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Making sense of the big, beautiful monster trade deal: Part #2

By David Kaufman, David Cheng, and Jeff Costellia

As we discussed in [Part #1](#), the long-awaited details of the Phase 1 trade deal between China and the United States were released on Wednesday, January 15, 2020. The Agreement called a “big, beautiful monster” has extensive detail in some areas, and others are left rather vague. In this Alert, we examine Chapter #2 of the Agreement—**Technology Transfer**.

The United States has been critical of what is described as the “forced technology transfer,” by Chinese businesses (supported by the Chinese government), of innovations from the U.S. and other nations. Deputy United States trade representative Dennis Shea is reported to have told the World Trade Organization (WTO) in 2018, “Fundamentally, China has made the decision to engage in a systematic, state-directed, and non-market pursuit of other (WTO) members’ cutting-edge technology in service of China’s industrial policy.” The argument from the U.S. is that in order for American companies to do business in China, they need to share all the details of their intellectual property (sometimes called the “secret sauce”) with Chinese partners. The Chinese government has denied that this is an official practice with the *People’s Daily* responding to the accusation—“A lie repeated a thousand times still is a lie.”

The contentious nature of the dispute has resulted in the most “bilateral” chapter in the Agreement. While other chapters focus mostly on what China is going to do under the Agreement—this chapter uses, mostly, the phrase “the Parties.” The chapter begins with, “The Parties affirm the importance of ensuring that the transfer of technology occurs on voluntary, market-based terms and recognize that forced technology transfer is a significant concern. The Parties further recognize the importance of undertaking steps to address these issues.”

The steps agreed to are, however, very amorphous. The chapter primarily sets general principles that the countries agree to not use “force or pressure” to transfer technology. The most concrete statement of how that will happen reads: “Neither Party shall adopt or maintain administrative and licensing requirements and processes that require or pressure technology transfer from persons of the other Party to its persons.” Essentially, each side is saying that they will eliminate legal restrictions that require the transfer of technology. Additionally, the parties agree “that any enforcement of laws and regulations with respect to persons of the other Party is impartial, fair, transparent, and non-discriminatory.”

The challenge here is that China has previously emphasized that any coercion is not supported by the government. Indeed, critics have pointed out that much of the transfer occurs as a byproduct of other local/industry rules and state-owned enterprise (SOE) market power. How China will effect changes in these circumstances is unclear. In addition, U.S. companies have been reluctant to complain openly about forced technology transfers out of fear of upsetting the Chinese government. Therefore, even with promises of due process and transparency, American businesses may not actually come forward to protest violations.

Also, unclear is how this chapter will play a role in U.S. policy towards Chinese investors and businesses attempting to operate in the U.S. Chinese companies looking to the U.S. market have faced increased scrutiny by a wide range of governmental entities, especially in the technology sector. The chapter does end with, “The Parties agree to carry out scientific and technological cooperation where appropriate.”

The impact of this Agreement, as drafted, on the fear by U.S. businesses of forced technology transfer in China, is still uncertain. We will need to monitor any changes to Chinese laws and regulations that allegedly create a coercive environment regarding innovation. In addition, we will need to see if there is indeed a shift in the practice of transferring core technologies to local partners. Also, we’ll need to learn if U.S. companies can take advantage of the promises of transparency and even-handedness to complain without actual retribution. Finally, it will be interesting to see if the Agreement does have a tangible impact on cross-border technology development and innovation collaboration.

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

- David Cheng at dcheng@nixonpeabody.com or +852 9307 3900
- Jeffrey Costellia at jcostellia@nixonpeabody.com or 202-585-8207
- David Kaufman, Director of Global Strategies, at dkaufman@nixonpeabody.com or 415-984-8241