September 15, 2021

The Honorable Katherine Tai
United States Trade Representative
Office of the United States Trade Representative
600 17th Street NW
Washington, DC 20508

Re: ACC Public Comments on China's Compliance with its World Trade Organization (WTO) Commitments (86 Fr 46066; Docket Number USTR-2021-0015)

Dear Ambassador Tai:

The American Chemistry Council (ACC) appreciates the opportunity to provide public comments on China's compliance with its WTO commitments. In May of this year, ACC sent you our 2021 Trade Policy Priorities, all of which relate to the critical U.S.-China trade relationship[1]. We strongly support the Administration's efforts to hold China to account on its unfair trade practices while taking steps to repair the U.S.-China trade relationship.

ACC's comments here outline our views on the U.S.-China Phase One deal; the impact of the U.S. and China tariffs on the business of chemistry in the United States; the importance of excluding chemicals and plastics from both the U.S. and China tariffs; and more effective approaches to supporting domestic U.S. manufacturing. We also outline below, five areas where China's compliance with its WTO commitments would make a meaningful commercial difference to U.S. chemical manufacturers:

- Eliminating WTO-inconsistent additional tariffs;
- Rolling back WTO-inconsistent use of anti-dumping and countervailing duties and increasing its subsidy transparency;
- Preventing the theft of trade secrets and other intellectual property;
- Implementing the WTO Agreement on Technical Barriers to Trade in full; and
- Ensuring that China implements its WTO commitments to refrain from imposing export restraints on certain raw materials.

<u>U.S. Section 301 and Section 232 Tariffs and Retaliation by Trading Partners Continue to Undermine the Competitiveness of U.S. Chemical Manufacturers</u>

As of the date of these comments, China is retaliating against over $11 billion in exports of U.S.-made chemicals in response to the U.S. Section 301 tariffs on imports from China. These tariffs impact $20 billion in imports of chemicals, many of which U.S. chemical manufacturers rely on to manufacture chemicals in the United States. The European Union, India, and Turkey are

[1] https://www.americanchemistry.com/better-policy-regulation/trade/resources/acc-letter-to-ambassador-tai-about-the-chemical-industry-trade-priorities

applying retaliatory tariffs on $1 billion in exports of U.S.-made chemicals in response to the U.S. Section 232 tariffs on steel and aluminum imports. The Section 232 tariffs and quotas have increased the cost of building chemical manufacturing plants in the U.S. and have limited the availability of steel necessary for plant construction and maintenance.

It is possible that additional Administration trade actions under Section 301 and Section 232 impact imports of chemicals from trading partners and result in retaliation by trading partners against U.S. exports of chemicals, further closing markets to U.S. chemical manufacturers and weakening their global competitiveness.

ACC remains concerned about overreliance on tariffs to address unfair trade barriers or other policy issues. Without an effective negotiation strategy to eliminate long-standing barriers to trade, overreliance on tariffs will reinforce a vicious cycle of unilateral U.S. tariff actions and trading partners imposing retaliatory tariffs on exports of U.S.-made chemicals and plastics. This vicious cycle will continue to undermine the competitiveness of the U.S. chemical industry and close markets to exports of U.S.-made chemicals and plastics. U.S. trading partners do not pay U.S. tariffs; tariffs are taxes on imports that Americans pay.

U.S. Chemical Manufacturers Support Implementing – And Expanding – the U.S.-China Phase One Deal

A stable, predictable U.S.-China trade relationship is critical to the success and competitiveness of U.S. chemical manufacturers. While the past four years have upended that relationship, the U.S.-China Phase One agreement has provided a degree of stability that should be preserved and expanded upon. China's chemical manufacturing sector is the largest in the world and projected to grow even further in the coming years.[2] That growth will afford significant opportunities for U.S. chemical manufacturers both to increase their exports of U.S.-made chemicals to China and invest in China's market.

However, for those increases and that investment to happen, the U.S. and China must rebuild their trade relationship using the Phase One deal as a cornerstone. This relationship must touch on all priority aspects of U.S.-China trade issues, both those falling within the remit of the WTO and those not yet addressed by WTO rules. China's government must implement both its Phase One deal and WTO commitments in full. We urge the Administration to bring China back to the negotiating table and seek binding, enforceable commitments by China on reforming its state-led capitalism system, opening its market, eliminating tariffs, and allowing and ensuring more foreign competition.

U.S. chemical manufacturers value their business relationships with partners in China. They want to continue to supply China's growing market with innovative and sustainable chemicals and plastics products while ensuring that both the U.S. and China meet their WTO commitments. China is the U.S. chemical industry's third-largest export market overall. U.S. chemical manufacturers exported $11 billion in chemicals and plastics to China in 2020, down from $13 billion in 2017 prior to the ongoing trade dispute. China also supplies the United States with critical inputs to our own manufacturing processes. In 2017, the United States imported $26.6

[2] https://www.mckinsey.com/industries/chemicals/our-insights/chinas-chemical-industry-new-strategies-for-a-new-era

billion in chemicals and plastics from China. Notwithstanding the trade dispute and the COVID-19 pandemic, the United States imported $29.4 billion in chemicals and plastics from China in 2020. A notable amount of U.S.-China chemicals trade is between related parties: 21 percent of U.S. imports from China and 37 percent of exports to China.

Phase 1 Not A Long Term Solution as it Solidifies Steep Tariffs on the Majority of U.S. Chemicals Trade with China

Since the implementation of the Section 301 tariffs on imports, ACC members have routinely cited tariffs and trade policy uncertainty as the most significant factors weighing on their bottom lines and potential for growth. It is therefore unfortunate that the Phase 1 deal has locked in a new status quo of additional tariffs in U.S.-China trade. In the short run, it may reduce uncertainty, but in the mid- to long-run, there is no guarantee that China will implement the deal and it is unlikely that it could meet its purchasing commitments. The Administration could decide to snap tariffs back to address China's lack of implementation.

Thus, for U.S. chemical manufacturers, uncertainty in the U.S.-China trade relationship remains along the following lines:

a. Additional tariffs on Lists 1-3 could remain in place at 25 percent on $15 billion in imports and on List 4a at 7.5 percent on $5.1 billion in imports of chemicals and plastics.
b. Additional tariffs on Lists 1-3 could still increase by 5 percent (suspended indefinitely, cite FR notice).
c. Additional tariffs on List 4a could snapback to 15 percent if China does not meet its commitments.
d. Additional tariffs on List 4b could be applied if China does not implement the agreement, impacting another $5.1 billion in imports of chemicals and plastics.
e. The U.S. additional tariffs cover 86 percent of chemical imports from China and 100 percent of plastics products imports, with minimal exclusions granted for imports of chemicals from China, most acutely under List 3.
f. China's retaliatory tariffs at 20 and 25 percent are still in place on almost $11 billion in U.S. exports of chemicals and plastics but decreased from 10 to 5 percent and 5 to 2.5 percent only on $100 million in U.S. exports of chemicals and plastics.

In light of the above, U.S. chemical manufacturers support additional negotiations between the U.S. and China that decrease the remaining uncertainty in U.S.-China chemical trade and take steps to expand it and create more new market access in China. The sections below outline a number of approaches of Administration consideration.

China's Phase One Deal Purchasing Commitments are Unrealistic and Do Not Cover the Most Competitive U.S. Exports of Chemicals and Plastics

We remain concerned that the Phase One deal does not include the most competitive U.S. exports made by U.S. chemical manufacturers. The attachment to Annex 6.1 under the Phase One deal only covers 672 chemical tariff lines under HTS Chapters 28, 29, 33, 35, and 38. Resins and plastic product exports under HTS Chapter 39 are not listed in the attachment to the Annex. Resins and plastic product exports under HTS Chapter 39 are not listed in the attachment to the Annex. These products still face prohibitively high retaliatory tariffs. Unfortunately, the Phase 1 deal does not commit China to eliminating these tariffs.

In fact, if China wants to meet its purchasing commitments, it may have to offer more exclusions from its retaliatory tariffs and extend the exclusions that are soon set to expire (see section below). We understand that China's product exclusion process has yielded very narrow exclusions designed to benefit China's companies importing very specific products. We are concerned that China's product exclusion process is not enabling China to meet its purchasing commitments. This situation calls into question how U.S. chemical manufacturers can increase exports of the products in the attachment to Annex 6.1 to China with China's retaliatory tariffs still in place.

USTR Should Launch a New Process for Excluding Products from the China Section 301 Tariffs

U.S. chemical manufacturers requested a significant number of exclusions from the Section 301 tariffs during the first iteration of the process, in particular, under List 3. Unfortunately, USTR at the time denied 90 percent of these requests, increasing the tariffs paid by the chemical industry at a time when tariff relief would have helped U.S. manufacturers navigate a volatile trading environment and a global pandemic.

ACC therefore urges USTR to reinstate all expired tariff exclusions that were previously granted; initiate a new fair, open, transparent, and timely product exclusion process backed by judicial review; and implement the recommendations of the Government Accountability Office (GAO) on documenting its procedures for considering product exclusion and extension petitions. The new exclusion process should be launched prior to the conclusion of USTR's "top to bottom" review of U.S. trade policy toward China. A new exclusion process would allow U.S. chemical manufacturers to seek new exclusions from the tariffs and contribute to economic revival and manufacturing competitiveness. We also urge USTR to work in good faith with the House Ways and Means and Senate Finance Committees on their oversight of the exclusion process.

China's Exclusions from its Retaliatory Tariffs Will Expire Soon, Harming Exports of U.S.-made Chemicals and Plastics

Similar to the USTR process for excluding products from the Section 301 tariffs on imports from China, trade authorities in China also implement a tariff exclusion process that covers a wide range of products from across the chemicals sector. However, many of these tariffs expired on September 16, 2021, with more exemptions expiring on December 25, 2021.

Across the various rounds of retaliation, retaliatory tariffs impact 1659 different chemical products. Among those, 108 products received exclusions. While this only tallies up to 6.5 percent of the total, the exclusions demonstrate that it is possible to pursue a policy of mutual tariff reduction. The combined retaliatory-MFN rate on many of the exempted products is quite high, with 13 products over 30 percent. Should China's tariff exclusions expire or progress on the Phase 1 deal falter, it is certain that U.S. exporters will once again face increased costs and will risk being driven out of a market that is essential to U.S. manufacturing competitiveness. We therefore urge USTR to build on the progress made in the Phase 1 deal and work with its counterparts in China to ensure the continued stability and expansion of China's program for excluding U.S. exports from its retaliatory tariffs.

The U.S. Chemical Industry Offers More Effective Approaches for Addressing the Impact of the U.S.-China Trade Dispute

The COVID-19 pandemic has produced significant disruptions in chemical supply chains, including with respect to imports from China that are essential to U.S. chemical manufacturing competitiveness. This situation expands the challenge that U.S. chemical manufacturers have faced for the last two years. To improve the business environment and create more certainty for chemical manufacturers and our downstream customers, we believe the U.S. and China should agree to suspend all the additional tariffs on bilateral trade immediately.

ACC also urges the Administration to:

- Provide indefinite product exclusions for chemicals and plastics on Lists 1, 2, 3, and 4a (HTS Chapters 28-39) – approximately $20 billion in imports. Providing exclusions for products that are not manufactured at all or in insufficient quantities in the U.S. should be a priority. This should align with China's tariff exclusion process and encourage China to exclude indefinitely all U.S. chemicals and plastics exports (approximately $11 billion) from the application of its retaliatory tariffs.

- Eliminate Section 301 tariffs for products in Lists 1, 2, 3, and 4a that are covered by any future Miscellaneous Tariff Bill (MTB) that the President signs into law. When the Congress passes an MTB, it decides that certain imports, including a wide range of chemicals, are essential for U.S. manufacturing competitiveness. The Section 301 tariffs across all four lists have obviated the benefits of the MTB to U.S. chemical manufacturers relying on those imports to manufacture certain chemistries in the United States. Furthermore, it is worth considering whether the next iteration of the American Manufacturing Competitiveness Act should exclude products under future MTBs from the application of Section 301 and Section 232 tariffs.

- Eliminate chemicals tariffs globally, particularly between the top chemical producing countries. Achieving this goal will give U.S. chemical manufacturers the predictability and certainty they need to plan, grow, compete, and succeed in the global marketplace.

- Obtain two binding, enforceable commitments from China in future negotiations:

    - First, China should harmonize its WTO tariff bindings for chemicals and plastics to U.S. levels under the Chemical Tariff Harmonization Agreement (CTHA) at the World Trade Organization (WTO).

    - Second, China should work together with the U.S. to bring other major chemical producing markets (e.g., Brazil and India) into the CTHA, to broaden the scope of participation in that initiative, bind any currently unbound tariffs for chemicals and plastics, and lower both the bound and applied rates for chemicals and plastics for new participants.

China's Retaliatory Tariffs Are Inconsistent with its WTO Commitments and Impede Market Access for U.S. Chemical Manufacturers

According to the WTO Tariff Profiles 2021, China's average most-favored nation (MFN) applied tariff rate for chemicals within Chapters 28-39 of the Harmonized System is 6.2 percent. Its average WTO bound rate for chemicals is 6.7 percent. Relative to other large emerging markets, China's average MFN applied and bound rates are low. For example, India's average MFN applied rate is 8.1 percent and its WTO bound rate is 39.6 percent. However, China's average MFN applied and WTO bound tariff rates for chemicals are higher than the average MFN applied rates for chemicals for the U.S. (2.8 percent), the EU (4.5 percent), and Japan (2.1 percent). China's relatively low rates are the result of China joining the WTO Chemical Tariff Harmonization Agreement as a part of its WTO Accession Protocol. The stability of China's tariff rates for chemicals and plastics had in the past provided U.S. chemical manufacturers certainty when exporting product to China.

Unfortunately, due to the ongoing trade dispute with the U.S., China has levied retaliatory tariffs that likely are inconsistent with its WTO commitments. China did not receive WTO authorization for these tariffs. It is pursuing a WTO dispute settlement case regarding the U.S.' use of Section 301 of the Trade Act of 1974 to levy unilateral tariffs on imports from China. In September 2020, a WTO dispute settlement panel found the U.S. Section 301 tariffs under Lists 3 and 4 to be inconsistent with U.S. WTO commitments[3]. In October 2020, the U.S. appealed the report of this panel to the Dispute Settlement Body. As the WTO Appellate Body is currently not operational, this appeal may never be heard.

ACC estimates that China's retaliatory tariffs in response to U.S. Lists 1, 2, 3, and 4 will ultimately impact over $11 billion in U.S. exports of chemicals and plastics. The China tariffs cover 91 percent of U.S. chemicals exports to China and 100 percent of U.S. plastic products exports to China covered.

China's additional tariffs on U.S. exports of chemicals and plastics obviated the certainty of China's MFN tariff rates, thereby threatening investments in chemical manufacturing in the United States. U.S. chemical manufacturers now face additional tariffs of 5, 10, 20, and 25 percent depending on the product, on top of existing MFN tariff rates. ACC supports an outcome where the U.S. and China resolve their trade dispute and eliminate these additional tariffs, reverting to the previous status quo of MFN trade.

In an ideal world, the U.S. and China should lead a global effort to eliminate chemical tariffs in major chemical-producing WTO members. Zero tariffs for chemicals and plastics trade globally would produce the most significant amount of certainty and predictability for U.S. chemical manufacturers, ultimately benefiting downstream users of chemicals in the United States in key sectors, such as agriculture, automotive, and building and construction. Zero tariffs globally would also leverage the historic competitive advantage the U.S. currently enjoys in chemical manufacturing, open new markets, and lead to more U.S. exports of chemicals and plastics to the rest of the world.

[3] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds543_e.htm

China Needs to Ensure Full Compliance with WTO Commitments on Anti-Dumping and Countervailing Duties and Subsidy Transparency

Industry continues to see challenges from procedural fairness and politicization issues with China's approach to anti-dumping/countervailing duty (AD/CVD) practices. The processes underpinning China's AD/CVD regime are non-transparent, unnecessarily burdensome, and designed to ensure negative outcomes for foreign companies, including unsubstantiated allegations of subsidies or non-market conditions.

ACC urges the Administration to request that China implement its WTO commitments under the Agreement on Anti-Dumping and the Agreement on Subsidies and Countervailing measures by making determinations based on law, rationale, data, and facts; and by establishing transparent, standard AD/CVD processes.

China Must Respect WTO Norms on the Protection and Enforcement of Intellectual Property Rights, Including Trade Secrets

Protection and enforcement of trade secrets and other intellectual property rights is essential for the success and competitiveness of U.S. chemical manufacturers globally, but in particular, in the China market. While China has made significant progress on intellectual property rights, it still lags on enforcement of those rights. Significant trade secret cases often languish in court for years, even when there are clear-cut cases of Chinese violations of the intellectual property rights of foreign companies. ACC and our members have seen some progress of late with Chinese courts advancing recognition and enforcement proceedings, especially for international arbitration awards. We welcome this progress, and look forward to continued expansion of efforts to ensure full enforcement of IP rights, particularly trade secrets. This supports the interests of Chinese companies to protect intellectual property and establish precedents to prevent further trade secret misappropriation. We also ask the Administration to fully prosecute specific cases of violations of U.S. intellectual property rights.

China Must Fully Implement the WTO TBT Agreement

ACC and our members have a significant interest in China's full implementation of the WTO Agreement on Technical Barriers to Trade (TBT Agreement). Chemical manufacturers operate in highly-regulated markets all over the world. They benefit from the TBT Agreement obligation in Article 2.9 to allow interested parties opportunities to provide public comment on proposed regulations not based on international standards. China's membership in the WTO has made a measurable impact on its ability to make its proposed regulations more transparent, notify its measures for review by stakeholders, and take the view of stakeholders into account. We urge the U.S. government to continue working with regulatory agencies and the center of government in China to ensure that it implements the TBT Agreement in full and adopts good regulatory practices, as embodied by the APEC-OECD Integrated Checklist on Regulatory Reform[4].

Access to Raw Materials from China Is Important to U.S. Chemical Manufacturers

Ensuring access to certain raw materials from China is important to U.S. chemical manufacturers, which use those materials in their manufacturing processes in the United States. Raw earth elements and compounds ("rare earths) are of particular relevance, given that China accounts for 90 per cent of the global supply of rare earths. In early 2021, the Chinese Ministry

[4] https://www.oecd.org/regreform/34989455.pdf

of Industry and Information Technology ("MIIT") issued the draft "Regulations on Rare Earth Management." The draft indicates that rare earths will be regulated by China's new Export Control Law (ECL), which entered into force in December 2020 per Article 15[5]. These regulations will tighten China's strategic control of rare earths. Rare earths will likely be subject to export approval procedures under the ECL. Therefore, the State Export Control Administrative Departments will have the authority to deny approval of applications to export rare earths, thereby preventing their export. U.S. chemical manufacturers seeking to procure rare earths from China will have to ensure they are complying with ECL provisions. Thus, whether this proposed regulation is consistent with the WTO Agreement, in particular China's Accession Protocol, is an open question.

Conclusion

ACC and our members value the efforts of the U.S. government in holding China to account on implementing its WTO commitments and addressing other trade-distorting practices, such as intellectual property theft, forced technology transfer, and subsidization of domestic industries. These unfair trade practices have undermined the competitiveness of our industry in China. However, the U.S. approach to date to addressing these practices has also hurt our competitiveness in the United States and globally. We believe that it is critical for the U.S. to work with like-minded allies at the WTO to find solutions to unfair trade practices in China. Through that approach, there will be greater incentive for China to support the multilateral trading system and become a more responsible stakeholder in that system. We look forward to working with you and your team at USTR on China's implementation of its WTO commitments, holding China to account on its unfair trade practices, repairing the U.S.-China trade relationship, and eliminating costly and burdensome tariffs between the U.S. and China.

Best regards,

Ed Brzytwa
Director for International Trade
American Chemistry Council

[5] ECL Article 15 – "[Import & Export Management] Import and export companies of rare earth products shall abide by the foreign trade law, the export control law and other laws and regulations."