTO rules, including specific commitments that China made in its WTO accession agreement. In the two WTO cases decided to date in this area, the WTO found that exports restraints maintained by China on raw material inputs breached China's WTO obligations.*

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 appear to 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 also 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 subsequently 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. With these export restraints in place, 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.

The WTO panel established to hear the export restraints case issued its decision in July 2011. The panel 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 appealed certain aspects of the panel's decision in August 2011, and the WTO's Appellate Body rejected China's appeal in January 2012, confirming 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 automatic export licensing requirements on a subset of those materials. Since then, the United States has been closely monitoring China's export licensing regime to ensure that it operates automatically and does not distort trade.

In 2010, 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 July 2010, China sharply reduced its export quotas, causing world prices for some of the rare earths to rise dramatically higher than China's domestic prices and

further hindering efforts in other countries to develop expertise in the increasingly important downstream manufacturing of green technology products. Then, in September 2010, China reportedly imposed a de facto ban on all exports of rare earths to Japan, causing even more concern among China's trading partners. In 2011, China expanded the scope of products covered by the rare earths export quota to include more processed rare earths products, making the quota even more restrictive than it had been in 2010. In addition, according to several reports, China's customs authorities began imposing minimum export prices on rare earth exports. It appeared that this practice disrupted the export quota process and contributed to rapidly increasing prices outside China.

The United States pressed China to eliminate its export restraints on rare earths, using both bilateral engagement through the JCCT process and multilateral engagement at the WTO during the final transitional reviews before the Market Access Committee, the Council for Trade in Goods and the General Council. Japan, the EU and other trading partners made similar efforts. However, China continued to refuse to abandon its use of export restraints. Accordingly, in March 2012, 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. Joint consultations took place in April 2012. A WTO panel was established to hear the case at the complaining parties' request in July 2012, and 18 other WTO members joined the case as third parties. Hearings before the panel took place in February and June 2013, and the panel issued its decision in March 2014. It rejected China's defenses,

which had attempted to portray China's export restraints as conservation or environmental protection measures, 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 appealed certain aspects of the panel's decision in April 2014, and the WTO's Appellate Body rejected China's appeal in August 2014, confirming that the export restraints at issue breached China's WTO obligations. China subsequently agreed to come into compliance with the WTO's rulings by May 2015, and it subsequently announced that it had eliminated the export quotas and export duties at issue by that deadline.

### 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 has also used its border taxes to encourage the export of certain finished products over other finished products within a particular sector. For example, in the past, China has 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 raised broad concerns about the trade-distortive effects of China's VAT export rebate and export duty practices the annual transitional reviews before the Committee on Market Access and the Council for Trade in Goods. The United States and other WTO members also have used the Trade Policy Reviews of China at the WTO, held in April 2006, May 2008, May 2010, June 2012 and July 2014, to raise their concerns. Bilaterally, the United States also raised broad concerns about the trade-distortive effects of China's variable VAT export rebate practices in connection with the July 2009, May 2010, May 2011 and July 2014 S&ED meetings and the October 2009, December 2010, November 2011, December 2012 and December 2013 JCCT 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.

To date, China has been unwilling to commit to abandon its use of trade-distortive VAT export rebates. However, China has acknowledged 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 agreed 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.

### INTERNAL POLICIES AFFECTING TRADE

#### Non-discrimination

*While China has revised many laws, regulations and other measures to make them consistent with WTO rules relating to MFN and national treatment, concerns about compliance with these rules still arise in some areas.*

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.

However, since then, concerns have arisen regarding China's observation of MFN and national treatment requirements in some areas.

### Strategic Emerging Industries

In 2010, China unveiled a new high-level government plan to rapidly spur innovation in seven high-technology sectors dubbed the strategic emerging industries (SEIs). The *Decision of the State Council on Accelerating the Cultivation and Development of Strategic Emerging Industries* 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 new energy vehicles (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 the Ministry of Industry and Information Technology (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. Through this engagement, the United States was able to obtain commitments from China at the November 2011 and December 2012 JCCT meetings. Specifically, China committed in 2011 to provide a "fair and level playing field for all companies, including U.S. companies" in the development of China's SEIs. In 2012, China went further by committing to provide foreign enterprises with fair and equitable participation in the development of SEIs, and announcing that policies supporting SEI development would be equally applicable to qualified domestic and foreign enterprises.

In 2013 and 2014, the United States continued to follow closely China's SEI policy development, including the various forms of financial support that the Chinese government provides to SEI sectors. Through the JCCT process, the United States urged China to be more transparent about the financial and other benefits being provided to these sectors. In addition, at the WTO, the United States submitted a request for information pursuant to Article 25.8 of the Subsidies Agreement regarding Chinese government subsidies available to enterprises in China's SEI sectors in 2014, and the United States followed up on this request with a counter

notification under Article 25.10 of the Subsidies Agreement in 2015, as discussed below in the Subsidies section.

The United States also has pressed China to repeal or modify several problematic measures. For example, a development plan for the LED industry issued by the Shenzhen municipal government included a call to support research and development in products and technologies that have the ability to substitute for imports. Shenzhen rescinded the plan in 2013 following U.S. Government intervention with China's central government authorities. Another example involves the high-end equipment manufacturing sector. In this sector, China maintains central, provincial and local government measures that condition the receipt of subsidies on an enterprise's use of at least 60 percent Chinese-made components when manufacturing intelligent manufacturing equipment. As the United States has made clear to China, these measures raise serious concerns, both in light of China's WTO obligations and China's past bilateral commitments relating to SEIs and the fair and equitable treatment of foreign enterprises. In 2015, China reported that it had decided not to renew this subsidy program.

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 are directing billions of dollars of investment into key Chinese industries. At the June 2015 S&ED meeting, China agreed 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.

In 2016, the United States will continue to monitor developments closely. The United States also will

continue to raise concerns over any policies that appear to run counter to China's WTO or bilateral commitments.

### 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 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 continued to address these and other MFN and national treatment issues with China in 2015, both bilaterally and in WTO meetings. The United States will continue to pursue these issues vigorously in 2016.

### Taxation

*China has used its taxation system to discriminate against imports in certain sectors, raising concerns under WTO rules relating to national treatment.*

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. One of these issues – the discriminatory VAT rates applied to imported versus domestically produced integrated circuits – was resolved in 2004 after the United States filed a WTO case, as previously reported. Other taxation issues remain, however.

### Regional Aircraft VAT

In December 2015, the United States brought a new WTO case against China, once again involving discriminatory VAT rates applied to imported versus domestically produced products. In this case, the United States is challenging discriminatory Chinese government measures exempting sales of certain aircraft produced in China, including general aviation aircraft, business jets, agricultural aircraft and regional jets, from the VAT while imposing that same tax on sales of imported aircraft. Compounding this problem, it appears that the Chinese government never published these measures as required by China's WTO commitments. Consultations are expected to take place in 2016.

### 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. China began to address these concerns in 2003 shortly after acceding to the WTO when it eliminated preferential treatment for boric acid and 19 other products. However, several other products continue to benefit from preferential treatment. During past meetings before the WTO's Council for Trade in Goods, the United States has urged China to

eliminate the preferential treatment for these remaining products.

### Subsidies

*China continues to provide injurious subsidies to its domestic industries, and some of these subsidies appear to be prohibited under WTO rules. Although China submitted a long-overdue WTO subsidies notification in 2015 covering subsidies provided during the period from 2009 to 2014, this notification was far from complete. In addition, China continued to have a poor record of responding to other WTO members' questions about its subsidies before the WTO's Subsidies Committee.*

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). This commitment expressly extends throughout China's customs territory, including in special economic zones and other special economic areas.

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 significant 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 sought to make progress on this issue through the filing of a counter notification under Article 25.10 of the Subsidies Agreement in October 2011. In its counter notification, the United States identified 200 unreported subsidy measures that China has maintained since 2004, 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, 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 and 2013, 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 has 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 more evidence of central government and sub-central government subsidies that China has not yet notified. In April 2014, the United States submitted an additional request for information pursuant to Article 25.8 regarding extensive subsidies provided by China in support of its so-called "strategic emerging industries." To date, China has not responded to either of these requests for

information, nor has China submitted an updated subsidy notification. Indeed, China also has failed to accept multiple requests for bilateral meetings focused on the more than 200 unreported subsidy measures identified in the United States' Article 25.8 and Article 25.10 submissions.

In October 2014, the United States submitted another counter notification under Article 25.10 of the Subsidies Agreement. This counter notification addresses the same Chinese subsidies that were the subject of the United States' written request for information pursuant to Article 25.8 of the Subsidies Agreement in 2012, and it provides English translations of the 110 subsidy measures at issue for the benefit of other WTO members and the public.

In 2015, the United States submitted another written request for information pursuant to Article 25.8 of the Subsidies Agreement and another counter notification under Article 25.10 of the Subsidies Agreement. The Article 25.8 submission addresses China's fisheries subsidies, while the Article 25.10 addresses subsidies provided to China's strategic emerging industries. Subsequent to the filing of those submissions, in October 2015, China submitted a new subsidies notification, covering the period from 2009 to 2014. As in its two previous subsidy notifications, this notification was far from complete.

In 2016, the United States will continue to research and analyze the various forms of financial support that the Chinese government provides to manufacturers and exporters in China, including in the steel sector, the aluminum, the green technology sector, the textiles and apparel sectors, and the fisheries sector, among other sectors, and assess whether this support is consistent with WTO rules. The United States will also continue 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 will continue to press China to submit a complete and up-to-date subsidies notification.

### 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 appear 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 is challenging 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. Since then, the two sides have been engaging in further discussions exploring the steps that China could take to address U.S. concerns.

In February 2015, the United States initiated a 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." Like in the export bases case, the subsidies in this case appear 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 and April 2015. Since then, the two sides have been engaging in further discussions exploring steps for China to take to address U.S. concerns.

### 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, 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 Chinese 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 warmwater shrimp, melamine, GOES, non-oriented electrical steel, hot-rolled steel, cold-rolled steel and corrosion-resistant steel. 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.

In September 2008, China requested WTO consultations with the United States regarding the Commerce Department's final determinations in the AD and CVD investigations on Chinese imports of steel pipe, steel tube, off-road tires and laminated woven sacks. Among other things, China challenged the imposition of anti-dumping duties calculated using a "non-market economy" measurement methodology while also imposing countervailing duties to address subsidization of the same imports (known as the "double remedies" issue). Consultations were held in November 2008, and proceedings before a WTO panel took place in July and November 2009. The panel issued a decision in October 2010, finding in favor of the United States on the "double remedies" issue. China filed an appeal with the WTO's Appellate Body in December 2010. In March 2011, the Appellate Body issued its decision, which overturned the panel's findings on double remedies. The United States subsequently agreed to come into compliance with the WTO's ruling, which required the Commerce Department to revisit its double remedies approach. The Commerce Department accordingly undertook so-called "Section 129" proceedings pursuant to U.S. law and issued final determinations in August 2012 that complied with the WTO's rulings on the double remedies. Pursuant to the new approach

announced in the Section 129 proceedings, when the Commerce Department is imposing antidumping duties calculated using a "non-market economy" measurement methodology while also imposing countervailing duties to address subsidization of the same imports, it now adjusts the antidumping duty rates in circumstances in which factual evidence shows that the domestic subsidies at issue lowered export prices.

Separately, in September 2012, China initiated a WTO case challenging, among other things, Public Law 112-99, new U.S. legislation enacted in March 2012 that expressly confirms the applicability of the U.S. CVD law to countries that have been determined to be "non-market economies" for purposes of the U.S. AD law and that grants the Commerce Department authority to adjust for the possibility of "double remedies" when AD duties and CVD duties are applied concurrently to the same imports. Consultations were held in November 2012. Hearings before the panel took place in July and August 2013. The panel issued its decision in March 2014, rejecting China's challenge to the U.S. legislation. China appealed the panel's decision in April 2014, and the WTO's Appellate Body rejected China's appeal in July 2014.

### Price Controls

*China has progressed slowly in reducing the number of products and services subject to price control or government guidance pricing.*

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.



In 2015, 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 April 2006, May 2008, May 2010, June 2012 and July 2014. The United States will continue to use that mechanism in 2016 to monitor China's progress in eliminating price controls.

At the July 2014 S&ED meeting, building on the Third Plenum pronouncement directing that the market should play a decisive role in the allocation of resources, the United States was able to secure a commitment from China to move toward market-based prices. Specifically, China agreed to accelerate the process of market-based price reforms for petroleum, electricity and natural gas, and to realize market-based prices in competitive sectors as soon as possible. In November 2015, China published a draft five-year plan covering the period from 2016 to 2020 in which it proposes to liberalize the prices in competitive sectors, including electricity, oil, natural gas, transportation and telecommunications.

### 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 has been able to engage in an informal dialogue with NDRC, and the United States has 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 have urged China to develop an approach that will 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. U.S. industry expressed concern that NDRC's proposal would significantly discriminate against foreign manufacturers. Similar pricing proposals had appeared at the provincial government level in the past. For example, in September 2010, Guangdong Province published a medical device pricing system for public comment that is similar to the one proposed by NDRC. Going forward, the United States will continue to work to ensure that NDRC and provincial government authorities seek its input and 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 ensure that MOH's tendering policies are fair and transparent and that the quality and innovation of medical devices are given adequate consideration in purchasing decisions. MOH subsequently entered into discussions directly with U.S. industry.

During the run-up to the December 2010 JCCT, 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 continued to work 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 "Manufactured in China 2025" 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. In a positive development, at the November 2015 JCCT meeting, China agreed that, in the area of market access, it will give imported medical devices the same treatment as those manufactured or developed domestically.

### **Standards, Technical Regulations and Conformity Assessment Procedures**

*China continues to take actions that generate WTO compliance concerns in the areas of standards, technical regulations and conformity assessment procedures, particularly with regard to transparency, national treatment, the pursuit of unique Chinese national standards, and duplicative testing and certification requirements.*

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.

### RESTRUCTURING OF REGULATORS

*China has restructured its regulators for standards, technical regulations and conformity assessment procedures in order to eliminate discriminatory treatment of imports, although in practice China's regulators sometimes do not appear to enforce regulatory requirements as strictly against domestic products as imports.*

As previously reported, in anticipation of its WTO accession, China made significant progress in the areas of standards and technical regulations. China addressed problems that foreign companies had encountered in locating relevant regulations and how they would be implemented, and it took steps to overcome poor coordination among the numerous regulators in China. 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.

China also began to take steps in 2001 to address problems associated with its multiplicity of conformity assessment bodies, whose task it is to confirm compliance to technical regulations and mandatory standards. AQSIQ was established as a new ministry-level agency in April 2001. It is the result of a merger of the State Administration for Quality and Technical Supervision and the State Administration for Entry-Exit Inspection and Quarantine. China's officials explained that this merger was designed to eliminate discriminatory

treatment of imports and requirements for multiple testing simply because a product was imported rather than domestically produced. China also formed the quasi-independent National Certification and Accreditation Administration (CNCA), which is attached to AQSIQ and is charged with the task of unifying the country's conformity assessment regime.

Despite these changes, U.S. industry still 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. The United States will continue to monitor these issues in 2016 to determine if U.S. industry is being adversely affected.

In a positive development, SAC released a standardization reform plan in March 2015 entitled the *Reform Plan on Further Improving Standardization Work*. This plan aims 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 the plan. For example, SAC issued draft "Association Standardization – Part 1: Guidelines for Good Practice" and accepted public comments on these draft national standards. In November 2015, the American National Standards Institute and other U.S. stakeholders commented on these draft national standards. China's entry into private standardization activities are being closely followed by U.S. stakeholders, whose interests are to have the

new Chinese private standardization system model off of U.S. practices and follow the WTO Code of Good Practice for the Preparation, Adoption and Application of Standards.

### STANDARDS AND TECHNICAL REGULATIONS

*China continues to pursue the development of unique Chinese national standards, despite the existence of well-established international standards, apparently as a means for protecting domestic companies from competing foreign technologies and standards.*

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.

The United States continues to make efforts to assist China through bilateral exchanges and training, as China works to improve its standards regime. For example, in May 2005, a new U.S. private sector standards office, using funding from the U.S. Department of Commerce, opened in Beijing. Its goals are to strengthen ties with Chinese government regulatory authorities, Chinese industry associations and Chinese standards developers and, in particular, to ensure that close communication exists between U.S. and Chinese standards developers. More recently, three international standards development organizations, ASTM International, the American Society of Mechanical Engineers and the American Petroleum Institute, opened their own offices in China in order to

encourage Chinese participation in their standardization and conformity assessment activities.

The United States also continued to provide technical assistance to China. Since 2004, this technical assistance has focused on broad standards-development issues, such as the relationship between intellectual property rights and standards, and specific standards in a number of industries, including petroleum, information and telecommunications technology, chemicals, steel, water conservation, energy efficiency, hydrogen infrastructure, elevators, electrical safety, gas appliances, distilled spirits, heating, ventilation and air conditioning, and building fire safety. The United States has also conducted programs addressing China's regulation of hazardous substances and China's new chemical management system.

In addition, in 2006, the U.S. Trade and Development Agency (TDA) launched the U.S.-China Standards and Conformity Assessment Cooperation Project. In 2015, this project, with funding from TDA and U.S. industry, continued to provide education and training to Chinese policy makers and regulators with regard to U.S. standards and conformity assessment procedures. Programs held this year covered topics such as environmental protection in shale gas development, electric vehicle technology and standardization, brownfield remediation and meat safety.

The American National Standards Institute, with funding and participation from the U.S. Department of Commerce, also maintains a Standards Portal in cooperation with SAC. The Standards Portal contains dual language educational materials on the structure, history and operation of the U.S. and Chinese standards systems, a database of U.S. and Chinese standards and access to other standards from around the world.

At the same time, 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 2015, the United States raised concerns at the WTO TBT Committee regarding several Chinese measures. These measures covered registration fees for drugs and medical devices products, banking sector ICT rules, insurance sector ICT rules, cosmetics labeling and the supervision and administration of medical devices.

### 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 despite 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 in 2016.

### 3G 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

agreed 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 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 agreed 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.

Since then, the United States has carefully monitored 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 (IIWG), 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. The United States also raised this issue in 2015 at the JCCT IIWG and has proposed additional roundtable discussion of this issue in 2016.

### 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 agreed 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. In 2015, the United States closely monitored developments in this area to ensure China followed through on this JCCT commitment, and will continue to do so in 2016.

### 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 is 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 appears 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 may 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 is in the process developing numerous "industry standards" relating to smart terminal requirements, which appear 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. In 2016, the United States will closely monitor developments in this area.

### 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.

The United States has engaged repeatedly with China on issues relating to the use of national standards, including through the submission of extensive comments on draft measures. For example, in November 2009, SAC circulated a draft of the *Provisional Rules regarding Administration of*

*the Establishment and Revision of National Standards Involving Patents* for public comment. This draft measure would implement China's vision for a standards development process that uses government power to deny or lower the royalty rates owed to owners of patents incorporated into Chinese national standards. The draft measure would establish the general principle that mandatory national standards should not incorporate patented technologies. However, when they do incorporate patented technologies, the draft measure provides for the possibility of a compulsory license if a patent holder does not grant a royalty-free license. In 2004, SAC circulated a similar draft measure – the *Interim Regulations for National Standards Relating to Patents* – for public comment, although it was never finalized. SAC's 2009 draft measure appears to incorporate many of the problematic aspects of the 2004 draft measure.

The United States provided comments to SAC on the 2009 draft measure in December 2009, requesting that SAC not move forward with it and instead consult with stakeholders. SAC reportedly received comments from 300 other interested parties as well. A draft measure with similar provisions was issued by the China National Institute for Standards (CNIS) in February 2010, and the United States provided comments to CNIS in March 2010. Throughout 2010, the United States also raised its concerns in meetings with China's regulators, and as of December 2010 neither SAC nor CNIS had moved forward to finalize their draft measures.

At the December 2010 JCCT meeting, the United States and China agreed that patent issues related to standards raise complex issues that require standard setting organizations to take into account the appropriate balance among the interests of patentees, standard users and the public when developing and adopting their rules on patent issues. The two sides also agreed to have further discussions on patent issues related to standards, including in the JCCT IPR Working Group, involving participants from all relevant U.S. and Chinese agencies.

In late 2012, SAC published for public comment a revised draft of the draft measure originally published in 2009. In written comments submitted in January 2013, the United States commended SAC for addressing various concerns raised in the United States' prior written comments, but also urged SAC to address important outstanding concerns. SAC, jointly with the State Intellectual Property Office (SIPO), subsequently issued final rules that took effect on January 1, 2014.

Meanwhile, since 2009, China's State Administration for Industry and Commerce (SAIC) has published draft rules regarding the application of the *Anti-monopoly Law* to intellectual property-related conduct that have drawn U.S. comments and engagement. 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.

The United States also has engaged with China's Supreme People's Court (SPC) regarding a series of draft judicial interpretations relating to standards. In June 2009, the SPC published a draft *Interpretation on Several Issues Regarding Legal Application in the Adjudication of Patent Infringement Cases* for public comment. The United States subsequently met with the SPC to discuss this draft measure and recommended modifications to clarify that a Chinese court could find a patent holder to be a participant in the group developing a standard incorporating patented technology only if the patent holder had consented to the inclusion of its patented technology in that standard. The United States also emphasized that if the patent holder had consented to the inclusion of its patent on the condition that it

be licensed on specified terms, then the draft measure should make clear that a Chinese court should enforce those licensing terms. When the SPC issued the final measure in January 2010, it did not include the provisions of concern.

In September 2014, the United States provided 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.

At the December 2014 JCCT meeting, the United States and China recognized that standards setting can promote innovation, competition and consumer welfare and also reaffirmed that IPR protection and enforcement is critical to promote innovation, including when companies voluntarily agree to incorporate patents protecting technologies into a

standard. The two sides also recognized that concerns may exist relating to the licensing of standards-essential patents that are subject to licensing agreements.

In 2015, as in-depth discussion of these issue continued, the United States 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 standards setting on a non-discriminatory basis. At the November 2015 JCCT meeting, China welcomed U.S.-invested firms in China to participate in the development of national recommendatory and social organization standards in China on a non-discriminatory basis. While the United States welcomes this step, it will continue to press China to take further steps to ensure that standards development processes are open to all interested parties.

China also made one other standards-related commitment at the November 2015 JCCT meeting. It agreed that licensing commitments for patents in voluntary standards are made voluntarily and without government involvement in negotiations over those commitments, except as otherwise provided by legally binding measures.

### **Information Security Standards**

In August 2007, China notified to the TBT Committee a series of 13 proposed technical regulations relating to information security for various information technology products, including routers, smart cards and secure databases and operating systems. China requested that comments be provided within 60 days, but did not specify implementation dates for the proposed regulations. Subsequently, in March 2008, CNCA issued an announcement indicating that the final regulations would be published in May 2008, and would become mandatory one year later.

In part because of past actions that China has taken in this area, including China's issuance of mandatory encryption standards for Wi-Fi technologies in 2003 and regulations that China had issued in 1999 requiring the registration of a wide range of hardware and software products containing encryption technology, these proposed regulations generated immediate concerns for the United States and U.S. industry. In particular, the proposed regulations go substantially beyond global norms by mandating testing and certification of information security in commercial information technology products, not just products for government use in national security applications. In other countries, mandatory testing and certification for information security is only required for products used in sensitive government and national security applications.

The United States and other WTO members expressed serious concerns to China about these proposed regulations in numerous bilateral meetings, including during the run-up to the September 2008 JCCT meeting, as well as at meetings of the TBT Committee in 2008 and during China's second Trade Policy Review, held in May 2008. At the September 2008 JCCT meeting, China announced that it would delay publication of final regulations while Chinese and foreign experts continue to discuss the best ways to ensure information security in China.

In April 2009, CNCA, AQSIQ and MOF announced that the implementation of compulsory certification for thirteen types of information security products would be delayed until May 2010, and would only be applied when products are sold to the government, representing a significant reduction in the scope of the requirements from China's original plan. In September 2009, during the run-up to the October 2009 JCCT meeting, China confirmed that the compulsory certification requirement only applies when products are sold to government agencies, and not to state-owned enterprises or other sectors of China's economy.

In 2010, the United States continued to meet with China's regulators to discuss their regulation of information security products. China's State Encryption Management Commission, in bilateral meetings, confirmed that it was considering revisions to its 1999 encryption regulations. The United States noted the earlier widespread concerns about these regulations and asked China to ensure that any revisions to these regulations would be published in draft form with opportunity for comment by interested parties.

Additionally, 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 a positive development, at the November 2015 JCCT meeting, China acknowledged an important clarification that it had made in a March 2000 announcement. In that clarification, China made clear that it limits the scope of its encryption regulations to software and hardware specifically dedicated to encryption functions.

### **Secure and Controllable ICT Policies**

Concerns about China's regulations addressing information security were heightened in 2015 as China 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."

A draft measure issued by the China Banking Regulatory Commission (CBRC) in December 2014, the *Guidelines for Promoting the Application of Secure and Controllable Information Technology in Banking Sector*, which included an accompanying *Classification Catalogue of Banking Information Technology Assets and Indexes of Security and Controllability* (collectively the "Banking ICT Rules"), called for 75 percent of ICT products used in China's banking system to be "secure and controllable" by 2019. The applicable criteria, which would have required banks to file source code for all software with the Chinese government, use chips and software that are "under" indigenous intellectual property rights (rather than comply with performance requirements), and submit encryption products to Chinese regulators for testing and certification, raised serious concerns in the U.S. and global ICT industry.

The Banking ICT Rules appeared to require encryption pre-approval by government regulators via conformity assessment procedures. According to current Chinese law, this pre-approval would require divulging source code and other sensitive design information, a matter of enormous concern to U.S. industry. Since 1999, China has agreed to impose these requirements only on ICT products whose "core function" was encryption and not to apply encryption registration requirements to the broader world of commercial ICT products. The Banking ICT Rules appeared to abandon that policy, and Chinese regulatory officials have discussed applying rules similar to the Banking ICT Rules in other priority

sectors. China's encryption regulations have been discussed on numerous occasions for the past 15 years, with the United States, the EU and others expressing serious concerns about any potential expansion of China's encryption regulations.

The United States raised serious concerns about the Banking ICT Rules at the highest levels of government in China. Other governments, and numerous global stakeholders, also raised serious concerns. Subsequently, in April 2015, China announced that it would suspend implementation of the Banking ICT Rules.

At the June 2015 S&ED meeting, China agreed that any future ICT regulations in the banking sector will be non-discriminatory and will not impose nationality-based conditions or restrictions on the purchase, sale or use of ICT products and services by commercial enterprises. China also committed to providing opportunities for public comment on draft regulations relating to ICT products and services before issuing them in final form. During the September 2015 state visit of President Xi, China extended its non-discrimination commitments to all ICT products in the commercial sector. Additionally, at the November 2015 JCCT meeting, China confirmed that while CBRC reconsiders the Banking ICT Rules, Chinese banks are free to purchase and use the ICT products and services of their choosing.

In October 2015, China's Insurance Regulatory Commission (CIRC) published draft regulations that impose information security-related requirements on ICT systems in the insurance sector and implement "secure and controllable" principles. This draft measure, the *Administrative Regulations on the Informatization of Insurance Institutions*, includes provisions relating to MLPS and China's encryption regulations and gives priority to buying "secure and controllable" hardware and software products. The United States, other WTO members and stakeholders from around the world expressed serious concerns about this draft measure. At the November 2015 JCCT meeting, China agreed that it will notify the draft measure to the WTO TBT

Committee and formulate it in an open and transparent manner.

Other problematic measures proposed or finalized by China in 2015 relate to cybersecurity and include an ostensible information security-related rationale for potential trade restrictive policies. In June 2015, China passed a *National Security Law* with a stated purpose of safeguarding China's security, but it included sweeping provisions addressing economic and industrial policy. China also drafted laws relating to counterterrorism and cybersecurity, which, if finalized in their current form, would impose far-reaching and onerous trade restrictions on imported ICT products and services in China. Additionally, in September 2015, the State Council published a big data development plan, which for the first time set a time table for adopting "secure and controllable" products and services in critical departments by 2020.

Given all these concerns, the United States identified the issue of technology policy as a top U.S. priority in 2015. Subsequently, at the November 2015 JCCT meeting, China committed that new information security measures will not limit commercial sales opportunities for foreign suppliers of ICT products and services unnecessarily. That commitment built on assurances provided by China during the state visit of President Xi in September 2015 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.

### CONFORMITY ASSESSMENT PROCEDURES

*China appears to be turning more and more to in-country testing for a broader range of products, which does not conform with international practices that generally accept foreign test results and certifications.*

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 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. In addition, China issued a measure, which it subsequently suspended, establishing a burdensome new regime for government inspection of imported medical devices that have already satisfied applicable Chinese certification requirements before being exported to China. Working with U.S. industry, the United States will continue to urge China in 2016 to reverse this trend and move in the direction of more globally recognized conformity assessment practices.

### Telecommunications Equipment

In the past, 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. With the rollout of 3G licenses in China in 2009, U.S. industry has expressed concern that there will be growing problems because a surge in new handset models will be

running through the approval process. In addition, as U.S. industry has reported, testing fees may increase as smartphones and other devices evolve with new functionalities, given that these fees are dependent on the number of functions on a particular device.

China's three main type approval certification processes for mobile phones are the Network Access License (NAL), the Radio Type Approval (RTA), and the China Compulsory Certification Mark (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 new 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.

In 2016, the United States will monitor developments in this area closely and will continue to pursue progress in enhancing transparency and streamlining China's telecommunications testing and certification requirements.

### **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 continued to express

concerns in 2015 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 2012, as in prior years, the United States raised its concerns about the CCC Mark system and China's limitations on foreign-invested conformity assessment bodies with China both bilaterally and during meetings of the WTO's TBT Committee. At the December 2012 JCCT meeting, China confirmed that eligible foreign-invested testing and certification entities registered in China can participate in CCC Mark-related work and that China's review of

applications from foreign-invested entities will use the same conditions as those applicable to Chinese domestic entities.

In 2013, the United States pressed China to move ahead to seek new testing and certification entities for CCC Mark-related work in order to produce practical results from its 2012 announcement that foreign-invested entities are permitted in this sector. At the December 2013 JCCT meeting, China committed that, beginning in Spring 2014, it would use the same conditions that are applicable to domestic entities when reviewing applications from foreign-invested entities registered in China to be designated as CCC Mark testing and certification organizations. Subsequently, in June 2014, CNCA issued a Notice calling for applications for new designated certification bodies to be submitted by July 25, 2014, and it accepted applications from foreign certification companies. In 2016, the United States will monitor developments in this area and work to further expand the scope of testing and certification activities available to U.S. providers in China.

### Medical Devices

Since the creation of China's CCC Mark system, one of the more significant problem areas has been duplicative certification requirements for imported medical equipment. At the April 2006 JCCT meeting, as previously reported, the United States was able to obtain China's commitment to eliminate the redundancies to which imported medical equipment has been subjected. However, China only took steps to address duplicative product testing. China did not address the more burdensome duplicative factory inspection, certification and registration requirements applicable to imported electro-medical equipment or additional product-specific concerns, such as redundancies on border inspections for imported pacemakers.

The United States raised its continuing concerns in this area through various bilateral meetings in 2006,



2007 and 2008, including the JCCT meetings held in December 2007 and September 2008, as well as during the transitional reviews before the TBT Committee in November 2006 and November 2007. In September 2008, CNCA and China's State Food and Drug Administration (SFDA) jointly issued an announcement eliminating redundant testing, fees and factory inspections.

Following further U.S. engagement, in May 2013, China removed eight categories of medical devices from the list of products requiring CCC Mark registration. Since then, the United States has continued to encourage China to take further steps to address duplicative or onerous testing and certification requirements applicable to medical devices.

In April 2009, SFDA circulated for public comment a draft measure intended to supersede the *Administrative Measures on Medical Device Registration*, originally issued in 2004, but did not notify the draft measure, entitled *Regulations on Supervision and Administration of Medical Devices*, to the WTO. The United States subsequently expressed concerns about this draft measure in bilateral discussions with SFDA and during the October 2009 JCCT meeting as well as at the transitional review before the WTO's TBT Committee later that year. At the October 2009 JCCT meeting, China committed to accept a prior approval document of a medical device issued by a foreign country regardless of its exporting origin, country of manufacture or legal manufacture to satisfy any prior approval registration requirement.

In 2012, China issued the third draft of the *Regulations on Supervision and Administration of Medical Devices*. Despite apparent agreement at the October 2009 JCCT meeting that China would reconsider its requirement that a medical device be registered in the country of export before it can obtain approval in China, the draft continued to require prior marketing approval by the country of origin or country of legal manufacture.

In March 2014, China's State Council finalized and published Order No. 650, the *Regulations for the Supervision and Administration of Medical Devices*. The Order 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. While China has notified many of the draft implementing rules to the WTO and has solicited public comments on them, the Order itself has not yet been notified to the WTO.

The United States and U.S. industry have raised concerns relating to Order No. 650 and the various implementing rules with the relevant Chinese government authorities, using the JCCT process and meetings of the WTO TBT Committee, among other fora. Particular provisions of concern include the requirement that a medical device be registered in the country of export before it can obtain approval in China, and new local clinical trial requirements. The lack of necessary transition periods to avoid serious market disruptions is also troubling.

The requirement that a medical device must be registered in the registrant's country of domicile before it can be accepted for registration in China appears to be more stringent than prior policy allowing registrants to submit marketing authorization in the manufacturer's country of origin. In consultations through the JCCT process, SFDA's successor, the China Food and Drug Administration (CFDA), assured the United States that implementation would be effectively the same as the prior requirement and that certification from the country of origin would satisfy the requirement under Order No. 650. However, the United States remains concerned about this requirement, as it places unnecessary market entry delays on imported medical devices, while offering no further 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 would not necessarily be an indication that a medical device is unsafe.

The United States is also concerned about new clinical trial requirements and CFDA's catalogues of exempted Class II and Class III devices, which do not capture the full range of products that meet the exemption criteria as laid out in Order No. 650. For products not listed in the exemption catalogues, the ways through which foreign manufacturers can demonstrate safety and effectiveness to obtain clinical trial waivers lack clarity and are severely limited. The United States has urged CFDA to expand the ways that foreign companies can demonstrate eligibilities for these exemptions. At the November 2015 JCCT meeting, China agreed to further expand the scope of the medical device clinical trial exemption catalogues and to conduct training for companies applying for clinical trial waivers. China further agreed to improve communication with manufacturers of innovative medical devices by designating dedicated personnel to provide guidance and to respond promptly upon request. For other types of medical device registration applications, China will conduct weekly group consultations for applicants.

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.

Separately, in April 2009, AQSIQ circulated draft *Regulations on the Recall of Defective Products*, which would apply to medical devices. Given that the Ministry of Health and SFDA began a process in 2008 to develop a recall system that would also cover medical devices, the United States became concerned about the possibility of redundant recall procedures. In bilateral discussions with China during the run-up to the October 2009 JCCT meeting, as well as at the transitional review before the TBT Committee, held in early October 2009, the United States raised its concerns. At the October 2009 JCCT meeting, China indicated that it would ensure that its product recall procedures for medical devices would not be redundant and that the Ministry of Health and SFDA would be the relevant regulatory authorities for medical device recalls. Since 2010, U.S. industry has not reported problems with the medical device recall system. In 2016, the United States will continue to monitor developments in this area to ensure that China's regulatory approach is consistent with China's JCCT commitment.

### Cosmetics

In December 2013, CFDA issued a notice requiring foreign cosmetics manufacturers to submit a certificate of free sale 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 new 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. U.S. industry had concerns about several provisions in this draft measure, including provisions that

appeared to contain unfair requirements for foreign products. For example, the draft measure retained the certificate of free sale requirement for imported cosmetics. It also generated concerns relating to product safety determinations and ingredient management and treatment of CBI during claims substantiation.

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 has been engaging 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. In addition, in July 2015, the SCLAO released a revised draft *Cosmetics Supervision and Administration Regulation* for public comment. The revised draft adopts a number of practices welcomed by international cosmetics companies, including changes more in line with international practices relating to the management of product safety determinations and the notification of new ingredients, as well as a reduction in the number of cosmetics products classified as special. At the same time, there are remaining concerns on claims management, given unclear provisions as to how CBI will be addressed in substantiation. In order to strengthen mutual understanding and cooperation, at the November 2015 JCCT meeting, the United States and China agreed to hold a Cosmetics Regulatory Dialogue in the first half of 2016. This dialogue will include participation by government officials from the relevant regulatory authorities and other interested ministries as well as private sector representatives and will be designed to facilitate the exchange of

views on various issues relating to regulations, rules and regulatory practices in the area of cosmetics.

### 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 October 2009, China issued for public comment its first draft catalogue, covering electronic information products that will be subject to hazardous substance restrictions and mandatory testing and conformity assessment under the China RoHS regulations. The draft catalogue, which was subsequently finalized and issued in final form, included mobile phones, other phone handsets and computer printers and was supposed to come into force ten months after its adoption. However, information on the applicable testing, certification and conformity

assessment regime was not included in either the draft or final catalogue.

China subsequently proposed revisions to the original China RoHS regulations. Specifically, in October 2010, China notified the draft *Measures for the Administration of the Pollution Control of Electronic or Electrical Products* to the WTO's TBT Committee and also solicited public comment on it. China has not yet finalized this measure.

In May 2010, MIIT and CNCA jointly issued the *Opinions on the Implementation of the National Voluntary Certification Program for Electronic Information Products Subject to Pollution Control*, which announced a voluntary program to certify electronic information products to the China RoHS limits established for six substances. More recently, MIIT and CNCA indicated that they intend to encourage electronic information product manufacturers, sellers and importers to take advantage of the program's financial and tax incentives and priority in government procurement. MIIT and CNCA began implementing this voluntary program in November 2011.

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.

The United States will carefully monitor developments in this area in 2016.

### TRANSPARENCY

*China has made progress but still does not appear to notify all new or revised standards, technical regulations and conformity assessment procedures as required by WTO rules.*

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 2015, 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.

## Other Internal Policies

### STATE-OWNED AND STATE-INVESTED ENTERPRISES

*The Chinese government has heavily intervened in investment and other strategic decisions made by state-owned and state-invested enterprises in certain sectors.*

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.

In the first few years after China's accession to the WTO, U.S. officials did not hear many complaints from U.S. companies regarding WTO compliance problems in this area, although a lack of available information made it a difficult area to assess. However, 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 decree then specifically identifies seven "strategic" industries, where state capital must play a leading role in every enterprise. These industries include civil aviation, coal, defense, electric power and grid, oil and petrochemicals, shipping and telecommunications. The decree 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 the start of the global economic downturn in late 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 recent Chinese government statement, 82 percent of central state-owned enterprises' assets are concentrated in the petrochemicals, 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 a potentially far-reaching measure, 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.

Particularly in recent years, the United States has sought to engage China on these and a variety of other issues related to state-owned enterprises. The United States has used bilateral avenues such as the Economic Track of the S&ED and the JCCT process as well as meetings at the WTO, principally through the Subsidies Committee and the Committee on Government Procurement.

At the May 2012 S&ED meeting, the United States obtained commitments from China designed to help create a more level playing field for U.S. enterprises competing against China's state-owned enterprises. China committed to providing non-discriminatory treatment to all enterprises, regardless of type of ownership, in terms of credit, taxation, and regulatory policies. China also agreed to increase the number of state-owned enterprises that pay dividends as well as to increase the amount of dividends actually paid. In addition, China agreed that it would encourage listed state-owned enterprises – which include China's largest and most profitable state-owned enterprises – to increase the portion of profits that they pay out in dividends so as to be in line with market levels.

Throughout 2013, using the S&ED and JCCT processes, the United States pressed China to eliminate subsidies primarily benefitting state-owned enterprises engaged in commercial activities.

The United States also pressed China to take steps to improve corporate governance, including by ensuring that there is no government or political involvement in the management of these enterprises or in their employment decisions.

According to 2013 Chinese government statistics, the assets of state-owned enterprises account for 41 percent of the total assets of Chinese industrial enterprises, representing a significant decrease from the 1978 figure of 92 percent. Nevertheless, the continuing concentration of state-owned enterprises in key sectors has meant that their economic influence has not decreased correspondingly.

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 do signal a high-level determination to accelerate needed economic reforms, they do not appear designed to reduce the presence of state-owned enterprises in China's economy. Rather, in the case of state-owned enterprises, the reform objectives are to consolidate and to strengthen those enterprises and to place them on a more competitive footing, both in China and globally.

At the July 2014 S&ED meeting, China did agree to incremental reforms for state-owned enterprises. Specifically, it committed to further deepen the reform of state-owned enterprises by improving and standardizing modern corporate governance structure and by reasonably increasing the proportion of market-based recruitment of management personnel for state-owned enterprises. China also pledged to increase significantly the dividends that state-owned enterprises pay to the government for social spending, reaching 30 percent by 2020.

Nevertheless, the Third Plenum Decision has not yet led to significant reform of state-owned enterprises, as new policies were still being formulated. In August 2015, China's State Council issued the *Opinions on Comprehensive State-Owned Enterprise Reform*, a measure that contains a number of important objectives. The ultimate significance of this measure will be determined by China's implementation, of which there is not much evidence to date. The United States has sought intensive dialogue with China on SOE governance issues, but so far China has rebuffed U.S. requests, although China has indicated a willingness to apprise the United States of SOE reform developments on an ongoing basis.

In 2016, the United States will continue to address the growing number of issues relating to state-owned enterprises in China in order to ensure that China fully adheres to its WTO obligations and that the actions of the Communist Party, the Chinese government and China's state-owned enterprises do not impede the ability of U.S. firms to compete and invest in China. The United States also will work to promote positive reforms called for by the Third Plenum Decision.

### STATE TRADING ENTERPRISES

*It is difficult to assess the activities of China's state trading enterprises, given inadequate transparency and China's failure to meet the WTO's detailed reporting requirements for 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 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 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 this year, 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.

### **GOVERNMENT PROCUREMENT**

*While China is moving slowly toward fulfilling its commitment to accede to the GPA, it is maintaining and adopting government procurement measures that give domestic preferences.*

The WTO Agreement on Government Procurement or GPA, is a plurilateral agreement that currently covers the United States and 42 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**

U.S. firms have made clear that China's timely GPA accession is a top priority for them. As a result, shortly after China became an observer to the WTO Committee on Government Procurement in February 2002, the United States began pressing China both bilaterally and in WTO meetings to move as quickly as possible toward 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, which amongst other improvements contained lower thresholds and

expanded sub-central coverage, among other improvements. However, even with these improvements, China's offer remains short of the coverage provided by other GPA parties.

At the December 2013 JCCT meeting, China agreed 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 consistent with timeline agreed at the December 2013 JCCT meeting. The offer included improvements in a number of areas, including thresholds, entity coverage and services coverage. Nevertheless, it 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.

In 2016, the United States will continue to use the mechanism for technical discussions established by the S&ED process to work with China, and it also will continue to consult and coordinate with other interested GPA parties. The United States' goal is to bring about China's accession to the GPA as expeditiously as possible and on robust terms that are comparable to the coverage of the United States and other GPA parties.

### China's Government Procurement Regime

In January 2003, China implemented its *Government Procurement Law*, which generally reflects the GPA and incorporates provisions from the United Nations Model Law on Procurement of Goods. However, China's *Government Procurement Law* also 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. China envisioned that its *Government Procurement Law* would improve transparency, reduce corruption and lower

government costs. This law was also seen as a necessary step toward reforming China's government procurement system in preparation for China's accession 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.

Using the S&ED and JCCT processes in 2009, the United States obtained important commitments from China that, if implemented, should lead to a government procurement regime that is more favorable to foreign-invested enterprises. First, 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, in which it expressed concerns about the lack of details regarding how the draft measure would be implemented as well as its broad application. As of December 2012, neither one of the draft measures had been issued in final form.

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 took important steps to address some of the U.S. concerns about China's indigenous innovation policies. Specifically, China agreed 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.

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. 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 further engaged with China on the draft *Implementation Rules of the Government Procurement Law* and the draft *Administrative Measures for Government Procurement of Domestic Products*. 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. The United States expects the *Implementation Rules of the Government Procurement Law* to be issued in final soon. At the December 2014 JCCT meeting, China confirmed that it will publish for public comment a further draft of the *Administrative Measures for the Government Procurement of Domestic Goods* after revising and improving it on the basis of thorough consideration of various opinions, including achieving cost savings, decreasing administrative burdens and increasing flexibilities.

In 2016, the United States will continue to work with China to move forward on its GPA accession and to address a range of other government procurement issues. In addition, the United States will continue to monitor the treatment accorded to U.S. suppliers under China's government procurement regime and will continue to urge China to apply its regulations and implementing rules in a transparent, non-discriminatory manner. The United States also will continue to encourage China to develop its government procurement system in a manner that will facilitate its expeditious accession to the GPA.

### INVESTMENT

*China has revised many laws, regulations and other measures on foreign investment to eliminate WTO-*

*inconsistent requirements relating to export performance, local content, foreign exchange balancing and technology transfer. However, some of the revised measures continue to "encourage" these requirements. Although China continues to consider reforms to its investment regime, including the use of a "negative list," many aspects of China's investment regime, including lack of a substantially liberalized market, maintenance of administrative approvals and the potential for a new and overly broad national security review system, continue to cause foreign investors great concern. China also has issued industrial plans covering the auto and steel sectors that include guidelines that appear to conflict with its WTO obligations. In addition, China has added a variety of restrictions on investment that appear designed to shield inefficient or monopolistic Chinese enterprises from foreign competition.*

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.

China continues to consider a number of reforms to its investment regime. Although China has repeatedly affirmed its plans to further open China to foreign investment, including in the November 2013 Third Plenum Decision, China has not followed 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 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 Chinese Communist Party's November 2013 Third Plenum Decision (as reinforced by some aspects of this year's Fifth Plenum Decision) directs the government to broaden foreign investment access in China, including for a number of services sectors, and to explore the possibility of a model for allowing

foreign investment that would provide pre-establishment national treatment and would employ a “negative list” approach in identifying exceptions. Although China's Foreign Investment Catalogue, as revised in March 2015, did liberalize investment in a few areas (including the manufacturing of chemicals and chemical raw materials), it did not provide liberalization in most of the areas important to foreign investors (including services sectors, agriculture, extractive industries and other manufacturing industries), and in some instances it seems to go backwards on market access.

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. The United States has a number of concerns with the draft law, including the existence of many elements that could be used to prohibit or restrict market access for foreign investors. One example is 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. The measure also sets forth China's intention to further streamline its administrative approval process relating to the negative list, including by moving to a filing for the record system in some but not all cases. Of particular concern, the measure 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.

The United States and China have committed at high levels to seek to conclude a high standard BIT. Building on China's commitment at the July 2013 S&ED meeting to negotiate a BIT that will provide national treatment at all phases of investment, including market access (i.e., the "pre-establishment" phase of investment), and will employ a negative list approach in identifying exceptions (meaning that all investments are permitted except for those explicitly excluded), the United States and China exchanged initial negative list offers in June 2015. Subsequently, as agreed at the June 2015 S&ED meeting, the two sides exchanged revised, improved negative list offers in September 2015. During the state visit of President Xi later that month, the United States and China reaffirmed, as a top economic priority, the negotiation of a high standard BIT that represents on each side an open and liberalized investment regime. Based on the progress made in the negotiations and both sides' improved negative list offers, the two sides also committed to intensify their negotiations and to work expeditiously to conclude the negotiation of a mutually beneficial, high-standard treaty.

### Administrative Licensing

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 (which is under review) 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 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 current foreign investment approval process, which lacks transparency and is governed by vaguely written and apparently unpublished rules, is a particular problem area. 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 approval practices, because they fear

retaliation from Chinese government officials. The 2012 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 to eliminate requirements relating to export performance, local content, foreign exchange balancing and technology transfer, as China committed to do in its accession agreement, some of the revised measures, for example, continue to encourage technology transfer or the use of local content, without formally requiring it. 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.

Over the years, the United States and other WTO members, including the EU and Japan, have raised concerns in this area during meetings of the WTO TRIMS Committee. The United States and several other WTO members also highlighted this area during China's Trade Policy Reviews, including the most recent one, which took place in July 2014.

On the bilateral front, 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.

Since the Third Plenum Decision in November 2013, the Chinese government has begun to give consideration to moving from an investment approval system to a record-filing system, at least in some cases. 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.

U.S. companies are encouraged by the overall reduction in license approval requirements and the focus on decentralizing licensing approval processes.



To date, however, U.S. companies report that these efforts have only had a marginal impact on their licensing experiences so far.

### Investment Restrictions

The United States and U.S. industry have become particularly concerned about new restrictions on investment being proposed and implemented by China. 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 calls for China to establish a review process to screen inward investment for national security implications.

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 – including the restrictions on foreign acquisitions of Chinese companies – as deeply worrisome and counter to the market-oriented principles that have been the basis for much of China's economic success over the past few decades. 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 2015, as in prior years, the United States raised its concerns about China's investment restrictions on multiple occasions, using bilateral mechanisms such as the JCCT process and the Economic Track of the S&ED. The United States also raised investment-related concerns in meetings at the WTO, as it will continue to do in the future, including as part of the Trade Policy Review of China at the WTO, which will next take place in 2016.

### Foreign Investment Catalogue

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, as previously reported, the State Council issued a revised Foreign Investment Catalogue without having provided an opportunity for public comment. The revised Foreign Investment 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. From a positive standpoint, the revised Foreign Investment Catalogue encouraged foreign investment in highway cargo transport and modern logistics, while it removed from the "encouraged" category projects of foreign-invested enterprises that export all of their production.

Using both the JCCT process and the S&ED process, the United States pressed China to increase the transparency of its revisions to the Catalogue. At the May 2010 S&ED meeting, China committed to publish proposed future revisions of the Foreign Investment Catalogue in advance for public comment.

This commitment was fulfilled in April 2011, when NDRC and MOFCOM jointly issued a draft of the newly revised Foreign Investment Catalogue for a 30-day public comment period. The United States submitted comments on the draft revised Foreign Investment Catalogue, noting that the proposed revisions fail to make substantial progress in opening China's market to greater foreign investment, and in some cases impose new limitations on foreign investment in sectors that previously had been more open. The draft revised Foreign Investment Catalogue places new sectors into the restricted and prohibited categories, including the processing of certain types of edible oil seeds, the mining of certain minerals, and the research and production of genetically modified seeds, among others. Even

some sectors listed in the encouraged category are subject to new investment limitations, including, for example, the manufacture of new energy vehicle components, which is now subject to a 50 percent equity cap for foreign investment. The United States also noted that the draft revised Foreign Investment Catalogue fails to provide foreign investors with clear and consistent guidance about their ability to invest in China's market.

In December 2011, China published the final version of the revised Catalogue, which entered into force in January 2012. Although the revised Foreign Investment Catalogue makes minor improvements, including by allowing wholly foreign-owned medical establishments and by removing the retailing of over-the-counter medicines from the "restricted" category, it is generally not responsive to the requests that the United States has made to lift investment restrictions in particular sectors.

In 2012, the United States continued to engage China vigorously through the S&ED process, the JCCT process and other bilateral channels in order to encourage China to make further on-the-ground improvements in its investment regime. At the May 2012 S&ED meeting, China committed to implement a more proactive opening-up strategy and to expand the areas open to foreign investment, and the degree of openness, during the 12th Five-year Plan period.

In November 2013, following the Third Plenum of the 18<sup>th</sup> Party Congress, the Chinese Communist Party issued a report, labeled the "Decision," which purports to present one of the largest and most ambitious economic reform programs since Deng Xiaoping's pioneering market-oriented reforms in 1978. Among other things, the Decision directs China to broaden foreign investment access in China, to explore the possibility of a model for allowing foreign investment that would provide national treatment at all phases of investment, including market access (i.e., the "pre-establishment" phase of investment), and would employ a "negative list"

approach in identifying exceptions (meaning that all investments are permitted except for those explicitly excluded), and to set up more free trade zones like the Shanghai Free Trade Zone, which, at the time, was newly established and still evolving.

Although little meaningful investment liberalization has taken place in the Shanghai Free Trade Zone to date, China did issue a draft of a revised *Catalogue Guiding Foreign Investment in Industry* for public comment in November 2014. In its written comments on the draft catalogue, the United States welcomed China's affirmation in the Third Plenum Decision that China intends to further open up to foreign investment as part of its domestic reforms and that its future foreign investment regime will be based on a "negative list." The United States further urged China to consider eliminating, rather than revising, its 2011 *Catalogue Guiding Foreign Investment in Industry*, given China's plans to move to a "negative list" to guide its foreign investment regime. In addition, the United States noted its concerns with the substance of the draft catalogue, explaining that while China proposes to remove certain investment restrictions from its 2011 *Catalogue Guiding Foreign Investment in Industry*, many significant investment restrictions remain in areas such as services, manufacturing and agriculture.

China's most recent revised Foreign Investment Catalogue, issued in March 2015, did liberalize investment in a few areas, including the manufacturing of chemicals and chemical raw materials. However, as the United States has made clear to China, it did not provide liberalization in most of the areas important to foreign investors, such as services sectors, agriculture, extractive industries and other manufacturing sectors, and in some cases, it seemed to go backwards on access. The United States also continues to urge China to abandon its maintenance of separate policies for foreign investment, as is represented by China's use of a 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, China missed this deadline, 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.

Over the last few years, additional problems began to arise 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, which include alternative fuel vehicles such as electric, fuel cell and bio-diesel vehicles. With that decision, China began 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 requiring manufacturers of NEVs in China to “demonstrate mastery” over, and hold intellectual property rights in, core NEV technologies. Because China only allows foreign automobile manufacturers to operate in China 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. The NDRC and MIIT regulations also require NEV manufacturers to establish research and development centers in China. Reportedly, China also was considering additional regulations that would require all NEVs manufactured in China to be sold under Chinese, rather than foreign, brands by 2015. These same reports indicated that China's regulators had 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. All of these requirements appeared to be inconsistent with commitments that China made in its WTO accession agreement, where China agreed not to tie investment approvals to the transfer of technology, the conduct of research or the use of

local content, and China also agreed to eliminate all restrictions on the types of cars foreign enterprises could produce or sell in China.

China has also pursued related policies similarly 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 final 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 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, raising national treatment concerns.

Similarly, municipal government-level restrictions intended to reduce pollution raise national treatment 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 during the run-up to the November 2011 JCCT meeting, including during the Industries and Competitiveness Dialogue held under the auspices of the JCCT. 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 will 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.

To date, it has been difficult to assess to what degree China has been implementing its November 2011 JCCT commitments. 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 is troubling, as it 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 monitor 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.

In October 2012, MOF, MIIT and MOST issued two new measures establishing a fiscal support fund for manufacturers of NEVs and NEV batteries. Because these ministries issued the measures in final form without having first circulated them in proposed form for public comment, the United States and U.S. industry did not have an opportunity to comment on them before they were finalized. 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.

During the run-up to the December 2012 JCCT meeting, the United States pressed its concerns about China's progress in implementing its November 2011 JCCT commitments in numerous bilateral meetings, including the JCCT Industries and Competitiveness Dialogue. The United States also raised concerns about the October 2012 fiscal support measures and, in particular, the conditions that must be satisfied to receive the funds available to manufacturers of NEVs and NEV batteries. The United States continued these efforts in 2014, using the JCCT process, but China has not revised its measures.

In 2014, China's regulatory agencies began a review of existing automotive "brand sales measures" affecting the distribution of automobiles and auto parts and aftersales and brand experiences. The United States continues to closely monitor the review of these measures to ensure that any new or revised measures comply with China's WTO obligations and bilateral commitments.

### Steel Sector

In July 2005, five years into its WTO membership, China issued a Steel and Iron Industry Development Policy. As previously reported, this policy contains many government mandates pertaining to the commercial behavior of Chinese steel enterprises

and created high barriers for potential foreign investors in China's steel sector. 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. It also calls for the use of domestically produced steel-manufacturing equipment and domestic technologies, 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.

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 the marketplace. 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. Indeed, this increasing tendency is at the root of many of the WTO compliance concerns raised by U.S. industry.

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 existing steel policies, specifically identifying a number of well-known objectives for the sector, 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 twelfth 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 ten percent of national industrial output. Indeed, 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 twelfth 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, including the Organization for Economic Cooperation and Development (OECD) Steel Committee, 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 twelfth five-year plan for the steel industry raised a number of specific concerns. In particular, the plan continues to place the government in the role of closely managing the development of the steel industry. The plan specifies 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 continues to emphasize “self-sufficiency” in steel production and states that continued reliance on imports of certain steel products is a problem to be addressed. For example, the plan appears to set specific targets for Chinese producers’ share of the domestic market in high-grade steel products that are currently supplied primarily by foreign steelmakers, including U.S. steelmakers. In the case of automotive steel and silicon steel sheets, the plan sets a goal of Chinese producers supplying 90 percent of the domestic market by 2015. The plan also provides no indication that China’s current restrictions on foreign investment are to be liberalized. At the same time, the plan lays out objectives for overseas investment by China’s steel producers and explains 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 is continuing to support the 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 serve as the guiding norms for the steelmaking industry in China. These industry norms offer 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 and local governments are directed to adopt measures to restructure or phase out these enterprises. 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

and demonstrate 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 notes, China’s current steel capacity dramatically exceeds market demand and, as of the end of 2012, China’s steel utilization rate was only 72 percent – much lower than the international average. While the measure aims to rein in excess capacity, it also raises a number of concerns. For example, it encourages banks to provide financing for technology upgrades, and it calls for policies to encourage Chinese steelmakers with excess capacity to relocate their excess capacity abroad, such as tax rebates for equipment and products relocated abroad.

In November 2013, MOF issued a new subsidy measure that provide 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.

At present, looking back at the time period from 2000 to 2014, the data show that China accounted for more than 75 percent of global steelmaking capacity growth. Currently, China’s capacity alone exceeds the combined steelmaking capacity of the EU, Japan, the United States, and Russia. China has no comparative advantage with regard to the energy and raw material inputs that make up the majority of costs for steelmaking, yet China’s capacity has continued to grow exponentially and is estimated to have exceeded 1.4 billion MT in 2014, despite weakening demand domestically and abroad. While China’s steel production is slowing and China may produce approximately 2 to 3 percent less steel in 2015 than in 2014, steel demand in China is projected to decrease 5 percent this year. As a result, China’s steel exports grew to be the largest in the world, at 93 million MT in 2014, a 50-percent

increase over 2013 levels, despite sluggish steel demand abroad. In 2015, there is rising concern that China's steel exports are still growing and may have increased 25 percent in the first ten months of 2015, as compared to the same period in 2014.

The United States has focused its engagement of China on steel issues in the JCCT process, including through the U.S.-China Steel Dialogue, a dialogue established under the auspices of the JCCT shortly after China issued its 2005 steel policy. The two sides have held four Steel Dialogue meetings, which have included participation from U.S. and Chinese steel industry officials, and have sought to increase mutual understanding of the challenges faced by each industry and to discuss strategies for addressing trade imbalances and overcapacity in the steel industry, including the benefits of increased reliance on market mechanisms.

At the WTO, the United States has also pressed its concerns regarding China's steel policy, in regular meetings and through the transitional reviews before the Committee on Import Licensing, the TRIMS Committee, the Subsidies Committee and the Council for Trade in Goods, with support from other WTO members, including Canada, Mexico, the EU and Japan. The United States also focused on China's steel policy in connection with China's first five Trade Policy Reviews at the WTO, held in 2006, 2008, 2010, 2012 and 2014, and in plurilateral fora such as meetings of the OECD Steel Committee.

In particular, the United States and other WTO members, including Canada and Mexico, have called for China to eliminate subsidies to its steel industry, except for those designed to facilitate capacity elimination or to address worker dislocation, to implement steel industry stimulus policies in a manner that encourages domestic consumption rather than exports and does not discriminate against imports, to eliminate the use of differential VAT rebates and duties on steel exports as a tool of industrial policy, to allow market forces rather than restraints on imports and exports to determine steelmaking raw material input supply and to

eliminate restrictions on foreign investment in China's steel industry. Several steel industry associations from North and South America and Europe have pressed similar concerns.

At the July 2014 S&ED meeting, the United States secured a commitment from China to establish mechanisms that strictly prevent the expansion of crude steelmaking capacity and that are designed to achieve, over the next five years, major progress in addressing excess production capacity in the steel sector. In addition, at the December 2014 JCCT meeting, the United States and China held an extended discussion of the root causes of excess capacity, the significant and varied costs associated with it and potential solutions for addressing the type of excess capacity challenges currently confronting China.

At the November 2015 JCCT meeting, China agreed to hold discussions with the United States in 2016 regarding capacity, production and trade in the steel sector and to provide updates on its progress in implementing its July 2014 S&ED commitment 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 within five years.

In 2016, the United States will continue to engage China, through the JCCT and S&ED processes, at the WTO and in plurilateral fora such as the OECD. The United States also will continue to work with Canada, Mexico and the EU to monitor and support concrete steps by China to rein in its steelmaking capacity.

### **Aluminum Sector**

In 2015, excess capacity in China's aluminum sector contributed to a severe decline in global aluminum prices, harming U.S. producers and workers. As the data show, monthly production of aluminum in China doubled between January 2011 and July 2015 and continues to grow. Large new facilities are being



built with government support, including through energy subsidies. At the November 2015 JCCT meeting, China agreed to intensify discussions with the United States regarding excess capacity in the aluminum sector.

### AGRICULTURE

*While China has timely implemented its tariff commitments for agricultural goods, a variety of non-tariff barriers continue to impede market access, particularly in the areas of SPS measures and inspection-related requirements. In addition, China's TRQ system for bulk agricultural commodities does not seem to function entirely as envisioned by China's WTO accession agreement, and reports commissioned by certain U.S. farm groups have concluded that China may be exceeding its domestic support commitments for certain commodities.*

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 limit the discretion 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 basic objective is to encourage a shift in policy to the use of measures that minimize the distortion of production and trade. Essentially, WTO members committed to reduce over time the types of domestic subsidies and other support measures that distort production and trade, while remaining free to maintain or even increase support measures that have little or no distorting effect, such as agricultural research or training by the government. 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.

In the area of export subsidies, WTO members committed to ban the use of these subsidies unless they fall within one of four categories of exceptions. The principal exception allows export subsidies subject to certain reduction commitments. However, like many other WTO members, 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), under which China also became obligated. 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 wheat, corn, rice, cotton, wool and vegetable oil, although these products had been subject to import monopolies by state trading enterprises.

China's tariff reductions have encouraged imports, and since China's accession to the WTO China's imports have reached record highs for many agricultural products, largely due to greater demand. At the same time, a variety of non-tariff barriers have continued 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 2015, serious problems have remained for U.S. exporters, who are faced 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 2015, as did the registration requirements that China imposes on U.S. food manufacturers. China's duties on imports of U.S. chicken broiler products, which the United States continues to challenge at the WTO, also disrupted trade.

On the positive side, U.S. agricultural products continued to experience strong sales to China. China is now the United States' largest agricultural export market, as U.S. exports to China exceeded \$24 billion in 2014, more than 10 times the level in 2002, with U.S. exports remaining strong through the first ten months of 2015, although down 11 percent when compared to the same period in 2014.

In September 2015, using the new multi-ministerial dialogue announced at the December 2014 JCCT meeting, the United States discussed science-based agricultural innovation with China, including the benefits of increased use of innovative technologies in agriculture. The United States will continue to pursue dialogue with China in this important area in 2016. As in prior years, the United States also will continue to pursue vigorous engagement with China in order to obtain progress on other outstanding concerns, including the high-level U.S.-China Agriculture Working Group, created at the April 2004 JCCT meeting, as well as JCCT plenary meetings to make progress on the range of other issues in the agriculture area. At the same time, the United States will not hesitate to take further actions, including WTO dispute settlement, if appropriate, to address U.S. concerns.

### Tariffs

*China has timely implemented its tariff commitments for agricultural goods each year.*

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 January 1, 2002, or by January 1, 2006. China did not have to implement any new tariff reductions in 2015, as the last few required tariff reductions on agricultural goods took place in 2008.

The accumulated tariff reductions made by China, coupled with increased demand, contributed to continued healthy exports of certain U.S. exports to China in 2015. Exports of some bulk agricultural commodities have increased dramatically in recent years, and continue to perform strongly, including soybeans, as discussed below in the sections on China's Biotechnology Regulations and Tariff-rate Quotas for Bulk Agricultural Commodities. Exports of forest products totaled \$2.6 billion in 2014, but decreased by 23 percent during the first ten months of 2015, compared to the same period in 2014. Fish and seafood exports totaled \$1.1 billion in 2014, the same level as in 2013, but decreased by 12 percent during the first ten months of 2015, compared to the same period in 2014. Meanwhile, exports of consumer-oriented agricultural products totaled \$2.4 billion in 2014, but decreased by 23 percent during the first ten months of 2015, compared to the same period in 2014.

However, the full market access potential of China's tariff cuts was not realized for some products. As discussed below, a variety of non-tariff barriers continue to impede market access for U.S. agricultural exports to China, particularly exports of consumer-ready and value-added products.

### **Tariff-rate Quotas on Bulk Agricultural Commodities**

*China's TRQ system for bulk agricultural commodities does not seem to be functioning entirely as envisioned in China's WTO accession agreement, due to opaque management practices and low quota fill despite domestic demand for imported products.*

An issue of particular concern involves China's commitments relating to TRQs on bulk agricultural commodities, which include several commodities of particular importance to U.S. farmers, such as 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. Low fill rates and 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, U.S. cotton exports to China totaled a then-record \$1.4 billion in 2004 and subsequently rose to \$3.4 billion by 2012 before declining to \$2.2 billion in 2013. This decline continued in 2014, with a drop to \$1.1 billion, while a further 9 percent drop has taken place in the first ten months of 2015, compared to the same period in 2014. Similarly, U.S. exports of corn to China increased in recent years, growing from \$1.5 billion in 2007 to \$1.3 billion in 2012, before declining to \$975 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 \$83 million. In 2015, corn exports rose by 38 percent during the first ten months of the year, compared to the same period in 2014, but remain relatively low compared to previous years. 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. Wheat exports dropped by 26 percent in the first ten months of 2015, compared to the same period in 2014.

In 2015, the United States continued to raise concerns about NDRC's TRQ administration, both bilaterally and at the WTO. These concerns related to domestic purchase requirements, allocation preferences and transparency, among other matters.

In 2016, the United States will continue to work to ensure that NDRC administers TRQs transparently and in a manner that is consistent with China's commitments and that does not impede market access or commercial decisions. The way in which China administers its TRQ policies will be especially critical in 2016, given China's massive cotton reserves – now calculated to total about one-half of global cotton supply – and their impact on demand for imported cotton in 2016 and beyond. In addition, the TRQs for corn and wheat are of particular concern because U.S. exports are price

competitive in China, but U.S. exporters have not been able to use China's TRQ system.

### China's Biotechnology Regulations

*China's dysfunctional biotechnology approval process continues to affect trade.*

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.

With some stability added to China's market through the issuance of temporary safety certificates, trade disruptions were minimized, and U.S. exports performed strongly. In 2003, U.S. soybean exports reached a then-record level of \$2.9 billion, representing an increase of 190 percent over 2002. In subsequent years, U.S. soybean exports continued

to increase dramatically, as China remained the leading export destination for U.S. soybeans. In 2014, U.S. soybean exports totaled \$14.7 billion.

In November 2006, MOA issued an announcement about the renewal requirements for existing safety certificates covering imported biotechnology crops. Because safety certificates for cotton, soybeans, corn and canola expired beginning in February 2007, it was possible that trade in these products would be disrupted. However, U.S. intervention ensured the timely renewal of the events that were about to expire.

Meanwhile, 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 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, such as public opinion, 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 another example, in March

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. Even if the MOA approval process proceeds quickly, trade may still be disrupted, as importers need time to apply for vessel based safety certificates and Quarantine Inspection Permits, both of which require valid safety certificates for biotechnology products and can take up to 30 working days.

In 2007, 2008 and 2009, the United States raised its concerns about these developments in several bilateral meetings, including JCCT working group meetings and other bilateral meetings focused on biotechnology issues. At the December 2007 JCCT meeting, China addressed one of the U.S. concerns that had arisen in 2007 when it agreed to eliminate a requirement to submit viable biotechnology seeds for testing during the approval process, which will reduce the possibility of illegal copying of patented agricultural materials.

Disruptions to trade continued to be a concern thereafter 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 late 2012, China also re-introduced the requirement that biotechnology seed companies must submit viable seed with their biotechnology applications. In addition, an apparent slow-down in issuing approvals 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. U.S. exports of corn and dried distillers' grains with solubles, or DDGS, were particularly affected by China's problematic regulatory system.

China had begun rejecting shipments of imported corn in November 2013 because of the detection of an unapproved genetically engineered (GE) event, MIR 162. Subsequently, some traders were able to re-route shipments to other markets, and trade from U.S. corn shippers to China largely ceased for the whole of 2014, with corn shipments dropping from \$1.3 billion in 2013 to \$77 million for the first ten months of 2014.

In July 2013, the Chinese regulatory authorities notified the United States that U.S. DDGS must be accompanied by a "GMO test report" with an official U.S. government stamp certifying that the product does not contain unapproved GE events. Eventually, China accepted an industry polymerase chain reaction (PCR) test report or certificate statement indicating the use of PCR testing. However, this step did not take place before some U.S. exports of DDGS to China were disrupted because they contained MIR 162.

In early December 2014, during the run-up to the JCCT meeting, China announced action on overdue approvals for some of the outstanding biotechnology events. Specifically, China announced that it would be issuing import approvals for three outstanding biotechnology products of significant importance to U.S. farmers, including two soybean events and one corn event, MIR 162. China's subsequent import approval for MIR 162 in late December 2014 resolved the immediate-term trade disruptions facing U.S. exports of corn and DDGS.

Throughout 2014, the United States continued to press China on multiple fronts, using both multilateral meetings at the WTO and bilateral engagement, to address the serious systemic problems with China's regulatory system for biotechnology products. At the November 2014

summit between President Obama and President Xi in Beijing, the two sides agreed to intensify science-based agricultural innovation for food security, and to strengthen dialogue in order to enable the increased use of innovative technologies in agriculture. Subsequently, 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 the agreement reached between President Obama and President Xi. 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.

During the September 2015 state visit of President Xi, China committed to further improve the administration of the biotechnology regulatory approval process, including by implementing a timely, transparent, consistent, predictable and science-based process following international standards. At the time of the state visit, the United States and China also co-chaired the inaugural SAID meeting, which focused broadly on creating an enabling environment for innovation in agriculture.

In 2015, MOA started routinely asking biotechnology seed companies for new data, even though 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 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. In 2016, the United States will continue to actively pursue these issues.

### Sanitary and Phytosanitary Issues

*China's regulatory authorities continue to impose SPS measures in a non-transparent manner and without clear scientific bases, including BSE-related import bans on U.S. beef and beef products, pathogen standards and residue standards for raw meat and poultry products, and an Avian Influenza-related import suspension on all U.S. poultry products. Meanwhile, China has made progress but still does not appear to notify all proposed SPS measures as required by WTO rules.*

In 2015, China's SPS measures continued to pose increasingly serious problems for U.S. agricultural producers exporting to China. As in prior years, the United States repeatedly engaged China on a number of SPS issues, in high-level bilateral meetings and technical discussions as well as during meetings of the WTO's SPS Committee. In addition, the United States continued to provide extensive training to China's regulatory authorities while also urging them to ensure China's full compliance with SPS Agreement transparency obligations.

In 2015, market access for U.S. soybeans and grain has continued. However, little progress was made in addressing SPS barriers for beef and poultry products, while concerns about SPS barriers for some pork products remain and market entry requirements for processed foods and horticultural products continue to be burdensome. In addition, China imposed a nationwide suspension of imports

of U.S.-origin poultry and poultry products tied to high-pathogenic AI.

In many instances, progress was made difficult by China's inability to provide relevant risk assessments or its science-based rationale for maintaining its import restrictions against U.S.-origin products. For example, China has been unable to provide a science-based rationale for import restrictions on U.S. beef and poultry products and some U.S. 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. The United States will continue to press for resolution of these and other outstanding issues in 2016.

### 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, the United States has repeatedly 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 acronym OIE) as effective and appropriate, for both food safety and animal health. China still has not provided any scientific justification for continuing to maintain its ban.

At the April 2006 JCCT meeting, China agreed 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, subsequent negotiations made it clear that China was only contemplating a limited market opening, still without any science-based support. In July 2006, China's food safety regulators unilaterally announced a limited market

opening, restricted to the entry of U.S. deboned beef thirty months of age or less, accompanied by 22 onerous entry conditions. Several of these conditions were not commercially feasible, and others did not even relate to BSE.

In May 2007, the United States received a risk classification as a "controlled risk" country by the OIE, indicating that all U.S. beef and beef products are safe to trade, provided that so-called "specified risk materials" (i.e., materials posing a BSE risk) are removed during processing. Later that month, while in Washington for the May 2007 SED meeting, Vice Premier Wu offered to open China's market to both deboned and bone-in beef, although still with the age restriction of 30 months or less. The United States rejected this offer because the applicable OIE classification has no such age restrictions.

Subsequent to May 2007, U.S. and Chinese officials met repeatedly at all levels. However, China did not indicate any willingness to begin accepting U.S. beef and beef products into its market in a manner consistent with the OIE's classification, and negotiations stalled.

At the same time that it banned U.S. cattle, beef and processed beef products, China also banned bovine-origin products (i.e., bovine semen, bovine embryos, and protein-free tallow) that are listed in OIE guidelines as safe to trade regardless of a country's BSE status. Additionally, China banned imports of U.S.-origin non-ruminant feeds and fats (such as pet food, rendered products and porcine proteins and skins) even though these products were of non-bovine-origin and presented absolutely no BSE-related risk. As previously reported, after numerous bilateral meetings, technical discussions and facility certifications, China allowed the resumption of trade in bovine semen and bovine embryos in early 2006. In addition, by early 2006, trade in the full range U.S.-origin non-ruminant feed and fat products had also resumed, after negotiation and resolution of a series of onerous, detailed and unnecessary non-BSE related information requirements proposed by China that appear to be inconsistent with OIE guidelines

and contrast sharply with U.S. requirements. To date, however, U.S. and Chinese officials continue to be unable to reach agreement on provisions of a protocol for protein-free tallow, a product listed by the OIE as safe to trade regardless of a country's BSE status. As a result, trade in protein-free tallow has still not resumed.

At the December 2010 JCCT meeting, the United States and China agreed to resume talks on U.S. beef market access. The two sides held a series of meetings in January 2011. The meetings did not produce agreement on market access terms, but did help to clarify the conditions both sides seek for trade to resume. In October 2011 meetings of the JCCT Agriculture and SPS Working Groups, the United States continued to press for a science-based beef market opening by China. Subsequently, at the November 2011 JCCT meeting, the two sides endorsed a commitment to increased technical engagement on this issue. Subsequently, technical meetings between the two sides took place in September and December 2012. Further discussions took place at the December 2012 JCCT meeting, where the United States expressed disappointment with the lack of progress on this issue.

In May 2013, the United States received the lowest risk status for BSE from the OIE, i.e., negligible risk. When the JCCT Agriculture and SPS Working Groups convened in November 2013, the United States again pressed for a science-based market opening by China for U.S. beef, and both sides agreed to a round of technical engagement in December 2013. Subsequent technical discussions and further engagement leading up to and during the December 2013 JCCT meeting did not lead to a resolution. The two sides therefore agreed to continue their discussions, with the shared goal of achieving a resumption in market access for U.S. beef products by July 2014.

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

### 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. One requirement establishes 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. Meanwhile, the complete elimination of these bacteria in raw meat and poultry is generally considered unachievable. Moreover, China apparently does not apply this same standard to domestic raw meat and poultry, raising national treatment concerns.

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. Despite positive results from USDA investigations of the plants, and extensive follow-up efforts by USDA, these plants have not been re-listed as approved to ship product 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, China would not agree 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.

Throughout 2015, the United States worked with China to resolve these issues, and will continue to do so in 2016.

Meanwhile, 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 Alimentarius (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. In 2016, the United States will continue to press China to revise these problematic standards.

### Avian Influenza Import Suspensions

In February 2004, as previously reported, China imposed a nationwide import suspension on U.S. poultry in response to cases of low-pathogenic AI found in Delaware. Throughout 2004, the U.S. provided technical information to China on the U.S. AI situation, and in August a high-level Chinese delegation conducted a review of the status of AI eradication efforts in the United States. In December 2004, China lifted its nationwide import suspension on U.S. poultry, leaving in place an import suspension only for the states of Connecticut and Rhode Island.

In early 2005, following the announcement of low-pathogenic AI found in the state of New York, China did not impose a nationwide import suspension. Instead, demonstrating progress in following OIE guidelines, China imposed an import suspension limited to poultry from the state of New York.

In 2006, China imposed an import suspension for poultry and poultry products originating from the state of Pennsylvania, based on incidents of low-pathogenic AI. China also suspended the importation of heat-treated and cooked poultry and

poultry products at the same time, even though the OIE's AI chapter makes clear that products that have been heat-treated in a manner to inactivate the virus should not be subject to an AI-related import suspension. In 2007, China also suspended imports of poultry and poultry products from West Virginia, Virginia and Nebraska because of low-pathogenic AI.

Following the eradication of AI in Connecticut, Rhode Island, New York, Pennsylvania, West Virginia, Virginia and Nebraska, the United States asked China to re-open trade in poultry and poultry products from these states, consistent with OIE guidelines. In response to U.S. engagement, at the September 2008 JCCT meeting, China announced the lifting of the state-level import suspensions covering Connecticut, Rhode Island, New York, Pennsylvania, West Virginia and Nebraska. However, China's state-level import suspension on Virginia remained in place, and China imposed new state-level import suspensions on poultry from Arkansas in August 2008, Idaho in September 2008 and Kentucky in April 2009. China also re-imposed a state-level import suspension on Pennsylvania and imposed a new state-level import suspension on Texas in January 2010. The Texas import suspension was especially egregious, given that no AI was actually detected.

In bilateral meetings in 2009 and 2010, including JCCT working group meetings, the United States pressed for removal of the current state-level import suspensions and for China's adoption of OIE-consistent policies governing the import of poultry and poultry products. At the December 2010 JCCT meeting, China announced the lifting of the state-level import suspensions covering Idaho and Kentucky, but not Virginia, Arkansas, Pennsylvania or Texas.

The Virginia import suspension, which dates from 2007, is also extremely problematic. Even though it is based on a single detection of low-pathogenic AI, China has been attempting to draw parallels between this one incident and a broad outbreak of high-pathogenic AI in Virginia more than 25 years earlier. At the same time, China has repeatedly refused the invitation of U.S. regulatory officials to

visit their laboratory and jointly sequence the low-pathogenic AI virus isolated from the one Virginia incident.

In 2011, in addition to maintaining its state-level import suspensions covering Pennsylvania, Texas, Arkansas and Virginia, China imposed a new import suspension on poultry and poultry products originating from the state of Minnesota based on detections of low-pathogenic AI. In bilateral meetings throughout the year, including at the November 2011 JCCT meeting, the United States pressed China to remove these import suspensions. In December 2011, China lifted its AI-related import suspensions on poultry and poultry products originating from Pennsylvania and Texas. Throughout 2012, the United States pressed China to lift its remaining AI-related import suspensions, which applied to the states of Arkansas, Minnesota and Virginia. The United States also continued to express its broader concerns about China's misinterpretation of the OIE's guidelines on Avian Influenza.

During the December 2012 JCCT meeting, the United States reiterated the need for China to follow OIE guidelines and lift the import suspensions applicable to Arkansas, Minnesota and Virginia, but China insisted that additional information was needed to lift the three import suspensions. Later that month, China lifted the Minnesota import suspension.

The United States continued to press China to follow OIE guidelines throughout 2013 and 2014, principally using the JCCT process. However, in February 2013, China imposed an import suspension on poultry and poultry products originating from New York based on a detection of low-pathogenic AI. In June 2013, China lifted the Arkansas import suspension, but re-imposed it when a detection of low-pathogenic AI was made several weeks later. Similarly, in June 2013, a detection of low-pathogenic AI in commercial pheasants led China to impose an import suspension on poultry from Wisconsin. In May 2014, a detection of H5 low-pathogenic AI in a commercial Japanese quail layer flock in California

led China to impose an import suspension on poultry from California. In that same month, China lifted its ban on poultry from Virginia. In September 2014, China imposed an import suspension on poultry from New Jersey in response to a detection of low-pathogenic AI in a pheasant at a hunting preserve. Even though the preserve was lifted from quarantine shortly thereafter when follow-up tests came back negative, and even though no poultry farms are located within a 10-mile radius of the preserve, China has kept the import suspension in place. Consequently, as of December 2014, China had in place state-level import suspensions applicable to five states, i.e., Arkansas, New York, Wisconsin, California and New Jersey.

In January 2015, China announced a suspension of imports of U.S. poultry and poultry products from all U.S. states in response to USDA's December 2014 notification of the presence of high-pathogenic AI 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 2015, only eight trading partners, including China, had a nationwide suspension of imports of U.S.-origin poultry and poultry products in direct response to the recent high-pathogenic AI outbreaks. China is the largest of these trading partners, blocking \$391 million in U.S. exports (based on 2014 values). Throughout 2015, U.S. officials urged China to take steps to remove or limit the suspension, which remains in place.

In 2016, the United States will continue to urge China to follow the OIE's guidelines relating to AI. The United States also will press China to lift the current nationwide suspension of imports of U.S.-origin poultry and poultry products.

### **H1N1-Related Import Bans**

In April 2009, China imposed import bans on U.S. pork and pork products and live swine, ostensibly related to its concern about the transmission of the H1N1 influenza A virus. Import bans based on this type of concern are not consistent with international

guidelines to control the spread of the H1N1 influenza A virus. International scientific bodies, including the Food and Agricultural Organization of the United Nations, the World Health Organization and the OIE, have repeatedly explained that the H1N1 influenza A virus is not transmitted by food products. Furthermore, the OIE has stated that “the imposition of ban measures related to the import of pigs and pig products does not comply with international standards published by the OIE and all other competent standard setting international bodies for animal health and food safety.” However, China still banned imports of pork, pork products and live swine from any states in which human cases of the H1N1 influenza A virus are present, and further imposed overly restrictive disinfection requirements, effectively blocking all imports from the United States because the virus is present in all 50 states.

Throughout 2009, the United States pressed China to remove its H1N1-related bans on imports of U.S. pork, pork products and live swine, using high-level bilateral meetings as well as JCCT working group meetings and the transitional review before the WTO's SPS Committee. At the October 2009 JCCT meeting, China announced its intent to reopen the China market to U.S. pork, pork products and live swine. In December 2009, MOA and AQSIQ issued a measure removing the bans on imports of U.S. pork and pork products, but not live swine. However, this measure required the negotiation of a mutually agreed export certificate, and China insisted that certain H1N1-related statements be included in the export certificate. Several months later, in May 2010, China and the United States reached agreement on export certificate language referencing the H1N1 influenza A virus. Nevertheless, the United States continues to believe that specific H1N1 references in a U.S. export certificate are unacceptable and inappropriate for inclusion in export certificates, given the international consensus that the H1N1 influenza A virus is not transmitted by food products.

### **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 on May 1, 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 1, 2010, and subsequently allowed the United States to continue to ship products to China after that 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 been monitoring this situation, and it appears that the finalized certificate is generally helping to facilitate market access for exports of U.S. dairy products to China.

### **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. Indeed, since 2003, the United States has identified more than 250 SPS measures implementing important new registration requirements, residue standards, inspection requirements and quarantine requirements – none of which China notified to the SPS Committee, even though these measures constrain U.S. exports of frozen meat, dairy products, grain, poultry, feed,

horticultural products, a variety of processed products and alcoholic beverages.

In 2015, 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 2016.

### Inspection-related Requirements

*China's regulatory authorities continue to administer inspection-related requirements in a seemingly arbitrary manner.*

Through two measures issued in 2002, the *Administrative Measures for the Entry-Exit Inspection and Quarantine for Grains and Feed Stuff* and the *Administrative Measures for Entry Animal and Plant Quarantine*, AQSIQ requires importers to obtain a Quarantine Inspection Permit (QIP), prior to signing purchase contracts for nearly all traded agricultural commodities. QIPs are one of the most important trade policy issues affecting the United States and China's other agricultural trading partners.

After AQSIQ began implementing these measures, traders complained that AQSIQ may intentionally slow down or even suspend issuance of QIPs at its discretion, without notifying traders in advance or explaining its reasons, resulting in significant commercial uncertainty. Because of the commercial necessity to contract for commodity shipments when prices are low, combined with the inherent delays in having QIPs issued, many cargoes of products such as soybeans, meat and poultry arrive in Chinese ports without QIPs, resulting in delays in discharge and additional demurrage bills for Chinese purchasers. In addition, traders report that shipment quantities are often closely scrutinized and are at risk for disapproval if considered too large.

Some improvements were made to the QIP system in 2004 following repeated U.S. bilateral engagement of China and through interventions made by the United States and other WTO members during the transitional reviews before the SPS Committee and the Committee on Import Licensing in 2002 and 2003. In June 2004, fulfilling a Chinese commitment made in connection with the April 2004 JCCT meeting, AQSIQ issued Decree 73, the *Items on Handling the Review and Approval for Entry Animal and Plant Quarantine*, which extended the period of validity for QIPs from three months to six months. AQSIQ also began issuing QIPs more frequently within the established time lines. Nevertheless, a great deal of uncertainty remains even with the extended period of validity, because a QIP still locks purchasers into a very narrow period to purchase, transport and discharge cargoes or containers before the QIP's expiration, and because AQSIQ continues to administer the QIP system in a seemingly arbitrary manner.

Traders continue to be hesitant to press AQSIQ for change because they would risk falling out of favor. Many traders would at least like AQSIQ to eliminate the quantity requirements that it unofficially places on QIPs. These quantity requirements have been used often by AQSIQ during peak harvest periods to limit the flow of commodity imports. In 2006, traders reported that MOFCOM not only limited QIP quantities, but also required some companies to use up the majority of a QIP before being issued another one and required other companies to use up their QIPs or risk being "de-listed." Eliminating these requirements would make the QIP system more dependent on market forecast.

Little improvement in the QIP system has taken place since 2004, despite U.S. engagement. AQSIQ officials continue to insist that the QIP system ensures that an adequate number of examiners are on duty at ports when shipments arrive to certify and inspect them for quality and quantity, while the United States and other WTO members argue that

there does not appear to be any scientific basis for the QIP system and that it serves as an unjust and overly restrictive barrier to trade. The United States will continue to press China on this issue in 2016.

Separately, in 2009, AQSIQ began implementing a measure, known as Decree 118, requiring all overseas feed and feed ingredients manufacturers shipping to China to undergo facility and product registration. In 2012, AQSIQ implemented another 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 is creating 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 new requirements.

Meanwhile, MOFCOM has been administering an additional import permit system for poultry products. Through its issuance of Automatic Registration Forms (ARFs) to importers, MOFCOM has allocated a volume amount to an importer for imports of particular commodities each year. However, problems periodically have arisen with MOFCOM's ARF administration. In July 2009, for

example, U.S. poultry industry representatives reported that MOFCOM's issuance of ARFs to importers of U.S. but not other foreign poultry products slowed dramatically for a short period of time. Subsequently, in January 2010, MOFCOM expanded the ARF system to include imports of soybeans, pork and dairy. The United States will continue to urge MOFCOM to eliminate the ARF system entirely in 2016.

### Domestic Support

*In recent years, China has been significantly increasing domestic subsidies and other support measures for its agricultural sector. Reports commissioned by certain U.S. farm groups have concluded that China may be exceeding its WTO-agreed levels of domestic support for certain commodities.*

As previously reported, over the past several years, China has been significantly increasing domestic subsidies and other support measures for its agricultural sector. China has established a direct payment program, instituted minimum support prices for basic commodities and sharply increased input subsidies. China has implemented a cotton reserve system, based on minimum purchase prices. 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 2014, the United States grew increasingly concerned about the effects of domestic support measures that China has pursued since 2008, such as the cotton reserves purchasing system. This purchasing system has led to a massive cotton stockpile in China, totaling one-half of global cotton supply as of December 2014. In addition, China announced new cotton target price programs in 2014, which may seriously reduce future demand for imported cotton. For similar reasons, China also now manages a large stockpile of corn.

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 its most recent notification concerning domestic support measures to the WTO, but it only provided information up to 2010. The United States remains concerned that the methodologies used by China to calculate support levels, particularly with regard to its price support policies and direct payments, may result in underestimates. In addition, reports commissioned by certain U.S. farm groups to calculate support levels for certain commodities, including corn, wheat and soybeans, have concluded that China may be substantially exceeding its WTO-agreed domestic support spending limits. The United States is investigating these reports.

In 2016, the United States will continue to monitor closely China's use of domestic subsidies and other support measures in the agricultural sector. The United States also will 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.

### Export Subsidies

*It is difficult to determine whether China maintains export subsidies in the agricultural sector, in part because China has not notified all of its subsidies to the WTO.*

Shortly after China's WTO accession, U.S. industry became concerned that China was providing export subsidies on corn, despite China's commitment to eliminate all export subsidies upon accession. It appeared that significant quantities of corn had been exported from China, including corn from Chinese government stocks, at prices that may have been 15 to 20 percent below China's domestic prices. As a result, U.S. corn exporters were losing market share for corn in their traditional Asian markets, such as South Korea and Malaysia, while China was exporting record amounts of corn. The United States has pressed its concerns about possible export subsidies on corn with China in bilateral meetings. The United States has also raised its concerns and sought additional information about China's corn policies – including the use of potentially excessive VAT export rebates – during meetings before the Committee on Agriculture, including the transitional reviews. Eventually, however, China began trending toward becoming a net importer of corn, and it appeared that China's exports were being made on a commercial basis, although concern remains regarding the operation of China's VAT rebate system for corn.

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 2016, 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

*Despite ongoing revisions of laws and regulations relating to intellectual property rights, and greater emphasis on rule of law and enforcement campaigns in China, key weaknesses remain in China's protection and enforcement of intellectual property rights, particularly in the area of trade secrets. Intellectual property rights holders face not only a complex and uncertain enforcement environment, but also pressure to transfer intellectual property rights to enterprises in China through a number of government policies and practices.*

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 that largely satisfies its WTO commitments. However, reforms are needed in key areas, such as updating 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, further improvement of China's measures for copyright protection on the Internet following China's accession to the WIPO Internet treaties, addressing deficiencies in China's criminal IPR enforcement measures and revising measures conditioning government procurement, financial benefits and preferences on intellectual property developed by, owned by or licensed to a Chinese party.

Effective IPR enforcement remains a serious problem throughout China. IPR enforcement is hampered by lack of coordination among Chinese government ministries and agencies, lack of training, resource constraints, lack of transparency in the enforcement process and its outcomes, procedural obstacles to civil enforcement, 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, including those relating to patents, trademarks and copyrights. 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 had also issued regulations and departmental rules covering specific subject areas, such as integrated circuits, computer software and pharmaceuticals. U.S. experts carefully reviewed these measures after their issuance and, together with other WTO members, participated in a comprehensive review of them as part of the first transitional review before the TRIPS Council in 2002.

Since then, China has periodically issued new IPR measures. The United States has reviewed these measures and pursued bilateral discussions and TRIPS Council reviews to address its concerns. Over time, China has become more willing to circulate



proposed measures for public comment and to discuss proposed measures with interested trading partners and stakeholders.

In 2011, China announced an updated Action Plan for revising its laws and regulations in order to better protect intellectual property rights. Among other things, this Action Plan set out China's intentions for revising various laws and other measures, including rules to implement the revised *Patent Law*, revisions to the *Trademark Law*, the *Copyright Law* and related measures. These efforts are ongoing, and the United States and U.S. right holders regularly have provided written comments to China on proposed measures and have engaged intensively with China's regulatory authorities to encourage the adoption of proposed U.S. revisions. For some years, a particular area of focus in the United States' bilateral engagement with China involves the outdated and ineffective laws and regulations governing trade secrets enforcement in China, which have gone essentially unchanged since 1993.

In addition, the United States has repeatedly 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 is to persuade China to improve its laws and regulations in certain critical areas, such as 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 criminal thresholds, the lack of criminal liability for certain acts of copyright infringement, the profit motive requirement in copyright cases, the failure to clarify that sports broadcasts are eligible for copyright protections, 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 consider a variety of improvements to its

administrative and civil enforcement regimes. While not all of these issues raise specific WTO concerns, all of them will continue to detract from China's enforcement efforts until addressed.

With regard to border enforcement, the United States is encouraged by the efforts of China's Customs Administration to pursue enforcement against counterfeit and pirated goods destined for export and the Customs Administration's agreement in 2007 to cooperate with U.S. customs authorities to fight exports of counterfeit and pirated goods. In January 2013, the Customs Administration hosted the first working group meeting under the agreement. Following that meeting, U.S. customs authorities and the Customs Administration exchanged information on IPR enforcement practices and cooperatively developed a plan to conduct a joint IPR enforcement operation focused on interdicting counterfeit consumer electronics. The month-long operation was successfully conducted in April 2013. At its conclusion, U.S. customs authorities and the Customs Administration committed to continued cooperation, including another joint enforcement operation. Nevertheless, the United States remained concerned about various aspects of the *Regulations on the Customs Protection of Intellectual Property Rights*, issued by the State Council in December 2003, and implementing rules issued by the Customs Administration in March 2009. At the December 2014 JCCT meeting, the United States secured China's agreement to continue the two countries' effective cooperation in cross-border enforcement efforts against counterfeit and pirated goods, and to conduct exchanges on the effectiveness of enforcement efforts.

China has been working on other measures that can have significant implications for the intellectual property rights of foreign right holders. For example, China enacted an *Anti-monopoly Law* that became effective in August 2008. Since then, China's enforcement of this law at times has generated concerns, including among foreign companies holding patented technologies. As discussed in the Competition Policy section below,

these concerns extend both to procedural fairness and remedial measures.

China's regulatory authorities also have issued various proposed and final measures relating to standards that incorporate patents, including interim rules from SAC and SIPO on national standards involving patents (effective January 2014), departmental rules on competition enforcement and intellectual property from SAIC (effective August 2015), draft guidelines on competition enforcement and intellectual property from NDRC (circulated for comment in October 2015) and draft patent law amendments (made available for comment in April and December 2015). 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 monitoring developments and has raised concerns with particular aspects of these measures.

### Technology Localization

The United States is seriously 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 discriminatory treatment of foreign right holders, but also because they are calculated to pressure foreign companies to transfer their technologies to enterprises in China. These policies and practices also discourage Chinese enterprises from developing their own innovative technologies. Currently, concerns among U.S. and other foreign stakeholders are growing at an accelerated pace because of the large number 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 provide government procurement preferences for goods or services

based on where the 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. In addition, China has agreed to revise or eliminate various measures that appeared to be inconsistent with this commitment.

At the July 2014 S&ED meeting, China agreed to take an affirmative step to address U.S. concerns about China's pursuit of intellectual property localization. Specifically, 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. China's execution of the pilot program has not proceeded at a rapid pace and must be brought to a close in the near term.

At the December 2014 JCCT meeting, China clarified and underscored that it will treat intellectual property rights owned or developed in other countries the same as domestically owned or developed intellectual property rights. China further committed that enterprises are free to base technology transfer decisions on business and market considerations, and are free to independently negotiate and decide whether and under what circumstances to assign or license intellectual property rights to affiliated or unaffiliated enterprises.

In December 2014, the CBRC published draft *Guidelines for Promoting the Application of Secure and Controllable Information Technology in Banking Sector*, along with an accompanying *Classification Catalogue of Banking Information Technology Assets and Indexes of Security and Controllability*, which would regulate the use of ICT products, services and technologies by financial institutions operating in China by requiring that an increasing percentage of these products, services and technologies be purchased from suppliers whose IPR is indigenously Chinese. In addition, the rules would require foreign firms to conduct ICT-related research and

development in China and to divulge proprietary IP as a condition for the sale of ICT products in China. The United States pressed its serious concerns with China throughout 2015. At the June 2015 S&ED meeting and during the September 2015 state visit of President Xi, China affirmed that it will not impose nationality-based conditions or restrictions on the purchase, sale or use of ICT products and services by commercial enterprises.

However, despite this sustained U.S. engagement and the bilateral commitments that China has made to date, new and proposed Chinese policies and practices discriminating against foreign right holders and pressuring foreign companies to transfer their technologies to enterprises in China have continued to proliferate. A number of measures promulgated in the name of enhancing cyber security or protecting national security impose unwarranted IP disclosure conditions and requirements that related IP rights be owned and developed in China. Recent proposal measures would extend this problem to the pharmaceuticals and medical devices industries. In 2016, the United States will press China to closely adhere to prior important bilateral commitments and to take further steps to address this problem.

### Online Copyright Protection

Since China acceded to the WTO, a sustained focus of U.S. engagement has involved China's online copyright protection, which is especially important in light of China's rapidly increasing number of Internet users. This engagement has seen important but incomplete steps forward by China.

As previously reported, one early step forward was a 2004 measure issued by the National Copyright Administration (NCA). Entitled *Measures for Administrative Protection of Copyright on the Internet*, it requires Internet service providers to take remedial actions to delete content that infringe on copyrights upon receipt of a complaint from the right holder, or face administrative penalties ranging from confiscation of illegal gains to fines of up to RMB 100,000 (\$16,400). The United States also

made it a priority to press China to accede to the WIPO Internet treaties and to fully harmonize its regulations and implementing rules with them. While compliance with the treaties is not required under WTO rules, they reflect important international norms for providing copyright protection on the Internet. At the July 2005 JCCT meeting, China committed to begin the process of acceding to the WIPO Internet treaties, and China acceded to these treaties a little more than one year later.

In 2006, the State Council adopted an important Internet-related measure, the *Regulations on the Protection of Copyright over Information Networks*. Although it does not appear to fully implement the WIPO Internet Treaties, this measure represents a welcome step, demonstrating China's determination to improve protection of the Internet-based right of communication to the public. Several aspects of this measure nevertheless would benefit from further clarification.

More recently, in 2012, the United States urged China to improve its online copyright protection by clarifying how Chinese law treats the issue of secondary liability. In December 2012, fulfilling a commitment that China had made at the JCCT meeting earlier that month, China's Supreme People's Court issued a Judicial Interpretation clarifying that those who facilitate the commission of copyright infringement will be equally liable for infringement. Since then, the United States has pressed China to incorporate the principles established in this Judicial Interpretation into the *Copyright Law*, which China is in the process of revising.

At the December 2014 JCCT meeting, China agreed to strengthen its enforcement against unlawful trademark counterfeiting and copyright piracy activities in the online environment and to deter the occurrence of infringement and counterfeiting through criminal, civil and administrative remedies and penalties. China further agreed that, in a practical and timely fashion, it will classify products

with significant impacts on public health and safety as priorities, and carry-out enhanced enforcement actions.

### Trademark Law

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, such as the "squatting" of 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, and false indications of geographic origin of products.

In August 2013, China's National People's Congress enacted important amendments to China's *Trademark Law*, including provisions to combat trademark squatting, expanding protection to sound marks, permitting multiclass registration and streamlining application and appeal proceedings. The United States welcomes these long-sought reforms, but notes that a number of important issues were not clarified in the *Trademark Law* or in implementing regulations issued in April 2014. The United States has raised key unresolved questions with China, such as the need to clarify the constructive knowledge standard applied in landlord liability proceedings.

### Pharmaceutical Patents and Market Access

In the pharmaceuticals sector, a serious concern of the United States has been patent protection and, in particular, SIPO examination guidelines governing information disclosure requirements for pharmaceutical patent applications. As a direct result of a series of amendments making these guidelines more restrictive, applications for pharmaceutical patents were denied in China, even as U.S. and other leading patenting authorities granted patents for the same pharmaceuticals. In

addition, patents granted prior to the adoption of the more restrictive SIPO guidelines have been vulnerable to invalidation challenges in China based on the retroactive application of these guidelines.

In an effort to address this problem, the United States engaged China in technical and legal dialogues and signaled the urgent need for SIPO to return to an appropriate interpretation of supplemental disclosure requirements, in harmony with the prevailing practice in the United States and other countries hosting innovative pharmaceutical industries. As previously reported, during Vice President Biden's December 2013 visit to China, China took an important step to strengthen the protection of pharmaceutical innovations by announcing that patent holders will be able to submit additional data to support their patents after filing their initial applications. At the December 2013 JCCT meeting, China reaffirmed this commitment and further affirmed that its existing patent requirements and procedures ensure that pharmaceutical inventions receive patent protection during examinations and re-examinations and before China's courts.

The United States also has been pressing China to adopt comprehensive reforms to ensure that all Chinese producers of bulk chemical and biological substances capable of being used as APIs for medicinal products are subject to CFDA's registration requirements and operate in compliance with CFDA's Good Manufacturing Practices. In this area, Vice President Biden's December 2013 visit to China resulted in China's commitment to take steps toward introducing a framework for registering manufacturers of bulk chemicals that can be used as active pharmaceutical ingredients, which would be a critical step in combatting dangerous counterfeit and substandard pharmaceuticals around the world. Building on this commitment, 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 agreed to share with the United States its proposal to enact regulatory and enforcement oversight and to be more transparent by publishing its revised *Drug Administration Law* in draft form for public comments and to take into account opinions from the United States and other relevant stakeholders.

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. China's law, and a commitment that it made in its WTO accession agreement, require China 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 is evidence that, as a result of this situation, 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.

At the December 2012 JCCT meeting, China took a step toward establishing effective regulatory data protection by agreeing 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. Despite extensive subsequent engagement, China has not yet adopted the contemplated definition of "new chemical entity." Going forward, the United States will be working with CFDA and other relevant agencies as it continues to seek resolution of this concern and other outstanding concerns in this area.

An additional area of concern in the pharmaceuticals sector involves the 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 concerns, along with analogous concerns relating to medical devices, have been the focus of various bilateral meetings with China. As the United States has pointed out, 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. At the December 2014 JCCT meeting, China committed to take several specific steps to streamline and speed up its regulatory review and approval systems for new pharmaceutical products and new medical devices. China also agreed to an enhanced dialogue with expert and high-level officials of relevant Chinese and U.S. agencies in 2015 to promote efficient pharmaceutical and medical device regulation and market access. However, the United States is concerned that some of the steps contemplated by China to implement reforms to address the regulatory delays would serve to promote domestic Chinese enterprises at the expense of foreign enterprises and foreign-invested enterprises in China and reduce incentives for innovative treatments to be introduced into the Chinese market.

In August 2015, the State Council published a guiding document entitled *Opinions on Reforming the Review and Approval Systems for Drugs and Medical Devices*, which proposes several reforms that could have far-reaching implications for the registration and approval of foreign pharmaceutical products. For example, it proposes the creation of a Marketing Authorization Holder pilot program to provide marketing flexibilities for pharmaceutical companies. However, restrictions in the pilot program appear to limit the ability of foreign companies to participate. The State Council measure also proposes a new 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, the

State Council measure calls for providing accelerated review and approval for innovative new pharmaceuticals where the applicant has shifted manufacturing activities to China. It also calls 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.

The State Council did not publish its *Opinions on Reforming the Review and Approval Systems for Drugs and Medical Devices* in draft for public comment before issuing it in final form. At about the same time, CFDA released a series of draft measures implementing the State Council measure. The United States raised transparency concerns and pressed China to allow comment on the substance of these various measures before they were finalized and implemented. At the November 2015 JCCT meeting, China characterized the State Council measure as providing guidelines for reforming China's pharmaceutical and medical device review and approval systems and agreed that CFDA will provide a public comment period of no less than 30 days for future administrative regulations and departmental rules implementing the State Council measure. China also affirmed that it will abide by its TBT notification commitments at the WTO.

The United States is also engaging CFDA as it considers amendments to pharmaceutical registration regulations. The United States is working to ensure that these amendments promote the early notification and resolution of patent disputes.

### Geographical Indications

At the December 2014 JCCT meeting, the United States reached agreement with China on how China should handle intellectual property protection for geographical indications, or GIs. 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, 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. Among other things, these commitments will benefit U.S. exporters whose products use trademarks or common names like "parmesan" and "feta" cheese. 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.

## 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. Although the central government has modified China's IPR laws and regulations in an effort to bring them into line with China's WTO commitments, effective IPR enforcement has not been achieved, and IPR infringement remains a serious problem throughout China. IPR enforcement is hampered by lack of coordination among Chinese government ministries and agencies, lack of training, resource constraints, lack of transparency in the enforcement process and its outcomes, procedural obstacles to civil enforcement, and local protectionism and corruption.

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 2015. Over the years, China has taken important steps to address problems identified in the Special 301 report, including through legal reforms, enforcement campaigns and cooperation with U.S. authorities. Despite laudable steps forward, challenges have evolved over time, and important new concerns have arisen. The Special 301 Report for 2015 welcomes high-level policy statements from China supporting increased protection of intellectual property rights and other positive developments, but underscores the broad range of ongoing challenges in what remains a complex and uncertain environment for IP right holders.

No longer published concurrently with the Special 301 report, the Notorious Markets Report identifies online and physical markets that exemplify key challenges in the global struggle against piracy and counterfeiting. As in prior years, the December 2014 Notorious Markets Report included various notorious physical and online markets located in China, although several markets have been de-listed from the Notorious Markets Report due to their work with right holders to significantly decrease the listing of infringing products for sale via their websites.

The United States continues to place the highest priority on addressing IPR protection and enforcement problems in China. A domestic Chinese business constituency is also increasingly active in promoting IPR protection and enforcement. In fact, Chinese right holders own the vast majority of design and utility model patents, trademarks and plant varieties in China and have become the principal filers of invention patents. In addition, the vast majority of the IPR enforcement efforts in China are now undertaken at the behest of Chinese right holders seeking to protect their interests. 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.

In 2015, as in prior years, the United States 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 held regular bilateral discussions with their Chinese counterparts, which have been periodically supplemented by technical assistance programs.

The United States' efforts have also benefited from cooperation with other WTO members in seeking improvements in China's IPR enforcement, both on the ground in China and at the WTO during meetings of the TRIPS Council. For example, several WTO members participated as supportive third parties in the United States' two IPR-related WTO cases against China. Previously, Japan and Switzerland had joined the United States in making coordinated requests under Article 63.3 of the TRIPS Agreement in order to obtain more information about IPR infringement levels and enforcement activities in China. In addition, since then, the United States and the EU have increased coordination and information sharing on a range of China IPR issues. China's membership in the APEC forum also brings increased importance to APEC's work to develop regional IPR best practices.

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. In fiscal year 2014, U.S. customs authorities effected 23,140 seizures of IPR infringing goods, which, if genuine, would have had a total estimated manufacturers' suggested retail price (MSRP) value of \$1.23 billion. Of these seizures, 63 percent, by

estimated MSRP value, originated from China, with a total estimated MSRP value of \$772.6 million.

At the same time, China is making positive efforts to improve IPR enforcement, and cooperation between the United States and China has produced some successful enforcement actions. At the urging of the United States, China took the important step away from short-term enforcement campaigns toward a more permanent and systemic effort, with greater resources and capacity. In 2011, China committed to establish a State Council-level leadership structure, headed by a Vice Premier, to lead and coordinate IPR enforcement across China in order to enhance China's ability to crack down on IPR infringement, thereby making permanent the leadership structure under the special campaign.

Since then, the United States has been closely monitoring the implementation and effectiveness of this leadership structure. The United States also has urged China to use it as an opportunity to tackle emerging enforcement challenges, particularly the sale of pirated and counterfeit goods on the Internet and media box piracy, and to ensure that these efforts lead to sustained and systemic improvements in enforcement and deterrence of intellectual property crimes in China.

Despite its many positive efforts to improve IPR enforcement, China has pursued other policies that continue to impede effective enforcement. These policies led the United States to resort to the WTO dispute settlement mechanism in April 2007, where it sought needed 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. These changes should be an important objective for China, given the lack of deterrence clearly evident in China's current enforcement regime. 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 on the market access side. As the WTO ruled in 2009, 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, again 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, as discussed above. 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 foreign film producers. However, China has not yet fully implemented its MOU commitments, including with regard to opening up film distribution opportunities. As a result, the United States has been pressing China for full implementation of the MOU.

### Trade Secrets

The United States remains seriously concerned about a growing number of cases in which important trade secrets of U.S. companies have been stolen by, or for the benefit of, Chinese competitors. 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 theft or misappropriation, 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, because U.S. companies want to avoid the costs of pursuing legal relief, when



weighed against the likelihood of obtaining no redress through Chinese legal channels and possible commercial repercussions for shining light on the conduct at issue.

As previously reported, the United States and China have increased their bilateral exchanges on the important issue of trade secrets, including in the JCCT IPR Working Group and the S&ED process and through direct engagement between senior-level U.S. and Chinese government officials. 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.

At the December 2013 JCCT meeting, China committed to cooperate with, and give serious consideration to the views of, the United States in 2014 on proposals to amend China's trade secrets law as well as on related legislative and policy issues. China further committed to adopt and publish an action plan on trade secrets protection and enforcement for 2014 that was expected to include concrete enforcement actions, improvements of public awareness about trade secrets infringement, and requirements for strict compliance with all legal measures providing for trade secrets protection and enforcement by all enterprises and individuals. China subsequently published work plans prioritizing efforts to enhance enforcement and public awareness efforts with regard to trade secrets, but the United States still would like to see China's adoption of an ongoing, robust action plan on trade secrets protection and enforcement.

At the July 2014 JCCT meeting, the United States secured China's commitment to vigorously investigate and prosecute cases of trade secrets theft, to publish civil and criminal judgments, and to protect trade secrets in the context of regulatory, administrative, and other government proceedings. China also agreed to continue to promote awareness of the importance of trade secrets, and to continue to prioritize trade secrets protection and

enforcement in its enforcement agencies' work plans.

At the December 2014 JCCT meeting, China confirmed that trade secrets submitted to the government in administrative or regulatory proceedings are to be protected from improper disclosure to the public and only disclosed to government officials in connection with their official duties and that government officials who illegally disclose companies' trade secrets are to be subject to administrative or legal liability. China further committed to study various specified ways in which it could improve its laws, regulations and administrative procedures governing the protection of trade secrets in the context of administrative or regulatory proceedings.

During the September 2015 state visit of China's President Xi to the United States, China committed that "states should not conduct or knowingly support misappropriation of intellectual property, including trade secrets or other confidential business information with the intent of providing competitive advantages to their companies or commercial sectors." Subsequently, at the November 2015 JCCT meeting, China also announced that it is in the process of amending its *Anti-unfair Competition Law*, intends to issue model or guiding court cases and intends to clarify rules on preliminary injunctions, evidence preservation orders and damages.

In 2016, protection against trade secret misappropriation in China will continue to be a top priority in the United States' bilateral engagement with China. The United States will work to ensure that China fully implements past commitments and will press China for 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. The initial expectation was that these rules would contribute to significant reductions in industry losses due to software piracy by building on China's ongoing implementation of prior 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.

According to the U.S. software industry, however, China's PC software piracy rate has remained relatively flat over the past six years, only dropping from 82 percent in 2007 to 74 percent in 2013. During the same period, the U.S. software industry reports that the commercial value of this unlicensed PC software grew from \$6.7 billion in 2007 to \$8.8 billion in 2013. Achieving sustained reductions in end user software piracy will require more enforcement by China's authorities, followed by high profile publicity of fines and other remedies imposed. One additional necessary tool – which has been the subject of multiple JCCT and S&ED commitments – is the use of Software Asset Management audits, not only by Chinese government agencies but also by enterprises, including state-owned and state-invested enterprises, to ensure that these agencies and enterprises are not using illegal software.

Accordingly, at the May 2012 S&ED meeting and the December 2012 JCCT meeting, the United States sought to build on China's past 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. China committed to intensify its use of software audits and inspections within the government and to expand its software legalization efforts in the enterprise sector. China also confirmed that it requires state-owned enterprises and state-owned banks under the supervision of the central government to purchase and use legal software.

More recently, at the July 2013 S&ED meeting, China committed to strengthen supervision of central state-owned enterprises and large state-owned financial institutions by establishing software asset management systems and enforcing requirements for them to purchase and use legitimate software. China also committed to provide budget guarantees and to promote 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 increasing concern to the United States and to a variety of software developers. The United States looks forward to 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 new Chinese regulations governing content review imposed procedural obstacles that have resulted in extensive delays in legitimate platforms obtaining broadcast permissions. The United States is strongly encouraging China to streamline procedures to avoid impediments to the streaming of licensed content.

An additional and 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 right 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. At the same time, the harm from counterfeiting is not limited to right holders and consumers. China estimated its own annual tax losses due to counterfeiting at more than \$3.2 billion back in 2002, and this figure could only have grown in the ensuing years.

In 2014, there were continuing reports concerning the impact that counterfeiting was having on U.S. agricultural industries, including the fruit and vegetable industries and the wine industry. Of particular concern were counterfeit semiconductors entering the supply chain, creating the risk of the installation of fake and shoddy semiconductor components in electronic equipment, including in equipment used for critical functions related to agricultural safety and security.

In 2015, several cases involving infringing and adulterated agricultural chemicals came to light. These cases caused significant public health, economic and environmental damage in China.

Some trademark rights holders are beginning to report a noticeable reduction in the visibility of counterfeit goods for sale in certain major retail and wholesale markets in China. This development appears to 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.

Despite recent amendments to relevant laws and the promulgation of new implementing measures, disputes involving bad faith trademark filings persisted in 2015. These incidents have caused consumer confusion, commercial harm and costly legal proceedings.

### SERVICES

*While China has implemented most of its services commitments, concerns remain in some service sectors. In addition, challenges still remain in ensuring the benefits of many of the commitments that China has nominally implemented are available in practice, as China has continued to maintain or erect restrictive or cumbersome terms of entry or internal expansion in some sectors. These barriers, often imposed through non-transparent and lengthy licensing processes, prevent or discourage foreign suppliers from gaining market access through informal bans on entry, high capital requirements, branching restrictions or restrictions taking away previously acquired market access rights.*

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 market access and national treatment limitations affecting trade and investment in services. 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 viewed as a good start toward opening up China's services sectors, particularly when compared to the services commitments of many other WTO members.

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, 14 years after China's accession to the WTO, significant challenges still seem to 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. However, 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 31, 2013.

In 2015, 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 provides a direct, non-transparent mechanism for enforcing this ban, and shuts off foreign suppliers from private Chinese enterprises that may be more attractive partners. 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.

In 2016, the United States will continue its efforts to resolve the many concerns that have arisen in the area of services.

### **DISTRIBUTION SERVICES**

*China has made substantial progress in implementing its distribution services commitments, although significant concerns remain in some areas.*

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 reserved 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 (or 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 substantial progress in implementing its distribution services commitments. As discussed below, however, significant concerns remain in some areas.

### Wholesaling Services

*China has issued regulations generally implementing its commitments in the area of wholesaling and commission agents' services. One significant exception involves China's restrictions on the distribution of imported theatrical films. In 2012, following a successful WTO case brought by the United States challenging these restrictions, the United States and China entered into an MOU providing for substantial increases in the number of U.S. films imported and distributed in China each year and substantial additional revenue for foreign film producers, although China has not yet fully implemented its MOU commitments. Meanwhile, U.S. companies continue to have concerns about restrictions on the distribution of other products, such as pharmaceuticals, crude oil and processed oil.*

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 (or 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 (or by December 11, 2006).

As previously reported, MOFCOM issued the *Measures on the Management of Foreign Investment in the Commercial Sector* in April 2004 following sustained engagement by the United States, including through the JCCT process. 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 providing for substantial increases in the number of foreign films imported and distributed in China each year and substantial additional revenue for foreign film producers. 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, while significantly more U.S. films have been imported and distributed in China on a revenue-sharing basis since the signing of the MOU and the revenue received by U.S. film producers has increased significantly, China has not yet fully implemented its MOU commitments, including with regard to critical commitments to open up film distribution opportunities for imported 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, particularly with regard to films that are distributed in China on a flat-fee basis rather than a revenue-sharing basis. At the June 2015 S&ED meeting, China committed to ensure that any Chinese enterprise licensed to distribute films in China can distribute imported flat-fee films on their own and without having to contract with or otherwise partner with China Film Group or any other state-owned enterprise. China further committed that SAPPFT, China Film Group or any other state-owned enterprise would not directly or indirectly influence the negotiation, terms, amount of compensation or execution of any distribution contract between a licensed Chinese distributor and a U.S. flat-fee film producer.

### 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. At the same time, despite overall progress in this area, many other 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. 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. In consultation with U.S. industry, the United States will continue to assess the effects of China's restrictive regulations in 2015 while urging China to remove unwarranted impediments to market entry. China's 2015 Foreign Investment Catalogue did remove "wholesale of refined petroleum" from the restricted list; however, it is not clear how in practice this change relates to remaining restrictions applying to construction and management of gas stations.

### 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 may not be applied to domestic enterprises. The United States has been closely monitoring how China applies these measures in an effort to ensure that foreign enterprises are not adversely affected by these restrictions.

### Retailing Services

*China has issued regulations generally implementing its commitments in the area of retailing services,*

*although some concerns remain with regard to licensing discrimination. China continues to maintain restrictions on the retailing of processed oil.*

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 (or 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 (or by December 11, 2006).

As previously reported, 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 revised *Catalogue Guiding Foreign Investment in Industry*, issued in December 2011, China removed the retailing of over-the-counter medicines from the "restricted" category of foreign investments.

### 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 that has since been exacerbated by China’s restrictions on foreign enterprises that seek to engage in wholesale distribution of crude oil. As in prior years, the United States is working with U.S. industry to assess the effects of China’s unwarranted restrictions on wholesale and retail distribution in this sector and will continue to engage the Chinese government in 2015 in an effort to ensure that U.S. industry realizes the full benefits to which it is entitled in this sector.

### Franchising Services

*China has issued regulations generally implementing its commitments in the area of 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, following U.S. engagement, 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. The United States welcomed this action and has been monitoring developments in this area since then.

### Direct Selling Services

*China has issued regulations generally implementing its commitments in the area of direct selling services,*

*although regulatory restrictions, including service center requirements imposed on the operations of direct sellers, continue to generate concern.*

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.

As previously reported, the Chinese regulatory authorities issued implementing measures in 2005 and 2006, which contained several problematic provisions. For example, one provision requires a direct seller to establish a service center in each urban district in which it intends to do business – which translates into many thousands of service centers to carry out direct selling throughout China. Another provision essentially outlaws multi-level marketing practices allowed in every country in which the U.S. industry operates – reportedly 170 countries in all – by refusing to allow direct selling enterprises to pay compensation based on team sales, where upstream personnel are compensated based on downstream sales. Other problematic provisions include a three-year experience requirement that only applies to foreign enterprises, not domestic enterprises, a cap on single-level compensation, restrictions on the cross-border supply of direct selling services and high capital requirements that may limit smaller direct sellers’ access to the market. To date, extensive U.S. engagement has failed to persuade China to reconsider the various problematic provisions in these measures.

Meanwhile, MOFCOM’s application and review process initially proved to be opaque and slow, although a number of companies, including several foreign companies, obtained direct selling licenses. However, beginning in May 2007, it appeared that MOFCOM was not issuing any new licenses even though several companies had applied for them. In 2009, following extensive U.S. engagement, China

issued a direct selling license to one additional U.S. direct selling company, although no further licenses have been issued to foreign companies. The United States is continuing to closely monitor MOFCOM's progress in issuing new direct selling licenses.

### Financial Services

#### BANKING SERVICES

*China has taken a number of steps to implement its banking services commitments, although some of these efforts have generated concerns, and there are some instances in which China still does not seem to have fully implemented particular commitments, such as with regard to Chinese-foreign joint banks and bank branches.*

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. To date, however, China has 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 is limited to 25 percent. For several years, the United States and other WTO members have urged China to relax these limitations, although no progress has yet been achieved.

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 three years 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.

In 2007 and 2008, working closely with U.S. banks, the United States was able to use the SED process and meetings of the U.S.-China Joint Economic Committee to improve the access of U.S. banks to the domestic currency business. For example, 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 addition, China agreed to reduce its limitations on foreign bank issuance of local currency denominated subordinated debt in order to be able to raise capital to expand operations. China also agreed to allow foreign incorporated banks to trade bonds in the interbank market on the same basis as Chinese banks and to allow foreign banks to increase liquidity on an exceptional basis through guarantees or loans from affiliates abroad.

At the July 2009, May 2010 and May 2011 S&ED meetings, China reiterated its commitment to deepen financial system reform. In addition, China agreed to continue to allow foreign-invested banks incorporated in China that meet relevant prudential requirements to enjoy the same rights as domestic banks with regard to underwriting corporate bonds in the interbank market. Subsequently, in April 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 applied, although only one foreign bank has been approved to underwrite.

At the May 2011 S&ED meeting, China took additional steps to deepen financial market opening. Specifically, 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.

At the July 2013 S&ED meeting, China pledged that locally incorporated foreign banks and securities firms will be able to directly trade government bond futures and to encourage investment by foreign and domestic institutional investors in these financial products. China also welcomed participation by foreign firms in corporate bond underwriting and pledged to facilitate further evaluations of underwriters in a fair and open process. China further agreed to give active consideration to reducing the waiting period for a foreign bank branch to apply for an RMB license.

At the July 2014 S&ED meeting, China committed to actively study policies concerning the further opening-up of the banking sector, and in 2015 the United States continued to press China for further liberalization. In 2016, the United States will continue to make every effort to ensure that China fully implements its WTO commitments and that U.S. banks realize the full benefits to which they are entitled.

### **MOTOR VEHICLE FINANCING SERVICES**

*China has implemented its commitments with regard to motor vehicle financing.*

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**

*China has issued measures implementing most of its insurance commitments, but these measures have also created market access problems and foreign insurers' share of China's market remains very low.*

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, 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, the United States has used all available opportunities to engage China and its insurance regulator, CIRC, on needed improvements to China's insurance regime. On the bilateral front, this engagement has included the JCCT process, the S&ED process and an Insurance Dialogue with CIRC, while multilateral engagement has included transitional review meetings before the WTO's Committee on Trade in Financial Services and the Trade Policy Reviews for China.

As previously reported, 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 insurance sector, 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 less than four percent. The market share of foreign-invested companies in the non-life (i.e., property and casualty) insurance sector is only one percent. In addition, China has entirely closed its market for political risk insurance to foreign participation. In May 2012, as discussed below, China did open up its mandatory third-party liability auto insurance market to foreign participation, which was a welcome shift.

The United States has continued to press 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. Meanwhile, in a newer development, China continues to take steps regarding the ability of insurance companies to provide certain insurance services over the Internet, which has started to provide additional useful channels to reach Chinese consumers. The United States has encouraged China to further expand the types of insurance allowed to be provided over the Internet.

Using annual U.S.-China Insurance Dialogue meetings and related bilateral meetings, including the JCCT and S&ED processes, the United States has continued to press CIRC to further open up the life, health and pensions 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 plans to expand its pilot projects for tax-deferred insurance pension products to additional regions and that it will treat domestic enterprises and foreign-invested enterprises equally with regard to participation and any future expansion. At the July 2014 S&ED meeting, China announced that it welcomes foreign companies to submit applications for internal branches and that it will follow the timeframes set forth in its own regulations in reviewing and approving those applications. Most recently, China's revised 2015 Foreign Investment Catalogue has removed "insurance brokerages" from the restricted category, although it is not clear whether in practice China allows foreign enterprises to provide the same full scope of brokerage activities as domestic enterprises.

Despite continuing challenges, a number of U.S. and other foreign insurers are currently operating in China, and they are continuing to work to broaden their presence in China. In 2016, as in prior years, the United States will continue to use both bilateral and multilateral engagement to address issues of concern to these and other U.S. insurers. The United States is committed to seeking market access for U.S. insurers on a transparent, fair and equitable basis.

### **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 five 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 been urging 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. In 2016, the United States will continue to

press China to re-open this sector on a transparent and non-discriminatory basis.

### **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. U.S. and other foreign insurers strongly welcomed the opening of this market, and many of them are now selling mandatory third party liability auto insurance in China, although the United States continues to engage with China regarding regulatory issues connected with the provision of this type of insurance.

### **FINANCIAL INFORMATION SERVICES**

*In response to a WTO case brought by the United States, China has established an independent regulator for the financial information sector and has removed restrictions that had placed foreign suppliers at a serious competitive disadvantage.*

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**

*China has not yet implemented electronic payment services commitments that were scheduled to have been phased in no later than December 11, 2006.*

*China agreed to implement these commitments by July 2013 in order to comply with the rulings in a WTO case brought by the United States, but it has not yet done so.*

In the Services Schedule accompanying its Protocol of Accession, China committed to remove market access limitations and provide national treatment for foreign suppliers providing 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. credit card companies, which typically provide electronic payment services in connection with the operation of electronic networks that process payment transactions involving credit, debit, prepaid and other payment cards. Through these services, they enable, facilitate and manage the flow of information and the transfer of funds from cardholders' banks to merchants' banks. However, the PBOC prohibited foreign suppliers from handling the typical payment card transaction in China, in which a Chinese consumer makes a payment in China's domestic currency, known as the renminbi, or RMB. Instead, through a variety of measures, the PBOC created a national champion, allowing only one domestic entity, CUP, an 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 CUP and apparently supported by the PBOC. The common theme of these proposals was that CUP would continue to be designated as a monopoly provider of electronic payment processing services for Chinese consumers for RMB processing, and that no other providers 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 CUP 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 provide these services, without also taking the critical step of establishing a process for foreign suppliers actually 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 sets out various requirements that must be satisfied by a company in order to receive a license and creates a two-step application process. It also calls for 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. As of December 2015, however, the PBOC still had not issued final licensing regulations, and therefore U.S. suppliers remain blocked from entering the market. Accordingly, the United States continues to actively press China and is considering additional next steps to ensure that China complies fully with the WTO's rulings.

### Legal Services

*China has issued measures intended to implement its legal services commitments, although these measures give rise to WTO compliance concerns because they impose an economic needs test, restrictions on the types of legal services that can be provided and lengthy delays for the establishment of new offices.*

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 through the JCCT process 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. The United States will continue to engage China in 2016 in an attempt to resolve these outstanding concerns.

### Telecommunications Services

*It appears that China has nominally kept to the agreed schedule for phasing in its WTO commitments in the telecommunications sector. However, restrictions maintained by China on value-added services have created serious barriers to market entry for foreign suppliers seeking to provide value-added services. In addition, China’s restrictions on basic services, such as informal bans on new entry, a requirement that foreign suppliers can only enter into joint ventures with state-owned enterprises and exceedingly high capital requirements, have totally blocked foreign suppliers from accessing China’s basic services market.*

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 2015. 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 May 2013, China released a draft revision of its Catalogue of Telecommunications Services that

seeks to expand the scope of value-added services to include a range of Internet-related services, even though these services are not telecommunications services, as discussed below in the Internet-related Services section below.

As China nears the end of its fourteenth year of WTO membership, 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. In fact, 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.

In May 2013, China introduced rules establishing a pilot program for the resale of mobile services, which can increase competitive opportunities in China's heavily concentrated market. The United States is very concerned that foreign firms are currently excluded from the pilot program, while China has issued licenses to approximately two dozen Chinese suppliers. To date, the United States has raised its concerns with China through the JCCT process, without success.

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 China's telecommunications regulator. While the regulator, 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.

If China takes the initiative, its planned new *Telecommunications Law* could be a vehicle for addressing some of the key existing market access barriers and other problematic aspects of China's current telecommunications regime. A draft of this long-awaited law has been under consideration for at least 13 years, although, to date, the Chinese government has not made a draft available for public comment, despite repeated requests from the United States and other WTO members. Information obtained through informal channels indicates that although some proposed provisions are helpful, others, including a possible codification of China's foreign equity caps for basic and value-added telecommunications services, appear to conflict with China's commitment in its GATS Schedule to negotiate further liberalization. The United States has strongly urged China to remove its foreign equity caps to allow for wholly foreign-owned companies in the basic and value-added telecommunications services sectors.

Over the years, the United States has raised its many telecommunications concerns with China, using bilateral engagement, particularly the JCCT process, 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 little progress.

Throughout 2015, principally using the JCCT process, the United States again vigorously engaged China on the range of telecommunications services issues, including priority issues such as removing foreign equity caps to allow for wholly foreign-owned companies, providing market access for foreign suppliers in connection with China's planned pilot projects on the resale of mobile telecommunications services and not moving forward with a Catalogue of Telecommunications Services that imposes new restrictions on Internet-enabled services, as discussed below. By the time of the November 2015 JCCT meeting, however, the United States had been unable to persuade China to make any significant changes. In 2016, the United States will continue to engage China vigorously on these and other issues that contribute to the absence of meaningful market-opening in China's telecommunications services sector.

### Audio-visual and Related Services

*China has taken steps to comply with the rulings in a WTO case brought by the United States with regard to the distribution of DVDs and sound recordings, although more steps are needed. Meanwhile, China's restrictions in the area of theatre services have wholly discouraged investment by foreign suppliers, and China's restrictions on services associated with television and radio greatly limit participation by foreign suppliers.*

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 Chinese-foreign joint ventures. Currently, no U.S. company is involved in the ownership or operation of a Chinese theatre.

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. In addition, 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 air time, 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. In addition, the *Interim Regulation on Digital Cable TV Pay Channels*, a 2003 measure, restricts foreign programming to a maximum of 30 percent of total air time on pay television channels. A newer measure, issued in October 2013, limits satellite stations to the licensing of one foreign program per year, and it prohibits it from being aired during prime time.

### Internet-related Services

*China's Internet regulatory regime is restrictive and non-transparent and impacts a broad range of*

*commercial services activities conducted via the Internet. In addition, China's treatment of foreign companies seeking to participate in the development of cloud computing, including computer data and storage services provided over the Internet, raises concerns in light of China's GATS commitments.*

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.

Foreign companies seeking to participate in the development of cloud computing, including computer data and storage services provided over the Internet, are not permitted to obtain Internet service provider (ISP) or Internet Data Center (IDC) licenses in China. Instead, a foreign company can only partner with a Chinese company holding an ISP or IDC license. In addition, China has generated WTO concerns by seeking to impose value-added telecommunications licensing requirements on this sector, including a 50 percent equity cap on investments by foreign companies, even though the services at issue are not telecommunications services. Throughout 2015, using the JCCT process, the United States pressed China to cease requiring value-added telecommunications services licenses for companies that use the Internet as a platform for providing these and other services to Chinese businesses or consumers, where the supplier neither owns nor controls the telecommunications transmission capacity used to supply the services. The United States also pressed China to allow wholly foreign-owned enterprises to supply these services. To date, however, the United States has been unable

to persuade China to make any significant changes in this area. In 2016, the United States will continue to engage China vigorously on these issues.

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, and to date China has not issued a final measure.

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. Other impediments to businesses and consumers conducting online transactions in China include the paucity of credit card payment processing systems (exacerbated by state-owned CUP's continuing monopoly over the processing of domestic currency transactions), consumer reluctance to trust online merchants, lack of secure online payment systems, and inefficient delivery systems.

China also has yet to develop a legal framework conducive to the rapid growth of electronic commerce. Laws recognizing the validity of "electronic contracting" tools and stressing the importance of online privacy and security have been proposed but not yet issued. A number of technical problems also inhibit the growth of electronic commerce in China, such as the rates charged by Chinese government-approved ISPs, slow connection speeds and relatively low Internet penetration in China.

With regard to content control, Chinese government officials from as many as 12 separate agencies, led by the State Internet Information Office, 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 or 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 places limits on what exactly

may constitute reportable news. In addition to interfering with news reporting in the traditional sense, these restrictions in some circumstances 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.

In 2011, following up on concerns that China's arbitrary blocking of commercial websites may undercut U.S. rights under the GATS, the United States invoked procedures available pursuant to the GATS to pose a series of questions to China regarding China's regulation of the Internet. In 2012, after China had provided an initial response to those questions, the United States met with China to obtain more details. Since then, the United States has continued its outreach to China to discuss these issues in more detail and to seek more transparency and predictability in China's regulatory regime.

### Construction and Related Engineering Services

*China has issued measures intended to implement its construction and related engineering services commitments, although these measures are problematic because they also impose high capital requirements and other constraints that limit market access.*

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.

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.

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 has also 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, although foreign companies have begun to have more success with regard to their licensing requests in 2009.

Meanwhile, in the area of project management services, inconsistent regulations have allowed market entry 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 has been urging China to clarify this situation and ease the entry barriers currently facing foreign-invested enterprises.

In 2016, as in prior years, the United States will continue to engage China through bilateral channels in an attempt to achieve improved market access for U.S. firms.

### Educational Services

*China made only limited GATS commitments in the educational services sector, and it has not sought to go beyond those commitments.*

In its accession agreement, China made limited GATS commitments relating to educational services and specifically excluded educational services provided in connection with national compulsory education from the scope of those commitments. 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.

### Express Delivery Services

*China has allowed foreign express delivery companies to operate in the express delivery sector and has implemented its commitment to allow wholly foreign-owned subsidiaries by December 11, 2004. However, China has blocked foreign companies' access to the document segment of China's domestic express delivery market.*

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 monitoring 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.

For the past four years, 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.

At the same time, in other ways, SPB's regulation of the express delivery sector in China has been overly burdensome and restrictive. China's new *Postal Law*, along with related regulatory measures, such as express delivery services regulations, seem overly burdensome in some respects and not in accordance with State Council mandates to simplify and streamline administrative approval processes. As in 2015, the United States will continue to engage China vigorously on these issues going forward.

### Logistics Services

*China has generally allowed foreign companies to supply logistics services, but foreign companies can face restrictions that are not applied to domestic companies.*

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.

### Aviation Services

*China has provided additional market access to U.S. providers of air transport services through a bilateral agreement with the United States.*

As previously reported, China took a significant step in July 2004 to increase market access for U.S. providers of air transport services. At that time, China signed a landmark bilateral aviation agreement with the United States that would more than double the number of U.S. airlines allowed to serve points in China and increase by five times the number of flights allowed for passenger and cargo services between the two countries over a six-year period. The agreement also expanded opportunities for code sharing and charter operations, granted cargo carriers the right to provide surface transportation in connection with international air

services and eliminated government regulation of pricing as of 2008. U.S. passenger and cargo carriers have since obtained additional routes and increased flight frequencies, as envisioned by the agreement.

Bilateral engagement with China to improve the existing aviation agreement resumed in April 2006 and yielded an amended agreement in May 2007, which allows for significantly expanded passenger and all-cargo air services and has further facilitated trade, investment, tourism and cultural exchanges between the United States and China. Among other things, the agreement added ten new daily passenger flights that U.S. carriers could operate to the Chinese gateway cities of Beijing, Shanghai and Guangzhou by 2012, allowed unlimited U.S. cargo flights to any point in China and an unlimited number of U.S. cargo carriers to serve the China market as of 2011, increased from six to nine the number of U.S. passenger carriers that could serve the China market by 2011, and expanded opportunities for U.S. carriers to code-share on other U.S. carriers' flights to China. The agreement also committed the United States and China to launch Open Skies negotiations in 2010, which they did.

Nevertheless, China's increasingly constrained aviation sector and a lack of clarity in China's airport slot allocation process have prevented U.S. airlines from fully exercising rights granted in the existing agreement. In addition, China's interpretation of cargo hub provisions in the agreement has resulted in U.S. cargo carriers experiencing difficulties in getting their operating schedules approved by the Civil Aviation Administration of China. Negotiations held in 2011 and 2015 have not led to any new agreement between the United States and China.

### Maritime Services

*Even though China made only limited WTO commitments relating to its maritime services sector, it has increased market access for U.S. service providers through a bilateral agreement.*

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

*China treats foreign travel agencies less favorably than domestic travel agencies in some respects, while China's regulation of foreign suppliers of global distribution system services has generated concerns in light of China's GATS commitments.*

In order to obtain a license, foreign travel agencies doing business in China must register with the China National Travel Administration (CNTA) and must submit an initial feasibility study and annual reports on future investment and possible expansion to CNTA 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, including at the December 2010 JCCT meeting and the November 2011 JCCT meeting, led to China's agreement to expand the MOU to cover 27 of China's 31 provinces. Most recently, at the December 2013 JCCT meeting, China announced that it is broadening the scope of access under the MOU to include two of the four remaining provinces.

Meanwhile, 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 dated August 2012, these regulations provide only 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.

### 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

*China has re-confirmed its commitment to use a single official journal for the publication of all trade-related laws, regulations and other measures. To date, it appears that some but not all central government entities publish their trade-related measures in this journal, although they take a narrow view of the types of trade-related measures that need to be published.*

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.

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, 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 *MOFCOM Gazette*. The United States subsequently monitored 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 closely monitoring 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. Consultations in this case took place in November 2012. Since then, the two sides have been engaging in further discussions exploring the steps that China could take to address U.S. concerns.

In 2015, the United States continued to use the S&ED process, including meetings of the U.S.-China Transparency Dialogue, to press China for further progress in implementing the official journal commitment that it made in its WTO accession agreement. The United States will continue to pursue these efforts in 2016.

### TRANSLATIONS

*China has not yet established an appropriate infrastructure to undertake the agreed upon translations of its trade-related measures into one or more of the WTO languages in a timely manner.*

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 14 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 credulity. As the United States has pointed out, other WTO members translate all of their legal measures. Indeed, one of these members – the EU – translates its measures into 23 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, 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. More recently, in the September 2012 WTO case challenging export base subsidies, discussed in the Official Journal section above, 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.

In 2014, the United States used the S&ED process to press China bilaterally to begin implementing its translations commitment. 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.

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. At the June 2015 S&ED meeting, China confirmed that it was actively studying this matter.

In 2016, the United States will closely monitor the implementation of China's March 2015 measure relating to departmental rules. The United States also will continue to press China for timely translations of laws and administrative regulations.

### **PUBLIC COMMENT**

*China has adopted notice-and-comment procedures for proposed laws and committed to use notice-and-comment procedures for proposed trade- and economic-related regulations and departmental rules, subject to specified exceptions. However, in practice, many of these types of measures are not made public prior to implementation.*

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 such as JCCT meetings and SED 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 SED meeting in December 2006, the United States and China agreed to make transparency, including notice-and-comment procedures and other

rulemaking issues, a topic for discussion in future SED meetings. These discussions began at the May 2007 SED meeting, while the United States continued to provide technical assistance to facilitate Chinese government officials' understanding of the workings, and benefits, of an open and transparent rulemaking process. 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.

The United States monitored the effectiveness of these changes. 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 directs ministries and agencies at the central and provincial levels of government to solicit public comment when developing their rules, 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, the United States was able to persuade China to commit 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, shortly before the May 2012 S&ED meeting, 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 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.

### ENQUIRY POINTS

*China has complied with its obligation to establish 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. Since the creation of these various enquiry points, U.S. companies have generally found these various enquiry points to be responsive and helpful, and they have generally received timely replies. 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

*Some problems with the uniform application of China's laws and regulations persist.*

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 2015, 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

*China has established courts to review administrative actions involving trade-related matters, but few U.S. or other foreign companies have had experience with these courts.*

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.

Beginning before China's accession to the WTO, China had taken steps to improve the quality of its judges. For example, in 1999, the Supreme People's Court began requiring judges to be appointed based on merit, educational background and experience, rather than as a result of politics or favoritism. However, existing judges, many of whom had no legal training, were grandfathered in. In part because of this situation, many U.S. companies in 2014 continued to express serious concern about the independence of China's judiciary. In their experience and observation, Chinese judges continue to be influenced by political, government

or business pressures, particularly outside of China's big cities.

Meanwhile, in 2015, the United States continued to monitor 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

*Various 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.*

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, 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, after several years of development, China enacted its *Anti-monopoly Law*, which became effective in August 2008. Pursuant to this law, the State Council has established an anti-monopoly commission with oversight and coordinating responsibilities, drawing its members from several Chinese ministries and agencies. Enforcement responsibilities have been divided among three agencies. MOFCOM has assumed responsibility for reviewing mergers. NDRC has assumed responsibility for reviewing monopoly activities, abuse of dominance and abuse of administrative power when they involve pricing, while SAIC reviews these same types of activities when they are not price-related.

After the *Anti-monopoly Law* was issued, 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 has 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 has 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 United States also launched an *Anti-monopoly Law* technical assistance program in 2008, funded by the U.S. Trade and Development Agency and led by a multi-agency team of U.S. experts. Since then, numerous workshops have taken place under this program in China on important substantive issues, such as merger review, unilateral conduct by firms with a dominant market position, cartel enforcement, non-discrimination in interstate commerce, merger remedies, competition law and



policy as it relates to the Internet, and the interface between intellectual property, antitrust and trade laws and policies. Chinese government officials from MOFCOM, SAIC, NDRC, SCLAO and the NPC have also traveled to Washington as part of this program.

The Chinese government's interventionist economic policies and practices and the large role of state-owned enterprises in China's economy have created some possible 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, U.S. industry has expressed concerns that enforcement against state-owned enterprises will be more limited than against private enterprises.

The inclusion of provisions on the abuse of administrative (i.e., government) power in the *Anti-monopoly Law*, which also appear in NDRC's and SAIC's implementing regulations, could be important instruments for reducing the government's interference in markets and promoting the establishment and maintenance of increasingly competitive markets in China. Both NDRC and SAIC recently have stated that tackling these abuses is one of their enforcement priorities and have reported taking a number of enforcement actions in the last two years.

An additional tension involves trade associations in China, which 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*.

The treatment of intellectual property rights by China's anti-monopoly enforcement agencies has generated concerns among U.S. and other foreign stakeholders. 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 October 2015, a draft *Anti-monopoly Guideline on Abuse of Intellectual Property Rights* prepared by the NDRC became public. The United States currently is studying this draft measure.

Some U.S. stakeholders have expressed concern about delays by MOFCOM, for example, in accepting merger filings and the overall length of review of transactions without anticompetitive effect. In a positive development, in 2014, MOFCOM introduced rules on "simple transactions," which allow transactions meeting certain criteria to be reviewed and cleared within 30 days from acceptance of the merger notification. Since then, well over 70% of mergers notified have qualified for simple transaction status, with nearly all cleared within 30 days. This new approach has significantly reduced the review time in the sizable majority of mergers, particularly those that do not pose a meaningful competition problem.

While initially MOFCOM's merger decisions were quite brief, MOFCOM now releases more detailed

explanations of its merger decisions. However, 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. In addition, some U.S. companies have raised concerns with the remedies that MOFCOM has adopted in granting conditional merger approvals.

In addition, MOFCOM's enforcement seems to have focused more on mergers involving foreign enterprises than those involving China's enterprises. Reportedly, approximately 85 to 90 percent of the transactions notified to MOFCOM since the *Anti-monopoly Law* went into effect in 2008 have involved at least one non-Chinese enterprise, and none of the 26 transactions that MOFCOM approved with conditions has been between Chinese enterprises. MOFCOM has imposed conditions in several transactions in which one party was a Chinese enterprise, including one instance involving a state-owned enterprise. In addition, MOFCOM has formally blocked only two transactions, one of which involved a foreign enterprise's 2009 attempt to acquire a well-known Chinese enterprise.

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 has complained about continuing difficulties in achieving representation before the Anti-monopoly enforcement agencies by their counsel of choice.

Throughout 2013 and 2014, the United States raised serious concerns with China regarding its enforcement of the *Anti-monopoly Law*. While this engagement continued into 2015, the United States

did secure some progress regarding its concerns in this area in 2014 and 2015.

Specifically, at the July 2014 S&ED meeting, the United States obtained China's recognition that the objective of competition policy is to promote consumer welfare and economic efficiency, rather than promote individual competitors or industries, and that enforcement of China's competition laws should be fair, objective, transparent and non-discriminatory. The United States also obtained China's express commitment 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 June 2015 S&ED meeting, China clarified which courts have jurisdiction to review *Anti-monopoly Law* decisions, including when the decisions involve intellectual property rights. China also committed that the MOFCOM, SAIC and NDRC officials who conduct administrative reconsideration of *Anti-monopoly Law* decisions would meet with the United States to discuss their procedures. Subsequently, 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. China further attached great importance to maintaining coherent rules relating to intellectual property in the *Anti-monopoly Law* context, taking

into account the pro-competitive effects of intellectual property licensing. Finally, China clarified that any State Council Anti-monopoly Commission guideline will apply to China's three anti-monopoly enforcement agencies.

### 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. Numerous governments and stakeholders around the world expressed serious concerns about the draft law. If passed in its current form, the draft law 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. The United States raised its serious concerns with the Chinese government at high levels, and it requested that China not implement the draft law as currently written and that China take into account the concerns of the international community as it considers potential revisions to the draft law.

### 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.

Despite initial enthusiasm, 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 recently has led to a significant increase in labor unrest in China as well as the arrest and detention of worker rights leaders.

In addition, skilled workers are in relatively short supply in China. Restrictions on labor mobility continue to distort labor costs. China is gradually

easing restrictions under the country's household registration system, which has traditionally limited the movement of workers within the country, in part due to the recognition that labor mobility is essential to the continued growth of the economy.

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." In the past, these companies often hired dispatch workers as a means to lower labor costs. 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. In response to concerns raised by the foreign business community, the Ministry of Human Resources and Social Security agreed to allow dispatch workers under contract prior to December 28, 2012, to continue working until the expiration of their contracts. Although the use of dispatch workers offers businesses some employment flexibility in China, it also permits employers to circumvent direct employment relationships and therefore employer liabilities to workers. In addition, overuse of arrangements involving workers from temporary placement agencies can lead to a fragmentation and weakening of labor regulation and protection. Further clarifications and final implementation details for the *Labor Contract Law* amendments are expected to be released soon.

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 has engaged in a campaign since 2006 to organize ACFTU chapters in foreign-invested enterprises, particularly large multinational corporations. In 2008, an ACFTU official publicly stated that ACFTU would continue to push multinational corporations, including Fortune 500 companies, to set up trade unions in China, and affirmed ACFTU's goal of unionizing all foreign-invested enterprises in 2009. By the end of 2009, ACFTU statistics indicated that 79 percent of foreign-invested enterprises had set up trade unions. In 2010, the ACFTU announced a new goal of establishing trade unions in 90 percent of foreign-invested enterprises by 2012.

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 its laws to address it, but 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 will continue to monitor China's anti-corruption efforts and encourage China to vigorously enforce its laws.

## APPENDICES

- Appendix 1* List of Written Submissions Commenting on China's WTO Compliance (September 23, 2015)
- Appendix 2* List of Witnesses Testifying at Hearing on China's WTO Compliance (October 7, 2015)
- Appendix 3* Excerpts from Joint Fact Sheet for 7th U.S.-China Strategic and Economic Dialogue (June 24, 2015)
- Appendix 4* Excerpts from Fact Sheet on U.S.-China Economic Relations for President Xi Jinping's State Visit to the United States (September 25, 2015)
- Appendix 5* U.S. Fact Sheet for 26th U.S.-China Joint Commission on Commerce and Trade Meeting (November 23, 2015)
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## 2015 USTR Report to Congress on China's WTO Compliance

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### *Appendix 1*

#### **List of Written Submissions Commenting on China's WTO Compliance September 23, 2015**

1. U.S.-China Business Council
  2. U.S. Chamber of Commerce
  3. U.S. Council for International Business
  4. International Intellectual Property Alliance
  5. International Film & Television Alliance
  6. American Insurance Association
  7. American Iron and Steel Institute
  8. The Aluminum Association
  9. American Wire Producers Association
  10. American Chemistry Council
  11. United States Information Technology Office
  12. National Pork Producers Council
  13. National Milk Producers Federation
  14. U.S. Dairy Export Council
  15. U.S. Grains Council
  16. USA Rice
  17. U.S. Wheat Associates
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## 2015 USTR Report to Congress on China's WTO Compliance

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### *Appendix 2*

#### **List of Witnesses Testifying at Public Hearing on China's WTO Compliance October 7, 2015**

1. Jeremie Waterman  
U.S. Chamber of Commerce
  2. Eva Hampl  
U.S. Council for International Business
  3. Michael Schlesinger  
International Intellectual Property Alliance
  4. Stephen Metalitz  
International Intellectual Property Alliance
  5. Craig Thorn  
USA Rice, U.S. Wheat Associates and U.S. Grains Council
  6. Mark MacCarthy  
Software & Information Industry Association
  7. John Lenhart  
Information Technology Industry Council
  8. James Reid  
Telecommunications Industry Association
  9. Devi Keller  
Semiconductor Industry Association
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*Appendix 3*

**7th U.S.-China Strategic and Economic Dialogue**

**June 24, 2015**

**Excerpts from Joint Fact Sheet**

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**II. Promoting Open Trade and Investment**

The United States and China underscored the importance of fostering an open, transparent, and non-discriminatory environment for trade and investment, recognizing that doing so is critical to economic growth and job creation in both countries and in the global economy. The United States and China committed to take the following measures to enhance our bilateral trade and investment relationship, to support an open and fair environment, and create greater opportunities for U.S. and Chinese companies and workers.

- The United States and China reaffirm that the Bilateral Investment Treaty (BIT) negotiation is a top priority in bilateral economic relations, and commend the progress of the negotiations to date. The two sides recognize that the exchange of negative list offers in the 19th round is an important milestone of the BIT negotiation. The two sides commit to intensify the negotiation and exchange improved negative list offers in early September, reflecting the two sides' shared commitment to open investment environments. Both sides are to continue to push the negotiation forward with a view to reaching a mutually-beneficial and high-standard treaty.
- Both China and the United States recognize the importance of information security related to ICT products, services or technologies (products) in the commercial and trade spheres. To enhance policy transparency, both sides affirm to solicit and take into account opinions from domestic and foreign parties in accordance with their respective laws before issuing regulations for such ICT products. The two sides are to keep open and continued communication on this issue.

China and the United States attach great importance to the information security of banking sector networks, risk management of banking information systems, and information security and protection of banking customers. Both sides recognize competition is essential to ensuring access to high-quality products in the banking sector.

Both sides commit to communicate and consult on generally applicable ICT regulations in the commercial banking sector. Both sides commit to 1) provide transparency for such banking ICT regulations, including by publicly soliciting and taking into account comments from foreign and domestic parties on draft regulations before being published in final form, and 2) ensure that such banking ICT regulations are nondiscriminatory and do not impose nationality-based conditions or restrictions on the purchase, sale, or use of such products by commercial enterprises.

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## 2015 USTR Report to Congress on China's WTO Compliance

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### *Appendix 3 (cont'd)*

#### **7th U.S.-China Strategic and Economic Dialogue**

**June 24, 2015**

#### **Excerpts from Joint Fact Sheet**

- Building on China's commitments regarding Anti-Monopoly Law (AML) enforcement in the 2014 U.S.-China Joint Commission on Commerce and Trade (JCCT), China commits that the intermediate people's court in the locality of the antimonopoly enforcement body issuing the administrative decision under the AML would have jurisdiction over the administrative appeal regarding that decision; provided that when such decision involves intellectual property rights, and the issuing authority is located in Beijing, Shanghai or Guangzhou, the intellectual property (IP) court in that municipality would have jurisdiction over the administrative appeal. China confirms that all parties to AML proceedings are entitled to seek administrative reconsideration in accordance with the same Chinese law and procedures. The department in charge of legal work under the administrative organs that performs the function of administrative reconsideration in each of Ministry of Commerce (MOFCOM), National Development and Reform Commission (NDRC), and State Administration for Industry and Commerce (SAIC) are to hold a meeting with the United States to discuss their administrative reconsideration procedures. The relevant department in MOFCOM would be the Department of Treaty and Law, in SAIC the Department of Law, and in NDRC, the Department of Laws and Regulations.
- The policies published by the Chinese government on the development of strategic emerging industries, including industry development promotion guidelines and associated national and sub-national industry development investment funds, are applicable to, and made available, on an equal basis to foreign-invested enterprises. China commits to enhance policy transparency, in this area, by soliciting public comments on drafts of the aforementioned measures that are legally binding.
- China and the United States affirm the importance of transparency in the development and issuance of regulatory measures, including Normative Documents, to enhance predictability for market participants and promote confidence in our economies.

The United States appreciates China's efforts to improve the management of Normative Documents, including through the strict implementation of a legal review mechanism for Normative Documents. The United States also welcomes China's 2015 amendments of its Legislation Law and Administrative Litigation Law, as well as the State Council's relevant documents, which provide that: administrative organs are not to take administrative action impairing the lawful rights and interests or adding to the obligations of citizens, legal persons and other organizations without a basis in law or regulation; when initiating an administrative lawsuit, a citizen, legal person or other organization may require the court to review a relevant Normative Document simultaneously; if a court finds a normative document is illegal, the Normative Document is not to be used as a basis for determining that an administrative action is lawful; and no administrative license or administrative penalty is to be set in a Normative Document. China confirms that Normative Documents with a direct influence on the rights and obligations of citizens, legal persons, or other organizations must be published in final form, according to law.

China is to discuss with the United States ways to develop a short-term solution to address problems arising from the issuance of Normative Documents with a direct influence on the rights and obligations of citizens, legal persons, or other organizations, including by discussing topics such as seeking public opinions.

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*Appendix 3 (cont'd)*

**7th U.S.-China Strategic and Economic Dialogue**

**June 24, 2015**

**Excerpts from Joint Fact Sheet**

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- The United States and China note the key involvement of then-Vice President Xi and Vice President Biden in negotiating and finalizing the Memorandum of Understanding between the People's Republic of China and the United States of America Regarding Films for Theatrical Release (MOU), which was initialed on February 18, 2012, and formally signed on April 25, 2012. In implementing its commitments under the MOU, China is to ensure that (a) the State Administration of Press, Publication, Radio, Film and Television (SAPPRFT) takes immediate steps to actively promote reform in the distribution of imported flat-fee films through the licensing of additional distributors, (b) Chinese enterprises can apply to SAPPRFT for licenses to distribute imported flat-fee films, (c) any application received by SAPPRFT is to be approved as long as the applicant satisfies applicable requirements, which must be non-discretionary and non-discriminatory, and (d) licensed distributors are to be able to contract directly with foreign flat-fee film producers or their authorized representatives, without SAPPRFT, China Film Group or any other state-owned enterprise directly or indirectly influencing the negotiation, terms, amount of compensation, or execution of any distribution contract between licensed distributors and U.S. flat-fee film producers or their authorized representatives. The United States and China confirm that any Chinese enterprise licensed by SAPPRFT to distribute films in China has the right to choose whether to contract or partner with another distributor to distribute imported flat-fee films or to distribute those films on its own, independently of any China Film Group company or any other state-owned enterprise.

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- Building on the U.S. and Chinese commitment at the 2014 S&ED to combat the illegal actions to manufacture, distribute, and export counterfeit and substandard active pharmaceutical ingredients (APIs) and APIs used for counterfeit and substandard products, both China and the United States continue to undertake efforts to protect supply chain integrity and to ensure patient access to safe and high-quality medicines. Regarding the regulation of API manufacturers, China and the United States commit to continue expert-level discussions and cooperation with relevant ministries. The United States commits to continue to review its authority to exclude from consideration the import of bulk chemicals from firms that are not registered with the China Food and Drug Administration, and both the United States and China commit to continue to exchange views on user fee programs. To facilitate exchange between the two countries, China commits to share the draft regulatory and enforcement framework developed by the Multi-Ministerial Work Mechanism to enact regulatory oversight of the manufacturers of bulk chemicals that can be used as APIs. China is in the process of revising the Drug Administration Law (DAL) and commits to develop and seriously consider amendments to the DAL requiring regulatory control of the manufacturers of bulk chemicals that can be used as APIs ("bulk chemicals"), including "export only" producers and distributors. The revised DAL is to be published in draft form for public comments according to China's domestic laws and regulation and international obligations and China is to take into account comments by the United States Government and other stakeholders.

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## 2015 USTR Report to Congress on China's WTO Compliance

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### *Appendix 3 (cont'd)*

#### 7th U.S.-China Strategic and Economic Dialogue

June 24, 2015

#### Excerpts from Joint Fact Sheet

- The United States and China recognize that copyright piracy and trademark counterfeiting on the Internet has become a global hazard, and it is necessary to conduct cross-border communication and cooperation and crack down on such crimes. China is to continue to place the special program on combating piracy and counterfeiting on Internet high on its 2015 agenda, to further tighten oversight, and take stern actions against crimes in this area. The United States and China commit to continuing to work through the Joint Liaison Group to identify, investigate and prosecute criminal IP offenses, including those committed on the Internet. The United States confirms its commitment to continue to objectively, fairly, and in good faith evaluate the efforts made by the Chinese government and Chinese entities for protecting and enforcing intellectual property rights in its Special 301 Report and Notorious Markets List.
- The United States and China reaffirm their 2014 JCCT IPR/Patent Protection commitment to incentivize future innovation and economic growth in both countries in support of creating positive conditions for innovation, including by strengthening cooperation to protect innovators from bad faith litigations.
- The United States welcomes China's issuance of the *Notification on Translation of Trade-related Departmental Rules* by the State Council General Office in March 2015, which provides for the publication of English translations of trade-related departmental rules. China takes note of the concerns of the United States with regard to timely publication of translations of trade-related administrative regulations, and China is to study these concerns.
- China and the United States welcome foreign investment in their countries and recognize the important role that investment by their enterprises can play in third countries. When such enterprises engage in responsible business conduct, it can have a range of benefits to both home and host countries. With that in mind, the two governments welcome their enterprises, when investing abroad, to participate in international initiatives, and follow best practices on responsible business conduct, as appropriate.

...

### **III. Fostering Financial Stability and Reform**

...

- To further the Third Plenum's goals of broadening direct financing channels for the real economy, developing a deep and efficient bond market, and strengthening links between domestic and international markets, China commits to enhance participation of foreign financial services firms and investors in its capital markets, including by:
    - Gradually expanding the business scope of securities companies with foreign equity participation.
    - Allowing qualified foreign financial institutions to set up joint venture securities companies in the Shanghai Pilot Free Trade Zone, with foreign shareholding no more than 49% and the domestic shareholders not limited to securities companies.
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*Appendix 3 (cont'd)*

**7th U.S.-China Strategic and Economic Dialogue**

**June 24, 2015**

**Excerpts from Joint Fact Sheet**

- Allowing qualified foreign brokers to establish futures companies in Shanghai Pilot Free Trade Zone in accordance with domestic laws and regulations, and trade specific domestic futures products for foreign traders.
- Allowing qualified, locally-incorporated, wholly foreign-owned or joint venture private fund management institutions to engage in private security fund management business, including secondary market trading of securities according to domestic regulations.
- Establishing a program that is to allow foreign investors to participate in the interbank bond markets, with an aggregate investment limit but without individual institution or jurisdiction quotas or limits, in line with China's policy of managed capital account liberalization.
- Establishing a program that is to allow foreign investors to participate in the listed bond markets, through free trade accounts in the Shanghai Pilot Free Trade Zone.
- Allowing qualified, locally-incorporated U.S. and foreign-invested banks to obtain licenses to be bond market settlement agents and licenses for underwriting, on the same basis as domestic financial institutions.
- Allowing foreign-invested credit rating agencies to issue ratings on local government bonds.

...

**IV. Enhancing Global Cooperation and International Standards**

...

- The United States and China welcome the progress that has been made by the International Working Group on Export Credits (IWG) in negotiating new international guidelines for official export credit support, including beginning work on horizontal guidelines at its next meeting later this year. Given the start of this new horizontal guideline phase of the IWG's work, the United States and China commit to strengthen IWG internal communications among all IWG members to advance steadily the IWG process. The United States and China reaffirm their support for: (1) IWG guideline coverage that includes official export credit support provided by or on behalf of a government, and (2) new horizontal international guidelines on official export credit support that promote international trade, and that, taking into account varying national interests and situations, are consistent with international best practices.

## 2015 USTR Report to Congress on China's WTO Compliance

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### *Appendix 4*

#### **President Xi Jinping's State Visit to the United States**

September 25, 2015

#### **Excerpts from**

#### **FACT SHEET: U.S.-China Economic Relations**

...

- The United States and China welcome the important progress that has been made in the negotiation of new international guidelines on officially supported export credits since the establishment of the International Working Group on Export Credits (IWG) through a joint high level commitment in 2012. The United States and China reaffirm their support for IWG guideline coverage of official export credit support provided by or on behalf of a government, including, but not limited to, official export credit support provided by official export credit policy financial institutions, and look forward to further discussing the scope of the guideline coverage at the next IWG meetings in October. The United States and China reaffirm that the guidelines should help ensure that governments complement commercial export financing, while promoting international trade.

...

- The United States and China recognize the positive progress of the ongoing bilateral investment treaty (BIT) negotiation. The Leaders reaffirm as a top economic priority the negotiation of a high standard BIT that reflects a shared commitment to the objectives of non-discrimination, fairness, and transparency, that effectively facilitates and enables market access and market operation, and that represents on each side an open and liberalized investment regime. In light of the progress made in the BIT negotiations and both sides' improved negative list proposals in September, the United States and China commit to intensify the negotiations and to work expeditiously to conclude the negotiation of a mutually beneficial treaty that meets these high standards.

...

- The United States and China commit to limit the scope of their respective national security reviews of foreign investments (for the United States, the CFIUS process) solely to issues that constitute national security concerns, and not to generalize the scope of such reviews to include other broader public interest or economic issues. The United States and China commit that their respective national security reviews apply the same rules and standards under the law to each investment reviewed, regardless of country of origin. When an investment poses a national security risk, the United States and China are to use their respective processes to address the risk as expeditiously as possible, including through targeted mitigation rather than prohibition whenever reasonably possible. The national security review of each country is applicable only to investments completed after such review process is established. Once an investment has completed the national security review process of either country, the investment generally should not be subject to review again if the parties close the investment as reviewed under the respective national security review process. In their respective national security reviews, the United States and China commit not to use information, provided by entities not party to an investment, for the purpose, unrelated to national security, of promoting the commercial interests of a competitor of a party to that investment. The United States and China commit to continue exchanging
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*Appendix 4 (cont'd)*  
**President Xi Jinping's State Visit to the United States**  
September 25, 2015  
Excerpts from  
**FACT SHEET: U.S.-China Economic Relations**

views on issues regarding their respective national security reviews in the future, including the scope of each country's national security review process and the role in each country's national security review process for entities not party to an investment.

- The United States and China highly value the important role the U.S.-China Joint Commission on Commerce and Trade (JCCT) plays in promoting bilateral economic relations and expanding mutually beneficial cooperation. Both countries are to ensure the success of the 26th JCCT by making progress on key trade matters of their business communities.
  - Technology is one of the pillars of the bilateral economic relationship between the United States and China. Creating the conditions for expanded two-way trade and investment in the technology sector and avoiding measures that restrict it are critical to sustaining positive momentum in the economic relationship between our countries.
    - Both countries affirm the value of adopting technology-product international standards that have been developed in an open, transparent, market-driven, and balanced manner that allow for due process. Furthermore, both countries recognize that industry's participation in standards development without undue government influence is fundamental to rapid innovation and technology development.
    - Both countries affirm the importance of competition policy approaches that ensure fair and non-discriminatory treatment of entities and that avoid the enforcement of competition law to pursue industrial policy goals.
    - Both countries commit that generally applicable measures to enhance information and communication technology cybersecurity in commercial sectors (ICT cybersecurity regulations) should be consistent with WTO agreements, be narrowly tailored, take into account international norms, be nondiscriminatory, and not impose nationality-based conditions or restrictions, on the purchase, sale, or use of ICT products by commercial enterprises unnecessarily.
    - Both countries affirm that generally applicable measures regulating technology products in the commercial sector benefit from meaningful consultation with the private sector, governments, and other stakeholders to encourage innovative, flexible, and cost-effective solutions.
    - The United States and China affirm the importance of developing and protecting intellectual property, including trade secrets, and commit not to advance generally applicable policies or practices that require the transfer of intellectual property rights or technology as a condition of doing business in their respective markets.
    - Both countries affirm that states should not conduct or knowingly support misappropriation of intellectual property, including trade secrets or other confidential business information with the intent of providing competitive advantages to their companies or commercial sectors. Both countries affirm that states and companies should not by illegal methods make use of technology and commercial advantages to gain commercial benefits.
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*Appendix 4 (cont'd)*

**President Xi Jinping's State Visit to the United States**

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- The United States and China commit to conduct high-level and expert discussions commencing in early 2016 to provide a forum to support and exchange views on judicial reform and identify and evaluate the challenges and strategies in implementing the rule of law. U.S. participants are to include leading members of the U.S. judiciary, U.S. government legal policy experts, and officials from the Departments of Commerce and Justice and the Office of the United States Trade Representative. Chinese participants are to include officials from the Central Leading Group on Judicial Reform, leading members of the Chinese judiciary, and Chinese government legal policy experts. This dialogue is to result in an improvement in the transparency and predictability of the business environment. This dialogue does not replace, duplicate or weaken existing regular bilateral legal and human rights dialogues between the United States and China.
- With strengthening policies to promote agricultural innovation and food security and to advance sustainable development as the themes of the Strategic Agricultural Innovation Dialogue (SAID), the two sides discussed food security, agricultural biotechnology, big data and information technology innovation, environmental management and sustainable development, agricultural and support programs, and plans for future bilateral dialogue and cooperation. Both countries commit to strengthen cooperation and create an enabling environment for agricultural innovation in the two countries and the world at large.
- China's Minister of Agriculture and the U.S. Secretary of Agriculture held a bilateral meeting on agricultural cooperation and renewed the Memorandum of Understanding between the Department of Agriculture of the United States of America and the Ministry of Agriculture of the People's Republic of China on Cooperation in Agriculture and Related Fields, to promote comprehensive, sustained, and balanced development of agricultural cooperation between both countries.
- The United States and China conducted in-depth discussions on the administration of agricultural biotechnology, and committed to further improve approval processes. Both sides reaffirmed the importance of implementing timely, transparent, predictable, and science-based approval processes for products of agricultural biotechnology, which are based on international standards. Both sides committed to strengthen policy formulation and information exchange, share experience in and practices of research and development, regulatory administration, and safety approval of agricultural biotechnology; further revise and improve regulation, based on comprehensive consultations with domestic and international stakeholders; and, enhance capabilities in safety administration and safety approval of agricultural biotechnology products.

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## 2015 USTR Report to Congress on China's WTO Compliance

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### *Appendix 5*

#### 26th U.S.-China Joint Commission on Commerce and Trade Meeting

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The following outcomes were achieved:

#### **AGRICULTURAL BIOTECHNOLOGY**

*China is the largest export market for U.S. soybeans (\$14.7 billion in 2014) and a major export market for U.S. corn and corn products (\$1.3 billion in 2014). Agricultural biotechnology is important to U.S. farmers of these products, with acreage for biotechnology varieties of soybeans and corn totaling over 90 percent of all varieties of soybeans and corn in 2014, enabling these farmers to increase yield while reducing their environmental footprint.*

China and the United States reaffirm the outcomes reached on agricultural innovation in September 2015 at the state visit of President Xi with President Obama. China and the United States have fully exchanged views about agricultural innovation at the JCCT and the Strategic Agricultural Innovation Dialogue; will jointly promote cooperation on agricultural innovation; and will create a favorable environment for agricultural innovation. Both countries reiterated they would work together to further the approval process based on international standards; and reiterated the importance of adopting a timely, transparent, predictable and science-based approval process.

China and the United States jointly agreed to strengthen policy and information exchange; share the experiences and practices on research and development, supervision and approval; and consider domestic and international stakeholders' comments when modifying and improving regulations.

#### **COMPETITION**

*In a set of welcome commitments relating to the Anti-monopoly Law (AML), China embraced key principles including the pro-competitive effects of intellectual property licensing and maintaining coherence in AML rules related to intellectual property rights (IPR), independence in decision making and the protection against disclosure of commercial secrets obtained in AML proceedings.*

China's anti-monopoly enforcement agencies are to conduct enforcement according to the *Anti-monopoly Law* and are to be free from intervention by other agencies.

China clarifies that commercial secrets obtained in the process of *Anti-monopoly Law* enforcement are protected as required under the *Anti-monopoly Law* and shall not be disclosed to other agencies or third parties, except with a waiver of confidentiality by the submitting party or under circumstances as defined by law.

Taking into account the pro-competitive effects of intellectual property, China attaches great importance to maintaining coherence in the rules related to IPR in the context of the *Anti-monopoly Law*. China clarifies that any State Council Anti-monopoly Commission guidelines will apply to the three anti-monopoly enforcement agencies.

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The Chinese side clarifies that in the process of formulating guidance related to intellectual property rights in the context of anti-monopoly law, it will solicit comments from relevant parties, including the public, in accordance with law and policy.

#### **EXCESS CAPACITY**

*China's exports of steel and aluminum are large and growing, and are the central cause of a glut of supply on the global market. They also are contributing to rapidly falling global prices and severe trade frictions. The United States welcomes China's willingness to engage in intensified discussions regarding these critical developments.*

#### **Steel**

The U.S. and Chinese governments and industry representatives agreed to hold discussions in 2016 regarding capacity, production and trade in the steel sector, including updates on progress made with regard to China's July 2014 U.S.-China Strategic and Economic Dialogue (S&ED) commitment 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 within five years. The two sides will exchange information on steel capacity developments in each economy through the JCCT's U.S.-China Steel Dialogue.

#### **Aluminum**

The United States and China agreed to intensify their discussions regarding overcapacity in the aluminum sector in 2016.

#### **FISHERIES, TIMBER AND WILDLIFE**

*China and the United States are among the largest consumers and traders of wildlife, fish and timber and associated products. The two countries share the objective of combatting wildlife trafficking, illegal, unreported or unregulated (IUU) fishing, and illegal logging and associated trade, recognizing their combined efforts and commitments will have significant benefits for the protection of the environment and its natural resources on a global scale. The United States and China are already taking action domestically and with international trade partners; including recent commitments to enact near-complete bans on the import, export and domestic commercial trade of ivory; and agree enhanced cooperation and information exchange in these areas is crucial to help support legal trade in these products and strengthen our collective ability to address illicit practices.*

#### **Information Exchange on Fisheries, Timber and Wildlife**

The United States and China agree to build on previous JCCT (2014) and S&ED commitments by enhancing information exchange and cooperation, under existing and appropriate agreements and mechanisms, in the areas of IUU fishing, wildlife trafficking, and illegal logging and associated trade. Recognizing these issues are global in

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nature, the two countries also agreed to exchange information and cooperate with other trading partners in the region, as appropriate.

#### Cooperation on Fisheries

The United States and China, through the JCCT, S&ED, bilateral fishing exchanges and related bilateral mechanisms and multilateral fora, will expand dialogue and cooperation in the effort to combat IUU fishing. In order to implement the 25th JCCT outcomes, the two sides will discuss cooperation in fisheries trade statistics and the exchange of relevant information and data. The two sides agree to hold a discussion in 2016 to continue information sharing and collaboration in support of efforts to combat IUU fishing practices.

#### On the Fight Against Illegal Logging

The United States and China firmly oppose illegal logging and associated trade and seek to implement a cooperative strategy to address these issues. The two sides agree to continue the fight against illegal logging and associated trade through exchange of information and experiences in the Bilateral Forum on Combatting Illegal Logging and Associated Trade, the S&ED, and other existing bilateral discussions and regional trade fora in 2016.

#### On the Fight Against Wildlife Trafficking

The United States and China attach great importance to combating the global challenge of illegal trade in wildlife and wildlife products. The two sides agreed to continue to use the S&ED and other existing mechanisms and fora to communicate and cooperate in support of combating wildlife trafficking.

### **FOOD SAFETY**

*The United States and China understand the importance of protecting human health while facilitating and expanding trade by utilizing a variety of means to address and seek to resolve food safety issues.*

The food safety issue is one of the key issues of global concern. China and the United States recognize the importance of addressing and resolving food safety issues to protect public health and facilitate trade. Chinese and U.S. food safety agencies can, through existing food safety cooperation mechanisms, including through the JCCT, further enhance food safety cooperation. China and the United States will, on a scientific basis, engage and cooperate on food safety issues to exchange risk communication and regulatory experiences. The United States and China reaffirm the importance of participation in the development of international food safety standards, and enhancing transparency in developing and implementing food safety regulations, including releasing draft regulations for solicitation of public comments, and taking into consideration public comments in final food safety regulations. China and the United States will enhance implementation of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), including through efforts to reinforce the use of scientific risk analysis in the development and implementation of food safety measures, strengthen consumer protection, and enhance public confidence in the food supply chain. China and the United States will participate

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actively in related activities of international organizations in the food safety field, and through exchanges of best practices together, with the goal of improving capability to prevent and respond to food safety incidents.

#### **GOVERNMENT SUPPORT**

##### **Integrated Circuit (IC) Industry Development Plans**

*In 2014, U.S. producers of semiconductors, or integrated circuits, supplied more than one-half of the \$336 billion global market. China represents the largest single end-market for U.S. semiconductors, and semiconductors were one of China's top imports in 2014, with U.S.-manufactured semiconductors representing 60 percent of China's total semiconductor imports. If China were not to implement its IC development plans transparently and using market principles, it could have deleterious effects for the entire global semiconductor innovation eco-system that is evolving on a foundation of deep global inter-industry, intra-industry and cross-industry collaboration across many complex and unique stages of the semiconductor supply chain.*

China confirms that the Semiconductor Industry Development Plan policies are equally applicable to and available for foreign-invested enterprises. For legally binding policies and measures for promoting the semiconductor industry development, China will publish them for public comment according to the procedures and time limits of relevant Chinese laws, and to enhance policy transparency. China commits that the National Semiconductor Investment Fund will be managed by professional fund companies in a manner consistent with market-based concepts and free from government intervention into normal operational activities. The United States and China share a commitment to a strong, growing global semiconductor industry that operates under fair, open and transparent legal and regulatory environments.

##### **Trade Policy Compliance**

*The United States welcomes China's willingness to conduct a careful examination of U.S. concerns regarding the WTO consistency of measures benefiting a wide range of manufacturers and agricultural producers in China.*

China noted that the United States provided comments to the Ministry of Commerce (MOFCOM) concerning the WTO consistency of certain matters relating to International Well Known Brands and farm machinery. China confirms that MOFCOM will deal with these matters in accordance with the *Circular on Strengthening Trade Policy Compliance* and the *Measures for the Implementation of Trade Policy Compliance*.

#### **INTELLECTUAL PROPERTY RIGHTS**

##### **Standards and Intellectual Property**

*Voluntary, consensus-based technological standards promote innovation, competition and consumer welfare and have helped spur investment and advances in a wide range of industries.*

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The United States and China affirm the beneficial role of standards in promoting innovation, efficiency, and public health and safety, and the need to strike an appropriate balance of interests of multiple stakeholders.

The United States and China commit that licensing commitments for patents in voluntary standards are made voluntarily and without government involvement in negotiations over such commitments, except as otherwise provided by legally binding measures.

The United States confirms that Chinese firms participate in the setting of voluntary consensus standards in the United States on a non-discriminatory basis, consistent with the rules and procedures of the relevant standards organizations. China welcomes U.S.-invested firms in China to participate in the development of national recommendatory and social organization standards in China on a non-discriminatory basis.

With a view to enhance mutual understanding and trust, the United States and China agree to hold dialogues over issues under this topic.

#### **Trade Secrets**

*Trade secret theft threatens to diminish U.S. competitiveness around the globe, putting American jobs at risk. Trade secrets are essential to businesses, large and small, and often are a company's most valuable asset. China announced steps to strengthen protection of trade secrets in China by providing U.S. companies with better legal tools to defend their trade secrets from misappropriation.*

The United States and China are committed to providing a strong trade secrets protection regime that promotes innovation and encourages fair competition. China clarifies it is in the process of amending the Anti-Unfair Competition Law; intends to issue model or guiding court cases; and intends to clarify rules on preliminary injunctions, evidence preservation orders and damages. The United States confirms that draft legislation proposed to establish a federal civil cause of action for trade secrets misappropriation has been introduced in relevant committees. Both sides confirm that IP-related investigations, including on trade secrets, are conducted in a prudent and cautious manner. The United States and China agree to jointly share experiences and practices in the areas of protecting trade secrets from disclosure during investigations and in court proceedings, and identify practices that companies may undertake to protect trade secrets from misappropriation in accordance with respective laws.

#### **Geographical Indications (GIs)**

*China's commitments on GIs will help to ensure that China's growing market remains open to exports of U.S.-originated products.*

The United States and China will continue our dialogue on GIs. Both sides reaffirmed the importance of the 2014 JCCT commitment on GIs and confirmed that this commitment applies to all GIs, including those protected

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pursuant to international agreements. China will publish in draft form for public comment, and expects to do so by the end of 2016, procedures that provide the opportunity for a third party to cancel already-granted GIs.

#### **Sports Broadcasts**

*Sporting events, live concerts and other broadcasts of live events are an integral part of American culture and entertainment media. They represent the collective creativity of thousands of Americans. China's unique position as the host country of the 2022 Winter Olympics and China's interest in promoting the development of Chinese sporting leagues provide incentives to protect these broadcasts under copyright provisions.*

The United States and China agree to protect original recordings of the images, or sound and images, of live events, including sports broadcasts, against acts of unauthorized exploitation, including the unauthorized retransmission of such broadcasts over computer networks, in accordance with their respective laws and regulations. The United States and China agree to discuss copyright protection for sports broadcasts and further cooperate on this issue in the JCCT IPR Working Group and other appropriate bilateral fora.

#### **Enhanced Enforcement Against Media Boxes and Unauthorized Content Providers**

*The digital media revolution is transforming the way that U.S. and Chinese viewers watch television, film and other cultural content. Unfortunately, entities and individuals seeking to take advantage of the ease by which digital media is copied, distributed and made available have created a chain of infringing activity from servers hosting infringing content to media boxes sold directly to consumers that allow the download and streaming of pirated programming from around the world.*

Noting the challenges posed by new technologies to the protection of copyright, China and the United States will continue discussions and share respective experiences and practices on combating the unauthorized online distribution of audiovisual content made possible by media boxes. China clarifies it is to enhance enforcement against such media boxes and the providers of unauthorized content in accordance with its laws and regulations.

#### **Online Enforcement**

*As one of the fastest growing e-commerce markets in the world, China presents valuable opportunities to reach hundreds of millions of Chinese consumers, who have a growing interest in and ability to purchase U.S.-branded goods online. However, it also presents challenges in ensuring that the millions of transactions taking place every day involve safe, reliable and legitimate goods. Preventing the online sale of pirated and counterfeit goods is a high priority for both the United States and China.*

In order to address the civil, administrative and criminal enforcement challenges caused by the rapid development of e-commerce, as part of the JCCT IPR Working Group, China and the United States will enhance engagement and exchanges between U.S. and Chinese government IPR policy and enforcement officials, IP right holders, business representatives and online sales-platform operators, among other relevant stakeholders. This engagement will

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cover current and anticipated challenges in protecting and enforcing IPR online by sharing respective practices, discussing possible improvements in each country's systems, facilitating information exchange and training between our two countries, and increasing cooperation on cross-border enforcement. The goal of this effort is to enhance existing legal and cooperative regimes among businesses, rights holders and governments in civil, administrative and criminal online IPR enforcement. Appropriate criminal matters will be referred, if necessary, to law enforcement agencies through the Joint Liaison Group (JLG) IP Criminal Enforcement Working Group or domestic law enforcement officials.

**PHARMACEUTICALS AND MEDICAL DEVICES**

*According to industry data, the U.S. pharmaceuticals industry directly employs more than 810,000 workers, supports a total of 3.4 million jobs in the United States, and provides annual compensation to its workers at approximately twice the average for all U.S. workers. China is the second largest market for pharmaceuticals in the world, with the size of its market being estimated at \$83 billion in 2013. Exports of U.S. medical devices to China reached over \$3 billion in 2014. According to industry data, the U.S. medical device industry includes over 7,000 companies, most with less than 100 employees, and supports 1.9 million U.S. jobs overall. Cutting red tape in China's medical device approval process, as China has committed to do below, will allow better patient outcomes in, and more exports to, China, the industry's largest growth market.*

**Pharmaceuticals and Medical Devices Registration and Approval**

The United States and China affirm:

- That China publishes annual reports on drugs and medical devices evaluation that include their performance efforts.
  - That in 2014 and 2015, China issued clinical trial exemption catalogues for Class II and Class III medical devices and the *Medical Device Clinical Trial Evaluation Guidelines*, and will conduct relevant training. In 2016, China will complete the drafting of the second batch of medical device clinical trial exemption catalogues in order to further expand the scope of the exemption catalogues.
  - That China is currently refining mechanisms to communicate with registration applicants. For innovative medical devices, the China Food and Drug Administration (CFDA) will appoint dedicated personnel in the evaluation and approval process to provide guidance and promptly communicate with the applicant upon request. For other types of medical device registration applications, relevant departments of the CFDA will conduct weekly group consultations for applicants.
  - That the *State Council Opinions on Reforming the Review and Approval Systems for Drugs and Medical Devices* (State Council 2015 No. 44) is the guideline for reforming China's drug and medical device review and approval systems. China agrees that the CFDA will provide no less than a 30-day public comment period for
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implementing departmental rules and regulations, and will also abide by its technical barriers to trade (TBT) commitments.

#### **Medical Devices Localization**

In accordance with China's medical device regulatory legal framework, China agrees that in the area of market access, it will give imported medical devices the same treatment as those manufactured or developed domestically.

#### **TECHNICAL REGULATIONS**

##### **Cosmetics Regulatory Dialogue**

*China is the 10th largest export market for U.S. personal care and cosmetics products, with exports totaling \$297 million in 2014 and growing at an average of 12 percent over the past five years. Beauty, make-up and skin care products are the largest category of these exports representing 52 percent of the total, followed by personal toiletry items such as shaving cream at 12 percent. China's recent actions to reduce tariffs on various consumer goods, including skin care products, from 5 percent to 2 percent, starting in June 2015, will further facilitate U.S. exports. Overall, the cosmetics sector is an important contributor to the U.S. economy, providing 48,513 manufacturing jobs in 2013.*

To deepen mutual understanding in cosmetics regulation and promote consumer protection, China and the United States agree to engage and to cooperate under the current JCCT Trade and Investment Working Group framework. The competent cosmetics regulatory authorities of the two countries agree to consider, through joint seminars and other formats, holding a cosmetics regulatory dialogue to discuss international best practices in cosmetics regulation. To this end, China and the United States agree to hold, in the first half of 2016, a dialogue in Beijing with participation from the competent U.S. and Chinese regulatory authorities as well as other government officials and stakeholders from the two countries to exchange views on various issues including cosmetics regulations, rules, and regulatory practices.

##### **TECHNOLOGY POLICY**

*China has been developing policies that could restrict the use of foreign information and communication technology (ICT) products in a wide range of commercial sectors. The measures either proposed or currently under review by Chinese authorities include ICT rules for the banking and insurance sectors, a draft counterterrorism law, a draft cybersecurity law and restrictions on U.S.-China data flows. The policies set forth in these measures could cause long-term damage to U.S. businesses trying to sell ICT products into China, a market estimated to be worth about \$465 billion this year. They also could add significant costs to foreign ICT companies operating in China and could prevent them from supplying the China market with the most technologically advanced and reliable products. China made several important commitments in this area.*

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**Pro-competitive and Non-discriminatory ICT Security Policy**

The two sides commit that information and communication technology information security measures generally applicable to the commercial sector are not to unnecessarily limit or prevent commercial sales opportunities for foreign suppliers of ICT products, services, or technologies and will not impose nationality-based conditions and restrictions on the purchase, sale and use of ICT by commercial enterprises unnecessarily.

**Transparency and Clarity of Chinese ICT Security Policy**

China confirms that a revised draft of “the banking sector’s guidelines for promotion of the use of safe and controllable information technology (2014-2015)” will be released for a 30-day public comment period and implemented after revision. Prior to this, China suspended the implementation of these “guidelines” via Notice 57, April 13, 2015. China is currently soliciting policy revision advice from concerned parties. Banks in China and the United States, in compliance with laws and regulations, are free to purchase and use the ICT products of their choosing, regardless of the country of origin of such products.

For the “Insurance system informatization regulatory requirements (draft)” China has provided more than a 30-day public comment period. China will notify the WTO TBT Committee of the “Insurance system informatization regulatory requirements (draft),” and China will formulate this measure in an open and transparent manner.

The Chinese side in March 2000 issued clarifications that encryption products and equipment containing encryption technology included in the scope of “Regulations on Commercial Cryptography Administration” are only limited to software and hardware that, at their core, are dedicated to encryption and decryption operations.

China confirms that it is willing to strengthen exchange and dialogue with the United States on the Multi-level Protection Scheme (MLPS) information security testing requirements.

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