



February 7, 2013

Mr. Stanford K. McCoy
Assistant United States Trade Representative for Intellectual Property and Innovation
Office of the United States Trade Representative
600 17th Street NW
Washington, DC 20508

Dear Mr. McCoy:

On behalf of the US-China Business Council (USCBC) and our more than 220 members doing business in China, we are pleased to submit comments and recommendations for the Office of the US Trade Representative's (USTR's) Special 301 Review. IPR protection remains one of the top challenges that US companies face as they seek to expand their business and investment in China. USCBC's 2012 member company survey showed that 95 percent of respondents are "very concerned" or "somewhat concerned" about IPR protection in China.

USCBC recognizes that China has made progress in recent years by improving and expanding its legal and regulatory framework for IPR, and by making measured improvements to enforcement. The Chinese government in recent years has launched revisions of its Patent, Trademark, and Copyright Laws, providing opportunities to domestic and foreign stakeholders to recommend changes to improve the system of laws and regulations that govern intellectual property (IP).

More than half (51 percent) of companies surveyed in 2012 noted some progress on IP protection in the previous year. China's 2010-2011 IPR enforcement campaign was a notable example of increased enforcement for many areas of IPR, in which government attention to intellectual property delivered measurable results for many companies. USCBC applauds China's efforts to institutionalize enforcement by creating the State Council Leading Group on Combating IPR Infringement and Sales of Counterfeit Goods ("Leading Group") to continue this work.

However, infringement of IPR – including patents, trademarks, copyrights, and increasingly trade secrets – remains a paramount concern for US companies operating in China. This challenging environment has a negative impact on the products and technologies that US firms are willing and able to research, manufacture, and sell in the China market. Forty percent of companies in our 2012 survey noted that China's level of IPR protection limits the products they are willing to license or the types of research and development (R&D) they are willing to undertake in China. Another 36 percent note that it limits what they are willing to sell in China.

Given the broad importance of IPR protection across industries – and the even greater importance to some key sectors – USCBC recommends that USTR keep China on the Priority

Watch List in 2013 and work with senior Chinese officials to make progress on the suggestions listed in this submission. We are attaching a set of documents to provide more detailed views of the IPR landscape in China and a comprehensive list of recommendations. In addition, I would like to highlight below a few priority areas of concern to our members.

Revise China's criminal thresholds and penalties for IPR infringement

Our member companies' top concern remains that legal penalties that are currently available in IPR enforcement proceedings provide an insufficient deterrent to IPR infringement. Specifically, administrative penalties levied against offenders remain too low to deter infringement and are often viewed by the offender as merely a cost of doing business. Moreover, existing value-based thresholds to determine potential criminal penalties are too high, effectively limiting the number of criminal cases that appear each year. To address this issue, we recommend that the US government work with relevant Chinese agencies and officials to:

- Eliminate value-based thresholds laid out in the Supreme People's Court 2004 judicial interpretation that counterfeit goods must meet to qualify for criminal prosecution, replacing them with a system that applies criminal penalties for commercial-scale infringement in line with World Trade Organization (WTO) practices.
- Increase the effective level of penalties for IPR infringement – both judicial damages and administrative penalties trademark and copyright infringement – by instituting statutory minimums and raising or eliminating the statutory maximums on fines and damages. In addition, encourage local regulators and judicial officials to levy fines that will serve as more effective deterrents and reward those who do so.
- Revise existing standards for calculating the value of infringing goods so that standards are based on the market value of the infringed goods (i.e. what the original goods would sell for in the marketplace), not the market value of the infringing goods (i.e. what the counterfeit goods would sell for in the same marketplace).

Encourage greater engagement with State Council Leading Group

USCBC and its members greatly appreciate the establishment – and ongoing work – of the State Council Leading Group on Combating IPR Infringement and Sales of Counterfeit Goods. We encourage this group to further boost its efforts to coordinate among government agencies to promote more robust efforts to protect IPR, particularly trademarks, and to expand its efforts to more actively include other types of IPR protection, including patents, copyrights and trade secrets. USCBC also recommends active, frequent collaboration between the Leading Group, its supporting office housed in the Ministry of Commerce, and US government and industry stakeholders to discuss progress on enforcement and emerging issues.

Other priority recommendations

In addition, we recommend that the US government encourage Chinese government agencies to:

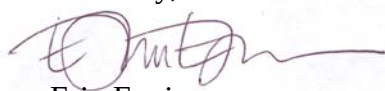
- Focus greater attention of regulators, enforcement agencies, and courts at all levels on IPR enforcement issues by increasing resources and personnel for local administrative agencies – particularly in trademarks and copyrights – to proactively tackle counterfeiting; including benchmarks for IP protection in regular performance evaluations of relevant

government officials; and actively conducting training for IPR personnel at all levels on best practices in handling IPR cases and emerging IPR issues;

- Promote a fair and open environment for IPR by setting and implementing regulations and policies in IPR-related areas (such as innovation, standards, taxation, research & development, and government procurement) that treat foreign-invested enterprises equally with their domestic private and state-owned enterprises, to ensure that all rights holders—foreign and domestic—receive equal legal protection for their IPR; and
- Encourage more consistent IPR enforcement across regions and jurisdictions by providing clearer guidance and fostering increased communication between central- and local-level government agencies, including greater information sharing and dialogue between provincial and local IPR regulators to share experiences and best practices;
- Pay greater attention and apply more resources to Internet-related IPR infringement, including by drafting new regulations relevant to Internet-related trademarks and copyrights and by increasing monitoring and investigation of Internet sales and distribution of counterfeit and pirated products;
- Promote the use of legal software, as agreed by China and the US in multiple high-level dialogues, through full implementation of existing policies and regulations, increasing funding to government agencies and for auditing of legal software use, and actively promoting use of legal software in state-owned enterprises and private companies; and
- Formulate more effective regulations on counterfeit-producing machinery and equipment, such as to mandate that infringing goods—and the equipment used to produce them—be destroyed upon seizure and not be permitted to enter the market under any circumstances.
- Draft and enforce new measures that require government officials to keep confidential all technology and IPR, including trade secrets, formulas, test data, and product information, gathered during regulatory reviews and product approvals, with concrete penalties when such penalties are violated.
- Remove market access and distribution barriers for legitimate copyrighted products, such as imported feature films and television programs, to better meet domestic demand with legitimate products as opposed to pirated ones.

We look forward to working with USTR and other US government agencies to promote an improved environment for IPR protection in China. Please do not hesitate to contact me or my colleague Ryan Ong (ryan.ong@uschina.org; 202-429-0340) with any questions or clarifications.

Sincerely,



Erin Ennis
Vice President

Attachments

- Appendix 1: USCBC Member Company Survey (October 2012) and Survey Supplement (December 2012) – Member Company Views on the IPR Landscape
- Appendix 2: USCBC IPR Suggestions (February 2013)

USCBC 2012 China Business Environment Survey Results:

Continued Growth and Profitability; Tempered Optimism Due to Rising Costs, Competition, and Market Barriers

Executive Summary

- » **US companies continue to see strong growth and profitability in China.** Two-thirds of companies surveyed said revenue from their businesses in China grew by 10 percent or more in the past year. Seventy-five percent said profit margins from their China operations were the same as or better than their company's global margins.
- » **Despite market growth, company optimism is tempered by rising costs, domestic competition, and continuing regulatory and market access barriers.** Although 90 percent of respondents said they are optimistic or somewhat optimistic about business prospects over the next five years, a sizeable number—45 percent—said they are less optimistic than three years ago.
- » **Companies' top 10 challenges are related to both daily business operations and government policies.** Talent recruitment and retention remained the top challenge for businesses in China; administrative licensing hurdles—including obtaining business licenses—ranked second. Though cost increases ranked fourth, companies said such increases were the number one restraint on profitability growth.
- » **Issues related to favoritism toward Chinese companies appear in five of companies' top 10 challenges.** Those issues include administrative licensing, competition with Chinese enterprises, uneven enforcement and implementation of laws and policies, investment restrictions, and standards and conformity assessment.
- » **The survey debunks widely-held assumptions.** Despite all the rhetoric about China's exchange rate harming the competitiveness of US companies in China, currency once again failed to make the top twenty five issues of concern. Over 90 percent of respondents say they are in China to reach the China market, not offshore production to export back to the United States.

USCBC Members' Top 10 Issues

1. Human resources: Talent recruitment and retention
2. Administrative licensing
3. Competition with Chinese enterprises (state-owned or private)
4. Cost increases
5. Intellectual property rights enforcement
6. Uneven local enforcement and implementation of laws and policies
7. Investment restrictions
8. Competition with foreign companies in China
9. Competition with foreign or Chinese companies not subject to US Foreign Corrupt Practices Act
10. Standards and conformity assessment

- » **Unique and authoritative respondent profile.** The survey incorporates a mix of manufacturing, services, agricultural, and resources companies; China- and US-based executives; and global CEOs as well as in-country managers. Eighty-one percent of the participating companies have over 10 years of experience in the China market.

USCBC 2012 China Business Environment Business Survey

The China market continues to deliver sales growth and profitability for US companies, but rising costs, increasing competition, and persistent market access and regulatory barriers are tempering the optimism of US companies doing business with China.

Each year, the US-China Business Council (USCBC) surveys its member companies to gauge the business climate in China and assess the top challenges of doing business there. In the midst of continued uncertainty in the global economy, China's comparative economic success remains attractive to US companies. According to USCBC's most recent survey data, 94 percent of respondents rank China as either their top global market priority or among their top five priorities [figure 2].

USCBC estimates that China is a \$250 billion market for American companies. Fully 94 percent of companies report that they are doing business in China to primarily access the domestic Chinese market, not develop an export platform. The importance of the China market at a time when the global economy remains weak is reflected in the survey:

- » More companies were profitable last year – 89 percent, the highest rate to date in the seven-year history of the USCBC member survey [figure 3];
- » Two-thirds of respondents saw their 2011 revenue from business in China increase by double digits – including 30 percent who reported revenue growth greater than 20 percent;

- » Nearly three-quarters of respondents indicate that they expect 2012 revenue to increase [figure 4];
- » Seventy-five percent of respondents report that their China operations have profit margins greater than or equal to their company's global profit margins [figure 5];
- » Sixty-six percent of respondents plan to increase investment in China in the coming 12 months.

Despite continued market growth and overall optimism, companies are somewhat less optimistic about their China operations than in prior surveys:

- » Forty-five percent of respondents are less optimistic today about the business climate than they were three years ago, even though 90 percent say they are optimistic or somewhat optimistic about the outlook for the next five years [figures 6, 7];
- » Profit margins are getting squeezed due to rising costs and competition in the market, but companies also noted that the Chinese government's policies and regulations limit their profitability in China [figure 8];
- » While two-thirds of respondents plan to increase investment in China in the next 12 months, 17 percent of respondents said they had halted or delayed planned investments, and fully half of those cited market access and investment barriers as the primary reason [figures 9, 10].

Fig. 2

China's Prominence in Overall Company Strategy

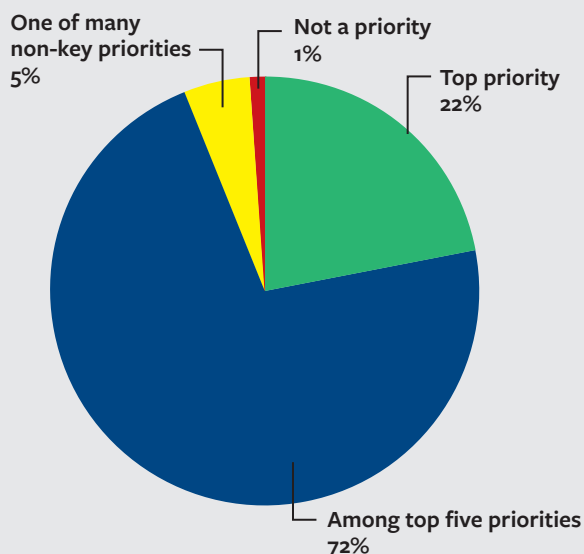


Fig. 3

Are Your China Operations Profitable?

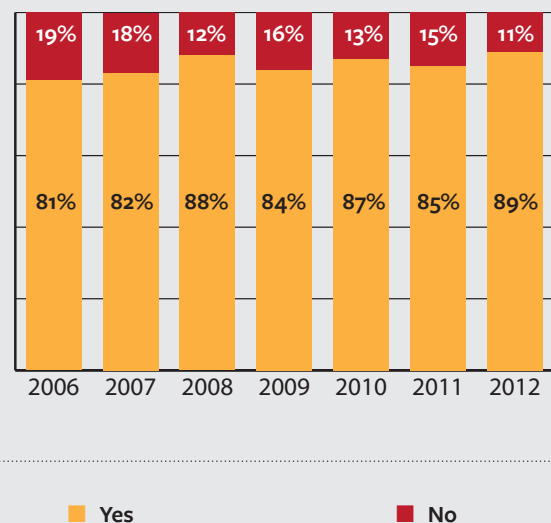


Fig. 4 Expected 2012 Revenue from China

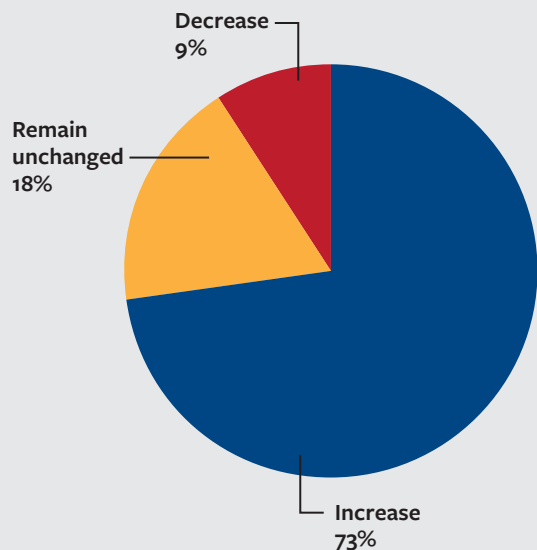


Fig. 5 Profit Margin of China-based Operations Compared to Overall Operations

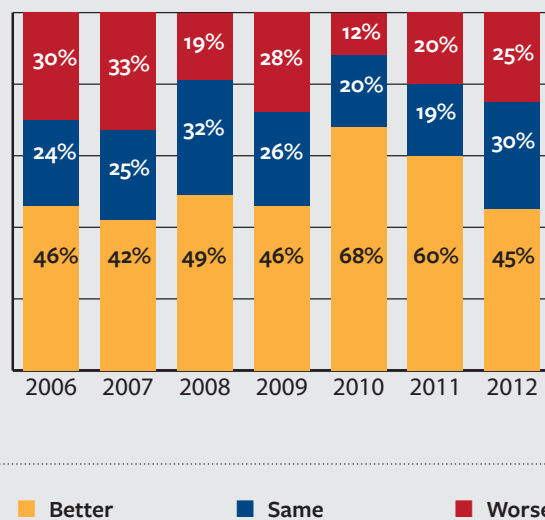


Fig. 6 View of Current Business Climate in China Compared with Three Years Ago

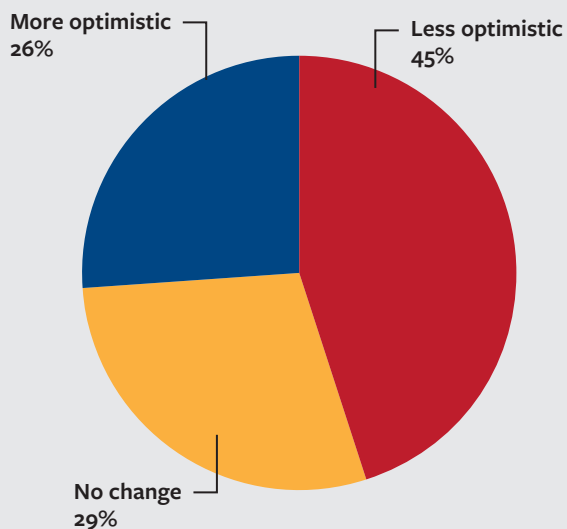
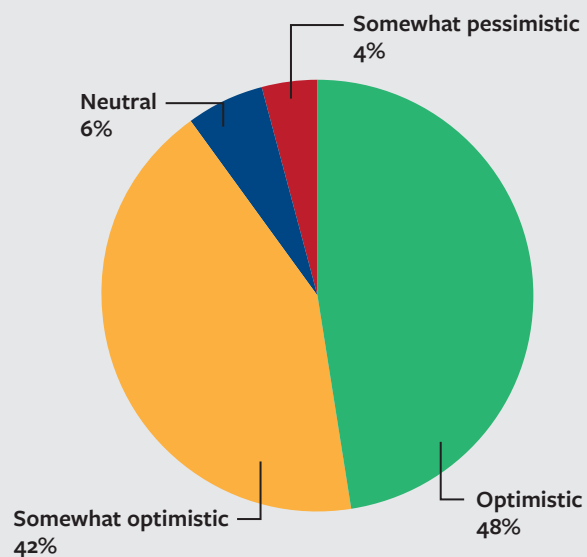


Fig. 7 Five-Year Outlook for Business in China



In summary, companies' priorities, resource commitments, revenue growth, and profitability numbers for China are largely in line with previous years and once again firmly underscore the importance of the China market. Companies remain generally optimistic in their five-year outlook on China, though slightly less so compared with responses

from the previous five years. The biggest change is in viewpoint: Almost half of companies reported that their view of the business climate in China is less optimistic than three years ago. The shift, however, is not from optimistic to pessimistic – it is from optimistic to somewhat optimistic. The change likely reflects a variety of causes.

Fig. 8 Primary Restraint on Increased Profitability in China

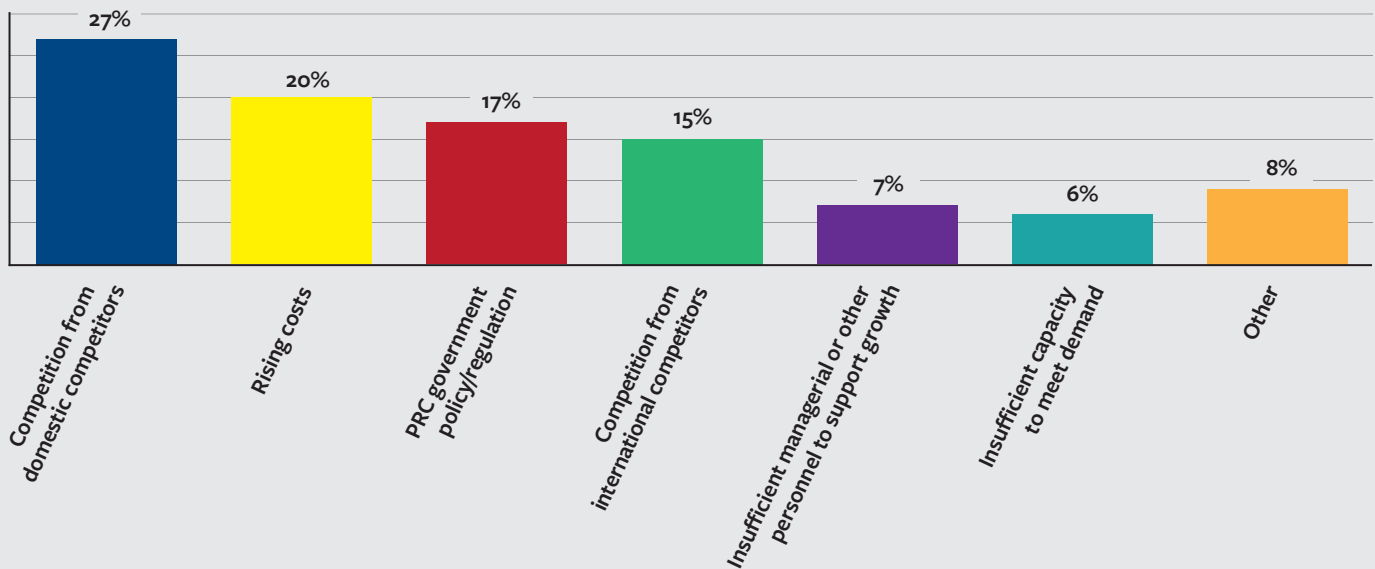


Fig. 9 Did Your Company Reduce or Stop Planned Investment in China in the Past Year?

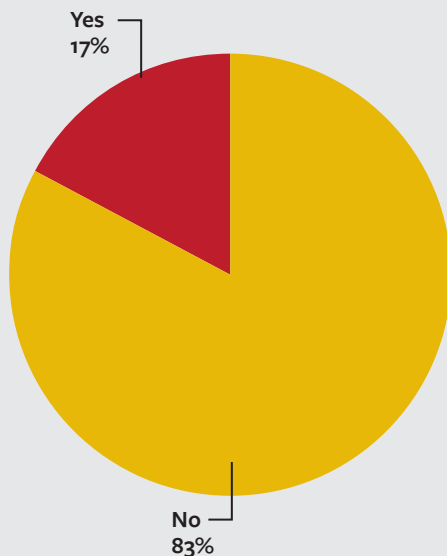
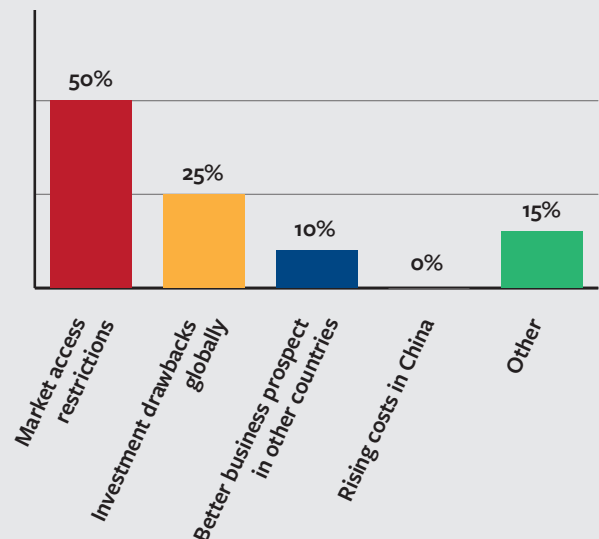


Fig. 10 Why did Your Company Reduce or Stop Planned Investment in China in the Past Year?



Many of the challenges that companies report are closely related to the running of daily business operations and are frequently interconnected with other challenges on the list. For example, the top challenge—talent recruitment and retention—has a direct correlation with the fourth challenge—cost increases—as companies increase compensation and benefits packages to retain employees. Increased competitive pressures (mentioned in challenges #3, #8, and #9) place added burdens on companies trying to rein in rising costs. Companies overwhelmingly reported concern about rising costs, citing this issue as the number one restraint on profitability growth.

Along with these business realities, there are challenges specific to China that can influence the perception and resolution of the challenges that US companies face there. For example, a potentially straightforward procedure, such as getting a business license, which ranked second in the list of challenges US companies face, can be a tool of government policy—in appearance or in fact—to restrict foreign entrants. With the Chinese economy growing less robustly than in previous years, the real or perceived threat of facing unfair competition, protectionism, and limits on market access become more serious deterrents to pursuing business opportunities in China (challenges #3, #6, and #7).

Concern about Chinese policies among US companies has had a tangible outcome: Half of the 17 percent of companies that reduced or tabled a planned investment in China said

their decisions were a result of increasing market access restrictions. These restrictions were also a likely contributing factor in the 20-plus percent reduction in US investment in China that was seen in the past year, along with companies generally reduced investments around the world due to global economic uncertainties. The lower number of respondents who express optimism or whose companies are planning new investments could also be attributed to concern about how open China is to foreign investment.

Among respondents' top challenges, concerns about favoritism toward Chinese companies can be seen in five separate top categories: administrative licensing (#2); uneven enforcement of Chinese laws and policies (#6); investment restrictions on foreign companies (#7); and standards and conformity assessment (#10).

Among these concerns, however, progress was made in the past year on a few issues. Regulatory transparency and protection of intellectual property continue to make slow improvements, even as both issues remain top concerns.

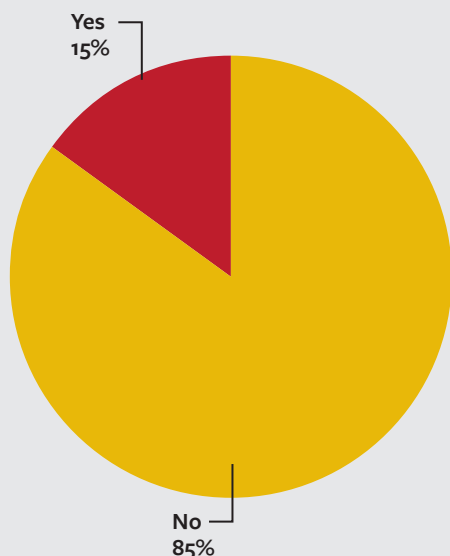
But it is essential to note that the central government also missed important opportunities to show its commitment to opening markets. Although central and many local governments have responded to foreign complaints and issued notices that end discriminatory “indigenous innovation” preferences in government procurement policies—a top issue in recent surveys—85 percent of respondents say they have yet to see any impact of the change [figure 11]. Most prominently, China's revised Catalogue Guiding Foreign Investment, which took effect on January 30, 2012, opened few new sectors to foreign companies and did little to reduce existing foreign investment ownership restrictions in other sectors. At a time when bilateral investment is gaining more attention in the broader relationship, continued restrictions on US investment in China may become a point of tension in the US-China relationship as Chinese companies seek greater investment opportunities in the United States.

Not in the Top 10

The challenges ranked highest by survey respondents include many familiar themes. Other issues that observers may hear about frequently did not make the top 10 challenges, however. China's currency policies and exchange rate once again failed to make the top 25 issues, showing that this issue is not a factor in US competitiveness in the China market. “Forced” transfer of technology, a topic raised in several recent bilateral meetings, ranked 16th in the survey responses. Technology transfer concerns are more likely to be reflected in more specific issues, such as foreign ownership restrictions, IP protection, and standards setting, all of which made the top 10.

Fig. 11

Have You Seen Any Positive Impact as a Result of China's 2011 Pledge to Delink Indigenous Innovation and Government Procurement?



Services sector market access also did not appear in this year's overall top 10. However, when results are filtered to show responses from services sector companies, market access barriers were the fourth-ranked issue, following licensing, employee retention, and domestic competition challenges.

What's Next?

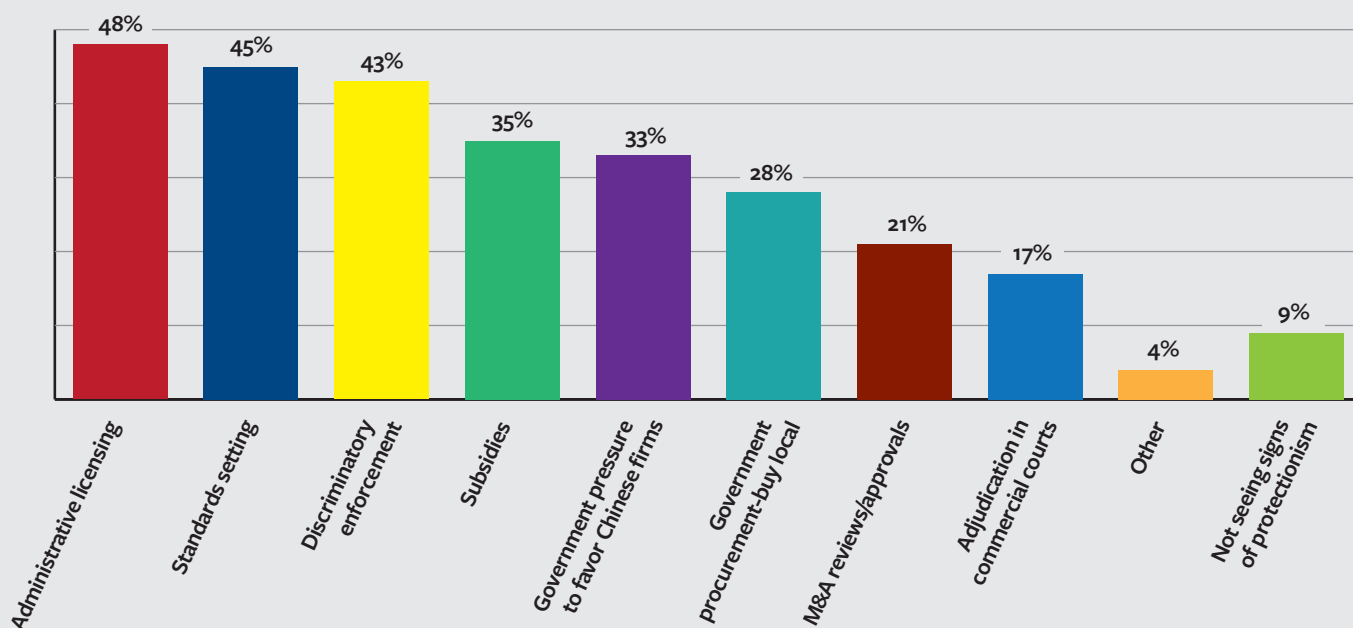
Addressing the wide variety of challenges identified in this year's survey requires an array of approaches. Some top concerns do not lend themselves to policy fixes and are part of China's business environment for the time being. Two of the top four issues, human resources shortages and cost increases, for instance, have no quick policy fixes.

Other business challenges can be influenced by policy and regulatory choices. Respondents note that they see signs of protectionism in how the business licensing and approvals system operates; in how standards are set and administered; in how Chinese regulations are enforced more strictly against foreign companies; and in how Chinese companies appear to have easier access to financing and government subsidy or funding programs [figure 12]. China's top political and government leadership will transition this year and next, with a turnover in officials that is anticipated to be more significant than at any time over the past 10 years. In

addition, there is an active debate in China about economic reforms, with some government leaders and domestic policy analysts calling for greater competition and market influences, including the promotion of private capital into sectors dominated by the state. The outcome of the policy debate is unclear, as is whether foreign companies will find their specific concerns addressed.

Sweeping policy changes are unlikely, however, — a point made often by senior Chinese officials in meetings with USCBC. While the leadership transition provides an opportunity for reforms, it is more likely that companies, US government officials, and other stakeholders will need to continue to do the hard work of analyzing the problems underlying the issues identified in this survey and come up with specific solutions. This requires constant engagement with the Chinese government and the use of trade tools, such as dispute settlement through the World Trade Organization, when necessary. While some pundits and officials may view dialogue as an ineffective way to resolve problems, developments in the US-China relationship have proven that direct engagement with China and close coordination with other trading partners produces meaningful results on issues that impact US workers and businesses.

Fig. 12 Signs of Protectionism in China



Challenge #5

IPR enforcement (trademark, patent, copyright, trade secrets)

Progress on Issue in Past Year: Improved/Unchanged

Rank in 2011:	5
Rank in 2010:	4
Rank in 2009:	8
Rank in 2008:	6
Rank in 2007:	3
Rank in 2006:	3

Companies continue to face challenges in enforcing their intellectual property rights (IPR) in China. Of those surveyed, 95 percent indicated they are either somewhat or very concerned about IPR enforcement. Despite that concern, over half indicated that they had seen some improvements in IPR protection in the past year. The continued difficulties have negatively affected company operations: The majority of companies report that IPR enforcement challenges limit the types of products they develop, make, or sell in China [figures 16, 17, 18, 19].

Companies report that the lack of a meaningful criminal deterrent is a significant roadblock to China developing a robust IP protection regime. USCBC has consistently called for the elimination of thresholds for an IP case of commercial scale to be considered under the criminal system.

Fig. 16 Level of Concern about IPR Enforcement

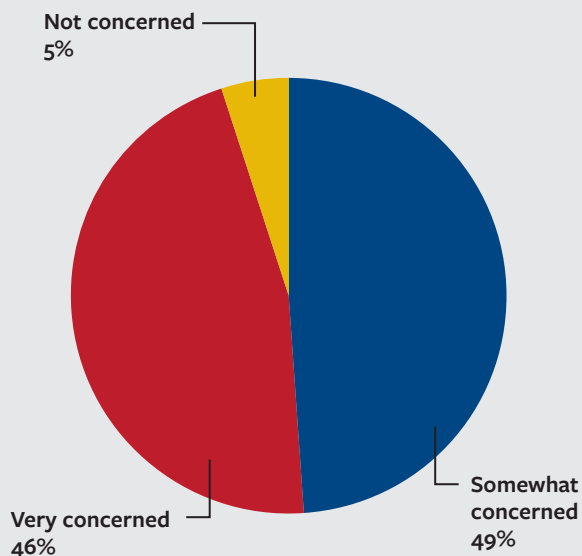


Fig. 17 Over the past year, China's Protection of IPR...

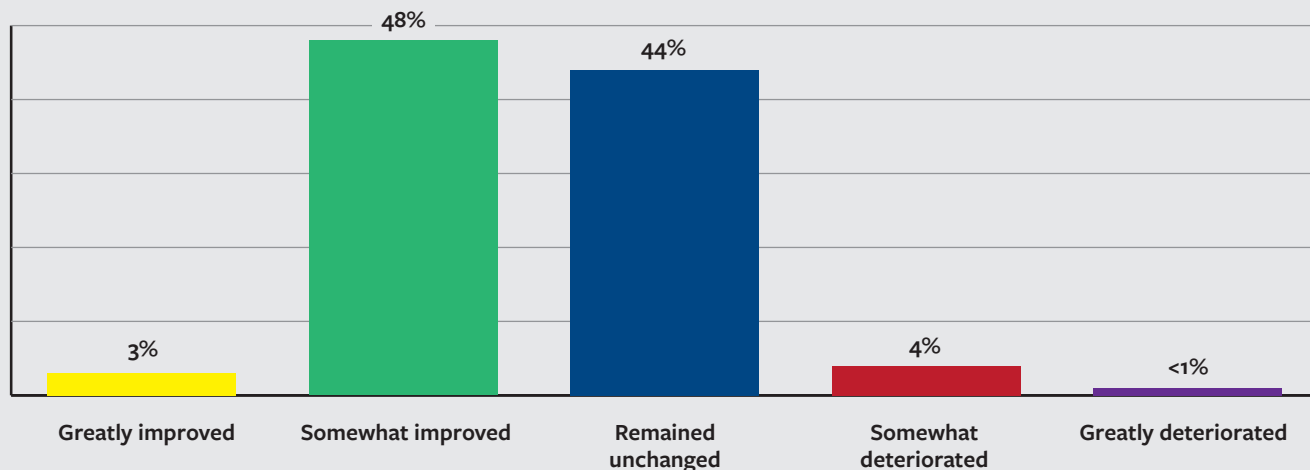
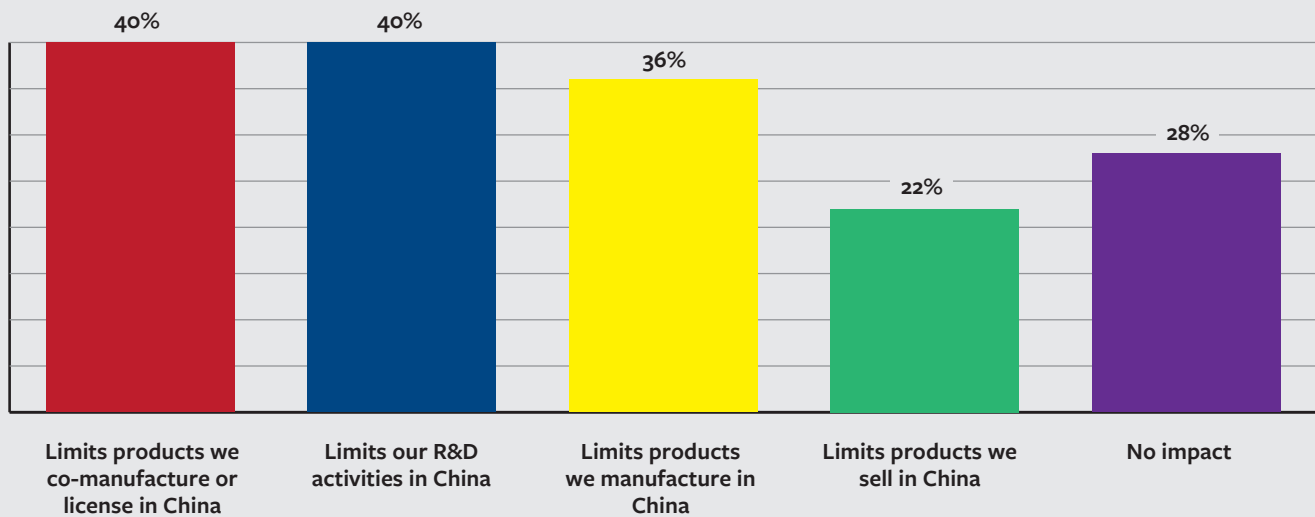


Fig. 18

Impact of Level of IPR Enforcement on Activities Undertaken in China

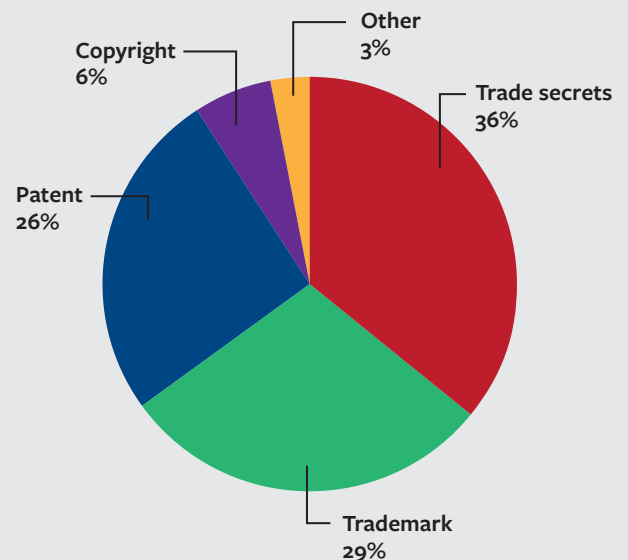


Companies report that:

- » “Enforcement actions to date are mostly civil fines which amount to a cost of doing business for the pirates; we want criminal penalties comparable to other parts of the world.”
- » “Huge amounts of money and time have been spent every year on hundreds of cases, while lots of cases are not being tackled due to limited resources.”
- » “Laws against counterfeiting and trademark infringement are unevenly and slowly enforced.”
- » “Fear of loss of critical IP creates a huge cost to create elaborate plans to protect IP needed to bring technology to China.”

Fig. 19

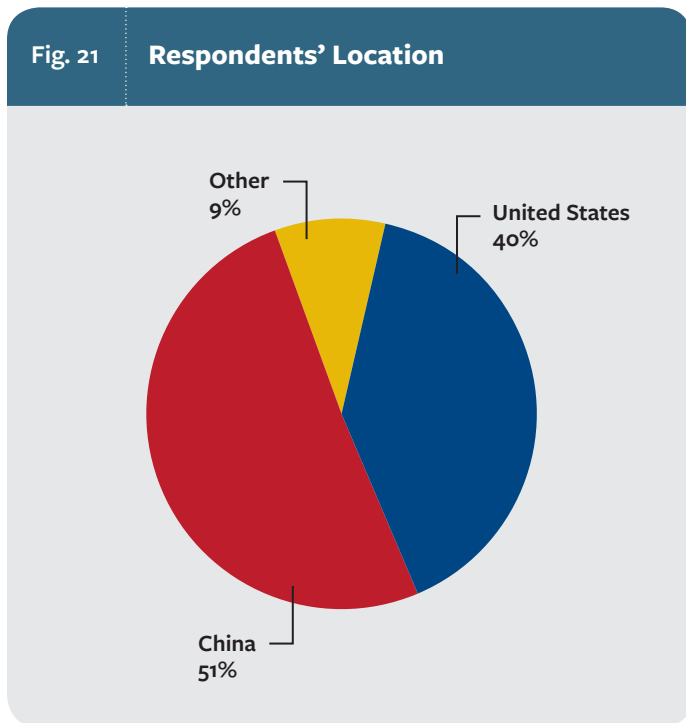
Intellectual Property Infringement of Greatest Concern



Respondent Profile

US and China-based executives

USCBC's survey incorporates a unique mix of US- and China-based executives. Half the respondents are based in China, and 40 percent are based in the United States. The remainder are located elsewhere in Asia or other locations [figure 21].

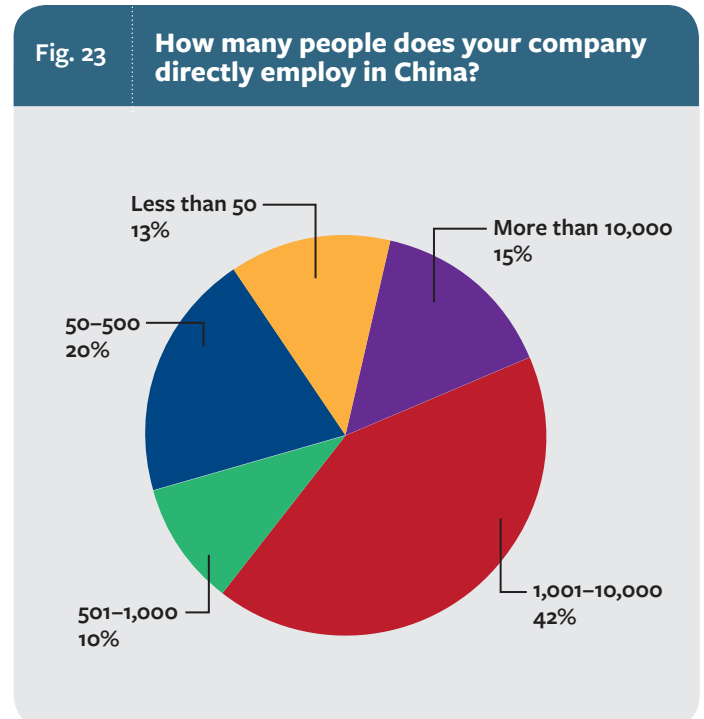
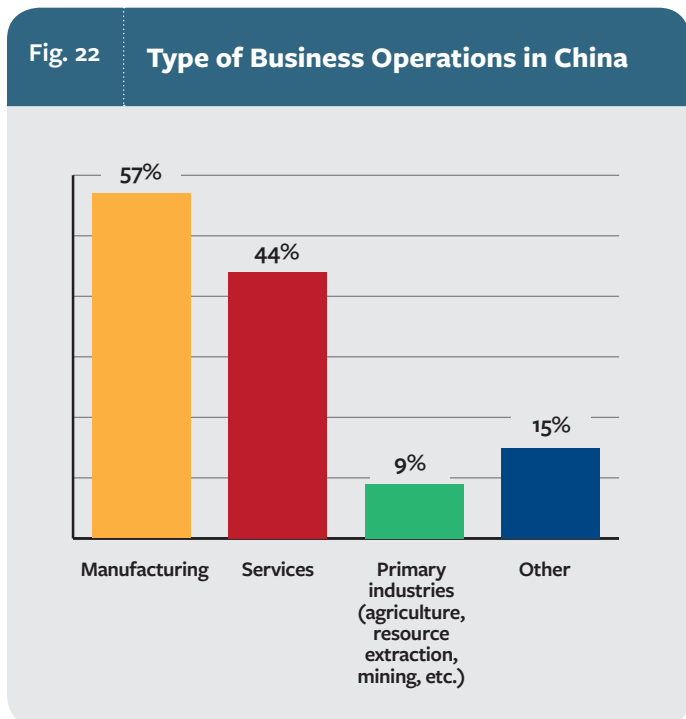


In addition, respondents range from CEOs of global corporations to executives based in the field. Survey results incorporate both strategic and tactical perspectives.

Cross-sector representation

USCBC members who completed this year's survey represent a cross-section of US companies doing business in China. Fifty-seven percent of respondents represent manufacturing companies, and 44 percent represent service providers—and many respondents' companies are active in both sectors. Nine percent work for companies in primary industries, such as agriculture and oil and gas [figure 22].

Respondents' companies represent small-, medium-, and large-sized enterprises, with the largest number of respondents (42 percent) having between 1,001 and 10,000 employees in China [figure 23].



Long experience in the China market

USCBC member companies have a long history of doing business in China: 53 percent of respondents' companies have been in China for more than 20 years, and 28 percent have been in China for 11–20 years. By the end of 2012, almost a quarter of respondents note that their company will

have more than \$1 billion invested in China, and 58 percent will have more than \$100 million invested [figures 24, 25].

In China to access Chinese customers

As in past years, the vast majority of USCBC member companies report that they are doing business in China to access China's domestic market. Fourteen percent use China as an export platform to reach other markets around the world, though only 12 percent use their China operations to produce products that are shipped back to the United States [figure 26].

Fig. 24 Years Doing Business with China

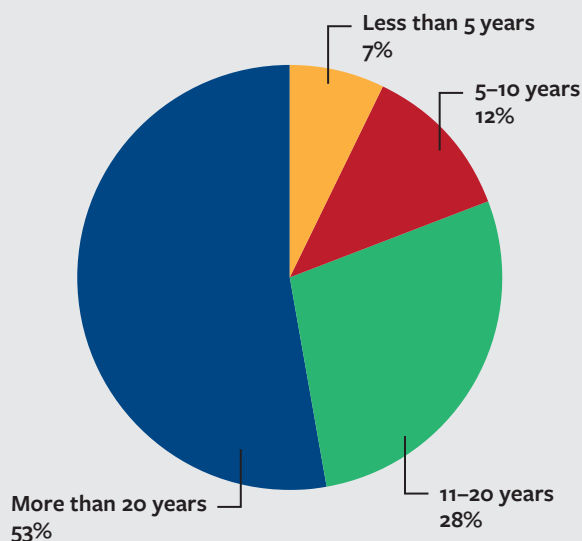


Fig. 25 Total Direct Investment Committed to the China Market

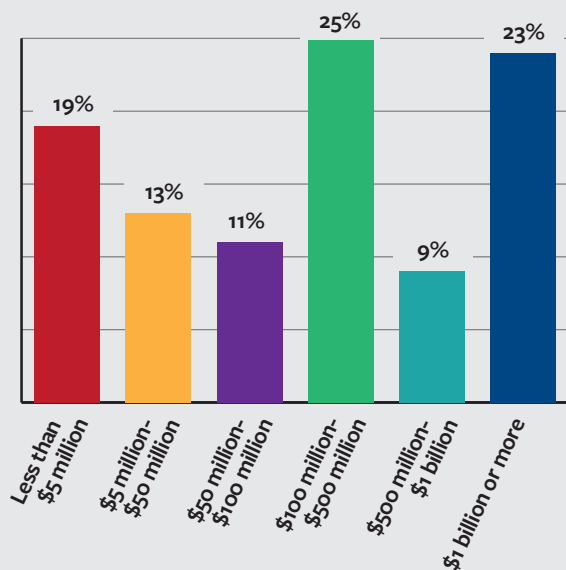
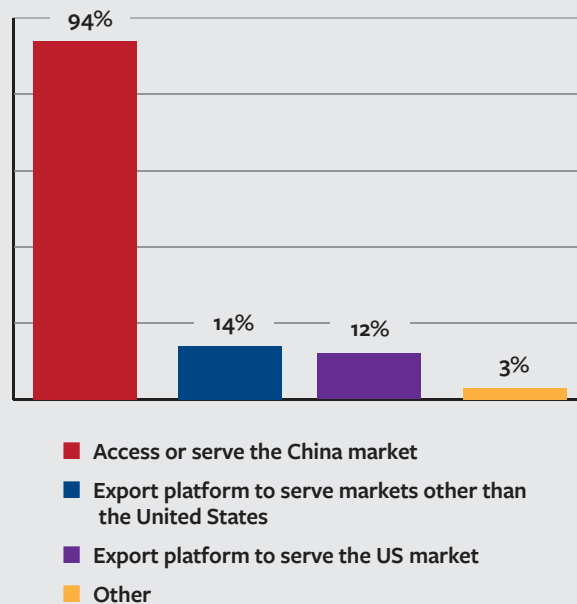


Fig. 26 Objectives for Existing and Future Investments in China



US-China Business Council 2012
China Business Environment Survey Supplement:
An In-Depth Look at Selected Top Issues

Introduction

Each year, the US-China Business Council (USCBC) surveys its member companies to gauge the business climate in China and assess the top challenges of doing business there. In October 2012, USCBC released a report on the major findings of its annual survey, including the top 10 priority issues identified as by USCBC member companies.

This report dives deeper into five key areas touched upon in the initial survey report: human resources and rising costs of doing business in China; competition with Chinese companies; technology transfer issues; intellectual property rights (IPR) protection; and China’s overall investment environment and policies designed to promote investment outside of traditional regions and into central and western China.

Key findings from the detailed survey questions explored in the survey:

» Most companies expect to expand their headcount in China in 2013, even though wages are expected to increase at least 5-10 percent next year.

- » More respondent companies compete with non-state owned companies than state-owned companies in China and most suspect that both types of companies receive tangible benefits that foreign companies do not receive.

» Most companies have not been asked to transfer technology to China in the past three years, but many of those that have been asked faced tough choices about how to handle the requests.

» Nearly all companies remain concerned about China’s IPR enforcement, but IPR protection continues to slowly improve and some are finding China’s courts as a viable means to enforce their rights.

» Companies plan to continue expansions of their operations in China, and some are looking to China’s central and western provinces as new markets where they may be able to expand their sales in the country.

The full survey report can be found on USCBC’s website: <https://www.uschina.org/info/members-survey/>.

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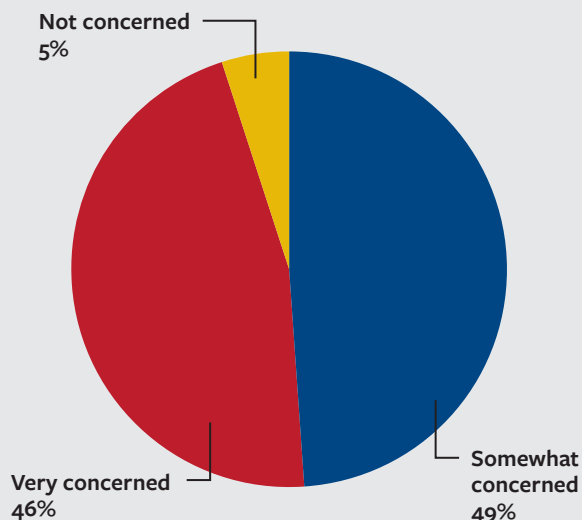
Focus: Intellectual Property Rights Protection

Executive Summary

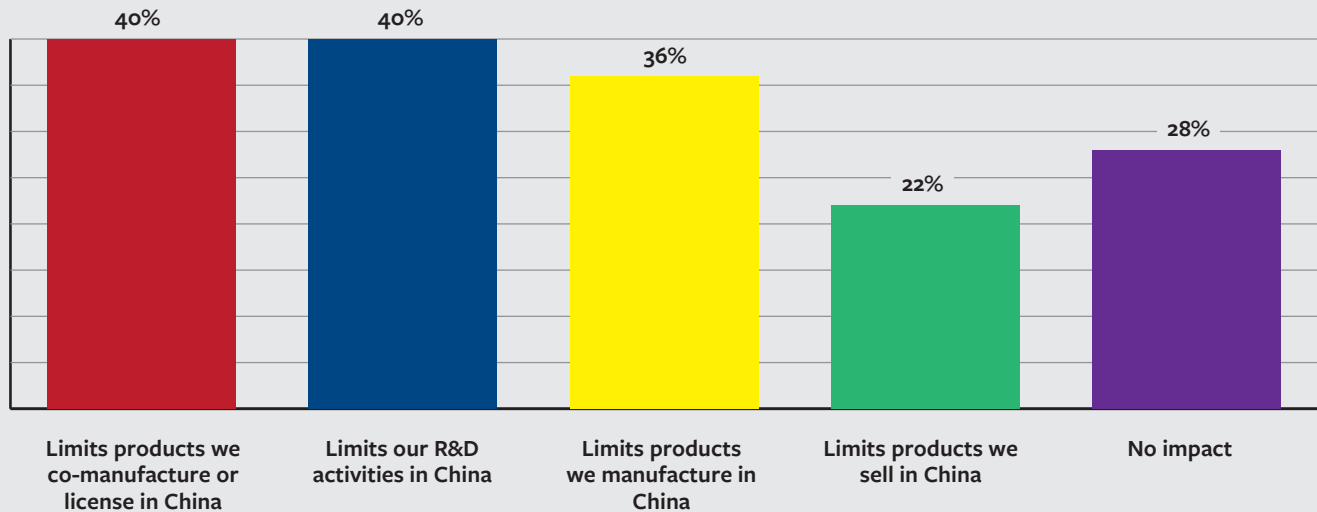
- » Intellectual property protection in China ranked fifth in this year's US-China Business Council survey, as companies continue to experience problems registering and enforcing their patent rights, protecting brands and trademarks, and fighting copyright piracy in China. Ninety-five percent of all companies surveyed this year indicated they were concerned about IPR enforcement.
- » There is no "one size fits all" strategy for improving IPR protection, however, as concerns about IP differ across a broad range of sectors and IP types: trademarks, copyrights, patents, trade secrets, and other areas. In asking respondents for their top area of IP concern, trade secrets (36 percent) ranked first, followed by trademarks (29 percent), patents (26 percent), and copyrights (6 percent).
- » Concerns about IPR infringement continue to an impact on company operations in China, constraining what US firms are willing to manufacture, research, sell, and license in China.
- » Companies also continue to have mixed views about their ability to use China's existing administrative, civil, and judicial channels to address IPR infringement, with barriers created by criminal thresholds and low levels of administrative fines and civil damages.
- » At the same time, companies note that China is making slow progress in protecting intellectual property rights, highlighted by a series of high-level Chinese government efforts to protect IPR. More than half of the companies surveyed (51 percent) indicated that IPR protection had improved at least somewhat over the last year.
- » Company views of enforcement channels are also slowly improving. For example, 82 percent of companies in this year's survey indicated that the courts were an at least somewhat viable option for resolving IPR disputes to some degree, up from 29 percent in 2011. A growing number of companies report successful outcomes from court cases taken to enforce IPR.

US company concerns about intellectual property protection in China are not a new issue, but they remain an important one. The US-China Business Council (USCBC) member companies continue to experience problems registering and enforcing their patent rights, protecting brands and trademarks, and fighting piracy of copyrighted works in China. Indeed, the protection of intellectual property rights (IPR) ranked fifth among this year's top issues. It has ranked consistently in the top 10 issues each year that USCBC has conducted its survey. In fact, 95 percent of all companies surveyed this year indicated they were concerned about IPR enforcement, and approximately half of those firms indicated they were "very concerned."

Level of Concern about IPR Enforcement



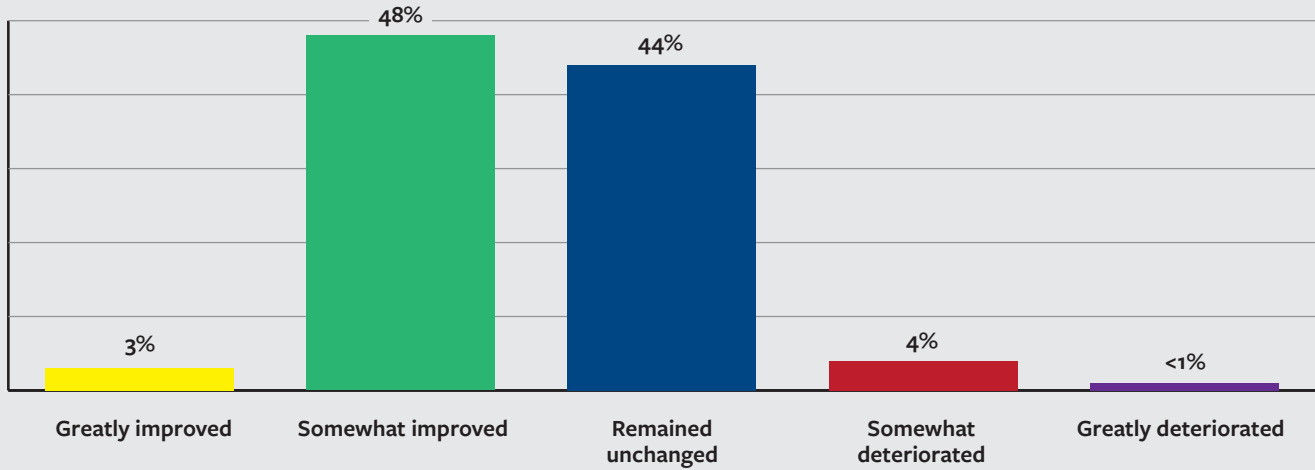
Impact of Level of IPR Enforcement on Activities Undertaken in China



Concerns about counterfeiting, piracy, and other forms of IPR infringement have a broad impact on company operations in China, constraining what US firms are willing to manufacture, research, sell, and license in China. Forty percent of companies indicated that China's inadequate IPR protection limits the products they will license or the types of research and development (R&D) they are willing to carry out in China, while 36 percent of firms say that IPR concerns limit what they are willing to sell in China.

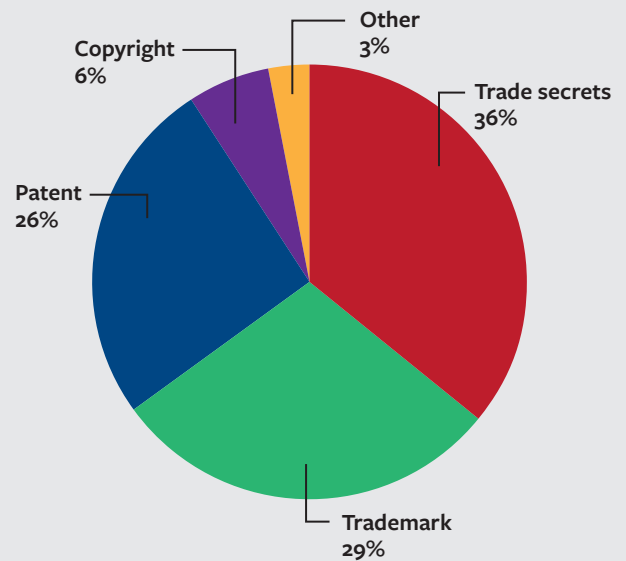
While companies report persistently high levels of concern about IP protection in China, companies also note that China has made some progress in protecting intellectual property rights in recent years, highlighted by three high-level Chinese government efforts to protect IPR, including the 2008 National IPR Strategy, 2010-2011 special campaign for IPR protection, and the November 2011 creation of a new central government leading group to promote IPR protection. More than half of the companies surveyed (51 percent) indicated that IPR protection had improved at least somewhat over the last year. In contrast, only 5 percent of companies reported that IPR protection had deteriorated.

Over the past year, China's Protection of IPR...

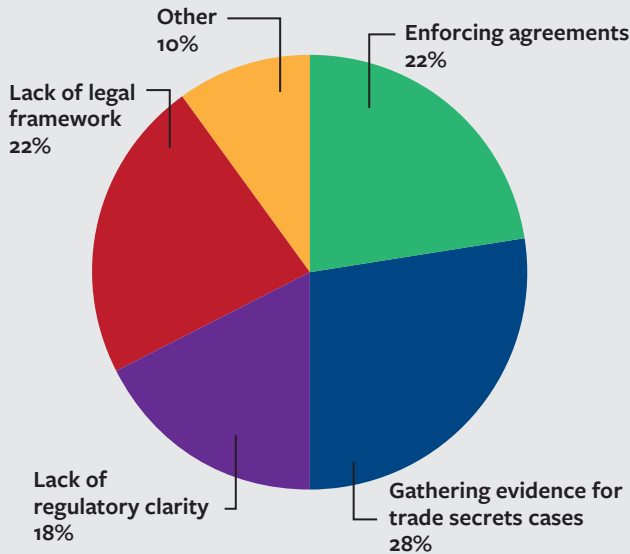


IPR protection, however, remains challenging because of its diversity, including not only a broad range of sectors but also a mix of IP types: trademarks, copyrights, patents, trade secrets, and other areas. There is no “one-size-fits-all” approach to tackling IPR protection. Each set of IPR issues involves different government agencies and different strategies. A review of the IPR areas of greatest concern illustrates this difficulty clearly. This year’s member survey asked respondents to list their greatest IPR concerns, and the top choices listed were trade secrets (36 percent), trademarks (29 percent), patents (26 percent), and copyrights (6 percent). The advocacy approaches and solutions sought from PRC government agencies must be tailored to tackle each of these challenges, yet coordinated to provide leverage and to show progress across the board.

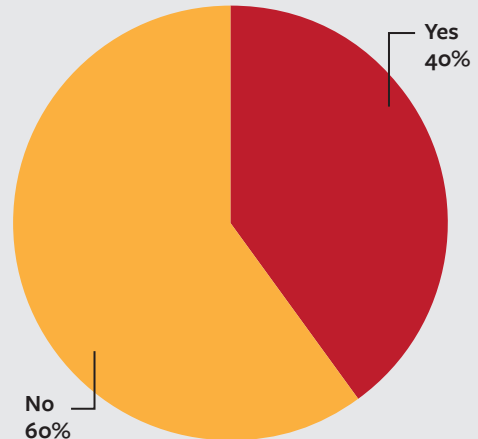
Intellectual Property Infringement of Greatest Concern



Aspect of Trade Secret Protection in China of Greatest Concern



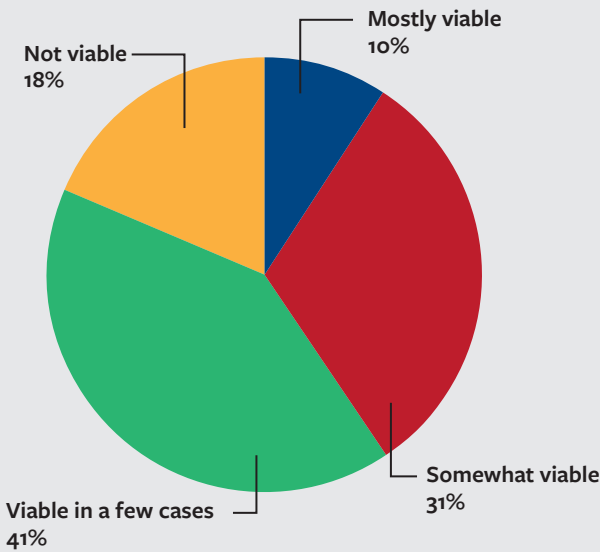
Is Online Intellectual Property Infringement a Problem for Your Company?



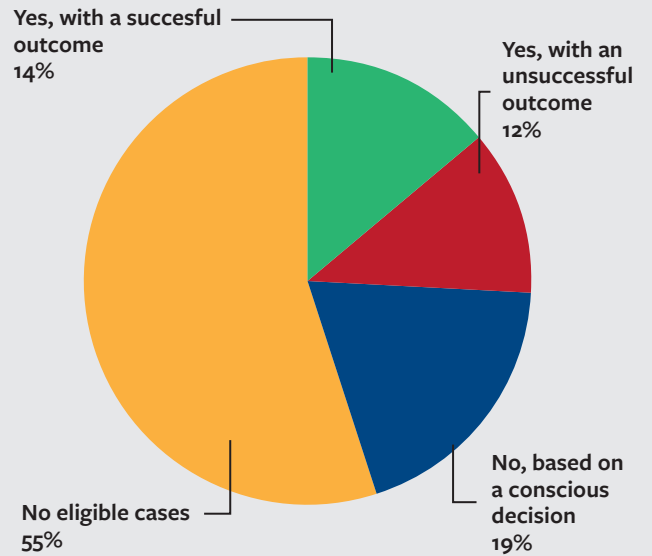
Trade secrets represent an emerging issue, rising to take the top spot this year. The challenges companies face in seeking to protect their trade secrets are complex, ranging from the difficulties in gathering evidence in trade secrets cases to difficulties in enforcing trade secret-related agreements, as well as the lack of a clear legal framework or regulatory process in China for handling trade secrets problems. Other emerging challenges relate to new vehicles of infringement, such as websites, file sharing services, and other online platforms. Although the majority of companies surveyed said that online IP infringement is not a concern for them, two-fifths of those surveyed indicated it was a concern, up from years past and reflecting the rising profile of this issue.

Companies also continue to have mixed views about their ability to use China's existing administrative, civil, and judicial channels to address IPR infringement. High thresholds for triggering criminal penalties continue to prevent companies from making better use of criminal penalties to battle counterfeiting and piracy. Administrative fines and penalties are low in comparison with the scope of the problem. Civil damages remain insufficient in many cases to compensate companies for infringement, and civil cases take considerable time and resources to pursue. While companies have seen improvements in using administrative and court channels in jurisdictions like Beijing, Shanghai, and Shenzhen, IPR enforcement outside of these locations is more mixed.

Are China's Courts a Viable Tool for Fighting IPR Infringement?



Has your Company Brought an IPR Case to China's Courts within Past Three Years?



At the same time, company views of some enforcement channels are improving. For example, 82 percent of companies in this year's survey indicated that the courts were a viable option for resolving IPR disputes to some degree, compared to the 18 percent who indicated they did not consider China's courts a viable option. The numbers of those saying they did not consider China's courts a viable option have fallen from 43 percent of respondents in 2010 and 29 in 2011, suggesting that US companies may be seeing slow improvement in China's official IPR judicial regime.

There are, in fact, tangible success stories to report. Companies indicated some success in using administrative and judicial tools to address counterfeiting and IPR infringement. Of the companies surveyed this year, just under half (44 percent) indicated that they had considered taking an IPR infringement case to court within the last three years. Of those that considered bringing a case, more than half (56 percent) indicated they had chosen to pursue cases in the courts. Fifty-eight percent of those firms who brought cases to trial reported a successful outcome.

Intellectual Property Rights Recommendations List

February 2013

Executive Summary

- China has made progress in recent years with continued improvements to its legal and regulatory framework for intellectual property rights (IPR) protection, and gradual improvements to enforcement through both high-level campaigns and ongoing efforts.
- IPR protection remains a high priority for both foreign and domestic companies, and has a tangible effect on the types of business activities that US companies are willing to conduct in China.
- There is no “one size fits all” solution to better IPR protection, however, as concerns and solutions differ not only across a broad range of sectors but also cut across different types of intellectual property, including patents, trademarks, copyrights, and trade secrets.
- Drawing on regular communication with its members about their views of the IPR landscape in China, USCBC has compiled a comprehensive list of recommendations to address concerns across the full IPR landscape, including systemic challenges, infringement, and judicial proceedings, as well as recommendations that touch on specific areas of IPR (patents, trademarks, copyrights, and trade secrets).
- USCBC’s top concerns remain that current penalties that are available in practice in IPR enforcement proceedings provide an insufficient deterrent to IPR infringement, and that existing value-based criminal thresholds effectively limit the number of criminal cases that appear each year.
- This list is designed to provide key stakeholders – including US and PRC government officials and industry representatives – a snapshot of the key priorities and concerns faced by US companies in China and a blueprint for how to address some of these challenges.

China has made progress in recent years with continued improvements to its legal and regulatory framework for IPR protection, and gradual improvements to enforcement. China’s 2010-2011 IPR enforcement campaign was a notable example of stepped-up enforcement for many areas of IPR, where government attention to intellectual property at all levels delivered measurable results for many companies.

The Chinese government in recent years has also launched revisions of its Patent, Trademark, and Copyright Laws, providing opportunities to domestic and foreign stakeholders to provide recommendations and feedback and to improve the system of laws and regulations that govern IPR. The US-China Business Council (USCBC) and its members greatly appreciate these efforts, and have noted steady progress each year towards the goal of a robust environment for creating and

protecting intellectual property in China.

Yet protection of intellectual property rights (IPR) remains a high priority for both domestic and foreign companies in China. Many US companies view this as one of the top concerns facing their operations in China and according to USCBC's annual member company survey, IPR protection has ranked among the top ten challenges facing USCBC members each year since 2003, and continues to have a negative impact on what products and technologies those US companies are willing and able to research, manufacture, and sell in the China market.

In addition, IPR protection is increasingly a concern for Chinese companies as they become more innovative and develop their own intellectual property. Chinese companies are more active than ever before in filing patents at home and abroad, developing and commercializing new technologies, innovating new branded products, and developing movies and cultural products. Further steps to improve China's intellectual property environment would promote development of these companies, and their growth and success both in China and around the world.

USCBC research illustrates the challenges of addressing IPR infringement and the need for a series of reforms at both the national and local levels to tackle and prevent IPR infringement. While some of the reforms that would address these challenges are specific to one set of problems or one type of intellectual property, other solutions would need to cut across multiple types of IPR and types of infringement to address broader structural issues.

USCBC is pleased to present a list of top IPR protection priorities as well as a comprehensive list of recommendations for the PRC government to strengthen IPR protection. USCBC developed these recommendations from conversations with member companies about their experience protecting IPR in China. We believe that this document will be useful for both US and PRC stakeholders in discussions on IPR and related issues.

Priority IPR Recommendations

Our member companies' top concern remains that current penalties that are available in practice in IPR enforcement proceedings provide an insufficient deterrent to IPR infringement. Specifically, administrative penalties levied against offenders remain too low to deter infringement and are often viewed by the offender as merely a cost of doing business. Moreover, existing value-based thresholds to determine potential criminal penalties are too high and effectively limit the number of criminal cases that appear each year.

China acknowledged its interest in addressing these issues at the 2012 Strategic & Economic Dialogue when it confirmed that it is studying further strengthening of measures for the pursuit of criminal liability for IPR infringement. To implement improved deterrents, we recommend that China:

- Eliminate value-based thresholds laid out in the Supreme People's Court 2004 judicial interpretation that counterfeit goods must meet to qualify for criminal prosecution, replacing them with a system that applies criminal penalties for commercial-scale infringement in line with World Trade Organization (WTO) practices.
- Increase the effective level of penalties for IPR infringement – both judicial damages and administrative penalties trademark and copyright infringement – by instituting statutory minimums and raising or eliminating the statutory maximums on fines and damages. In

addition, encourage local regulators and judicial officials to levy fines that will serve as more effective deterrents and reward those who do so.

- Revise existing standards for calculating the value of infringing goods so that standards are based on the market value of the infringed goods (i.e. what the original goods would sell for in the same marketplace), not the market value of the infringing goods (i.e. what the counterfeit goods would sell for in the marketplace).

In addition, USCBC and its members greatly appreciate the establishment – and ongoing work – of the State Council Leading Group on Combating IPR Infringement and Sales of Counterfeit Goods. We encourage this group to further boost its efforts to coordinate among government agencies to promote robust efforts to protect IPR, and to expand its active efforts to actively include other types of IPR protection, including patents, copyrights, and trade secrets. USCBC also recommends active, frequent collaboration between the Leading Group, its supporting office housed in the Ministry of Commerce, and US government and industry stakeholders to discuss progress on enforcement and emerging issues.

Chinese government agencies can also take action on other priority recommendations:

- Focus greater attention of regulators, enforcement agencies, and courts at all levels on IPR enforcement by increasing resources and personnel for local administrative agencies – particularly in trademarks and copyrights – to proactively tackle counterfeiting; including establishing benchmarks for IP protection in regular performance evaluations of relevant government officials; and actively conducting training for IPR personnel at all levels on best practices in handling IPR cases and emerging IPR issues.
- Promote an open, fair landscape for innovation and IPR by setting and implementing regulations and policies in IPR-related areas (such as standards, taxation, research & development (R&D), and government procurement) that treat foreign-invested enterprises (FIEs) equally with their domestic private and state-owned enterprises, to ensure that all IPR holders – foreign and domestic – receive equal legal protection for their IPR.
- Encourage more consistent IPR enforcement across regions and jurisdictions by providing clearer guidance and fostering increased communication between central- and local-level government agencies, including greater information sharing and dialogue between provincial and local IPR regulators to share experiences and best practices.
- Pay greater attention and apply more resources to counterfeiting Internet-related IPR infringement, including by drafting new regulations relevant to Internet-related trademarks and copyrights and by increasing monitoring and investigation of Internet sales and distribution of counterfeit and pirated products.
- Promote the use of legal software, as agreed by China and the US in multiple high-level dialogues, through full implementation of existing policies and regulations, increasing funding to government agencies and for auditing of legal software use, and actively promoting the use of legal software in state-owned enterprises and private companies.
- Formulate more effective regulations on counterfeit-producing machinery and equipment, such as to mandate that infringing goods – and the equipment used to produce them – be destroyed upon seizure and not be permitted to enter the market under any circumstances.
- Draft and enforce new measures that require government officials to keep confidential all technology and IPR, including trade secrets, formulas, test data, and product information, gathered during regulatory reviews and product approvals, with concrete penalties when such penalties are violated.

- Remove market access and distribution barriers for legitimate copyrighted products, such as imported feature films and television programs, to better meet domestic demand with legitimate products as opposed to pirated ones.

For additional recommendations, please see USCBC's full list of IPR recommendations beginning on the next page.

USCBC List of IPR Recommendations

Overall IPR Landscape

Policy

- Release for public comment IPR-related documents, including laws and regulations, administrative procedures, and relevant judicial interpretations, for a period of 30 days or more. Such steps would be in keeping with the spirit of China's commitments under the Strategic and Economic Dialogue and its predecessors, and would result in better accepted and understood policy outcomes. (See USCBC's March 2012 [transparency report](#) for an analysis of the State Council and National People's Congress track record to publish regulations for public comment.)
- Promote an open, fair landscape for innovation and IPR by setting and implementing regulations and policies in IPR-related areas (such as standards, taxation, research & development (R&D), and government procurement) that treat foreign-invested enterprises (FIEs) equally with their domestic private and state-owned enterprises, to ensure that all IPR holders – foreign and domestic – receive equal legal protection for their IPR.
- Follow internationally proven, effective innovation best practices by ensuring that programs to promote innovation, such as those that promote strategic emerging industries (SEIs), offer subsidies for patent registrations, provide R&D funding support, and award high- and new-technology enterprise (HNTE) tax status, are non-discriminatory both in principle and in practice. Specifically, Chinese government agencies should:
 - Avoid any qualification criteria in these policies that would require intellectual property to be owned by or exclusively licensed to an entity in China;
 - Include language in these policies stating that all enterprises operating in China, including foreign-invested enterprises such as wholly foreign-owned enterprises (WFOEs) and foreign majority-owned joint ventures, have equal access to government-funded innovation programs; and
 - Fully implement China's pledge to delink its innovation and government procurement policies. (See USCBC's January 2013 [report](#) documenting China's progress in implementing its January 2011 pledge to break links between innovation and government procurement.)

Implementation

- Continue to strengthen the efforts of the State Council Leading Group on Combating IPR Infringement and Sales of Counterfeit Goods to coordinate robust government efforts to protect IPR, and expand the active efforts of this group beyond counterfeiting to address other types of IPR protection, including patents, copyrights, and trade secrets, and emerging IPR issues such as compulsory licensing.
- Promote active, frequent collaboration between the State Council Leading Group, its supporting office housed in the Ministry of Commerce, and US government and business stakeholders to discuss progress on enforcement and emerging issues.
- Require IPR enforcement authorities to provide equal treatment for foreign, foreign-invested, and domestic companies, including compliance with investigative and judicial procedures during IPR proceedings.
- Encourage more consistent IPR enforcement across regions and jurisdictions by providing clearer guidance and fostering increased communication between central- and local-level government agencies, including greater information sharing and dialogue between provincial and local IPR regulators to share experiences and best practices.

- Establish more regular, consistent feedback and communication mechanisms to facilitate communication between relevant government agencies and other relevant stakeholders – including companies, industry associations, standards organizations, and government-supported institutes that work on IPR issues – to promote information exchange and collaborate on programs, events, seminars, and workshops designed to educate stakeholders and build capacity among PRC officials.
- Conduct regular, targeted professional training for IPR personnel at the national and local levels – including IPR enforcement officials, patent and trademark examiners, Customs officials, and judges who handle IPR cases – on best practices in handling IPR cases, emerging IPR legal topics, and evolving procedures to best ensure reasonable, consistent, and accurate interpretations of the law.

IPR Infringement

Policy

- Eliminate value-based thresholds laid out in the Supreme People's Court 2004 judicial interpretation that counterfeit goods must meet to qualify for criminal prosecution, replacing them with a system that applies criminal penalties for commercial-scale infringement in line with World Trade Organization (WTO) practices. Such reforms would be consistent with statements made by government officials at the 2012 Strategic & Economic Dialogue to study such criminal penalties.
- Increase the effective level of administrative penalties for IPR infringement – particularly trademark and copyright infringement – by instituting statutory minimums and raising or eliminating the statutory maximums on fines for IPR infringement. In addition, encourage local regulators to levy fines that will serve as more effective deterrents, rewarding those who do so.
- Raise the maximum amount of statutory damages available for civil penalties in cases of patent, trademark, copyright, and trade secret infringement to deter counterfeiting more effectively.
- Revise existing standards for calculating the value of infringing goods so that it is based on the market value of the infringed goods (i.e. what the original goods would sell for in the same marketplace), not the market value of the infringing goods (i.e. what the counterfeit goods would sell for in the marketplace).
- Increase the number of cases transferred from administrative to criminal proceedings by:
 - Clearly stating and enforcing the obligations of local public security bureaus (PSBs) to proactively file and investigate criminal investigations;
 - Changing policies and practices that limit local prosecutors from initiating and investigating potential criminal cases; and
 - Reforming incentive structures that encourage administrative agencies to retain infringement cases so that they benefit from fines collected and credit earned.
- Revise existing intellectual property laws, such as the Trademark Law, to include presumptions of knowledge for landlords in IPR crimes committed by tenants and to add buyer liability for those who purchase counterfeit goods.
- Make repeat counterfeiters subject to criminal liability for their actions.
- Amend the PRC Criminal Law to:
 - Include automatic criminal sanctions for counterfeiting of food and pharmaceuticals;
 - Create criminal sanctions for the unauthorized audio or video recording devices to record a live performance or other recorded work in a performance space; and
 - Provide clear criminal sanctions for efforts to circumvent technological protection measures designed for protection of copyrights.
- Strengthen the legislated authority of local administrative agencies to investigate IPR infringement fully, including mandating seizures of both counterfeit goods and the equipment used to produce counterfeit goods and allowing administrative agencies to work cooperatively on cases that cross jurisdictional boundaries.
- Revise existing laws and regulations, such as the Criminal and Trademark Laws, to mandate that infringing goods – and the equipment used to produce them – be destroyed upon seizure and not be permitted to re-enter the marketplace under any circumstances.
- Remove provisions in the Implementing Regulations for PRC Customs IPR Protection Rules that allow travelers to carry a “reasonable amount of counterfeit or pirated goods for personal use.”
- Authorize Customs to impose fines on exporters of counterfeit and pirated products sufficient to deter future infringement.

Implementation

- Significantly increase funding and resources for local administrative agencies that investigate IPR infringement.
- Encourage local enforcement authorities, such as administrations of industry and commerce (AICs) and PSBs, to tackle IPR enforcement proactively, rewarding those who do so and stating explicitly and repeatedly in annual work plans that adequate enforcement of IPR is an important component of their regular work and a part of their annual performance evaluations.
- Actively encourage the training of, and interaction between, local officials involved with IPR enforcement, including administrative enforcement officials, public security officials, and Customs inspections to facilitate transfers between Customs, administrative agencies, and local police;
- Increase enforcement of Internet-based IP by boosting investigation of sales and distribution of products, including audiovisual products that are engaged in counterfeiting and/or piracy.
- Make trading companies liable for counterfeit products shipped using their permits or under their names.
- Create a system to monitor counterfeiters involved in previous Customs seizures and list their names publicly; require future shipments from the same counterfeiters to undergo Customs auditing for a specified period of time.
- Permit and encourage PSBs to initiate investigations based on *prima facie* evidence of probable cause so that assets may be frozen before raids are conducted.
- Require infringers to be financially liable for the storage and destruction costs of counterfeit goods.
- Stipulate that if counterfeit labels are not *on* products being exported or imported but are included alongside products, then the products may be seized.

Patents

Policy

- Further revise the draft Regulations on Service Inventions in close consultation with all stakeholders, including foreign businesses, to ensure that efforts to boost innovation do not create significant administrative burdens for companies with active patent portfolios or drive up compensation costs above international norms (see USCBC's [December 2012 comments](#)).
 - Limit the scope of these regulations to patentable inventions only, excluding trade secrets and software.
 - Eliminate provisions permitting the inventor right of first refusal for any intellectual property that the company seeks to assign or license.
 - Add language clearly stating that timeframes proposed in the draft Regulations would only apply in the absence of an inventor-employer agreement, and that company policies and agreements would supersede the draft Regulations.
- Further revise the draft Patent Law to:
 - Improve patent enforcement by clearly differentiating the roles, authority, and responsibilities of administrative authorities and judicial authorities, allowing judicial authorities to play the predominant role in patent enforcement based on their level of expertise and the complexity of patent cases;
 - Expand the definition of patentable items to include software; and
 - Permit companies whose patented products are produced and used by other firms for the purposes of applying for a generic production license to apply for an extension of their patent term to account for the full period in which competitors are using their products, in keeping with the spirit of regulations in other innovative jurisdictions, such as the European Union and the United States.
- Clarify under China's Antimonopoly and Patent laws that measures taken by antitrust authorities to rectify IPR-related anticompetitive behavior are specifically targeted at the anticompetitive behavior, in line with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Article 31(c).
- Revise measures that deal with compulsory licensing, including the Patent Law, Patent Law Implementing Regulations and the State Intellectual Property Office's (SIPO) Measures for the Compulsory Licensing of Patents (see USCBC's [November 2011 comments](#)) to:
 - Define the process for how that patent use would be judged to be "anticompetitive" in line with the Antimonopoly Law and consistent with TRIPS;
 - Limit use of compulsory licenses for national emergencies or public interest to specific, non-commercial circumstances to ensure that these licenses are not used to prevent competition; and
 - Add language to clarify how royalty rates are determined when compulsory licenses are granted, and ensure that such language allows the determination to be based on objective economic analysis.
- Clarify the scope of inventions whose completion "depends on genetic resources" to provide reasonable guidance to companies about what inventions might be patentable.
- Remove procedures that require disclosure of genetic resources under the PRC Patent Law.
- Further revise the Standardization Administration of China's (SAC) draft Provisional Administrative Measures for National Standards Involving Patents to ensure proper protection of patent rights during standards setting processes and to clarify key terms such as "legal liability" and "verification materials."
- Release for a public comment period of at least 30 days a draft version of the "Special Procedures for the Development of Standards Part 1: Standards Related to Patents," referred to in the SAC's

Provisional Administrative Measures for National Standards Involving Patents, and clarify the process by which patents will be incorporated into national standards.

- Amend the Administrative Regulations on Technology Import and Export to remove requirements foreign parties seeking to import technology must meet to license technology that would not be required in purely domestic technology licensing transactions, such as requirements in Article 25 that foreign parties guarantee the completeness, accuracy, effectiveness, and capability of the technology; instead, allow foreign and domestic parties to more freely negotiate and sign valid technology licensing contracts.
- Release a clear, unified set of requirements and procedures for registering technology import contracts to ensure more even enforcement, as different jurisdictions often have different requirements.

Implementation

- Continue to increase the quantity and quality of patent examiners through increased hiring and cooperative exchange programs with international patent agencies to prevent backlogs in the approval process while ensuring the quality of the patent approval process.
- Encourage government officials at all levels seeking to provide incentives for companies to register and commercialize patents to focus on both the quality and the quantity of patents by eliminating or revising subsidies for utility-model patents.
- Clarify that SIPO's security review process for foreign filing license applications to ensure that the process does not cause delays in the filing and protection of patents and that data submitted remains confidential.
- Reform China's patent system to limit the number of approved patents of questionable validity, most notably utility-model patents. Possible reforms include:
 - Increasing the level of examination for utility-model patents by requiring utility-model patents to undergo a substantive examination. Alternatively, relevant government officials could require a SIPO examiner to prepare a formal Evaluation Report for utility-model patents, either prior to the granting of the patent or at a minimum after the patent grant and prior to the filing of a related complaint, or require submission of a Search Report by a recognized International Searching Agency;
 - Permit third parties to comment on an issued utility-model patent, permitting them to introduce prior art that might challenge the validity of the patent;
 - Adding requirements for invention and utility-model patents that patent applicants must sign an oath to affirm that they are the inventor of the patent application;
 - Revise language in the Patent Law and other regulations to introduce lower levels of damages available for utility-model patents, in keeping with the lower standard of inventiveness for these patents;
 - Institute penalties for bad-faith patent applications, which could include invalidating the patent as well as fines or damages;
 - Explicitly state that defendants can receive damages and recoup court costs from frivolous lawsuits brought by utility-model patent holders;
 - Establish a separate channel to handle opposition hearings for utility-model patents; and
 - Eliminate current provisions that limit parties seeking invalidation of a utility-model patent to citing two references per claim.

Trademarks

Policy

- Complete revisions to the draft Trademark Law (see USCBC's [April 2010 comments on the draft Trademark Law](#)), including revisions that would:
 - o Allow China-based subsidiaries of foreign companies to handle trademark registrations and trademark matters directly without having to go through a trademark agent;
 - o Strengthen protections for well-known trademarks by broadening the criteria allowing trademark examiners to reject trademarks that are identical or similar to well-known trademarks;
 - o Permit “multi-class” applications that would allow companies to file trademarks in more than one trademark category with one set of application materials;
 - o Increase protection for personal names, including Western personal names, both via explicit provisions and strengthened enforcement;
 - o Remove language in previous drafts that allows local AICs to suspend investigations based on “actual circumstances that may impact the handling of the case”;
 - o Maintain language in the existing law allowing companies to appeal decisions on opposition cases made by the China Trademark Office to the Trademark Review and Adjudication Board (TRAB), as opposed to language included in the latest draft that would permit trademarks that “survive” those opposition cases to be automatically registered; and
 - o Replace the term “specially used” in Article 53 of the current Trademark Law with “predominantly used,” in line language in other PRC IPR-related laws, like the Copyright Law, as well as TRIPS Article 61.
- Issue clear guidelines for trademark examiners on how to handle trademark oppositions and disputes based on prior rights, including copyrights, trade name rights, and portrait rights. Provide regulatory guidance on the differences, legal protections, and procedures for obtaining well-known marks, famous marks, and famous brands, and streamline the process to allow more qualified trademarks to apply for and receive well-known mark status.
- Draft clear guidelines on criteria and practices for review of applications for non-traditional trademarks, including sounds, smells, and dynamic marks, and issue these guidelines for public comment.
- Draft and release new regulations designed to define and regulate Internet-related use of trademarks, including use of trademarks on websites, use of websites as platforms for goods, and trademark-related aspects of domain name registration.
- Eliminate the requirement used by some AICs that companies bringing an infringement case provide legalized power of attorney forms before the AIC is willing to proceed.
- Allow evidence of a trademark’s use and reputation outside of China to be considered as a factor in trademark-related proceedings in China, including cancellation, opposition, and infringement proceedings.

Implementation

- Continue to increase the funding and staffing of the China Trademark Office to avoid long delays in future reviews of trademark applications and to eliminate current backlogs.

Copyrights

Policy

- Revise and finalize the draft Copyright Law (see USCBC's [March 2012 comments on the Copyright Law](#)), including revisions to:
 - Extend copyright protection from 50 years to 70 years, in line with international norms;
 - Expand copyright protection to live telecasts of sporting events and to cover information services distributed via digital channels;
 - Expand the list of activities that constitute copyright infringement to include unauthorized uploading and transmitting works through computer networks; intentionally facilitating copyright infringement by others; and manufacturing, importing, selling or trafficking in technologies and products designed to circumvent copyright protection;
 - Permit authorities greater flexibility to consider and use various methods for calculating damages based not just on actual losses but also on the full economic implications for the rights-holder, such as loss of potential future income and damage to their reputation; this will ensure that they are significant enough to serve as a deterrent; and
 - Expand copyright protection to specifically cover information services distributed via digital networks.
- State explicitly that criminal liability applies to end users of infringed software, regardless of how it is obtained.
- Eliminate requirements that copyright offenders must be proven to have acted with profit-making motive to constitute infringement.
- Release clear administrative regulations describing the criteria for examiners at the China Center of Copyright Protection to consider when reviewing applications for copyright registration to ensure that these examinations are carried out fairly and consistently.
- Issue judicial guidance to shift the burden of proof in copyright cases to the defendants. This would thus require them to show prima facie evidence of copyright ownership, once a plaintiff can establish that they have a registered copyright, that the defendant had access to that copyright, and that the defendant is using or producing materials identical or similar to the plaintiff's copyrighted material.
- Establish a formal appeal process to allow applicants to appeal refusals of applications for copyright registration, appoint administrative and judicial bodies to conduct these appeals, in line with administrative and judicial appeals processes available for other forms of IPR.
- Clarify that copyright owners of two-dimensional works (such as movies and comics) have the right to assert infringement against those who produce three-dimensional works (such as toys and models) derived from those copyrighted works.
- Clarify that characters in copyrighted works such as books, cartoons, movies, and videogames should be protected as part of the copyright, and that using those characters in other works without authorization constitutes copyright infringement, even if the images used are not identical to those in the original work.
- Clarify that a copyright owner is not required to submit a PRC copyright registration certificate to file a complaint with a local administrative agency to initiate an administrative investigation against copyright infringers, as copyright registration in China is not required under Article 2 of the PRC Copyright Law to guarantee copyright protection. Such requirements are also in keeping with international copyright treaties signed by China, such as the Berne Convention and the TRIPs Agreement.

Implementation

- Promote the use of legal software, as agreed by China and the US in multiple high-level dialogues, by:
 - o Fully implementing existing policies and regulations, such as the PRC Government Legal Operation System Procurement Requirements and the Enterprise Legalization Plan, and drafting additional guidance for government and enterprises to follow;
 - o Allocating increased funding to government agencies to promote legal software purchases;
 - o Auditing the use of legal software by government agencies and publishing the results of those audits broadly; and
 - o Actively promoting the use of legal, licensed software in state-owned enterprises and in private companies via various means, including software asset management programs.
- Remove market access and distribution barriers for legitimate copyrighted products, such as imported feature films and television programs, to better meet domestic demand with legitimate products as opposed to pirated ones.
- Strengthen China's legal framework for protection of copyrights online to best protect the rights and interests of all parties in using and protecting copyrighted materials on evolving technology platforms, including consistent and transparent enforcement across China of the Supreme People's Court's December 2012 judicial interpretation dealing with online piracy and intermediary liability for information service providers (ISPs) and other information network providers.
- Increase efforts to prevent piracy related to mobile devices, including piracy of mobile applications (or "apps").

Trade Secrets

Policy

- Draft and enforce new measures that require government officials to keep confidential all technology and IPR, including trade secrets, formulas, test data, and product information, gathered during regulatory reviews and product approvals, with concrete penalties when such penalties are violated.
- Revise the Anti-Unfair Competition Law – last revised in 1993 – and other key laws and regulations to strengthen trade secrets protection and to replace vague terms such as “consumer confusion” with clear, objective standards for evaluation and practical means for establishment, including consumer surveys admissible in court and notarized statements where appropriate.
- Issue judicial guidance for district courts dealing with possible trade secrets cases, especially on the types of evidence admissible and sufficient to document protection of trade secrets.
- Permit judges greater leeway in applying “common sense” tests to find trade secret infringement in line with international judicial practice, even in cases where the direct act of infringement cannot be formally documented.
- Issue judicial guidance to shift the burden of proof in trade secrets cases to the defendants, once a plaintiff can establish that they own a relevant trade secret, that the defendant had access to that trade secret, and that the defendant’s product is similar to that of the plaintiff’s.

Implementation

- Provide specific training programs for local administrative and judicial officials about trade secrets, including what types of information may constitute trade secrets, proper handling of trade secrets cases, and international best practices for trade secrets cases.
- Encourage judges dealing with trade secrets cases to consider a broader array of evidence – such as witness testimony – that would allow companies to demonstrate trade secret infringement.
- Expand efforts by the State Council Leading Group on Combating IPR Infringement and Sales of Counterfeit Goods to protect trade secrets in China.
- Encourage greater use of evidence preservation in court cases, provided that an adequate bond is provided by the plaintiff. Consider adopting a private, or “in-camera,” review process for evidence seized in these circumstances to prevent abuse of these orders.

Judicial Proceedings

- Continue to push for greater enforcement of court rulings and full enforcement of preliminary and permanent injunctions by administrative and judicial authorities. Study the institution of “contempt of court” procedures in case where infringers ignore permanent injunctions and other court orders.
- Streamline the application process for preliminary injunctions against infringers, and encourage judges to more liberally grant and enforce such injunctions.
- Encourage judges to admit forms of evidence other than traditional documentary evidence – including affidavits, witness testimony, promotional materials, and third-party evidence such as market and consumer surveys as valid evidence for consideration in IPR cases.
- Issue Supreme People’s Court model cases and judicial interpretations related to IPR, particularly in areas where local rulings are not consistent and in emerging areas of IPR law.
- Support and promote international training for IPR judges, including those at the district and intermediate levels, and broaden their exposure to Western legal experts in existing and emerging areas of IPR law.
- Clarify the roles, qualifications, and operating procedures for courts’ use of expert panels in IPR cases, including patent and trade secrets cases, and consider allowing qualified independent experts brought by both parties to testify.
- Publish all IPR-related cases, including administrative, civil, and judicial cases, through a unified channel on a regular basis to increase transparency and promote more even judicial enforcement.
- Establish a dedicated appeals court to manage all appellate patent cases to better ensure uniform application of the Patent Law, in line with best judicial practices in innovative jurisdictions like Japan and the United States.
- Increase the penalties for perjury in civil legal proceedings to discourage false testimony in civil trials related to IPR infringement.
- Encourage local courts to combine cases that involve the same right holders and infringers and similar fact patterns (such as infringement of several different movies or published works owned by the same copyright holder) under the PRC Civil Procedure Law to more efficiently use the resources of the courts and both parties.