CHINA LAW UPDATE

CHINA-U.S. PHASE ONE AGREEMENT: THE END OF TECHNOLOGY TRANSFER DEBATE?

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I. INTRODUCTION

After thirteen rounds of high-level consultations, China and the United States (U.S.) eventually reached the historic *Phase One Agreement* in December 2019, where the second chapter embodied bilateral consensus upon protracted technology transfer disputes. The U.S.-China technology transfer debate can be traced back to the 2012 Special 301 Report[1] issued by the Office of the United States Trade Representative (USTR), in which the U.S. for the first time expressed its concerns upon China's technology transfer regime. The concerns have been kept in the USTR Special 301 Reports for the next five years,[2] during which time China's responses to the U.S. concerns were mainly communicated through high-level bilateral dialogues platforms,[3] whereby China repeatedly pledged technology transfer liberalization.[4] However, the U.S. seemed to be dissatisfied with China's performance of its commitments and adopted a more aggressive strategy to reinforce its claims. The more aggressive strategy consists of approaches both inside and outside the World Trade Organization (WTO) framework. The rationale behind U.S. dual-track strategy is that no provision in WTO agreements *directly* regulates technology transfers. Instead, technology transfers may trigger WTO disputes

[1] 2012 Special 301 Report for the first time indicated that Chinese regulations, rules, and regulatory documents used technology transfer as a condition for licensing. *See* USTR, 2012 SPECIAL 301 REPORT 32 (2012), https://ustr.gov/sites/default/files/2012%20Special%20301%20Report_0.pdf (last visited May 16, 2020).

[2] *See* USTR, 2013 SPECIAL 301 REPORT 36 (2013); USTR, 2014 SPECIAL 301 REPORT 34 (2014); USTR, 2015 SPECIAL 301 REPORT 40 (2015); USTR, 2016 SPECIAL 301 REPORT 31 (2016); USTR, 2017 SPECIAL 301 REPORT 35 (2017).

[3] The two main high-level bilateral dialogues platforms between the U.S. and China before 2018 are the Joint Commission on Commerce and Trade (JCCT) and the Strategic Economic Dialogue (S&ED). While the two dialogue platforms functioned well since their establishment, both were shelved after President Trump took office in 2017.

[4] China committed in 2014 JCCT that it must "treat intellectual property rights owned or developed in other countries the same as domestically owned or developed intellectual property rights," and that "enterprises are free to base technology transfer decisions on business and market considerations, and are free to independently negotiate and decide whether and under what circumstances to assign or license intellectual property rights to affiliated or unaffiliated enterprises." Also, in the 2012 S&ED, China committed that technology transfer is to be decided by firms independently and not to be used by the Chinese government as a pre-condition for market access. *See* USTR, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 8 (2018), https://ustr.gov/sites/default/files/Secion%20301%20FINAL.PDF. . .source=post_page (last visited May 24, 2020) [hereinafter "301 Findings"].

only if China's measures concerned violate its commitments under WTO multilateral agreements, especially national treatment in TRIPS and/or GATS and IP protection obligations in TRIPS.[5] Being well aware of WTO limitations, the U.S. brought a WTO case against China and meanwhile imposed additional tariffs on Chinese imports, hoping China would make concessions outside WTO forum to fulfill all its concerns. Specifically, U.S. has three concerns over China's technology transfer regime: first, China's regime is an unfair arrangement to U.S. companies for the presence of foreign ownership restrictions, wide discretion left to officers, and sensitive technical information disclosure in administrative approvals; second, China's regulations discriminate against U.S. enterprises by imposing additional licensing restrictions; and third, policies of the government instruct or encourage Chinese companies to acquire U.S. technologies through outbound investment. While the WTO case the U.S. initiated against China's discriminatory regulations for violating national treatment (TRIPS Article 1.1) and intellectual property (IP) protection obligations (TRIPS Article 28)[6] took care of U.S.'s second allegation, the first and the third allegations, i.e. the unfair arrangement claim and the outbound investment claim, were not covered. Consequently, under the urge of the U.S., the two allegations remained were written in the *Phase One Agreement* as "international obligations" which are legally binding on China and complementary to China's WTO commitments.

The key question here is whether the *Phase One Agreement* puts an end to the technology transfer debate between the U.S. and China. To answer this question, this note begins with an overview of controversial issues throughout the technology transfer debate in Section II. In the light of this overview, Section III provides a textual observation of the *Phase One Agreement* with the aim of identifying U.S. concerns covered by the agreement and remaining issues. Section IV further discusses the implication of the *Phase One Agreement* on bridging U.S.-China technology transfer divergence by estimating both its shortages and progressions. Section V sets forth the conclusions.

II. CONTROVERSIAL ISSUES IN THE U.S.-CHINA TECHNOLOGY TRANSFER DEBATE

U.S. criticisms upon China's technology transfer regime cover a wide range of battlefields, among which *de facto* compulsory technology transfers and voluntary commercial actions are the two foremost issues. Both issues were severely criticized by the U.S. in the *Findings of the Section 301*

[5] Julia Ya Qin, *Forced Technology Transfer and the U.S.-China Trade War: Implications for International Economic Law*, 22 J. INT'L ECON. L. 4, 743, 753–55 (2019).

[6] Request for Consultations by the United States, *China — Certain Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS542/1 (Mar. 26, 2018).

Investigation (hereinafter "301 Findings") [7]and have been high on U.S. list of priorities in negotiating the *Phase One Agreement* with China. Prior to the textual analysis and the prospect estimate of the agreement in following sections, it is a must to clarify U.S.-China divergence upon these issues.

A. De Facto Compulsory Technology Transfers?

The year 2018 is a watershed of U.S. criticisms upon the Chinese technology transfer regime. If we take a full view of the Special 301 Reports from 2012 to 2020, it can be found that before 2019 the U.S. criticisms mainly concentrated on technology transfer requirements embodied in China's laws and regulations. But since the year 2019, U.S. concerns have penetrated the Chinese government's technology transfer practices. The alteration partly results from the WTO case the U.S. initiated in 2018. As mentioned above, the U.S. initiated a WTO case against China on 23 March 2018 for two of China's regulations imposing discriminatory licensing restrictions on U.S. companies. A few months later, the U.S. requested a suspension of the proceedings [8] following China's modification of the two disputable regulations in March 2019. Since then U.S. criticisms have been more centered on specific actions of Chinese officials in licensing processes, i.e. *de facto* compulsory technology transfers.

The *de facto* compulsory technology transfers, as the U.S. alleged, derive from wide discretion left to government officers under China's numerous review processes, multi-layer licensing mechanisms, and vaguely-worded provisions,[9] wherein Chinese officials may use oral communication and informal administrative guidance to pressure U.S. firms to transfer technology.[10] According to the U.S., despite the removal of technology transfer requirements from licensing regulations, *de facto* compulsory technology transfers persist in the Chinese government practices. The Chinese government, on the other side, denied the existence of *de facto* technology transfer in its *Position on the China-U.S. Economic and Trade Consultations*[11] and noted in a DSB meeting that the U.S. uses "selective facts and dubious evidence" that either "cannot be verified or be admitted in any credible

[7] USTR, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF?source=post_page (last visited May 16, 2020) [hereinafter "301 Findings"].

[8] Communication from the Panel, *China—Certain Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS542/10 (June 14, 2019).

[9] USTR, *supra* note 5, at 36.

[10] USTR, UPDATE CONCERNING CHINA'S ACTS, POLICIES AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION 22 (2018), https://ustr.gov/sites/default/files/enforcement/301Investigations/301%20Report%20Update.pdf (last visited May 24, 2020).

[11] SCIO, CHINA'S POSITION ON THE CHINA-U.S. ECONOMIC AND TRADE CONSULTATIONS 4 – 6, Box 1 (2019), http://www.scio.gov.cn/zfbps/32832/Document/1655934/1655934.htm (last visited May 24, 2020).

dispute proceeding."[12] The China Chamber of International Commerce (CCOIC) backed this position and challenged the *de facto* technology transfer allegations in a written comment[13] submitted to the USTR with more specific doubts, such as the variability of anonymous surveys which were used as evidence in the 301 Findings to prove that U.S. companies have been *de facto* forced to transfer technologies.

B. Voluntary Commercial Actions?

It is arguable whether U.S. technologies are voluntarily transferred on a commercial basis instead of being forced or directed by the Chinese government. Controversies over whether technology transfers are voluntary commercial actions trigger legal consequences in international law from two aspects: first, if U.S. enterprises in China are forced to transfer their technologies by the government, China is likely in breach of its WTO commitments, especially national treatment and IP protection obligations; and second, since private actions are in principle not subject to international norms but rather disciplined by domestic law, unless the U.S. attributes tech-acquisition actions to the Chinese government, it has no foundation to challenge technology transactions between private corporations on the basis of treaty obligations set forth in both WTO rules and U.S.-China bilateral agreements.

On the side of the U.S., it fiercely condemns that the Chinese government forced not only U.S. companies to transfer but also Chinese investors to acquire cutting-edge technologies. Here U.S. arguments are twofold: first, U.S. enterprises in China are forced to transfer technologies to Chinese companies under ownership restrictions as well as current administrative review and licensing regimes;[14] and second, the Chinese government directed outbound investment behaviors of Chinese companies through various national strategies and policies to obtain U.S. technologies, especially those in industries deemed important by state industrial plans.[15]

China, conversely, rebuts that voluntary technical cooperation between Chinese and U.S. firms based on market principles should not be distorted as "forced technology transfer." To illustrate that U.S. technology holders have also reaped enormous benefits from this process, the Chinese Ministry of

[12] *Statement by China at the DSB Meeting*, MOFCOM (Aug. 1, 2019), http://english.mofcom.gov.cn/article/newsrelease/counselorsoffice/bilateralexchanges/201908/20190802886550.shtml (last visited May 24, 2020).

[13] CCOIC, *Written Comments on Section 301 Investigation: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation* (hereinafter "*Written Comments on 301 Findings*"), Docket No. USTR-2018-0005 (May 11, 2018), https://www.regulations.gov/document?D=USTR-2018-0005-2220.

[14] USTR, 301 Findings, *supra* note 7, at 24.

[15] *Id.* at 65.

Commerce publicized statistics in September 2018,[16] according to which U.S. firms in China realized approximately $517 billion of sales revenue and over $36 billion of profits in 2015 and their sales reached about $606.8 billion and profits exceeded $39 billion in 2016. Standing by the Chinese government, the CCOIC further indicates that the argument of U.S. firms being forced to transfer technologies under ownership restrictions is far-fetched as most of the industries in which foreign ownership requirements maintained,[17] are not high-tech industries. Even for the high-tech industry in which the requirements are maintained, U.S. companies are not "forced" to transfer their technologies because technology transfer is still subject to their willingness and choices, including establishing a joint venture with another Chinese enterprise if they find the initial technology transfer terms unacceptable.[18] As for the outbound investigation accusation, the CCOIC rebuts that Chinese enterprises' investment activities in the U.S. are out of commercial considerations and widely spread across all U.S. industries. As outbound investment decisions made by Chinese enterprises are based on their own needs to develop, Chinese enterprises' investment activities should not be distorted as the government's ambitions to acquire advanced foreign technology.[19] Following China's logic, technology transfer is no more than a commercial issue between private entities subject to domestic laws rather than a disputable matter under international agreements.

III. TEXTUAL ANALYSIS: U.S. CONCERNS COVERED BY THE PHASE ONE AGREEMENT

Considering WTO litigations did not comprehensively satisfy its concerns, the U.S. took a further step to fulfill its remaining concerns by writing them in the *Phase One Agreement* so that they can be claimed as China's international obligations. Given the significant weight of the *Phase One Agreement* in fulfilling U.S. claims, the aim of this section is to find out to what extent U.S. concerns are taken care of in this agreement.

A. Claims Settled in Technology Transfer Provisions

When it comes to technology transfers to Chinese companies, U.S. criticisms focus not only on IP protection but also on market access and outbound investment, thereby strengthening the protection for U.S. technology transfers overseas. Given U.S. widespread criticisms, it is

[16] SCIO, *supra* note 11, Box 1. STATE COUNCIL, THE FACTS AND CHINA'S POSITION ON CHINA-U.S. TRADE FRICTION 15 (2018), http://english.www.gov.cn/archive/white_paper/2018/09/26/content_281476319220196.htm (last visited May 24, 2020).

[17] Such as publishing, printing, shipping agency, gas station, banking, insurance, securities, futures, market investigation, education, medical treatment, television programs and film production, cinemas, performance brokers. *See* CCOIC, *Written Comments on 301 Findings*, *supra* note 13, at 24.

[18] CCOIC, *Written Comments on 301 Findings*, *supra* note 13, at 36–37.

[19] CCOIC, *Written Comments on 301 Findings*, *supra* note 13, at 30–39.

understandable that technology transfer is listed as a single chapter rather than being incorporated in the IP chapter in the *Phase One Agreement*.

Urged by the U.S., five corresponding provisions are put into the technology transfer chapter, including general obligations (Article 2.1), market access (Article 2.2), licensing requirements (Article 2.3), due process (Article 2.4), and cooperation (Article 2.5).

As a response to the U.S. concern that U.S. companies' technology transfers in China are involuntary, the general obligations set forth in Article 2.1 require both Parties to ensure that the transfers of technology owned by persons of the other contracting party are based on "market terms" and "voluntary" principle without any force or pressure by governments. It is an obvious restatement of U.S. position in the Special 301 Report since the year 2016, that in formulating policies to promote innovation, trading partners including China, are urged to take account of the importance of voluntary and mutually agreed commercial partnerships.[20] Actually, prior to the conclusion of the *Phase One Agreement*, voluntary and market principles have been incorporated in the Foreign Investment Law adopted early in March 2019.[21] Fixed in the form of treaty provisions, voluntary and market principles have been elevated from a domestic rule of China to an international obligation, which is largely in the interest of U.S. potential allegations in the future.

Targeting at U.S. concerns about the Chinese government's involvement in outbound investment, subparagraph 3 of Article 2.1 clearly prohibits Parties from supporting or directing the outbound investment activities of its persons to acquire foreign technology with respect to industries targeted by its industrial plans. As noted in Section II, government's involvement in outbound investment is not necessarily contrary to WTO rules. Under this provision, however, Chinese government's support for the outbound acquisition of U.S. technology will definitely violate its international obligation, as this provision provides a stricter obligation than WTO rules by disregarding whether or not the support is in breach of national treatment or IP protection obligations.

As for the *de facto* technology transfer concern, Article 2.3 Subparagraph 2 forbids Parties, formally or *informally*, from using technology transfer as a condition for licensing. More specifically, Article 2.4 highlights the fairness and transparency of law enforcement. Subparagraph 1 of this provision underlines that the Parties shall ensure laws and regulations are enforced in an impartial and non-discriminatory manner. Subparagraph 2 requires transparency of the Parties' regulatory enforcement mechanisms, including publication of their procedural rules, the rights to review the evidence and be represented by legal counsel in administrative proceedings. It is noteworthy

[20] *See* USTR, 2016 SPECIAL 301 REPORT 22 (2016); USTR, 2017 SPECIAL 301 REPORT 20 (2017); USTR, 2018 SPECIAL 301 REPORT 18 (2018).

[21] Waisharst Touzi Fa (外商投资法) [Foreign Investment Law] (promulgated by Nat'l People's Congress, Mar. 15, 2019, effective Jan. 1, 2020), art. 22 (Chinalawinfo).

that procedural requirements embodied in Article 2.4 do not automatically permeate into Chinese domestic legal order, hence *de facto* technology transfers are still a pending problem as discretion has been left to the Chinese government in performing this treaty obligation.

U.S. concerns about sensitive technical information disclosure in Chinese administrative approvals in the 301 Findings are written in Article 2.3. Subparagraphs 5 and 6 of this provision stipulate the "necessity" and "confidentiality" requirements for administrative review processes in the territory of both Parties, which imposes legal restrictions on Chinese forced disclosure of sensitive technical information from the aspect of international law.

B. Issues Remained

According to the textual analysis above, it is clear that the U.S. technology transfer concerns have been largely covered by the *Phase One Agreement* provisions. The remaining issues here are foreign ownership restrictions, such as joint-venture requirements and foreign equity limitations, which are imposed by a wide range of Chinese laws and regulations on foreign investors. The U.S. has expected issues concerning foreign ownership restrictions to be tackled in future U.S.-China Phase Two negotiations.[22] At the same time, the U.S. has been actively pushing forward its criteria on technology transfer via channels other than bilateral negotiations with China. For instance, at the trilateral meetings held in May 2018, the U.S. allying Japan and the European Union issued a joint announcement that observed that technology transfers could be pressured or forced through ownership restrictions.[23] Considering all these U.S. efforts, it is predictable that more external pressure will be put on China's side in future negotiations over foreign ownership restrictions.

But it is noteworthy that tremendous progress in lifting foreign ownership limits has been made by China in the past few years, especially after the new negative list[24] issued in June 2019. In addition, the Chinese Premier has announced that caps on foreign ownership of brokerages, futures dealers and life insurers would be removed by 2020 to further liberalize financial

[22] USTR, 2019 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 5 (2020), https://ustr.gov/sites/default/files/2019_Report_on_China's_WTO_Compliance.pdf [hereinafter "*WTO Compliance*"]. (last visited May 24, 2020)

[23] USTR, JOINT STATEMENT ON TRILATERAL MEETING OF THE TRADE MINISTERS OF THE UNITED STATES, JAPAN, AND THE EUROPEAN UNION (2018), https://www.meti.go.jp/press/2018/05/20180531009/20180531009-2.pdf. (last visited May 24, 2020)

[24] Waishang Touzi Zhunru Tebie Guanli Cuoshi (Fumian Qingdan) (2019) (外商投资准入特别管理措施（负面清单）（2019年版）) [Special Administrative Measures (Negative List) for the Access of Foreign Investment (2019)] (promulgated by Nat'l Dev. and Reform Comm'n and the Ministry of Commerce, June 30, 2019, effective July 30, 2019) (Chinalawinfo).

industries.[25] Given China's willingness of lifting foreign ownership, future U.S.-China negotiations over foreign ownership restrictions can be optimistically predicted in general.

IV. AN ESTIMATE OF THE POST-AGREEMENT TECHNOLOGY TRANSFER DEBATE

Although U.S. concerns, as textual observations in Section III indicate, have been generally taken care of *on paper*, the fundamental divergences over China's technology transfer regime still exist between China and the U.S. The *Phase One Agreement* with non-compulsory dispute settlement and arbitrary exit mechanisms, is in a fragile nature and unlikely to end the technology transfer disputes.

A. Underlying Divergences Between the U.S. and China

Targeting at U.S. concerns about outbound investment and *de facto* technology transfers, the *Phase One Agreement* clearly prohibits the Chinese government from directing the investors to acquire U.S. technology prioritized by its industrial plans (Article 2.1) and informally using technology transfer as a condition for licensing (Article 2.3). However, U.S.-China consensuses written on paper are actually walking around a more essential dispute over China's industrial policies which, from the U.S. point of view, are instruments used by the government to materialize its state-led mercantilism.

For instance, the *Made in China 2025*,[26] a national plan to promote China's technologies and innovation capabilities in ten strategic industries, is the flashpoint in White House's launch of the Section 301 Investigation against China, which eventually resulted in the escalation of technology transfer debate. Since announced in 2015, the *Made in China 2025* initiative has generated concern among U.S. policymakers. A study by the U.S. Chamber of Commerce concludes that the *Made in China 2025* intends to "leverage the power of the state to alter competitive dynamics in global markets in industries core to economic competitiveness" and should be "top of the agenda in future government-to-government economic and commercial discussions with China."[27] On 4 May 2018, in the trade negotiations with China, the U.S. proposed a discussion framework in which it called for China

[25] *Premier: China to Become More Open, Transparent, Predictable for Foreign Investment*, STATE COUNCIL (July 2, 2019), http://english.www.gov.cn/premier/news/2019/07/02/content_281476744532796.htm. (last visited May 24, 2020)

[26] Guowuyuan Guanyu Yinfa Zhongguo Zhizao 2025 de Tongzhi (国务院关于印发《中国制造2025》的通知) [Notice on the Printing and Release of "Made in China 2025"] (promulgated by the State Council, May 19, 2015, effective May 19, 2015), http://www.gov.cn/zhengce/content/2015-05/19/content_9784.htm.

[27] U.S. CHAMBER OF COMMERCE, MADE IN CHINA 2025: GLOBAL AMBITIONS BUILT ON LOCAL PROTECTIONS 7–8 (2017), https://www.uschamber.com/report/made-china-2025-global-ambitions-built-local-protections-0 (last visited May 24, 2020).

to halt subsidies for the *Made in China 2025*.[28] Based on the hostile perception, the *Made in China 2025* has been slammed in the 301 Findings for discriminating against foreign enterprises, exacerbating market distortions and creating excess capacity in targeted sectors. Subsequently, the U.S. government announced a 25% tariff targeting products benefiting from Chinese industrial policies, including the Made in China 2025 program.

Since *Made in China 2025* had become a focal point in the 301 Findings, the Chinese government has started playing it down.[29] However, the principles behind this initiative are still alive in the form of other industrial plans and national policies. The *Catalogue of Encouraged Industries for Foreign Investment* released in June 2019, for example, lists industries that are supported by the government to attract foreign investors with advanced technologies.[30] Alongside policies for attracting foreign investors, national strategies targeting encouraging Chinese companies' outbound investments such as the "Going Out Strategy" and the "One-Belt One-Road Initiative," have also been lashed out in the 301 Findings.

A study shows that utilizing foreign investment to promote technological advancement has long been rooted in the heart of China's foreign direct investment policies and played a key role in the transformation to an innovative economy.[31] Given these strategies are of vital importance to China, it seems barely possible that the Chinese government would abandon these strategies so as to satisfy U.S. concerns. The only thing the U.S. can expect is the Chinese government, in materializing these strategies, may avoid too much involvement in specific commercial activities. Given the difficulties in reconciling U.S. substantial concerns over China's industrial policies with China's demands for further developing its industrial capacities, there is still a long way for both sides to bargain over technology transfer issues relating to Chinese industrial policies.

B. The Fragile Nature of the Phase One Agreement

Differing from most trade agreements, the *Phase One Agreement* proposes a dispute settlement mechanism barely relying on unilateral assessment and consultation, without recourse to any kind of third-party

[28] Wayne M. Morrison, *Enforcing U.S. Trade Laws: Section 301 and China* 2 (2019), https://crsreports.congress.gov/product/pdf/IF/IF10708 (last visited May 24, 2020).

[29] Lingling Wei & Bob Davis, *China Prepares Policy to Increase Access for Foreign Companies*, WALL ST. J. (Dec. 12, 2018 7:21 PM), https://www.wsj.com/articles/china-is-preparing-to-increase-access-for-foreign-companies-11544622331.

[30] Guli Waishang Touzi Chanye Mulu 2019 (鼓励外商投资产业目录 2019) [Catalogue of Industries for Encouraging Foreign Investment 2019], (promulgated by Nat'l Dev. and Reform Comm'n and the Ministry of Commerce, June 30, 2019, effective June 30, 2019) (Chinalawinfo).

[31] Zhou Weihuan at al., *Technology Transfer under China's Foreign Investment Regime: Does the WTO Provide a Solution?*, 54 J. WORLD TRADE (forthcoming June 2020) (manuscript at 3). (on file with authors)

involvement.[32] In accordance with Article 7.4 of the agreement, when disputes arise, the complaining party may first request the other party to make an assessment of the matter concerned, after which the designated officials of both sides shall begin multiple rounds consultations. If no consensus is reached during the consultations, the complaining side may suspend an obligation under this agreement or adopt a remedial measure to prevent the escalation of the situation. As for the complained party, it may withdraw from the agreement if the measures of the complaining side are considered to be taken in bad faith. As a result, the withdrawal procedure can be easily triggered under the complained party's unilateral assessment.

The dispute settlement mechanism of this agreement is vulnerable because it highly relies on the bargaining over disputable matters. Without recourse to any kind of third-party involvement, no standard that is independent of U.S. subjective criteria can be applied in deciding the compliance of China, and vice versa. As for technology transfer disputes, in which China is more likely to become the complained party since technology transfer provisions of the agreement are mainly targeting at its regime, China's performance of its technology transfer obligations is entirely subject to the unilateral assessment of the U.S. under the dispute settlement mechanism.

Without third-party intervention, the withdrawal mechanism is "arbitrary" for the lack of objective criteria in determining whether the remedial measures are taken in "bad faith." As a result, the arbitrary exit mechanism can substantially set China free in performing its technology transfer obligations since it may easily withdraw from the agreement once it finds U.S. criteria are unacceptable. But since China has always been calling for a return to bilateral dialogues to find a solution,[33] it can be predicted that the withdrawal provision will not be easily invoked by China. However, even if the agreement is less likely to be thrown away in the context of technology transfer disputes, it is hard to say that other disputes, in which the U.S. might be the complained party, will not jeopardize this agreement.

[32] Statistics show that despite nearly all preferential trade agreements (PTAs) with dispute settlement provisions specify consultation as the initial step to solve disputes, most of them include third-party dispute settlement provisions which bring in mediation, arbitration, standing body or external body to assist dispute settlement in conjunction with the consultation mechanism. Up to 2009, 46% of PTAs include an arbitrary provision, 18% of PTAs bring in mediation mechanism, and 29% of PTAs either resort to external bodies such as ICJ or the standing judicial bodies established by their own. *See* Andreas Dür & Manfred Elsig, *Trade Cooperation: The Purpose, Design and Effects of Preferential Trade Agreements*, *in* DISPUTE SETTLEMENT PROVISIONS IN PTAS 319, 324 (Andreas Dür & Manfred Elsig eds., 2015).

[33] China has consistently called on the U.S. to return to bilateral negotiation instead of escalating trade war. China's positions can be found in a range of announcements publicized on the official webside of Ministry of Commerce. *E.g.*, Shangwubu Jiu Yue Wu Ri Lixing Xinwen Fabuhui (商务部9月5日例行新闻发布会) [Ministry of Commerce's Regular Press Briefing, September 5, 2019], ZHONGHUA RENMIN GONGHE GUO GUOWUYUAN XINWEN BANGONGSHI (中华人民共和国国务院新闻办公室) [STATE COUNCIL INFO. OFFICE OF THE PEOPLE'S REPUBLIC OF CHINA] (Sept. 6, 2019), http://www.scio.gov.cn/xwfbh/gbwxwfbh/xwfbh/swb/Document/1664167/1664167.htm.

Under the fragile arrangement, the *Phase One Agreement* can be easily put into danger once China's performances fall short of U.S. expectations. Given the fundamental divergences between two sides could hardly be bridged in the short term, the full enforcement of the agreement is destined to be tough.

C. Praises to the Phase One Agreement

Although the post-agreement technology transfer debate remains to be seen, the conclusion of the *Phase One Agreement* is in the interest of both sides. For the U.S., technology transfer provisions have a legally binding force on the Chinese government. Consequently, from the perspective of international law, the legal basis for U.S. future claims on technology transfer is provided, and the U.S. does not have to resort to the limited protection of WTO rules which is far less than it expects. Particularly, from a political viewpoint, considering the 2020 Presidential Election, it is in Trump's interest to reach an agreement with China that looks like the U.S. won, and maintain this agreement until November 2020 so that the agreement could be propagated as a great success of Trump's "more aggressive approach"[34] in dealing with U.S.-China economic relationships.[35] From China's standpoint, even though the *Phase One Agreement* is not an end to U.S. dissatisfactions, it is at least a temporary ceasefire of U.S. criticisms and, perhaps more importantly, for the tariff war flamed following the Section 301 Investigation which to a certain extent contributed to instability of China's economy in 2018. Besides, China may easily release itself from U.S. expectations written in the *Phase One Agreement* by withdrawing from the agreement, and the situation will not be worse than before the agreement was signed. In a nutshell, concluding a fragile agreement like this, both China and the U.S. generate benefits for their own at a minimal cost.

Another praise should be given to the *Phase One Agreement* for it easing U.S.-China technology transfer disputes in general by introducing remedial measures. Although it is criticized by some scholars for its retaliation-based dispute settlement mechanism, which legitimizes the use of unilateral retaliatory measures that are unlawful under WTO rules.[36] However, despite

[34] Given the failure of previous efforts in tackling trade issues with China, the Trump administration boasts that it has announced a new, more aggressive approach to U.S. engagement with China. The new approach began to demonstrate key progress with the signing of the Phase One Agreement, a historic agreement requires structural reforms and other changes to China's technology transfer regime. *See* USTR, *WTO Compliance*, *supra* note 22, at 4.

[35] In 2019 Annual Report, the *Phase One Agreement* has been highly praised for China historically agreed to reform its technology transfer regime. *See* USTR, 2020 TRADE POLICY AGENDA AND 2019 ANNUAL REPORT 4-6 (2020), https://ustr.gov/sites/default/files/2020_Trade_Policy_Agenda_and_2019_Annual_Report.pdf (last visited May 24, 2020).

[36] Weihuan Zhou, *Phase One's Dispute Settlement Mechanism a Poor Alternative to WTO Appellate Body*, HERBERT SMITH FREEHILLS CIBEL CENTRE (Feb. 11, 2020), https://www.cibel.unsw.edu.au/news/opinion-phase-ones-dispute-settlement-mechanism-poor-alternative-wto-appellate-body.

potential deviation from the WTO multilateral trade regime, it is the most practical arrangement in the context of U.S.-China trade war. Because divergences between China and the U.S. over technology transfers do not fully fall under the WTO jurisdiction and have long been resolved through bilateral dialogue. Given the collapse of the previous dialogue platforms, i.e. the Joint Commission on Commerce and Trade and the Strategic Economic Dialogue, the *Phase One Agreement* is in essential a reconstruction of China-U.S. dialogue mechanism, thereby benefitting the whole picture of U.S.-China trade relationship. Indeed, the existing dispute settlement mechanism is not a perfect design and cannot promise a full satisfaction of U.S. technology transfer concerns, but without which things can only get worse.

V. CONCLUSIONS

Whereas the *Phase One Agreement* has covered most U.S. concerns about China's technology transfer regime, it does not put an end to the U.S.-China debates over China's technology transfer regime. Given that the dispute settlement mechanism is non-compulsory in nature and the withdrawal arrangement is essentially arbitrary, the *Phase One Agreement* is not a promise to the fulfillment of technology transfer concerns covered. Fundamentally, underlying divergences that center on China's industrial strategies in pursuing cutting-edge technologies are so vital to China's economic development that they are impossible to be given up by the Chinese government to fulfill U.S. claims. Despite its fragile nature and failure in bridging essential divergences, the *Phase One Agreement* still deserves praises as it is the most practical and beneficial resolution for easing tensions between the U.S. and China.