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INTERNATIONAL BUSINESS ALERT

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Economic and trade agreement with China brings investment opportunity for U.S. companies to enter China market

On Jan. 15, 2020, the United States and China entered into the Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China, which successfully concluded Phase I of trade negotiations between the two countries. Entering into the agreement, both the United States and China recognize that "it is in the interests of both countries that trade grow," that "there is adherence to international norms so as to promote market-based outcomes," and further acknowledge "the existing trade and investment concerns that have been identified by the Parties."

While the agreement does not resolve all concerns, it does address the contentious issues, including:

- Intellectual property protection
- Prohibition on forced technology transfer
- Openness of the financial industry

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China has committed to do more to protect intellectual property, curb the practice of forcing foreign companies to hand over sensitive technology and refrain from manipulating its currency to benefit Chinese exporters.

President Xi Jinping and said China has committed to "continue to further opening up its doors to the rest of the world."

China additionally committed to buy an additional $200 billion in American goods and services by 2021, which provides U.S. companies in the identified industries the opportunity to enter the China market.

At the signing ceremony, China's Vice Premier, Liu He, read a letter from President Xi Jinping and said China has committed to "continue to further opening up its doors to the rest of the world." While it still remains to be determined how the agreement will be enforced, this agreement, in combination with China's amendment of its Foreign Investment Law, Trademark Law, Anti-Unfair Competition Law, the publication of the Negative List and other similar initiatives, signals China's willingness to further open up its market and to provide a fair and transparent legal environment for foreign investment in China.

Strengthened intellectual property protection

One item the U.S. stressed during negotiations was the need for strengthened intellectual property protection. Following China's amendment of its Trademark Law and Anti-Unfair Competition Law in 2019, the agreement provides further details on the protection of trade secrets and confidential business information, including specifying the scope of prohibited acts constituting trade secret misappropriation, burden-shifting in civil trade secret misappropriation cases, the availability of injunctive relief and criminal enforcement efforts to curb trade secret misappropriation.

Pharmaceutical companies receive extra protection under the agreement, including the allowance of supplemental data in the patentability

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determination, early resolution of patent disputes and patent term extension. These protections address issues pharmaceutical companies historically faced in license and patent applications in China. Moreover, the protections call for further amendment of China's patent law to effectively implement those rules. The agreement also calls for the establishment of a system to specifically combat counterfeit medicine or products with health and safety risks.

Piracy and counterfeiting on e-commerce platforms are also addressed with in the agreement, calling upon China to establish a systematic mechanism combating online infringement. Bad faith trademark registration, a prevalent problem for both domestic and foreign companies in China, is also recognized. Mandates for expedited and fair judicial resolution and enforcement to resolve intellectual property cases are laid out in the document as well. While the rules still require effective oversight of implementation, binding rules with enforcement mechanisms mark a solid step forward in protecting intellectual property.

Further prohibition on forced technology transfer

Forced technology transfer, a focused topic during the U.S.-China trade war, is extensively addressed. The agreement provides that anyone shall have access to—and be able to operate openly and freely in—China without any force or pressure to transfer their technology. In addition, no person shall require or pressure another to transfer technology in relation to acquisitions, joint ventures or other investment transactions, and no technology transfer shall be made as a requirement for any type of administrative license application.

Going forward, any license or transfer of technology must be based on market terms that are voluntary and reflect mutual agreement. Moreover, China must not support or direct outbound foreign direct investment activities aimed at acquiring foreign technology with respect to sectors and industries targeted by its industrial plans, particularly the Made in China 2025 plan.

It is worth noting that China's recent Foreign Investment Law, its rules and regulations, Supreme People's Court's interpretations and State Council's opinions all prohibit forced technology transfers. While it remains to be seen how the agreement and other relevant provisions will be enforced,

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particularly by local governments, inclusion in the agreement reflects the willingness of the central government of China to end forced technology transfers.

China's $200 billion shopping list

In entering into the agreement, China committed to import an additional $200 billion in goods and services (based on the 2017 level) identified by the U.S., including:

- $52.4 billion in energy products
- $32 billion in agricultural commodities
- $77.7 billion in manufactured goods
- $37.9 billion in services

In order to ease importation, the agreement provides detailed provisions on safety standards, inspections, and import and export license requirements for U.S. agriculture products such as dairy, meat, poultry and pet food.

While China is committed to making purchases for the next two years, its commitment beyond that is vague. The countries "project that the trajectory" of increased purchases from the U.S. would continue through 2025. Despite the uncertain terms, the agreement brings excellent opportunities for U.S. companies to enter the China market throughout the next few years.

Further opening the market for financial services

For decades, China's financial services market was monopolized by several major Chinese banks and unavailable to foreign investors. Just recently, China started to loosen control on these services and the agreement builds on that by fully opening the market for banking services, credit rating services, electronic payment services, financial asset management (including distressed debt) services, insurance services, securities and fund management. The provisions further loosen the requirements for foreign investors to apply for licenses and permits.

For the first time in China's history, the financial services market is fully open to foreign investors. The importance of which cannot be overlooked. For years, companies like Visa, MasterCard and American Express targeted the China market but had little-to-zero presence because of the restraints

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on foreign investors. The allowance of U.S.-owned credit rating services to rate domestic bonds sold to domestic and international investors is considered a major shift, particularly because China does not currently have a reputable credit rating agency. While it remains very competitive for U.S investors to seize market shares, China's openness to financial services brings unprecedented opportunities for U.S. financial service providers, particularly before China opens up the financial service industry to financial service providers from countries other than the U.S.

Exchange rate transparency

China has notably committed to increase exchange rate transparency. These commitments include adhering to the exchange rate market decision mechanism, avoiding competitive devaluation and apparent exchange rate intervention, publishing exchange rate-related financial data in a timely manner, resolving disputes through consultation between the president of the Chinese Bank of the United States and the United States Treasury, and implementing a new dispute resolution system. In other words, China can no longer unilaterally determine the exchange rate for the renminbi (RMB), China's official currency, going forward, effectively lessening U.S. investors' concerns entering into China.

New dispute resolution system

On the issue of enforcement, the agreement has created a new dispute resolution system. Unlike other dispute resolution systems, which typically refer disputes to a neutral third-party tribunal to decide the dispute, the agreement creates Bilateral Evaluation and Dispute Resolution Offices. When a trade dispute occurs, the country's Bilateral Evaluation and Dispute Resolution Office will receive and subsequently evaluate the complaint from either country. The representative of the party receiving the complaint must address it and respond within 10 days. If the representative is not authorized to handle the dispute, the representative must transfer the complaint to the appropriate official who must address the allegations within 21 days.

The agreement establishes an appeals process where issues can be elevated from mid-level officials up to the offices of the United States Trade Representative and the vice premier of China. If disputes remain unresolved after 45 days, the complaining party is permitted to suspend an obligation to this agreement and potentially resort to additional tariffs

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as deterrence measures, while the other party refrains from potential retaliatory measures in acknowledgement that the deterrent measure was taken in good faith. If the other party chooses to retaliate, the parties may withdraw from the agreement upon written notice, returning the two countries back to a trade war.

While not perfect, this is a solid start

While the agreement aims to ease trade tensions, it is not perfect and leaves several issues unaddressed. Outstanding issues, such as government subsidies, cyber security, and perhaps most importantly, existing tariffs, have been left for Phase II of the negotiations.

At this point, it remains unclear when Phase II will begin, what issues it will address or whether or not it will even happen. However, it appears the U.S. is keeping the $360 billion in existing tariffs on Chinese imports as leverage to force China to abide by the agreement and make further concessions on sensitive issues.

Despite its imperfections, the agreement is a solid start. It has eased the tension between China and the U.S. and ushers in new opportunities for U.S. companies to acquire Chinese market share.

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