

# U.S. & CHINA

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## Making sense of the big, beautiful monster trade deal: Part #1

By David Kaufman, David Cheng, and Jeff Costellia

The long-awaited details of the Phase 1 trade deal between China and the United States were released on Wednesday, January 15, 2020, shortly after the official signing by President Trump and Vice Premier Liu He. The 96-page Agreement (“Agreement”), which the president has called a “big, beautiful monster,” has extensive detail in some areas and others are left rather vague. In almost all instances, additional work on adopting new regulations, predominantly by China, is required. Therefore, there is still some high degree of uncertainty in the actual new protocols. However, if fully implemented as the drafters intended, the Agreement would create new cross-border trade opportunities for both Chinese and U.S. businesses. The additional intellectual property and other protections could also lead the way for increased investment from the U.S. into China.

While there is quite a lot to still be done, the deal, at least, pauses the economic hostilities and creates some clarity on trade and investment going forward. The Agreement is segmented into six chapters:

- Intellectual property
- Technology transfer
- Trade in food and agricultural products
- Financial services
- Macroeconomic policies and exchange rate matters and transparency
- Expanding trade

In this Alert, we will examine in detail the Intellectual Property (IP) chapter of the agreement that could have an impact on the current trade and investment environment between the world’s two largest economies.

### Trade secrets

In the IP chapter of the Agreement, the parties agree to work on protecting “confidential business information.” The Agreement defines this term as “concerns or relates to the trade secrets, processes, operations, style of works, or apparatus, or to the production, business transactions, or logistics, customer information, inventories, or amount or source of any income, profits, losses, or

expenditures of any person, natural or legal, or other information of commercial value, the disclosure of which is likely to have the effect of causing substantial harm to the competitive position of such person from which the information was obtained.” The Agreement mandates that China beef up its prohibitions around misappropriating these trade secrets, including through electronic intrusion and breaches of confidentiality agreements.

China further is required to shift the burden of proof “to the accused party to show that it did not misappropriate a trade secret once a holder of a trade secret produces” sufficient evidence. The burden is also to shift to the accused party to prove the “trade secret identified by a holder is generally known among persons within the circles that normally deal with the kind of information in question or is readily accessible, and therefore is not a trade secret.” China is also required to modify its current threshold of requiring actual losses before criminal enforcement of trade secret theft. And, China is to put prohibitions on the government accessing trade secrets.

These provisions could give American companies new armor AND ammunition to protect their trade secrets in both China and in the U.S. However, there is quite a bit of additional legislation and regulation required for it to have any real impact. In addition, the practical application, in China, of the provisions will need to be monitored before U.S. companies can really feel that they have additional protections.

## **Piracy and counterfeiting**

China’s robust e-commerce economy has transformed shopping. However, there have been allegations of large quantities of illicit or counterfeit goods for sale on the e-commerce platforms. The Agreement calls on China to strengthen the protections for designers and manufacturers who find their goods misrepresented or counterfeit products online. The Agreement calls for China to make it easier for rights holders to have products removed. In addition, the Agreement calls for the Chinese government to take action against the platforms themselves that sell counterfeit goods, including the revocation of the operator’s license. Plus, the Agreement also calls for “significantly increasing the number of enforcement actions” at “physical markets” as well. As American designers and consumer products companies are contemplating entering or expanding their distribution in the massive China market, these provisions could be significant. However, again, the details regulations and enforcement activity will be important as to the overall impact of the new rules.

## **Geographic indications**

The Agreement pushes back on the use of “Geographic Indications” (GI) to restrict trade between the countries—including agreements around GI with other countries. In addition to increased transparency and protest rights, the Agreement requires China to ensure that “competent authorities, when determining whether a term is generic in China, take into account how consumers understand the term in China.” While setting out a general direction in this area, there is little additional substance that will change the trade dynamic immediately.

## **Pharmaceuticals**

The Agreement impacts IP in the pharmaceutical industry in a few major ways. First, it wants to make getting a patent easier for U.S. companies by China permitting “pharmaceutical patent applicants to rely on supplemental data to satisfy relevant requirements for patentability, including sufficiency of disclosure and inventive step, during patent examination proceedings, patent review

proceedings, and judicial proceedings.” It also provides for a more robust notification and dispute resolution system, including “expeditious remedies,” to thwart infringing drugs and medicines. It also calls on China to engage in “expeditious enforcement action against counterfeit pharmaceutical and related products containing active pharmaceutical ingredients, bulk chemicals, or biological substances.” This effort includes greater transparency—sharing information with the relevant U.S. agencies regarding enforcement actions, raw material cites, and other compliance protocols. These steps could be important as the U.S. grapples with a significant dependence on China-produced drugs and as U.S. pharmaceuticals companies struggle with breaking into the Chinese market.

## **Additional details**

There are a few important procedural changes included in the Agreement. While these changes, on behalf of China, are included in the IP chapter, it is unclear the impact they will have on other legal and administrative areas. These modifications could dramatically change the way U.S. companies interact with the Chinese government and court system.

### ***Patents***

“China agrees the request of the patent owner shall extend the term of a patent to compensate for unreasonable delays, not attributable to the applicant, that occur in granting the patent. For purposes of this provision, an unreasonable delay shall at least include a delay in the issuance of the patent of more than four years from the date of filing of the application in China, or three years after a request for examination of the application, whichever is later.”

### ***Copyrights***

“Legal presumption that, in the absence of proof to the contrary, the person whose name is indicated as the author, producer, performer, or publisher of the work, performance, or phonogram in the usual manner is the designated right holder in such work, performance, or phonogram and that the copyright or related right subsists in such subject matter.”

### ***Document authentication***

“Parties shall not require formalities to authenticate evidence, including requiring a consular official’s seal or chop, that can be introduced or authenticated through stipulation, or witness testimony under penalty of perjury.”

### ***Witness testimony***

“In civil judicial proceedings, China shall afford a party a reasonable opportunity to present witnesses or experts in its case and cross-examine any witness testifying in the proceeding.”

## **Action Plan**

The Agreement calls for China to deliver, within 30 days, an “Action Plan to strengthen intellectual property protection aimed at promoting its high-quality growth. This Action Plan shall include, but not be limited to, measures that China will take to implement its obligations under this chapter and the date by which each measure will go into effect.” To fully implement the provisions in the Intellectual Property chapter, there will need to be significant legislative, policy, regulatory, and practical changes to China’s current structure. It is unclear how this will be accomplished in an expeditious manner. This Action Plan will hopefully give us some insights into the changes and,

importantly, the timetable. We will continue to monitor the public statements and concrete changes by the Chinese government.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

- David Cheng at [dcheng@nixonpeabody.com](mailto:dcheng@nixonpeabody.com) or +852 2171 6212
- Jeffrey Costellia at [jcostellia@nixonpeabody.com](mailto:jcostellia@nixonpeabody.com) or 202-585-8207
- David Kaufman, Director of Global Strategies, at [dkaufman@nixonpeabody.com](mailto:dkaufman@nixonpeabody.com) or 415-984-8241