



# ECONOMIC AND TRADE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE PEOPLE'S REPUBLIC OF CHINA FACT SHEET

## INTELLECTUAL PROPERTY

The Phase One economic and trade agreement signed by the United States and China on January 15, 2020, includes a chapter on intellectual property (IP) that strengthens protection and enforcement of IP in China. These high-standard provisions will help secure a level playing field for American companies and preserve American competitiveness.

The IP chapter addresses numerous longstanding concerns in the areas of trade secrets, patents and pharmaceutical-related intellectual property, geographical indications, trademarks, and enforcement against pirated and counterfeit goods. The United States and China also agreed to address additional IP issues, including with respect to data protection for pharmaceuticals, unauthorized camcording of motion pictures, and copyright protection for sporting event broadcasts, in future negotiations.

The IP chapter requires China to promulgate an Action Plan that will outline the structural changes that China will take to implement its obligations under this chapter. China must also provide a public comment period of at least 45 days for all proposed implementation measures.

### Trade Secrets

Trade secret theft threatens to diminish U.S. competitiveness around the globe and puts U.S. jobs at risk. The IP chapter strengthens protections for trade secrets and enforcement against trade secret theft in China, a top priority for the United States. In particular, the IP chapter requires China to:

- Expand the scope of civil liability for trade secret misappropriation beyond entities directly involved in the manufacture or sale of goods and services,

so that trade secret owners can bring suit against any natural or legal persons, including individual former employees or cyberhackers.

- Cover acts such as electronic intrusions, breach of confidentiality, and inducement of a breach of confidentiality as prohibited acts of trade secret theft.
- Level the playing field by shifting the burden of producing evidence or burden of proof in civil cases to the defendants when trade secret owners have a reasonable indication of trade secret theft.
- Make it easier for trade secret owners to obtain preliminary injunctions to prevent the use of stolen trade secrets before the trade secret has lost its value.
- Allow for the initiation of criminal investigations for trade secret theft without the need to show actual losses, which are difficult to prove before the trade secret has lost its value.
- Ensure that criminal enforcement is available for willful trade secret misappropriation, including a requirement for China's system to at least cover theft, fraud, physical or electronic intrusion for an unlawful purpose, and the unauthorized or improper use of a computer system in the scope of prohibited acts.
- When undisclosed information, trade secrets, or confidential business information is submitted to the central or sub-central levels of government, prohibit the unauthorized disclosure of such information by government personnel or third-party experts or advisors, including:
  - limiting requests for information to no more than necessary for the legitimate exercise of investigative or regulatory authority;
  - limiting access to submitted information to only government personnel necessary for the exercise of legitimate investigative or regulatory functions;
  - ensuring that third party experts or advisors with conflicts of interest do not have access to such information; and
  - providing deterrent criminal, civil, and administrative penalties, including monetary fines, the suspension or termination of

employment, and imprisonment, for the unauthorized disclosure of a trade secret or confidential business information.

### **Patents and Pharmaceutical-Related Intellectual Property**

Robust protection of intellectual property is critical to incentivizing the development of new and innovative treatments and cures. The IP chapter requires China to:

- Establish a mechanism for the early resolution of potential pharmaceutical patent disputes, including a cause of action to allow a patent holder to seek expeditious remedies before the marketing of an allegedly infringing product, so that innovative pharmaceutical companies can effectively enforce their rights in China.
- Provide patent term extensions to compensate for unreasonable patent office and marketing approval delays that cut into the effective patent term.
- Permit the use of supplemental data to meet relevant patentability criteria for pharmaceutical patent applications.

### **Trademarks and Geographical Indications**

The IP chapter will enhance protections for U.S. brand names and also will help address the potential for inappropriately “overprotecting” geographical indications (GIs) in ways that shut out U.S. agricultural and food producers. The IP chapter requires China to:

- Address longstanding concerns regarding bad-faith trademark registrations, such as by invalidating or refusing bad faith trademark applications.
- Ensure that any GI measures taken in connection with an international agreement do not undermine market access for U.S. exports to China using trademarks and generic terms.
- For GIs, use relevant factors when making determinations for genericness, including usage of a term in dictionaries, newspapers, and websites, how the good referred to by a term is marketed and used in trade, and whether the term is used in relevant standards.

- Not provide GI protection to individual components of multi-component terms if the individual component is generic.
- Publicly identify which individual components are not protected when granting GI protection to multi-component terms.

### **Enforcement against Pirated and Counterfeit Goods**

According to OECD studies, China continues to be the top source for pirated and counterfeit goods in international trade. In its most pernicious forms, IP infringement endangers the public, such as through exposure to health and safety risks from counterfeit products such as semiconductors, automobile parts, apparel, footwear, toys, cosmetics, and medicines. To address these issues, the IP chapter obligates China to:

- Provide effective and expeditious action against infringement in the online environment, including requiring expeditious takedowns and ensuring the validity of notices and counter-notices.
- Take effective action against e-commerce platforms that fail to take necessary measures against infringement.
- Take effective enforcement action against counterfeit pharmaceuticals and related products, including active pharmaceutical ingredients.
- Significantly increase actions to stop the manufacture and distribution of counterfeits with significant health or safety risks.
- Provide that its judicial authorities shall order the forfeiture and destruction of pirated and counterfeit goods, as well as the materials and implements predominantly used in their manufacture.
- Significantly increase the number of enforcement actions against pirated and counterfeit goods at physical markets in China and that are exported or in transit.
- Ensure, including through third party audits, that government agencies and SOEs only use licensed software.

### **Deterrent-Level Remedies and Penalties and Issues in the Judicial System**

The levels of remedies and penalties have not been sufficient to deter the significant volume of IP theft in China. In addition, certain procedures or other aspects of China's judicial system have created barriers with respect to the ability of U.S. IP owners to effectively enforce their rights. To address these issues, the IP chapter includes obligations for China to:

- Provide deterrent-level civil remedies and criminal penalties for IP theft, including increasing the range of minimum and maximum pre-established damages, sentences of imprisonment, and monetary fines.
- Require the transfer of cases from administrative authorities to criminal authorities when there is a reasonable suspicion of a criminal violation.
- Ensure expeditious enforcement of judgments for violations of intellectual property rights.
- Provide legal presumptions of copyright ownership and waiving certain other requirements for bringing copyright infringement claims.
- Eliminate or streamline requirements for foreign litigants to authenticate evidence for use in Chinese courts.
- Provide a reasonable opportunity to present witnesses and to cross-examine opposing witnesses in civil proceedings.