



U.S. CHAMBER OF COMMERCE

AmCham China
中国 美国 商会

Priority Recommendations for U.S.-China Trade Negotiations

from the

U.S. Chamber of Commerce

and

American Chamber of Commerce in China

January 16, 2019

Table of Contents

I. Executive Summary	3
II. Priority Recommendations for Chinese Actions to Address Trade/Investment Barriers	6
III. Annex I: Cross-Sectoral and Industry-Specific Member Company Issues	10
IV. Annex II: Recommendations for Alleviating Concerns Regarding Technology Transfer	68
V. Annex III: Recent Tracking of Problematic Made in China 2025 Policies	80
VI. Annex IV: Draft U.S.–China 90-Day Negotiation Discussion Memorandum	113



Executive Summary

On behalf of the U.S. Chamber of Commerce (“the U.S. Chamber”) and the American Chamber of Commerce in China (“AmCham China”), we respectfully provide the enclosed submission and accompanying annexes to share our views on the ongoing, 90-day U.S.-China trade negotiations. This submission reflects the extensive input we have received from across our collective memberships.

In calibrating its approach, the U.S. government should not overlook that China remains a critical market for American companies. A majority of American companies in China reported revenue and profit growth there last year.¹ The bilateral relationship also supports approximately one million jobs in the United States.² Simply put, many of our members derive significant value from continued U.S.-China commercial engagement.

Nevertheless, the U.S. Chamber and AmCham China have been consistent in expressing shared concerns over many years regarding China’s long-standing intellectual property rights violations, forced technology transfers, and state interventions in the economy—many of which USTR highlighted in its Section 301 report issued in March, 2018 (as updated in November, 2018), the substance of which we support. Addressing these problems requires permanent, verifiable and enforceable solutions, and we look forward to working closely with the U.S. government to develop approaches in each area.

Even so, we have been equally consistent in expressing our strong conviction and deep concern in numerous public submissions to the U.S. government that untargeted, punitive tariffs imposed in response to China’s harmful practices undermine American competitiveness, escalate a counterproductive cycle of retaliation, and lead to unintended, damaging consequences.³

As both governments engage at this critical juncture, our organizations recommend the following three objectives to guide U.S. negotiators:

I. Prioritize Structural Issues that Restore Fairness and Open Markets

Negotiations should address systemic issues in the Chinese economy that result in unfair competition and non-market outcomes. Elements of China’s economic model are difficult to square with China’s WTO commitments to market access and nondiscrimination and

¹ According to the American Chamber of Commerce in China (“AmCham China”) 2018 China Business Climate Survey Report, nearly two-thirds of survey respondents reported revenue growth and three-quarters of respondents reported that they were profitable in China last year—the highest number in three years.

² <https://www.uschina.org/reports/us-exports/national>

³ In light of China’s retaliation and its corresponding impact on American business, we believe the U.S. and Chinese governments should, at a minimum, mirror each other’s granted tariff exclusion requests while seeking to fully eliminate Section 301 tariffs over the negotiating period.

impose strains on the global trading system. The distortionary impacts of China’s industrial policies and the subsidies that underpin them are harming U.S. companies, workers, consumers, and competitiveness. While reducing the trade deficit and purchases of U.S. exports may be one aspect of the negotiations, we urge the U.S. government to prioritize outcomes that address structural challenges posed by China’s economic policies and practices.

II. Eliminate All Forms of Forced Technology Transfer

China’s regulatory regime too often sets unnecessarily burdensome requirements for foreign companies to transfer technology as a condition for doing business in China’s very large market. An interlocking set of policies—including not only caps on foreign equity ownership but more importantly procedures related to administrative licensing, standards, procurement, data localization, and competition and security reviews—results in foreign companies being coerced or induced to transfer technology as a precondition for market access, or denied market access if they fail to do so. We urge the U.S. government to take a holistic approach that achieves specific and concurrent changes to laws, regulations, and standards—and implementation thereof—across China’s policy landscape.

III. Address Serious Challenges in the Regulation of the Digital Economy

Data localization, prescriptive security requirements, and preferences for domestic technologies in sectors lacking any reasonable connection to legitimate national security concerns pose immediate and far-reaching challenges for American companies. These policies restrict the free flow of commercial data across borders and limit access to a burgeoning market for American digital products and services. We urge the U.S. government to leverage these negotiations to remove all forms of localization policies and ensure China applies national security requirements precisely and narrowly so as not to discriminate against foreign companies and undermine competition.

Our organizations recognize that achieving concrete, far-reaching progress in these priority areas will not be easy, which is why we are recommending a two-step process to support verification of commitments and enforcement where differences may arise.

Step One – Securing Changes to Laws and Policies: Explicit changes to Chinese normative guidance, laws, and regulations that comprise the regulatory structure that China uses to force technology transfer would be a significant and positive first step. Commitments by China to meaningful reform in these areas will require clear benchmarks, timelines, and intensive monitoring to ensure lasting changes not only to China’s legal and regulatory architectures, but also impartial implementation of laws and regulations.

To support the U.S. government in its efforts to identify needed changes to normative guidance (e.g. documents such as the 13th Five-Year Plan, Made in China 2025 and other overarching industrial policy blueprints), laws, and regulations, we are pleased to provide three annexes to this submission as follows:

- Annex I: Cross-Sectoral and Industry-Specific Member Company Issues
- Annex II: Recommendations for Alleviating Concerns Regarding Technology Transfer

- Annex III: Recent Tracking of Problematic Made in China 2025 Policies⁴

Step Two – Creating New Disciplines That Provide Recourse to Independent Arbitration and Can Be Multilateralized at the WTO:

Our organizations urge the U.S. government to negotiate new disciplines with China that will bind and limit its ability—in practice—to apply laws, regulations, and policies in a manner that results in discriminatory treatment against U.S. companies in China.

In addition, reliance on China’s legal system—both administrative and judicial mechanisms—has too often proven insufficient in providing U.S. companies and the U.S. government with the requisite guarantees that business in China is regulated in a transparent and non-discriminatory manner. Consequently, we urge the U.S. government not only to seek new, high-standard binding rules that directly discipline areas of Chinese regulatory overreach, but also establishment of an independent arbitration mechanism to ensure strong deterrence and, when needed, fair and effective enforcement.

- Annex IV: This annex contains recommendations for new disciplines that could be incorporated into a new, high-standard agreement with China that would help to deter malpractice in critical regulatory areas encompassing technology transfer concerns—standards setting, conformity assessment, antitrust enforcement, IP protection—and address disputes impartially when they occur. In this annex we also recommend new disciplines covering state-owned enterprises, subsidies, national treatment and national security.

Our organizations urge that any bilateral commitments reached in this negotiation covering subsidies, state-owned enterprises, and technology transfer should also be adopted multilaterally, including by the World Trade Organization.

We appreciate the U.S. government’s attention to and seriousness in these negotiations. China constitutes a critical market for American products and services, and American business needs a level playing field with China as we compete around the world. We are committed to working constructively with the U.S. government to ensure U.S.-China economic and commercial ties are mutually beneficial.

⁴ We submit that local and provincial implementation of national industrial policy guidance is a significant component of the distortive impact presented by China’s economic model to global markets in sectors as diverse as steel and semiconductors, and needs greater attention in bilateral economic discussions.



PRIORITY RECOMMENDATIONS FOR CHINESE ACTIONS TO ADDRESS TRADE/INVESTMENT BARRIERS

1. Expand near-term market access for U.S. exporters and investors, ensure fair and equal opportunity to compete and protect intellectual property.

A: Expand Access to Chinese Market for U.S. Companies

Background

China's investment regime—one of the G-20's most restrictive—blocks investment in key industries. China's average tariff level (9.9%) is nearly three times higher than the United States (3.5%).

Solution

- Lift all restrictions on foreign ownership or management of Chinese enterprises, subject to a list of narrow and specific exceptions for sensitive sectors comparable in number to U.S. restrictions, and take additional steps to expand market access, including in, but not limited to, the following sectors:
 - financial services;
 - agricultural biotechnology;
 - new-energy and combustion vehicle manufacturing;
 - cloud computing and telecommunications services;
 - internet-related services; and
 - legal services.
- Substantially reduce tariff rates in priority sectors for U.S. exporters, including autos.

B: Ensure Fair and Reciprocal Treatment for U.S. Companies

Background

China's licensing and approval regimes forestall or deny market access, even in nominally open sectors. Behind-the-border policies and practices, such as in antitrust and standard-setting, limit U.S. companies' ability to compete in the market.

Solution

- Provide foreign investors treatment no less favorable than the best treatment offered to any domestic Chinese company, whether private, state-owned or state-controlled;
- Eliminate laws and regulations, enforcement activities, approval processes and licensing, procurement preferences, and other requirements that treat foreign entities less favorably than domestic firms, including by:

- allowing U.S. companies to independently obtain licenses (e.g., cloud services and e-payments) without a Chinese partner;
- allowing any investment unless the restrictive action is specifically justified based on bona fide narrowly defined national security concerns;
- publishing in advance all licensing and other requirements and conditions for the provision of online services; if any additional requirements or conditions are imposed in connection with a government approval of a specific application, those requirements or conditions shall be made public;
- eliminating restrictions on foreign companies' access to China's domestic procurement market and removing procurement preferences for domestically or domestically-invested products and services as well as any other burdensome regulatory approaches at multiple levels of government;
- ensuring Chinese marketing approval processes for agricultural products are transparent, science-based and synchronized with other trading partners (e.g. biotech);
- eliminating requirements for domestic content, licensing or requirements to transfer technology, localize production or use of domestic content, or counter-trade;
- allowing US companies to sign contracts, procure services in China on the same terms as Chinese companies, and use their trademarks and brands to market their services;
- ensuring enforcement actions in the areas of anti-monopoly and standard-setting are non-discriminatory and not unfairly directed at foreign entities, ideally through binding international dispute settlement;
- eliminating territorial-based restrictions on doing business throughout China for companies registered in special economic zones; and
- ending China's forced technology transfer through "non-governmental" technical standards bodies.

C: Protect U.S. Intellectual Property against Theft, Forced Transfer, and Infringement

Background

China uses various means to force foreign companies to transfer their technology to Chinese partners, fails to adequately protect intellectual property and to provide effective enforcement against violation of intellectual property rights, and supports and conducts cyber intrusion to steal valuable proprietary information from U.S. companies.

Solution:

Strengthen intellectual property laws, regulations, and enforcement by:

- prohibiting theft of proprietary information, including theft of trade secrets or other proprietary information, of U.S. companies through a comprehensive, standalone trade secrets law and increased criminal remedies;
- eliminating technology transfer requirements and regulatory preferences for indigenous innovation;
- providing effective protection against unfair commercial use of test data, providing effective enforcement of patents (including a patent linkage mechanism), providing

- patent term restoration to help compensate for lengthy regulatory processes, and eliminating discriminatory practices in patent examination of foreign applications, and accelerating the patent approval process;
- adopting a plan to restructure the counterfeit economy and providing effective enforcement against counterfeit goods, including medicines and other goods, and against bad faith trademark filings;
- providing effective rules and enforcement against online piracy of music, movies, television, books, journals, software, games, and illegal streaming devices known as set top boxes, and eliminating quotas on foreign video content available on online platforms; and
- creating deterrent-level penalties for intellectual property (e.g. trade secrets) theft, including through cyber-enabled means.

2. Curb overcapacity, eliminate subsidies, and remove other policies that promote unfair competition.

Background

China provides massive subsidies—including for agriculture, aluminum/steel, as well as Made in China (MiC) 2025 industries—that distort domestic and global competition in favor of Chinese national/global champions.

Solution

Remove subsidies and market distortions through a State Council/Party proclamation and under strict timelines, including by:

- eliminating market-distorting non-commercial assistance or subsidies that artificially support industries (e.g. aluminum, steel, agriculture, export credits, and MiC 2025 industries);
- providing a meaningful liquidation or re-organization process for non-competitive firms in sectors with demonstrated overcapacity; and
- reducing policy prescriptions that result in excessive provincial/local investments in areas targeted for growth by national-level industrial policies.

3. Remove restrictions on digital trade, including eliminating the “secure and controllable” and similarly-worded requirements and allowing the free flow of data.

Background

China’s laws/regulations restrict data flows, require data localization, and allow for standards that either mandate tech transfer/IP disclosure or function as *de facto* requirements to buy only from domestically-invested companies.

Solution

Eliminate restrictions on data and ICT products and services by:

- excluding all commercial ICT products from “secure and controllable” requirements, and ensuring that cybersecurity requirements are in keeping with international best

practices for protection of government systems (e.g. U.S. FISMA/FedRamp, European NIS Directive);

- establishing a presumption that all categories of data can be transferred across borders without restriction unless subject to a very narrowly defined national security exemption;
- lifting requirements to use or locate computing facilities locally as a condition for conducting business in China;
- according U.S. online service providers with full and non-discriminatory market access, including the ability to provide online services without the need to acquire a value-added telecoms service license or to enter into a joint venture;
- eliminating content review and approval schemes for foreign content that effectively limit opportunities for U.S. platforms; and joining the APEC Cross-Border Privacy Rules system.



ANNEX I: CROSS-SECTORAL AND INDUSTRY-SPECIFIC MEMBER COMPANY ISSUES

CROSS-SECTORAL ISSUES

INDUSTRY-SPECIFIC ISSUES

CROSS-SECTORAL ISSUES

INDIGENOUS INNOVATION & INDUSTRIAL POLICY

1. Competition Law

Intellectual Property Rights

- We request that the U.S. government secure a commitment from China to address industry concerns in the multiple draft guidelines on intellectual property (IP) abuse from China's anti-monopoly enforcement agencies (AMEA's):
 - removing its unbalanced essential facilities doctrine;
 - deleting provisions on excessive pricing;
 - eliminating provisions that prohibit or restrict the refusal to license; and
 - eliminating provisions on vertical monopolies to the extent that they deny enterprises the right to establish distribution structures to suit their specific business needs.

The IP system rests on the basic principle that IP is a right to exclude all others from commercially benefiting from it and the right to determine the rates for and other terms of the license. We, therefore, request China's Anti-Monopoly Law (AML) IP Abuse guidelines not be issued until they, at a minimum, reflect these principles.

- Secure a commitment that China will refrain from (i) compelling new licensing of IP solely because of an unconditional refusal by the owner to grant a license to a third party that needs access to the IP to innovate and/or compete; and (ii) requiring a business justification for a refusal to license when non-essential IP is involved. Recognize that these behaviors can discourage technology owners from deploying their newest and best technologies in China.
- Secure commitments from China to agree not to interfere in licensing negotiations between standards implementers and the owners of “essential” patents or other IPRs in the standard, per its 2004 Joint Commission on Commerce and Trade (JCCT) commitment that has not been followed,⁵ and agree not to adopt policies that would have an effect similar to direct interference in licensing negotiations.
- Allow foreign and Chinese companies to enter into IP licensing arrangements freely and without government involvement, per China’s 2014 JCCT commitment. We note that the December 2018 Draft of the Foreign Investment Law (FI Law) includes text explicitly banning forced technology transfers and “government intervention” in the normal operations of foreign business. We will closely monitor further developments along these lines.
- The State Administration of Market Regulation (SAMR) should publicly make clear that the good faith assertion of IP rights is exempted from the AML under Article 55 and will never constitute an abuse of IPR.
- Remedies for anticompetitive mergers or abuse of dominant market position by non-Chinese companies should be consistent with the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) Articles 3 and 31, should only include requirements for IP licensing or other technology transfers where necessary to remedy the specific competition concerns and should be blind as to the nationality of the party to whom the license or technology transfer is made.

Transparency and Due Process

- Secure a commitment from China to provide additional guidance regarding the required content of notifications so that more notifications will be complete and accepted when initially filed.

⁵ China committed at the 2004 JCCT to remove PRC regulators from negotiations regarding payment terms with relevant IPR holders.

- Encourage China to enable SAMR to collaborate more deeply and substantively with competition regulators in other major jurisdictions on M&A cases requiring multi-jurisdictional approvals, including through the remedy phase.

2. **Indigenous Innovation Policies and Product Lists**

- Secure a commitment from China that it will repeal all remaining central- and local-level policies that provide preferences for domestic products or indigenous IP with a primary focus on Made in China 2025 sectors.
- Secure a commitment that China immediately make all plans and accompanying rules and regulations for its Strategic Emerging Industries (SEI) Initiative publicly available. Secure a commitment that SEI plans, rules, and regulations provide a level playing field for all companies, regardless of the nationality of their shareholders, and allow the market to select the most appropriate, sustainable technologies.
- Eliminate preferential tax policies for domestic companies producing high-value technologies (e.g., machine equipment, control systems, software) defined under the “Opinions on Promoting the Application of the First Series of Major Technological Equipment,” jointly issued by eight government ministries in April 2018. This includes policies for reduced corporate income tax rates, preferential tax policies and import duties.
- Request that China further modify the High- and New-Technology Enterprise (HNTE) program to:
 - eliminate the current HNTE requirement to own proprietary core technology in China and replace it with criteria that emphasize usage rights;
 - expand the criteria of the licensing conditions to include non-exclusive licensee or usage rights; and
 - reduce the amount of sensitive information that companies must release when they submit an application, limiting release to that which is truly necessary to evaluate a company’s high- and new- technology activities, and provide more explicit assurances that this information will be adequately protected.

3. **Public Procurement**

- Finalize a clear, consistent, and inclusive definition of what constitutes a “domestic product” by issuing the “Administrative Measure for the Government Procurement of Domestic Products.” Ensure that any definition would provide equal treatment to all legal entities in China providing goods and services regardless of ownership.

WTO Government Procurement Agreement (GPA)

- Secure a commitment from China to accede to the WTO GPA with an offer that includes additional state entities, lower thresholds for exclusion, and more provinces.
- Secure a schedule for regular technical discussions between the U.S. and China on GPA accession with a view towards China acceding to the GPA in 2019. Create opportunities for private sector participation in these discussions.

China's Domestic Government Procurement

- Revise the Bidding and Tendering Law and the Procurement Law to expressly commit that foreign-invested enterprises have equal access to information at the start of a bidding process, that there is transparency and fair evaluation during the tendering process, and that there is efficient and meaningful remediation to raise objections in cases of perceived irregularities.

4. Standards

- We are deeply concerned about revisions to the Standardization Law that expand public disclosure requirements, establish a path for social organization standards to be transposed and adopted as national standards, provide support for indigenous innovation, and lack consistency with the WTO Technical Barriers to Trade (TBT). Secure a commitment for the following recommended changes to the Standardization Law:
 - **Indigenous Innovation:** Newly added Article 20 is highly problematic, and we strongly recommend it be removed from the law. The inclusion of a stated preference for indigenous innovation in social organization standards creates a trade barrier that would conflict with the WTO TBT 4.1, WTO TBT Annex 3, D, and TBT Annex 3 F. The WTO TBT requires all measures to be consistent with the Code of Good Practice. Article 20 conflicts with WTO TBT Annex 3, D which requires equal treatment of products originating from different countries and TBT Annex 3, F provisions for use of international standards.
 - **Public Disclosures:** The Standardization Law expands public disclosure requirements for enterprises. These requirements are unique to China and will likely add significant costs not only to enterprises but also to government agencies. We recommend NPC remove enterprise standards from the Standardization Law and limit any mandatory public disclosure requirements only to mandatory standards. All other standards should be disclosed on a voluntary

basis.

- **Transposition:** We are concerned that implementing policies for the Standardization Law will establish a path for social organization standards to be transposed and adopted as national standards (recommended/mandatory) or recommended standards. The addition of Article 20 on support for indigenous innovation (see the bullet below) to the law creates a scenario where the WTO TBT requirements on a central government for the publication of a work program and sufficient public notice would be subverted. We recommend China commit to a verification system to ensure it adheres to WTO TBT notification requirements, and social organization and other standards are not transposed and adopted as national standards or recommended standards.
- **Consistency with WTO TBT:** As a signatory to the WTO, China should use its commitments in the WTO Agreement on the TBT as a basis for its legal and policy frameworks for standardization. WTO consistency is particularly important for the Standardization Law because it serves as the legal framework for China's standardization development. China should re-open the Standardization Law to public comment with a 60-day notification period and ensure its full compliance with WTO TBT requirements.
- Secure a commitment from China to (i) align Chinese standards—including national, industrial, and local standards—with international standards, and (ii) base Chinese standards and technical regulations on international standards wherever practical.
- While we appreciate the release of the *Guiding Opinions on Foreign-Invested Enterprises' Participation in China's Standardization Work*, ensure the Guiding Opinions allow foreign companies access to and voting rights in Chinese standards setting bodies, including mandatory and voluntary standards, on par with Chinese companies, and ensure that there is no “presumption of participation” in Chinese standards setting laws, rules or administrative regulations that would allow a Chinese standards body to adopt or implement the IP of a foreign company into a Chinese standard on non-market or royalty-free terms.
- Secure a commitment from China to create a unified channel for making draft versions of all mandatory standards (national, industrial, etc.) and technical requirements available to domestic, foreign-invested, and foreign-based companies for comment at least two months prior to its adoption along with opening all domestic standards development organizations to foreign voting participation.

- Review all TC260 standards for compliance with/duplication of existing international standards, and adopt international standards where one already exists.

5. **Conformity Assessment and Certification Redundancy**

Encryption

- In May 2017, the Office of the State Commercial Cryptography Administration issued its draft Encryption Law. The draft law as currently worded requires all cryptographic work to be subject to regulation, a heavy-handed approach that will likely stifle innovation and create unnecessary barriers to trade. In particular, commercial encryption products should not be regulated, nor should commercial encryption products be classified as a “state secret.”
- In March 2000, the State Encryption Management Commission issued a clarification, which excluded from the scope of the 1999 encryption regulation products which do not have encryption as their “core function.” U.S. industry has relied heavily on this commitment and on subsequent statements by the Chinese government that the “core function” commitment will remain in place. The draft law should be revised to recognize this commitment and to ensure that any subordinate regulations will also do so.
- Secure a commitment that China will remove all requirements to use localized encryption, including in the draft China Insurance Regulatory Commission (CIRC—now CBIRC) regulations, to prevent imposition of a disproportionate burden on foreign-invested insurers because Chinese algorithms may differ from those of their parent companies, thereby reducing their competitiveness. Furthermore, the import of encryption products should not be regulated and equal weight should be given to international algorithms.
- Secure a commitment from China to avoid onerous and/or discriminatory testing and certification standards for commercial encryption, including a commitment not to require the disclosure of source code or other proprietary information for testing by state laboratories to gain market access.

Intellectual Property

- Secure a commitment that security requirements should not require forced technology transfer or review/disclosure of proprietary information or other IP such as source code as a condition of market access under compulsory certification regimes.

- Secure a commitment from China to require only the minimum amount of information necessary to show conformance (i.e., no unrelated or unnecessary information) and take all measures necessary to protect any confidential business information it receives.

Information Technology/Electronics

- Ensure that China implements its 2006, 2009, and 2010 JCCT commitments to maintain a policy of technology neutrality towards 3G/4G/5G and other telecom standards by allowing operators and end users to adopt technology freely and based upon market principles.
- In light of China’s “Management Methods for the Restriction of the Use of Hazardous Substances in Electrical and Electronic Products,” seek clarification that the voluntary China Restriction of Hazardous Substances (RoHS) testing regime remains voluntary and is implemented based on a self-declaration of compliance by importers and sellers of those products included in the RoHS product scope. RoHS compliance should not require on-site factory inspections or the disclosure of companies’ proprietary information, including material make-up of components as well as the identity of suppliers.

Standards/Testing

- Secure a commitment from China to refrain from categorizing a standard as “voluntary” in the instance where it is actually a mandatory requirement for conformity assessment programs. By doing it in this manner, China bypasses the need to identify the WTO TBT process.
- Secure a commitment from China to engage the U.S. in negotiations on a mutual recognition agreement (MRA).
- Recommend China join the APEC Pathfinder for Remanufacturing, alongside most other countries in the region, ensuring that remanufactured products follow the same technical standards as original new products. As such, China would allow the free flow of cores and remanufactured finished goods (RFG) across borders.

6. Cybersecurity Initiatives

China Banking and Insurance Regulatory Commission (CBIRC) Informatization Regulations

- Secure a commitment that China will stay implementation of all regulations—including CBIRC’s (previously CIRC) *System Informatization Regulatory Requirements* (draft) and the China Banking Regulatory Commission *Guidelines for the Promotion of the Use of Secure and Controllable Information Technology*—requiring “secure and controllable” products until these regulations are consistent with WTO agreements/rules (including but not limited to those in the TBT Agreement), are narrowly tailored, take into account international norms, are nondiscriminatory, and do not impose nationality-based conditions or restrictions, on the purchase, sale, or use of information communication technology (ICT) products by commercial enterprises unnecessarily—per commitments made at the presidential bilateral in September 2015.
- Secure a commitment that China will remove data localization requirements from the CBIRC *Insurance System Informatization Regulatory Requirements* (draft). We are concerned about provisions in the revised draft CIRC regulations that would require data sourced within China be stored in a data center located in China. This requirement is unwarranted and costly. Moreover, CBIRC can and already does require that all insurance institutions licensed in China provide relevant information to enable CIRC to perform its supervisory responsibilities.
- Secure a commitment that China will remove procurement preferences for products that are “secure and controllable” (Article 53) from the CBIRC *Insurance System Informatization Regulatory Requirements* (draft). It remains unclear what definition or standard applies to “secure and controllable.” At the 2015 Strategic and Economic Dialogue (S&ED) the Chinese “committed to ensure that ICT regulations will be non-discriminatory, are not to impose nationality-based requirements, and are developed in a transparent manner,” and re-affirmed this at the 2015 JCCT. We ask that this commitment be applicable to commercial insurance.
- Ensure that China remove all restrictions on cross-border data transfer (Article 58) and explicitly allow for copies of financial data to leave China’s shores for business and analytical purposes. Cross-border data transfer frameworks should be modeled, if even loosely, on the APEC Cross-Border Privacy Rules system.
- Secure a commitment that the CBIRC regulations will not require adoption of Chinese domestic cryptographic standards.

- Secure a commitment to remove provisions that set information system security requirements in accordance with the Multi-Level Protection Scheme (MLPS).

China Banking and Regulatory Commission's Banking Regulations

- Secure a commitment from China that the CBIRC's *Promotion Guidelines for Banking Applications of Secure and Controllable Information Technology (2014-2015)* will not be released or enforced at a later date. While we appreciate their suspension, we request clarity that the Regulations will not reemerge at a later date.
- Secure a commitment that regulators are not currently enforcing the Banking Regulations despite their suspension and that banks are once again allowed to buy U.S. ICT for critical infrastructure purposes.

Cybersecurity Law

- Secure a commitment that China's Cybersecurity Law will not enforce source code disclosure requirements. The implementing rules and regulations for the Cyber Security Law should not go beyond the scope of the law as stated within the original text. Ensure security requirements are technology-neutral and yield a measurably improved security outcome. We recommend that China:
 - provide a clear and narrow definition of "critical information infrastructure";
 - consult international best practices and certification procedures in global standards and certification;
 - remove requirements for data localization. Data localization requirements should be applied only to operations of critical information infrastructure, and not to "network operators." The security assessment and other requirements for operators of critical information infrastructure should not be overly complicated;
 - allow for foreign-invested enterprise participation, on an equal basis, in the standards setting process for cybersecurity. Technical Committee 260 (TC260) should implement a standards development process that conforms to international standards, is transparent, open to participation on a global scale, market-driven, consensus-oriented, and technology-neutral. TC260 should not adopt standards that confer advantages to particular technologies based on national origin;
 - remove all preferential policies for "secure and trustworthy"; and

Security Assessment Measures for Exporting Personal Information and Important Data

- Secure a commitment that the Measures, if implemented, will establish a presumption that all categories of data can be transferred across borders without restriction unless subject to a very narrowly defined national security exemption.

Measures on Network Product and Service Security Review (Measures):

- Secure a commitment to remove security reviews covered in the Measures but do not belong in a national security context—such as “dominant market position”.

Critical Information Infrastructure Protection Regulations

- Secure a commitment from China that will limit the definition of critical information infrastructure (CII) to include only infrastructure belonging to the Communist Party of China, the Central Government, and the People’s Liberation Army, but NOT including other government-affiliated institutions like state-owned enterprises, local governments, and healthcare and education institutions. The institutions listed that should not be included in the CII definition are not exhaustive, but merely illustrative of institutions that are often associated with State control and thus have potential to be included in a CII definition.

Testing/Standards

- Secure a commitment from China to make the following amendments to the Cybersecurity Classification Protection Scheme:
 - Secure a commitment that MLPS is applied only in the interest of genuine national security; right now draft Article 2 has an overly broad application of all “networks,” except those for personal use.
 - Remove “secure and trustworthy” from Article 10 and ensure any procurement related article not promote or lead to buy local policies, and edit Article 28 to ensure commercial procurers set procurement requirements
 - Remove the requirement (Article 21) for organizations to have a “connection” to security organs
 - Remove the requirement that all Level 3 networks use state approved encryption
 - Curtail Article 50 to ensure MPS’s authorities do not disrupt normal business or put companies’ information at risk.
- Secure a commitment from China to remove all indigenous IPR and information security import, sale and usage restrictions for widely available information security technology and services that are used in the general commercial market including

SOEs and non-sensitive government procurement (e.g., MLPS regime and a requirement to use the ZUC algorithm for 4G LTE equipment).

- Secure a commitment that China adopt internationally accepted best practices and global standards such as Common Criteria.
- Building off China’s 2013 JCCT commitment not to require applicants to divulge the source code or other sensitive business information in order to comply with ZUC provisions, the U.S. government should continue to press China on the importance of not implementing onerous testing and certification requirements for encryption technology and standards that require a review of source code, low/high level design, and other sensitive business confidential IP.
 - Secure a commitment that China will not subject hardware and software procurement decisions to the MLPS for the financial services industries.
- Secure a commitment from China to:
 - Adopt international standards for information security certification;
 - Apply international norms to those parts of the market where products must carry a certification to be used or purchased;
 - Not require the transfer of protected information to the government to obtain any certification by allowing third-party internationally accredited laboratories to operate in China;
 - Adopt globally accepted norms and best practices in the area of cybersecurity policy and remove requirements for domestic IP at Level-3 and above for systems and mandatory product testing in government affiliated laboratories; and

7. **State-Owned Enterprises and Subsidies**

- Secure a commitment for China to provide a full accounting to the WTO of all subsidies granted under the program, and agree to a schedule for corresponding reduction and elimination of subsidies in key sectors, with a focus on Made in China 2025 industries.
- Work toward new principles, criteria, and classification measures that would clarify the independence of SOEs from the direction and support of the Chinese government and the Communist Party, thereby facilitating increased Chinese investment by SOEs in the U.S.
- Seek public clarification from China on SOEs and the precise meaning and scope of its July 2014 S&ED commitment “to ensure that enterprises of all forms of

ownership have equal access to inputs...and to develop a market-based mechanism for determining the prices of those inputs.”

- Encourage China to allow private sector input as it considers this new mechanism.
- Secure a commitment from China to comply fully with its existing international obligations to notify the WTO, in a WTO-authorized language, of all subsidies and industrial policies, including those under the 13th Five-Year Plan and Made in China 2025 at the provincial and local levels, that impact trade and investment within 90 days of the agreement.
- Negotiate new agreements with China on SOE-related issues that can address export and investment challenges. Given that many of China’s SOEs appear not to operate solely as commercial entities, ensure that any future investment agreements with China address concerns over the noncommercial nature of SOEs.
- Current subsidies to SOEs distort competitive opportunities for both domestic and foreign companies. Consider replacing the current subsidy system with a tax credit regime based on current global norms. Moving to a tax credit regime will incentivize good companies to invest their own funds and receive credits later. A tax credit regime is also conducive to anti-corruption measures, enhances tax compliance, and allows greater control of businesses.

8. Trade Remedies

- Secure a commitment from China that use of its trade remedy laws will be governed by facts; meet transparency requirements consistent with other major jurisdictions internationally insulated from political pressures, including retaliatory purposes; and adjudicated in a manner consistent with WTO rules.

INTELLECTUAL PROPERTY

1. Enforcement of IPR

- Criminal Enforcement: Amend the criminal code to eliminate value-based thresholds laid out in the Supreme People’s Court 2004 *Judicial Interpretation of Several Issues Concerning the Specific Application of Law in Handling Criminal Cases Involving Infringement of Intellectual Property*. In addition, institute concurrent “civil claims” to a criminal prosecution by allowing right holders as victims to file collateral civil claims for compensation during the trial of criminal IPR cases.

- Evidence Preservation: Strengthen rules related to evidence preservation orders and provide more severe civil sanctions against those who breach court orders, hide or destroy evidence, or repeatedly infringe.
- Injunctive Relief: Increase effectiveness of civil remedies by providing for more effective injunctive relief by successful claimants, including efficient and low-cost enforcement via continuing contempt jurisdiction. In addition, it is important that China enforce injunctive orders obtained in an international arbitration forum preventing disclosure or use of the IP. In addition, China should provide injunctive relief based on private settlement agreements and MOUs.
- Investigations and Penalties: Secure a commitment from China to explore new ways to strengthen the investigation and penalty powers of administrative enforcement authorities, for piracy, counterfeit and trade secret theft, with appropriate safeguards, such as a court-supervised discovery process, imposing statutory minimum fines, raising or eliminating the statutory maximum on fines, and encouraging enforcement officials to levy larger fines to serve as a deterrent. Such changes could later be implemented through amendments to the Trademark Law, Anti-unfair Competition Law (for trade secrets, as well) and Copyright Law.
- Patent Administrative Enforcement: As mentioned in our comments on the draft Fourth Amendment to the Patent Law, while we appreciate the Chinese government's heightened attention to patent enforcement, China should not vest the administrative bodies in the patent area with investigative responsibility on infringement and allow them to impose fines and punitive damages, due to the complexities of patent disputes and the adequacy of judicial sanctions.
- Raise Penalties: Increase the effective level of penalties for IPR infringement – both judicial damages and administrative penalties – by instituting statutory minimums and raising or eliminating the statutory maximums on fines and damages for IPR infringement, and by encouraging enforcement authorities to levy larger fines that will serve as deterrents that are more effective. 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).
- Resources: Increase resources for IPR enforcement personnel at all levels, including enforcement officials and IPR regulators and judges. In particular, increase resources and authority for local public security bureaus, industry and commerce administrations, and local copyright bureaus to proactively tackle counterfeiting, piracy, and other IPR infringement, including online sites and services, mobile networks and apps that intentionally facilitate infringement. Establish benchmarks for IP protection in regular performance evaluation of government officials.

- Internet Sales and Distribution: Increase monitoring and enforcement investigations of Internet sales and distribution platforms for counterfeiting and piracy, and provide regular reporting of enforcement activity. Ensure that efforts to boost enforcement balance the needs of legitimate IPR holders and responsible Internet intermediaries.
- Destruction of Equipment/Blueprints and Drawing Specification: If the final appeal court upholds a decision to exclude products, mandate that infringing goods—and, provided that the equipment, blueprints or drawing specification was used exclusively to create the infringing goods or the equipment used to produce them—be destroyed and not be permitted to re-enter the market under any circumstances. Blueprints or drawing specifications should be returned to owner.
- Enforcement of Foreign Judgements: Encourage PRC courts to accept petitions to enforce foreign court judgments related to IPR protection, and to issue court orders to enforce those judgments in greater numbers.
- Proof of IP Ownership and Proof of Infringement: Simplify evidentiary standards to establish ownership of IP and infringement. Allow and admit forms of evidence such as affidavits (under penalty of perjury), brochures of infringers, and live testimonies to prove ownership of IP and infringement in judicial proceedings.
- 3-in-1 Court System: Some jurisdictions in China have been experimenting with what is called a 3-in-1 court system for IPR cases. These courts enable an IP tribunal with expertise on the issue to hear all civil, criminal, and administrative cases on IP. This promotes consistency in enforcement decisions and may encourage adoption of more consistent procedures for IP cases across China. The U.S. should encourage the Supreme People’s Court to continue to promote the implementation of 3-in-1 specialized IP courts in additional jurisdictions.
- Accountability and Transparency: Recently, China has made progress toward a more open and transparent enforcement system by announcing that administrative enforcement agencies should proactively disclose information regarding cases involving IP infringement and also begin to publish IP court decisions. The U.S. should encourage continued progress in this area through the expansion and implementation of recent initiatives to publicly release and publish IPR-related decisions, including administrative, civil, and judicial decisions and encourage publication through a unified, searchable channel that is updated on a regular basis.

2. Trade Secrets

Forced Disclosure in Licensing/Approvals

- Improve the use of “expert panels” in the permitting process by 1) clearly defining and limiting the specific scope of authority and technical area under panel review; 2) allowing companies to reject experts with a competitive conflict of interest from sitting on the panel; and 3) requiring regular training of panel members on their responsibilities, including expectations regarding the scope of “necessary” information and for protecting confidential business information and trade secrets.
- Limit what constitutes “necessary” information to be disclosed in the various permitting processes, focusing on what is essential for evaluation of the permit and/or administrative license.
- Given that many approvals have been delegated to the local level, designate an office/point-of-contact at the local level (either in the municipal government’s general office or at the working office of the local IP leading group if the municipality has one) from whom the company can seek clarification (or appeal) on questions related to what is “necessary” to be disclosed for a permit and/or license.
- Use of Specialized IP Courts: China has committed to “enforcement, transparency, and specialized IP courts.” The U.S. should encourage the Supreme People’s Court to include complex trade secret cases within the type of cases eligible for cross-territorial jurisdiction and advocate for a broad definition of “technical trade secrets” that are within the jurisdiction of the specialized IP courts.
- Discovery: Develop more robust discovery procedures related to infringement and damages, with appropriate judicial oversight and protections of confidential information. The U.S. should also support training on trade secret cases for judges and court staff.
- System to Deter Theft/Infringement: Create a blacklist system, in consultation with the U.S. government, to combat trade secret and other IP infringement.
- Amend the Criminal Code: Unequivocally ban the theft of trade secrets.

3. Copyright

- Online Infringement: Run a new campaign and impose maximum administrative penalties on Internet infringers; increase resources to agencies to revoke business

licenses and halt online services by enterprises whose business is primarily focused on providing access to infringing materials and shut down websites that engage in such activities; implement a framework for the forwarding of infringing notices by ISPs to subscribers identified as distributing infringing content using peer-to-peer systems, including measures to deter repeated acts of infringement; and encourage the use of cutting-edge technologies to identify online infringement.

- Media Box/Set Top Box (STB)/Over-The-Top (OTT) Box Piracy: Request China's Leading Group to take a firm stand against this type of infringing activity and take steps to eradicate the problem, including by preventing exports.
- Evidentiary Standards: Reduce unreasonably high evidentiary standards and allow and admit other forms of evidence (such as affidavits, brochures of infringers, and live testimonies) besides documentary evidence to prove infringement and ownership of intellectual property in judicial proceedings, including those dealing with copyright and with trade secrets.
- Online Video Regulations: Modify restrictions, registration, and review requirements relating to foreign content for online audiovisual services. Specifically, advance registration and full-season review requirements, and allow rolling approval for content.
- Increase Resources: Urge the Chinese government to commit to expand resources at relevant copyright offices to a level that is commensurate with the scale of the piracy problem.
- Hold Government Accountable: Follow through with respect to China's commitment to implement mechanisms, including transparent performance indicators, to hold local government officials responsible for effectively enforcing IP violations, including the Internet and mobile piracy and the unlicensed use of software by enterprises.
- Live Sports Event Broadcast and Non-Interactive Streaming: Provide clarification that live sport event broadcasts and non-interactive streaming are forms of creativity protected by the Copyright Law and can be protected without revision to the Copyright Law under Article 3(9) where copyright protection is provided to "other works as provided for in laws and administrative regulations."
- We propose that the appropriate authority issue a regulation making clear that live television broadcasts are copyrightable works in China. This would provide the needed legal protection to prevent pirated Internet retransmissions of valuable live broadcasts.

- **Combating Unauthorized Camcording:** Urge the Chinese government to make it unlawful to use, or attempt to use an audiovisual recording device to make or transmit a copy of a cinematographic work or other audiovisual work, or any part thereof, from a performance of such work in an exhibition facility; and implement watermarking in theatrical prints and ensure that the Chinese government and those involved in the value chain for theatrical distribution step up efforts to deter illegal camcording, which is responsible for over 90% of all piracy during the theatrical window.
- **Criminalization of Key Copyright Offenses:** The Chinese government should commit to lower the threshold for criminal enforcement actions to be taken against infringers, including Internet infringers, and including infringements on a commercial scale undertaken for purposes other than financial gain. China should also criminalize:
 - *unauthorized use of software* by enterprises. China recognizes that the “for profit” requirement for criminal prosecution fails to recognize the significant value of copyrights, adds to the vulnerability of copyright works in the digital era - constraining enforcement efforts in China to deal with many types of blatant piracy such as hard disk loading of software and uploading to file-sharing sites;
 - *hard disk loading* of software or other copyright materials, including third party confidential information;
 - *internet piracy* including the communication to the public or the making available of any work/related right; and
 - *circumvention of technological protection measures*, trafficking in circumvention technologies and providing circumvention services.
- **Concurrent “Civil Claim” to a Criminal Prosecution:** Urge the Chinese government to commit to allow rights holders as victims to file collateral civil claims for compensation during the trial of criminal IPR cases.

4. **Trademark and Counterfeiting**

- **Case Referrals:** Advocate for a substantial increase in the number of referrals of cases – large and small – to authorities in Guangzhou, one of the primary locations where online traders in fakes are located.
- Fully implement SAIC Order 49 to promote the registration of complete and accurate details of the identities of online traders and the linking of counterfeiting data to corporate registration records, particularly at the provincial level. Most importantly, Order 49 should be implemented to fulfill its promise as a tool to

facilitate the deletion of counterfeit material online upon a notice from the brand owner.

- State-Promoted Counterfeits: Counterfeits and infringing goods on major online platforms claim association with provincial governments. If this is true, the provincial governments have engaged in the official promotion of businesses on such platforms which are selling counterfeit and/or infringing products. We ask the U.S. government to address this practice with the provincial governments and other government officials. Reference to provincial government is providing credibility in the eyes of consumers to illegal products and damaging the brand integrity of U.S. businesses.
- Global Spread of Counterfeit Products through online platforms based in China: Online platforms based in China are among the largest source of online counterfeit products across a number of products and are fast-becoming the internet platforms of choice in many countries around the world. There is no way that rights holders have the resources individually to combat this global supply of counterfeits and no government has adequate resources to seize all small package infringing goods at the border. The U.S. should work with China to ensure that online platforms that have been the source of distribution of massive amounts of counterfeits establish takedown processes consistent with global best practices—including amount of resources required from right holders, information sharing with rights holders test buy programs, and follow-up with authorities (e.g., PSB, AICs and Customs) to find the source offender.
- Enforcement: We underscore the need for more innovative measures to allocate responsibilities for individual counterfeiting cases and to promote cooperation between administrative authorities and the public security bureaus (PSBs) in the course of investigations.
- Pharmaceutical Counterfeiting: As China reviews changes to the intellectual property provisions in the Criminal Code and other enforcement reforms, underscore the need for clarification on how administrative authorities and the PSBs will allocate responsibility for investigations in the absence of formal numerical thresholds.
- Assess outcomes and develop best practices based on China's recent crackdown on illegal online drug sellers. Implement best practices as part of the National Drug Safety Strategy
- Like finished drugs, APIs must be strictly regulated in order to protect against adulteration or counterfeiting that may cause injury to or loss of human life. Although APIs may be considered drugs under China's Drug Administration Law

(DAL) and registered in compliance with that law, some API manufacturers in China do not register their APIs with the Chinese regulatory authority. These manufacturers are not required to produce APIs and bulk chemicals in accordance with relevant good manufacturing practices, creating significant quality and safety risks. In addition, it is difficult for foreign manufacturers to verify good manufacturing practice certifications where they do exist, and to track the APIs' movement throughout the supply chain.

- Ensure that China follows through on its commitment, made at the 2014 and 2015 S&ED, to develop and seriously consider amendments to the DAL requiring regulatory control of the manufacturers of bulk chemicals that can be used as active pharmaceutical ingredients (APIs), including “export only” producers and distributors.
- Continue to examine its authority to exclude from importation bulk chemical firms not registered with CNDA. China can also demonstrate its commitment to addressing these issues by participating in and making progress on the technical exchanges, trainings, and regulatory cooperation efforts.

5. Patent Law & TRIPS-Compliant Compulsory Licensing

Utility Model Patents (UMPs)

- Secure a commitment from China to strengthen examination of utility model patents (UMPs) and to ensure that remedies for UMPs are not as substantial as for invention patents. Under the current Patent Law, the same damages are allowed for both invention and UMPs. Because a UMP, by definition, should represent a lesser technical achievement than the invention patent, the penalty for infringing the utility model patent should also, by definition, be lower. Furthermore, many UMP's are granted for subject matter that is outside the narrow scope (i.e., non-functional structural subject matter) of UMP subject matter. The China National Intellectual Property Administration (CNIPA—formerly SIPO) should provide more training for examiners to ensure that more attention is paid to the subject matter for which UMP protection is sought. Enhanced guidelines and public notice on subject matter eligibility should be also considered.
- We are concerned that the 2014 “Certain Provisions of the SPC on Issues Concerning Application of Law in Trying Cases Involving Patent Disputes” no longer requires a utility model or design patent owner to present the patent search report or the patent evaluation at the time of filing the lawsuit. Since a UMP has not been fully examined before registration is allowed, the court should place the burden

of proving validity of the UMP and incurring associated costs on the UMP holder, or alternatively stay the case and mandate a substantive examination at the cost of the UMP holder, before the lawsuit may proceed and before the alleged infringer incurs any costs. Secure a commitment from China to develop a mechanism to deter frivolous lawsuits, especially from owners of utility model or design patents (e.g. require utility model or design patent owners to deposit a bond that is sufficient to compensate the accused infringer that wins in defense of an improperly brought lawsuit).

- Secure a commitment from China to reduce or eliminate government subsidies for UMPs and design patent filings and mandate substantive examination of these patents prior to initiating litigation. Further, UMPs and Invention Patents shall be subject to the same standards for patentability.

Services Invention Remuneration and Awards:

- Draft regulation released on April 1, 2015 by then-SIPO was greatly improved from the 2014 draft, however, we still have significant concerns. It contains provisions that link compensation for inventions to ambiguous and difficult to define market valuations, thereby introducing potential unlimited risk and cost for research and development undertaken in China.
 - Secure China’s commitment to conduct more extensive research before passage of any regulation in this field. Absent that commitment, secure an agreement from China to amend its Service Invention Regulations to clarify that a contract between the employer and the inventor overrides all the provisions laid out in the Service Invention Regulations.
 - Building from the 2014 U.S.-China Innovation Dialogue “to respect the rules and policies” developed between employers and inventors concerning award and remuneration “in line with their domestic laws,” seek further clarity about how existing contracts will be evaluated *vis-à-vis* the Service Invention Regulations and how companies will be able to avoid going against domestic laws while also having their existing contracts respected.

Patent Law

- Proposed Amendment to China’s Patent Law: The Chamber is still reviewing our draft revised Patent Law issued in December 2018. The below sections are our suggestions based on the 4th draft revisions. Ensure changes to the patent laws designed to enhance patent enforcement do not create an environment of over-enforcement, significant sham litigation, and unfair leverage over alleged infringers, particularly through the offensive or defensive assertion of low-quality UMPs.

- Secure a commitment from China to permit no further expansion to the “ex officio” powers beyond those existing in the 3rd Amendment to China’s Patent Law.
- Press the Chinese government to remove the CNIPA proposed “ex officio” patent enforcement powers against ill-defined “market-disruptive” activities.
- Secure a commitment from China to eliminate new proposed Articles 14 and 82 of the draft Patent Law amendment. The provisions of Article 14 are better left to consideration under the existing AML, not the Patent Law. Disclosure requirements for standard essential patents and penalties for failure to comply with disclosure requirements is better left to the IPR Policies of Standard Setting Organizations, as determined by their members, and should not be part of the Patent Law.
- Urge CNIPA to coordinate with NMPA on making appropriate revisions to the Patent Law as part of the 4th Amendment to allow a patent-holder to file an infringement suit under the NMPA’s proposed patent linkage system (discussed below).
- Compulsory Licensing: Secure a commitment from China to ensure that both the wording and the implementation of the compulsory licensing provisions in the 3rd Amendment to China’s Patent Law Implementing Regulations, in particular Article 49(2), are consistent with the WTO TRIPS Agreement.
- Secondary Liability Guidelines: Secure a commitment from China and the SPC that indirect patent infringement cases will be accepted and that clarifying guidelines will be provided regarding the application of secondary liability principles to indirect patent infringers.
- Evidence Collection: Provide authority to administrative judges to obtain sales figures during the evidence gathering phase so that more realistic damage awards can be awarded. Current statutory awards significantly undervalue patents and tend to create an incentive to infringe until caught.
- Patent Linkage: We support NMPA’s efforts in pushing forward with a drug-patent linkage system for China. A patent enforcement system is essential in creating a regulatory system that promotes innovation—a key theme in China’s 13th Five-Year Plan.

Ensure that China improves and enforces its mechanism to ensure that patent

disputes may be resolved prior to market entry by follow-on pharmaceutical products. If a follow-on company actually begins to market a drug that infringes the innovator's pharmaceutical patents, the damage to the innovator may be irreparable even if it later wins its patent litigation.

Putting in place a patent enforcement system that includes an effective early dispute resolution mechanism (i.e. patent linkage) will significantly advance Chinese biopharmaceutical innovation by incentivizing the development of new life-saving medicines in China, as well as encouraging the early introduction of generic drugs, thereby contributing to building a thriving generic industry.

China's proposals set forth in Circulars 52-55 specifically provide the basic framework for establishing patent linkage, regulatory data protection, and the establishment of a compendium of medicines in China similar to our Orange Book in the United States.

While we view the patent linkage section of Circular 55 as overall positive, we recommend NMPA review the timeline for issuing a notice to challenge, filing a case, and staying an approval. The timeline proposed is not aligned with international best practice and may need to be adjusted given China's litigation procedures and timeframes. For example, in the United States, after receiving a receipt of the Notice of Patent Challenge, a listed patent holder has 45 days to bring a suit for patent infringement. Circular 55 gives only 20 days, yet the documentation needed to file suit in China may take longer to prepare.

- Following the model of other countries, China, through Drug Administration Law (DAL) reforms, should enable patent holders to file patent infringement suits before marketing authorization is granted for follow-on products.
 - Revise the DAL to institute mechanisms that ensure the originator manufacturer is notified of relevant information within a set period of time when a follow-on manufacturer's application is filed.
 - Further, provide sufficient time for patent disputes to be resolved before marketing occurs through, for example, automatic postponement of drug registration approval, either pending resolution of the patent dispute or for a fixed period of time.

6. Data Supplementation for Patents and Regulatory Data Protection

- Data Supplementation for Patents: China agreed to consider post-filing data and explicitly agreed that any of its newer versions of the patent examination guidelines will not have retroactive effects. We support the proposed amendments to the *Guideline for Patent Examination* SIPO released in November of 2016 which

conditionally accept supplemental data. According to the amendment, experimental data submitted after the application date shall be taken into consideration by the examiner.

However, in the amendments it seems that the applicant can only supplement data to further strengthen the technical effects which already have some data in the original document. It is still unclear whether the applicant can supplement data to support the assertive technical effect, for example supplementing data to prove the technical effect of some chemicals which was mentioned but not produced and tested in the original application document. We encourage the U.S. government to monitor the implementation of this new provision concerning data supplementation.

- **Regulatory Data Protection (RDP):** We applaud NMPA for moving forward with the implementation of regulatory data protection (“RDP”) in accordance with China’s Opinions on Strengthening the Reform of the Drug and Medical Device Review and Approval Process to Encourage Drug and Medical Device Innovation (“Innovation Opinions”) released in 2017. In particular, the proposed terms of six and 12 years for chemically synthesized drugs and biologics, respectively, would be truly world-leading, consistent with China’s broader aspirations to develop its biopharmaceutical industry and patient access to new medicines. The provision of six years of protection for pediatric applications and orphan drugs, which are seemingly unrestricted by location or time of development, are also promising measures.

However, the proposed location- and time-based conditions and limitations placed on the terms for innovative drugs and biologics are not consistent with China’s international commitments, are not practical, and could well undermine the very goals that are driving these proposed reforms. In this respect, the Draft Measures would make it difficult – if not impossible – to obtain the benefits of RDP by forcing innovators into arbitrary choices concerning the location of development and timing of submissions. In some cases, the costs of these choices for the overall development program could exceed the benefits of RDP. Moreover, there remains significant uncertainty regarding the scope of the data protected and the criteria for protected categories, and we are very troubled by the broad post-approval data disclosure requirements.

The final RDP implementing measures should apply to all future and pending marketing approval applications for innovative drugs and biologics. In addition, we also urge NMPA to create a transitional mechanism in the Draft Measures to allow companies with approved applications to apply for RDP after the effective date of the Draft Measures if their application and data would still qualify. This transitional mechanism would not affect any generic or follow-on applications that have already been approved. Those medicines would remain on the market. However, the grant

of RDP for these transitional medicines would prospectively block any new generics seeking to rely on that data from being approved.

INVESTMENT

1. Negative List and Investment Approvals

Negative List

- Pursuant to the announcement of the adoption of the negative list approach across China, secure a commitment from China to provide meaningful opening for foreign enterprises by significantly reducing and/or eliminating foreign ownership restrictions, including in
 - (i) agriculture and agricultural biotechnology,
 - (ii) financial services,
 - (iii) basic and value-added telecommunications,
 - (iv) express delivery services,
 - (v) cloud computing and data centers,
 - (vi) refining of petrochemicals,
 - (vii) energy-intensive industries, and
 - (viii) audiovisual and other media industries, to provide commercially

- Pursuant to China's efforts to transform its investment regime and unify the existing primary laws governing foreign investment, secure a commitment, which includes verification mechanisms, that proposed amendments to the draft Foreign Investment Law actually result in:
 - a level-playing field and is not used to promote domestic industrial policy, further open the market, and improve the predictability, transparency and fairness of the foreign investment regime;
 - equal treatment of foreign invested enterprises and all other enterprises in the areas of: market access, including government procurement, innovation incentives, law enforcement standards, especially enforcement of competition laws, and product certification, examination and approval, and license granting;
 - restricted and prohibited categories be abandoned and unified into a simple and efficient negative list. The arrangement of two categories contradicts the negative list model; and
 - all other issues being governed by the *Corporate Law* (such as organizational form, registration, accounting, taxation) in a manner that provides national treatment to foreign companies in China.

Investment Approvals

- Secure a commitment from China to modify investment approval processes to require that projects and investments be approved unless they violate specific laws and regulations.
- Secure a commitment from China, in the event an investment application is denied, to provide a written statement within a prescribed deadline detailing the specific laws and regulations that would have been violated if the investment had been approved. In addition, urge China to put in place a robust redress mechanism so that the applicant can appeal to higher level authorities if there is disagreement with an administrative decision.
- Secure a commitment from China that the reviewing agency will provide a complete list of information required at the very beginning of the investment application process and the reviewing agency is able to ask for additional information only when there is an event which might overhaul the case, consistent with the *Administrative Licensing Law*.
- Secure a commitment from China to publish timelines for stakeholder, expert, and outside government agency consultations and other approval process steps that currently lack deadlines.
- Secure a commitment from China to allow foreign investors to participate with their proposed JV partners in submitting JV investment approval applications and communicating directly with approval authorities.
- Secure a commitment from China to eliminate the requirement to establish separate legal entities across various levels of government (i.e., city, provincial, national) for individual business operations to satisfy local authorities' desire to generate tax revenues. These practices increase unnecessary administrative costs and raise the overall cost for business operations, which deters foreign investment.

2. National Security Reviews

- Any laws or measures governing national security review should provide precise, narrowly tailored definitions for the key considerations governing the national review of foreign investment process

- Secure a commitment from China to remove economic security (or related economic references) as a criterion when defining national security, which is inconsistent with OECD guidelines because such economic tests could become a vehicle for domestic industries seeking to block foreign competition:
 - Banking regulations requiring the use of technology products and services developed and controlled by Chinese companies, in the name of national (economic) security concerns, are evidence that economic considerations in national security reviews could result in discrimination against foreign companies and undermine competition in the market.
- Secure a commitment from China to clarify definitional wordings in connection with the types of transactions that will attract review that go beyond traditional national security interests and other terms in these measures and laws that are vague, at best (e.g., “important agricultural products,” “important energy and resources,” “important infrastructure,” “important transportation services” and “key technologies”).

REGULATORY TRANSPARENCY

- Encourage the PRC government to publish in advance for public comment by local and foreign stakeholders, all trade and economic-related administrative regulations, departmental rules, normative documents, and standards that are proposed for adoption and to provide a public comment period of not less than 30 days from the date of publication.
 - We note and welcome the 61-day comment period—notably longer than the usual 30-day period—for the recently released draft Foreign Investment Law.
- Encourage the PRC government to ensure that MNCs have the right, when resolving administrative disputes, to engage the regulatory office and third party regulatory experts beyond the local enforcement department, as they will have a neutral position in interpreting the regulation.

INDUSTRY-SPECIFIC ISSUES

AGRICULTURAL BIOTECHNOLOGY

- The Chinese government should commit to establishing a scientifically rational regulatory process for products only intended for import and not local cultivation. Under such a process, China should:
 1. commence risk assessments as soon as submissions are made and eliminate the requirement that a risk assessment be conducted only after the trait is deregulated in a major production market;
 2. embrace the principle of data portability and not require that risk assessment data be generated in-country;
 3. require in-country environmental trials only if the safety assessment identifies environmental risks specific to China; and
 4. adhere to its statutory timeline of 270 days for completion of the approval process.

- In the immediate term, the Chinese government should honor the commitments made as part of the 100-Day Action Plan and complete the risk assessments of all pending biotech traits.

- China should establish a low-level presence (LLP) policy on biotechnology-derived products according to the Codex Alimentarius Commission guidelines to eliminate the risk of import disruptions resulting from asynchronous approvals. LLP refers to the potential low level presence in imports of GM material already authorized and being produced in other countries, but not yet approved in the importing country such as China. Asynchronous approvals will only become more prevalent as more new GM plants are developed and enter into commerce around the world.

AGRICULTURE

1. Foreign Direct Investment

- Improve the sustainability and competitiveness of Chinese agriculture by opening the industry up to foreign investment in seed technology, modern agricultural processing, and bulk transportation.

- Secure a commitment from China for favorable treatment for investment in livestock husbandry, which is listed in the encouraged category of the Guiding Catalogue and a priority in the 13th Five-Year Plan.

- Secure a commitment from China to reduce complex and inconsistent administrative licensing requirements for investment approvals for new food production plants.
- Urge China to follow the objectives in its 13th Five-Year Plan, which emphasize the need to shift more resources to agriculture and food production in order to improve people's lives.
- Implement regular government-to-government technical cooperation in order to address barriers to trade including those related to foreign matter, new product registration, and documentation requirements for custom clearance. Reinitiate the U.S.-China Strategic Agriculture Innovation Dialogue (SAID) and provide a mechanism for private sector input into the SAID agenda.

2. **Tariff Rate Quotas (TRQ)**

- Allow the market to determine import demand while removing import/tariff rate quotas and countervailing duties that currently apply to all major agricultural products.
- Secure a commitment from China to abolish nontransparent quotas and registration systems and ensure that tariff-rate quota (TRQ) allocations for corn and other commodities are large enough to be commercially viable. To increase transparency and administrative efficiency, China should consider releasing lists of TRQ holders.
- Secure a commitment from China to increase the corn import quota and open the corn import market according to domestic market demands.

3. **Unscientific Restrictions on Imports**

- Secure a commitment from China to remove unscientific restrictions on importation of U.S. poultry, pork and genetically modified organism (GMO) products.
- Secure a commitment from China to eliminate the “test and hold” policy on U.S. pork for ractopamine.
- Secure a commitment from China to eliminate restrictions on US-made pet food containing ruminant, plant, or poultry materials.
- Change regulatory requirements on the importation of grains and oilseeds to use the international, science-based standard for low level presence (LLP) as it relates to genetically modified crops, in alignment with CODEX Alimentarius.

4. Standards

- Secure a commitment from China to integrate overlapping and conflicting national and industrial standards in agriculture, and to prioritize the setting and amending of thousands of national food safety standards—in particular in the vegetable oil, grains and food additive areas—so that compliant enterprises are able to conform to binding regulations and mandates.
- Implement standardized customer information quality (CIQ) regulations consistently in all ports throughout China.
- Fully utilize international plant protection conventions standards for Phyto-sanitary measures as they apply to grains and oilseeds.
- Secure a commitment from China to reach Mutual Acceptance of Data (MAD) agreements with overseas OECD Good Laboratory Practice (GLP) labs and establish a grace period for any foreign data generated before agreements are reached. According to MARA regulations, companies operating in China are required to generate all data for agrochemical products locally, or in countries with which the Chinese government has signed MAD agreements. To date, no countries have signed MAD agreements with China. These requirements create significant barriers to trade and make it very difficult for MNCs to register new agricultural products in China.

5. Agricultural Equipment

- Secure a commitment from China that any subsidies offered to customers, dealers/distributors, or manufacturers of agricultural equipment are equally available to domestic Chinese brands and to multinational brands.
- Encourage MARA to structure existing subsidy programs so that lessees, not just owners, of agricultural equipment are able to take advantage of those subsidies.
- Secure a commitment that Stage III emissions standards for off-road equipment, and specifically agricultural equipment, are fully enforced. The full implementation of Stage III emissions standards will support the Chinese government's goal of reducing air pollution.
- Encourage the consistent implementation of agricultural equipment subsidies across provinces in order to increase efficiency and accommodate the harvest season when setting the implementation of NR4.

6. Animal Health

- Secure a commitment from China to give foreign companies equal treatment in the registration, importation and distribution of animal vaccines, to include imports.⁶
- Secure a commitment from China to allow foreign developers of animal vaccines to submit an application for registration without requiring that product be registered in another country.
- Secure a commitment from China to lift the ban on registering and marketing vaccines for diseases listed on the World Animal Health Organization's List A (e.g., foot-and-mouth disease, Newcastle disease).⁷
- Secure a commitment from China to apply the VAT equitably to imported animal vaccines. Current VAT on domestic vaccines is 3% vs 17% for imports.⁸

ALUMINUM

- Secure further commitments from China to address issues regarding excess capacity that have been discussed in international fora, including the G20.

AUTOS

1. Investment

- Secure a commitment from China to ease the conditions required for approval of new WFOEs, JVs, branches, and expansion of both manufacturing and distribution capacity in line with official commitments and timelines (e.g., 80% saturation clause, consolidation requirement, local brand requirement, new energy production requirement, etc.)

2. Clean Energy Vehicles

⁶ Although the pre-marketing approval requirements for imported vaccines are nominally similar to those for domestic vaccines, the registration process itself operates in a discriminatory manner. It is therefore inconsistent with China's obligation under the Agreement on Technical Barriers to Trade (TBT Agreement), Article 2.1, to accord imported products "treatment no less favorable than that accorded to like products of national origin." It is also inconsistent with Article 2.2 of the same agreement, which requires China to "ensure that technical regulations are not . . . applied with a view to or with the effect of creating unnecessary obstacles to international trade," and to ensure that technical regulations are not "more trade-restrictive than necessary to fulfill a legitimate objective" (Article 2.2). Chinese restrictions on the distribution of imported vaccines violate the same provisions of the TBT Agreement, as well as Article III.3 of the General Agreement on Tariffs and Trade (GATT), which requires that import products "be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

⁷ The ban on the registration and marketing by foreign companies of vaccines for List A diseases is also clearly discrimination and unduly trade-restrictive, in violation of the same provisions.

⁸ The differential VAT rate is a clear violation of GATT Article III.2, which requires that imported products "not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products."

- Secure a commitment from China to remove explicit and implicit requirements for participation in the new energy vehicle (NEV) industry that mandate technology “mastery” and creation of new, indigenous brands.
- Secure a commitment from China not to expand restrictive requirements to other participants in the NEV industry.
- Ensure that all qualifying vehicles, regardless of brand or place of manufacture, are afforded equal treatment in awarding of energy saving and other incentives.
- Secure a commitment from China to allow foreign-invested entities, including automotive JVs, to compete for R&D funding, and to conduct one or more workshops on how foreign-invested entities can apply for and participate in R&D funding opportunities for China-based research.

3. Automotive Emissions Standards

- Secure a commitment from China to expand capability at national, provincial, and local levels to enforce environmental and emissions standards consistently.
- Secure a commitment from China to confirm, apply, and implement truck emissions standards on time and in a manner consistent with global practices.
- Secure a commitment from China to adopt, apply, and implement auto safety, emissions and fuel regulations in a manner that is consistent with global practices.

4. Automotive Financing

- Consistent with China’s 2012 S&ED commitment to allow foreign and domestic auto financing companies to issue bonds regularly, including issuing securitized bonds, ensure equal access to capital market funding options, such as corporate bonds and asset backed programs, for automotive finance companies through published rules and less restrictive qualifications.

5. Government Procurement

- Secure a commitment from China, consistent with the high-level commitments of national treatment for foreign investors by Chinese leaders in the S&ED and other fora, to limit the procurement criteria to attributes of the vehicle by removing or revising the IP ownership and R&D spending requirements.

- China should agree to revise the Ministry of Information and Industry Technology's (MIIT) eligibility criteria for government procurement of vehicles to ensure that U.S. auto companies invested in China are able to participate in vehicle procurement opportunities on the same footing as their domestic counterparts.

6. Private-Public Dialogue

- China should provide enterprises with more opportunity to participate in discussions and submit opinions at earlier policy drafting stages so that policies and standards can better meet market needs and contribute to overall market development.

BANKING AND NONBANKING FINANCIAL SERVICES

1. Market Access and Licensing

Mutual Fund Custody License

- Secure a commitment during the 90-day negotiations for U.S. financial institutions to be granted a Mutual Fund Custody License under the new model described in the previous financial services section as having been awarded to other foreign financial institutions.
 - The Mutual Fund Custody License is the basis for any domestic custody business such as custody for institution mandates, insurance assets, pension assets, private funds, etc.
 - Allow foreign bank branches to offer full custody services under this new license including both the handling of securities and cash for domestic securities investment funds.
 - Allow foreign banks to participate in local and cross-border custody business operations consistent with global practices.
 - In the last 12 months the China Securities Deposit and Clearing Co. (CSDCC), which is an organization under CSRC's leadership, eliminated the requirement for foreign firms to become a CSDCC clearing participant (which meant foreign firms had to have RMB 40bn (~US \$6bn) registered capital) in order to receive a Mutual Fund Custody License.
 - Several European firms have been granted the license under this new model while US firms have not, resulting in an un-level playing field among foreign competitors.

Market Access, Licensing, and Approvals

- Continue to streamline the approval process of foreign bank subsidiaries in terms of location selection.
- Allow foreign banks to submit multiple network expansion applications simultaneously.
- Allow foreign banks to offer a full line of products and services, such as online banking and credit and debit cards supported by payment brands and issued on networks of their choice.
- Eliminate the requirement for foreign bank branches to hold RMB 2 million in net assets and instead consider the parent company's overseas assets as part of this requirement.
- Urge China to continue the process of rapid liberalization of the current Qualified Foreign Institutional Investor (QFII) restrictions on an agreed transition schedule.
- Accelerate the granting of Qualified Domestic Limited Partnership (QDLP) quotas to foreign banks in China.
- Permit underwriting by locally incorporated banks of foreign banks of Commercial Paper (CP), short-term notes (STNs)/medium-term notes (MTNs) and improve upon the application review criteria.
- In line with announced commitments, further open the Credit Rating Agency market to international Credit Rating Agencies, including new or amended regulations concerning development of the credit rating sector consistent with international best practices.
- In line with announced commitments, eliminate ownership caps for securities JVs with further consideration of securities JVs business scope expansion, JV partner qualification, foreign investor qualification, and offshore infrastructure leverage.

2. ICT Systems and “Secure and Controllable”

- Secure a commitment that China will stay all regulations requiring “secure and controllable” products until these regulations are consistent with WTO agreements/rules (including but not limited to those in the TBT Agreement), are narrowly tailored, take into account international norms, are nondiscriminatory, and do not impose nationality-based conditions or restrictions, on the purchase, sale, or use of ICT products by commercial enterprises unnecessarily—per commitments made at the Presidential bilateral in September 2015.

3. **Transparency**

- Secure commitments from China that provide for equal access to regulatory proposals; require public availability of proposed regulations; provide an adequate public comment period (of no less than 30 days) on new regulations; and mandate the enforcement of regulations in a non-discriminatory manner. Encourage strengthened coordination among different regulators as well as between central and local level regulators to reduce reporting requirements.

4. **Harmonization with International Best Practice**

- Further align bond market practices to global standards including establishing a corporate trustee structure to further protect investors.

CIVIL AVIATION

- Secure a commitment from China at senior, political levels to move toward a more flexible and open airspace and airway structure in support of economic development, reform, and opening up.
- Encourage China to adopt a national Air Traffic Flow Management (ATFM) framework that incorporates a System Wide Information Management (SWIM) system and collaborative decision making (CDM) procedures for air traffic control, airline, and airport exports to enable growth and efficiency through enhanced system management that also alleviates delays.
- Encourage the Chinese government to rebate the VAT assessed on freighter conversion services conducted on both domestic and foreign airliners by maintenance, repair and overhaul (MRO) companies.
- Secure a commitment from China to reduce the high VAT and import duty for regional and general aviation (GA) aircraft.
- Secure a commitment from China to streamline and expedite review procedures for foreign investment in commercial aviation and related ventures.
- Eliminate the 5% tariff on small and medium sized aircraft and aircraft parts from the U.S. \$60 billion list (List 3) announced on September 18 and effective September 24, 2018.

ELECTRONIC PAYMENT SERVICES

1. Approvals

- The People's Bank of China (PBoC) should accept license applications submitted by U.S. EPS suppliers resulting in full and prompt market access. *Applications to Prepare* should be processed and completed as expeditiously as possible.

2. National Security Reviews (NSR)

- If U.S. EPS companies' BCCI license applications are required to undergo a potential National Security Review (NSR) at any stage in the process, the NSR should be transparent, time-bound, and narrowly-tailored to consider only legitimate national security factors. Similar to the U.S. CFIUS process, greenfield investments should not be subject to the NSR and/or the NSR should favorably recommend companies that have been processing cross border-transactions.
- China should provide a detailed list of any and all Chinese government and non-governmental entities involved in the NSR process and a full description of the sequence and timeframe by which the NSR will occur.
- China should clarify the NSR process including a time-bound schedule for final decisions on NSR-reviewed transactions, not to exceed 90 calendar days in total. Clarifications should confirm that greenfield investments are not subject to the NSR and/or that any BCCI application submitted by a U.S. company with at least 3 years of experience processing cross border transactions should receive a favorable NSR recommendation.

3. Card Issuance

- Issue formal guidance (e.g., a normative document) reiterating that Chinese banks may continue to issue dual brand-dual currency bankcards that allow U.S. EPS suppliers to process foreign currency payment card transactions and that international routing of such transactions will continue to follow commercially-agreed terms.

4. Standards

- To meet national information security level protection, foreign EPS providers are required to use products that are certified by the national encryption authority and in line with China's national and industry standards. However, the PBOC 3.0 standard differs from the universally accepted EMV chip standard which is used globally by all major EPS suppliers including China UnionPay to ensure interoperability and consumer convenience for cross-border payments. Compliance with PBOC 3.0 by foreign EPS

suppliers would significantly increase operational costs at no additional benefit to Chinese consumers; as such, the PBOC 3.0 standard should be voluntary rather than required for card issuance.

5. Local Entity Requirement and Data Localization

- Secure a commitment that the final issuance of the regulation will result in foreign EPS providers being granted full market access to domestic RMB processing in accordance with the WTO ruling on the EPS case in 2012.

ENERGY/ENVIRONMENT

1. National Treatment

- Secure a commitment from China to provide equal treatment to foreign or foreign-invested companies and not favor locally owned manufacturers through government/SOE procurement preferences, de jure and de facto localization requirements, and product standards.
- Request that China provide foreign-invested companies equal treatment with regard to Strategic Emerging Industries (SEIs) related policies and incentives, such as in energy saving & environmental protection, new energy, new energy vehicle, and high end equipment manufacturing.
- Secure a commitment from China to remove requirements for applicants to have indigenous intellectual property when applying for relevant SEI incentives at local levels (in Shanghai, Jiangsu, Sichuan). Such requirements discriminate against foreign-invested companies, which do not have locally-owned intellectual property.
- Ensure full implementation of China's JCCT commitments regarding wind turbine market access and local content requirements.

2. Standards

- Urge China to increase engagement with and participation of foreign-invested enterprises in the development of laws, regulations, standards, pilot programs and financial incentive programs relating to clean technology.
- Secure commitment from China to develop new clean energy standards that build on existing international standards so as to reduce duplications and improve effectiveness.

- Secure from China a commitment for full implementation of the JCCT commitment to ensure that the processes for developing standards of smart grid products and technologies are open and transparent, allow foreign stakeholders to participate in the development of standards, technical regulations and conformity assessment procedures on no less favorable terms than it affords domestic stakeholders.
- Secure from a China a commitment to ensure that high-quality, practical, internationally harmonized standards are in place for all sectors of the clean technology industry, and that they are effectively implemented and enforced.
- Encourage government agencies to share best practices related to standards enforcement, including applicable penalties for violations, in order to further ensure a fair, competitive playing field.

3. **Bidding Criteria**

- Secure a commitment from China to amend government and SOE procurement practices to adopt full life cycle assessments in the evaluation of clean technology products/projects. Ensure China commits to adopting international standard bidding processes in which China's local public tender and bidding processes and terms and conditions for clean energy infrastructure projects are based on the quality, rates of return, and long-term viability of projects, rather than primarily on price alone.

4. **Equity and Other Restrictions**

- Secure commitments from China to:
 - remove restrictions that limit foreign investment to 50% or less in high-energy propulsion batteries for new energy vehicles,
 - lift equity restriction on foreign investment in liquid natural gas which would allow foreign companies greater flexibility to structure their operations and bring technology and expertise to the Chinese market more rapidly, and
 - lift restrictions on foreign firms investing in cogeneration plants, which limit operational bandwidth and hinder their ability to compete on a level playing field with Chinese domestic competitors.

5. **Oil and Gas**

- Secure from the Chinese government a commitment to initiate comprehensive oil and gas legislation, to include the designation of a specific regulator for the oil and gas sector, and to accelerate market-oriented pricing reforms of domestic natural gas and petroleum products.

- Encourage China to pursue policy changes and advance legislative reforms necessary in the oil and gas sector to expand upstream acreage, remove restrictions, increase permitting efficiency, and provide fiscal and taxation incentives to attract upstream international oil company investors.
 - Encourage China to develop a clear regulatory framework for shale gas production sharing contracts that addresses the unique aspects of shale gas exploration, development, and production, as well as investor concerns such as the mandatory JV requirement.
- 6. Heavy Duty Commercial Vehicles Emission Enforcement and Fuel Economy**
- Encourage China to meet its commitment for nationwide availability of low-sulfur diesel fuel. It is also important that Diesel Emission Fluid (DEF or Urea) is available. Application of urea into the exhaust stream is necessary to achieve NSIV emission requirements. If the requirement for using Urea is not enforced, vehicle operators will operate without it, resulting in higher emissions. It will also drive down demand for urea resulting in urea providers no longer investing in developing nationwide urea infrastructure. Enforcing the use of Urea and requiring diesel stations to stock Urea will ensure that it is available for all.
 - Make air pollution control policies and implementations more transparent and consistent to ensure the normal operations of the machinery manufacturing industry.
 - Secure a commitment from China to engage bilaterally with the United States to share best practices on achieving measurable fuel economy gains from commercial vehicles.
- 7. Transportation of Dangerous Goods**
- Secure the following commitment related to harmonization of dangerous goods regulations for ground transportation to ensure an uninterrupted supply chain for consumer products with equitable market access as experienced in other global venues.
 - China should reaffirm its commitment to harmonize its dangerous goods regulations with the UN Model Regulations by adopting full implementation of GB 28644.2-2012 & GB28644.1-2012 nationwide and in multiple transport modes including parcel post services. These regulations follow the UN Model regulations and allow for the transportation of low risk products known as Limited Quantity/Excepted Quantity for transportation by ground as it already does for air and vessel shipments.

EXPRESS DELIVERY SERVICES (EDS)

1. Air Cargo Services

Co-terminalization

- Express carriers seek the resumption of negotiations between the two countries for co-terminalization rights and slots to be made available. Express carriers are currently not able to exercise co-terminalization rights provided to US air cargo carriers under the US-China Aviation Agreement. Co-terminalization allows a US-originating flight to serve two or more points in China using the same aircraft, facilitating connection to another Chinese destination from existing gateways to better utilize aircraft and reduce network costs. It does not mean carrying traffic originating and destined within China.

Customs Transit through Hubs

- China should establish whole-of-government approaches for coordinating policies and supporting coherent laws to facilitate the movement of transit shipments through air cargo hubs, including Customs, Security and other border agencies. Efficient functioning of air hubs requires policies that facilitate the movement of aircraft and shipments between origin and destination via China. China however lacks developed customs transit policies and all transit regulated goods, including strategic goods and biological substances are treated as imports, requiring import permits and approvals from related regulators even if they are being transferred between aircraft in airport secured zones. One example is the transit of clinical trials and biological substances requiring the approval of health authorities. Further, goods that are bound for third destinations where they can be legally imported but prohibited for import into China are confiscated and express carriers are held liable.
- Institute preferential customs policies delivered in cross-border e-commerce (CBEC) zones in all ports uniformly across the country.
- Reduce non-tariff barriers to entry by China Customs, such as unnecessary licensing procedures that make it very difficult to get certain imported products to market in China.
- Secure a commitment to streamline and facilitate measures for shipments under the Normal Channel, based on the World Customs Organization's Immediate Release guidelines.
- Secure a commitment that clearance of goods should be based on value, rather than based on the various channels, which discriminate between e-commerce and non-e-

commerce goods, which would simplify documentation and applicable taxes, enhance clearance times, and facilitate returns.

- Call on China to eliminate user fees charged by all agencies at each port.
- Secure a commitment from China to establish a U.S.-China government-industry customs dialogue to address customs bottlenecks in the supply chain, which, among other things, hamper the growth of U.S. exports to China. Customs and industry share a common goal of safe, efficient clearance, and an open dialogue could help both parties move toward that goal. Many issues could be addressed through the dialogue, but top priorities for U.S. industry would be the issues noted below.
- Secure a commitment to work with the General Administration of Customs (GAC) to build on recent progress that has been made to simplify bonded transfer procedures so that goods to and from locations that are not international gateways can flow smoothly through China's gateway airports into international trade networks. This will help China achieve its goals of developing second-tier cities and expanding foreign trade and help EDS providers with hubs in China operate those hubs more efficiently. Current customs procedures create perverse incentives to operate hubs outside of China, which damage the interests of firms and local governments who have invested in hubs in China.
- Secure a commitment from China to establish low value and *de minimis* customs clearance levels, consistent with U.S. levels and with China's position as one of the world's largest participants in global trade.
- Secure a commitment to remove the GAC's four-hour prior to loading advanced commercial information requirement for export goods and standardize China's export requirements with international norms and industry practices.
- Encourage China to establish a 24-7 customs handling system similar to that in other advanced trading economies. Customs and other border crossing agencies, such as SAMR, should commit to building and maintaining IT systems that are available for trade 24-7 with a high degree of reliability. When systems go down, agencies should be encouraged to communicate clearly with traders the reason for the outage, to provide back-up solutions, and to make allowances for delays due to system failures.
- Secure a commitment from China that any change in tariff codes will follow the World Customs Organization rules and standards and to release draft annual Harmonized System changes at least three months before the legal effective date to allow sufficient time for companies to implement.

- Secure a commitment from China to eliminate ancillary charges levied by local customs or port/airport operators or concessionaires for services such as connection to the customs network, customs forms and access to customs facilities. Whenever possible, such as when filing declarations through the on-line customs system, firms should be able to choose to provide such services for themselves or from a number of qualified vendors. Where sole-source charges are necessary, they should be levied strictly on a cost-recovery basis.
- Secure a commitment that China will clearly define the parameters for export and import controls criteria so that the application of compliance requirements is consistent.
- Increase transparency and consistency of customs enforcement across all ports.

2. **Market Access**

- China should open up the domestic letter and document sector to foreign express delivery providers, explicitly stating in regulation that foreign carriers with valid domestic express licenses are eligible to deliver documents between points in China.
- China’s WTO GATS schedule indicates that it does not have any limitations specified under courier services (CPC 75121), except for those specifically reserved to Chinese postal authorities by law at the time of accession. The Courier Services classified under CPC 75121 include “services consisting of pick-up, transport and delivery services, whether for domestic or foreign destinations, of letters, parcels and packages, rendered by courier and using one or more modes of transport, other than by the national postal administration.”
- Secure a commitment from China to remove this sector from its investment restrictions negative list.

3. **Logistics**

- Secure a commitment that that any licensing or permitting regulated at the national level remains at the national level such that market players do not face more onerous province-by-province or even city-by-city licensing or permitting requirements. For example, Articles 52 and 53 of the SPB’s Postal Law of the People’s Republic of China (PRC) are inconsistent with the “Business Scope of Express Business Operation Permits.” We recommend that the SPB clarify the difference and support the broadest possible business scope, aligned with the national network business model of EDS providers and the interests of consumers.

- Secure a commitment from SPB that all proposed regulations must be published for comment, that interested parties must be provided with at least forty-five (45) days within which to provide comments, and that SPB must respond in detail regarding whether the recommendations are being adopted and, if not, the reasons they are being rejected.
- Secure a commitment that China's 2011 Express Service National Standards and subsequent express standards that are recommended industrial standards according to China's Standards Law will not be cited in any postal regulation with compulsory enforcement.
- Secure a commitment to enable EDS providers to contract with Chinese domestic delivery permit holders to provide local pick-up and delivery, trucking and other services related to express delivery.
- Secure a commitment from China to remove restrictions in China's Postal Law that prevent foreign EDS providers from providing their Chinese customers with domestic document delivery services.
- Secure a commitment from China to simplify SPB's current permitting processes and re-evaluate its security measures, in line with China's central government's call for comprehensive governance reforms. Ensure such measures conform with a balanced, risk-based, strategic approach relative to the need for fast and efficient trade.
- Secure a commitment that security measures and requests for information and access to company IT and other systems be, not only balanced, risk-based and strategic, but also implemented uniformly. Provincial and local agencies are increasingly requiring companies to provide information and access that is inconsistent, overly burdensome and that raises business confidentiality concerns.
- Secure a further commitment that any requests for new data reporting will be posted for public comment in advance of implementation and that firms will be given sufficient time (at least six months) to prepare for implementation. SPB currently collects substantial data from firms on shipments, facilities, vehicles and staff. Secure a commitment that other agencies; including local agencies, seeking the same data will obtain that data through the existing SPB reporting systems.
- Ensure coordinated and consistent security measures between the SPB and Ministry of Public Security at all levels, national, provincial and local.

4. Aviation

- Urge China to live up to its commitments under the U.S.-China air transport agreement and remove CAAC restrictions on change-of-gauge operations and co-terminalized flights between Beijing, Guangzhou, Shenzhen and Shanghai.
- Urge China to provide transparency and improved certainty for slot coordinators and carriers by committing to reform its slot allocation procedures to meet the International Air Transport Association (IATA) Worldwide Scheduling Guidelines, and to ensure fair and equal rights for airlines to compete in the international air services market.
- Encourage China to increase airport and airspace capacity by: opening significantly more of China's airspace to civilian air operations; improving coordination between civilian and military airspace authorities; appropriately prioritizing resources to expand airports and other infrastructure in China's highest demand markets rather than directing resources first to lower demand markets; and improving air traffic control capacity, capabilities and flexibility to meet ever increasing demand in China's airspace.

INSURANCE, PENSIONS, AND ASSET MANAGEMENT

1. Equity Restrictions on Foreign Investment

- Secure a commitment from China to relax the 50% equity restrictions on foreign investment and allow foreign insurers to own up to 100% of a life insurer in China, and allow foreign insurers their choice of juridical form: branch, wholly-owned subsidiary or JV. The 50% equity cap, imposed by China to protect its nascent insurance industry from foreign competition since China's WTO accession, is unnecessary in present-day China. It hinders insurance penetration and deprives consumers of best in class financial products and services. Lifting the cap will help China achieve its objectives to deepen financial reforms and promote financial inclusion.

2. Online Insurance Distribution

- We recommend further opening the Internet channel by allowing more types of products to be sold online nationwide, to include critical illness products, based on the draft regulation on Internet insurance issued by China Insurance Regulatory Commission (CIRC) in December 2014. These regulations allowed certain products to be sold online without geographic restrictions under certain conditions. Lifting the branching restriction will tap the enormous potential of online insurance sales, provide more options for consumers and contribute to China's ambitious goals of reforming the financial sector and enhancing financial inclusion.

3. Foreign Currency Denominated Products

- We recommend CBIRC and Central SAFE approve the sale of long-term foreign currency denominated life insurance products (FCDP). FCDP are already available in other markets in Asia (e.g., Japan). Access to FCDP would provide Chinese consumers with improved diversification to manage risk, particularly in the face of volatile equity markets, and offer Chinese consumers with foreign currency savings in China an alternative to low-interest bank deposits. FCDP would help to support China's drive towards more innovation in the financial services sector.

4. Secure and Controllable

- Secure a commitment that China will stay all regulations—including the China Banking and Insurance Regulatory Commission (CBIRC) *Insurance System Informatization Regulatory Requirements* (draft)—requiring “secure and controllable” products until these regulations are consistent with WTO agreements/rules (including but not limited to those in the TBT Agreement), are narrowly tailored, take into account international norms, are nondiscriminatory, and do not impose nationality-based conditions or restrictions, on the purchase, sale, or use of ICT products by commercial enterprises unnecessarily—per commitments made at the presidential bilateral in September 2015.

5. Branches, Subsidiaries

- Secure national treatment for foreign insurers in branch licensing and request CIRC to issue an administrative notice to clarify and implement in practice that all insurers, both foreign-invested and domestically-owned, are authorized to submit multiple concurrent applications for branch approval, which, if approved, will be granted concurrently within a reasonable timeframe. Although current branch application procedures have formally leveled the playing field between foreign-invested insurers with respect to branch as well as sub-branch approvals, foreign insurers still suffer stricter and lengthier approval procedures in comparison to domestic entities and the *de facto* refusal to concurrent branch applications.
- The abilities to expand geographically and diversify risk portfolios are basic, fundamentally important insurance principles which allow insurance companies to avoid concentration of risk and unbalanced, over-exposed books of business.
- In support of China's commitment to address the moratorium on new licenses for regional sales offices, amend the regulations for the three structures that perform functions comparable to regional sales offices, i.e., sub-branches, central sub-branches and departments, to allow foreign-invested insurers to apply directly to the local CBIRC

office under the same procedures as domestically-owned insurers and not through the International Department of central CBIRC.

- Request CBIRC to adopt global best practices in terms of branch requirements, regulatory maintenance and compliance costs in order to reduce the burdensome costs for foreign insurers to operate in China. The cost of operating in China is very high compared to most other markets. Administrative burdens and compliance are particularly onerous, including CBIRC's I/T requirements and rules regarding claims, finance and compliance personnel for new branches.

6. **Liability Insurance**

- Request CBIRC to help advance an understanding of the Tort Liability Law and its relevance to the insurance sector, in line with the State Council's explicit goal to build a liability culture and improve food and product safety. To shift financial burdens away from the state, it is essential that Chinese companies purchase liability insurance to protect their balance sheets. In particular, product liability insurance should be required for companies bidding on government contracts.

7. **Enterprise Annuities (EA)**

- Establish a transparent and public procedure for formulating CBIRC recommendations to Ministry of Human Resources and Social Security (MOHRSS) as part of the ongoing licensing process for EA providers where the licensing authority is held by MOHRSS in consultation with CIRC, the China Banking Regulatory Commission (CBRC) and the China Securities Regulatory Commission (CSRC).
- End the informal moratorium on EA licensing (last batch of licenses were awarded in November 2007) and publish the necessary process for companies to apply for EA authorization on an ongoing basis.
- Allow 100% foreign equity ownership in EA-related companies.

8. **Insurance Brokerage**

- Allow international and regional brokers to service Chinese small and medium enterprises (SMEs). If approved, this development would lead to a better understanding of loss control and risk-management techniques among companies currently not being served by foreign brokers.
- Liberalize the rules for setting up brokerages and allow captive agents to convert to brokers which would broaden market access for insurers.

9. Investment of Assets

- Recognize the global experience, capital, and organizational resources for all seasoning or staffing requirements for Insurance Asset Management Companies (IAMC) and/or other investment requirements, focusing on the desired risk management standards, rather than the number of bodies necessary to guide each type of investment class.
- Allow foreign-invested insurers the option to work with mutual fund companies (several of which have foreign partners) to leverage their extensive experience and global best practice on fund management.

10. Remuneration

- Allow foreign-invested insurers to use the "Rules and Guidelines for the Management of Remuneration of Insurance Companies" issued by CBIRC in July 2012 for consideration and reference only. The rigid remuneration standards set by the Guidelines are likely to lead to obstacles in the competition for talent and also unfairly handicaps foreign-invested insurers whose management remuneration structure is inherently different because foreign insurers operate globally and generally from their home offices.

11. Reinsurance

- Secure a commitment that CBIRC's enforcement of its China Risk-Oriented Solvency System (C-ROSS) is principles-based and aligns with the Insurance Core Principles of the International Association of Insurance Supervisors and is not "one size fits all" enforcement.
- Secure a commitment for CBIRC to re-consider C-ROSS' Chapter 8 on Credit Risk Minimum Capital to prevent unfortunate concentrations of risk.

MEDIA/ENTERTAINMENT/ACADEMIC JOURNALS

1. Filmed Entertainment

- Complete the U.S.-China Film Agreement "MOU" review, consistent with shared commitments that an updated MOU will enhance opportunities and access for foreign revenue sharing films, including by increasing the revenue share in line with international norms, increasing the number of revenue sharing movies allowed into China, promoting and approving additional companies to engage in distribution, eliminating black-out periods for foreign films, allowing film producers to determine release dates, and formally allow film producers to engage in marketing.

- Allow foreign enterprises to hold a majority share in entities engaged in the production, distribution, and publication of audiovisual products and games in all formats, including new media.
- Enforce a ban on the sale of audiovisual media by street vendors.
- Increase steps to curtail online piracy, including unauthorized streaming of U.S. television programming and other audio-visual content from sites in China.
- Ensure that the censorship process for audiovisual works is transparent and is conducted in a timely fashion, and work to establish a transparent and consistent film ratings system. Specifically, eliminate the two-window and entire series requirements for approval of OTT content and replace it with a rolling approval process, subject to the same levels of transparency and timeliness as domestic content.
- Broaden the carriage of foreign TV content beyond hotels and foreign compounds, and eliminate foreign content restrictions on Chinese TV channels, including the limit on foreign-produced animation during primetime.

2. **Sound Recordings**

- Secure a commitment from China to allow the U.S. sound recording industry to invest and operate in China in all facets of the music business, in the same manner as Chinese record companies. This would include the right/ability to sign artists, record, produce, market, and distribute recorded music in physical form as well as over Internet and mobile platforms.
- Secure a commitment from China to allow U.S. record companies to acquire or establish foreign-invested enterprises (which can be wholly foreign-owned, majority foreign-owned or controlled, or minority foreign-owned or controlled, at the election of the U.S. company) for the purpose of engaging in the above full range of activities.
- Secure a commitment from China, consistent with the recent WTO decision on trading rights, to ensure that any entity may freely import sound recordings into China, invest in and operate companies involved in the digital distribution of music, and enjoy the same rights and privileges as their Chinese counterparts.
- Secure a commitment from China to terminate the discriminatory censorship regime that it maintains with respect to foreign music for physical release. Chinese censorship restrictions delay or prevent U.S. copyright owners from providing legitimate products to the market in a timely fashion. For example, PRC government censors are required to review any sound recording containing foreign repertoire before its physical release,

while domestically produced Chinese repertoire is only recorded, not censored (and, of course, pirated product is wholly uncensored and is the dominant form of music accessed by Chinese society).

- Regarding online distribution of foreign-produced sound recordings, it is noted that a trial period for 1 year for the licensed platforms to self-censor the sound recordings was started in late 2013. This self-censorship scheme should be maintained after the trial period. Up to now, the aforesaid pilot project is still on-going and no progress or problems have been reported.
- Secure a commitment from China to abolish the requirement for foreign music producers to have exclusive licensee for the purpose of content self-censorship for online distribution of foreign-produced music. There is no written confirmation from Ministry of Culture (MOC) regarding the abolishment of the requirement for exclusive licensee.
- Push for the early adoption of the Copyright Amendment Bill which includes the introduction of rights for producers to collect royalty for the use of sound recordings in public performance and broadcast programs.
- Secure a commitment from China to extend the term of protection for sound recordings to at least 70 years as soon as possible.
- Encourage the Chinese government to introduce additional regulation, supervision and control over the collecting societies so that right owners can be adequately and properly compensated for the uses of their works.

3. Cable Television

- Secure commitment from China to revise the catalogue for foreign investment to allow foreign enterprises to set up companies to produce and distribute TV programs, own TV channels and provide telecom valued-added services over China's cable TV networks.
- Eliminate the ban on foreign animation during primetime television.

4. Academic Journals

- Fully implement the 2009 *Notice on Strengthening Library Protection of Copyright* commitments by the National Copyright Administration (NCAC), MOC, Ministry of Education (MOE) and National "Anti-pornography" Office to strengthen copyright protection in libraries in all provinces, autonomous regions and municipalities through:

- adoption of model inspection guidelines;
 - regular inspections;
 - development and adoption of individual library copyright protection plans;
 - regular progress reports from provincial authorities about enforcement of the library directive; and
 - a library roundtable on copyright in the educational and research setting.
- Ensure timely conclusion of long-delayed administrative case involving KJMed, an unauthorized provider of online journals. Ensure that the outcome provides effective deterrence against similar services that have emerged while this case has stalled.
 - Investigate and pursue swift enforcement against new unauthorized online journal access providers, including copycat sites to KJMed and document sharing sites.
 - Reconvene interagency meetings with the NCAC, MOE, MOC, and libraries, as a follow up on the 2009 library directive that resulted in a voluntary inspection campaign targeting online journal piracy. Create an enforcement hotline, where libraries/publishers can report infringing sites directly.
 - Address the increased unauthorized dissemination of copyrighted material through personal cloud storage services (e.g. Baidu Cloud, Aliyun, Weiyun).

MEDICAL TECHNOLOGY/HEALTH CARE

1. Market-Based Health Care Reform

- We encourage the Chinese government to shift towards a more timely, transparent and predictable reimbursement system, in which manufacturers may apply for reimbursement at any time, drug clinical assessment is completed within a pre-defined period following the application (e.g., within 90 days), and negotiations between manufacturers and the responsible government agency take place periodically (e.g., semi-annually).
- Drug clinical assessments should be transparent, evidence-based, focused on clinical benefits and independent from economic considerations. Following the clinical assessment, a fair negotiation based on clear conditions and open communication should be conducted between the national reimbursement authority and the manufacturer. These reimbursement system reforms would provide U.S. companies increased market access and significantly improve patient access to innovative medicines.
- Lower the tax rate for private hospitals. Healthcare institutions are restricted to joint venture requirements per the 2018 version of the Guiding Catalogue on Foreign Investment, and therefore they do not enjoy a reduced corporate rate of 15% as many

other encouraged industries do. Private healthcare enterprises continue to pay the standard maximum rate of 25%. Moreover, due to the inability of foreign-invested healthcare providers to consolidate accounts of their facilities (including those in the same city), this could lead to an exponentially higher effective tax rate for the company as a whole.

- Secure a commitment by China to further encourage private investment in healthcare by fully implementing the initiatives in Document 58 at all government levels and add healthcare services to the encouraged category of the Catalogue Guiding Foreign Investment.
- Remove the caps on foreign ownership of private healthcare enterprises.
- As the PRC government continues to implement its healthcare reform plan, secure a pledge from the government to continue market economic reform in the healthcare sector and avoid limiting patient choice through interference in the market, such as restrictions on healthcare services, preferential market access treatment for domestic products, inappropriately low reimbursement rates, or the introduction of price caps and markup limitations.
- Streamline and harmonize competitive, market-oriented bidding practices for medical devices and pharmaceuticals at the provincial level.
- Eliminate price caps and negotiations, reward value, consult industry in policy development and make meaningful revisions based on that input.
- Set up tiered product quality categories in the pharmaceutical tendering process that are based on scientific criteria and internationally accepted standards, including a category for originators/reference drugs with the highest price premium.

2. Medical Devices

Pricing and Payment Policies

- Secure a commitment that no price caps, no centralized pricing, and no favorable treatment to domestic companies will be used in tenders.
- Secure a commitment to recognize the unique differences between drugs and devices for pricing and payment policies, for example metrics in tenders that recognize quality differences based on value among medical devices.

- Secure a commitment that implementation of prospective payment systems will only be done when based on sound and reliable data, and the methodologies of these payment systems should be made transparent as they are currently in other developed markets.
- Secure a commitment for the State Council to issue an order or opinion that instructs the National Health Commission, National Medical Security Administration (new medical insurance bureau), and local HCs and MSAs to follow these commitments and prepare the implementing regulations for the above-mentioned tendering rules.

Regulatory Issues

- Secure a commitment from the Chinese government to provide NMPA with necessary resources to achieve comparable device review and approval times with U.S. FDA within the next five-years.
- Secure a commitment to eliminate country-of-origin requirements for all devices and ensure acceptance of foreign clinical data for all device categories including innovative devices, and eliminate in-country type testing for medical devices which already have test results under international standards. This should all be done via a State Council order or notice.
- Secure a commitment for NMPA to publicly disclose statistics on device reviews and approvals on a quarterly basis, i.e., show significant progress over the next year in the number of imported Class II and III device approvals that rely on foreign clinical data.
- Secure a commitment to use international standards with no local deviation, and eliminate mandatory medical device and diagnostic standards. The commitment should result in significant reduction of the number of mandatory standards required by NMPA for market approval. The commitment should also instruct the China Medical Device Standardization Administration (CMDSA) to adopt international standards with no local deviation.

Domestic Subsidies

- Secure a commitment to end all subsidies and local content requirements under Made in China 2025 for domestic medical device and diagnostic firms via a State Council notice.

RETAIL AND DIRECT SALES

1. Retail and E-Commerce

- Secure from China a commitment to revise the *Measures on the Administration of Foreign Investment in Commercial Sectors* and other related regulations in line with China's WTO commitments and common international practices.
- Secure a revision to the *Tentative Regulations of SAIC on the Proportion of the Registered Capital to the Total Amount of Investment of Sino-Foreign Equity Joint Ventures* to make minimum capital requirements consistent with the Company Law, and to ensure foreign and domestic retailers are treated equally regarding minimum registered capital requirements.
- Secure a commitment from China to eliminate restrictions on retail networks of foreign majority-owned companies with more than 30 stores that prohibit selling particular goods, including DVDs, CDs, books, petroleum, tobacco, and pharmaceuticals, or at a minimum, ensure that regulations on the distribution restrictions are applied equally to Chinese and foreign retailers.
- Issue guiding policies to provincial and municipal governments to standardize requirements for WFOE for foreign retailers. Introduce mandatory regulations that prevent local governments from forcing retailers to set up new legal entities in their jurisdictions. Reform the current statistical methodologies relevant to local government key performance indicators to avoid incentivizing local governments to require the establishment of more WFOEs.
- Revise the Product Quality Law to more clearly define and distinguish legal liabilities of operators and producers.
- Secure a commitment from SAIC to publish clear guidance to all local AICs that channel fees should not be regarded as commercial bribery under Chinese law, thus ensuring national law will be implemented consistently nationwide.
- Secure a commitment from China to revise the Foreign Investment Catalogue to move e-commerce from the "restricted" to "encouraged" category and allow foreign telecommunications e-commerce companies to set up and operate open online marketplaces, including providing basic and value-added telecommunications services.

2. Direct Sales

- Secure commitments from China to review and revise the Direct Sales Regulations, the Regulations to Prohibit Multi-level Marketing, and their associated administrative

directives, to bring them in line with China's WTO commitments, standard international practices, and business reality in the China market.

- Secure a commitment from China to enhance market access and increase transparency by simplifying and increasing the speed of the license approval process according to the 90 day process in the direct selling regulations, and duly informing companies regarding their approval progress.
- Secure a commitment from China to simplify the approval process by requiring only provincial-level approval of service center establishment plans; eliminate multilevel government approvals and sales initiation approvals.
- Urge China to revise the requirement for having a service center in each district to one per city, and ensure that local requirements are consistent with national regulations.

SOFTWARE

1. Software Legalization

- Press the Chinese government to fully implement its JCCT and S&ED commitments on government and SOE software legalization in a comprehensive and transparent manner. It is essential that software legalization encompass all types of software, not just select categories. China should commit not to influence, either formally or informally, the software purchasing decisions of SOEs in any way and to eliminate all explicit or *de facto* mandates or preferences for the procurement of domestic software brands by government agencies or SOEs, including measures such as price controls or preferences for certain types of licenses or licensing terms. In order to hold government and SOE officials accountable for these efforts, the Chinese government should develop performance indicators for government and SOE officials linked to measurable progress on software legalization.
 - For SOE legalization, China should develop a legalization program that encompasses all SOEs under the authority of CBIRC or directly supervised by the State-owned Assets Supervision and Administration Commission (SASAC), including central, provincial and municipal-level SOEs, and requires SOEs to utilize software asset management (SAM) best practices and third-party audits and certify annually that all their software is fully licensed. China should ensure that all government agencies tasked with overseeing SOE legalization are adequately resourced in terms of funding, manpower and appropriate audit tools, and ensure that SOE software procurement budgets are transparent and sufficient to meet software legalization needs.

- For government legalization, China should implement ongoing legalization programs for government agencies at all levels - central, provincial, municipal and county – and at all institutions that are funded by and report to these agencies. This includes providing sufficient and transparent budgets for software purchases and implementing SAM best practices.

2. Copyright, Criminal and Patent Law Reform

- Secure a commitment from the Chinese government to continue to consult closely with industry stakeholders and move the process forward to amend the Copyright Law, Criminal Code and related laws and judicial interpretations to include needed changes to facilitate civil and criminal enforcement against the unlicensed use of software by enterprises. This includes clearly establishing in the Copyright Law that unlicensed software use is an infringement of the right of reproduction (whether the unauthorized copy is a permanent or temporary reproduction), clarifying that enterprise use of unlicensed software and Hard-Disk Loading (HDL) may be subject to criminal penalties, strengthening rules related to evidence preservation orders, increasing statutory damages for copyright infringement, and providing for criminal liability for circumvention of technological protection measures (TPMs) as well as production and distribution of tools and methods to circumvent TPMs.
- In regard to the Patent Law, press the Chinese government to remove the CNIPA proposed “ex officio” patent enforcement powers against ill-defined “market-disruptive” activities and permit broad patentability of graphical user interfaces (GUI) and computer programs that have a technical character.
- As mentioned in the IP section above, press CNIPA to remain open to further comment and engagement on the draft *Service Invention Regulations* (SIR), in particular to ensure that employer-employee contracts or agreements supersede the provisions of the SIR regarding employee compensation.

3. Trade Secrets

- Press the Chinese government to implement its Action Program on trade secrets protection and enforcement with effective enforcement actions and public awareness initiatives and undertake necessary legal reforms.

4. Market Access

- **Software Procurement:** Revise new Ministry of Finance rules on software procurement to eliminate price controls and preferred licensing terms that have the effect of discriminating against or excluding foreign brands and broaden the definition of

“standard configurations” of desktop software to include all types of software used by government agencies. Moreover, these rules should not be used to direct or influence procurement by SOEs.

- **Telecom Services Catalogue:** Eliminate from coverage under the Catalogue IT services offered by software companies that should not be considered telecom services, e.g., cloud computing, content delivery, information security services and call centers.
- **ICP, ISP and IDC Licenses:** Address restrictions that prevent foreign companies from obtaining internet content provider (ICP), internet service provider (ISP) and internet data center (IDC) licenses, which they need in order to offer cloud computing and other internet-based services.
- **MLPS:** Remove the restrictive provisions of the Multi-Level Protection Scheme (MLPS) requiring that information security and other IT products procured for a broad array of information systems be Chinese-owned products with Chinese-owned IP.
- **Encryption Products:** Push for a transparent revision process of China’s current commercial encryption regulations that rescinds the ban on importing, distributing, and selling foreign commercial encryption products to domestic commercial organizations in China. Ensure the government of China is not informally requiring or pressuring companies to use indigenous encryption algorithms like ZUC through SOEs, unwritten and discriminatory incentives, or otherwise.
- **Standards-Setting Process:** Urge China to institute meaningful reforms in its standards-development processes to allow participation by both foreign and domestic companies on an equal footing, to encourage development and adoption of industry led standards and ensure that such standards efforts proceed in an open and transparent manner, and to adopt internationally accepted standards when available. Encourage China to avoid using the international standardization process to standardize prescriptive technologies, like the ZUC algorithm, so they can then mandate them domestically in a way that stifles innovation and competition and is contrary to the spirit of the WTO Agreement on Technical Barriers to Trade.

TAX

- **China “1000 Enterprises” Tax Initiative:** Secure commitment from Chinese Government to ensure confidentiality of data collected as part of the *China 1000 Enterprises Initiative*, and that information gathered is relevant and data formats are compatible with existing company systems. Secure a commitment that any data provided by companies remains secure and is not made available or leaked outside of SAT, or used for purposes other than the ones stated. In this regard, ‘data security’ encompasses the

following aspects: the process of the data collection, transfer of the data as well as the subsequent storage of data.

- Provide greater clarity as to when exported services will qualify for VAT exemption.
- Provide greater clarity on tax treatment of outbound remittances by PRC subsidiaries of U.S. companies, which currently are being held up by the tax administration pending tax clearance.
- Devote additional resources to clear the backlog of Advance Pricing Arrangements applications to give greater tax certainty to U.S. companies which have transactions with their PRC subsidiaries such as licensing transactions or services or exports of manufactured goods.
- Obtain commitment to provide more preferential individual income tax treatment to foreign professionals working in China including expanding the scope of exempt benefits-in-kind, more favorable treatment of equity compensation and eliminating the tax gross-up calculations where tax is borne by employers.
- Exempt from Circular 698 reporting requirements for genuine corporate restructuring taking place within a majority owned group, to encourage more efficient consolidation of Chinese subsidiaries by U.S. entities.
- Provide greater certainty regarding the commencement of business timing for tax loss carry forward rules by establishing an SAT advance ruling mechanism on the commencement of business date which will be binding on all levels of the tax administration.
- Introduce a tax consolidated filing regime for corporate income tax purposes. This would allow foreign investors with multiple legal entities in China to offset their tax losses from some of their legal entities against the taxable profits in other legal entities. Tax losses in China can only be carried forward for 5 years under China's Corporate Income Tax Law so there is a significant tax cost for large scale investment projects if tax losses cannot be recouped within the first 5 years of operations of the legal entity that incurred the tax losses. Tax consolidated filing is possible in many mature tax jurisdictions such as Australia, Japan and in the U.S. and helps attract more foreign investment.
- Permit settlement of salary cost reimbursements for foreign employees on secondment to China from overseas without the imposition of any taxes such as Business Tax or Value Added Tax. This is a problem faced by many U.S. MNC's in their efforts to have top executive talent work on their investments in China. Currently U.S. executives

seconded to the China branch must continue to have employment with a U.S. entity to continue to participate in the U.S. retirement savings plan. However, when the U.S. payroll entity charges the salary costs to the Chinese subsidiary, these salary cost reimbursements are subjected to China's Business Tax unless certain strict requirements are satisfied. This has left many Chinese subsidiaries unable to remit the salary cost reimbursements to the U.S. payroll entity.

- Permit foreign-invested companies to be exempt from the same import duties and import VAT as are domestic companies when importing major technological equipment (e.g., energy equipment, oil and petrochemical equipment).

TELECOMMUNICATION SERVICES

1. Value-Added Telecom Services Licenses (VATS)

- Remove restrictions on investment (e.g., equity caps) for VATS, and remove licensing requirements for VATS that prevent or inhibit foreign companies from independently obtaining requisite licenses, such as licensing restrictions for cloud computing.
- Secure a commitment to nullify two draft notices from MIIT – *Regulating Business Operation in Cloud Services Market* (2016) and *Cleaning up and Regulating the Internet Access Service Market* (2017). These measures, together with existing licensing and foreign direct investment restrictions on US CSPs operating in China under the *Classification Catalogue of Telecommunications Services* (2015) and the *Cybersecurity Law* (2016), would require US CSPs to turn over essentially all ownership and operations to a Chinese company, forcing the transfer of incredibly valuable intellectual property and know-how to China.
- Amend the Cybersecurity Law and all requisite implementing regulations that inhibit cross-border data flows for data not reasonably connected to national security. China's increased controls over the Internet are creating barriers to the cross-border flow of data and the ability of companies to operate in China. In a globalized economy, companies across all sectors rely on the Internet to transmit and receive data to operate and serve their customers. A spate of recent regulatory rules in China are clamping down on Internet flows, making it difficult and unpredictable for companies that operate in the Chinese market.
- Secure a commitment from China to remove remaining caps to FDI in this sector and remove JV requirements. Eleven years after China's WTO accession, China continues to use its discretionary interpretational authority to limit the number of foreign invested telecom entities to only 20 to 30 and all in the VATs area.

- Secure a commitment to eliminate services offered by software companies that should not be considered telecom services, e.g., cloud computing, content delivery, information security services and call centers, from coverage under the Catalogue for IT services.

2. **High Capitalization Requirements**

- Secure a commitment from China to lower capitalization requirements for basic service licenses and allow foreign companies access to the market.
- Secure a commitment to reconsider the capital structure required of service providers as defined in the *Resale Services Circular* so that both incumbent and new entrant carriers can acquire capacity at wholesale rates and interconnect their networks to deliver services to a broader customer base. The very narrow definition in the Circular means that foreign investors are essentially excluded from the market.

3. **JV Partnership Requirement**

- Secure a commitment from China to eliminate the requirement that a foreign company must select a state-owned and licensed telecom company as a JV partner.

4. **Independent and Impartial Regulator with Transparent Procedures**

- Secure a commitment from China to establish a regulatory body that is separate from, and not accountable to, any basic telecom supplier, and that is capable of issuing impartial decisions and regulations through transparent procedures.

5. **Draft Telecom Law**

- Secure a commitment from China to go beyond codifying existing rules in the draft Telecom Law by incorporating the above suggestions. Finalizing and adopting a market opening Telecom Law should be a top priority. Any revision of the Telecom Law should allow both foreign and domestic companies to provide cloud computing services in the China market.
- Urge China not to adopt unique indigenous technical standards for cloud computing that would create market access barriers for foreign firms operating in China.



ANNEX II: RECOMMENDATIONS FOR ALLEVIATING CONCERNS REGARDING TECHNOLOGY TRANSFER

U.S. Chamber of Commerce & American Chamber of Commerce in China

January 16, 2019

Overview

Technology transfer is a long-standing challenge for American companies entering or operating in China. The Chinese government maintains numerous laws, regulations, policies and standards (collectively, “policies”) that either provide insufficient protection of critical technology, or expressly require the transfer of technology as a pre-condition for market access. In addition to specific technology transfer policies, China maintains an interlocking framework of polices that, in effect, force, or at the least, induce technology transfer. This nexus of issues—including market access, administrative licensing, commercial licensing, anti-trust, standards, procurement, and localization—requires a comprehensive and holistic approach that makes progress on each issue concurrently over time.

We have attempted to provide a reasonably comprehensive overview in the chart below of the types of policies and practices that must be changed to eliminate required or involuntarily induced technology transfer. Some may need to be qualified to a certain extent to satisfy legitimate national security concerns, which should be defined as narrowly as possible. China has already indicated a few to which it may be prepared to agree on, but the scope of policies and practices that should be adjusted to address technology transfer is considerable. Although not all discrete policies would necessarily be changed in the 90-day negotiation period, we hope China will take near-term, time-committed actions to make significant reforms to laws, regulations, and practices as outlined below.

Key Asks

1. Eliminate on a nationwide basis market access restrictions that either require joint ventures or set limits on foreign equity or control, except on narrowly-defined national security grounds as stipulated in the Negative List.
2. Allow American companies to independently apply for and obtain any and all requisite licenses for investment and operation.
3. Remove intellectual property disclosure requirements and preferences based on national origin contained within laws, regulations, standards, certifications, procurement processes, approvals, and any administrative review.
4. Allow American companies to license intellectual property on market-based, freely-negotiated terms.

5. Allow the vast majority of data to be transferred across borders, without requiring a security assessment or any data localization requirement, subject only to narrow, clearly-defined expectations.
6. Follow internationally-accepted best practices for enforcing antimonopoly laws and regulations.
7. Remove non-market driven and discriminatory financial incentives that distort competition and contribute to domestic and global overcapacity.

1. Eliminate market access restrictions that either require joint ventures or put limits on equity or control.

Specific Technology Transfer Concerns Associated with Pre- and Post-Market Access		
Relevant Legal Reference	Implementation	Benchmark
Special Management Measures for Foreign Investment Access (Negative List) (2018 Edition) 外商投资准入特别管理措施（负面清单）（2018年版）	<ul style="list-style-type: none"> Update the nationwide market access negative list to make it <u>one-for-one reciprocal</u> with the U.S.'s negative list used in recent BITs. 	Joint notice from MOFCOM and NDRC
PRC Foreign Investment Law Draft, Article 33 《中华人民共和国外国投资法（草案）》第三十三条	<ul style="list-style-type: none"> Do not apply national security reviews to greenfield foreign investments 	State Council notice circulating draft Foreign Investment Law would replace separate laws governing joint ventures and wholly foreign-owned enterprises
PRC Foreign Investment Law Draft 《中华人民共和国外国投资法（草案）》	<ul style="list-style-type: none"> Publish a single, unifying set of greenfield investment rules for domestic and American companies that creates no legal distinction based on nationality of shareholders and overrides the draft foreign investment law 	State Council notice of drafting plan; overrides draft Foreign Investment Law
	<ul style="list-style-type: none"> Eliminate restrictions on foreign-hosted websites in China that are not reasonably connected to national security 	

2. Allow foreign companies to independently apply for and obtain any and all requisite licenses for investment and operation within sectors not included on the market access negative list. (E.g., all value-added telecoms service licenses, including those needed for cloud computing; all financial services licenses; electronic payment service provider licenses, etc.)

Specific Technology Transfer Concerns Associated with Pre- and Post-Market Access

Relevant Legal Reference	Implementation	Benchmark
<u><i>Market Access Negative List (2018 Version)</i></u> <u>《市场准入负面清单（2018年版）》</u>	<ul style="list-style-type: none"> Confirm the <i>Market Access Negative List</i> will be the sole government document listing all central and local level licensing requirements for all industry sectors and commit to a transparent regulatory process that includes consultation with all stakeholders—including the foreign business community—to minimize unnecessary administrative burdens when updating the list 	NDRC and MOFCOM updates to Market Access Negative List (2018 Version) with a fixed regulatory process in place to make updates
	<ul style="list-style-type: none"> Issue a State Council notice requiring that all Chinese regulatory agencies provide national treatment in all licensing decisions (i.e., U.S. companies will receive the same treatment as all domestic and other foreign countries in administrative licensing decisions) 	Contained within State Council notice
	<ul style="list-style-type: none"> Amend all licensing regimes that set different requirements based on nationality. 	Contained within State Council notice
	<ul style="list-style-type: none"> Make each license approval time-bound, and automatically granted if not reviewed by deadline 	Contained within State Council notice
	<ul style="list-style-type: none"> Institute a time-bound licensing dialogue whereby negotiations for phased-in reduction of a fixed number of licenses on the list are agreed to 	Contained within State Council notice
<u><i>Telecoms Services Classification Catalogue (2015 Version)</i></u> <u>《电信业务分类目录（2015年版）》</u>	<ul style="list-style-type: none"> Remove Internet data centers (B11), content distribution networks (B12), VPN services (B13), online data processing and transaction services (B21), storage and forwarding services (B23) and call center services (B24) from the catalogue of classified telecoms services requiring government licensing, or allow WFOEs to obtain independently Issue a State Council directive that recognizes all forms of cloud computing as an internet related service, and not a value-added telecom 	Revise the <i>2015 Telecom Services Classification Catalogue</i>

<p><i>Notice on Standardizing Activity in Cloud Computing Market Operations, Articles 1, 3, 4, 7, 9</i> 《关于规范云服务市场经营行为的通知（公开征求意见稿）》</p>	<ul style="list-style-type: none"> • Eliminate the definition of cloud computing as governed by an IDC-IRCS license under the 2015 Telecoms Catalogue • Allow foreign companies to independently apply for and hold a license. • Remove requirements to construct cloud service platforms as well as network data and service facilities physically within China • Remove requirement for local partners of foreign cloud companies to directly sign contracts with customers on behalf of the partnership 	
--	--	--

3. Remove intellectual property disclosure requirements and preferences based on national origin contained within laws, regulations, standards, certifications, procurement processes, approvals, and any administrative review.

Specific Technology Transfer Concerns Associated with Pre- and Post-Market Access		
Relevant Legal Reference	Implementation	Benchmark
	<ul style="list-style-type: none"> • Forbid review of any IP or sensitive business information as a requirement for product approvals, investment approvals, marketing approvals, security reviews, standard-setting and qualifications, and subsidy and tax cut qualifications in any current and future laws, regulations, and normative documents 	Joint CCP and State Council notice
<u>PRC Cybersecurity Law, Articles 5, 10, 15, 16, 17, 21, 22, 23, 28, 31, 35, 37, 38.</u> <u>《中华人民共和国网络安全法》</u>	<ul style="list-style-type: none"> • Narrow the scope of Critical Information Infrastructure, • Ensure alignment with international standards, • Remove proprietary IP disclosure requirements, • Remove procurement preferences for “secure and trustworthy” products, • Remove duplicative and intrusive security reviews, and • Eliminate localization requirements contained within the <i>Cybersecurity Law</i> and its supporting/implementing guidelines and standards, in particular any relevant TC260 standards. 	Amendment to Cybersecurity Law and all final and draft implementing guidelines
<u>Cybersecurity Classification Protection Regulations Draft for Comment (MLPS Regulations), Articles 17, 21, and 28</u> <u>《网络安全等级保护条例（征求意见稿）》第十七条、第二十一条、第二十八条</u>	<ul style="list-style-type: none"> • First priority is to suspend all efforts related to MLPS as it is discriminatory and may violate WTO obligations • (Article 17) Clarify expert review panels, their review processes, and specify what types of information and data are required for review while ensuring that no IP or sensitive business data are required disclosures • (Article 21) Clarify rules on “connections” to security organs, the expert/technical review, the certificate system, and the “regular” grading assessments • (Article 28) Remove requirements for “expert organizations” to carry out specialized assessments for “important parts” that use network products. 	MPS revision to MLPS Regulations
<u>Information Security Technology Grading Guidelines on Network Security Multi-Level Protection Scheme (MLPS Standards)</u>	<ul style="list-style-type: none"> • First priority is to suspend all efforts related to MLPS as it is discriminatory and may violate WTO obligations • Remove any requirements for systems graded Level 3 and above to be developed by Chinese companies and use Chinese intellectual property in their key components. 	TC260 revision to MLPS Standards

《信息安全技术 网络安全等级保护定级指南》		
National Security Law, Article 59 《中华人民共和国国家安全法》第五十九条	<ul style="list-style-type: none"> • Guarantee that there will be no required security reviews for greenfield investments • When a security review must occur guarantee that no IP or sensitive business information disclosure will be required 	Amendment to National Security Law
China Compulsory Certification (CCC) 《强制性产品认证管理规定》	<ul style="list-style-type: none"> • Remove proprietary IP disclosure requirements contained within China Compulsory Certification reviews 	SAMR notice
PRC Encryption Law draft, Article 17 《中华人民共和国密码法（征求意见稿）》第十七条	<ul style="list-style-type: none"> • Guarantee that the “cryptography and test certification system” does not require disclosure of IP and sensitive/confidential product information 	State Council revision to <i>draft Encryption Law</i>
PRC Export Control Law draft 《中华人民共和国出口管制法（征求意见稿）》	<ul style="list-style-type: none"> • Remove proprietary IP disclosure requirements contained within the draft Export Control Law and its supporting/implementing guidelines 	State Council revision to draft Export Control Law
PRC Standardization Law, Article 10, 20, 27 《中华人民共和国标准化法》	<ul style="list-style-type: none"> • When technical compliance tests are required, compliance procedures shall treat products from all countries equally, and they shall not be more trade restrictive than necessary • Remove any stated preference for indigenous innovation in any standard • Eliminate any requirement to publish sensitive business information 	NPC revision to <i>Standardization Law</i>
	<ul style="list-style-type: none"> • Exclude all commercial ICT products from “secure and controllable”, “indigenous and controllable”, “secure and reliable” and like requirements, and ensure that cybersecurity requirements are in keeping with international best practices for protection of government systems (e.g., U.S. FISMA/FedRamp, European NIS Directive) 	CAC, MIIT, TC260 joint declaration
PRC Environmental Impact Assessment Law, Article 13 《中华人民共和国环	<ul style="list-style-type: none"> • Ensure that environmental impact assessment (EIA) “small inspection teams” do not require any IP or sensitive business data as part of their assessments; ensure that no EIA approval is contingent on IP disclosure 	Amendment to <i>EIA Law</i>

境影响评价法》第十三条		
<i>TC260 Secure and Controllable Standards on CPUs, Operating Systems, and Office Suites, Sections 3.1, 5.2.1,</i>	<ul style="list-style-type: none"> Remove IP disclosure, grading/ranking based national origin, and political factors in assessing security 	Remove all Secure and Controllable standards.

4. Allow American companies to license intellectual property on market-based, freely-negotiated terms.

Specific Technology Transfer Concerns Associated with Discriminatory Treatment in IP Licensing		
Relevant Legal Reference	Implementation	Benchmark
<u>Regulations of the People's Republic of China on the Administration of the Import and Export Technologies (TIER), Article 24</u>	<ul style="list-style-type: none"> Amend indemnity terms to allow for market-based negotiated allocation of risk between licensor and licensee 	Amendment to TIER
<u>Regulations of the People's Republic of China on the Administration of the Import and Export Technologies (TIER), Article 29</u>	<ul style="list-style-type: none"> Amend rules regarding technology improvements contained within TIER to allow licensor and licensee to freely negotiate shared ownership of improvements to licensed technology 	Amendment to TIER
<u>PRC Sino-Foreign Equity Joint Venture Law</u> <u>《中华人民共和国中外合资经营企业法》</u> <u>PRC Sino-Foreign Cooperative Joint Venture Law</u> <u>《中华人民共和国中外合作经营企业法》</u>	<ul style="list-style-type: none"> Repeal or amend joint venture laws and their associated implementing regulations that address rights granted to joint ventures for use of licensed foreign-contributed technology in perpetuity 	Single, unifying commercial investment law for domestic and foreign investors, provided that such law, e.g. Company Law, does not mandate role for Communist Party branches
<u>PRC Contract Law, Articles 123 and 353</u> <u>《中华人民共和国合同法》</u>	<ul style="list-style-type: none"> Apply technology licensing terms equally to domestic and foreign-invested enterprises; do not require conflicting terms contained between joint venture regulations, TIER, to override China's <i>Contract Law</i> in foreign licensing agreements. 	Amendment to TIER

5. Allow the vast majority of data to be transferred across borders, and to be done without requiring a security assessment and remove any data localization requirement, subject only to narrow, clearly-defined exceptions.

Specific Technology Transfer Concerns Associated with Other Industrial Policies, Regulations, and Laws		
Relevant Legal Reference	Implementation	Benchmark
Critical Information Infrastructure Protection Regulation draft for comment, Article 18 《关键信息基础设施安全保护条例（征求意见稿）》第十八条	<ul style="list-style-type: none"> Limit the definition of Critical Information Infrastructure (CII) to include only infrastructure belonging to the Communist Party of China, the Central Government and the People’s Liberation Army, but NOT including state-owned enterprises, local governments, and healthcare and education institutions. China should amend the Cybersecurity Law, the draft Critical Information Infrastructure Protection Regulation, and all related CII-specific departmental rules and guidelines. 	CCP and State Council notice
Security Assessment Measures for Exporting Personal Information and Important Data, Articles 2 and 17 《个人信息和重要数据出境安全服务评估办法（征求意见稿）》第二条	<ul style="list-style-type: none"> (Article 2) Significantly narrow scope of data produced and collected that is required for local storage and/or subject to security assessment prior to exportation to data that is vital to national security concerns (Article 2) Expressly allow intra-company data flow without restriction. (Article 17) Significantly narrow and specify the definition of personal information and important data in line with globally accepted norms and best practices 	Revision to the <i>Security Assessment Measures</i>
PRC Cybersecurity Law, Articles 31 and 37 《中华人民共和国网络安全法》第三十一条、第三十七条	<ul style="list-style-type: none"> (Article 31) Provide a narrow definition of national security similar in scope and nature to that used by the United States. (Article 37) Remove requirement that all personal information and important data gathered or generated by critical information infrastructure (CII) operators be stored in China. 	Amendment to the <i>Cybersecurity Law</i>
Guidelines for Data Cross-Border Transfer Security Assessment 《数据出境安全评估指南》	<ul style="list-style-type: none"> Significantly narrow the scope for data only reasonably connected to national security concerns. 	

6. Follow internationally-accepted best practices for enforcing antimonopoly laws and regulations.

Specific Technology Transfer Concerns Associated with Other Industrial Policies, Regulations, and Laws		
Relevant Legal Reference	Implementation	Benchmark
PRC Antimonopoly Law, Article 7 《中华人民共和国反垄断法》	<ul style="list-style-type: none"> Amend the <i>PRC Antimonopoly Law (AML)</i> to clarify explicitly that all state-owned enterprises, including those controlled by the central government, fall within the scope of the law’s enforcement Amend article 7 of the <i>AML</i> to clearly define state-owned enterprises and which industries are related to the “economic lifeblood of the national economy and national security” 	<ul style="list-style-type: none"> - NPC amendment to AML - Adopt OECD policy principles on competitive neutrality - Adopt SOE provisions contained within the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)
Regulation on the Prohibition of Conduct Eliminating or Restricting Competition by Abusing Intellectual Property Rights (IP Abuse Guidelines), Articles 7, 22, and 24 《关于禁止滥用知识产权排除、限制竞争行为的规定》	<ul style="list-style-type: none"> Amend Article 7 so that licensing of an “essential facility” cannot be compelled Amend Article 22 by deleting the wording “whether the IPR is essential to access to downstream market by relevant undertakings” Amend Article 24 so that refusals to license are not actionable unless a voluntary commitment by the patent holder to license its patent has been breached 	<ul style="list-style-type: none"> - SAMR revision to IP Abuse Guidelines - Adopt the International Chamber of Commerce’s set of best practices on due process in competition law enforcement

7. Remove non-market driven and discriminatory financial incentives that distort competition and contribute to domestic and global overcapacity.

Specific Technology Transfer Concerns Associated with Other Industrial Policies, Regulations, and Laws		
Relevant Legal Reference	Implementation	Benchmark
	<ul style="list-style-type: none"> Eliminate market-distorting non-commercial assistance or subsidies that artificially support industries (e.g., aluminum, steel, agriculture, export credits, new energy vehicles, and all MIC 2025 industries) 	
	<ul style="list-style-type: none"> Strictly abide by the rules and procedures contained within WTO's Agreement on Subsidies and Countervailing Measures, including requirements for subsidy notification 	
	<ul style="list-style-type: none"> Provide a meaningful liquidation or re-organization process for non-competitive firms in sectors with demonstrated overcapacity 	
<u>Administrative Measures on High and New Technology Enterprises</u> <u>《高新技术企业认定管理办法》</u>	<ul style="list-style-type: none"> Ensure all financial incentives provided to industry are equally accessible to domestic and foreign-invested enterprises without preference for domestic IP or undue burden for domestic licensing rights to IP (e.g., HNTE Program) 	Amendments to HNTE program, and programs that distribute support from the National Integrated Circuit Investment Fund



CHINA CENTER | 中国中心
U.S. Chamber of Commerce | 美国全国商会

ANNEX III: RECENT TRACKING OF PROBLEMATIC “MADE IN CHINA 2025” POLICIES

U.S. Chamber of Commerce

January 16, 2019

Overview

Made in China 2025 (MIC2025) constitutes a broad strategy to use state resources to localize and indigenize innovation and capture global market share in sectors critical to economic competitiveness. In 2017, the U.S. Chamber of Commerce (the U.S. Chamber) researched and published a report, “Made in China 2025: Global Ambitions Built on Local Protections,” that analyzed the implementation of the MIC2025 plan. The report raised concerns about an emerging regulatory system that aimed to create comparative advantage and alter competitive dynamics in global markets across critical sectors.

Since the report’s release, the U.S. Chamber has continued to monitor and track MIC2025 policies, in particular those at the sub-central level. The U.S. Chamber has identified over 100 sub-central policies (see chart starting on the next page) spanning 24 provinces, municipalities, and autonomous regions that either set targets, create rules, or provide normative guidance. The policies either directly implement or at least refer to the MIC2025 plan or one of its target industries. Although this chart does not represent an exhaustive list of sub-central policies, it suggests a deep, concerted, and continuing effort among sub-central authorities to carry out and take advantage of incentives tied to the MIC2025 plan.

Key Findings:

- **Sub-central Authorities are Actively Promoting MIC2025 and its Key Industries** The central-level MIC2025 policy has influenced provincial and local level governments to develop their own plans that align with the themes and objectives of the central government.
- **Developing and Owning Indigenous Innovation and Intellectual Property is a Primary Goal** Indigenous innovation and IPR are prevalent throughout many of the documents in the chart below. Some policies have a clear vision to patent indigenous IPR and implement it in domestic and international standards.

- **The Government is Using Regulatory Levers to Achieve Indigenization Goals** Numerous sub-central authorities are providing state support—including through standards setting, procurement catalogues, and financial support and incentives—to companies that develop or own indigenous innovation and intellectual property rights in MIC2025 sectors.

While our organizations applaud China’s comments to respond to the foreign business community’s concerns associated with MIC2025, any solution must address systemic challenges at all levels of the Chinese government. Moreover, due to the complexity and scale of potential rectifying actions, any commitment by the Chinese government must be verifiable, enforceable, and based on clear timetables.

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
Anhui	Anhui Provincial Small and Medium Enterprise Promotion Regulations (Revised Draft)	安徽省中小企业促进条例（修订草案）	8/31/2018	Technology	<ul style="list-style-type: none"> • Encourages county-level governments to promote indigenous innovation in SMEs • Encourages SMEs to create technology centers and research centers to raise indigenous innovation capability • Encourage SMEs to research and develop technologies and products that have indigenous IPR • Guide and support SME patent applications, trademark registrations and reduce the filing and maintenance cost for patents • Allows SMEs producing new technological products to write off R&D expenditures, and gives preferential tax policies for those same firms and their personnel
Anhui	Supporting the Development of the Robot Industry	支持机器人产业发展若干政策	7/2/2018	Robotics	<ul style="list-style-type: none"> • Supports enterprises' development of industrial robots and intelligent product lines with indigenous IPR. • Gives subsidies and one-off rewards to firms (nominally both domestic and foreign) involved in the robotics industry, including testing and certification • Supports tax deductions for R&D, and other financial breaks for enterprises
Anhui	Notice of the Anhui Provincial Department of Science and Technology on Printing and Distributing the Implementation of Several Policies Supporting Science and Technology Innovation	安徽省科技厅安徽省财政厅关于印发支持科技创新若干政策实施细则的通知	5/6/2018	Technology and innovation	<ul style="list-style-type: none"> • Implements a subsidy policy for companies to buy R&D and equipment to increase indigenous innovation capability • Lists “possession of indigenous IPR” as a requirement to obtain financial support, ranging from RMB 3 million to 10 million • Supports the acquisition of advanced technology from outside the province for transfer and industrialization

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
					<ul style="list-style-type: none"> • Calls for the subsidization of R&D, talent acquisition, insurance, major science and technology projects as well as tax breaks for relevant enterprises
Anhui	Notice of the People's Government of Anhui Province on Printing and Distributing Several Policies on Scientific and Technological Innovation	安徽省人民政府关于引发支持科技创新若干政策的通知	5/11/2017	Technology	<ul style="list-style-type: none"> • Provides monetary support for international patent litigation • Makes large provincial awards and subsidies available to local universities and schools for the creation of technological enterprises • Outlines the exact values of monetary support, subsidies, and repayments in all areas encouraging development of the technology industry
Anhui	The People's Government of Anhui Notice on Supporting Certain Policies for Science and Technology Innovation	安徽省人民政府关于印发支持科技创新若干政策的通知	4/22/2017	Technology and Innovation	<ul style="list-style-type: none"> • Outlines specific subsidies and tax breaks for enterprises involved in R&D, development of new technologies, entrepreneurship, pilot funds and projects selected by the government (rank a batch of tech enterprises A, B, or C, this determines the amount of money they receive with which they can do what they want to grow)

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
Anhui	13 th Five Year Plan for Automobiles and New Energy Vehicles	安徽省“十三五”汽车和新能源汽车产业发展规划	2/13/2017	Autos and NEVs	<ul style="list-style-type: none"> • Basic research and development is relatively weak, and the level and efficiency of indigenous innovation in the industrial chain needs to be improved • Indigenize energy saving technologies such as advanced transmission and high-efficiency internal combustion engines • Create a technical innovation system for auto parts with a relatively strong indigenous research and development capability
Anhui	Anhui Province 13 th Five Year Plan Medical Industry Development Plan	安徽省“十三五”医药产业发展规划	2/13/2017	Medical	<ul style="list-style-type: none"> • Raise indigenous innovation capabilities in the medical industry
Anhui	Anhui Industrial Technology Innovation Plan	安徽省“十三五”工业技术创新发展规划	1/23/2017	Industrial Technology	<ul style="list-style-type: none"> • Focus on key points in industrial development, guide enterprises to participate in the formulation and revision of international standards, national standards, industry standards, and form a batch of technical standards with indigenous IPR

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
Anhui	Anhui Accelerates the Implementation of the Internet+ Action Plan	安徽省加快推进互联网+行动实施方案	12/24/2015	Internet+	<ul style="list-style-type: none"> • Promotes subsidies, equity investments, guarantees, etc. to help indigenous internet companies become national brands • Calls for implementation of the social credit system that includes IPR protection • Promotes the MLPS system • Promotes network security brands and backbone companies to strengthen the promotion and application of indigenous and controllable internet security products
Anhui	Implementation Opinions on Reform of Innovation and Entrepreneurship Education in Colleges and Universities	安徽省高等学校创新创业教育改革的实施意见	12/1/2015	Innovation and Entrepreneurship	<ul style="list-style-type: none"> • Supports tax reductions for technology enterprises started by students
Anhui	Made in China 2025: Anhui Chapter	关于印发中国制造2025 安徽篇 的通知	11/18/2015	Made in China 2025	<ul style="list-style-type: none"> • Guide companies to participate in the formulation and revisions of international standards, national standards, and industry standards, develop technology, products, and standards with indigenous IPR • Nurture backbone companies that have indigenous IPR in main industries • Strengthen the cultivation of new products with indigenous IPR • Provide subsidies and preferential tax policy to incentivize indigenous technological development • Promote the creation of indigenous brands in the car industry...expand exports of indigenously branded cars • Support the development of Chinese medicines and natural medicine innovation with indigenous IPR • Calls for enlarging indigenous research for agricultural machinery

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
Anhui	The General Office of the People's Government of Anhui on the Revision and Implementation of the Innovation Drives Development Strategy to Further Accelerate the Construction of Innovative Provinces	安徽省人民政府办公厅关于修订印发实施创新驱动发展战略进一步加快创新型省份建设配套文件的通知	7/20/2015	Technology and innovation	<ul style="list-style-type: none"> • Outlines the exact numerical values and methods for the distribution of funds from the central government to Anhui province for the development of indigenous innovation • Has provision instructing provincial/county/city level government to use funds and subsidies to support the purchase of all needed critical instruments and equipment and to cooperate or purchase research organizations • Provides that only companies that own indigenous IPR are eligible for financial and other support
Beijing	Notice on Printing and Distributing the Administrative Measures for Supporting Funds for R&D Expenses of Small and Micro Enterprises in Science and Technology in Zhongguancun National Indigenous Innovation Demonstration Zone	关于印发中关村国家自主创新示范区科技型小微企业研发费用支持资金管理暂行办法的通知	3/8/2018	Science and technology	<ul style="list-style-type: none"> • Supports subsidies and land preference based on calculated R&D expenditures in the Zhongguancun indigenous innovation special technology zone

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
Beijing	Beijing 13 th Five Year Plan for Social and Economic Development	北京市国民经济和社会发展的第十三个五年规划纲要	1/10/2018	Five Year Plan	<ul style="list-style-type: none"> • Support exports from companies that possess indigenous IPR and indigenous brands • By 2020 25% of exports should be from “double indigenous” enterprise exports
Beijing	Notice on the Printing and Distributing the Implementation Rules of the Zhongguancun National Independent Innovation Demonstration Zone to Promote the Deep Integration of Innovation and Support Funds for Science and Technology Finance	关于印发中关村国家自主创新示范区促进科技金融深度融合创新发展支持资金管理颁发实施细则的通知	10/10/2017	Science and technology	<ul style="list-style-type: none"> • In numerous sections, including types of investment vehicles (e.g. angel and venture capital), requires target companies to possess core technology or indigenous IPR • Requires potential recipients of financial incentives to be qualified as High-New Technology Enterprises (HNTE) • Calls for subsidies for rent, construction, and software systems in Zhongguancun in Beijing for at least the first 3 years of establishment; supports subsidies to finance M&A • Details how internet and technology startups are funded and reimbursed

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
Beijing	Notice on Printing and Distributing the Action Plan for Artificial Intelligence Industry Cultivation in Zhongguancun National Independent Innovation Demonstration Zone (2017-2020)	关于印发中关村国家自主创新示范区人工智能产业培育行动计划（2017-2019）的通知	9/30/2017	Artificial Intelligence	<ul style="list-style-type: none"> • Participate in international science and technology major cooperation projects, undertake international technology transfer and promote overseas promotion of original technologies • State provided demonstration project insurance (i.e. self-driving cars) • Encourage companies to expand work on AI related patents, standards, and trademarks, support companies to apply for foreign and domestic patents, register trademarks internationally • Further develop statewide funds to support R&D in AI
Beijing	Notice of the Beijing Municipal People's Government on Printing and Distributing the Plan for the Construction of Modern Industry and the Construction of Key Functional Areas During the 13th Five Year Plan Period in Beijing	北京市人民政府关于印发北京市十三五时期现代产业发展和重点功能区建设规划的通知	1/13/2017	Technology and innovation	<ul style="list-style-type: none"> • Develop an indigenous and controllable, safe and reliable integrated circuit industry
Beijing	Beijing Science and Technology Plan Fund Management Measures	北京市科技计划项目经费管理办法	1/4/2017	Science and Technology	<ul style="list-style-type: none"> • Differentiates between direct subsidies beforehand to subsidize research and set up before the launch, and post subsidies awarded based on performance • Subsidies available for both direct (e.g., utilities, etc.) and indirect costs • Subsidies for equity investments, risk compensation fund, and loan interest

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
Beijing	Notice for the Subsidy Project of the 2017 Beijing Future Science and Technology Research Achievements	2017年度北京未来科技城科研成果后补助项目申报通知	10/21/2016	Technology	<ul style="list-style-type: none"> Requires projects that receive subsidies to advance national or Beijing industrial policies
Beijing	Notice on Printing and Distributing the "Several Measures to Promote the Innovation and Development of Zhongguancun Intelligent Robot Industry"	关于印发“关于促进中关村智能机器人产业创新发展的若干措施”的通知	4/25/2016	Intelligent robots	<ul style="list-style-type: none"> Give priority for recommended government equity projects for projects that have internationally advanced levels of indigenous IPR Direct government funds towards those projects that have, among other things, indigenous research Provide subsidies for companies that file patents and contribute to standards Financial support for companies to purchase robotic manufacturing capabilities Provide subsidies for robotics manufacturing as well as loan insurance and forgiveness
Beijing	Beijing Action Plan: Made in China 2025	关于印发《〈中国制造 2025〉北京行动纲要》的通知	12/5/2015	Made in China 2025	<ul style="list-style-type: none"> Support companies...to develop critical tool design software with indigenous IPR Achieve a batch of innovative achievements with indigenous IPR in cutting edge areas of next generation information technology, new materials, life sciences, and smart manufacturing Expand foreign cooperation, support backbone companies to use joint equity and M&A to absorb and re-innovate the technology of international advanced products Build an indigenous and controllable product system, including application software, basic hardware and software, and network and security equipment, for indigenous and controllable information systems and security cloud services in finance, telecommunications, and industry

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
					<ul style="list-style-type: none"> Establish a complete industry value chain for trusted computing that has a self-controllable information industry ecosystem
Chongqing	Notice on Deepening the “Internet Plus Advanced Manufacturing Industry” to Develop Industry Internet Implementation Plan	关于印发重庆市深化“互联网+先进制造业”发展工业互联网实施方案的通知	5/17/2018	Internet and advanced manufacturing	<ul style="list-style-type: none"> Nurture 3-5 domestically competitive industrial internet platforms and 10 leading enterprises Create specialized funds and provide preferential taxes in Chongqing for the development of the industrial internet Encourage financial institutions to give preferential loans/insurance to firms that operate in the internet space
Chongqing	Notice on the Chongqing Smart Manufacturing Action Plan for 2017	关于印发重庆市智能制造 2017 行动计划的通知	4/11/2017	Intelligent equipment and manufacturing	<ul style="list-style-type: none"> Provide policy protection for intelligent industries Strengthen the sharing of government and company information with financial institutions, research and establish a new model of industry-finance integration
Fujian	Notice on Adjusting the Members of the Made in China 2025 Leading Small Group	福建省实施“中国制造 2025”行动计划领导小组办公室关于调整福建省实施“中国制造 2025”行动计划	7/5/2018	Made in China 2025	<ul style="list-style-type: none"> Assigns provincial leaders throughout the bureaucracy in Fujian province to the Made in China 2025 Leading Small Group for the province, to ensure its thorough implementation across sectors

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
		划领导小组成员的通知			
Fujian	Fujian Provincial Science and Technology Plan Project Fund Management Measures	福建省及科技计划项目经费管理办法	6/14/2018	Science and technology	<ul style="list-style-type: none"> • Forms of financial support for technology and R&D within the province (according to national and provincial guidelines) include post-subsidies, interest subsidies, risk compensation funds, equity investment, for direct costs • Technicalities about the amounts of funds, how they will be reviewed, where exactly they can be applied, all in support of the central state goals
Fujian	Implementation of the Opinions of the Fujian Provincial People's Government on Deepening the Development of the Internet by the Internet+ Advanced Manufacturing Industry	福建省人民政府关于深化“互联网+先进制造业”发展工业互联网的实施意见	4/20/2018	Internet+	<ul style="list-style-type: none"> • Calls for implementation of the Made in China 2025 Leading Small Group’s “Internet+ and Advanced Manufacturing” initiative • Increases financial support and subsidies for internet demonstration projects; encourages social capital to set up funds; calls for insurance companies to develop special packages • Calls for open development and cooperation that is "secure and controllable"

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
Fujian	Implementing Opinions of the Fujian Provincial People's Government on Promoting the Development of a New Generation of Artificial Intelligence	福建省人民政府关于推动新一代人工智能加快发展的实施意见	3/9/2018	Artificial Intelligence	<ul style="list-style-type: none"> • Calls for the province becoming an artificial intelligence hub within China by 2020, and becoming a main force in the national artificial intelligence industry that is integrated with other fields by 2025 • Calls for policy support for artificial intelligence through financial incentives (awards, subsidies, tax breaks); support for companies that join industrial parks; encourages companies to "go global" by investing in and acquiring talent and research from abroad
Fujian	Fujian 13 th Five Year Plan for New Energy Development	福建省“十三五”能源发展专项规划	10/10/2016	New Energy	<ul style="list-style-type: none"> • Create an industrial value chain (for the wind industry) with complete indigenous innovation...and comprehensive competitiveness
Fujian	Fujian Province's Action Plan for Made in China 2025	福建省实施《中国制造2025》行动计划	7/28/2015	Made in China 2025	<ul style="list-style-type: none"> • Calls for secure and reliable internet systems to develop provincial high tech industry and calls for support for indigenous IP • Emphasizes creation of strict standards and the localization of patents

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
Gansu	Gansu Action Plan for Made in China 2025	关于印发《中国制造 2025 甘肃行动纲要》的通知	6/3/2018	Made in China 2025	<ul style="list-style-type: none"> • Integrate MIC2025 with BRI and take advantage of BRI • Achieve a batch of S&T achievements and technical standards in critical areas • Encourage research institutes and network security companies to jointly establish R&D centers to conduct research on core technologies and improve indigenous innovation capability • Cultivate a batch of high-tech enterprise clusters with indigenous IP and strong market competitiveness • Encourage companies to vigorously develop indigenous innovation, and research technologies and products with indigenous IP • Nurture the development of leading software companies that possess indigenous IP and have a yearly average of 100 new software products and 10-15 patents
Gansu	Gansu Special Action Plan for Advanced Manufacturing Development	关于印发甘肃省先进制造产业发展专项行动计划的通知	6/3/2018	Advanced manufacturing	<ul style="list-style-type: none"> • Vigorously introduce companies that possess indigenous IP and critical components (in the wind power equipment industry) into the industrial park • Control a batch of strategic critical and core technology • Support indigenous innovation capabilities of companies • Accelerate the localization of production and reduce the reliance on imports for certain nuclear energy companies • Encourage industrial technology transfer and investment in relevant firms

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
Gansu	Gansu Special Action Plan on Data and Information Industry Development	关于印发甘肃省数据信息产业发展专项行动计划的通知	6/3/2018	Data and information industry	<ul style="list-style-type: none"> • Cultivate a batch of high-tech enterprise clusters with indigenous IP and strong market competitiveness • Encourage companies to vigorously develop indigenous innovation, and research technologies and products with indigenous IP • Nurture the development of leading software companies that possess indigenous IP and have a yearly average of 100 new software products and 10-15 patents. • Achieve a batch of S&T achievements and technical standards in critical areas • Guide the formulation and promotion of foundational standards and critical technology standards
Guangdong	Notice of the Guangdong Provincial Economic and Information Technology Commission on the Selection of Guangdong Robotic Backbone Enterprises	广东省经济和信息化委关于遴选广东省机器人骨干企业的通知	2/6/2018	Robotics	<ul style="list-style-type: none"> • Calls for local governments in Guangdong to fully implement Made in China 2025 by inviting companies to apply to become a “backbone” robotics enterprise in the region • Identifies strong indigenous innovation capabilities as a principle for applying to become a backbone robotics enterprise • Doesn’t identify specific benefits of being classified as a backbone robotics enterprise
Guangdong	Notice of the General Office of the People's Government of Guangdong Province on Printing and Distributing the 13th Five-Year Plan for the Development of Strategic Emerging Industries in Guangdong Province	广东省人民政府办公厅关于印发广东省战略性新兴产业发展“十三五”规划的通知	8/17/2017	13th FYP	<ul style="list-style-type: none"> • Calls for the creation of a secure and reliable next generation IT industry systems • Establishes a plethora of economic development goals related to strategic emerging industries • Calls for expedited use of capital to foster an environment that is beneficial to strategic emerging industry development

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
Guangdong	Notice on the Implementation Plan for the "Made in China 2025" Pilot Demonstration City Group in the Six Cities and One District of the West Bank of the Pearl River	关于印发珠江西岸六市一区创建“中国制造 2025”试点示范城市群实施方案的通知	4/21/2017	Made in China 2025	<ul style="list-style-type: none"> Establishes a region in Guangdong province as a Made in China 2025 demonstration zone Encourages local governments to compensate companies for loan interest and to provide other incentives for achieving Made in China 2025 objectives in the region
Guangdong	Notice of the General Office of the People's Government of Guangdong Province on the Internet+ Action Plan (2015-2020)	广东省人民政府办公厅关于印发广东省“互联网+”行动计划（2015-2020年）的通知	4/11/2017	Internet+	<ul style="list-style-type: none"> Instructs local governments in Guangdong to provide capital support as part of their implementation of the Internet+ plan Calls for obtaining funds from the central government, such as the National Strategic Emerging Industries Fund, for implementing Internet+ in Guangdong
Guangdong	Notice of the General Office of the People's Government the Internet+ Action Plan's Implementation Plan	广东省人民政府办公厅关于印发广东省深入推进“互联网+流通”行动计划实施方案的通知	9/27/2016	Internet+	<ul style="list-style-type: none"> Calls for supporting Chinese-produced encryption products and achieving indigenous and controllable information security Calls for strengthening the guiding role of government capital
Guangdong	Implementing Opinions on Carrying out the Made In China 2025 Plan	关于贯彻落实《中国制造 2025》的实施意见	9/21/2015	Made in China 2025	<ul style="list-style-type: none"> Calls for implementation of Made in China 2025 Identifies creation of an indigenously innovated smart manufacturing system as one of several primary objectives

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
Guizhou	Implementing Opinions on Carrying Out the Made In China 2025 Plan	关于贯彻落实《中国制造 2025》的实施意见	9/5/2016	Made in China 2025	<ul style="list-style-type: none"> • Develop a batch of bio-innovative drugs that possess indigenous IP • Strengthen indigenous innovation capability • Encourage and support companies and industry organizations to use international standards and foreign advanced standards, and vigorously participate in the formulation of international standards and national standards, and guide social organization standards and industrial technology alliances to formulate organization standards that meet market and innovation demands. • Use “Guizhou Standards” to promote the export of Guizhou products and technology • Support a batch of “Four Foundation” projects that possess indigenous IP...cultivate “Four Foundation” companies to accelerate the industrialization of indigenous IP and technology • Explore safe and reliable industrial internet • Give preference to indigenous IPR and innovation • Encourage and guide financial institutions to increase credit support for eligible projects
Hangzhou	Decision on Creating a "Made in China 2025" National Demonstration Zone to Build a Modern China Manufacturing City to Create a Strong Industrial City	关于创建“中国制造 2025”国家级示范区建设现代中国制造业打造万亿工业强市的决定	4/15/2018	Made in China 2025	<ul style="list-style-type: none"> • Strive to realize continued strengthening of indigenous innovation and accelerate the formation of brands and products with indigenous IP • Support key companies in participating in the formulation and revision of local, industry, and national standards • Plan to achieve an industrial output value of more than RMB 100 billion to optimize industrial structure • Promote innovative state construction • Provide training and resources for companies in areas highlighted in Made in China 2025

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
Henan	Henan Three Year Development Plan for Intelligent Manufacturing and Industrial Internet (2018-2020)	关于印发河南省智能制造和工业互联网发展三年行动计划(2018—2020年)的通知	4/18/2018	Manufacturing and Industrial Internet	<ul style="list-style-type: none"> • Create an “enterprise to the cloud” reference catalogue and evaluation standard, use financial support and government procurement services to guide companies to move basic infrastructure, business systems, and equipment to the cloud • Create a "white list" of priority projects and industries that financial institutions will give preferential support to
Henan	Henan Implementation Plan of Made in China 2025	中国制造 2025 河南行动纲要	2/26/2016	Made in China 2025	<ul style="list-style-type: none"> • Support industrial alliances and leading companies to create a platform for “patenting technology, turning patents into standards, and industrializing standards” • Deepen the concentrated application of indigenous and controllable information technology in the manufacturing industry • Vigorously introduce and support integrated circuit design and specialized equipment, general chips, information communication equipment and other core technology and products, and breakthrough bottlenecks in domestic production. • Form a batch of technologies, products, and standards that have indigenous IP. • Expand government loans and reduce financing costs to local enterprises • Give tax concessions—e.g. import equipment tax exemption, R&D tax deductions—for high tech enterprises • Promote indigenous innovation and IPR

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
Hubei	Hubei Economic and Social Development Plan	湖北省国民经济和社会发展第十三个五年规划	7/15/2016	Five Year Plan	<ul style="list-style-type: none"> • Cultivate a batch of enterprises that possess indigenous innovation capability and indigenous IPR
Hubei	Hubei Action Plan for Made in China 2025	湖北省关于印发中国制造 2025 湖北行动纲要的通知	12/23/2015	Made in China 2025	<ul style="list-style-type: none"> • Lists “increasing indigenous innovation capabilities” as a “main task” • Launch research and construction of a domestically produced information infrastructure for an intelligent factory that implements an intelligent factory information infrastructure system with indigenous, controllable, and secure data, business, and process integration for ships, cars, and other industries • Implement the operation to elevate Hubei brands, increase the protection of indigenous IPR • Establish a complete indigenous research and innovation system for NEVs • Support a batch of innovative pharmaceutical industrialized projects with indigenous IPR and significant market prospects in China and abroad...seize the commanding heights of biomedicine in China • Nurture indigenous IPR, own core technology and indigenous strategic brands in new materials • Establish an indigenous research design and production system for the aviation industry • Develop domestically produced information security services software • Calls for raising the level of high-end domestically produced medical equipment

<u>Province</u>	<u>Policy Name (EN)</u>	<u>Policy Name (CH)</u>	<u>Date Released</u>	<u>Industry</u>	<u>Notes</u>
Hunan	Hunan Medical Industry Development Plan	湖南省医药行业十三五发展规划	7/12/2016	Medical	<ul style="list-style-type: none"> • Implement and encourage policies to guide the preferential procurement of Hunan drugs and medical devices in Hunan public medical institutions
Hunan	Hunan Five Year Action Plan on Building a Strong Manufacturing Province under Made in China 2025	湖南省贯彻《中国制造 2025》建设制造强省五年行动计划	1/28/2016	Made in China 2025	<ul style="list-style-type: none"> • Lists indigenous innovation as a “foundational principle” • Put indigenous innovation at the core of the development of the manufacturing sector • Develop an indigenous and controllable information technology industry • Promote domestic production in the aviation industry • Cultivate and enhance the ability of enterprises to use IPR, encourage and support enterprises to use IPR to participate in market competition, and carry out various methods and channels for patent acquisition, transfer, operation, etc., and build an industrialized-oriented patent portfolio and strategic layout • Cultivate 50 products...that possess core technology and indigenous IPR • Use special funds and preferential taxes for strategic emerging industries

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
Hunan	Opinion on Speeding Up the Development of New Material Industry	关于加快新材料产业发展的意见	12/12/2015	Materials	<ul style="list-style-type: none"> • Encourage Hunan new materials enterprises with indigenously innovated products to apply for the “Hunan Province Two-Type Product Government Procurement Catalogue”; products that are incorporated into the Catalogue should receive preferential procurement and government support, such as government first purchase, ordering and review discounts and price deductions • Give subsidies for patent grants and key invention patents • Give subsidies to the organizations that participate in international and national standards formulation • Encourage banks to increase their credit lines and funding • Award subsidy funds to enterprises that achieve certain established goals in the sector
Inner Mongolia	Accelerate the construction of information and communication infrastructure	加快信息通信基础设施建设意见	7/20/2018	ICT	<ul style="list-style-type: none"> • Strive to have a secure and controllable information communication basic infrastructure and network by 2020
Inner Mongolia	Inner Mongolia Implementation Plan for Made in China 2025	关于印发《内蒙古自治区落实〈中国制造 2025〉行动纲要》的通知	2/6/2017	Made in China 2025	<ul style="list-style-type: none"> • Guide companies to gradually change from relying on bringing in technology to developing indigenous innovation, and raise indigenous innovation and attract/absorb/re-innovate capability • Aims to constantly strengthen indigenous innovation • Use the advantage of rare earth resources in our region to focus on developing imaging equipment, mobile medical products, wearables, and remote medical treatment with indigenous IPR • Accelerate the creation of a batch of branded products and companies that possess indigenous IPR • Create a corporate credit system to guide enterprises to accomplish their responsibilities • Give tax concessions and exemptions for indigenous innovation

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
Jiangsu	Implementing Opinions of the Provincial Government on Accelerating the Construction of the Provincial Technology Transfer System	省政府关于加快推进全省技术转移体系建设的实施意见	6/26/2018	Technology	<ul style="list-style-type: none"> Establishes goals and plans for the province's implementation of the PRC Law on Promotion of the Transformation of Scientific Achievements Calls for establishing an interoperable technology transfer system that covers all of China; focus sectors include AI, smart manufacturing, big data, etc. Calls for utilization of the government's technology achievement transformation fund to guide societal capital Reduces income tax and VAT burdens for eligible technology companies in accordance with HNTE program
Jiangsu	Notice of the Implementing Opinions on the Development of a New Generation of Artificial Intelligence Industry in Jiangsu Province	江苏省新一代人工智能产业发展实施意见	5/29/2018	Artificial Intelligence	<ul style="list-style-type: none"> Calls for a major batch of indigenously innovated new products to be developed in Jiangsu province Calls for secure and reliable smart manufacturing lifecycle big data management and analysis Calls for secure and reliable Informatization adaptation and assembly technology Calls for increasing financial support, including encouragement of all types of provincial funds; calls for exploring creation of an AI industry investment fund that utilizes social and state capital
Jiangsu	Notice on Printing and Distributing the Measures for the Administration of Risk Compensation Funds for Transformation of Scientific and Technological Achievements in Jiangsu Province	关于印发江苏省科技成果转化贷款风险补偿资金管理暂行办法的通知	10/10/2017	Science and technology	<ul style="list-style-type: none"> Provides access to funds for technology companies that were provided certain loans but incurred losses during the technology commercialization process

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
Jiangsu	Notice on Interim Administrative Measures for Provincial Financial Reward Funds for Enterprise Research and Development Expenses in Jiangsu Province	关于印发江苏省企业研究开发费用省及财经奖励资金管理暂行办法的通知	10/10/2017	Research and development	<ul style="list-style-type: none"> • Informs cities of principles to follow—including indigenous innovation—in determining allocation of capital to offset R&D costs for companies in Jiangsu
Jiangsu	Jiangsu Province Opinions on Supporting Special Products and Cultivating Giant Technology Enterprises (2017-2020)	江苏省专精特新产品和科技小巨人企业培育实施意见	3/28/2017	Technology and entrepreneurship	<ul style="list-style-type: none"> • Calls for expedited implementation of Made in China 2025 and Internet+ initiatives • Made in China 2025 sector products produced in Jiangsu will receive privileged certification
Jiangsu	Jiangsu IPR Development Plan	江苏省“十三五”知识产权发展规划的通知	10/28/2016	IPR	<ul style="list-style-type: none"> • Accelerate the construction of cooperation platforms...integrate domestic and foreign technology information channels and excellent technology transfer intermediary service organizations, promote the cross-border transfer of advanced technologies and critical and core technologies • Sets quantifiable targets for indigenous innovation as a proportion of GDP and exports
Jiangsu	Jiangsu Implementation Plan for Made in China 2025	中国制造 2025 江苏行动纲要	6/3/2015	Made in China 2025	<ul style="list-style-type: none"> • Calls for creation of RMB 30 billion Jiangsu Industry and Informatization Fund • Calls for integration of existing funds under provincial and bringing in state capital to support Made in China 2025 priorities • Calls for development of indigenous products that are secure and controllable • Calls for development of a batch of indigenous, secure, and controllable high-end equipment

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
Jiangxi	Administrative Method of Jiangxi Made in China 2025 Special Fund	关于印发《江西省中国制造 2025 专项资金管理办法》的通知 (webpage no longer accessible)	5/16/2018	Made in China 2025	<ul style="list-style-type: none"> Distribute special funds according to guidelines released at the beginning of every year, with evaluations carried out after completion of the project Sets up measures to ensure firms are not cheating/faking access to funds
Jiangxi	Measures to Promote the Development of Artificial Intelligence and Intelligent Manufacturing	关于加快推进人工智能和智能制造发展的若干措施	10/9/2017	Artificial Intelligence and Intelligent Manufacturing	<ul style="list-style-type: none"> Support AI and smart manufacturing enterprises to acquire foreign and domestic high-end brands, encourage relevant industry investment funds to provide support Allocate RMB 10 million to each industrial base for the construction of public platforms Give financial, insurance, rent, subsidy, and tax support, beyond Made in China 2025 levels, for artificial intelligence and intelligent manufacturing Give further incentives to attract domestic and international talent Gives subsidies for AI/smart manufacturing companies that lead the formation of international standards, national standards, and industry standards, as well as companies that obtain domestic/foreign patents
Jiangxi	Jiangxi Methods on Specific Funds for SME Development under Made in China 2025(Trial)	关于印发《中国制造 2025 专项资金支持中小企业发展试行办法》的通知	3/11/2016	Made in China 2025	<ul style="list-style-type: none"> Set up a small and medium enterprise guidance fund, and develop a service system for SMEs

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
Jiangxi	Jiangxi Implementing Opinions on Implementing Made in China 2025	关于贯彻落实《中国制造 2025》的实施意见 (webpage no longer accessible)	1/27/2016	Made in China 2025	<ul style="list-style-type: none"> • Support local formulation of standards for technological projects • Allocate RMB 1 billion each year from the budget to support upgrading of manufacturing industry • Subsidize up to 20% of investment in R&D in relevant areas
Jilin	Notice on the Plan to Arrange for a Special Fund for Provincial Level Key Industrial Development in 2017, Special Fund for SMEs, and Private Economy Development	关于下达 2017 年省级重点产业发展专项资金、中小企业和民营经济发展专项资金因素法安排计划的通知 (webpage no longer accessible)	11/23/2017	Technology and innovation	<ul style="list-style-type: none"> • Approves a special fund for SMEs and Made in China 2025 in Jilin; credit and review agencies will carry out thorough reviews of progress
Liaoning	Liaoning Work Plan on Becoming a Strong Manufacturing Province	辽宁省工业强基工程实施方案(2016-2020 年) (webpage no longer accessible)	10/1/2017	Manufacturing	<ul style="list-style-type: none"> • Enhance local controllability of major manufacturing enterprises • Provide preferential tax policies and further support from specialized funds for advanced manufacturing

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
Liaoning	Policy Clarification on the Administrative Methods for Liaoning's Industry Guidance Fund for the Development of Innovation Projects	《关于印发辽宁省产业创业引导基金直接投资科技创新项目管理暂行办法的通知》政策解读	1/10/2017	Technology and innovation	<ul style="list-style-type: none"> • Delineates the exact nature and availability of the science investment fund (i.e., how much and how long they can be used for, and the monitoring)
Qinghai	Qinghai Action Plan for Made in China 2025	中国制造 2025 青海行动方案 (webpage is no longer accessible)	6/27/2016	Made in China 2025	
Shandong	Action Plan for Shandong Intelligent Production “1+N” Promotion Campaign (2018-2020)	山东省智能制造“1+N”带动提升行动实施方案	6/4/2018	Intelligent manufacturing	<ul style="list-style-type: none"> • Prescribes commercial and economic development targets to city-level governments in Shandong in accordance with the Chinese government’s Made in China 2025 plan, smart manufacturing plans, and other provincially focused outlines • Calls for providing rewards and policy support for qualified companies
Shandong	Shandong 13 th Five Year Plan	山东省国民经济和社会发展第十三个五年规划纲要	02/14/2017	IPR	<ul style="list-style-type: none"> • Support more enterprises, associations, and science research organizations to participate in the formulation of international standards, national standards, and group standards in order to convert more technologies with indigenous IPR into standards

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
Shandong	Draft Regulations on Promoting the Transformation of Scientific and Technological Achievements in Shandong Province	山东省促进科技成果转化条例	12/16/2017	Science and technology	<ul style="list-style-type: none"> • Calls for providing policy support for technological achievements that are commercialized in Shandong province • Instructs county governments in Shandong to support commercialization of technology achievements through government procurement, guiding funds, loan interest subsidies, other subsidies, and compensation of certain costs incurred
Shandong	Notice of the People's Government of Shandong Province on the Internet+ Action Plan (2016-2018)	山东省人民政府关于印发上东“互联网+”行动计划（2016-2018）的通知	8/17/2016	Internet+	<ul style="list-style-type: none"> • Calls for preferential use of Chinese-produced hardware and software and technical services • Calls for “secure, indigenous, and controllable” critical data resource services • Calls for utilizing the province’s “Strategic Emerging Industries VC Fund”, “Equity Investment Guidance Fund”, and “VC Guidance Fund” to support the province’s Internet+ action plan
Shandong	Shandong Action Plan for Made in China 2025	《中国制造 2025》山东省行动纲要	3/28/2016	Made in China 2025	<ul style="list-style-type: none"> • Provides tax incentives, preferential loans and interest rates, and relaxes private investment restrictions for safe and reliable software and hardware industrial control systems

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
Shanghai	Notice of the General Office of the Shanghai Municipal People's Government on Forwarding the Implementation Measures for Shanghai to Encourage the Purchase and Use of New Energy Vehicles	上海市人民政府办公厅关于转发市发展改革委等七部门制定的上海市鼓励购买和使用新能源汽车试试颁发的通知	1/31/2018	New energy vehicles	<ul style="list-style-type: none"> • Defines NEVs as those listed on “The Catalogue for the Promotion and Application of NEVs” or other relevant catalogues • Offers large subsidies for both consumers and producers of electric and new energy vehicles, easier for businesses to get funding and people to get their license as well, outlines exact values of subsidies • Provides free special license plates for imported cars, but does not provide financial support for the sale of imported cars
Shanghai	Notice of the State Council on Printing and Distributing the National Technology Transfer System Construction Plan	国务院关于印发国家技术转移体系建设方案的通知	9/29/2017	Technology and innovation	<ul style="list-style-type: none"> • Allows the science and technology enterprises to offset taxable income by 70% of investment amount • Improve export control system, strengthen the security assessment of technology transfer • Guide companies to establish international technology management enterprises and foreign research centers to develop cooperation with foreign technology transfer organizations, incubators, and venture capital organizations • Launch all types of international technology transfer activities and establish regular communication with technology transfer international organizations • Attract high-level foreigners and groups with experience in technology transfer • Encourage technology transfer from foreign firms
Shanghai	Notice on the Printing and Distributing the Shanghai Fuel Cell Vehicle Development Plan	关于印发上海市燃料电池汽车发展规划的通知	9/28/2017	Fuel cells	<ul style="list-style-type: none"> • Lists specific targets, including number of companies and value of the supply chain, for the fuel cell industry • Offers rhetorical and financial support for fuel cells

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
Shanghai	Notice of the Municipal Economic Information Commission on Printing and Distributing the Implementation Opinions of Shanghai on Promoting the Innovation and Development of Cloud Computing and Cultivating the New Format of Information Industry	使经济信息化委关于印发上海市关于促进云计算创新发展培育信息产业新业态的实施意见的通知	1/4/2017	Cloud computing	<ul style="list-style-type: none"> • Cultivate backbone companies, cultivate 20 companies with operating income exceeding RMB 1 billion • Support cooperation among suppliers and government agencies, large SOEs, and operators of commercial platforms, promote the application of cloud operating systems and cloud bases (and other core products) with indigenous IPR • Promote government procurement of market-based cloud computing services, expand the proportion of cloud computing services procurement • Increase financial support to cloud computing research and industrialization; increase the level of government procurement and advance cloud computing services to enter government procurement catalogues • Establish a catalogue of backbone cloud enterprises, increase major support (e.g. financial policy, market resources, personnel policy) toward companies on the catalogue • Encourage government funds and social funds to participate in software industry M&A fund, encourage Shanghai cloud companies to launch domestic and foreign M&A
Shanghai	Made in China 2025 Shanghai Implementation Plan	印发《“中国制造2025”上海行动纲要》的通知	8/30/2016	Made in China 2025	<ul style="list-style-type: none"> • Accelerate domestic production of high-end medical equipment and core components • Realize domestic production of F-class and H-class gas turbines • Indigenously develop all types of CPU products, and form the capabilities for the research, upgrading, and application of indigenous chips • Grasp indigenous IPR for critical technology for quantum • Indigenously develop and promote networked and intelligent CNC systems

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
					<ul style="list-style-type: none"> • Develop a batch of innovative chemical drugs and high-quality generics with indigenous IPR • Develop stem cell technologies and products with indigenous IPR • Indigenously develop critical materials and components for fuel cell vehicles • Form a system for promoting the integration of standardization and S&T indigenous innovation, form a batch of technical standards with indigenous IPR; establish and perfect the self-announcement of enterprise product standards and encourage innovation in technical standards • Support for deferred tax pilot and international mergers and acquisitions • Create a secure and controllable software ecosystem
Shanghai	Shanghai Science and Technology Innovation "13th Five Year Plan"	上海市科技创新“十三五”规划		Technology and innovation	<ul style="list-style-type: none"> • Possess a batch of industrial core technology with internationally advanced levels and indigenous IPR • Encourage companies to set up high standard company labs, company technology centers, and construction technology research centers to build an indigenous technology and innovation system • Focus on developing standards and technical systems for analyzing measurements for core scientific issues (e.g. genes, environment) that have indigenous IPR • Develop stem cell technology and products that have indigenous IPR • Grasp indigenous IPR for core technology of quantum computing • Establish indigenous and core technology and products to support “cloud, internet, and terminal” intelligent services • Promote the engineering and industrialization of indigenous network security technology such as optical fiber security communications to lead the development of

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
					<p>secure and indigenously innovated cyberspace technologies and industries</p> <ul style="list-style-type: none"> • Form core capabilities and environment for the research, upgrading, and application of indigenous chips • Focus on core technologies such as molecular phenotypic breeding and molecular design breeding (seeds), and cultivate a batch of new varieties with indigenous IPR and market competitiveness • Research a batch of innovative chemical drugs and generic drugs that possess indigenous IPR • For NEVs and autonomous vehicles, support breakthrough and domestic production in sensors, chips, and critical technology • Launch research on a number of medical device products to realize domestic production of products
Shanxi	Shanxi Manufacturing Upgrade Action Plan	山西省制造业振兴升级专项行动方案	2/7/2018	Intelligent manufacturing	<ul style="list-style-type: none"> • Lists “increase indigenous innovation capabilities” as a “main mission” • “Entrusts” specific companies to establish or develop certain manufacturing bases or products/technologies in MIC2025 industries • Calls for increased government procurement of indigenously innovated products • Calls for provincial level special funds to support intelligent manufacturing and preferential tax policies
Shanxi	Shanxi Act Plan of Made in China 2025	中国制造 2025 山西行动纲要	8/1/2016	Made in China 2025	<ul style="list-style-type: none"> • Increase the indigenous innovation capabilities in the manufacturing sector • Speed up the develop of indigenous and controllable technologies

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
Sichuan	Sichuan Action Plan for Made in China 2025	中国制造 2025 四川行动计划	10/23/2015	Made in China 2025	<ul style="list-style-type: none"> Establishes pursuit of Made in China 2025 objectives as an economic development plan for the province Calls for specifically Chinese-made New Energy Vehicles occupying an important position within the industry Identifies improvement of the province's indigenous innovation capabilities in manufacturing as one of ten main tasks in achieving Made in China 2025 objectives
Xinjiang	Xinjiang Action Plan for Made in China 2025	关于印发中国制造 2025 新疆行动方案的通知	5/19/2016	Made in China 2025	<ul style="list-style-type: none"> Supports tax incentives, leveraging of government funds, deductions for corporate R&D expenses, and incentives for technology centers Calls for further financial incentives for medium sized enterprises
Yunan	Implementing Opinions on Carrying Out the Made In China 2025 Plan	关于贯彻《中国制造 2025》的实施意见 (webpage is no longer accessible)	7/22/2016	Made in China 2025	<ul style="list-style-type: none"> Provide beneficial fiscal and taxation policies and absorb capital from other places to create provincial smart manufacturing industry investment funds Subsidize private financial institutions that aid in the realization of Made in China 2025 goals Calls for social credit system for manufacturing enterprises

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
Zhejiang	Notice on the Special Implementation Plan for Major Basic Research of the 13th Five Year Plan for Zhejiang Province	浙江省科学技术厅浙江省自然科学基金委员会关于印发浙江省“十三五”重大基础研究专项实施方案的通知	7/19/2017	13th FYP	<ul style="list-style-type: none"> • Calls for resolving challenges with development of secure and controllable microchips among many other objectives • Calls for establishing a government fund to distribute capital for major fundamental R&D
Zhejiang	Implementing Opinions of Zhejiang Provincial People's Government on Deepening the Integration of Manufacturing and Internet	浙江省人民政府关于深化制造业与互联网融合发展的实施意见	5/2/2017	Internet and manufacturing	<ul style="list-style-type: none"> • Establishes Made in China 2025 and Internet+ as guiding principles in the province's economic development • References a “Made in China 2025 Pilot Demonstration Zone” in Ningbo specifically for provincial support • Identifies indigenous and controllable industrial control systems, Chinese-produced encryption products, and trustworthy cloud services as objectives for achieving industrial information systems upgrading in the province • Encourages local governments and companies to obtain provincial and central government funds for supporting development
Zhejiang	Zhejiang Science and Technology Progress Regulations	浙江省科学技术进步条例	10/14/2016	Science and Technology	<ul style="list-style-type: none"> • Calls for integrating indigenously innovated products and services into a government procurement catalogue for preferential procurement; notes the government should be the first party to procure the products and services when introduced to the market • Companies that meet certain requirements and are located within certain industrial clusters can be granted certain corporate tax subsidies

Province	Policy Name (EN)	Policy Name (CH)	Date Released	Industry	Notes
Zhejiang	Several Opinions of the General Office of the People's Government of Zhejiang Province on Completing the Shortcomings of Science and Technology Innovation	浙江省人民政府办公厅关于补齐科技创新短版的若干意见	10/14/2016	Science and technology	<ul style="list-style-type: none"> • Calls for establishing a catalogue of indigenously innovated products and services that is incorporated into a government procurement catalogue for preferential procurement
Zhejiang	Zhejiang Action Plan for Made in China 2025	关于印发中国制造2025 浙江行动纲要的通知	12/31/2015	Made in China 2025	<ul style="list-style-type: none"> • Identifies Made in China 2025 as a need for building the province into a strong manufacturing base • Identifies Chinese-produced embedded CPUs as a major development area within integrated circuitry • Identifies formation of secure, indigenous, reliable IT industrial systems in the plan's major tasks • Calls for strengthening financial and fiscal policy support for implementing the plan, by guiding funds and loans to major manufacturing sectors
Zhejiang	Opinions of the General Office of the People's Government of Zhejiang Province on Strengthening the Construction of Technology Market System and Promoting the Industrialization of Transformation of Scientific and Technological Achievements	浙江省人民政府办公厅关于进一步加强技术市场体系建设促进科技成果转化产业化的意见	8/31/2015	Science and Technology	<ul style="list-style-type: none"> • Calls for implementing Made in China 2025 and Internet+ strategies for achieving the province's industrial upgrading • Calls for the province to continue providing fiscal support to cities and counties for developing a technology market



ANNEX IV: DRAFT U.S. –CHINA 90-DAY NEGOTIATION DISCUSSION MEMORANDUM

Introduction

We strongly support the Trump Administration’s Section 301 investigation, and the need to address endemic forced technology transfer and technology theft concerns with China. The lack of effective administrative and judicial recourse for U.S. companies in China if regulatory authorities and Chinese commercial partners fail to honor China’s regulations or legal commitments related to a covered investment requires a new approach. Given the legal uncertainties for U.S. companies operating in China—both under administrative and judicial processes—the U.S. government should seek an agreement with China that contains new, far-reaching disciplines on the scope of regulation—and its application—that China uses to force technology transfer.

Such an agreement, if it provides a robust independent enforcement mechanism for disputes, would offer rare and significant opportunity to push forward the U.S.-China economic relationship. Treaty-based, enforceable rights with independent dispute settlement would provide American companies with new opportunities to expand in the world's second largest market and protect their intellectual property.

In addition, a properly-crafted, high-standard text with China is urgently needed to address related challenges that American companies regularly face from Chinese government policies that disadvantage U.S. companies. These policies include, but are not limited to:

- industrial policies designed to foster national champions, both state-owned and state-supported;
- opaque foreign investment approval, regulatory policies, and enforcement practices designed to help domestic companies and achieve industrial policy goals;
- non-commercial behavior of SOEs and other actors in the marketplace, which act under not only government, but Party influence, that often impairs foreign investors’ ability to both access the market and realize the value of their investments; and

This memo therefore proposes important ways to address U.S. industry concerns regarding forced technology transfer in China and other market-distorting, discriminatory policies affecting U.S. companies. We believe that the proposals in this memo are worthy of serious discussion and strong consideration by the U.S. government given the significant known challenges that exist for U.S. companies doing business with China.

Based on extensive discussions and input from our members, the Chamber has focused its attention on the following topics:

- I. Enhanced performance requirements (including forced IP localization and data flows)
- II. Transparency and due process of investment reviews and administrative proceedings (including AML enforcement concerns)
- III. Standards
- IV. Essential Security

In addition to these areas, we also propose new text covering state-owned enterprises and state action that would subject to both state-to-state and investor-state dispute settlement mechanisms.

- I. Disciplines on State Enterprises (including direct disciplines on SOE behavior and clarifying the national treatment obligation)
- II. Adequate coverage of State action

The memo uses the 2012 U.S. Model BIT text as a starting point, but incorporates provisions from other agreements, both bilateral and multilateral to strengthen the coverage and recourse for U.S. companies under any a potential agreement. The Chamber is flexible as to the architecture for any agreement covering technology transfer, SOE, and subsidy concerns with China.

In the memo, all BIT text (both existing and proposed) is italicized. As noted above, except where indicated, we use the existing Model BIT as a baseline. Newly proposed language is underlined, and proposed deletions are ~~struck through~~. In some cases we put forward multiple options to address the same concern.

I. Enhanced performance requirements

Forced technology transfer and IP localization are priority concerns for many U.S. investors. The 2012 Model BIT for the first time included text that expressly prohibits governments from requiring that U.S. investors transfer technology as a condition for investment. This language helpfully ensures that China cannot condition investment on any requirement to transfer a technology, a production process, or other proprietary knowledge to a Chinese entity. It further prohibits forced commitments or undertakings to purchase Chinese technology or to forego particular technology of the investor's choosing where such commitments or undertakings afford protection to Chinese investors or technology. Below are some additional proposals that would clarify and/or expand

these protections, including by ensuring that the text addresses goods, services and all areas of intellectual property. These proposals also explicitly address Chinese restrictions or barriers to the flow of data across borders by creating a new Article 8bis. **A new article for cross-border data is being proposed as to avoid the current Model BIT structure which allows for NCMS to be taken against the prohibition of performance requirements.**

Suggested edits

Article 8: Performance Requirements

1. *Neither Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, directly or indirectly impose or enforce any requirement or enforce any commitment or undertaking.**

** For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a “commitment or undertaking” for the purposes of paragraph 1.*

- (a) *to export a given level or percentage of goods or services;*
- (b) *to achieve a given level or percentage of domestic content;*
- (c) *to purchase, use, or accord a preference to goods or services produced in its territory, or to purchase goods or services from persons in its territory;*
- (d) *to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;*
- (e) *to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;*
- (f) *to transfer a particular technology, a production process, intellectual property or other proprietary knowledge to the Party or a person in its territory*;*

- (g) *to supply exclusively from the territory of the Party the goods that such investment produces or the services that it supplies to a specific regional market or to the world market; ~~or~~*
- (b) (i) *to purchase, use, or accord a preference to, in its territory, a technology, production process, intellectual property, or other proprietary knowledge of the Party or of persons of the Party; ** or*
- (ii) *that prevents the purchase or use of, or the according of a preference to, in its territory, a particular technology, production process, intellectual property, or other proprietary knowledge so as to afford protection on the basis of nationality or to promote a commercial advantage ~~to~~ for its own investors or investments, or to for a technology, production process, intellectual property, or other proprietary knowledge of the Party or of persons of the Party.*

** For greater certainty, “to transfer” for purposes of clause 1(f) and 2(f) means to license, disclose, disseminate, practice, or otherwise make available.*

*** For purposes of this Article, the term “technology of the Party or of persons of the Party” includes technology that is owned by the Party or persons of the Party, and technology for which the Party holds, or persons of the Party hold, an exclusive license.*

2. Neither Party may directly or indirectly condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with any requirement:

- (a) *to achieve a given level or percentage of domestic content;*
- (b) *to purchase, use, or accord a preference to goods or services produced in its territory, or to purchase goods or services from persons in its territory;*
- (c) *to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; ~~or~~*

- (d) *to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;*
- ~~(e) *to transfer a particular technology, a production process, intellectual property or other proprietary knowledge to the Party or a person in its territory, or*~~
 - ~~(i) *to purchase or use, or accord a preference to, in its territory, a particular technology, production process, intellectual property or other proprietary knowledge of the Party or of persons of the Party; or*~~
 - ~~(ii) *that prevents the purchase or use of, or the according of a preference to, in its territory a particular technology, production process, intellectual property or other proprietary knowledge, so as to afford protection on the basis of nationality or to promote a commercial advantage for its own investors or investments or for a technology, production process, intellectual property, or other proprietary knowledge of the Party or of persons of the Party.*~~

3.

- (a) *Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.*
- ~~(b) *Paragraphs 2(e) and (f) do not apply to the results of government-funded research.*~~
- ~~(c) *Paragraphs 1(f) and (h) do not apply:*~~
 - ~~(i) *when a Party authorizes use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement so long as such use does not deprive the intellectual property owner of market-based remuneration for such use, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or*~~

- (ii) *when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws so long as such requirement does not deprive the intellectual property owner of market-based remuneration for such use.****
- (~~ε~~d) *Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c), (f), and (h), and 2(a) and (b) shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:*
- (i) *necessary to secure compliance with laws and regulations that are not inconsistent with this Treaty;*
- (ii) *necessary to protect human, animal, or plant life or health; or*
- (iii) *related to the conservation of living or non-living exhaustible natural resources.*
- (~~ε~~e) *Paragraphs 1(a), (b), and (c), and 2(a) and (b), do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.*
- (~~ε~~f) *Paragraphs 1(b), (c), (f), (g), and (h), and 2(a) and (b), do not apply to government procurement.*
- (~~ε~~g) *Paragraphs 2(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.*
4. *For greater certainty, paragraphs 1 and 2 do not apply to any commitment, undertaking, or requirement other than those set out in those paragraphs.*
5. *This Article does not preclude enforcement of any commitment, undertaking, or requirement between private parties, where a Party did not impose or require the commitment,*

undertaking, or requirement and did not condition the receipt or continued receipt of an advantage on the parties' agreeing to the commitment, undertaking, or requirement.

*** *The Parties recognize that a patent does not necessarily confer market power.*

Article X: Cross-Border Data Flows

1. Neither Party may, in connection with a covered investment, directly or indirectly impose or enforce any requirement; enforce any commitment or undertaking; or, condition the receipt of continued receipt of an advantage in connection with a covered investment on compliance with any requirement:

(a) to purchase, use, or accord a preference to computing facilities* located in its territory or computer processing or information storage services supplied in its territory;

(b) to provide access to, process, or store information including personal information, within its territory; or

(c) that prevents the electronic transfer of information within or outside of its territory.

* "Computing Facilities" means any computing devices used to process, store, or provide access to information.

2. Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraph 1 shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:

(a) necessary to secure compliance with laws and regulations that are not inconsistent with this Treaty;

(b) necessary to protect human, animal, or plant life or health; or

(c) related to the conservation of living or non-living exhaustible natural resources.

II. Transparency and due process of investment reviews and administrative proceedings

U.S. companies have expressed significant concerns with China's transparency and due process practices, including in enforcing its AML. Model BIT Article 11 (Transparency) includes several paragraphs designed to increase transparency and due process protections for investors, including in the context of administrative and judicial proceedings. These provisions do not necessarily address many of the specific challenges that U.S. companies are facing in connection with Chinese AML and other enforcement proceedings. The edits proposed below address the principal concerns that have been raised by U.S. industry:

- *Need to bring clarity and timing around the license approval process*
- *Opportunity to review and rebut facts and arguments in administrative proceedings and to present facts and arguments in defense.*
- *Right to legal counsel in administrative proceedings.*
- *Right against self-incrimination in administrative proceedings.*
- *Avoidance of conflicts of interest in administrative proceedings.*
- *Protection of confidential information in administrative proceedings.*
- *Clarification of the right to seek judicial review.*
- *Opportunity to introduce, review, and challenge evidence in judicial proceedings.*
- *Publication of rules of procedure for administrative hearings.*

Suggested edits

Our proposed edits, which are displayed on top of Article 11(2), (6), and (7) of the U.S. Model BIT text, are as follows:

Article 11: Transparency

*** * * ***

2. Publication

To the extent possible, each Party shall:

- (a) *publish in advance any measure referred to in Article 10(1)(a) that it proposes to adopt; ~~and~~*
- (b) *provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures; and*
- (c) *publish rules of procedure for administrative proceedings convened to determine whether conduct violates its laws or what administrative sanctions or remedies should be ordered for violation of such laws. These rules shall include procedures for introducing evidence in such proceedings, which shall apply equally to all parties to the proceeding.*

*** * * ***

6. Administrative Proceedings

1. With a view to administering in a consistent, impartial, and reasonable manner all measures referred to in Article 10(1)(a), each Party shall ensure that in its administrative proceedings* applying such measures to particular covered investments or investors of the other Party in specific cases:

- (a) *wherever possible, covered investments or investors of the other Party that are directly affected by a proceeding are provided reasonable notice, in accordance with domestic procedures, when a proceeding is initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated, a timeline for conducting the proceeding, reaching a decision, and notifying interested parties of the proceeding, ~~and~~ a general description of any issues in controversy, and the anticipated scope of the proceeding;*
- (b) *such persons are afforded an effective ~~reasonable~~ opportunity, prior to any determination of liability or imposition of penalties or other legal or equitable relief, whether preliminary or final, to*

review all arguments and non-confidential evidence on which the authority may base its determination and to meet with the authority to present facts and arguments in support of their positions prior to any final administrative action when time, the nature of the proceeding, and the public interest permit; and

- (c) such persons are afforded the right to in-person, contemporaneous representation by legal counsel of their choice at all stages of the proceeding and in all interactions with the authority entrusted with administrative enforcement**;
- (d) the authority entrusted with administrative enforcement does not permit any third party to assist the authority in the administrative proceeding, or to review any confidential information provided to the authority by the subject of the investigation or proceeding without the knowledge and consent of that subject, where the third party or authority has an actual conflict of interest or could reasonably be perceived as having such a conflict***;
- (e) all information supplied by a person in connection with the proceeding is handled in such a manner that the person's legitimate commercial interests in the confidentiality of that information are protected;**** and
- (f) its procedures are in accordance with domestic law.*****

* For greater certainty, an administrative proceeding includes any review, inspection, investigation, or other proceeding, or any part thereof (such as a meeting, interview, or hearing), including decisions respecting technical regulations, standards, and conformity assessment procedures, whether formal or informal, conducted by an administrative agency or other authority acting on behalf of such agency.

** For greater certainty, this right includes the right to be accompanied by and confer with foreign legal counsel, so long as such person also is represented by domestic legal counsel.

*** For greater certainty, the Parties agree that an actual or perceived conflict of interest would arise where the third party is, represents, advises, or is affiliated with a party that is, represents, or advises, any other party that has an interest in the administrative proceeding, which would include, but is not limited to, complainants, customers, or competitors of the subject of the proceeding, or an association or other entity whose members include such complainants, customers, or competitors.

**** For greater certainty, the protection of information supplied in connection with a proceeding should not interfere with the obligations set forth in Article 11 (6)(b) or 7(2)(a).

**** For greater certainty, the Parties affirm that their respective procedures prohibit officials, in the context of administrative proceedings, from threatening or otherwise placing pressure on persons subject to such proceedings to make admissions of law or fact against their own interest or to refrain from making arguments in their defense, or discouraging a person from discussing a proceeding with a representative of the other party.

2. Within [ten] working days after an investor of one Party submits an application to the authorities of the other Party for a license, permit, or other authorization to establish, acquire, expand, manage, conduct, operate, or sell or otherwise dispose of an investment, that other Party shall:

- (a) issue an official acknowledgement of receipt of the application; and
- (b) initiate examination of the application or provide the investor with a statement in writing on why the application cannot be examined.

7. Review and Appeal

1. Each Party shall establish or maintain judicial, quasi-judicial, or administrative tribunals with separate ~~or~~ procedures through which a covered investor of the other Party may obtain for the purpose of the prompt review and, where warranted, correction of final administrative actions regarding matters covered by this Treaty. Such tribunals shall be impartial, independent of any office or authority entrusted with administrative enforcement or executive powers, independent of influence from any political party, and shall not have any substantial interest in the outcome of the matter.
2. Each Party shall ensure that, in any such tribunals or procedures, the parties to the proceeding are provided with the right to:
 - a) an effective opportunity to support or defend their respective positions, which shall include the right to present evidence in its defense and to be heard in the proceeding; in particular, each Party shall ensure that the parties have a reasonable opportunity to (i) cross-examine any witnesses or other persons who testify in the hearing; (ii) to review and rebut [all] the evidence and any other relevant information provided to or obtained by the authority or tribunal; and (iii) to review all exculpatory or other facts or materials obtained by the authority and all records of communications between the authority and third parties in connection with the proceeding, consistent with the applicable discovery rules of the tribunal in question; and

- b) *a decision based on the evidence and submissions of record or, where required by domestic law, the record compiled by the administrative authority.*
3. *Each Party shall ensure, subject to appeal or further review as provided in its domestic law, that such decisions shall be implemented by, and shall govern the practice of, the offices or authorities with respect to the administrative action at issue.*
4. *Each Party shall, upon request, enter into consultations with the other Party if that Party has cause to believe that the Party addressed failed to comply with any provision of paragraph 6 or 7 of this Article with respect to an investor or investment of the requesting Party. The Party addressed shall accord full and sympathetic consideration to, and shall afford adequate opportunity for, consultations with the requesting Party. Failure to comply with any provision of paragraph 6 or 7 of this Article shall render the respective administrative or judicial decision null and void.*⁹

III. Standards

U.S. industry has expressed numerous concerns on China's use of technical regulations and standards to engage in discriminatory and trade-restrictive practices.¹⁰ The only provision in the U.S. Model BIT that addresses standards is Article 11(8), but this provision focuses only on standards *development*, not other standards-related issues. The edits proposed below address the principal concerns that have been raised by U.S. industry:

- *Right to vote on proposed standards and applicable policies.*
- *Opportunity for comment by non-participants.*
- *Measures based on standards developed without right of foreign participation.*
- *Reliance on international standards.*
- *Non-discriminatory treatment of standards.*
- *Non-discriminatory conformity assessment and testing procedures.*
- *Protection of confidential information.*

⁹ Article 11.7(4) would be subject exclusively to state-to-state dispute settlement.

¹⁰ The U.S. Model BIT follows the terminology of the WTO Agreement on Technical Barriers to Trade ("TBT Agreement") in using "standard" to mean a technical document with which compliance is voluntary, and "technical regulation" to mean one with which compliance is mandatory. This memorandum uses these terms in the same way.

Suggested edits

Our proposed edits, which are displayed on top of Article 11(8) of the U.S. Model BIT text, are as follows. **We also believe that at a minimum, Article 11 (8a) should be made subject to investor-state dispute settlement:**

Article 11: Transparency

* * * *

8. Standards-Setting

- (a) *Each Party shall allow persons of the other Party to comment on and participate in the development of standards and technical regulations by its central government bodies and state enterprises and shall require the written consent of persons of the other Party before incorporating such person's technology into a standard or technical regulation.* Each Party shall allow persons of the other Party to comment on and participate in the development of these measures, and the development of conformity assessment procedures by its central government bodies and state enterprises, on terms no less favorable than those it accords to its own persons, and shall take full account of and respond to any such comments received.*

** For purposes of this Paragraph 8 and for greater certainty, participation includes the right to make a technical contribution to and vote on a proposed standard or technical regulation and to assist in developing the patent licensing and other policies applicable to such measures on terms no less favorable than those extended to other participants. A Party may satisfy this obligation by, for example, providing interested persons a reasonable opportunity to provide comments on the measure it proposes to develop and taking those comments into account in the development of the measure.*

- (b) *Each Party shall [[take such reasonable measures as may be available to it to]] ensure ~~recommend~~ that non-governmental ~~standardizing~~ bodies in its territory allow persons of the other Party to comment on and participate in the development of standards by those bodies and that such bodies require the written consent of persons of the other Party before incorporating such person's technology into a standard. Each Party shall take such reasonable measures as may be available to it to ensure ~~recommend~~ that non-governmental bodies in its territory allow persons of*

the other Party to comment on and participate in the development of these standards, and the development of conformity assessment procedures by those bodies, on terms no less favorable than those they accord to persons of the Party and that such bodies take full account of and respond to any such comments received.

NOTE: As an alternative (or in addition) to the proposed “reasonable measures” text in 8(b), above, another option would be to add the following as a final sentence to this paragraph:

*“Each Party agrees to use voluntary, consensus standards in lieu of government-unique standards or technical regulations except where doing so would be inconsistent with law or otherwise impractical.**

** For greater certainty, “voluntary, consensus standards” are standards developed or adopted by voluntary consensus bodies, both domestic and international. These standards include provisions requiring that owners of relevant intellectual property have agreed to make that intellectual property available on a non-discriminatory, reasonable-royalty basis to all interested parties.*

NOTE: As an alternative to the proposed additions relating to “comments” in paragraphs 8(a) and 8(b), above, another option would be to add the following text as a new sub-paragraph:

(c) Each Party shall, before the adoption of a technical regulation or the adoption or approval of a standard by a government body or state enterprise, allow a period of at least 60 days for the submission of comments on the draft regulation or standard by persons of the other Party and shall take fully into account any comments submitted by any person of the other party. No later than at the start of the comment period, such body or enterprise shall publish a notice announcing the period for commenting in an appropriate publication.

*(d) **[Obligation to rely on relevant international standards]***

Where technical regulations or standards are required and relevant international standards exist or their completion is imminent, each Party shall use them, or relevant parts of them, as a basis for their technical regulations or standards. Each*

Party shall avoid using technical regulations or standards that deviate from relevant international standards except when such international standards or relevant parts would be an ineffective means for the fulfillment of the legitimate objectives pursued. Where a Party does not use a relevant international standard, it shall ensure that its technical regulation or standard is not prepared, adopted, or applied with a view to or with the effect of creating unnecessary obstacles to international trade.

* For greater certainty, the requirement to “use” relevant international standards or relevant parts of them includes the requirement to observe any licensing commitments made by owners of standards-essential patents in connection with the international standard. “International standard” includes voluntary consensus standards developed by non-governmental bodies outside the territory of a Party.

(e) **[Non-discriminatory treatment of standards]**

Except where a Party has adopted a relevant technical regulation, the Party shall not adopt any measure relating to a specific standard or set of standards with a view to or with the effect of creating unnecessary obstacles to investment or trade.

(f) **[Non-discriminatory conformity assessment and testing]**

Each Party shall take reasonable measures to ensure that, in cases where a positive assurance of conformity with a technical regulation or standard is required, such conformity assessment procedures extend treatment to products originating or certified in the territory of the other Party, to suppliers of the other Party, and to products that implement standards promulgated by bodies other than those in the territory of the Party, treatment that is no less favorable than the Party extends to its own products, suppliers, and standards.

(g) **[Protection of confidential information]**

The Parties shall take reasonable measures to ensure that, in cases where a positive assurance of conformity with a technical regulation or standard is required, (i) any confidential information requested is essential to show conformity; and (ii) anything supplied by a person of the other Party in connection with such conformity assessment is handled in such a manner that the person's legitimate commercial interests are protected.

~~(e)~~ This Subparagraphs 8(a) and 8(b) does not apply to:

(i) sanitary and phytosanitary measures as defined in Annex A of the World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures; or

(ii) purchasing specifications prepared by a governmental body for its own production and ~~or~~ consumption requirements.

(i) For purposes of subparagraphs 8(a) through ~~and~~ 8(~~e~~), “central government body”, “standards”, “technical regulations”, international standards, non-governmental body, and “conformity assessment procedures” have the meanings assigned to those terms in Annex 1 of the WTO Agreement on Technical Barriers to Trade and by the decisions of the WTO TBT Committee.* Consistent with Annex 1, the three latter terms do not include standards, technical regulations or conformity assessment procedures for the supply of a service other than a technology service.

* For greater certainty, a standardizing body is “subject to the control of the central government” if it acts under the instructions of, or is directed, funded, or controlled by, a central government body.

IV. Essential Security

There are concerns that China will likely abuse the essential security provision found in the treaty. The Chamber appreciates that sensitivity regarding the essential security exception. That said, several options are provided below. **The Chamber would likely not support re-insertion of language in certain past BITs that determinations of essential security are self-judging.**

Suggested edits

These proposed edits are based on Article 18 (Essential Security) of the Model BIT.

[Option 1]

NOTE: This language is based on past U.S. BITs and expressly calls out economic objectives as an inappropriate basis for invoking the essential security exception.

Nothing in this Treaty shall be construed:

1. *to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or*
2. *to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests;*
 - a) *in time of war or national emergency, or*
 - b) *if not arising from a state of war or national emergency, with a clear and direct relationship to the essential security interests, as opposed to economic objectives, of the Party involved.*

[Option 2]

NOTE: This option includes the explicit reference above and also is based on the OECD Guidelines.

A. *Nothing in this Treaty shall be construed:*

1. *to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or*

2. *to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests;*

a) in time of war or national emergency, or

b) if not arising from a state of war or national emergency, with a clear and direct relationship to the essential security interests, as opposed to economic objectives, of the Party involved.

B. An investment restriction based on essential security concerns should be:

1. proportional to the essential security threat to which the measure responds and avoided when other existing measures are adequate and appropriate;

2. based on rigorous risk assessment techniques; and

3. tailored to the specific risks posed by specific investment proposals, including by providing for policy measures (including risk mitigation agreements, where appropriate) that address security concerns but fall short of blocking investments.

I. Disciplines on State Enterprises

Given the pervasiveness of state-owned and state-invested enterprises (“SOEs”) in the Chinese economy, it is critical that the USG explore additional disciplines on these enterprises in an agreement with China.

Under Section A, we propose several avenues to address SOE behavior. We include a range of SOE-specific obligations. Other sections in this memorandum also indirectly address SOE behavior, including those related to forced IP localization, standards setting, and Anti-Monopoly Law (“AML”) enforcement.

The SOE-specific suggestions below use, as a starting point, Chamber proposals for past agreements. The proposed provisions below also focus on China’s World Trade Organization (“WTO”) obligations and its SOE-related commitments under paragraph 46 of the WTO Working Party Report on the Accession of China.

The suggested text also seeks to address regulatory impartiality with regard to SOEs and private actors, subsidies, commercial exceptions to sovereign immunity, and an express requirement not to require or encourage state enterprises to act in a manner inconsistent with a potential agreement. Finally, we include some language on designated monopolies.

Under Section B, with regard to national treatment, we provide for a clarifying footnote to article 3(1) of the 2012 Model BIT. We also have included the addition of “any of” to the national treatment obligation to underscore the principle that it applies to any Chinese investors, including SOEs. This last recommendation has been in prior Chamber proposals as well.

Finally, under Section C, we include proposed language on market access provisions for consideration.

A. Stand-Alone Obligations on State Enterprises

These provisions could be a stand-alone article or these concepts could be incorporated through an Annex, as long as the Annex is an integral part of an agreement. In this section, unless otherwise noted, this language would be entirely new to the Model BIT.

The Chamber would propose making the SOE obligations subject to ISDS.

Suggested edits

Article X: State Enterprises

A. Affirmation of World Trade Organization Commitments on State Enterprises

NOTE: This approach mirrors the EU proposal in the Trans-Atlantic Trade and Investment (“TTIP”) negotiations and expressly includes services commitments related to monopoly service suppliers.

1. The Parties affirm their existing rights and obligations with respect to each other under:
 - (a) Article XVII, paragraphs 1 through 3, of the General Agreement on Tariffs and Trade 1994;
 - (b) the Understanding on the Interpretation of Article XVII of the GATT 1994;
 - (c) Article VIII of GATS, paragraphs 1, 2 and 5; and
 - (d) for China, under paragraphs 46 of the Report of the Working Party on the Accession of China to the WTO,

which are hereby incorporated into and made part of this Treaty.

B. Further Disciplines Related to State Enterprises

NOTE: This section is based in part on a Chamber April 2013 proposal.

NOTE: Paragraph B(1)(b) below tracks the language of GATT Article XVII.

1. Each Party shall ensure that any state enterprise that it establishes or maintains:
 - (a) accords non-discriminatory treatment in the sale of its goods or services to covered investments and in its purchase or sale of goods or services from covered investments; and
 - (b) acts solely in accordance with commercial considerations in its purchases or sales of goods or services, such as with regard to price, quality, availability, marketability, transportation, quantity, value, nationality of the supplier, country of origin, and other terms and conditions of purchase or sale of any goods, services, or intellectual property purchased, licensed or sold.

2. Each Party shall ensure that its state enterprises do not either directly or indirectly, including through its dealings with its parent, subsidiaries, or other enterprises with common ownership:
- (a) enter into agreements that restrain competition on price or output or allocate customers for which there is no plausible efficiency justification, or
- (b) engage in exclusionary practices that substantially lessen competition in a relevant market in a Party's territory to the detriment of consumers.

NOTE: The language below expands upon the commitments made by China in paragraph 46 of China's Working Party Report on its accession to the WTO.

3. Each Party shall not influence, directly or indirectly, commercial decisions of its state enterprises, including on the quantity, value, price, quality, availability, marketability, transportation, nationality of the supplier, country of origin, and other terms and conditions of purchase or sale of any goods, services, or intellectual property purchased, licensed, or sold, except in a manner consistent with this Treaty.

4. Impartial Regulation

NOTE: This provision addresses regulatory impartiality with regard to SOEs and private actors. The focus is on implementation and impartial enforcement.

- (a) Each Party shall ensure that all measures are implemented and enforced in an impartial manner with respect to all enterprises, and that measures are not implemented or enforced in a manner that promotes the commercial activities of, or otherwise competitively advantages, state enterprises as compared to other enterprises.

NOTE: Text in (b) is from EU TTIP proposal.

- (b) Each Party shall ensure that any regulatory body responsible for regulating an enterprise is independent from, and not accountable to, any state enterprise.

5. Subsidies

NOTE: Below we offer language to both spur thinking and as a placeholder for consideration based on what the USG has done in past agreements. The first two options explicitly cross-reference the WTO SCM Agreement. The third provision is based on the SCM Agreement but is a stand-alone provision. Last, following the three options below, we have included a proposal to address a sector-specific subsidies issue in financial services.

[Option 1]

Each Party shall refrain from granting to state enterprises specific subsidies that are contingent, in law or in fact, whether solely or as one of several other conditions, (i) upon export performance of goods or services, or (ii) upon the use of domestic over imported goods or services. For purposes of this paragraph, a specific subsidy has the meaning afforded in Articles 2 and 8 of the WTO SCM Agreement.

[Option 2]

Each Party affirms its existing rights and obligations with respect to each other under Articles 2, 3, and 8 of the WTO SCM Agreement prohibiting the grant of certain specific subsidies to state enterprises, which are hereby incorporated into and made part of this Treaty.

[Option 3]

Each Party shall refrain from granting to state enterprises specific subsidies that are contingent upon export performance, whether of goods or services, or are conditioned upon the use of domestic over imported goods or services. For purposes of this paragraph, a specific subsidy is one that (i) limits access to certain enterprises, (ii) has subjective, rather than objective, criteria or conditions, or (iii) notwithstanding any appearance of non-specificity, there are reasons to believe that the subsidy may in fact be specific because a limited number of enterprises are eligible, there is predominant use by certain enterprises, disproportionately large amounts of subsidy are granted to certain enterprises, or the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy leads to the conclusion that the subsidy is specific.*

* In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered.

NOTE: Financial Services Subsidies

Description: China is gradually transforming its banking system from a centralized, government-owned and government-controlled provider of loans into an increasingly competitive market. However, some would argue that the transformation into different types of banking entities has not changed the dynamic of state influence and control, particularly with respect to how these banks provide low-cost credit to Chinese state-owned enterprises and other Chinese domestic companies. According to a 2012 Congressional Research Report^[1] “China’s Banking System: Issues for Congress,” three banks in China remain fully government-owned. Five of the previously state-owned policy banks have been transformed into joint-stock companies, with different categories of shareholders, and are supposedly operating as commercial banks. In four of the five of these “equitized banks”, the majority of the shares are non-tradable shares held by the People’s Bank of

^[1] China’s Banking System: Issues for Congress, <http://fas.org/sgp/crs/row/R42380.pdf>

China (PBOC), the Ministry of Finance (MOF), or other government entities, raising questions about their degree of separation from government control. The report notes that despite the financial reforms, allegations of various forms of unfair or inappropriate competition have been leveled against China's current banking system. Some observers maintain that China's banks remain under government-control, and that the government is using these banks to provide inappropriate subsidies and assistance to selected Chinese companies.

Policy Consistency: The ongoing negotiation potentially provides an important opportunity to discipline the practice of the Chinese government giving subsidies to state-owned or influenced banks. Closing this practice would reduce the ability of these banks to provide subsidies through low-cost credit to other state-owned enterprises or Chinese domestic companies. Disciplining subsidies to a state-owned bank or other financial institution is consistent with U.S. policy and practice in the context of the financial services chapter of free trade agreements (FTAs) and in the General Agreement on Trade in Services. Financial services chapters of FTAs apply to the same investment landscape for financial institutions and investors and investments of investors in financial institutions as the investment chapter applies to all other sectors of the economy. The US Model BIT in Article 14.5(b) excludes the application of national treatment, most-favored nation treatment and senior management and boards of directors to subsidies or grants provided by a Party, including government supported loans, guarantees, and insurance. This practice is parallel to the investment chapter of FTAs (see KORUS Investment Chapter Article 11.12.5(b)). This carve out does not exist in US FTA financial services chapters (see KORUS Article 13.9 and NCM article of previous FTAs). Under US FTA financial services chapters, a Party may not provide a subsidy or grant, including government supported loans, guarantees and insurance to a financial institution or to an investor in a financial institution unless it has negotiated an exception to do so in its non-conforming measures, i.e., the negative list.

BIT Text Change: From a text perspective, an agreement would need to include text to carve back in the discipline for subsidies to state-owned financial institutions and to domestic Chinese financial institutions. This could be accomplished by adjusting the language in Article 14.5(b) such that the existing carve out for subsidies from national treatment, MFN and senior management and boards of directors does not include financial institutions or investors of investments in financial institutions. Another option is to over-ride the existing carve-out in Article 14.5(b) in Article 20, which sets out certain specific rules on financial services, by carving in the application of national treatment, MFN, and senior management and boards of directors to subsidies. From the business community perspective, this policy change in the BIT is a win-win. It addresses a policy issue that is related to concerns regarding state-owned or state-influenced companies and continues to be consistent with the existing USG policy approach.

NOTE: Paragraph 6 is based on the commercial exception to the U.S. Foreign Sovereign Immunities Act and is drafted to the best of our knowledge to align with the approach taken in the TPP.

6. Each Party shall ensure that its state enterprises submit to the jurisdiction of other the other Party's courts in any civil case:

(a) in which the action at issue is based upon a commercial activity of the state enterprise carried on in the territory of the other Party; or

(b) upon an act performed in the territory of the other Party in connection with a commercial activity of the state enterprise elsewhere; or

(c) upon an act outside the territory of the other Party in connection with a commercial activity of the state enterprise elsewhere and that act causes a direct effect in the territory of the Party.

7. Nothing in this treaty shall be construed to prevent a Party from establishing or maintaining a state enterprise.

NOTE: Paragraph 8 is modeled on the EU TTIP proposal. This could be an additional way to reach informal government action.

8. A Party shall not require or encourage a state enterprise to act in a manner that would be inconsistent with this Treaty if the Party itself were to engage in that conduct.

NOTE: There are concerns related to designated monopolies that are not believed to be captured by other provisions in the BIT text, the designated monopolies text below is based on and modified from the Singapore FTA.

9. Designated Monopolies

(a) Nothing in this Treaty shall be construed to prevent a Party from designating a monopoly.

(b) Where a Party designates a monopoly and the designation may affect the interests of persons of the other Party, the Party shall provide written notification, in advance wherever possible, to the other Party of the designation.

(c) Each Party shall ensure that any privately-owned monopoly that it designates after the date of entry into force of this Treaty and any government monopoly that it designates or has designated:

(i) acts in a manner that is not inconsistent with the Party's obligations under this Treaty wherever such a monopoly exercises any regulatory, administrative, or other governmental authority that the Party has

delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions, or impose quotas, fees or other charges;

(ii) acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale, except to comply with any terms of its designation that are not inconsistent with subparagraph (iii) or (iv);

(iii) provides non-discriminatory treatment to covered investments of the other Party in its purchase or sale of the monopoly good or service in the relevant market; and

(iv) does not engage, either directly or indirectly, including through its dealings with its parent, subsidiaries, or other enterprises with common ownership, in anticompetitive practices in a non-monopolized market in its territory that affect covered investments. Such anticompetitive practices may include, but are not limited to:

(a) selling non-monopoly products or services at prices below cost;

(b) tying products or imposing unreasonable trading conditions;

(c) excluding competitors from access to otherwise public or shared infrastructure;

(d) refusal to deal or exclusionary dealing; and,

(e) any other conduct that results, directly or indirectly, in anticompetitive effect.

B. Article 3: National Treatment

Suggested edits

NOTE: We believe it is important to clarify both the comprehensiveness of NT and its application to SOEs as follows:

*Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of any of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.**

* For greater certainty, an enterprise shall not be deemed in unlike circumstances to an investor of the other Party on the ground that it is an enterprise owned or controlled by a Party.

C. Specific Market Access Provisions Related to Establishment of Investments

The Canada-European Union Comprehensive Economic Trade Agreement (“CETA”) includes market access provisions on investment that are modeled on similar commitments for services in GATS Article XVI and U.S. FTAs. It is worth considering whether the approach taken in CETA on investment in this respect are worth considering an agreement with China.

NOTE: Language based on CETA, GATS Article XVI, and U.S. FTAs.

Article X: Market Access Regarding the Establishment of Investments

With regard to the establishment of investments of the other Party in its territory, a Party shall not adopt or maintain, either on the basis of a political subdivision or on the basis of its entire territory, measures that:

(a) impose limitations on:

(i) the number of enterprises that may carry out a specific economic activity whether in the form of numerical quotas, monopolies, exclusive suppliers or the requirement of an economic needs test;

(ii) the total value of transactions or assets in the form of numerical quotas or the requirement of an economic needs test;

(iii) the total number of operations or the total quantity of output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;

(iv) the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment;

(v) the total number of natural persons that may be employed in a particular sector or that an enterprise may employ and who are necessary for, and

directly related to, the performance of economic activity in the form of numerical quotas or the requirement of an economic needs test; and

(b) restrict or require specific types of legal entity or joint venture through which an enterprise may carry out an economic activity.

II. Adequate Coverage of State Action under the BIT

This section examines the definition of “measure” and “state enterprise” under the treaty, as well as language regarding the “scope” of treaty coverage for state action. We also include here a discussion of means to ensure that in dispute settlement proceedings China participates in the process in good faith with regard to documents to be provided in response to document production requests relevant to the dispute at hand.

A. Definition of Measure

There are concerns about “informal” or “non-binding” government mandates that can influence the behavior of state-owned and state-favored enterprises to the detriment of U.S. business. We provide several options below that clarify that informal guidance that is viewed as authoritative and with which SOEs and other actors believe they must comply qualifies as a “measure” under a potential agreement.

Suggested edits

These proposed edits are based on the definition of “measure” in Article 1 (Definitions) of the Model BIT.

[Option 1]

“measure” includes any law, regulation, procedure, requirement, ~~or~~ practice, or other instrument or directive having similar effect.

[Option 2]

“measure” includes any law, regulation, procedure, requirement, ~~or~~ practice, or other instrument or directive adopted by a Party that is viewed as authoritative and complied with by private or state enterprises, whether or not the measure is formally binding as a matter of domestic law.

B. Definition of State Enterprise

The definition of state enterprise in an agreement with China should be bolstered significantly. One option for China might be a definition modeled on the Singapore FTA:

State enterprise means: for China, an enterprise owned, or controlled through ownership interests, by that Party or an enterprise in which that Party has effective influence.

Effective influence exists where the government and its government enterprises, alone or in combination have the ability to exercise substantial influence over the composition of the board of directors or any other managing body of an entity, to determine the outcome of decisions on the strategic, financial, or operating policies or plans of an entity, or otherwise to exercise substantial influence over the management or operation of an entity.

C. Article 2: Scope and Coverage

It is important to address the role of the State in directing SOE activity in China to make explicit that China is responsible for the actions of SOEs where there is evidence that the specific SOE conduct at issue was directed or controlled by a Chinese government entity. Currently, the article on scope focuses only on a formal delegation of governmental authority.

Suggested edits

Our proposed edits are based on Article 2(2) of the Model BIT and on the ILC Draft Articles on State Responsibility.

[Option 1]

2. *A Party's obligations under Section A shall apply:*
 - (a) *to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party;**
 - (b) *to a state enterprise or other person where the conduct at issue is under the instructions of, directed, or controlled by a Party; and*

~~(a)~~ to the political subdivisions of that Party.

** For greater certainty, government authority that has been delegated includes a legislative grant, and a government order, directive or other action transferring to the state enterprise or other person, or authorizing the exercise by the state enterprise or other person of, governmental authority.*

[Option 2]

2. A Party's obligations under Section A shall apply:

(a) to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party or where a state enterprise or other person acts under the instructions of, or under the direction or control of, a Party in carrying out the conduct at issue,* and

(b) to the political subdivisions of that Party.

** For greater certainty, government authority that has been delegated includes a legislative grant, and a government order, directive or other action transferring to the state enterprise or other person, or authorizing the exercise by the state enterprise or other person of, governmental authority.*

D. “State secrets” in dispute settlement

Concerns have been expressed that China may abuse a “state secrets” privilege to justify withholding relevant information in dispute settlement proceedings. Investor-state dispute proceedings generally lack the broad discovery provisions that are available in U.S. domestic proceedings, and the tribunal has little authority to compel a state actor to produce state documents. Generally, the consequence of a state’s unjustified withholding of information relevant to an international dispute is an adverse inference, *i.e.*, the tribunal hearing the case will infer that the information withheld is unfavorable to the withholding party and decide the case based on that inference.

Suggested edits

Our proposed edits are to Article 29(3), which states that nothing in the dispute settlement provisions of the BIT “requires a respondent to disclose protected information or to furnish or

allow access to information that it may withhold in accordance with . . . Article 19 [Disclosure of Information Article].”

Article 19: Disclosure of Information

Nothing in this Treaty shall be construed to require a Party to furnish or allow access to confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private.

Article 29: Transparency of Arbitral Proceedings

* * * *

3.

(a) Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 18 [Essential Security Article] or Article 19 [Disclosure of Information Article].

(b) Notwithstanding paragraph (a), if a Party seeks to withhold information sought by a disputing party or the tribunal in an arbitral proceeding, the tribunal has the authority to determine whether withholding the information is justified. This includes the authority to determine whether the information at issue would impede law enforcement, be contrary to the public interest, or would prejudice the legitimate commercial interests of particular enterprises, public or private.