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U.S.-China 'Phase One' Trade Deal: Implications for the World Trade Organization

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U.S.-CHINA ‘PHASE ONE’ TRADE DEAL: IMPLICATIONS FOR THE WORLD TRADE ORGANIZATION

AUSTIN LOWE*

ABSTRACT

President Donald Trump took office with a mandate to reset the U.S. economic relationship with China, exhibiting a personal focus on the bilateral trade deficit. At the forefront of this effort, U.S. Trade Representative Robert Lighthizer oversaw a series of negotiations that ultimately culminated in the ‘phase one’ trade deal (“Phase One Deal”), made public in January 2020. The Trump administration pointed to the deal as evidence of the fruits of its efforts, all while purposefully inducing gridlock at the World Trade Organization’s (“WTO”) Dispute Settlement Body to highlight its dissatisfaction with the regime and its purported failure to rein in the predatory economic practices of China and other countries.

The content of the Phase One Deal does mark some important areas of progress in the U.S.-China economic relationship, with certain sectors such as financial services and agriculture benefitting more than others. More important, however, is the significance of the deal in terms of its relation to further discussions around structural issues endemic to China’s economy as well as the future of the multilateral trading system writ large. This Note assesses both, focusing on the current trajectory of economic reform in China as well as imminent and long-term issues that will confront the Biden administration as it seeks to chart out a more equitable economic relationship with China.

Part I of this Note describes the historical and ideological background leading up to the Trump administration’s trade policy toward China, including the eventual Phase One Deal. Part II delves into the substance of the deal, focusing on significant provisions. Part III then assesses whether these provisions are consistent with, or in violation of, both countries’ WTO commitments. This Part also evaluates whether there is any reason to anticipate divergences in implementation as a result of linguistic differences in the English and Chinese versions of the agreement. Recognizing that much of the onus is on China to reform its economic model, Part IV then evaluates trends in the country’s reform trajectory and whether the United States can expect good-faith implementation of China’s publicly touted commitments regarding its laws and policies. Part V concludes by assessing whether the WTO remains relevant as the primary dispute resolution forum in U.S.-China trade and explores potential areas for improvement going forward, including what should serve as the focus of subsequent negotiations.

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INTRODUCTION

In discussions of China’s rise, the country’s accession to the World Trade Organization (“WTO”) in 2001 is often described as a watershed moment.¹ From foreign policy wonks to economists, many who study China are quick to point out that the United States and like-minded countries may have been overly optimistic about what the WTO commitments would mean for China’s economic reform trajectory and approach to international economic relations more generally. Few, however, focus on the possible legal underpinnings for this outcome, and until recently the United States has done little in the way of seeking to rewrite the rules that enabled China to benefit from increased access to markets worldwide while doing little to fundamentally change its state-capitalist economic model.

The Trump administration took office with a mandate to reset bilateral trade relations with China. The administration largely shirked the WTO as a forum for dispute adjudication and instead took unilateral actions to punish China for what it considers longstanding predatory economic practices. Although this approach may have prompted changes in China’s behavior in certain discrete areas, the go-at-it-alone approach failed to generate the so-called structural reforms to China’s economy that the administration claimed to seek. The main fruit of the Trump administration’s efforts in this regard is the U.S.-China ‘phase one’ trade deal (hereinafter “the Phase One Deal”), signed by both parties in January 2020.² This preliminary agreement raises interesting questions in terms of what the Trump administration was ultimately seeking vis-à-vis its negotiations with Chinese counterparts and whether its provisions are consistent with—or in violation of—both countries’ existing WTO commitments.

This Note is divided into five Parts. Part I describes the historical and ideological background leading up to the Trump administration’s trade policy toward China, including the eventual Phase One Deal. Part II delves into the substance of the deal, focusing on significant provisions. Part III then assesses whether these provisions are consistent with, or in violation of, both countries’ WTO commitments. This Part also evaluates whether there is any reason to anticipate divergences in implementation as a result of linguistic differences in the English and Chinese versions of the agreement. Recognizing that much of the onus is on China to reform its economic model, Part IV then evaluates trends in the country’s reform trajectory and whether the United States can expect good-faith implementation of China’s publicly touted commitments regarding its laws and policies. Part V concludes by assessing whether the WTO remains relevant as the primary dispute resolution forum in U.S.-China trade and explores potential areas for improvement going forward, including what should serve as the focus of subsequent negotiations.

¹BOB DAVIS & LINGLING WEI, SUPERPOWER SHOWDOWN: HOW THE BATTLE BETWEEN TRUMP AND XI THREATENS A NEW COLD WAR 87–88 (2020).

²Donna Borak, *Trump signs first stage of trade deal with China*, CNN (Jan. 15, 2020, 6:04 PM), <https://www.cnn.com/2020/01/15/politics/us-china-trade-deal-phase-one-signed/index.html>.

I. BACKGROUND ON TRUMP ADMINISTRATION’S APPROACH TO U.S.- CHINA TRADE RELATIONS

Prior to his election to the presidency in 2016, Donald Trump was already a frequent critic of China’s economic practices. He was allegedly influenced by the book *Death by China* written by Peter Navarro—the so-called “China hawk” who would eventually serve as his trade advisor.³ More generally, Trump took a hard stance on bilateral trade deficits, one of the most consistent aspects of his international worldview.⁴ This perspective originated in the 1980s during the period of U.S. economic competition with Japan. Trump’s derision of bilateral trade deficits stems from the notion that other countries are “taking advantage of the United States.”⁵ Contrary to the views of many economists⁶ who do not necessarily see trade deficits as a negative, Trump saw unbalanced trade flows as representing an opportunity cost for the United States—other countries are disproportionately selling to us what we could be making at home and selling to them.⁷

On the campaign trail, trade with China served as a central focus of Trump’s criticism of past administrations. Perhaps most egregiously, he accused China of “raping”⁸ the United States through its economic practices. Trump’s abrasive approach came with sharp critiques of the Obama administration and aspects of its ‘pivot to Asia’ strategy—notably, what was then dubbed the Trans-Pacific Partnership (“TPP”), a regional trade agreement consisting of mostly Asian countries and the key economic component of this strategy. As part of his campaign promises, Trump pledged to name China a currency manipulator and impose tariffs on Chinese imports.⁹ In retrospect, some of candidate Trump’s rhetoric appears hypocritical given his own business dealings in China,¹⁰ but in any event, it served to attract voters in key swing states where the loss of manufacturing jobs was attributed to the outsourcing of labor by major U.S. and multinational corporations both before and after China’s accession to the WTO.¹¹

Although Trump’s views may be unpopular among some economists, he is not alone in his zero-sum approach to trade. Trump’s selection of longtime trade hawk Robert Lighthizer as U.S. Trade Representative (“USTR”) should then come as no surprise to those who were familiar with his publicly expressed

3 See Jacob M. Schlesinger, *Trump Forged His Ideas on Trade in the 1980s—and Never Deviated*, WALL ST. J. (Nov. 15, 2018, 12:55 PM), <https://www.wsj.com/articles/trump-forged-his-ideas-on-trade-in-the-1980s-and-never-deviated-1542304508>.

4 See Marc Fisher, *Over four decades, Trump’s one solid stance: A hard line on trade*, WASH. POST (Mar. 7, 2018, 3:46 PM), https://www.washingtonpost.com/business/over-four-decades-trumps-one-solid-stance-a-hard-line-on-trade/2018/03/07/4b1ed250-2172-11e8-badd-7c9f29a55815_story.html.

5 See Schlesinger, *supra* note 3.

6 See, e.g., William D. Lastrapes, *An economist explains why trade deficits aren’t a bad thing*, WORLD ECON. F. (Oct. 18, 2018), <https://www.weforum.org/agenda/2018/10/why-trade-deficits-aren-t-so-bad>.

7 See PAUL BLUSTEIN, SCHISM: CHINA, AMERICA AND THE FRACTURING OF THE GLOBAL TRADING SYSTEM 224 (2019).

8 *Trump accuses China of ‘raping’ US with unfair trade policy*, BBC (May 2, 2016), <https://www.bbc.com/news/election-us-2016-36185012>.

9 Nick Corasaniti et al., *Donald Trump Vows to Rip Up Trade Deals and Confront China*, N.Y. TIMES (June 28, 2016), <https://www.nytimes.com/2016/06/29/us/politics/donald-trump-trade-speech.html>.

10 See, e.g., Mike McIntire et al., *Trump Records Shed New Light on Chinese Business Pursuits*, N.Y. TIMES (Oct. 20, 2020), <https://www.nytimes.com/2020/10/20/us/trump-taxes-china.html>.

11 See BLUSTEIN, *supra* note 7, at 225.

views.¹² Lighthizer, who formerly served as Deputy USTR in the Reagan administration, is a longtime critic of China’s economic policies and has frequently exhibited skepticism of the ability of the WTO to address bilateral trade disputes.¹³ Lighthizer also has a penchant for unilateral trade actions,¹⁴ which would become the major avenue through which the Trump administration would eventually execute its vision for U.S. trade policy.

In 2017, USTR initiated an investigation into China’s economic practices pursuant to Section 301 of the Trade Act of 1974. The investigation was primarily focused on China’s theft of U.S. intellectual property (“IP”) and related practices—namely, through forced technology transfer and cyber theft. Section 301 enables retaliation against foreign governments for practices that USTR deems unreasonable or that burden or restrict U.S. commerce.¹⁵ In this case, USTR released a March 2018 report finding that a number of China’s economic practices are indeed unreasonable and burden or restrict U.S. commerce.¹⁶ As a result of such findings, the Trump administration proceeded to impose tariffs on a variety of Chinese imports beginning in July 2018, with the first tranche of 25-percent tariffs covering about USD 36 billion in goods. The administration would eventually impose tariffs on an estimated total of USD 550 billion in Chinese imports. China responded in kind with equivalent tariffs on various U.S. imports until eventually, it could no longer match the goods covered given the bilateral trade imbalance.

China also initiated proceedings at the WTO, claiming that the U.S. tariffs were inconsistent with certain provisions of the General Agreement on Tariffs and Trade 1994 (“GATT 1994”) and the Dispute Settlement Understanding.¹⁷ A panel was eventually established for this dispute in January 2019. China also filed two additional cases in response to subsequent U.S. actions under Section 301.¹⁸ In September 2020, the Dispute Settlement Body (“DSB”) panel issued its report in response to the first case,¹⁹ finding that the U.S. tariffs were indeed inconsistent with provisions of the GATT 1994. Specifically, the panel found that the Section 301 tariffs were *prima facie* inconsistent with Article I:1 because they applied only to products from China, thus violating the fundamental GATT principle of most-favored-nation treatment, and with Article II because they were applied in excess of the rates to which the United States bound itself in the Schedule of Concessions.²⁰ The

12 See DAVIS & WEI, *supra* note 1, at 187.

13 See generally *Evaluating China’s Role in the World Trade Organization Over the Past Decade: Hearing Before the U.S.-China Econ. and Security Review Comm’n*, 111th Cong. (2010) (statement of Robert E. Lighthizer, Former Deputy USTR).

14 See BLUSTEIN, *supra* note 7, at 233.

15 See 19 U.S.C. § 2411.

16 See OFF. OF THE U.S. TRADE REPRESENTATIVE, FINDINGS OF THE INVESTIGATION INTO CHINA’S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (2018), <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF> [hereinafter SECTION 301 INVESTIGATION REPORT].

17 Request for the Establishment of a Panel by China, *United States — Tariff Measures on Certain Goods from China*, WTO Doc. WT/DS543/1 (May 4, 2018).

18 Dorcas Wong & Alexander Chipman Koty, *The US-China Trade War: A Timeline*, DEZAN SHIRA & ASSOCIATES (Aug. 25, 2020), <https://www.china-briefing.com/news/the-us-china-trade-war-a-timeline/>.

19 Panel Report, *United States — Tariff Measures on Certain Goods from China*, WTO Doc. WT/DS543/R (adopted Sept. 15, 2020).

20 *Id.* ¶ 7.96.

United States appealed the decision through a notification to the DSB in which it acknowledged that, at the time, no Appellate Body could be established given the Trump administration’s continued opposition to the appointment of a new Director-General.²¹

II. PHASE ONE DEAL OVERVIEW

A. BACKGROUND

The WTO proceedings took place against the backdrop of ongoing, if intermittent, efforts toward a negotiated outcome by the U.S. and Chinese sides. The tit-for-tat cycle of retaliation was marked by continued escalation and little high-level dialogue. Eventually, President Trump met with Chinese paramount leader Xi Jinping at the G20 Summit in Buenos Aires in December 2018, during which the two sides agreed to a 90-day truce in which both would cease escalatory action. As part of the truce, the White House statement claimed China would increase its purchases of U.S. “agricultural, energy, industrial, and other product” and thanked Xi for agreeing to designate fentanyl as a controlled substance under Chinese law.²² The Chinese Foreign Ministry statement emphasized the spirit of cooperation and naturally framed these prospective commitments as reflecting a negotiated outcome rather than concessions.²³

The subsequent meetings over the next few months in anticipation of the March 1, 2019 deadline were divided into a two-track dialogue: the first focused on the area of “trade,” and the second on the area of “structural issues.” Gridlock resulted in multiple cancellations, and Trump eventually extended the deadline to raise the tariffs on an estimated USD 200 billion in Chinese imports, or the third tranche of Section 301 tariffs.²⁴ In spite of limited progress, such as the agreement to establish so-called “enforcement offices” in April,²⁵ the United States increased the third-tranche tariffs on May 10, prompting swift retaliation from China.²⁶ Despite another short-lived truce following the G20 Summit in

21 Laurence Norman & Drew Hinshaw, *U.S. Opposes Pick to Lead World Trade Organization*, *Riling Member Nations*, WALL ST. J. (Oct. 29, 2020), <https://www.wsj.com/articles/u-s-opposes-pick-to-lead-world-trade-organization-riling-member-nations-11603911883>.

22 Press Release, White House Office of the Press Secretary, Statement from the Press Secretary Regarding the President’s Working Dinner with China (Dec. 1, 2018), <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-regarding-presidents-working-dinner-china/>.

23 See ZHONGHUA RENMIN GONGHEGUO WAIJIAOBU (中华人民共和国外交部) [PEOPLE’S REPUBLIC OF CHINA MINISTRY OF FOREIGN AFFAIRS], GUOWU WEIYUAN JIAN WAIJIAOBUZHANG WANG YI XIANG ZHONGWAI MEITI JIESHAO ZHONGMEI YUANSHOU HUIWU QINGKUANG (国务委员兼外交部长王毅向中外媒体介绍中美元首会晤情) [STATE COUNCILOR AND MINISTER OF FOREIGN AFFAIRS WANG YI BRIEFS THE CHINESE AND FOREIGN MEDIA ON THE MEETING BETWEEN THE U.S. AND CHINESE HEADS OF STATE] (Dec. 2, 2018), <https://www.fmprc.gov.cn/web/wjbzhd/t1618091.shtml>, English translation available at <https://www.mfa.gov.cn/eng/>.

24 Ana Swanson & Alan Rappeport, *Trump Delays a Tariff Deadline, Citing Progress in China Trade Talks*, N.Y. TIMES (Feb. 24, 2019), <https://www.nytimes.com/2019/02/24/us/politics/us-china-trade-truce.html>.

25 David Lawder, *U.S., China agree to establish trade deal enforcement offices: Mnuchin*, REUTERS (Apr. 10, 2019, 2:20 PM), <https://www.reuters.com/article/us-usa-trade-china-idUSKCN1RM2FV>.

26 Ana Swanson & Keith Bradsher, *Trade Dispute Between U.S. and China Deepens as Beijing Retaliates*, N.Y. TIMES (May 13, 2019), <https://www.nytimes.com/2019/05/13/us/politics/us-china-trade-tariffs.html>.

Osaka in June, the Trump administration would eventually impose tariffs on another USD 300 billion in Chinese imports in September.

Notwithstanding the continued escalation and scale of what was eventually deemed a trade war, the two sides agreed to hold high-level talks from October 10-11, 2019. As a result of these talks in Washington, D.C., Trump announced that the Phase One Deal had been reached, which would include China’s purchase of an estimated USD 40 billion in U.S. goods annually and pledge to improve IP protections.²⁷ The substance of the deal was released in January 2020.²⁸

B. CONTENT

1. Purchase Agreement

Chapter 6 of the agreement is focused entirely on “expanding trade,”²⁹ a key aspect of the Trump administration’s objectives given its focus on the bilateral trade deficit. As part of this chapter of the agreement, China must purchase “manufactured goods, agricultural goods, energy products, and services” identified in an annex in an amount exceeding the 2017 baseline amount by USD 200 billion.³⁰ The agreement notes that official data from both sides will be used to evaluate China’s implementation of this commitment and that China has the option to request consultations with the United States should its ability to fulfill these obligations come into question.³¹

2. Dispute Resolution Process

Chapter 7 of the agreement addresses bilateral evaluation and dispute resolution.³² This chapter discusses the creation of a “Trade Framework Group” led by the USTR on the U.S. side and the designated Vice Premier on the Chinese side, reflecting the existing framework in the prior bilateral trade negotiations led by USTR Lighthizer and Vice Premier Liu He. Each side must also create a “Bilateral Evaluation and Dispute Resolution Office,” which serves as the entity to whom the other party may submit an appeal regarding implementation of the agreement.³³

Lack of a resolution at the working level results in the appeal being raised to the deputy USTR-vice ministerial level and subsequently to the USTR-

27 Jeff Mason & David Lawder, *U.S. outlines 'Phase 1' trade deal with China, suspends October tariff hike*, REUTERS (Oct. 11, 2019, 4:50 AM), <https://www.reuters.com/article/us-usa-trade-china/us-outlines-phase-1-trade-deal-with-china-suspends-october-tariff-hike-idUSKBN1WQ10X>.

28 Jacob Pramuk, *Trump signs 'phase one' trade deal with China in push to stop economic conflict*, CNBC (Jan. 16, 2020, 10:58 AM), <https://www.cnbc.com/2020/01/15/trump-and-china-sign-phase-one-trade-agreement.html>.

29 OFF. OF THE U.S. TRADE REPRESENTATIVE & U.S. DEP’T OF TREASURY, ECONOMIC AND TRADE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE PEOPLE’S REPUBLIC OF CHINA 6-1 (2020), [https://ustr.gov/sites/default/files/files/agreements/phase one agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf](https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf) [hereinafter PHASE ONE DEAL].

30 *Id.*

31 *Id.* at 6-2.

32 *Id.* at 7-1.

33 *Id.*

vice premier level. Should the parties fail to reach a consensus on the response to such an appeal, either may respond by suspending obligations under the agreement or adopting remedial measures that it considers appropriate. Notably, each party may also withdraw from the agreement entirely if it finds that the action taken in response to an appeal was taken in bad faith. Moreover, Article 7.6 provides that each party consult with each other should natural disasters or unforeseeable events prevent compliance or implementation,³⁴ a provision rooted in fundamental principles of contract law such as frustration and impracticability.

3. IP Protections and Technology Transfer

Chapters 1 and 2 of the agreement address intellectual property and technology transfer, respectively. This is a key component of the agreement, as “Chinese theft of American IP currently costs between \$225 billion and \$600 billion annually.”³⁵ Cybertheft, which former National Security Agency Director once described as “the greatest transfer of wealth in history,”³⁶ was also one of the critical behaviors examined by the Section 301 investigation.

Chapter 1 details measures that largely impact China more than the United States.³⁷ For example, in the case of trade secrets, it requires that China adopt a number of administrative procedures in judicial proceedings, such as burden-shifting to the accused party in a civil proceeding and an expanded scope of what constitutes criminal trade secret misappropriation. In effect, the goal of these chapters is to make China’s IP enforcement system more akin to that of the United States, with nearly every Section noting that “existing U.S. measures afford treatment equivalent to that provided for in this Section.”³⁸ Notably, Article 1.35 also required China to promulgate an “Action Plan” regarding its efforts to strengthen IP protections pursuant to the provisions in this chapter.³⁹ China did not meet this deadline, but on April 20, 2020, it released the plan,⁴⁰ which includes most of the commitments made in the Phase One Deal other than those that already exist in other legislation or are slated to be included in new legislation (such as the Copyright Law).⁴¹

Many commentators have noted that the commitments made by China in Chapter 1 were already in progress or in effect as of the signing of the Phase One Deal.⁴² The only entirely new aspects are the patent term extension

³⁴ *Id.* at 7-4.

³⁵ See SECTION 301 INVESTIGATION REPORT, *supra* note 16, at 9.

³⁶ Josh Rogin, *NSA Chief: Cybercrime Constitutes the “Greatest Transfer of Wealth in History,”* FOREIGN POLICY (July 9, 2012, 6:54PM), <http://foreignpolicy.com/2012/07/09/nsa-chief-cybercrime-constitutes-the-greatest-transfer-of-wealth-in-history/>.

³⁷ See PHASE ONE DEAL, *supra* note 29, at 1-1.

³⁸ See, e.g., *id.* at 1-2.

³⁹ See *id.* at 1-18.

⁴⁰ U.S.-China Business Council, *China Issues Action Plan on Intellectual Property in Accordance With Phase One Commitments After Initial Delay*, CHINA MARKET INTELLIGENCE (Apr. 21, 2020), <https://www.uschina.org/cmi/china-issues-action-plan-intellectual-property-accordance-phase-one-commitments-after-initial-delay-april-21-2020>.

⁴¹ See Hogan Lovells, *China publishes IP Action Plan under China-US Trade Deal: what’s new and how will it affect you?*, LEXOLOGY (Apr. 23, 2020), <https://www.lexology.com/library/detail.aspx?g=51a33332-448d-4bd7-91bb-5d770b38cb97>.

⁴² See, e.g., *Client Alert: U.S.-China “Phase One” Trade Deal*, COVINGTON (Jan. 17, 2020), <https://www.cov.com/-/media/files/corporate/publications/2020/01/us-china-phase-one-trade->

provision in Article 1.12 and the lower threshold for criminal enforcement of trade secret protections in Article 1.7, both of which currently exist in the United States. For a more detailed discussion of the prior efforts to reform China’s IP protection regime, see Part IV.

Chapter 2 is much shorter in length and effectively commits both parties to not force the others’ entities to transfer technology as a condition for market access.⁴³ Although this chapter is clearly intended to address longstanding U.S. concerns regarding this issue, China has long claimed that it does not force companies to transfer technology as a matter of policy.⁴⁴

4. Financial Services

Chapter 4 addresses financial services,⁴⁵ including banking, credit rating services, electronic payment services (“EPS”), and insurance, among other sectors. This chapter also largely focuses on increasing market access and streamlining approvals for U.S. firms in the Chinese market. This includes a three-month approval timeline for credit rating agencies following the signing of the agreement and a one-month timeline for EPS following completion of preparatory work for license applications. In addition, as part of the agreement, China committed to lifting equity caps in the insurance and securities sectors by April 1, 2020.

5. Additional WTO-Relevant Content

Chapter 4, which focuses on trade in food and agricultural products, contains a number of provisions that invoke the parties’ respective WTO commitments or the WTO as a forum for adjudication. For example, in the Section focused on Chinese market openings to U.S. dairy, the agreement states that China must ensure that any new standards developed for various forms of dairy products “are consistent with China’s WTO obligations.”⁴⁶ Annex 14 of this chapter also references a specific Panel Report in relation to tariff-rate quotas on wheat, rice, and corn.⁴⁷ This case, *China — Tariff Rate Quotas for Certain Agricultural Products*, was brought by the United States, which claimed that China’s tariff-rate quotas for wheat, short- and medium- grain rice, long grain rice, and corn were inconsistent with the GATT 1994 as well as China’s Protocol of Accession to the WTO. As a report by the U.S.-China Economic and Security Review Commission indicates, China “has a history of applying the TRQs in an opaque and managed way that ensures the quota is never met, which restricts access for U.S. farmers and violates [its] WTO commitments.”⁴⁸

deal.pdf.

43 See PHASE ONE DEAL, *supra* note 29, at 2-1.

44 See BLUSTEIN, *supra* note 7, at 253.

45 PHASE ONE DEAL, *supra* note 29, at 4-1.

46 PHASE ONE DEAL, *supra* note 29, at 3-5.

47 *Id.* at 3-18.

48 U.S.-CHINA ECON. AND SECURITY REVIEW COMM’N, THE U.S.-CHINA “PHASE ONE” DEAL: A BACKGROUND 3 (2020), <https://www.uscc.gov/sites/default/files/2020-02/U.S.-China%20Trade%20Deal%20Issue%20Brief.pdf>.

III. PHASE ONE DEAL ASSESSMENT

The significance of the phase one agreement in addressing fundamental issues in the bilateral trade relationship is called into question on two fronts: first, its reiteration of commitments already made by both parties, whether through WTO membership or otherwise; and second, for its potential lack of compliance with the WTO.

A. *More of the Same?*

Chapter 2 addresses technology transfer, a key concern of the United States. In spite of the commitments made by China in this chapter, its vague provisions simply reflect what China has long claimed⁴⁹ in the face of foreign criticism: that China does not force foreign firms to transfer technology as a condition of market access, despite rampant evidence⁵⁰ to the contrary. Prior to the finalization of the Phase One Deal, China even updated its Foreign Investment Law to explicitly ban administrative organs and their employees from forcing technology transfer “through administrative measures.”⁵¹ Moreover, as others have pointed out,⁵² China had already promised to abandon any such policy as a result of its accession to the WTO in 2001. Thus, whether this chapter actually changes anything on the ground in China remains to be seen, and if past experience is any indicator, this seems unlikely.

In addition to reflecting existing WTO commitments, China was already in the process of opening its financial services sector. As one commentator noted, “Beijing had announced or implemented almost all of its concessions already, in part because Chinese officials increasingly understood that foreign competition in these areas was in China’s own interest.”⁵³ In November 2017, then-Vice Minister of Finance Zhu Guangyao announced that the cap on ownership in joint ventures in securities, funds, or futures would be lifted over the next three years.⁵⁴ The China Securities Regulatory Commission updated its timeline in October 2019, with the caps in fund management and securities to be lifted by April 1 and December 1, 2020, respectively. The Phase One Deal did move up the date for securities to April 1, but this seems too insignificant to constitute a negotiating “win” from the U.S. perspective.

49 Keith Zhai, *China Says Foreign Firms Won't Be Forced to Turn Over Technology*, BLOOMBERG (Nov. 13, 2017, 4:30 PM), <https://www.bloomberg.com/news/articles/2017-11-10/china-says-foreign-firms-won-t-be-forced-to-turn-over-technology>.

50 Lee G. Branstetter, *China's Forced Technology Transfer Problem— And What to Do About It*, PETERSON INST. FOR INT'L ECON. (June 2018), <https://www.piie.com/system/files/documents/pb18-13.pdf>.

51 Austin Lowe, *China's Foreign Investment Law Fails to Address U.S. Concerns*, LAWFARE (Mar. 7, 2019, 8:00 AM), <https://www.lawfareblog.com/chinas-foreign-investment-law-fails-address-us-concerns>.

52 Jennifer Hillman, *What to Look for in the “Phase One” U.S.-China Trade Deal*, COUNCIL ON FOREIGN RELATIONS (Jan. 14, 2020), <https://www.cfr.org/blog/what-look-phase-one-us-china-trade-deal>.

53 Martin Chorzempa, *Did the US-China phase one deal deliver a win for US financial services?*, PETERSON INST. FOR INT'L ECON. (Jan. 27, 2020, 5:00 PM), <https://www.piie.com/blogs/trade-and-investment-policy-watch/did-us-china-phase-one-deal-deliver-win-us-financial>.

54 *See China widens access to financial markets for foreign investors*, XINHUANET (Nov. 10, 2017, 3:48 PM), http://www.xinhuanet.com/english/2017-11/10/c_136742633.html.

There's less to the phase one deal than meets the eye

Sector	Timing in phase one deal	Previous timing	Foreigners allowed in already?
Securities fund custodian services	5 months (June 2020)	Already open	Standard Chartered (received license in October 2018)
Type-A lead underwriting	3 months (April 2020)	Already open	BNP and Deutsche Bank (received license in September 2019)
Credit rating	3 months (April 2020)	Already open	Standard & Poor's received license, already issued ratings
Securities	April 2020	December 2020	JPMorgan approved for majority ownership, not full foreign ownership
Fund management	April 2020	April 2020	JPMorgan awaiting approval for 51% stake in China venture, seeking 100% in another
Futures	April 2020	January 2020	UBS has fully owned futures business since 2016
Insurance	April 2020	January 2020	Allianz approved for wholly foreign-owned unit in November 2019
Payments/bank card clearing	Maximum delay between most approval steps	n.a.	PayPal approved for 70% stake; Mastercard and American Express approved to set up joint ventures

n.a. = not applicable
Sources: Caixin, CNBC, Reuters, US Trade Representative, Financial Times, Allianz, and Bloomberg.

55

B. INCONSISTENCY WITH WTO COMMITMENTS

The purchase agreement in Chapter 6 stands out as the most troublesome in terms of WTO principles. Indeed, this chapter has already been questioned at a meeting of the WTO Agricultural Committee. In July 2020, other members suggested that the purchases might violate the most favored nation obligation under GATT Article I.⁵⁶ Although the United States and China insisted that this chapter will be implemented based on market-driven principles, it could constitute a quota in violation of the provision prohibiting quantitative restrictions in GATT Article XI should China import such products only from the United States to meet the levels called for in the agreement.⁵⁷ At the very least, it would certainly seem that winding down imports from other countries in an effort to increase U.S. imports would, on its face, violate the most favored nation obligation under GATT Article I.

C. AREAS OF PROGRESS

Some areas do present “wins” for the United States in terms of negotiated outcomes, even if they represent what China already should have been implementing as a result of its WTO commitments. Namely, the insurance and EPS industries are arguably the biggest beneficiaries of this agreement.

55 Chorzempa, *supra* note 53.

56 Brett Fortnam, *At WTO, India defends ag subsidy moves; U.S., China defend phase-one*, WORLD TRADE ONLINE (July 29, 2020, 5:47 PM), <https://insidetrade.com/daily-news/wto-india-defends-ag-subsidy-moves-us-china-defend-phase-one>.

57 See Hillman, *supra* note 52.

First, the insurance industry benefits from the additional language in Article 4.6 that prohibits “business scope limitations, discriminatory regulatory processes and requirements, and overly burdensome licensing and operating requirements” in all insurance sectors. It is unclear why this language is missing in the articles covering other financial services sectors, and commentators have noted that the lack thereof could result in China employing such measures in these sectors.⁵⁸ Increased regulatory scrutiny of Chinese investment in U.S. markets may have contributed to China’s reticence to commit to such language in the other sectors,⁵⁹ but time will tell whether the inclusion of this language ultimately makes a difference in the insurance industry.

U.S. providers in the EPS industry also benefit from the commitments made by China in Article 4.4. This article includes a one-month timeline for acceptance of an application by a U.S. provider after it completes the necessary preparatory work. The agreement specifies that this includes the applications of Mastercard, Visa, or American Express. While it does not mandate a timeframe for the actual approval process, this is still a significant step in light of China’s apparent noncompliance with a DSB Panel Report and recommendations following a complaint brought by the United States at the WTO.

The United States first requested consultations with China regarding barriers to market access in this sector in 2010, alleging that such barriers were inconsistent with its obligations under Articles XVI and XVII of the General Agreement on Trade in Services (“GATS”).⁶⁰ These articles include the most favored nation treatment obligation, the obligation to refrain from limitations on the number of service suppliers, and the national treatment obligation. The United States essentially alleged that China allowed its national EPS champion UnionPay to maintain a monopoly on all *renminbi*-denominated domestic payment transactions and prevented foreign players from entering the EPS market. While the Panel rejected the allegation that China maintained a monopoly for all such transactions, it found that it did for certain types of transactions, and thus violated Article XVI:2(a) of the GATS by limiting the number of service suppliers.⁶¹ The Panel also found that the requirement for all cards and terminal equipment bear the UnionPay logo violated national treatment obligations under GATS Article XVII.⁶²

The Panel Report was adopted on August 31, 2012, and in September of that year, China stated that it intended to implement the DSB recommendations to address these violations. However, foreign EPS providers simply became enmeshed in China’s opaque regulatory application and approval process,⁶³ and there was little movement on the issue prior to the finalization of

58 See Chorzempa, *supra* note 53; Claire Reade, *Does the Phase One China Deal Measure Up? Depends on How You Measure*, CTR. FOR STRATEGIC AND INT’L STUD. (Jan. 22, 2020), <https://www.csis.org/analysis/does-phase-one-china-deal-measure-depends-how-you-measure>.

59 See Robert Schmidt & Matt Robinson, *Pushing for More Scrutiny of Chinese Stocks Traded in the U.S.*, BLOOMBERG QUINT (Oct. 1, 2020, 1:30 PM), <https://www.bloomberquint.com/businessweek/u-s-pressuring-chinese-companies-for-more-transparency-on-finances>.

60 See Request for Consultations by the United States, *China—Certain Measures Affecting Electronic Payment Services*, WTO Doc. WT/DS413/1 (Sept. 20, 2010).

61 See Panel Report, *China—Certain Measures Affecting Electronic Payment Services*, WTO Doc. WT/DS413/R (adopted Aug. 31, 2012).

62 *Id.*

63 Doug Palmer & Frank Tang, *China slow-walks opening country to U.S. credit card companies*, POLITICO (Apr. 2, 2019, 11:21 AM), <https://www.politico.com/story/2019/04/02/china-us-credit-card-companies-1309803>.

the Phase One Deal. Following the deal’s signing in January 2020, Mastercard won approval in February⁶⁴ and was soon followed by American Express,⁶⁵ demonstrating the credibility of this commitment on the part of Chinese negotiators after their government had long balked at the issue.

D. DISPUTE SETTLEMENT MECHANISM

The inclusion of a new bilateral dispute settlement process is one area where it is difficult to assess significance or lack thereof. Bown and Keynes note that it signifies that the Trump administration appeared “to have abandoned the WTO system as a way of addressing its complaints with China.”⁶⁶ It is unclear whether this was actually the case, however, as Lighthizer himself continued to call for WTO reform rather than suggesting that the system be completely abandoned.⁶⁷ Regardless, the enforcement mechanism arguably does not have the “real teeth” that Lighthizer claimed it would.⁶⁸ In essence, it effectively enables both sides to take unilateral measures—likely the imposition of tariffs—for perceived violations of the agreement and also provides them the option to walk away from the deal entirely. Given the fractured state of bilateral trade relations, with tariffs still in place by both sides, the enforcement mechanism may do little more than provide a more formalized channel to air grievances and consult with the other party.

The initial high-level meeting called for in Chapter 7 was delayed as a result of the COVID-19 outbreak and President Trump’s blaming of China for the resulting pandemic.⁶⁹ It is unclear whether this enforcement mechanism will be utilized in any meaningful sense by the Biden administration going forward, though Biden’s USTR Katherine Tai has already begun to engage in dialogue with Vice Premier Liu He on related issues.⁷⁰

E. LINGUISTIC ASSESSMENT

Article 8.6 notes that the English and Chinese versions of the agreement both serve as the authentic, or authoritative texts. This acknowledgment is relevant given the lack of China expertise among Trump administration officials

64 *Mastercard Wins Approval to Join China’s \$27 Trillion Market*, BLOOMBERG (Feb. 11, 2020, 4:22 AM), <https://www.bloomberg.com/news/articles/2020-02-11/mastercard-wins-approval-to-enter-china-s-27-trillion-market>.

65 Nisha Gopalan, *AmEx May Find China Can Live Life Without It*, BLOOMBERG OPINION (June 16, 2020, 12:55 AM), <https://www.bloomberg.com/opinion/articles/2020-06-16/amex-may-find-china-may-live-life-without-it>.

66 Chad P. Bown & Soumaya Keynes, *Why Trump Shot the Sheriffs: The End of WTO Dispute Settlement 1.0*, PETERSON INST. FOR INT’L ECON. (Mar. 2020), <https://www.piie.com/system/files/documents/wp20-4.pdf>.

67 See Robert E. Lighthizer, *How to Set World Trade Straight*, WALL ST. J. (Aug. 20, 2020, 7:32 PM), https://www.wsj.com/articles/how-to-set-world-trade-straight-11597966341?mod=article_inline.

68 David Lawder, *In U.S.-China Phase 1 trade deal, enforcement may end in ‘We quit’*, REUTERS (Jan. 15, 2020, 4:24 PM), <https://www.reuters.com/article/us-usa-trade-china-enforcement-idUSKBNIZE2T1>.

69 Joe McDonald, *China, US Hold Delayed Trade Meeting to Discuss ‘Phase 1’ Deal*, THE DIPLOMAT (Aug. 25, 2020), <https://thediplomat.com/2020/08/china-us-hold-delayed-trade-meeting-to-discuss-phase-1-deal/>.

70 David Lawder & Andrea Shalal, *U.S. trade chief Tai says U.S. faces ‘very large challenges’ on China*, REUTERS (May 27, 2021, 3:31 PM), <https://www.reuters.com/world/us/us-trade-chief-tai-says-us-faces-very-large-challenges-china-2021-05-27/>.

as well as the Chinese government’s tendency to interpret its laws more flexibly than foreign observers might anticipate. Notably, the initial lack of a Chinese-language version of the draft text threatened to scuttle progress in the ongoing trade negotiations.⁷¹ As a result, this linguistic analysis focuses on provisions that appear to place the onus on China, rather than the United States, to reform its policies or practices and evaluate whether the Chinese-language version is vaguer or more open to interpretation than the English counterpart.

In general, the English and Chinese versions of the agreement mirror each other word for word.⁷² There are, however, important nuances regarding the Chinese word for “shall,” which does not even necessarily impose an obligation in the context of U.S. law.⁷³ One wonders why the negotiators would not have preferred the term “must,” which explicitly connotes a legally binding obligation in both English and Chinese. Moreover, the initial list of U.S. demands to China specified “must.”⁷⁴ In English-to-Chinese translation, “shall” is often translated as “应” or “应当,” which is a higher value modal verb in the Chinese context.⁷⁵ Modal verbs “are a type of verbs which express meanings such as volition, ability, possibility, necessity, etc.”⁷⁶ Thus, the use of the high value modal verb in the Chinese version of the agreement suggests that it could carry a stronger sense of obligation than the weaker English “shall.” In addition, “应” or “应当” has become the standard legal usage in Chinese legal contexts and generally carries a similar meaning to “必须,” or must.⁷⁷ However, an important distinction is that “shall” in Chinese connotes a greater degree of flexibility and allows for exceptions, unlike the Chinese word for “must.”⁷⁸ In any event, the Chinese version of the text does not contain any translations that diverge from the English or suggest an attempt to provide a defense in the case of an attempt to shirk commitments made by the Chinese side.⁷⁹

A worthwhile case study on the importance of language in negotiations with China is Xi Jinping’s 2015 “pledge” to not militarize features in the South

71 Wendy Wu, *Lost in translation? How verbal mishaps and lack of Chinese-language document threaten US-China trade deal*, S. CHINA MORNING POST (Mar. 28, 2019, 12:28 PM), <https://www.scmp.com/news/china/diplomacy/article/3003597/lost-translation-how-verbal-mishaps-and-lack-chinese-language>.

72 See Shining Tan, *Clarity & Ambiguity in the U.S.-China Phase-1 Deal*, CTR. FOR STRATEGIC AND INT’L STUD. (Mar. 18, 2020), <https://www.csis.org/blogs/trustee-china-hand/clarity-ambiguity-us-china-phase-1-deal>.

73 See *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995) (“Though ‘shall’ generally means ‘must,’ legal writers sometimes use, or misuse, ‘shall’ to mean ‘should,’ ‘will,’ or even ‘may.’”).

74 Keith Bradsher, *U.S.-China Trade Talks End With Strong Demands, but Few Signs of a Deal*, N.Y. TIMES (May 4, 2018), <https://www.nytimes.com/2018/05/04/business/china-us-trade-talks.html>.

75 See Zhangjun Lian & Ting Jiang, *A Study of Modality System in Chinese-English Legal Translation from the Perspective of SFG*, 4 THEORY AND PRAC. IN LANGUAGE STUD., 497, 499 (2014).

76 Bian Wu, *Chinese Translation of Modal Verb Shall in Shakespeare’s Measure for Measure*, 11 INT’L N. LINGUISTICS 53 (2019).

77 See Yu Wentang (余文唐), *Woguo Faluzhong “Keyi,” “Bixu” he “Yingdang” de Hanyi, Qubie he Yingyong (我国法律中“可以”、“必须”和“应当”的含义、区别和应用)* [*The Meaning, Differences, and Applications of “Can,” “Must,” and “Shall” in Chinese Law*], Geren Tushuguan (个人图书馆) [Personal Library] (July 7, 2020), http://www.360doc.com/content/20/0707/09/819919_922727632.shtml.

78 *Id.*

79 Adams Lee & Dan Harris, *The US-China “Phase One” Deal — No Text, No Translation. What, Me Worry?*, CHINA LAW BLOG (Jan. 14, 2020), <https://www.chinalawblog.com/2020/01/the-us-china-phase-one-deal-no-text-no-translation-what-me-worry.html>.

China Sea.⁸⁰ During his visit to the White House Rose Garden, Xi remarked that “China does not intend to pursue militarization”⁸¹ of the Spratly Islands, the sovereignty over which remains disputed.⁸² This remark was a high-level political commitment rather than a binding treaty under international law, but the linguistic nuances are important to illustrate how China approaches commitments made in the international arena. Xi used the word “无意,” or “to have no intention of,” to signify that China had no intention of militarizing the Spratly Islands.⁸³ U.S. officials saw this word as a commitment of sorts,⁸⁴ and the Trump administration’s State Department subsequently referred to Xi’s statement as “empty promises.”⁸⁵ Most of the Chinese government readouts of the appearance, meanwhile, do not even mention this statement.⁸⁶ The fact that the U.S. side appeared to take this statement at face value provides an important lesson for future negotiations with China, whether on trade or otherwise. In the future, U.S. negotiators might consider insisting on the use of higher value modal verbs, such as “必须,” or must, to avoid the possibility of Chinadownplaying or walking back on its commitments.

III. WHERE THINGS STAND IN CHINA

As the case of the EPS market demonstrates, much of China’s prospective market openings can be little more than words on paper until the Chinese leadership has the political will to ensure that its bureaucratic apparatus sees their implementation through. As a result, what happens on the ground following the inking of any bilateral or multilateral agreement will elucidate whether foreign participants in the market can expect any follow-through. Still, it is important to track developments in China’s domestic legislation and official interpretations thereof, which not only reflect the priorities of the Chinese Communist Party (“CCP”) leadership but also serve as guidelines for the lower-level bureaucracy that oversees day-to-day implementation.

80 Jeremy Page et al., *China’s President Pledges No Militarization in Disputed Islands*, WALL ST. J. (Sept. 25, 2015, 6:00 PM), <https://www.wsj.com/articles/china-completes-runway-on-artificial-island-in-south-china-sea-1443184818>.

81 Press Release, White House Office of the Press Secretary, Remarks by President Obama and President Xi of the People’s Republic of China in Joint Press Conference (Sept. 25, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/09/25/remarks-president-obama-and-president-xi-peoples-republic-china-joint>.

82 See, e.g., Richard Javad Heydarian, *US torpedoes China with South China Sea sanctions*, ASIA TIMES (Dec. 2, 2020), <https://asiatimes.com/2020/12/us-torpedoes-china-with-south-china-sea-sanctions/>.

83 *User Clip: General Secretary Xi’s Broken Promise in the South China Sea*, C-SPAN (Sept. 27, 2020), <https://www.c-span.org/video/?c4910122/user-clip-general-secretary-xis-broken-promise-south-china-sea/>.

84 See Page et al., *supra* note 80.

85 Press Statement, Morgan Ortagus, Dep’t Spokesperson, U.S. Dep’t of St., China’s Empty Promises in the South China Sea (Sept. 27, 2020), <https://www.state.gov/chinas-empty-promises-in-the-south-china-sea/>.

86 See, for example, the coverage of Xi’s visit by China’s state-run Xinhua News Agency. *Xi Jinping Chuxi Meiguo Zongtong Aobama Zai Baigong Juxing de Huanying Yishi* (习近平出席美国总统奥巴马在白宫举行的欢迎仪式) [*Xi Jinping Appears at White House Welcome Ceremony Hosted by U.S. President Obama*], XINHUANET (新华网) [XINHUANET] (Sept. 26, 2015, 1:25 AM), http://www.xinhuanet.com/world/2015-09/26/c_1116684419.htm.

A. IP Protection Regime

Prior to the finalization of the Phase One Deal, China had already accelerated the process of improving its IP protection regime. These include reforms targeting adjudication of IP disputes, updates to domestic laws, and interpretations of relevant issues by the Supreme People’s Court.

1. Judicial Structure and Jurisprudence

A number of reforms related to China’s judicial structure for the adjudication of IP-related claims are notable. First, pursuant to an October 2018 decision by the National People’s Congress—China’s legislature—China established a new IP Court of Appeal within the Supreme People’s Court on January 1, 2019.⁸⁷ The new appellate court will play a similar role to the Court of Appeals for the Federal Circuit in the United States.⁸⁸ The court will handle technology-related infringement cases as well as patent cases, and commentators have noted that its creation may “lead to greater consistency and efficiency in the adjudication of high-tech cases in China, and may lead, in some cases, to the joint hearing of validity and infringement arguments at the appellate level.”⁸⁹

January 1, 2019 was also the date on which new regulations for interim and preliminary injunctions came into effect. This was an improvement to the existing IP adjudication system and was seen as an attempt to help foster a more liberal approach to temporary injunctions by Chinese courts, which have been less inclined to issue such rulings in the past.⁹⁰ These regulations serve to bolster the likelihood of effective implementation of commitments made by China in the Phase One Deal to provide expeditious remedies such as injunctions in the context of trade secret and patent disputes.

Developments in the jurisprudence of the Supreme People’s Court are also worth noting. In September 2019, the Court issued a significant ruling related to trademark infringement in the context of original equipment manufacturing (“OEM”), finding that affixing trademarks on goods manufactured under an OEM license does constitute trademark use and may infringe on Chinese trademarks.⁹¹ This ruling effectively means that such practices could more easily be found to constitute trademark infringement, though its overall impact remains to be seen. Separately, and following the conclusion of the Phase One Deal, the Supreme People’s Court (“SPC”) issued an important interpretive document on trade secret protection in June 2020. Such

87 See Grace Guo & Stefaan Meuwissen, *China: looking back at 2019’s main IP developments and looking forward at what 2020 may bring*, JD SUPRA (Apr. 13, 2020), <https://www.jdsupra.com/legalnews/china-looking-back-at-2019-s-main-ip-93099/>.

88 Eugene Low et al, *China: New National-Level Appeal Court – Improved Consistency and Efficiency in High-Tech IP Cases*, HOGAN LOVELLS (Nov. 9, 2018), <https://www.engage.hoganlovells.com/knowledgeservices/news/china-new-national-level-appeal-court-cautious-hopes-for-improved-consistency-and-efficiency-in-high-tech-ip-patent-cases>.

89 Guo & Meuwissen, *supra* note 87, at 1.

90 See *What you need to know about China’s new Regulations on interim injunctions in IP cases*, HOGAN LOVELLS (Feb. 28, 2019), [https://f.datasrvr.com/fr1/319/20320/\(2019.02.28\)_China_updates_its_rules_on_interim_injunctions_PDF.pdf](https://f.datasrvr.com/fr1/319/20320/(2019.02.28)_China_updates_its_rules_on_interim_injunctions_PDF.pdf).

91 Jonathan Liang et al., *Dust unsettled? China’s Supreme Court refines OEM jurisprudence in ground-breaking Honda judgment.*, LEXOLOGY (Nov. 29, 2019), <https://www.lexology.com/library/detail.aspx?g=483f924a-cbac-4308-ae24-e1c36558729a>.

“judicial interpretations” “are quasi-legislative enactments of the SPC that can have the force of law.”⁹² The interpretation includes multiple provisions that track with existing U.S. law on trade secret protection and also effectively implements China’s commitment in Article 1.5 of the Phase One Deal to shift the burden of proof to the defendant to show that there was no misappropriation once the plaintiff has established a *prima facie* case.

2. Legislation and Regulation

In addition to updating the framework for adjudication of IP disputes, China promulgated a number of legislative and regulatory enactments in 2019 that are also significant in the context of the Phase One Deal.

First, China issued draft amendments to the Patent Law in January 2019, which included “*inter alia*, higher damages for patent infringement, more options for rewarding inventors under an employee invention remuneration scheme, and patent term extensions for design patents and pharmaceutical patents.”⁹³ China made further amendments to this law following the finalization of the Phase One Deal in an apparent attempt to implement its commitments on patent protection for pharmaceuticals.⁹⁴

China also made amendments to its Trademark Law and Anti-Unfair Competition Law in 2019, effectively implementing commitments it would subsequently make in the Phase One Deal. Namely, the amendments to the Trademark Law effectively implement the commitment made in Article 1.24 regarding enforcement against bad-faith trademarks and the amendments to the Anti-Unfair Competition Law in terms of codifying the expanded scope of what constitutes a trade secret and shifting the burden of proof to the defendant in trade secret cases.

B. Foreign Investment Regime

China’s foreign investment regime, which continues to present considerable barriers to market access,⁹⁵ surprisingly played little to no role in the bilateral negotiations toward the Phase One Deal. As the United States continues to press for structural reforms to China’s economy, this is an important area to watch.⁹⁶ The lack of any language regarding China’s foreign investment regime in the Phase One Deal, save for the developments related to investment in financial companies, may reflect China’s unwillingness to put foreign control of what it

92 James Pooley, *Has China Finally Embraced Robust Trade Secret Protection?*, IPWATCHDOG (June 14, 2020), <https://www.ipwatchdog.com/2020/06/14/china-finally-embraced-robust-trade-secret-protection/id=122471/>.

93 Guo & Meuwissen, *supra* note 87 at 2.

94 See Client Alert: *China Draft Patent Law Amendment Introduces Initial Framework for Patent Linkage for Pharmaceutical Patents and Patent Term Adjustment and Restoration*, COVINGTON (July 14, 2020), https://www.cov.com/media/files/corporate/publications/2020/07/china_draft_patent_law_amendment_introduces_initial_framework_for_patent_linkage_for_pharmaceutical_patents_and_patent_term_adjustment_and_restoration.pdf.

95 See Austin Lowe, *China misses its chance to clear up doubts about the Foreign Investment Law*, S. CHINA MORNING POST (Jan. 16, 2020, 1:00 AM), <https://www.scmp.com/comment/opinion/article/3045898/china-misses-its-chance-clear-doubts-about-foreign-investment-law>.

96 See Lowe, *supra* note 51.

perceives as politically sensitive sectors on the negotiating table. But until China does so, there is little likelihood that one will witness fundamental changes to the country’s state-directed capitalist model.

1. Foreign Investment Law

China released its draft Foreign Investment Law for public comment and eventually promulgated it on an accelerated timeline in 2019. The ongoing bilateral trade talks with the United States likely prompted a sense of urgency in this regard.⁹⁷ For example, the law itself contained key provisions to address U.S. concerns in the area of technology transfer.⁹⁸ Despite this, the law’s vague provisions give China much leeway to intervene in the approval of foreign investments, whether for political retaliation or national security purposes.⁹⁹

2. Negative Lists

The Foreign Investment Law merely serves as the basic law governing foreign direct investment (“FDI”) in China. What sectors are encouraged, restricted, or prohibited in terms of foreign investment is governed by China’s negative lists. In recent years, and arguably irrespective of the Trump administration’s China trade policy, China has progressively reduced the number of sectors that are closed off to FDI,¹⁰⁰ including through the removal of joint venture (“JV”) requirements. This is also the means through which China eliminated its previous caps on foreign investment in financial companies. Despite the often-touted claim that China requires foreigners to enter into a JV to invest in its markets, this has always been a sector-specific barrier dictated by the negative lists. Thus, the negative lists are arguably the most important feature of China’s foreign investment regime, as they determine whether sensitive sectors such as media, the Internet, and information and communications technology are open to FDI.

The most recent updates to the negative lists—the national list and the free trade zone-specific list—reduced barriers in a number of sectors. First, the JV requirement infrastructure was removed. Additional openings were seen in manufacturing and agriculture by reducing the ownership requirements for foreign players, though these sectors are still not fully liberalized and require a JV to invest. Newly opened sectors include nuclear fuel production and radioactive minerals processing, urban water supply and drainage networks, tobacco, and air traffic control. These openings were arguably driven more by the Chinese leadership’s concerns over economic growth and the ongoing economic effects of the COVID-19 pandemic.¹⁰¹

⁹⁷ See BLUSTEIN, *supra* note 7, at 253.

⁹⁸ See Lowe, *supra* note 51.

⁹⁹ *Id.*

¹⁰⁰ Qian Zhou, *China’s 2020 New Negative Lists Signal Further Opening-Up*, DEZAN SHIRA & ASSOCIATES (July 1, 2020), <https://www.china-briefing.com/news/chinas-2020-new-negative-lists-signals-further-opening-up/>.

¹⁰¹ See Jonathan Bench, *China Updates its Negative Lists, Dropping Restricted Categories by Nearly 25%*, CHINA L. BLOG (Aug. 2, 2020), <https://www.chinalawblog.com/2020/08/china-updates-its-negative-lists.html>.

Aside from the full liberalization of investment in financial companies, which China had already planned prior to negotiations on the Phase One Deal, none of these openings appear to directly address the concerns voiced by the Trump administration. One wonders why the administration chose to focus on the trade imbalance when China was already making moves toward liberalizing its investment regime and could arguably have been pushed to liberalize in areas such as services where the United States has a comparative advantage.

V. RECOMMENDATIONS

The Trump administration’s attempt at negotiating the Phase One Deal was an admirable effort, particularly for its recognition that the trajectory of U.S.-China economic relations was no longer sustainable. The major constraint on the negotiations, however, was that the main leverage employed by the Trump administration—the existing tariffs and the threat of additional action—did not provide China with any real incentive to reform its economic model. The reality is that China has already reaped the benefits of the multilateral trading system while managing to evade implementation of many of its commitments in the process. Unilateral pressure, even from the most powerful country in the world, is simply not enough to change the political calculus of the leadership in Beijing.

Where, then, does the United States go from here? If the major lesson from the experience of the Phase One Deal is that unilateral pressure is insufficient, then the natural next step is to consider plurilateral and multilateral options. Luckily, there is an appetite for such an arrangement among major U.S. allies and partners. In the WTO context, the most prominent examples are attempts by the United States, the European Union (“EU”), and Japan to rewrite the rules on state subsidies, with China viewed as the major culprit in this regard.¹⁰² The Biden administration has also demonstrated its intention to return to a more traditional approach to U.S. foreign policy that involves multilateralism and concerted diplomacy over the unilateralism characteristic of its predecessor. All of this suggests that now is the opportune moment to build a global coalition focused on combating China’s nefarious economic behavior. The question is how to approach this in the context of trade.

The WTO is not obsolete, but it does require reform to account for new political and economic realities. The consensus-based system has proven to be ineffective in encouraging a shift to market-based capitalism in China; indeed, the system was created “before the developments in China that created a unique economic structure not envisioned by the rule drafters.”¹⁰³ Moreover, trade in new technologies, particularly in the areas of telecommunications and software, presents novel challenges that implicate national security and does not fit neatly into twentieth-century style economic relations envisioned by the GATT and WTO. As a result, the United States must take the lead in creating new regimes to address such challenges while also maintaining pressure on China bilaterally

102 See Philip Blenkinsop, *U.S., EU, Japan agree new subsidy rules with China trade in focus*, REUTERS (Jan. 14, 2020, 8:58 AM), <https://www.reuters.com/article/us-trade-wto-subsidies-idUSKBN1ZDIRM>.

103 BLUSTEIN, *supra* note 7, at 145.

to ensure the protection of U.S. economic interests at home and within China. The Biden administration should consider a number of avenues for action in this regard.

A. NEAR TERM

First, the Biden administration should maintain unilateral pressure on China through the use of existing trade tools. USTR Katherine Tai has already made a decision to maintain the existing Section 301 tariffs on Chinese imports.¹⁰⁴ Although not ideal from a trade liberalization perspective, the tariffs have proven to provide at least a modicum of leverage in getting China to the negotiating table. There is currently no virtue in extending overtures to China with no end goal in mind, and the new Administration would be folly to immediately reward the Chinese government for its recent behavior on issues such as the South China Sea¹⁰⁵ and the ongoing genocide in Xinjiang.¹⁰⁶

A related approach would see the United States be more aggressive in targeting Chinese subsidies by expanding the scope of countervailing duty (“CVD”) investigations to focus more on an entity’s ties to the CCP. Such a proposal is already reflected in the so-called Public Bodies Memorandum issued by the Department of Commerce on May 18, 2012, in response to the Appellate Body’s finding that Chinese state-owned enterprises (“SOEs”) did not constitute public bodies within the meaning of Agreement on Subsidies and Countervailing Measures.¹⁰⁷ Following the *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* decision, Commerce began requesting information on the role played by the CCP in management and boards of directors in subsidy investigations.¹⁰⁸ A formalization of this approach is all the more necessary given the increasing role that the CCP plays in not only SOEs but also private firms.¹⁰⁹ Given that the CCP reigns supreme across all aspects of the Chinese economy, a more liberal use of CVD investigations would send a strong message that Washington will not sit idly by as China finds novel ways to exact control over domestic companies that were simply not contemplated by the WTO rules.

Second, the Biden administration should reaffirm its commitment to multilateral trade but refrain from addressing its core trade disputes with China to the WTO in the near term.¹¹⁰ This would reflect a recognition that, even if there has been some success in holding China accountable through DSB

104 Bob Davis & Yuka Hayashi, *New Trade Representative Says U.S. Isn’t Ready to Lift China Tariffs*, WALL ST. J. (March 28, 2021, 2:22 PM), <https://www.wsj.com/articles/new-trade-representative-says-u-s-isnt-ready-to-lift-china-tariffs-11616929200>.

105 See Steven Stashwick, *China’s South China Sea Militarization Has Peaked*, FOREIGN POL’Y (Aug. 19, 2019, 4:12 PM), <https://foreignpolicy.com/2019/08/19/chinas-south-china-sea-militarization-has-peaked/>.

106 Lindsay Maizland, *China’s Repression of Uighurs in Xinjiang*, COUNCIL ON FOREIGN RELS. (June 30, 2020), <https://www.cfr.org/backgrounders/chinas-repression-uighurs-xinjiang>.

107 See BLUSTEIN, *supra* note 7, at 164.

108 *Id.* at 165.

109 Lingling Wei, *China’s Xi Ramps Up Control of Private Sector. ‘We Have No Choice but to Follow the Party.’*, WALL ST. J. (Dec. 10, 2020, 10:05 AM), <https://www.wsj.com/articles/china-xi-clampdown-private-sector-communist-party-11607612531>.

110 Cf. BLUSTEIN, *supra* note 7, at 218 (arguing that the WTO should still serve as the “chief policy instrument for dealing with Beijing”).

proceedings,¹¹¹ fundamental reforms are required in terms of how to address the challenges posed by China’s unique economic model. Before addressing any such reform in the medium to long term, the new administration should form a coalition with like-minded allies and partners to identify shared concerns unique to trade in the twenty-first century and work toward the creation of a new interim body, separate from the WTO, that includes a focus on the digital economy—namely, telecommunications (particularly fifth generation, or 5G, technology), software, and related issues regarding censorship, surveillance, and espionage.¹¹² Such considerations are already in progress with the promulgation of a proposal by the EU to form a new partnership focused on advancing democratic values in the digital economy.¹¹³ The creation of a separate body stems from a recognition that China, with its Great Firewall and tendency to leverage new technologies for authoritarian purposes, cannot currently be integrated into any regime focused on developing democratic and market-driven principles in the digital economy and technosphere more broadly. This coalition could also serve as the forum to finalize discussions on how the countries can jointly approach the issue of state subsidies vis-à-vis China and eventually use this consensus to precipitate long-term reform of the WTO.

Third, the Biden administration should begin the process of re-joining the TPP, which has been renamed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”). The United States played an instrumental role in the initial negotiations during the Obama administration,¹¹⁴ but domestic skepticism of free trade in the lead-up to the 2016 presidential election led leaders in both parties to criticize the agreement and made ratification in Congress impossible.¹¹⁵ Trump withdrew from the agreement upon taking office,¹¹⁶ and it is unclear whether Biden would be willing or able to rally the political capital necessary to gain sufficient support for the agreement in Congress. This represents another major challenge for the Administration in communicating the benefits of free trade and multilateralism to the voting public, which has become more skeptical of free trade agreements in recent years, though support for such agreements generally appears to be on the rise.¹¹⁷ Biden must ensure that he does not alienate the more progressive wing of the Democratic party while also reframing the messaging around the benefits of free trade and globalization to assuage skeptics on both sides of the aisle.

111 *Id.* at 144, 229.

112 Austin Lowe, *Toward a New International Order for the Digital Economy*, LAWFARE (Mar. 17, 2021, 8:01 AM), <https://www.lawfareblog.com/toward-new-international-order-digital-economy>.

113 See Sam Fleming et al., *EU proposes fresh alliance with US in face of China challenge*, FIN. TIMES (Nov. 29, 2020), <https://www.ft.com/content/e8e5cf90-7448-459e-8b9f-6f34f03ab77a>.

114 See Daniel C.K. Chow, *How the United States Uses the Trans-Pacific Partnership to Contain China in International Trade*, 17 CHI. J. INT’L L. 370 (2016).

115 See Alan Yuhas, *Congress will abandon Trans-Pacific Partnership deal, White House concedes*, THE GUARDIAN (Nov. 12, 2016, 8:14 PM), <https://www.theguardian.com/business/2016/nov/12/tpp-trade-deal-congress-obama>.

116 Donald J. Trump, *Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement*, WHITE HOUSE (Jan. 23, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific-partnership-negotiations-agreement/>.

117 *Climate Change and Russia Are Partisan Flashpoints in Public’s Views of Global Threats*, PEW RSCH. CTR. (July 30, 2019), <https://www.pewresearch.org/politics/2019/07/30/climate-change-and-russia-are-partisan-flashpoints-in-publics-views-of-global-threats/>.

The most important function of joining the CPTPP, in addition to reaffirming the U.S. commitment to free trade, would be to provide a basis for future negotiations among like-minded countries on WTO reform and the aforementioned regime for the digital economy. The CPTPP includes shared commitments on SOEs, electronic commerce, and competition policy.¹¹⁸ The United States could employ these provisions as a starting point to generate negotiations with CPTPP members on long-term WTO reform.

B. MEDIUM TO LONG TERM

The Biden administration should focus less on the bilateral trade imbalance and more on ensuring that U.S. companies can compete on a level playing field in the Chinese market.

First, the Biden administration should seek to increase market access for U.S. investors and companies in China by pushing for the finalization of a bilateral investment treaty (“BIT”). Efforts to negotiate such a treaty accelerated toward the end of the Obama administration,¹¹⁹ but the two sides failed to reach a final outcome.¹²⁰ Following a record-high level of Chinese FDI to the United States in 2016, bilateral FDI levels declined significantly in tandem with the onset of the U.S.-China trade war.¹²¹

A high-standard BIT with China could provide numerous economic benefits for the United States. This is evidenced by the past success of BITs in reducing investment barriers.¹²² If the agreement were to include the provisions envisioned in the U.S. Model BIT,¹²³ which was finalized by the Obama administration in 2012, then it could reduce the number of sectors closed off to investment in China and also provide for a formal investor-state dispute settlement process.

There will likely be little appetite for such an agreement in the near term, especially in light of increased regulatory scrutiny of Chinese investment in the United States—particularly in what Congress has deemed “critical technology” or “critical infrastructure.”¹²⁴ As a result, the United States should devote resources to the pursuit of such an agreement only if it has made inroads in other areas of the relationship. Still, such an agreement is necessary if reciprocity in the bilateral investment relationship is ever to be achieved.

Second, the Biden administration should look to revive interest in trade liberalization in the area of services. The GATS has proven to be ineffective in generating widespread reductions in barriers to market access, so much so that twenty-three parties, including the United States, began negotiations on a Trade

118 See BLUSTEIN, *supra* note 7, at 215–16.

119 See Gordon G. Chang, *U.S., China Rushing Investment Treaty At End Of Obama Term*, FORBES (Nov. 6, 2016, 12:01 AM), <https://www.forbes.com/sites/gordonchang/2016/11/06/u-s-china-rushing-investment-treaty-at-end-of-obama-term/?sh=16012269713a>.

120 WAYNE M. MORRISON, CONG. RSCH. SERV., IF10307, A U.S.-CHINA BILATERAL INVESTMENT TREATY (BIT): ISSUES AND IMPLICATIONS (2018).

121 Thilo Hanemann et al., *Two-Way Street – US-China Investment Trends – 2020 Update*, RHODIUM GROUP (May 11, 2020), <https://rhg.com/research/two-way-street-us-china-investment-trends-2020-update/>.

122 See PETERSON INST. FOR INT’L ECON., TOWARD A US-CHINA INVESTMENT TREATY 4 (2015).

123 OFF. OF THE U.S. TRADE REP., U.S. MODEL BILATERAL INVESTMENT TREATY (2012).

124 Stephanie Zable, *The Foreign Investment Risk Review Modernization Act of 2018*, LAWFARE (Aug. 2, 2018, 3:39 PM), <https://www.lawfareblog.com/foreign-investment-risk-review-modernization-act-2018>.

in Services Agreement outside the auspices of the WTO in 2013.¹²⁵ Despite being outside the bounds of the WTO, the agreement is intended to eventually be incorporated into the GATS once it can secure enough support among member states.¹²⁶ Although negotiations stalled in 2016, this framework could be revived under the Biden administration and seek to incorporate newly developed rules for the digital economy among like-minded states.¹²⁷ If successful, this approach could precipitate needed reforms and adapt WTO rules to twenty-first-century realities.

Third, the United States can build support for a currently unprecedented case against China for both violating substantive WTO commitments and nullifying and impairing the benefits WTO members expected to receive. Jennifer Hillman, a former member of the Appellate Body, has proposed that the United States join a broad coalition of like-minded countries in bringing a “broad and deep” case against China for failing to live up to its WTO commitments and addressing the systemic issues in its economy.¹²⁸ Specifically, such a case would address China’s unwritten policy of forced technology transfer, discriminatory licensing restrictions, investment restrictions, and state subsidies, among other practices, while also bringing a non-violation claim alleging that China’s economy fails to meet the expectations of WTO members that its market be based on “open, market-oriented policies” as provided for in the 1994 Marrakesh Declaration establishing the WTO.¹²⁹ This would serve as a concurrent, complementary effort to plurilateral talks among a select set of members to reinforce the significance of the body itself as the central mechanism for mediating disputes in international trade.

Fourth, the United States must prepare for a degree of so-called “decoupling” in the U.S.-China economic relationship,¹³⁰ as senior Biden administration officials have already done.¹³¹ Certain Chinese policies present a fundamental threat to both U.S. interests and the liberal, rules-based international order. Although the openness of the U.S. economy serves as a virtue and a strength, the United States must adopt measures to ensure that national security is not endangered by next-generation threats, many of which stem from China’s technology-enabled model of authoritarianism. The United States can continue to seek trade liberalization with other nations while recognizing that certain mechanisms, including those that may traditionally be viewed as protectionist, may be necessary to ensure its security.

125 *Trade in Services Agreement*, OFF. U.S. TRADE REP., <https://ustr.gov/TiSA>.

126 Rachel F. Fefer, CONG. RSCH. SERV., R44354, *TRADE IN SERVICES AGREEMENT (TiSA) NEGOTIATIONS: OVERVIEW AND ISSUES FOR CONGRESS* (2017).

127 Sam Dupont, *The Biden Administration Should Pursue a Digital Trade Agreement*, SLATE (Nov. 23, 2020, 9:00 AM), <https://slate.com/technology/2020/11/digital-trade-agreement-biden.html>.

128 *See U.S. Tools to Address Chinese Market Distortions: Hearing Before the U.S.-China Econ. And Security Review Comm’n*, 115th Cong. (2018) (statement of Jennifer A. Hillman, Professor from Practice, Georgetown Law School).

129 *Id.*

130 *See, e.g.*, Brendan Greeley, *Trump raises prospect of ‘decoupling’ US economy from China*, FIN. TIMES (Sept. 7, 2020), <https://www.ft.com/content/06047bc5-81dd-4475-8678-4b3181d53877>.

131 *Yellen says U.S. may decouple to some extent from China to protect security*, REUTERS (June 16, 2021, 12:37 PM), <https://www.reuters.com/world/us/yellen-says-us-may-decouple-some-extent-china-protect-security-2021-06-16/>.

CONCLUSION

Lighthizer was prescient in his assessment that the WTO was ill-equipped to address the systemic challenges posed by China. During his testimony before the U.S.-China Economic and Security Review Commission in 2010, he opined that “the WTO dispute settlement system is simply not designed to deal with a legal and political system so at odds with the basic premises on which the WTO was founded.”¹³² To Lighthizer’s credit, the Section 301 tariffs were somewhat successful in bringing China back to the negotiating table and making progress in areas where the United States had made little headway for years. Such unilateral measures, however, are insufficient to address the myriad challenges posed by the China model under Xi. Systemic issues require systemic solutions, and the United States must work with allies and partners to determine the best path forward in the near term and the future.

The failure to successfully rein in China’s predatory economic practices will have ramifications beyond the trade realm. Indeed, it will enable a techno-totalitarian regime espousing an outmoded ideology to maintain its power through state-directed economic policies and, in turn, continue to oppress the Chinese people. At a very basic level, the United States must approach the next phase of negotiations with China with a recognition that the CCP regime poses an existential threat to the liberal international order developed under U.S. leadership. The trendlines are already clear in this regard—the Biden administration must simply seize the opportunity to coalesce with the international community and reinvigorate U.S. leadership in a twenty-first-century context.

¹³² Lighthizer, *supra* note 13, at 16–17.