

USA/China Trade Agreement Webinar

Business Impact of IP Provisions: What's In, What's Not, & What Else to Know

Mark A. Cohen, Berkeley Center for Law & Technology

Thomas L. Jarvis, Winston Chair International IP Litigation

Randal R. Rader, former Chief Judge Federal Circuit

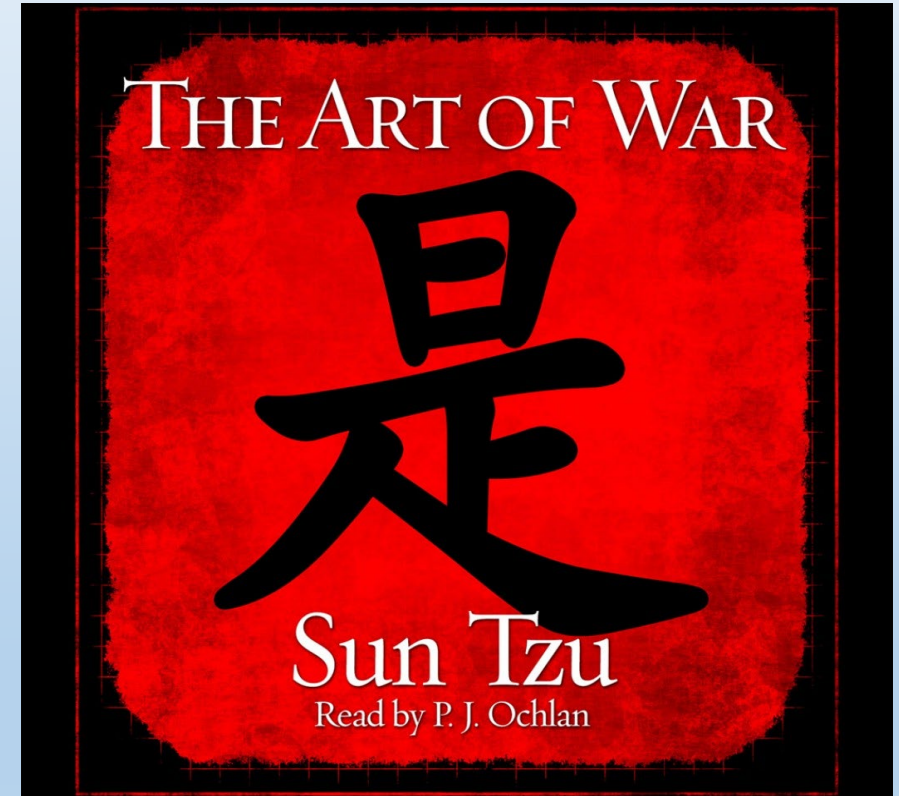
BERKELEY CENTER FOR
LAW & TECHNOLOGY

 The Rader Group

January 23, 2020

WINSTON
& STRAWN
LLP

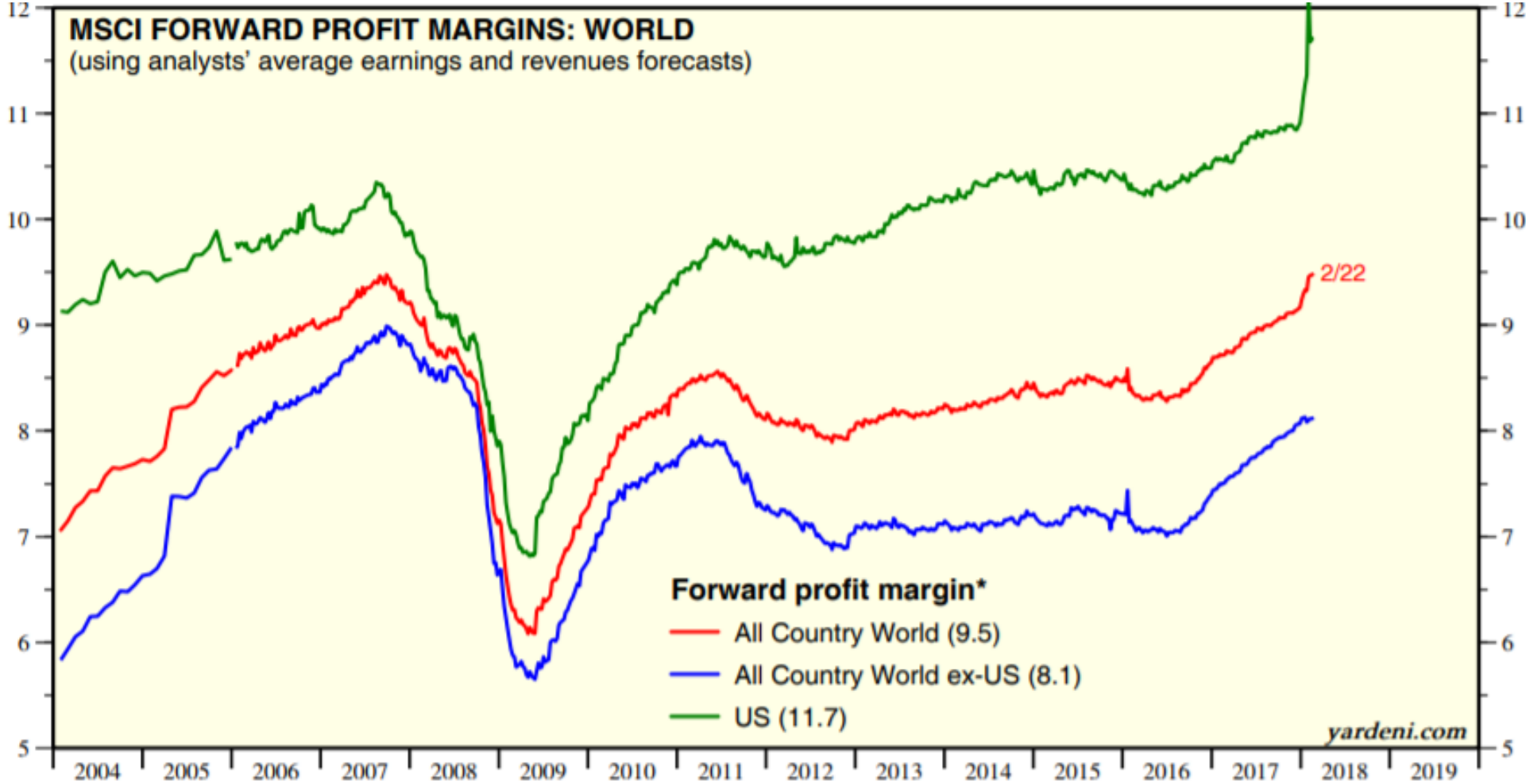
USA / China Trade Backgrounder:



Importance of National Markets: Household Consumption

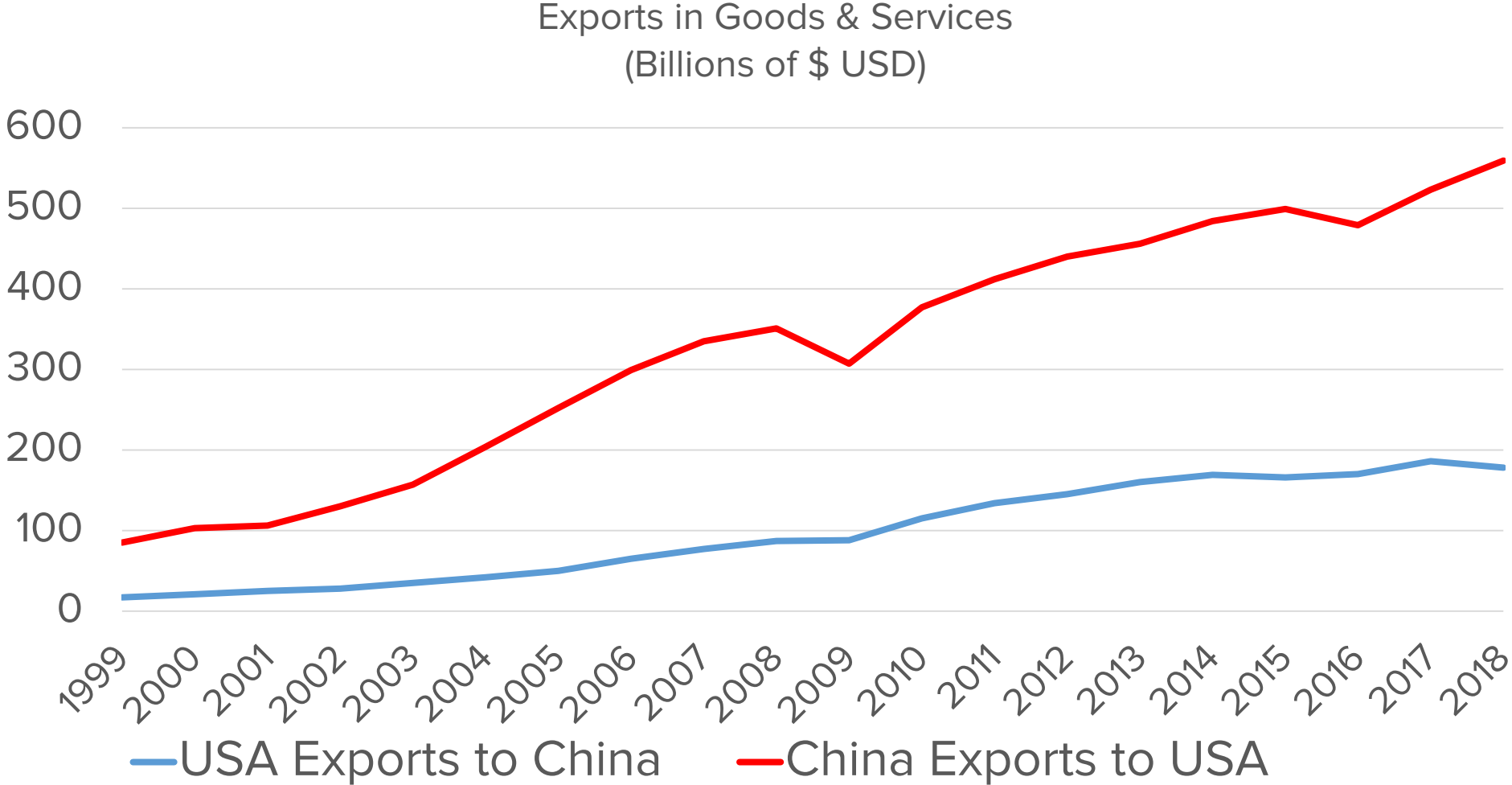
Country	1970 (\$ millions)	2015 (\$ millions)	Percentage (2015)
United States	647,688	12,283,683	29%
China	49,021	4,251,426	10%
Japan	101,649	2,479,111	6%
United Kingdom	85,260	1,857,670	4%
Germany	120,210	1,814,321	4%
France	81,294	1,332,527	3%
India	51,299	1,246,729	3%
Brazil	~	1,124,727	3%
Canada	48,813	891,199	2%
Mexico	25,561	791,942	2%
Australia	22,126	762,109	2%
Russia	~	719,339	2%
Spain	26,141	690,083	2%
South Korea	6,628	681,789	2%
All Other Countries		11,681,276	27%
World Tot		42,607,931	

Profit Margins Around the World



* Time-weighted average of the consensus estimates for current and next year. Monthly through December 2005, weekly thereafter.
Source: Thomson Reuters I/B/E/S.

USA / China Trade Imbalance

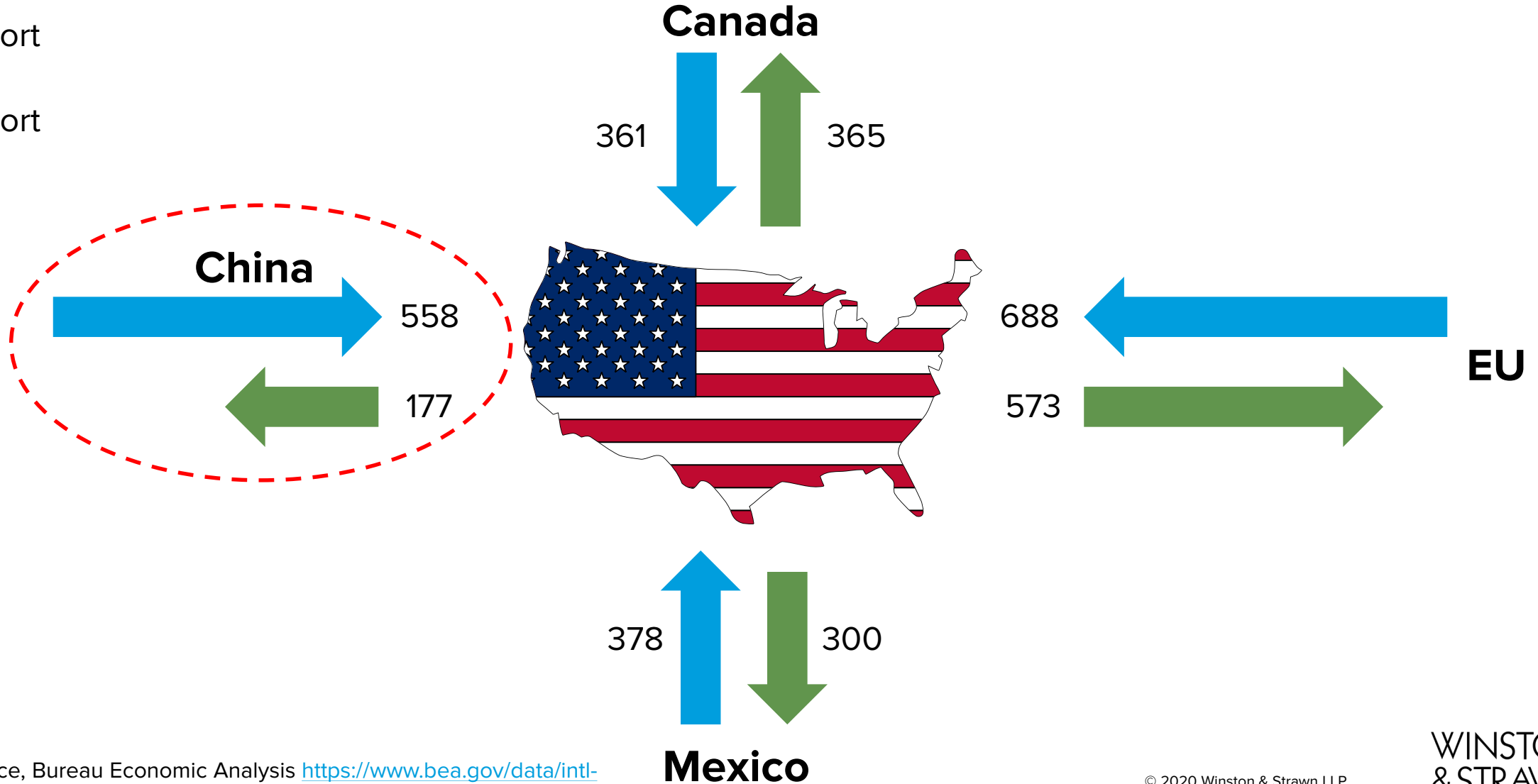


U.S. Dept. Commerce, Bureau Economic Analysis <https://www.bea.gov/data/intl-trade-investment/international-trade-goods-and-services>

Global Market Imbalances

Billions of \$ USD (2018)

Import
Export



The Agreement

ECONOMIC AND TRADE AGREEMENT BETWEEN
THE UNITED STATES OF AMERICA AND
THE PEOPLE'S REPUBLIC OF CHINA



PHASE ONE

Office of the U.S. Trade Representative
https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf

© 2020 Winston & Strawn LLP

WINSTON
& STRAWN
LLP

Phase One Provisions

- Chapter 1: Intellectual Property
 - Trade Secrets
 - Patents
 - Pharmaceutical-Related IP
 - Geographical Designations of Origin & Trademarks
 - Piracy and Counterfeit Goods
- Chapter 2: Technology Transfer
- Chapter 3: Food & Ag Products
- Chapter 4: Financial Services
- Chapter 5: Macroeconomic Policies & Exchange Rates
- Chapter 6: Expanding Trade
- Chapter 7: Dispute Resolution

Overview

1. Signed January 15, 2020; various effective dates
2. Primary provisions
 - A. Chinese reforms related to intellectual property, technology transfer, agriculture, financial services, and currency & foreign exchange
 - B. Chinese commitment to increased purchases of U.S. goods and services
 - C. USA agreement to significantly modify its Section 301 tariff actions
 - D. Dispute resolution system
3. Congressional ratification not required b/c Section 301 agreement

Trade Secrets—China Is Required to . . .

1. Expand scope of civil liability from those directly involved in using trade secrets to also encompass those misappropriate or cyberhack.
2. Cover electronic intrusions, breach & inducement to breach NDAs.
3. When trade secret owners establish prima facie misappropriation, shift burden of producing evidence and proof to defendants in civil cases.
4. Prohibiting Chinese government personnel and third party experts from disclosing trade secrets or confidential business information by—
 - A. Limiting requests for information to that necessary for regulatory objectives
 - B. Limit access to personnel necessary for regulatory objectives
 - C. Limit access to third party experts who do not have conflicts of interest
 - D. Criminal, civil, and admin penalties for disclosure of confidential information

Trade Secret Issues

1. Evolution of Chinese trade secrecy problems & law
2. China's Anti-Unfair Competition Law ("AUCL") (April 23, 2019)
3. Preliminary Injunctions vs Action Preservations
4. Shifting burden of proof
5. Statutory damage caps increases from to about \$744,000 USD
6. Exemplary damages for willful misappropriation 5x actuals
7. Cross border issues, e.g. ITC section 337
8. Interplay of criminal, civil, and administrative actions
9. Trade secrets vs confidential business information.

Pharmaceutical IP— China Is Required to . . .

1. Establish mechanism for expedited remedies before marketing of an allegedly infringing pharmaceutical.
2. Provide patent term extensions to compensate for patent office and marketing approval delays.
3. Permit use of supplemental data to establish patentability for pharmaceutical patent applications.

Pharmaceutical IP Issues

1. No “orange book” of approved drugs w/ therapeutic equivalence evaluations.
2. Pharma patent linkage to regulatory approvals.
3. Biologics covered.
4. No artificial infringement arising from filing for regulatory approvals, thus linkage weakened.
5. No regulatory data protections.
6. Patent term extensions.

General Patent Issues

1. Patent provisions limited to pharmaceutical products & practices.
2. No standards-essential patent prosecution or litigation provisions.
3. No low-quality patent provisions.
4. No non-practicing entity (NPE/patent trolls) provisions for litigation.
5. No limitations on industrial policy and patent grants.
6. No additional design patent protection.

Trademarks— China Is Required to . . .

1. Protect U.S. brand names
2. Stop “overprotecting” geographical designations that shut out U.S. agricultural and food products
3. Invalidate or refuse bad faith trademark applications
4. Consider common usage in dictionaries, the press, and trade when determining geographic designations of origin
5. Not recognize geographic designations of origin for products comprised of generic components

Trademark Issues

1. Brand names = “famous marks”?
2. No Chinese common law trademark rights.
3. Trademark squatting / warehousing.
4. Overlapping administrative, civil, and criminal actions = inaction.
5. Abusive registrations.

Pirated & Counterfeit Goods— China Is Required to . . .

1. Actions against online infringements, including takedowns and ensuring validity of notices & counter notices
2. Actions against e-commerce platforms that tolerate infringement
3. Increase actions to stop counterfeits with health/safety risks
4. Forfeiture and destruction of pirated/counterfeit goods and mfg equip
5. Increase actions against pirated/counter goods in physical markets
6. Third party audits to ensure government agencies and SOE only use licensed software

Pirated & Counterfeit Goods Issues

1. E-Commerce challenges
 - A. Automated systems
 - B. Third party offers for sale & fulfillment difficult to police
 - C. Amazon vs Alibaba instances of counterfeits & policing efforts
2. E-Commerce platforms addressed, but not e-tailers.
3. Refines liability for erroneous but good faith takedown notices.
4. Revocation operating licenses for repeated pirated/counterfeit goods.
5. Actions against counterfeits w/ health or safety risks.
6. Blocking cross-border distribution of counterfeits.

IP Remedies— China Is Required to . . .

1. Provide deterrent-level civil and criminal penalties
2. Transfer cases from administrative to criminal authorities
3. Expedited enforcement of judgements
4. Provide presumptions of copyright ownership
5. Streamline requirements for foreign litigants to authenticate evidence
6. Provide for witness testimony and cross-examination in civil actions

Remedies Issues

1. Some provisions already adopted.
2. Remedies to “deter” future IP theft.
 - A. Civil remedies to deter specific defendant
 - B. Criminal remedies for society-wide deterrence
3. Complex interplay of admin vs judicial remedies.
4. Uncertain standards for prosecutorial discretion.
 - A. Low rates of referral to prosecutors
 - B. No requirement for prosecutors to accept cases
 - C. No solution for prosecutor inaction
 - D. No provision for additional prosecution resources.

Implementation of IP Provisions

1. Method of implementation determined by each party.
2. By about March 16, 2020, China will issue Action Plan to implement its obligations with effective dates for each measure.
3. USA affirms that its existing measure are consistent with the obligations imposed on China.

Chapter 2: Technology Transfers— China Is Required to . . .

1. Prohibition against requiring or pressuring foreign companies to transfer their technology as a condition for market access, administrative approvals, or receipt of other advantages.
2. Any transfer or licensing of technology is based on market terms that are voluntary and mutually agreed upon.
3. Prohibit state-directed outbound investment aimed at acquiring foreign technology in sectors and industries targeted by industrial policies
4. Due process, transparent, and non-discriminatory enforcement in administrative proceedings

Technology Transfer Issues

1. Unclear why tech transfer was not included in IP chapter.
2. Accelerates elimination of forced tech transfer provisions already underway.
3. Resumption of Scientific and Technical Cooperation agreements.
4. China 3-5-2 directive for government offices to remove foreign software.
5. No provisions re Huawei issues.

What's Not in the Agreement

1. Reconciling tariff rates
 - A. Chinese tariffs on USA goods average more than 12%
 - B. USA tariffs on Chinese goods average less than 3%
 - C. Obstacle: Chinese consumers prefer Western goods

2. Subsidies of Chinese State Owned Enterprises (SOEs)
 - A. Targeting specific global industrial sectors
 - B. Made-In-China 2025: \$350 Billion in subsidies to 10 industries, including robotics, semiconductors, electric vehicles, smart electrical grid, etc.)
 - C. WTO slow to resolve (Boeing/Airbus began 2004, decision 2011, compliance 2019).

What's Not in the Agreement

3. National Security Policy Arising from Trade
 - A. Maintaining industries that are critical to economic security (steel, aluminum)
 - B. Identifying technologies/industries critical to military security
 - i. 5G Wireless Telecommunications
 - ii. Artificial Intelligence
 - iii. Block Chain
 - iv. Autonomous Weapons

What Else?

1. What is not covered by the Agreement?
2. Expanded work for IP counsel, agencies, and courts
3. What comes next, if anything?
 - A. Regulatory Data Protection (RDP)?
 - B. Artificial infringement?
4. Civil code, patent law, copyright law, criminal code, antimonopoly law modifications?

Other Provisions



WINSTON
& STRAWN
LLP

Chapter 3: Trade in Food & Agricultural Products— China Is Required to . . .

1. Purchase of \$40+ billion/year of U.S. food products next 2 years
2. Establish transparent, science- and risk-based biotechnology approvals
3. Average 24 month review process for feed products
4. Expand scope of beef, pork, poultry products that may be imported
5. Recognize USDA oversight of meat processing, eliminating unique Chinese registration requirements
6. Eliminate certain restrictions against dairy, infant formula, rice, seafood, fruits, vegetables imported from USA

Chapter 4: Financial Services— China Is Required to . . .

1. Eliminate caps on foreign ownership of securities, insurance, asset management, and futures businesses—100% USA ownership permitted.
2. Remove discriminatory regulatory requirements.
3. Permit USA credit and debt card companies to operate.
4. Permit USA bond rating services to operate & rate Chinese bonds.

Chapter 5: Macroeconomic Policy & Exchange Rates—China Is Required to . . .

1. Refrain from competitive devaluations & targeting of exchange rates
2. Increase transparency
3. Provide mechanisms for accountability & enforcement

Chapter 6: Expanding Trade— China Is Required to . . .

1. Increase by \$200 billion its 2017 imports in four categories of goods
 - A. USA manufactured goods (\$120 billion in 2020, \$132 billion in 2021)
 - B. USA agricultural products (\$80 billion over 2020-2021)
 - C. USA energy products (\$30 billion in 2020, \$46 billion 2021)
 - D. USA services (financial, cloud, travel) (\$100 billion in 2020, \$112 billion 2021)

Chapter 7: Dispute Resolution

1. Bilateral Evaluation & Dispute Resolution Arrangement
2. Trade Framework Group USTR & Vice Premier of China to implement
3. Bilateral Evaluation & Dispute Resolution Offices
 - A. Assess specific implementation issues
 - B. Receive complaints
 - C. Consultation to attempt resolution
4. Obligations to provide requested information
5. Appeals of issues prior and new obligations by USTR & VP China for good faith counter measures
6. Reaffirm WTO rights & obligations

USA Concessions



WINSTON
& STRAWN
LLP

Reductions in Section 301 Tariffs And Equivalent Legal Protections

1. Reduce 301 tariffs from 15% to 7.5% on \$112 Billion of Chinese goods
2. Cancel 301 tariffs set for Dec. 15, 2019 on \$160 Billion of Chinese goods
3. For virtually all Chinese obligations, there are representations that “The United States affirms that existing U.S. measure afford treatment equivalent to that provide in this Article” or similar statements.
 - A. Exception for combating counterfeit and pirated products—
USA is studying measures.
 - B. Exception for criminal IP actions—USA will cooperate with China.

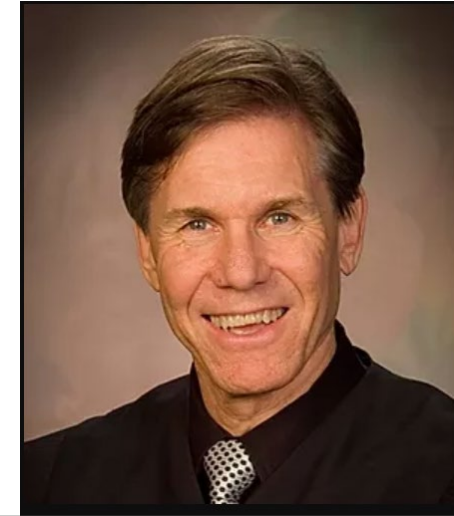
Questions/Answers



Mark A. Cohen
Berkeley Law School
Email: mark.cohen@berkeley.edu



Thomas L. Jarvis
Winston & Strawn LLP
Email: tjarvis@winston.com



Judge Randall R. Rader
The Rader Group PLLC
Email: randall.rader@theradergrouppllc.com