USTR Report Blasts Mainland China’s Compliance with WTO Obligations

Mainland China and Russia have failed to embrace the market-oriented economic policies championed by the World Trade Organisation and are not living up to key commitments they made when they joined the WTO, according to the Office of the U.S. Trade Representative’s annual reports on each economy’s compliance with WTO rules. USTR Robert Lighthizer said this year’s reports show that “the global trading system is threatened by major economies who do not intend to open their markets to trade and participate fairly.”

The report on mainland China takes a decidedly sharper tone than in previous years, asserting that the United States erred in supporting mainland China’s entry into the WTO “on terms that have proven to be ineffective in securing China’s embrace of an open, market-oriented trade regime.” Mainland China has not dismantled policies and practices incompatible with the principles of non-discrimination, market access, reciprocity, fairness and transparency, the report states, and instead remains a state-led economy that poses “serious problems” to the United States and other trading partners. Meanwhile, USTR states that Beijing has used the imprimatur of WTO membership to become a dominant player in international trade.

Objectionable policies and practices include requiring or pressuring foreign companies to transfer technology as a condition for securing investment or other approvals; pursuing industrial policies that promote, guide and support domestic industries while simultaneously and actively seeking to impede, disadvantage and harm their foreign counterparts; and using policy tools not employed by other WTO members, including a wide array of state intervention and support that restricts, takes advantage of, discriminates against or otherwise creates disadvantages for foreign enterprises and their technologies, products and services.

The report also signals a shift toward more enforcement and away from the co-operative high-level dialogues of the past 15 years that “have largely failed” to bring mainland China into compliance with its WTO commitments. “WTO rules are not sufficient to constrain China’s market-distorting behavior,” the report states, because mainland Chinese policymakers are ostensibly “not interested in moving toward a true market economy.” Additionally, U.S. trade officials believe that while some problematic policies and practices pursued by Beijing have been found by WTO panels or the Appellate Body to contravene mainland China’s multi-lateral obligations, “many of the most troubling ones are not directly disciplined by WTO rules or the additional commitments that China made in its Protocol of Accession.” The report insists that WTO rules were not created with a state-led economy in mind and mainland China has merely replaced older state-led policies on which it had made commitments with more sophisticated policies and practices.

The report highlights the inability of the United States to secure meaningful, long-lasting...
progress from mainland China through the various co-operative mechanisms that have guided Sino-U.S. trade relations over the past 15 years. For example, at the 2010 Strategic and Economic Dialogue meeting, the 2012 S&E meeting, the 2012 Obama-Xi summit and the 2014 Joint Commission on Commerce and Trade meeting, mainland China committed that foreign companies are free to base technology transfer decisions on business and market considerations and to independently negotiate and decide whether and under what circumstances to assign or licence intellectual property rights to affiliated or unaffiliated enterprises. However, it seems clear to USTR that mainland China’s regulatory authorities do not allow U.S. companies to make their own decisions about technology transfer and the assignment or licencing of intellectual property rights but instead continue to require or pressure foreign companies to transfer technology as a condition for securing investment or other approvals.

The report also states that Beijing has repeatedly committed not to link government procurement preferences to the ownership or development of intellectual property in the mainland, including at the 2010 JCCT meeting, the 2011 S&E meeting and the 2011 JCCT meeting. However, as recently as the November 2016 JCCT meeting the United States brought to mainland China’s attention more than 30 provincial and local measures linking government procurement preferences to the ownership or development of intellectual property in the mainland. Outside the government procurement context, mainland China also has made broad commitments to treat intellectual property owned or developed outside the mainland the same as intellectual property owned or developed in the mainland, including at the 2012 S&E meeting and the 2014 and 2015 JCCT meetings. Still, U.S. officials contend that Beijing continues to pursue various policies outside the government procurement context that require or favour the ownership or development of intellectual property in the mainland.

Moreover, the report observes that mainland China committed at the 2015 Obama-Xi summit, the 2016 S&E meeting and the 2016 JCCT meeting that its “secure and controllable” information and communications technology policies applicable to the commercial sector would not unnecessarily limit or prevent commercial sales opportunities for foreign suppliers of ICT products, services and technologies and would not unnecessarily impose nationality-based conditions and restrictions on the purchase, sale or use of ICT products, services and technologies by commercial enterprises. Nevertheless, the report states, mainland China continues to pursue “myriad mercantilist policies under the guise of cybersecurity, as evidenced by, among other things, significant declines in commercial sales of foreign ICT products and services” in mainland China.

Mainland China has also repeatedly committed to review applications of agricultural biotechnology products in a timely, on-going and science-based manner and to implement specific changes to the review process, including at the 2015 Obama-Xi summit, the 2015 JCCT meeting and the 2016 S&E meeting, as well as during the run-up to the 2017 Comprehensive Economic Dialogue meeting. Yet, mainland China’s approval process remains troubling as mainland Chinese regulatory authorities continue to review applications slowly and without scientific rationale while mainland Chinese companies continue to try to build up their own capabilities in the area of agricultural biotechnology. According to the report, mainland China even issued a new measure after the 2016 S&E meeting that added ambiguity and delay to the approval process without making the previously promised changes.

In all, USTR believes that while mainland China has shown a willingness to take modest
steps to address isolated issues and will sometimes make broader commitments when pressed at very high levels, "it is not prepared to follow through on significant commitments or to make fundamental changes to its trade and investment regime." As a result, the idea that bringing more WTO cases alone will solve on-going problems with mainland China is "naïve at best" because the WTO dispute settlement mechanism "is not effective in addressing a trade regime that broadly conflicts with the fundamental underpinnings of the WTO system."

While the United States will continue to use dispute settlement through the WTO as an enforcement tool, the report states, it will also "take all other steps necessary to rein in harmful state-led, mercantilist policies and practices pursued by China, even when they do not fall squarely within WTO disciplines." Indeed, Washington intends to "rigorously enforce U.S. trade remedy laws" when U.S. interests are being harmed by unfairly traded or surging imports from mainland China and will continue to participate in other multi-lateral fora such as the Global Forum on Steel Excess Capacity.

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