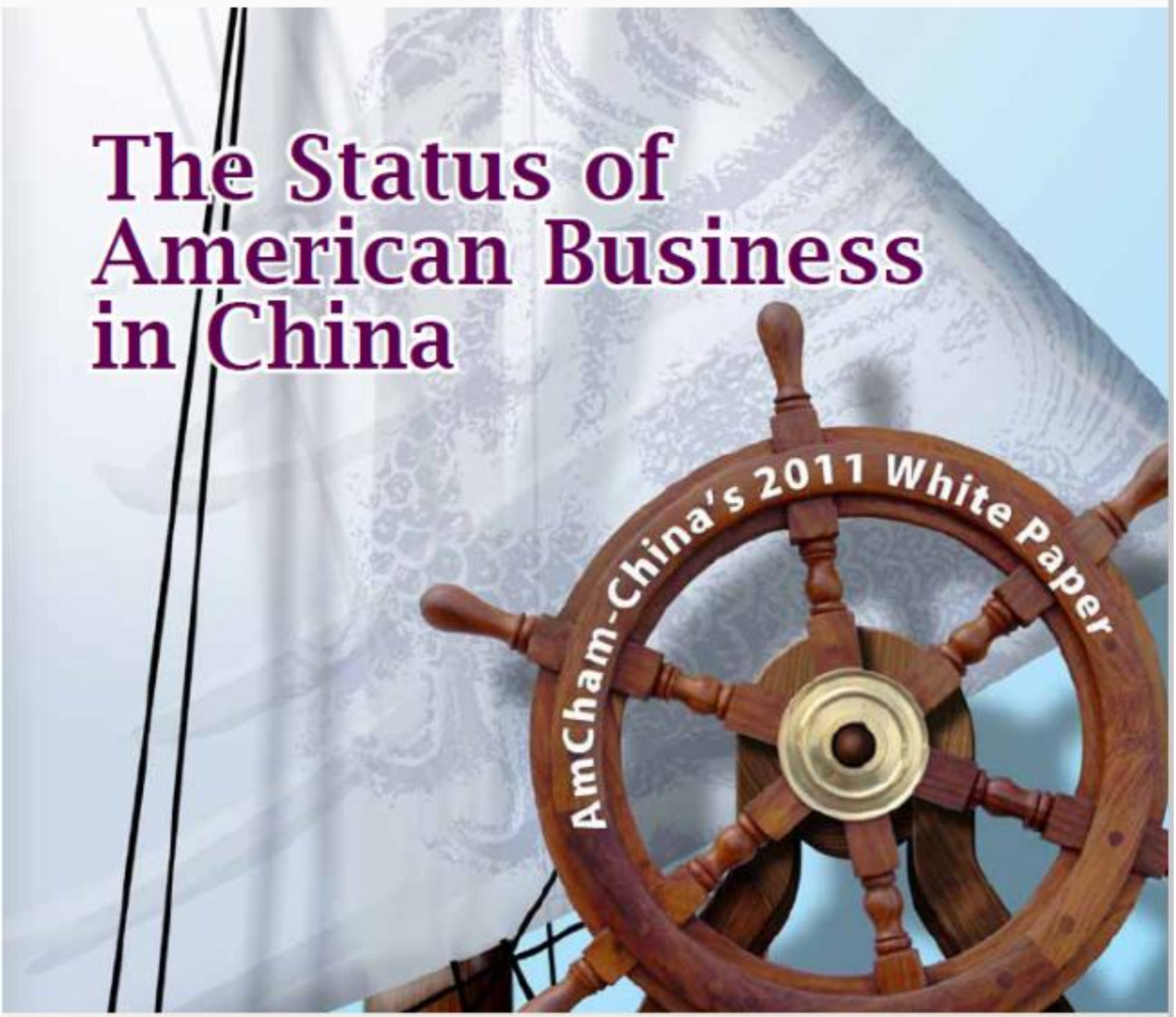
The Status of American Business in China

09 May 2011



Regulatory and market access concerns dampen optimism

By Elizbeth Rowland

The US business community in China continues to see great opportunity for short- and medium-term growth in China, with business performance returning to pre-financial crisis levels in 2010. Through a successful US-China Joint Commission on Commerce and Trade (JCCT) in December 2010 and President Hu Jintao's visit to the US in January 2011, the US and China have also made clear that the preservation and healthy development of the bilateral relationship remain a top priority.

Much uncertainty underlies this apparent optimism, however, as detailed in the 2011 AmCham-China American Business in China White Paper. Since China's reform and opening began over 30 years ago, China has maintained gradual yet constant progress toward establishing a market-based, globally integrated economy. However, in recent years, China has unveiled an increasingly complex web of innovation, government procurement, standards, licensing, competition law, intellectual property rights (IPR) and other industrial policies restricting market access and favoring domestic over foreign-invested firms. As a result, US businesses have started to question whether China will continue welcoming market participation by foreign and foreign-invested companies.

In the 2011 White Paper, AmCham-China urges China to reconsider discriminatory industrial policies that shelter domestic firms from the healthy market competition that drives innovation and benefits Chinese consumers. We provide concrete examples of where China has failed to provide national treatment and has restricted market access to foreign-invested companies to the detriment of the Chinese economy. To highlight AmCham-China members' concern, this year the White Paper includes a new section entitled Industrial Policy and Market Access with several chapters dedicated to these issues. Key themes of these chapters are outlined below.

INNOVATION POLICY AND GOVERNMENT PROCUREMENT

China's innovation policies provide incentives, subsidies and preferential treatment for domestically innovated products and technology in order to foster development of "domestic" Chinese innovation and "national champions." In the 2011 AmCham-China Business Climate Survey, over a quarter of AmCham-China member company respondents reported losing business as a result of indigenous innovation. Forty percent of those surveyed replied that they believe the effects of indigenous innovation will begin to negatively impact their business in the coming years. Survey respondents expect to lose the most business in the state-owned enterprise (SOE) procurement market, with this concern rising ten percent over the 2010 Survey results.

In its World Trade Organization (WTO) accession agreement, China committed to joining the Agreement on Government Procurement (GPA) and to giving foreign companies equal access to China's government and SOE procurement markets. Nevertheless, China has continued to promulgate laws and regulations restricting these markets and has yet to submit a commercially meaningful GPA accession offer. We are heartened by China's recent commitment in January 2011 to de-link its innovation policies from government procurement decisions. However, implementation at both national and sub-national levels will be the determining factor to the actual impact of this commitment.

STANDARDS, LICENSING AND CERTIFICATION

In recent years, China has continued to increase standards testing, licensing and certification burdens on industry, creating arduous and overlapping requirements often duplicative of international standards. In the 2011 Business Climate Survey, 71 percent of respondents reported that licenses are not granted equally between foreign and Chinese companies, and 35 percent stated that obtaining licenses has become more onerous in recent years. Standards are often used as a tool for domestic companies to monopolize markets or as a method for limiting trade. The increasing and unequal burden of standards, licensing and certification undermines the development of China's own industry innovation and harms consumers by driving up costs.

In the 2011 White Paper, AmCham-China urges the Chinese government to allow substantive participation by foreign companies in standards drafting working groups. We also encourage China to avoid the establishment of standards that create trade barriers putting foreign companies at a disadvantage to domestic companies.

INTELLECTUAL PROPERTY RIGHTS

The 2011 Business Climate Survey reveals a rise in the percentage of members who consider IPR infringement among the top five challenges to doing business in China, from 19 percent in 2010 to 24 percent in 2011. A majority of member companies, 70 percent, still rate China's IPR enforcement as either "ineffective" or "totally ineffective."

RECOMMENDATIONS FOR THE CHINESE GOVERNMENT

- Reconsider discriminatory innovation, procurement, standards and other industrial policies.
- Submit a commercially meaningful GPA accession offer.
- Allow full market participation by foreign and foreign-invested firms in banking, securities, telecommunications, legal services, insurance and electronic payment services.
- Increase consistency among various levels of government with regard to regulatory promulgation, interpretation and enforcement.

AmCham-China appreciates the concerted efforts China has made to improve IPR protection, including through the State Council's IPR enforcement campaign launched in October 2010. At the JCCT in December 2010, China also committed to enforcing legalization of SOE software procurement and not discriminating against foreign-originated IPR in government procurement. These are important steps. However, to fully realize their benefits, implementation will be crucial.

Though China has made progress in some aspects of IPR protection, the 2011 White Paper highlights other IPR issues that remain problematic. Such issues include standards and market access regulations that force transfer of IPR, rising risk of litigation involving "junk" patents, restricted access to the SOE procurement market for products with foreign-owned IPR, and the lack of national treatment for foreign IPR and foreign-invested companies.

The compromised ability of US companies to protect their IPR in China will frustrate joint efforts and partnerships between US and Chinese companies, thwarting long-term growth goals on both sides. IPR enforcement is crucial to ensure the continued growth and development of an innovation- and knowledge-based economy in China.

COMPETITION LAW

Selective application of China's Anti-Monopoly Law (AML) disproportionately targets deals involving foreign firms while allowing Chinese domestic monopolies, or "national champions," to thrive. This unequal treatment unfairly restricts market access for foreign firms and reduces market competition, ultimately hurting Chinese consumers. Uncertainty remains surrounding the potential application of antitrust law to IPR as well, with US companies fearing future forced IPR transfer in the name of the AML.

MARKET ACCESS

China restricts market access to foreign companies indirectly through many of the policies described above; however, direct restriction of market access in specific sectors is a problem as well. In banking, securities, telecommunications, legal services, insurance and electronic payment services, foreign firms are partially or completely barred from the market. This is despite the fact that Chinese firms have full and open access to these markets in the US. The persistence of direct market access restrictions not only defies the principal of reciprocity and contradicts China's WTO commitments to provide foreign companies with national treatment in many sectors. It also decreases healthy market competition and limits the development of the services sector in China. In the 2011 White Paper, AmCham-China encourages China to ease market access restrictions in these sectors.

TRANSPARENCY

Much of the US business community's concern about the current and future regulatory environment in China stems from lack of transparency. With bureaucracy, unclear laws and regulations, and inconsistent regulatory interpretation topping the list of business challenges in the 2011 Business Climate Survey, US businesses have sent a signal that transparency must be increased if China hopes to improve the investment environment.

In the 2011 White Paper, we emphasize that enhancing communication and collaboration between the various levels of government with regard to regulatory promulgation, interpretation and enforcement would help minimize conflicting and overlapping laws. This would not only benefit the domestic and foreign business communities, but it would also save the government departments that serve them valuable time and resources. Likewise, improving transparency through more public comment periods and making more laws and regulations available online in both Chinese and English would help reduce confusion and improve compliance with the law.

CHINA'S ECONOMIC FUTURE AND THE ROLE OF US COMPANIES

US companies have played an important role over the past three decades in helping to speed the transformation of the Chinese economy from a closed, underdeveloped market to the increasingly open, modern and prosperous system it is today. Through investment, research and development, training and other contributions, American and foreign businesses have helped Chinese firms develop, cultivating their innovative, technological and management expertise through partnerships.

As Chinese firms seek to expand their reach abroad, these international partnerships and the role of US companies in the Chinese economy will become even more crucial to domestic firms' success. Likewise, as China strives to fundamentally restructure its economy and rapidly develop services and high-tech industries during the 12th Five-Year Plan period (2011-2015), US-Chinese collaboration could contribute toward those goals. Yet, China's growing tendency toward protectionism through industrial policy puts this collaboration—and the continued development of its domestic industry—at risk.

Upon accession to the WTO in 2001, China committed to expanding economic reform and opening and granting foreign companies national treatment in many of China's domestic markets. AmCham-China encourages China to continue building on the remarkable progress made in the ten years since WTO accession by maintaining an open and competitive economy for all market participants. AmCham-China members look forward to working with China to advance modernization and innovation at this pivotal turning point for China's economy.

RECOMMENDATIONS FOR THE US GOVERNMENT

- During export control reform, take into account the availability of high-tech items in China from both domestic and foreign sources.
- Focus on addressing China's industrial policy and market access restrictions rather than on currency valuation.
- Continue funding for the US Trade and Development Agency as well as for capacity-building and cooperation programs in China.
- Negotiate to conclusion a reciprocal agreement with China to increase visa validity periods.

BOTH GOVERNMENTS

- Maintain regular bilateral dialogues.
- Avoid distraction by short-term political issues, instead maintaining a long-term view of the bilateral relationship.

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