



September 28, 2022

Submitted via www.regulations.gov

William Shpiece
Chair of the Trade Policy Staff Committee
Office of the United States Trade Representative
600 17th Street, NW
Washington, DC 20508

Re: ACC Comments Concerning China's Compliance with its World Trade Organization (WTO) Commitments (87 FR 52835; Docket Number USTR-2022-0012)

Dear Mr. Shpiece:

The American Chemistry Council (ACC) appreciate the opportunity to submit the following comments in response to the Office of the United States Trade Representative's (USTR) Request for Information ("RFI") in the preparation of its annual report to the Congress on China's compliance with its WTO commitments. ACC strongly supports 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. Many of ACC's Trade Policy Priorities relate to U.S.-China trade and supply chain issues.

ACC's comments outline our specific views on the continued impact of U.S. and China tariffs on chemical products including how they have affected U.S. manufacturing, investment, and supply chain resiliency. We 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;
- 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 refrains from imposing export restraints on certain raw materials.

I. Import Regulations

U.S. Section 301 and Section 232 Tariffs and Retaliation by China Continues to Undermine the Competitiveness of U.S. Chemical Manufacturers

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. China has also been changing the traditional classification of chemical and plastics products into classifications that fall under retaliatory tariffs classification, further increasing duties paid.

China's retaliatory tariffs, like the tariffs that the U.S. has imposed on imports from China, have increased the cost of doing business for U.S. chemical manufactures and as these tariffs continue, will affect the U.S. chemical industry's long-term competitiveness and result in future negative economic impacts on U.S. companies, workers, and consumers involved in the business of chemistry. While there was hope that such impacts would only be temporary, we have found that these impacts have been longer-lasting and more detrimental than expected and have done little to change China's behavior.

China's retaliatory tariffs also continue to cover an overwhelming large share percent of U.S. chemicals exports, estimated to be about 86 percent in 2021. While China has a limited exclusion process for its tariffs which has provided relief to some U.S. exporters, it is critical that the U.S. government continue to work with its counterparts in China to extend and expand these exclusions from both sides.

Exclusions from 301 Tariffs are More Likely to Benefit U.S. Chemical Producers over Chinese Producers

An analysis of the limited exclusions from the imposition of the 301 tariffs from the United States as well as exclusions from retaliatory tariffs imposed by China has shown that the net benefit for U.S. chemical manufacturers and the downstream companies who use U.S. chemical inputs were several orders of magnitude higher compared to what China gained from such exclusions. A similar story can be told with U.S. exports of chemicals and plastics to China. Initially, China imposed retaliatory tariffs on about 85% of U.S. chemical exports that initially led to export declines – though exclusions and/or inclusion in the U.S. China “Phase 1” deal mitigated some of these impacts. However, when looking at export trends, the analysis shows that neither retaliatory duties nor inclusion of such products in the U.S. China “Phase 1” deal impacted such trends but, by and large, exclusions from tariffs granted by China did. This shows that further exclusions of chemical and plastic tariffs from imposition of the 301 tariffs are more likely to *strengthen* U.S, manufacturing, boost exports, and help contribute to the U.S. trade surplus.

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 2022, China's average most-favored nation (MFN) applied tariff rate for chemicals within Chapters 28-39 of the Harmonized System is 6.1 percent. Its average WTO bound rate for chemicals is 6.7 percent. While this lower is than the average WTO bound rate for chemicals (39.6 percent), these are considerably higher than the average MFN applied rates chemicals for its closest competitors: 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 to China. Unfortunately, China's continued imposed of retaliatory tariffs have decimated that predictability. As you are aware, China did not receive WTO authorization for these tariffs. While China continues to pursue a WTO dispute settlement case regarding the U.S.' use of Section 301, this case may never move forward, as the WTO Appellate Body is currently not operational.

We would encourage the Administration to request China exclude indefinitely all U.S. chemicals and plastics exports from the application of its retaliatory tariffs, and that the U.S 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, especially those products that are covered by any future Miscellaneous Tariff Bill (MTB) that the President signs into law. This would align with China's tariff exclusion process and encourage China to exclude indefinitely all U.S. chemicals and plastics exports from the application of its tariffs.

ACC would also recommend that the U.S. obtain two binding, enforceable commitments from China in any future negotiations. First, China should harmonize its WTO tariff bindings for chemicals and plastics to U.S. levels under the WTO Chemical Tariff Harmonization Agreement (CTHA). 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.

II. Internal Regulations Affecting Trade

China's AD/CVD Duty Investigations Are Inconsistent with Legal Obligations and Procedural Principles Under the WTO Agreement on Subsidies and Countervailing Measures.

U.S. chemical manufacturers are seeing growing politicization of Chinese trade remedy measures, raising concerns about China's commitment to WTO principles and core values such as procedural fairness. China has deliberately targeted key imports of countries when disputes arise to pressure and damage foreign industry as well as to support China's domestic industrial development policies, often through unsubstantiated allegations of subsidies or non-market conditions. The

process is non-transparent, unnecessarily burdensome and designed to ensure negative outcomes, establish maximum political and commercial leverage, and misuse the rationale and nature of the anti-dumping and countervailing duty processes. China maintains these discriminatory provisions despite the impact to their own domestic industry and would benefit from accelerating a sunset review and removal of these practices.

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 as well as in the China market. While China has made some 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. Similarly, Chinese courts have stalled recognition and enforcement proceedings for international arbitration awards obtained by foreign companies against Chinese companies. Delay or denial of prompt and credible enforcement of intellectual property rights violations erodes U.S., international and, ultimately, Chinese interests in protecting intellectual property and preventing further trade secret misappropriation.

We encourage the U.S. government to continue to press China to ensure broad protection of intellectual property rights, as required under China's WTO commitments and the Economic Agreement between the governments of the United States and the People's Republic of China.

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 and in particular the obligation under Article 2.9 to allow interested parties opportunities to provide public comment on proposed regulations not based on international standards.

While we have seen some positive developments in China's decision-making process, this has often been matched with a decrease in providing an adequate opportunity for notice and comment, going against China's WTO obligations to allow for a reasonable time-period for public comment

on new regulations. Failing to offer translations in common global languages other than Mandarin (e.g., English) makes stakeholder engagement exceptionally time consuming and difficult.

We also see a lack of transparency in how China implements regulations with stark differences between the way Chinese authorities implement regulations and the texts of regulations. For example, Chinese authorities have started to adopt a “cumulative risk assessment” practice regarding new chemicals registration for foreign based producers, which puts new stricter controls on the volume of new substances granted approval that are not found in the regulation itself. Not only is this assessment practice inconsistent with international standards, but the fact that authorities have indicated that they will provide guidance for this practice after it has already been implemented and without adequate notice shows a lack of adherence to TBT commitments.

III. Export Regulations

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

ACC continues to be concerned new regulations and controls on the export of raw earth elements and compounds (“rare earths”), which are used to make chemicals in the United States. Ensuring access to certain raw materials from China are of particular relevance to the U.S. chemical industry, given that China accounts for 90 per cent of the global supply of rare earths.

In early 2021, the Chinese Ministry 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 155. 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. It is still not clear whether this proposed regulation is consistent with the WTO Agreement, in particular China’s Accession Protocol.

Conclusion

ACC and our members continue the 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 through the imposition of 301 tariffs has not been effective and has negatively impacted U.S. chemistry companies’ ability to invest in their companies to innovate new products, hire more American workers, and remain competitive 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 continuing to work 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.

Sincerely,

A handwritten signature in cursive script that reads "Jason Bernstein".

Jason Bernstein
Director, Global Affairs
American Chemistry Council

Trade Remedies

DBDPE is used in many countries for a wide variety of products, including electronics, appliances, airplanes and aerospace equipment, and motor vehicles. Approximately 500 – 1500 metric tons of DBDPE were imported into Canada in 2018 with ~25% imported as a raw material for manufacturing purposes, and ~75% imported in resins, manufactured articles, and finished products. Imported electrical and electronic products including wire and cable products are responsible for the majority (68%) of DBDPE imports. Imported DBDPE in transportation equipment primarily functions as a flame retardant in wire and cable components, and other electric components of finished vehicles. Approximately 100 – 500 metric tons of DBDPE is exported from Canada each year, primarily in wire and cable products and transportation equipment.

Product manufacturers use DBDPE to meet or exceed relevant flammability and safety standards. For example, DBPDE is commonly used in casings and enclosures for electrical and electronic equipment to protect from fire and shock risk. If left untreated, these materials are flammable, so flame retardants provide a necessary and important layer of fire safety. There are hundreds of end-product standards for which flame retardants like DBPDE are used to meet safety standards and performance goals. As there is no viable or foreseeable alternative to DBPDE, the virtual elimination of DBDPE as proposed in CAN/673 would cause real and substantial barriers to trade and disruptions to supply chains which use DBPDE.

DBDPE is not a concern to human health and in the applications which flame retardants are used. We understand that assertions that DBPDE *may* pose a risk to aquatic organisms are based not on the performance of DBPDE itself but on using another unrelated chemical product, decabromodiphenyl ether (“decaBDE”), as a proxy or analogue to DBPDE. However, there are no scientific studies or data that support the use of decaBDE as an analogue to model DBDPE. To the contrary, all available evidence demonstrates that DBDPE behaves very differently both scientifically and structurally than decaBDE. Moreover, not one study submitted to Environment and Climate Change Canada (ECCC) in its risk assessment used for the regulatory impact analysis used in CAN/673 demonstrated the potential for DBDPE to breakdown under rigorous and lengthy testing. While CAN/673 cites meeting the goals of the Canada-U.S. Great Lakes Water Quality Agreement (GLWQA) as a justification for its proposed risk management measures, DBDPE is

not listed as a Chemical of Mutual Concern as part of the agreement, and risk management measures for DBDPE are not needed to comply with the GLWQA.

We also have concerns about the timeline for the implementation of the ban on the manufacture, import and use of DBDPE as set out in CAN/673, which fail to fully account for the time necessary to develop, certify for use, and incorporate an alternative substance into the supply chain. Creating a situation of finding and developing suitable alternatives when flame retardants are banned but the flammability requirements remain stringent will be untenable to many businesses, especially small and medium-sized businesses. Notwithstanding that the potential for debromination of DBDPE remains unproven by ECCC, rather than virtual elimination as proposed by CAN/673, a reasonable less trade restrictive alternative would be to employ a process not unlike that used in the case of the Pest Control Products Act. Prior to approval of importation, manufacture or use, a review of the related processes could be required to be undertaken to ensure that there are adequate safeguards to prevent a release into the environment, and a condition of approval could be a requirement to ensure that those safeguards are in place. Even if Canada was to conclude that DBDPE had the potential to cause harm to the environment, alternative risk management measures not resulting in virtual elimination would be sufficient to manage the potential risk of harm posed by DBDPE.

In summary, while we recognize that measures are necessary to protect the environment and marine life, the proposed restrictions on DBPDE in CAN/673 would be a global outlier and would place an undue and unnecessary burden on businesses in other countries. To comply with CAN/673, businesses around the world will have to redesign, reformulate, recertify, and remanufacture products only for Canada as it is the only regulatory authority in the world proposing such restrictions. As businesses continue to recover from the impacts of an unprecedented global pandemic, including detrimental supply chain complications, we think such restrictions on DBPDE are unnecessary and not supported by the state of the science for this vital chemical product.

We hope that you will consider these comments and appreciate the time and opportunity to provide input into Canada's Technical Barriers to Trade (TBT) process. We look forward to participating in any additional steps of this process.

Sincerely,

Jason Bernstein
Director, Global Affairs
American Chemistry Council