UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

United States Council for International Business

STATEMENT
on
China's Compliance with its World Trade Organization (WTO) Commitments

Submission to the United States Trade Representative (USTR)

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Docket Number: USTR-2018-0030

Introduction

The United States Council for International Business (USCIB) welcomes the opportunity to provide comments and recommendations on China's compliance with its World Trade Organization (WTO) commitments. In this response to the August 24th Federal Register notice, USCIB provides the Office of the United States Trade Representative with member feedback received to date concerning China's fulfillment of its commitments in several key industry areas and more broadly with regard to regulations related to intellectual property enforcement, transparency, and standards.

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USCIB and its members understand and appreciate that U.S.-China economic relations are complex and multifaceted, and American business holds a direct and important stake in this relationship and in its success. China's emergence as one of the world's largest economies makes it clear that its practices and policies have an increasing impact on its trading partners, and engagement with China can be challenging. Engagement and exchange of best practices with the Chinese government and business community continue to be a productive approach to addressing challenges, despite the current discontinuation of several of the structured high-level dialogues between the two governments. China's growing importance in the global economy provides strong incentives for both countries to work together to address our common challenges and responsibilities.

The current China 301 actions are very disruptive to U.S. business, and do not show any indication that they will in fact resolve the underlying issues and change China's behavior regarding intellectual property theft and forced technology transfer. In addition, as our submission lays out, there are many more issues beyond those that need to be addressed. Accordingly, high-level dialogues between the United States and China continue to be of the utmost importance. We also urge both countries to utilize the full range of multilateral forums in addition to the WTO, including Asia-Pacific Economic Cooperation (APEC) Forum and the Organisation for Economic Co-operation and Development (OECD), to work toward improved commercial relations.

On China's fulfillment of its WTO obligations, USCIB acknowledges the efforts China has made since joining the WTO in 2001 to meet its obligations under the terms of its accession agreement. However, there still remain significant WTO obligation compliance concerns. USCIB notes that its member concerns extend beyond those discussed in this paper, including government procurement; until China officially accedes to and implements the WTO Government Procurement Agreement (GPA), government procurement program concerns remain among USCIB members.

This USCIB submission contains comments related to these concerns in two parts. The first part addresses selected horizontal areas of concern that transcend industry sectors, and the second section includes specific sectoral industry concerns. We have summarized some important horizontal concerns below that are further detailed, with examples, in this document:

- **IT Security Measures**: China has enacted a variety of trade-restrictive and overly prescriptive requirements on information technology (IT) under the guise of protecting security that will have widespread impact on companies' operations across different economic sectors. The Cybersecurity Law, which went into effect in June 2017, established a number of burdensome restrictions on the cross-border flow of data and established intrusive security reviews of equipment and services used by network operators and operators of critical information infrastructure (CII). USCIB members urge the U.S. government to continue to press for full suspension of all existing and proposed measures involving trade-restrictive requirements in this area.

- **China's Antimonopoly Law (AML)**: Chinese antitrust enforcement authorities continue to use the AML as a tool to advance industrial policies goals rather than to protect competition. While we support China's efforts to address anti-competitive practices, U.S. companies have repeatedly experienced Chinese regulators using AML enforcement absent sufficient economic proof of market power or anti-competitive harm or any transparency regarding analyses that may have been conducted. In addition, anecdotal evidence indicates that the AML enforcement agencies often disregard basic norms of fairness, due process, and transparency. USCIB members urge the U.S. government to continue to focus on this issue and its effects on U.S. companies.

- **Intellectual Property Rights (IPR)**: While USCIB members acknowledge improved IPR laws and combating of IPR violations in China, there continue to be major concerns across industry sectors such as in audiovisual, software, agricultural biotechnology and chemicals. USCIB members urge the U.S. to continue to press for increased protection of IPR through enhanced and efficient enforcement options, better coordination and enforcement by Chinese authorities, and more severe penalties.

- **National Treatment and Non-Discrimination**: Chinese authorities continue to use a variety of policy tools and regulatory measures – including AML enforcement (described above), technology standards policies, IPR enforcement practices, and licensing and investment reviews – to compel transfer of U.S. IP or technologies to Chinese entities at below-market rates and to exclude U.S. companies from full and equal participation in the Chinese market. USCIB members continue to call on China to abide by their WTO commitments of national treatment and non-discrimination and ensure a competitive market that allows for foreign business participation on a level playing field with domestic Chinese firms.

- **Regulatory Environment**: China should fairly and transparently develop, promulgate and enforce regulations and other legal norms. However, USCIB members continue to experience business obstacles related to institutions, rulemaking practices and regulatory enforcement. Acceptance of international standards and practices and improved coordination among regulators in China would create a more transparent and predictable framework.

- **State-Owned Enterprises (SOEs)**: As companies increasingly face competition from Chinese SOEs, within China, in third markets and in the United States, companies believe that it is critical that the U.S. government use all available tools to ensure fair competition through level playing fields. Chinese SOEs receive favorable treatment (e.g. subsidies, credit, regulatory advantages) which distorts competition.

As always, USCIB would be pleased to meet with officials at U.S. agencies to discuss recommendations and concerns at greater length.

About USCIB:

USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and regulatory coherence. Its members include top U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. As the U.S. affiliate of the International Chamber of Commerce, the International Organization of Employers and the Business and Industry Advisory Committee to the OECD, USCIB has a unique global network through which it provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade and investment. More information is available at www.uscib.org.

I. CROSS-SECTORAL BUSINESS ISSUES

Anti-Monopoly Law (AML)

While the Chinese leadership continues to pledge that the market will play a greater role in China's economy, competition regulators continue to use the AML to intervene in the market in an effort to advance industrial policy goals. Developments continue to suggest that these efforts are part of broader and coordinated effort by Chinese authorities to use a variety of policy tools – including technology standards policies, IPR enforcement practices, and licensing and investment reviews– to reduce China's perceived dependence on foreign IP while protecting and promoting domestic Chinese companies. National Development Reform Commission (NDRC) officials in particular have been publicly outspoken about the important role that industrial policy considerations should play in antitrust enforcement in China and their intention to broaden significantly the scope of their review of competitive practices in a wide range of "strategic sectors," including automobiles, telecommunications, banking and petroleum. There are also concerns that the AML enforcement agencies – in particular the State Administration for Industry & Commerce (SAIC) and the NDRC – do not base their enforcement decisions on the sort of detailed economic assessment of the competitive effects of companies' conduct that has become standard in most competition law enforcement regimes around the world; that they are not sufficiently transparent; and that companies are not permitted adequately and meaningfully to defend themselves against allegations of anticompetitive conduct or otherwise to provide justifications for their conduct. Furthermore, there are concerns that the AML enforcement agencies' practice of consulting with other ministries and agencies, or other stakeholders, regarding specific matters is not transparent to companies that are being investigated.

Encouragingly, Chinese authorities have also used the AML to prevent undue concentrations of market power, combat cartels and abuse of market dominance, and pursue other legitimate antitrust goals. However, in many cases involving foreign companies, China's AML enforcement agencies have fused China's competition laws and related statutes to advance China's industrial policy goals, including in cases where there was no evidence of abuse of market power or anti-competitive harm.

The Chinese companies that benefit from these policies are often national champions in industries that China considers strategic, such as commodities and high-technology. Through its AML enforcement, China seeks to strengthen such companies and, in apparent disregard of the AML, encourages them to consolidate market power, contrary to the normal purpose of competition law.[1]

[1] NDRC, Ministry of Industry and Information Technology ("MIIT"), and other agencies have an official policy to achieve industrial concentrations in the automobile, steel, cement, shipbuilding, electrolytic aluminum, rare earths, electronic information, pharmaceuticals, and agriculture industries. *See* Guiding Opinions on Accelerating the Promotion of Mergers and Reorganizations of Enterprises in Key Industries, issued by MIIT, NDRC, Ministry of Finance; Ministry of Human Resources and Social Security, Ministry of Land and Resources, MOFCOM, People's Bank of China ("PBC"), State-owned Assets Supervision and Administration Commission ("SASAC"), State Administration of Taxation ("SAT"), SAIC, China Banking Regulatory Commission ("CBRC"), and China Securities Regulatory Commission ("CSRC") (Jan. 22, 2013), Gong Xin Bu Lian Chan Ye [2013] No. 16 (*hereinafter* "2013 MIIT Joint Opinions"). Indeed, all three AMEAs are among the authors of this document. Companies and local

By contrast, the companies that suffer are disproportionately foreign. Moreover, the curtailment of IP rights and related demands that have been imposed on U.S. and other foreign companies in several recent AML cases and settlements appear designed more to strengthen the bargaining position of domestic licensees than to address any true market distortions or anti-competitive harms. While USCIB welcomes the outcome of previous dialogues, recognizing that the objective of competition policy is to promote consumer welfare and economic competition, continued U.S. government focus on this important issue is warranted.

The following elements of the AML are relevant in this regard:

- **Goals:** The goals of the AML, as defined in Section 1 thereto, are not limited to the safeguarding of competition or enhancing consumer welfare. Instead, the AML lists the additional goals of "safeguarding the…social public interest" and "promoting the healthy development of the socialist market economy." Similarly, the 2003 Anti Unfair Competition Law (AUCL) goals, as stated in Section 1 thereto, include "safeguarding the healthy development of the socialist market economy." Hence, both the AML and the AUCL explicitly identify industrial policy goals as the basis for their enactment.

- **Discriminatory Enforcement Targeting Foreign Intellectual Property:** AML investigations by China's competition authorities in areas involving intellectual property, which have been repeatedly identified by NDRC, MOFCOM, SAIC and the NPC as a priority area, appear to exclusively target foreign companies and their proprietary technology, including America's flagship companies. Furthermore, Chinese companies benefiting from AML enforcement cases to date were consistently national champions benefiting from NDRC and SAIC investigations that prevented foreign companies from fully asserting their intellectual property against them. In other words, Chinese stakeholders use the umbrella of China's competition agencies, especially NDRC, investigations to facilitate lucrative infringement of U.S. companies' intellectual property rights or obtaining them for lower prices.

- **Significant Due Process Inadequacies Facilitate the Discrimination:** The discriminatory enforcement of China's AML against U.S. companies in intellectual property related cases is aided by procedural inadequacies that render defense against such investigations difficult. Furthermore, these inadequacies create a smoke screen that make the discriminatory nature of these enforcement actions difficult to prove. Examples of such procedural challenges include, but are not limited to:
    - Lack of transparency into the agencies' decision-making process, insufficient rules on how investigations are conducted, on the admissibility of evidence, what probative weight is given to specific pieces of evidence, etc.

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governments may oppose this policy, but there is no indication that the AML constitutes an impediment to implementing it. *See* David Stanway, "China ditches steel industry consolidation targets in new plan," Reuters (Mar. 25, 2014) (quoting Xu Leijiang, the chairman of Baoshan Iron and Steel, as stating that the policy created "huge monsters" lumbered with debt and unprofitable investments).

- Not allowing companies to understand the issues for which they are being investigated and the allegations and theories of competitive the agencies;
- Denial of access to the evidence held by investigators;
- An absence of a fair and effective opportunity to review and rebut evidence and allegations, or to cross examine witnesses before a decision is taken;
- Lack of adequate protection of confidential information submitted by the investigated company, despite the fact that Article 41 of the AML awards such confidentiality. Consequently, there are concerns that such sensitive information, which often contains proprietary trade secrets, may be shared with Chinese companies.
- Denial of the right to be represented by outside counsel in hearings and meetings with agency officials, and an implication that the presence of outside counsel will escalate the investigation.

These procedural challenges facilitate the ability to use antitrust enforcement as an industrial policy tool to devalue U.S. intellectual property and stand in stark contrast to international best practices in this area expressed in documents such as the International Competition Network (ICN) Guidance on Procedural Fairness (2016)[2], and the OECD Competition Committee's *Transparency and Procedural Fairness* – Key Points document (2012)[3].

It is important to ensure that the AML, AUCL and related AML Antitrust-Intellectual Property guidelines are equally enforced against Chinese and non-Chinese companies, and not used to target foreign companies as a policy tool to promote China's national industrial policy objectives. The current language of these statutes, their enforcement record, and the broad procedural challenges surrounding their enforcement, suggest that the road to such equal treatment may still be long.

Certification, Licensing and Testing Barriers

In a number of areas, the Chinese government has imposed certification, licensing, and testing requirements on products, services, and production materials. In most cases, these requirements involve government review and approval of in-scope products and materials before these are allowed to enter the market (*i.e.*, "pre-market" approvals or certifications). Even where such pre-market requirements apply equally to domestic and international (*i.e.*, Chinese and non-Chinese) origin items, the fact is that China's system for checking imports is more onerous than the system for checking products and materials already within China, (*e.g.*, coming off production lines). This renders these requirements discriminatory in effect and exacerbates the negative effects of any pre-market requirements on imports into China.

Some USCIB members continue to observe improvements in certification program recognition of the market-access burdens that pre-market approvals and certification programs impose on companies. These recognitions include laudable efforts by certain regulatory authorities and accredited certification organizations to encourage the development of compliance or product

[2] ICN Guidance on Investigative Process,
http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf
[3] http://www.oecd.org/competition/mergers/50235955.pdf

conformity assurance programs that would reduce burdens for companies with good compliance program/product conformity track records.

Additionally, due to a continuing lack of capacity to administer the requirements in an efficient manner, infrastructure to carry out certification (*e.g.*, qualified laboratories), licensing and testing requirements, certification requirements that mandate disclosure of confidential business (including supplier or competitor) information, and/or China's refusal to recognize testing results and comparable certification issued in other major markets or provide accreditation to foreign laboratories that are not based in China, these requirements raise costs for foreign suppliers and often function as barriers to those products' and materials' access to the Chinese market.

- These requirements affect a broad cross-section of U.S. industry such as the chemical registration regime, the battery registration regime, the imported pharmaceuticals program, the regime (multiple chemical classes) for restricting the material content of electronic products, the mandatory entry-exit inspection and quarantine authority (China Inspection and Quarantine - CIQ) inspections for wearing apparel and the cybersecurity certification requirements for information technology products (known as the Multi-Level Protection Scheme, or MLPS). China also requires animal testing for imported cosmetic products, even if there is already safety data on the products.

- Specifically, CIQ import registration is not harmonious with the existing order fulfillment and service logistic model. For products that are regulated under the China Compulsory Certification (CCC) program, CIQ requires importers to apply for import license along with the corresponding CCC certifications of the items in the shipment. In today's multi-tiers and multi-suppliers environment, sellers must have the flexibility to fulfill customer's order with functional equivalent products made by different qualified suppliers, *i.e.* same Product ID (or SKU) but different original equipment manufacturer (OEM) manufacturer name/model number. This forces seller/importer to limit the supplier of each Product ID to only one. To meet this requirement, the seller must have additional order fulfillment process in place to identify the brand/model number of the item in each shipment or the seller must limit the number of suppliers for each Product ID to only one. As a result, supply chain flexibility is limited and additional operational costs are incurred. This import constraint can simply be removed if they would accept multiple CCC approvals of equivalent products sold under the same Product ID.

- Some USCIB members have observed that there should be an alternative process to waive CCC certification for non-Chinese SKU products whose purpose for importing into China is not for sales.

- CIQ also requires all CCC regulated products to have a valid certificate at the time of import. Since CCC certification expires when the product is no longer in production, it creates a situation where a service part residing outside of China can no longer be imported into China after the certification expires. This policy contradicts today's electronic service model of refurbishing used products for service and worldwide dynamic fulfillment.

Additionally, products produced before their CCC certification has expired are allowed to be continuously sold in China's territory. However, these products cannot pass the customs clearance process. USCIB members support Chinese customs accepting expired CCC certification, as the certification was valid when the product was produced.

- Chinese agencies resist less burdensome approaches which do not require pre-market certification or approval, in part, because it is easier to institute a "one-size fits all" system that assumes all members of the regulated community are noncompliant than to create a more complex system that applies additional burdens only on those with poor compliance records and programs. At present, the systems still tend to be overbuilt, requiring that all covered products or materials, regardless of the presence of any indicators of non-compliance with Chinese law, undergo expensive and lengthy reviews or tests.

USCIB members continue to support past feedback from U.S. and Chinese government dialogues, which suggest the possibility of Chinese agency consideration of self-declaration of conformity (SDoC)-type approaches for those companies that can demonstrate a good compliance track record. USCIB members encourage continued, vigorous promotion of such approaches in future bilateral and multilateral dialogues.

Customs and Trade Facilitation

USCIB encourages China to continue to pursue customs reform, modernization and simplification to promote the streamlined movement of goods across the border, which provides for the rapid movement of goods throughout the world and global supply chain.

- Continued global ratification of the landmark WTO Trade Facilitation Agreement (TFA) and its robust country implementation is a key priority for USCIB and its members. We commend China for taking necessary steps to ratify the TFA, as well as depositing their instrument of acceptance with the WTO. In February 2017, the TFA entered into force, achieving the two-thirds member ratification threshold. Today, over 135 WTO member countries have ratified the Agreement.[4] USCIB encourages China to work with its trading partners, specifically with those countries with which it has existing bilateral or regional free trade agreements, to encourage that they take all necessary domestics steps to ratify the TFA. In addition to promoting ratification, China should urge its partners to complete notification of all Category B and C commitments, in the event they have not yet done so. As a general matter, we would like to highlight the importance of the National Committees on Trade Facilitation. We assert that these Committees need to be established promptly and must include participation of the industry members. Trade Facilitation is critical for business. Full implementation of the TFA will significantly decrease transaction costs, cut down on regulatory red tape at the border, and provide much needed transparency and predictability to traders.

[4] For the ratifications list, please see www.tfafacility.org/ratifications.

- Consultation with industry at an early stage will allow for open discussions on reform measures and the smooth implementation of such measures. While China's General Administration of Customs (GAC) has met with industry in the past, those meetings usually consist of GAC explaining their policy rather than engaging in dialogue to seek practical solutions.

- Deficiencies in China's IT systems for customs clearance introduce uncertainty and inefficiencies for the logistics and transportation industry and local customs authorities alike, and do not match China's economic growth needs. Industry would look forward to engaging with customs authorities to help support reform and modernization and share best practices so that the Chinese economy and society may benefit from fast and efficient trade. Limitations equally apply to the China Inspection and Quarantine (CIQ) agency. In order to have goods cleared through customs, they must also clear through CIQ, so the problem is two-fold. (See Certification, Licensing and Testing Barriers for further details.)

- When China joined the ATA Carnet system, an international system under the auspices of the World Customs Organization (WCO), it accepted both ATA Conventions – the ATA Carnet Convention and the in the 1990's updated ATA Carnet Convention, the Istanbul Convention. However, China has not accepted the full scope of ATA Carnet Acceptance. To date, they only accept ATA Carnet of Exhibitions and Fairs (E&F) (i.e., goods for display or use at exhibitions, trade fairs, meetings or similar events). As a result, China is still not a fully participating member of the ATA chain. We are pleased to hear and are very encouraged by the steps that China Customs and the Ministry of Foreign Affairs have taken towards formal acceptance of the "ATA Carnets for "Professional Equipment (PE)" and "Commercial Samples (CS)". Once China accepts ATA Carnets under the PE and CS, U.S. companies, and all members of the ATA system, micro-small-medium sized companies and those with a global presence will see immediate, measurable, and positive bottom-line benefits. Under existing commitments, the Chinese Customs Administration rejects PE and CS ATA Carnets.

- Ensure that annual changes to the domestic HTS (Harmonized Tariff Schedule) are released to the public at least 3 months before the legal effective date to allow sufficient time for industry to implement changes.

- Customs Inquiries: For business to respond to information requests, it is important that China Customs allow ample time for response. It takes time to gather information, identify relevant stakeholders, draft responses, and obtain necessary approvals, so that responses are adequate to a government request.

- When and where possible, China Customs should communicate all questions to a company point of contact at one time. This will allow for a streamlined internal process as there will not be a continuous need for internal information requests, additional data mining, etc.

- USCIB members have concerns due to verbal requests from CIQ that companies under audit must reimburse CIQ travel expenses. These concerns include Foreign Corrupt Practice Act (FCPA) violations, as well as fear that audited programs may not be renewed for refusal to comply with request. CIQ was asked to put their request in writing, which CIQ has yet to do.

- USCIB members feel that the returns process into China is unnecessarily cumbersome and lengthy. We understand that all returns require CIQ examination, for which our members do not understand the rational. It has been noted that the returns process takes at least 1 month.

- USCIB members encourage the U.S. government to secure a commitment from China to establish a bilateral Customs Dialogue, including industry participation, to address customs bottlenecks in the supply chain, which hamper the growth of U.S. imports to China as well as the development of China's trade facilitation infrastructure. Customs and industry share a common goal of safe, efficient clearance and an open dialogue could help both parties move closer toward that goal. Many issues could be addressed through the dialogue, including such specific issues as:
    - Improvement in the clear definition of parameters for export and import controls criteria for consistent application of compliance requirements.
    - Improved transparency and consistency of customs enforcement across all ports.
    - Work with 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 express carriers with hubs in China operate those hubs more efficiently. Current customs procedures conversely create incentives to operate hubs outside of China, which damage the interests of firms and local governments who have invested in hubs in China.
    - Work with GAC to establish low-value and *de minimis* customs clearance levels consistent with U.S. levels (i.e., USD $800) and consistent with China's position as one of the world's largest participants in global trade. As a practical matter, China has virtually no effective low-value and/or *de minimis* customs treatment.
    - Address 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.
    - Work with China to explore the benefits of establishing a 24-7 customs handling system similar to that in other advanced trading economies. Customs and other border crossing agencies, such as the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), 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.

- Explore the value of eliminating 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 online 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.

Intellectual Property Rights

USCIB and its members acknowledge that China has improved most of its key intellectual property right (IPR) laws, and has made limited progress in combating copyright piracy and trademark counterfeiting, since acceding to the WTO. However, despite these improvements, USCIB members have observed the following particular IPR-related concerns.

1. Copyright

- Unlicensed software use and optical media products, CD, VCD and DVD, and counterfeit goods continue to be a major problem. The existing Copyright Law provides inadequate criminal liability for copyright offenses, and high and unrealistic thresholds, which make bringing a criminal copyright case virtually impossible, and enforcement in line with international standards is sorely lacking.

- We urge the U.S. to continue to press the Chinese government to establish reasonable and appropriate thresholds for commercial-scale piracy consistent with trade-related aspects of intellectual property rights (TRIPS) standards, in particular to address the digital piracy problems. Also, enterprise end-user unlicensed software use should be clarified as a criminal offense—absent any affirmative showing that the enterprise engaged in the infringement "for profit," as Chinese law currently requires—in order to allow for prosecutions against unlicensed software use by commercial actors, with adequate penalties to deter further infringement.

- There is a great need for better coordination between agencies to protect copyright.

- There is also a need for better coordination between administrative and criminal measures to protect copyright. China's criminal law provisions have rarely been used to prosecute piracy because of the high thresholds for criminal liability established by the People's Supreme Court in its interpretations of the criminal copyright provisions. Additionally, both the Copyright Law and the Criminal Code should be revised to be fully compliant with TRIPS, or a new judicial interpretation should be promptly issued to clarify the scope of these laws if amendment is not practicable in the near future. Most importantly, these laws should be revised to provide criminal penalties "that are sufficient to provide a deterrent" (TRIPS, Art. 61) against piracy and counterfeiting.

- Both the civil Copyright Law and the Criminal Code need to be revised to reflect the development of new technologies and international standards/practice of enforcement, especially with respect to digital piracy issues involving copyright.

- Enforcement remains slow, cumbersome and rarely results in deterrent punishment. Effective enforcement will not become a reality if there is inadequate attention, investment and training by the Public Security Bureaus (PSB), Prosecutors and Judges. The PSB needs to treat criminal enforcement of IPR offenses as a top priority.

- Despite adopting Copyright Law measures to implement the World Intellectual Property Organization (WIPO) Internet Treaties, current policies fail to adhere to these international standards in several important areas, including but not limited to, failing to include all exclusive rights granted to rights holders by the treaties.

- There should be increased criminal actions and sanctions against online infringers (including, but not limited to those who are determined to be repeat infringers) and additional measures. China should also adopt civil law measures, consistent with the approach of the Digital Millennium Copyright Act (DMCA) and U.S. common law secondary infringement principles, against Internet Service Providers (ISPs) and online platforms that knowingly host infringing content or purposefully induce their users to post, disseminate, or access infringing content.

- After the litigation over the licensing rights of the TV show "The Voice of China" concluded in favor of the foreign licensor, the former Chinese licensee produced and broadcasted essentially the same TV show under a slight different name and thus far has been able to stay clear of copyright infringement. This case underscores the difficulties faced by foreign companies in protecting their copyrights in China.

2. Trademark and Counterfeiting

- For branded products, trademark protection is crucial to maintaining high-quality goods and services in order to build and strengthen customer loyalty. Counterfeiting damages the reputation of companies; compromises the safety and quality of products (which affects Chinese as well as foreign consumers); results in the loss of tax revenue to the government; and harms China's reputation among foreign companies as a desirable place to do business.

- Another challenge faced by major U.S. brand holders is the approval and status of certain trademarks in China; China only very rarely grants "well known" or "famous mark" status depriving foreign trademark owners of the ability to fully protect and enforce their trademarks against infringement and piracy in China.

- Updates to China's Trademark law increase the risk that brand owners will be held hostage to pirates registering marks in bad faith. Marks opposed by brand owners are immediately registered. Brand owners can spend years waiting for a Trademark Review and Adjudication Board (TRAB) decision to invalidate. While waiting, bad-faith registrants build up years of use improving its chances for permanent use based on existing Chinese judicial policy. These bad faith registrants may even be able to take enforcement action against a brand owner's own use of its trademark under these circumstances. This undermines the confidence of potential investors and can result in the building of an export offensive launched from behind the barrier of delayed enforcement.

- China should establish a formal mechanism to respond to embassy requests for expedited cancellation for internationally important cases through the TRAB, considering increased procedures and staffing for important international trademark cancellation cases.

- Areas of concern in China's judicial interpretations related to trademark protections and counterfeiting: lack of clarity regarding valuation of seized goods and liability of accomplices; failure to define adequately key concepts; removal of provisions allowing for criminal prosecution based on repeated administrative offenses; use of numerical thresholds for criminal liability; and differing thresholds for liability of individuals and enterprises.

- Related to counterfeiting in China is the fact that U.S. corporations have been unexpectedly assessed fees for the storage of seized counterfeit goods in which there are no clear guidelines on the circumstances under which such fees will be assessed, no prior arrangement for such assessments, and no indication of when payment of such fees will be required. Uniform requirements in a clear, published form, are essential as the imposition of uncertain storage fees without prior notice or advance agreement undermines the ability of U.S. business to address the Chinese domestic market effectively.

- In 2015, a U.S. company was held liable for trademark infringement in China for using the Chinese character version of its English-language trademark, which was registered by a Chinese company, with damages amounting to $15,000,000. This continues to cause confusion among U.S. business seeking to protect their intellectual properties in China, especially concerning the registration and use of the Chinese characters for their English-language trademark.

- Despite recent development, there still lacks an efficient mechanism in China to curb the widespread counterfeiting of the products of famous U.S. brands. In fact, the OECD estimates that 80% of global counterfeits originate in China (including Hong Kong). Many U.S. companies continue to suffer from tremendous sales and reputation loss caused by counterfeiting, which has even worsened in recent years due to the rise of internet-based commerce.

3. **.cn Country Code Top-Level Domain Name (ccTLD)**
   - China fails to provide adequate protection for .cn ccTLD disputes due to the limited time period, two years, offered to trademark owners to object to .cn infringements. USCIB supports the removal of this time period. The two-year limit is inconsistent with the provisions of GATT-TRIPS, Article 41(2), which prohibits "unreasonable time-limits" that would prevent the fair and equitable enforcement of intellectual property rights.

4. **Fraudulent Domain Name and Internet Brand/Keyword Application Notices and Non-Solicited Marketing**
   - China fails to address Chinese domain name registrars and fraudsters, who, through email scams and marketing ploys, attempt to solicit trademark owners to purchase domain names and Internet brands/keywords at exorbitant registration rates by sending false notices regarding individuals who purportedly are seeking to register the trademark owner's trademarks as domain names and Internet brands/keywords.

   - The registrars solicit the trademark owners to register such domain names and Internet brands/keywords. These solicitations attempt to create a false sense of urgency and a need for trademark owners to react because they often set a specific deadline for response.

   - These scams are widely directed to many large and small U.S. companies and continue to cause considerable confusion and disruption to business operations. In the latest iteration of these scams, Chinese registrars are even posing as law firms, with a working fraudulent website, soliciting companies to register domain names or keywords.

5. **Patent Concerns, Administrative Monopolies, and Essential Technologies**
   - Although China has put into place some components of an effective intellectual property legal and regulatory framework, implementation of those regulations is inadequate and critical gaps remain. Local public officials evince a stronger interest in protecting their local economy than in policing IPRs and have been known to act uncooperatively in patent infringement suits.

   - Attempts to enforce patent rights through patent administrative departments are largely ineffective because the administrative agencies only have the power to stop infringements in their local territories and because they act slowly, cannot collect damages and suffer from a lack of transparency. Enforcement actions through the court system are sometimes more effective in certain jurisdictions, but capacity and effectiveness of the courts varies by province and damages are not calculated in such a way as to compensate for all the actual expenses of a rights-holder in stopping infringing acts. In practice, preliminary injunctions are very difficult – if not impossible – to secure.

- The China Food and Drug Administration (CFDA) in May 2017 issued Draft Policy Circular 55, which, together with a more recent opinion, proposes to establish a patent linkage system in China. If effectively implemented, such a system would provide for the early resolution of patent disputes involving innovative medicines before potentially infringing competing products enter the market. The CFDA has published a "Catalogue of Approved Drug Products" listing a limited number of drugs. We welcome the proposed policy and are looking forward to more details from the CFDA in the near future.

- USCIB members have concerns regarding provisions on the application of the AML to administrative monopolies that could be interpreted to exempt certain SOEs from AML enforcement, which could create a huge loophole given the tremendous power and influence that SOEs have in many sectors of the Chinese economy.

- As the Anti-Monopoly Commission works on consolidating draft IP Antitrust Guidelines that have been prepared by SIAC, NDRC, the Ministry of Commerce (MOFCOM) and the State Intellectual Property Office (SIPO), those drafts have prompted concerns regarding the Guidelines' potential to harm long-term competitiveness. In the draft guidelines released by AMC in March 2017 "dominant" IP holders are prohibited from refusing "without justifiable reasons" to license their IP under reasonable conditions when the technology is "essential for companies to compete in the relevant market." The definition of what is or is not "essential . . . to compete" is not clear, but could be interpreted to be sufficiently broad as to apply to a wide range of technologies. The "refusal to license article" also fails to include requirements for proving injury or harm to competition and consumers. In China, the AML does not include any reference to the necessary or essential facility concept. And in the US, the "essential facility doctrine" has never been used in determining an antitrust obligation for refusal to license intellectual property. Intellectual property rights by their nature are innovations, and the alternative approaches to the intellectual property remain available. According to this article, for IPR that constitutes an essential facility, refusal to license may lead to an "abuse of dominant market position." This amounts to an improper compulsory licensing requirement for truly valuable and useful IPRs in the market, and is contrary to the principles stated in the Preface of the draft Guidelines and would be the result of unreasonable governmental scrutiny of a patent owner exercising its right not to license someone. It would deny certain IPR holders the right to exclude, even though the IPR holders do not engage in any conduct inconsistent with IPR laws and administrative regulations. Such regulations, if enacted, could greatly impair the value of the underlying intellectual property.

- Included in China's 2020 economic reform plan, the Chinese government is in the process of introducing intellectual property courts in major cities. "The Decision on Major Issues Concerning Comprehensively Deepening Reforms" released in 2013 states that "[w]e will strengthen the utilization and protection of intellectual property rights, improve mechanisms for encouraging technological innovation, and explore ways to establish an intellectual property court." The introduction of such specialized courts in China, which could be similar to the Federal Circuit in the U.S., is expected to improve the enforcement of intellectual property rights in China.

6. Trade Secrets, Protection of Confidential Test Data, and Regulatory Data Protection

- Enforcement of trade secrets is very difficult because the evidentiary burden is very high, ability for discovery is minimal, damages are so low as to lack deterrent value, and local protectionism can be a serious obstacle. Foreign companies are often reluctant to transfer key trade secrets into China because of the serious threat of misappropriation by competitors and employees and the near impossibility of enforcement.

- As a practical matter, proving trade secret misappropriation is extremely difficult and can result in additional damage. Under criminal law, theft is determined not by the conduct itself, but by the consequences of the loss. Providing the required proof to initiate a criminal investigation may not only be difficult, but can require waiting until a more significant and possibly irreparable injury materializes, beyond the initial breach. From a civil perspective, it is unclear whether cyber-attacks, such as hacking, actually constitute misappropriation. Trade secret owners may also face additional hurdles, depending on the individual court, such as the requirement to prove their intellectual property was used in a business undertaking. Such proof is both challenging to obtain and prevents early action by trade secret owner who detect potential issues near the time of the breach.

- The legal infrastructure for the enforcement of trade secrets needs to be significantly strengthened, including by providing effective measures to prevent the leakage of evidence presented during civil enforcement the availability of damages to trade secret owners when pursuing administrative enforcement.

- The value of trade secrets may also be weakened by Chinese regulations that sometimes require companies to submit technical and functional features of their products as well as confidential test data for recordal with local quality and technical supervision authorities. Failure to provide the invention may prevent access to the Chinese market. The information furnished, however, is unprotected from further disclosure. In fact, in many circumstances, local agencies will provide the information to anyone who asks. This requirement and practice puts technical secrets at significant risk of leaking into the public domain.

- China committed as part of its accession to the WTO to provide a six-year period of regulatory data protection (RDP) against unfair commercial use for clinical test and other data submitted to secure approval of products containing a new chemical ingredient. After Draft Policy Circular 55, the China National Drug Administration (CNDA), formerly known as the China Food and Drug Administration, issued draft measures on the implementation of drug clinical trial data protection in April 2018 and sought public comment. Although a welcomed step, further clarity has been sought on the proposed location and time-based conditions and limitations placed on the terms for innovative drug and biologics.

- China's current regulatory data protection system is not effective and has various limitations/ambiguities. The CFDA has recently issued Draft Policy Circular 55, which provides a newly proposed structure for regulatory data exclusivity. We welcome the proposed policy and are looking forward to more details from the CFDA in the near future.

IT Security Measures

In recent years, a significant number of new Chinese laws, regulations, policies, and proposals have been announced that ostensibly relate to IT security and which have implications for companies across economic sectors that employ digital technologies in their operations and in serving their customers. These measures are having a significant negative effect on U.S. Information Communications Technology (ICT) companies' market opportunities in China, as well as on these companies' customers in China who currently rely on U.S. products in their IT systems. The most significant measure has been the entry into force on June 1, 2017 of China's Cybersecurity Law, a broadly written instrument that will impose significant restrictions on the cross-border flow of data and impose a complex and burdensome cybersecurity review regime on companies integrating new technologies into their internal networks. The data localization provision will go into effect this year on December 31, 2018. Given the broad definition of what constitutes operators of Critical Information Infrastructure, many companies across an array of economic sectors could potentially be subject to the law's very restrictive data localization requirement if they employ cloud computing or big data technologies, for example. There is no reason to believe that these measures will serve their claimed purpose of improving IT security in China; on the contrary, because they could restrict the use of certain technologies and exclude or delay many more advanced or secure products from entering into the market, they have the potential to significantly weaken cybersecurity in China across all sectors. They also erect substantial market access barriers by imposing sweeping indigenous technology requirements, data flow restrictions, and other burdens on ICT products.

These measures raise serious questions on China's compliance with its international and bilateral trade commitments. Mandating the use of "secure and controllable" technologies, and then defining this term in ways that disadvantage or even exclude foreign products and suppliers, creates significant market access barriers. In 2015, reflecting the widespread concerns that exists on this issue, USCIB members, along with 30 other international industry associations, requested a complete suspension of Guidelines for Secure and Controllable Information in the Banking Industry (2014-2015), issued via Circular from the Ministry of Industry and Information Technology and China Banking Regulatory Commission (CBRC) on December 26, 2014, via letters written directly to the Chinese Government leaders in April 2015. Later that month, Chinese lawmakers announced that the rules would be temporarily suspended pending review. In 2016, the suspended rules were revised for better protection of China's financial industry's information and technology security, and will be re-implemented. Another example is the Circular of the People's Bank of China on Urging Banking and Financial Institutions to Undertake Protection of Personal Financial Information (January 21,

2011) provided, among other things in Article 6 that financial information should not be stored offshore.

Trade-restrictive technology mandates like the Cybersecurity law and other sector regulations that include measures that require data localization or restrict cross-border transfer are increasingly prevalent. Cross-border data flows are necessary to companies across all sectors to operate and engage in e-commerce. USCIB members urge the U.S. government to continue to press for full suspension of all existing and proposed measures involving trade-restrictive technology standards and data-related requirements, such as the restrictions of cross-border flow of data, and the establishment of a transparent and consultative mechanism to develop privacy and cybersecurity-related measures that reflect global best practices and disadvantage or otherwise have discriminatory impacts against U.S. suppliers.

Market Access

Market access restrictions inhibit the ability of USCIB members to access and expand in China's market and build thriving businesses to satisfy consumer demand. In many sectors, as demonstrated in the second part of this submission, USCIB members call on China to open its market to any firm able to meet objective, non-discriminatory criteria. Market access should not be hindered through licensing systems subject to arbitrary government decisions. Previous efforts and initiatives to reduce or make more challenging existing market access for foreign companies are particularly alarming. It is important that market access be promoted for both physical and digital goods and services.

For example, China's filtering and blocking of online services act as a barrier to a trade and investment for foreign firms. The 2018 National Trade Estimate Report, USTR's annual publication highlighting significant foreign barriers to U.S. exports, concluded that "China continues to engage in extensive blocking of legitimate websites, imposing significant costs on both suppliers and users of web-based services and products. According to the latest data, China currently blocks 12 of the top 30 global sites, and U.S. industry research has calculated that up to 3,000 sites in total are blocked, affecting billions of dollars in business, including communications, networking, app stores, news and other sites. While becoming more sophisticated over time, the technical means of blocking, dubbed the Great Firewall, still often appears to affect sites that may not be the intended target, but that may share the same Internet Protocol address. In addition, there have been reports that simply having to pass all Internet traffic through a national firewall adds delays to transmission that can significantly degrade the quality of the service, in some cases to a commercially unacceptable level, thereby inhibiting or precluding the cross-border supply of certain services." Furthermore, according to the 2016 China Business Climate Report by AmCham China, "Member companies also report a continued concern about the negative impact of Internet controls on their business operations."

In July 2015, after many years of discussion, the WTO agreed to an expansion of the Information Technology Agreement (ITA). Participating WTO members, including China, finally agreed to a list of an additional 201 products to be afforded duty-free treatment under the umbrella of the

Information Technology Agreement. In December 2015, a Ministerial Declaration was issued, and was acknowledged by WTO trade ministers. In most cases import duties on the expanded list of 201 products either become duty-free upon implementation (for most countries July 1, 2016), or after a three-year duty phase-out period, (for the most part by July 1, 2019). However, there are some exceptions which will result in tariff reductions to go out to 5 years (i.e., 2021) or in a series of very exceptional cases out 7 years (i.e., 2023). This is a historic and groundbreaking deal, which follows completion of the Trade Facilitation Agreement (TFA). The WTO has said, "Annual trade in these 201 products is valued at over $1.3 trillion per year, and accounts for approximately 7% of total global trade today." The list of Expansion – ITA products includes: new-generation semi-conductors; GPS navigation systems; medical products which include magnetic resonance imaging (MRI) machines; machine tools for manufacturing printed circuits; telecommunications satellites; video games; and touch screens. ICT is critical in today's digital world, and U.S. technology companies are in a race for global leadership in the digital economy. Further elimination of tariffs in the ICT sector will facilitate the movement of technologies critical for innovation, reduce costs associated with these key technologies making them more accessible by consumers globally and, in some cases, lowering production costs enabling the growth of global value chains.

The market access provided by the WTO ITA is important to USCIB members. We commend China on being party to this landmark agreement. We recommend that China:

- speed-up early implementation of respective tariff elimination phase in, in other words, we recommend shortening the staging periods for China's expanded tariff reduction commitments, ensuring the swiftest implementation possible;

- promote the "autonomous immediate elimination of customs duties..." to other ITA participants;

- encourage other WTO members to become a participant to the ITA;

- continue work, in cooperation with other governments, on IT non-tariff barriers to trade; and

- open timely discussion on the list of covered products under review, so as to determine if additional product expansion is warranted due to technological developments.

National Treatment and Non-Discrimination

In accepting the obligations inherent in WTO membership, China agreed to be bound by the principle of national treatment, that is, to treat imported goods no less favorably than goods produced in country. As the WTO Appellate Body has held, national treatment prohibits WTO Members from adopting measures that "'modif[y] the conditions of competition in the . . . market, so that imported products are granted less favorable treatment than like domestic products.'"[5] As

[5] WT/DS438/AB/R (15 Jan 2015), ¶ 5.205 (quoting panel decision).

part of this agreement, China agreed to repeal all rules and regulations that were inconsistent with this obligation and would not adopt requirements that treat imported goods less favorably.

- In fact, however, Chinese authorities are using a wide variety of laws, regulations, and other policy tools—including AML enforcement (described above), technology standards policies, IPR enforcement practices, and licensing and investment reviews—to compel U.S. companies to license or otherwise transfer valuable U.S. technologies and know-how to Chinese entities at below-market rates, and to exclude U.S. companies from full and equal participation in the Chinese market. The effect of these measures—both separately and in combination—is to modify the conditions of competition in the Chinese market to the systematic detriment of U.S. suppliers.

- USCIB members call on China to abide by these commitments of national treatment and non-discrimination. Moreover, where China has allowed foreign business participation in a market currently, China should not reform legislation in a manner that prohibits future participation in that market by foreign-owned enterprises.

Regulatory Environment

USCIB, as the American affiliate to the Business and Industry Advisory Committee (BIAC) to the OECD, regularly provides input on the OECD's Regulatory Review of China. Businesses have called on the OECD to work with the government of China to improve government accountability at all levels of government, increase the transparency and predictability of rules, rigorously enforce laws and contracts, fully respect property rights, develop and implement more cost-effective regulatory frameworks and strongly commit to fighting bribe solicitation and corruption. The observations below reflect USCIB's input to the OECD, as well as USCIB member general observations concerning operations in China.

1. **Fair and Independent Regulators**

   USCIB again commends Chinese government efforts to strengthen frameworks for transparency and uniformity in enforcement practices, as well as Ministry or Agency-specific efforts to increase transparency of enforcement activities. Nonetheless, USCIB members have noted that numerous obstacles remain to achieving uniform practices in the enforcement area in China. We call for resolution and further focus in this area, and expect fair, transparent and independent regulators in China. USCIB members remain concerned regarding an apparent lack of coordination between the central and local authorities. In some cases, inconsistencies in regulations and enforcement exist on a regional basis. Improved coordination among regulators would benefit USCIB and domestic companies, creating a more transparent and predictable framework.

2. **Transparency and Notice**

   - There are both positive and negative signs for transparency in the development of rules and regulations in China. A positive area to note are recent developments to require that government entities are more transparent in their decision-making process, but in

Agricultural Biotechnology, there has been a decrease in transparency with the development of new requirements without consultation, advance notice or documentation, going against China's WTO agreement to allow for a reasonable time period for public comment on new regulations.

- China agreed in its accession to the WTO to allow for a reasonable period of time for public comment in most sectors where it adopts new or amends existing laws and regulations relating to foreign trade. It also committed to regularly publish such measures in one or more of the WTO official languages. This commitment strongly reflects that transparency is a crucial element in creating a stable and predictable environment for foreign investment. Working towards this, submitted Chinese WTO notifications are in English.

- While USCIB appreciates the improvement in opportunities to comment on proposed rules, the timeframe is often too short to allow for translation, sometimes offered only by invitation and comments may only be provided at the early stages of the rulemaking process. One improvement to the process would be for agencies to respond to substantive comments made by interested parties.

- USCIB members strongly believe, in order to improve transparency and reduce uncertainty, Chinese government agencies should develop better pre-ruling processes to provide clarifications and adopt feedbacks on proposed rules and regulations.

- USCIB members ask that China move away from approaches whereby it issues measures and interpretations of those measures on the same date that they enter into effect. We encourage USTR to press for more meaningful and predictable rulemaking notice and comment opportunities. Same-date effectiveness of such measures or related documents reinforces the perception on the part of USCIB members of the regulated community in China that the Chinese government is insensitive to potential compliance preparation and improvement timing needs of the community associated with announced measures and related documents.

3. Consistency of Regulatory Approvals

- USCIB members observe that there is a strong need for consistency among Chinese agencies with respect to the approaches for regulatory approvals of materials used in products.

- Ambiguity in legal measures issued at the national level concerning regulatory approvals can result in problematic misinterpretation at the local level that creates delays in production and loss of sales for companies that must obtain approvals for materials for use in certain products.

- China should be encouraged to adopt policy that is consistent with the approaches of other countries which have established regulations on biotechnology and which have a record of approvals of biotechnology products such as the United States, Canada, Brazil, Argentina and Japan regarding the regulation and approval of biotech products including combined event products (also called stacks). Consistency with countries with FFP import regulations is also warranted.

Standards

USCIB recognizes the value of standards in setting technical requirements but is concerned with issues such as the continued rapid proliferation of standards, ambiguities over the applicability of standards, and the varying degree of openness of the standard development process to foreign stakeholders.

We provide examples of these concerns below and call for a dialogue on this issue to help U.S. stakeholders address these concerns, which cover multiple sectors and multiple agencies and affiliated organizations in China. We also recommend Chinese agencies to consider adopting international standards, such as those of the Institute of Electrical and Electronics Engineers (IEEE), International Electrotechnical Commission (IEC), or International Telecommunication Union (ITU).

1. **Proliferation of Standards at a Rapid Rate**
   - Standards are generally the most numerous measures, often with legal effect, in markets that involve highly technical products, and are issued with increasing frequency, which often can significantly affect a company's China operations and the China market access of a company's products. It is increasingly important to monitor the development of such measures, covering individual agencies as well as China's primary standard publisher, the Standardization Administration of China (SAC), and WTO notification bodies.

   - Tracking standard development is easier in some respects, such as via the SAC web site. However, this only helps monitor certain types of national standards. The lack of transparency into the development and establishment of standards in China, which warrants discussion, necessitates outreach to the Chinese government for solutions.

   - The proliferation of standards calls for a mechanism, such as a Chinese government database, to provide comprehensive and timely access to standards of all kinds. Further, high-level dialogue on how existing standards are being implemented can help assess options for developing China's science and technology regulatory foundation in a manner that provides USCIB members with meaningful notice, access to, and understanding of the standards that affect the member operations and their products.

2. **Access to Standards**
   - USCIB commends the improvements to transparency and access to standards in China. Many more standards than in the past are now published for public comment. However,

concerns remain. For instance, standard developing agencies in China could make improvements in the regular updating and posting of draft standards for public comment.

- The laws encourage the adoption of international standards where appropriate and possible. This reference is laudable. However, it remains the case that insufficient details are provided on how international standards should be incorporated into the Chinese standardization regime.

- Also problematic is that some Chinese standard development authorities treat standards as "proprietary" documents, rather than as public laws. Full texts of such standards, or at least texts of recent, national (GB) standards, are not generally accessible in full text on government or other public web sites in China. Such standards, as part of Chinese law, should be as accessible to the public through the appropriate agency to facilitate compliance.

3. Participation by Foreign Stakeholders

- Regulations issued by the Standards Administration of China provide that foreign-invested enterprises registered in China are qualified to join Chinese standardization bodies and participate in the drafting of standards. However, the decision whether to allow participation by foreign-invested companies is in practice left to individual technical committees (TCs) and technical subcommittees (SCs), some of which do not permit foreign-invested enterprises to participate in the drafting of standards or technical regulations at all, or require overly specific expertise for participation that may create hurdles for some foreign stakeholders with legitimate interests and useful inputs to join the TCs and SCs.

- Others only permit foreign-invested enterprises to be observers or participants without voting rights, and even in cases where foreign-invested enterprises are permitted to join a TC, they often are not notified when new working groups (WG) under a given TC are created to develop a new standard. Through more equal participation by foreign-invested companies, Chinese standards may have a better chance of acceptance in the global marketplace.

4. Mandatory Versus Voluntary Standards

- It is presently not possible for USCIB members to rely on the alphanumeric designation of a standard as evidence that the standard is mandatory or voluntary in nature. The best approach currently available is to review the content of a standard to determine whether the language therein requires a behavior, or merely suggests such behavior. Where the language is ambiguous, recourse to the drafters of the standard and the agency with interpretive authority for the standard can of course provide insights.

- However, this leaves significant room for variation in the interpretation of whether a standard is voluntary or mandatory. Even though this standard has an alphanumeric designation typically associated with a voluntary standard, Chinese government authorities have nonetheless carried out enforcement actions against products that are not labeled according to this standard. Consistent application of voluntary and mandatory standards that are predictable, transparent, and consistent with the alphanumeric designation of the standard should be supported.

State-Owned Enterprises (SOEs)

One clear reality of international business these days is that U.S. businesses continue to increasingly face competition from Chinese SOEs not only in China but also in important third markets and here in the United States, and in a number of industries are being negatively impacted by overcapacity resulting from the operation of these entities. Whether state-owned or controlled (at the national or sub-national level) or "state-championed" firms nominally privately-owned, these entities often benefit from preferential treatment by Chinese authorities at the national and sub-national level. It is critical that the U.S. government use all available tools, including the G20 and the WTO, to press aggressively for level playing fields for U.S. companies whenever and wherever they compete with these Chinese entities. U.S. government bilateral and multilateral efforts should be carefully coordinated with other U.S. government efforts regarding SOEs, including in the modernization of North American Free Trade Agreement (NAFTA), in the OECD and in other forums.

We strongly urge the U.S. Government to:

- Aggressively press China to come into full compliance with its existing WTO obligations to notify to the WTO all of its subsidies and industrial policies at the national and provincial level which impact trade and investment. State-owned and state-championed firms are certainly not the only beneficiaries of Chinese government preferential treatment but full Chinese notification to the WTO is a clear obligation of their accession. Transparency in the SOE area can be step one.

- Reinvigorate an ongoing dialogue between the United States and China to raise U.S. concerns regarding overcapacity and treatment accorded to Chinese SOEs and state-championed enterprises. Seek clear explanations from the Chinese authorities on its policies on the treatment of its SOEs and state-championed enterprises when they compete with private sector companies, including U.S. companies. Obtain concrete, enforceable Chinese government commitments to the principle of a level playing field when these and similar entities are competing in the commercial space with private enterprises.

- Seek binding commitments from the Chinese government on real transparency of Chinese SOEs and state-championed enterprises – including all measures of support from national and provincial government entities, their treatment on tax, regulatory, procurement policies, and other key criteria to assist in international assessment of Chinese practices. This transparency, especially for the largest and most competitive SOEs and state-championed enterprises, should begin immediately.

- Resume negotiations of a U.S.-China Bilateral Investment Treaty (BIT). Such an agreement provides the opportunity to address various issues important to U.S. business, including seeking the strongest possible SOE and state-championed enterprise provisions (including transparency, level playing field/national treatment, and limitations on subsidies and other preferential treatment).

- Secure commitment from Chinese authorities that appropriate representatives from the Chinese government and Chinese SOEs will participate actively and constructively in international organizations (*e.g.* the OECD, WTO) as well as in seminars and research projects organized by U.S. government agencies conducting serious analytical work and policy debates on the global issues related to SOEs and state-championed enterprises.

- U.S. officials should ratchet up their efforts to coordinate closely with other leading market economy governments (*e.g.* Europe, Canada, Japan, Australia, Korea) to build greater international support for coordinated international efforts on the issue of Chinese SOEs and state-championed enterprises. The U.S. can't tackle these important SOE issues alone. We need international support from our key allies in relevant multilateral (*e.g.* WTO, OECD, IMF) and regional (*e.g.* APEC) fora as well from key partners in their own high-level dialogues with China.

Taxation

Tax laws should be administered in a manner that promotes consistency, certainty and transparency. China has made significant strides in the taxation area in the recent past but continuing efforts are needed. Further progress and improvements can be made by (i) developing a centralized tax ruling process, (ii) pushing best practices and standards of the SAT (and local tax authorities in developed areas) into the less developed areas to leverage significant strengths already developed, (iii) providing for more open and transparent consultation in the rule making process, and (iv) adhering to international tax standards recently agreed by the G20, including China, in the OECD's Base Erosion and Profit Shifting initiative ("BEPS") and (v) establishing a more formalized tax-focused judicial function to address expected increases in tax dispute.

A centralized tax ruling process, where resulting rulings would be made publicly available, would be an important for China to accelerate its progress. Tax rulings would provide certainty on particular issues and prevent local administrators from taking a different view of a given transaction. We are aware of that there is a proposal to establish an advance ruling process in the new Tax Administration and Collection Law ("TACL"); we encourage the development and adoption of published ruling procedures that set common standards in the application of tax rules for taxpayers and tax officials alike.

China already has a cohort of well-trained, independent tax regulators focused in the major cities (primarily Beijing and Shanghai) and the SAT. However, decentralized regulation enforcement practices create opportunities for inconsistent, unfair and unlawful practices among tax regulators. In addition to a ruling process, we further encourage the tax authorities to identify the more advanced practices in those more sophisticated localities and to “push” those practices and standards into the less developed areas. China has a promising base to build on, but standards can be inconsistent between locations. Certain local tax bureaus seem to concern themselves as much with maintaining or increasing the revenue they receive through tax enforcement, regardless of changes in business models or conditions, and sometimes at the expense of rule-based enforcement. If this is a feature of the system itself, it should be de-emphasized.

The rule-making process should be open for affected taxpayers to make comments and the comments period should be adequate and not rushed. Submitted written comments should be made part of the public record. There are examples of regulations involving changes adverse to USCIB members in the tax area have been applied on a retroactive basis, which represent problems with respect to notice and fair application of the law.

We believe China’s participation in various international and multi-lateral tax initiatives, such as the BEPS project of the G20/OECD, has facilitated the adoption of international standards domestically. We encourage the further growth of this trend with the caution that China should adopt changes related to BEPS on a multilateral basis with other countries and not do so unilaterally. China should adhere to the parameters of the BEPS consensus and should not unilaterally go beyond the G20 consensus.

We would like to make a recommendation for China to build a tax court system in future tax legislation framework, to provide protection to both revenue authorities and taxpayers and to resolve controversies. China currently has both administrative and judicial functions to resolve tax disputes, but the judicial function is less well known and not focused solely on tax disputes. China should consider establishing specialized tax judicial function (e.g. a Tax Court) more readily available to taxpayers and with specialized expertise to increase the efficiency of dispute resolution in anticipation of the increase in international tax disputes from the implementation of the BEPS report recommendations.

Labor Laws

China should adopt and consistently enforce labor laws that adhere to ILO Fundamental Principles and Rights at Work. While USCIB members implement the highest standards of labor and employment practices, it is clear that inconsistent enforcement by Chinese authorities of existing laws domestically encourages a culture of lax labor compliance in many parts of the country. Both the U.S. Department of State in its 2017 U.S. Department of State Country Reports on Human Rights in China and the USTR 2017 Report to Congress on China’s WTO Compliance highlight the negative consequences of this culture, particular regarding forced labor, child labor, wage and hour policies, occupational safety and health, non-discrimination in the workplace, and the ability of Chinese workers to form independent unions. USCIB members urge the U.S. Government to continue to focus on the impacts of this issue on U.S. companies.

II. SECTORAL ISSUES

Agricultural Biotechnology

China is one of the largest markets for U.S. grain exports in addition to being a growing market for seed. However, China's regulatory import approval system has become a barrier to international trade. Specifically, China's policies that restrict technology developers from applying for regulatory approval before a product is approved in an exporting country, and the lengthy and unpredictable regulatory process restricts farmers in exporting countries such as Argentina, Brazil, Canada and the United States from having access to new technologies to enhance crop yield and respond to environmental challenges such as drought or insect pressure.

1. **International Grain Trade and the Regulatory Import Approval Process**
   - In 2017, the U.S. exported roughly $20 billion worth of agricultural products to China, approximately 63% of which were biotechnology-derived plant products. For oilseeds and grain, the U.S.-China trade relationship is a success story – in 2001 U.S. soybean exports to China were roughly $1 billion. In 2015-2016, China represented 57% of total U.S. soybean exports.

   - In a trend over the last several years, China's regulatory import approval system has nearly shut down, and at times a de facto moratorium on approvals has been in place. It is clear that economic and political factors have driven this trend which calls into question whether China is meeting its obligations under the WTO. China's use of its regulatory process to control imports has more recently resulted in a widely-reported trade disruption in U.S. corn and DDG exports. The U.S. agricultural value chain needs predictable implementation and enforcement of Chinese regulatory decisions to maintain and grow the China market. Our trade relationship is too important to not resolve this issue.

   - While China's actions can directly and unnecessarily restrict access of U.S. oilseeds and grain to its market, this is only part of the story. China's regulatory delays have widespread impacts that will ripple throughout the U.S. agricultural value chain by directly influencing whether or not U.S. farmers will have access to the latest technologies to help increase their efficiencies and yield, put a damper on investment in U.S. innovation and overall competitiveness, and finally, every year of delay that results in a product not going to market, translates to the loss of patent life and intellectual property protection for U.S. companies.

   - A recent analysis found that in the last six years, delays in China have impacted the U.S. economy by foregoing the creation of 34,000 jobs, $7 billion in GDP, $4.6 billion in wage growth, and $14.8 billion in business sales. If the status quo persists, the U.S. will forego 19,000 new jobs, $7.4 billion in GDP, $4.4 billion in wage growth, and $14.5 billion in business sales.

- The biotechnology industry and its partners have long advocated for minor changes in the implementation of China's regulatory system to improve the predictability and transparency. Despite numerous high-level commitments, the regulatory process has only become less transparent and predictable, necessitating an overhaul in the system as it applies to imports of products intended only for food, feed, and processing.

- In the immediate term, the Chinese government should complete the risk assessments for the pending biotech traits.

- The Chinese government should establish 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) only require in-country environmental trials 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.

- 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.

2. Transgenic Seed Business and IPR Protections

- While China has made strides toward strengthening its IP protections, biotechnology companies continue to experience problems with counterfeiting and effective enforcement of intellectual property in certain provinces.

- Intellectual property is fundamental to innovation in the seed industry. Patent and Plant Variety Protection (PVP) requirements and expertise in China are key areas for companies that are trying to enter the market in China. China should further enhance the effective IP protection of plant related inventions through patents and PVP. Many varieties are not protected under either patent or under PVP.

3. Transgenic Seed Business and the Regulatory Approval Process

- We commend China's moves toward opening up its economy and reforming its foreign direct investment (FDI) rules, but urge that the reforms be broad-base and that the definitional scope for FDI be broadened to include all sectors, including agriculture.

China's FDI catalogue and prohibition of FDI in the transgenic seed business denies millions of Chinese farmers' access to numerous agricultural biotech products.

- Current FDI regulations should be modified to repeal and lift the prohibition on plant biotechnology so that new technologies can be made available to Chinese farmers more rapidly**.** Currently in China, each plant variety containing a biotech trait must undergo a separate production approval, resulting in significant redundancy, cost and timing delays. We urge China to adopt a more trait-based approval system to align with global practices and reduce the delays incurred under the current trait-by variety approach.

- Additionally, China's assessments for seed quarantine are not entirely risk-based, which leads to the hindrance of seed movement both inter-provincial and import/export. The seed restrictions and assessments should be reevaluated based upon up-to-date, science-based criteria to allow for greater movement of seed across borders for breeding and production.

Audiovisual

Intellectual property rights violations and the limitations on market access for providing legitimate product into the market constitute the greatest impediments to the development of a healthy Chinese media and entertainment market. Without a proper, functioning market where intellectual property rights are respected and laws are enforced, investment and growth will not reach their full potential. The factors cited above contribute to high levels of piracy of foreign audiovisual products in China.

1. **Intellectual Property Rights Violations**
   - Media box piracy continues to be a growing problem and threat to the continued development and sustainability of a vibrant legitimate TV marketplace that informs and entertains consumers. Two types of devices currently pose grave challenges to copyright owners and licensed providers. The latest device is the Internet-enabled set top boxes or so-called piracy streaming devices sold by resellers in physical marketplaces and online through e-commerce platforms that are typically pre-loaded with apps to unlicensed and illegally pirated content, or are marketed as being capable of accessing pirate content/apps. These devices also enable consumers to access unlicensed online streaming websites and load apps to pirate content. Another device is the illegal free-to-air decoders that facilitate unauthorized access to pay-television service. The illegal decoders essentially gain access to stolen keys that unlock signals via real-time Internet or satellite transmissions, mimicking the services of a legitimate set-top box.

   - China remains a hub for manufacturing and distributing these devices and technologies that interfere with the ability of copyright owners to manage a variety of business models that offer consumers innovative and lawful access to products and services. Criminalization as well as targeted, deterrent actions against manufacturers, distributors and facilitators of media box piracy is critical to minimizing the negative impact on the legitimate media sector, including the Chinese media sector, around the world and the global economy. Additionally, governments and law enforcement should coordinate on efforts to address the importation of these illicit media boxes.

- Enforcement with respect to all forms of intellectual property theft in China remains inefficient and often ineffectual, with low penalties for violators. However, periodic special campaigns of intellectual property rights enforcement, and the establishment of the IPR Leading Group have made positive contributions to the enforcement environment. We look forward to ways to cooperate to address areas of mutual concern.

- Despite steps to improve enforcement, piracy persists at very high levels. Piracy promotes a lack of respect for the law and has a negative impact on both U.S. and Chinese films.

- Internet piracy is another major challenge. Online infringers have used the Internet to distribute a wide range of illegal products that violate copyright protections, particularly those for films and television shows. Without a comprehensive approach to this problem, China's market will be artificially constrained. The high levels of growth in the market do not undercut this point- studies have shown that online piracy has a significant impact on box office receipts and an even bigger impact on revenue from other "windows." The State Council Legislative Affairs Office should complete its review of the current Copyright Law and prioritize enactment of reforms.

- Necessary elements of this comprehensive approach include implementing principles of liability for secondary infringement (e.g., inducement liability), coupled with a framework similar to the Digital Millennium Copyright Act (DMCA) which includes conditional safe harbors addressing responsibilities and limitations of monetary liability for Internet Service Providers (ISPs) for copyright offenses and measures for notice-and-takedown of websites offering pirated material. Additionally, the law should expressly prohibit "camcording" -- the use of an audiovisual recording device in a cinema to copy or transmit part or whole of an audiovisual work. There is no legitimate reason to camcord a film.

2. Market Access Restrictions

- Market access restrictions inhibit the ability of content providers to participate fully in the legitimate market and satisfy consumer demand. Although these restrictions affect each sector differently, the situation is most acute in the sound recording, film, TV and online media markets.

- Present rules in the music sector prevent the establishment of wholly owned subsidiaries, or even equity joint ventures, for the production, advertising, promotion and distribution of sound recordings. As a consequence, the infrastructure for the production and distribution of legitimate recordings is severely underdeveloped, greatly exacerbating the piracy situation.

- China's market access restrictions in the film sector are covered by an MOU between the U.S. and China. This MOU had a built in review; both countries should prioritize completion of that MOU review and attendant update to the terms of MOU as envisioned by both countries in the original agreement.

- China maintains significant market access restrictions on its TV and online video sectors. Limits on broadcasting foreign television programming during primetime should be eased. Regulations that impose a quota of 30% on foreign content for online video producers, coupled with a content review scheme that significantly slows time to market of the most valuable U.S. TV content have a negative impact on foreign TV producers and programmers and are resulting in increased piracy for such content given the delayed availability of the content through legitimate means. Finally, China prohibits foreign companies from operating online video services in China (through a foreign ownership prohibition and licensing restrictions), a blatantly discriminatory policy.

- China currently prohibits foreign investors from 100% ownership of film and TV production and distribution entities in China (i.e., for production for the local market). Coupled with other discriminatory limits on TV and online video content, this policy effectively forecloses US companies from participation in a large and growing segment of China's domestic audio-visual sector, or forces them into joint ventures to do so. These restrictions are discriminatory and unnecessary. While China has the right to set content standards for its own market – as do all countries – a foreign investment prohibition has no bearing on enforcement of those standards.

- Censorship clearance procedures for films, optical media and on-line distribution should be streamlined and discriminatory treatment toward foreign product abolished, which severely restrict the ability to distribute timely and legitimate film, CD, VCD, DVD and online products in China, and provide yet another unfair and unintentional advantage to pirate producers.

- With respect to sound recordings, the current investment regime greatly restricts the ability of foreign record companies to enter the Chinese market, and USCIB requests that the Chinese government reforms its investment and censorship provisions in the music market to facilitate the growth of a healthy record industry in China.

Chemicals

USCIB recognizes that China is a major growing world producer and market for chemicals and downstream manufacturers. We would like to highlight areas of ongoing concern for the chemicals sector as well as businesses that use chemicals in the manufacture or formulation of their products.

1. **New Chemical Regulatory Program**
   - An example of the key, USCIB member concerns regarding the existing Guidelines on the Notification of New Chemical Substances is that "read across" from toxicology studies with similar chemicals is accepted, but members have indicated that, in practice, it appears that data from such read across techniques is not accepted. (The "read across" approach refers to a situation where endpoint information for one, source chemical is used to predict the same endpoint for another, target chemical, which is considered to be "similar in some way, such as with respect to structural similarity"). China should readily accept test data generated in other countries under international guidelines for the mutual acceptance of data. All scientifically valid information that enables one to assess a chemical should be sufficient and acceptable to meet the provisions of the Regulation.

   - USCIB has concerns regarding the protection of Confidential Business Information (CBI) under the New Substance Notification regulations. CBI protections are fundamental to any chemical control law and are essential to doing business in a jurisdiction. Complete disclosure of chemical formulations is typically required to support chemical registrations in China. There are a number of Chinese government organizations that continuously request confidential information from companies during either registration or import activities. As there is no concept of an individual trade secret law in China, it remains unclear how government authorities manage the CBI and ensure it is protected.

2. **Globally Harmonized System (GHS) Implementation**
   - USCIB recognizes and appreciates China's adoption of the UN GHS 4th edition in 2011, and for updating related Chinese technical standards.

   - Of concern is the Safety Data Sheet (SDS) guidance through GB/T 17519-2913. The standard requires companies to convert all Safety Data sheets to a new format that is out of line with international standards.

   - The changes are primarily format (removing section numbers) and duplication of information in multiple sections. The general consensus of industry is that:
     - GB/T 17519-2013 puts China SDS out of alignment with the UN guidance and adoption of GHS in other countries;
     - The work load and financial cost is prohibitive to modify the format and reissue all their Chinese SDS;
     - The perceived benefits of implementing the requirements is outweighed by costs;
     - The lead time required to accomplish these changes is insufficient; and,
     - Without all of the above, it will be difficult and expensive to implement the proper training to ensure compliance.

- While working to align SDS standards both internally and to international standards, the government should allow existing manufacturers/importers the option to choose which guidance they should use.

3. Import Restrictions

- USCIB members report concerns with the inconsistent application of China's laws governing chemical hazard communication and labeling among different localities within China. For instance, members observe that inspection requirements with respect to so-called "dangerous chemical" imports issued by the national authorities is applied differently at different ports of entry into China, and even sometimes differently at the same port depending on the time and customs/import inspection official overseeing a particular import. USCIB asks USTR to reinforce the critical importance of consistent application of national requirements with Chinese counterparts, using this area as a key example. Inconsistent application of laws raises the complexity and cost of ensuring conformity with requirements and increases the barriers to market access for U.S. companies. USCIB would be pleased to discuss specific details of this situation with our colleagues at USTR upon request.

- USCIB members also report that chemicals under certain Harmonized Tariff Schedule (HTS) codes must go through compulsory local testing by CIQ (China Inspection and Quarantine) inspection with hazard identification. The local hazard test and identification reports are issued with a period of validity, *e.g.* 1 year. This is a duplicative step that creates delays when trying to get products to the market in China. Additionally, companies would benefit from the lengthening of the period of validity for products where hazards have been tested and identified in local agents. CIQ should remove or adjust the HTS codes under compulsory local testing for products if they have no hazards found during local testing.

Electronic Payment Access

For decades, U.S. suppliers of electronic payment services have processed "cross-border" transactions in China. Cross-border transactions primarily involve purchases by individuals traveling to and from China, and take place in a currency other than renminbi ("RMB"). Until 2016, there was no legal avenue for non-Chinese companies to obtain a license to process RMB-denominated (domestic) transactions that take place in China on cards issued in China.

As a result of Chinese government policies, a Chinese company called China UnionPay ("CUP") has had a stranglehold on the domestic market in China, and has been able to leverage its position to build an acceptance footprint around the world and compete directly with established U.S. EPS companies. In fact, in just 16 years, CUP has become the largest network in the world. Since CUP was launched in 2002, they have quickly grown to more than 7 billion cards in circulation. By comparison, Visa and Mastercard only have 5.6 billion cards combined.

When China joined the WTO in 2001, it committed to allow non-Chinese EPS companies to compete and do business in its domestic market on equal terms with Chinese companies, including by processing RMB-denominated transactions in China. Unfortunately, China ignored its WTO commitments.

The United States challenged China's EPS regulations in WTO dispute settlement, and prevailed in 2012. The WTO dispute settlement panel found that China could not prohibit or cap the number of suppliers from other WTO Members who provide EPS services through a local entity in China. The WTO panel also found that China could not discriminate against EPS services and service suppliers of any other Member.

China promised to bring itself into compliance by July 2013. It failed to do so. Five years later, U.S. companies still have not been able to enter the market, while Chinese companies continue to thrive.

After several years of consistent, high-level engagement by the U.S. government, China adopted new Administrative Measures in 2016 that theoretically allow non-Chinese EPS companies to obtain licenses to process domestic transactions. In July 2017, the U.S. secured China's agreement as part of the 100-day plan in the U.S.-China Comprehensive Economic Dialogue to allow U.S. EPS companies to begin to apply for licenses, which in turn was supposed to have led to "full and prompt market access." However, not only are the Administrative Measures laden with new and highly ambiguous regulatory requirements, but China has simply failed to implement them in practice. Applications from major U.S. EPS suppliers have languished for close to a year with no indication that China has even started the review process. To fulfill its WTO obligations and uphold commitment under the U.S.-China 100-Day Action Plan as agreed in 2017, China should ensure that the People's Bank of China (PBOC) accepts and reviews- on a timely and equal basis and without discrimination based on ownership structure- the applications for Bank Card Clearing Institution (BCCI) licenses from all qualified applications who meet the stated requirements.

The mistreatment of U.S. companies in China is in stark contrast to the treatment of CUP in the United States. CUP, through a reciprocal agreement with Discover, has obtained a virtually 100% merchant acceptance rate in the United States. Major U.S. payment networks are accepted at only approximately 15% of Chinese merchants, and only for dollar denominated transactions, not RMB transactions.

Express Delivery Services (EDS)

The Chinese government has publicly recognized the importance of Express Delivery Services (EDS) to the Chinese economy by supporting modern supply chains through reliable and highly efficient links between distant producers, suppliers and consumers – both internationally and domestically. A robust, competitive, streamlined EDS industry will help China achieve its goals of promoting domestic consumption and reducing its economic dependence on exports.

Furthermore, customs reform, modernization and simplification promote the fast, streamlined movement of goods across borders necessary in today's global trade environment. Chinese government policies, however, appear to be designed to split the delivery industry into multiple parts of its value chain – logistics, freight forwarding, express, trucking, and aviation – undermining the benefits realized by the sum of those integrated parts. Moreover, EDS providers face increased, inconsistent regulation that is overly burdensome and fails to strike a necessary risk-based, strategic balance relative to the need for fast, efficient trade.

As the U.S. government evaluates China's compliance with its WTO commitments, USCIB highlights a longstanding issue dating back to China's accession to the WTO. We also put forward additional recommendations in policy areas critical to the competitiveness of express delivery services.

1. Foreign EDS Firms' Access to China's Domestic Document Market

- China's Postal Law prohibits foreign EDS firms from competing in China's domestic document delivery market, broadly interpreting "letters" and "correspondence" to include all documents. USCIB believes this discrimination against foreign firms raises national treatment concerns in the context of China's WTO commitment to open up Courier Services (CPC 75121) except to the extent those services were specifically reserved to Chinese postal authorities by law at the time of China's WTO accession. USCIB encourages the U.S. government to address this discriminatory restriction in a high-quality BIT.

2. Logistics, Postal and Security Regulation

- The EDS industry faces challenges with burdensome regulations promulgated by the State Post Bureau (SPB). Overall, the regulatory structure fails to take a balanced, risk-based approach relative to the importance of moving goods effectively and efficiently throughout the global supply chain. USCIB members request that the U.S. government consider the following related issues:
    - Ensure 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 China's Postal Law are inconsistent with the "Business Scope of Express Business Operation Permits." SPB should 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.
    - Work with SPB to ensure that all proposed regulations are published for comment, that interested parties are provided with at least forty-five (45) days within which to provide comments, and that SPB will respond in detail regarding whether the recommendations are being adopted and, if not, the reasons they are being rejected.
    - Confirm 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.

- 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.
- Simplify SPB's current permitting processes and re-evaluate its security measures, in line with the Chinese central government's call for comprehensive governance reforms and to conform such measures to 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.
- SPB currently collects substantial data from firms on shipments, facilities, vehicles and staff. Other agencies, including local agencies, seeking the same data should obtain that data through the existing SPB reporting systems. Additionally, any requests for new data reporting should be posted for public comment in advance of implementation, providing firms with sufficient time (at least six months) to prepare for implementation.
- Ensure coordinated and consistent security measures between the SPB and Ministry of Public Security at all levels, national, provincial and local. China's current import clearance regime, supported by three channels, unnecessarily complicates trade and restricts low-value shipments, including shipments from U.S. small e-Commerce businesses, from benefitting from expedited shipments treatment, as envisioned in the WTO Trade Facilitation Agreement. China's import clearance procedures are complex and supported by highly calibrated import duty and tax structures. Imports can be cleared through a choice of three channels: 1) Normal Channel; 2) E-Commerce Channel (GAC 26); and 3) Postal/Personal Shipments Channel. Due to the burdensome requirements to utilize the e-Commerce channel, including retailer commercial presence and registration limited to companies with Chinese affiliates, USCIB members would like to see streamlining and facilitation measures for shipments under the normal channel, based on WCO Immediate Release guidelines. Members also would like to see the clearance "based on value" rather than the various channels discriminating between e-Commerce and non-e-Commerce goods. Such measures would simplify documentation and applicable taxes, enhance clearance times, and facilitate returns.
- Also in line with China's WTO Trade Facilitation Agreement implementation, the U.S. should call on China to eliminate user fees charged by all agencies at each port. In 2015, in response to the Chinese central government's call to relieve the administrative burden on enterprises, and further simplify the process for international trade at the border, China Customs adopted a series of measures, including efforts to reduce or cancel electronic declaration data transmission and inspection fees at different ports. While China Customs has made great strides in eliminating or reducing fees, additional trade costs can be eliminated by other border agencies at each port.

- With regard to China's Cybersecurity Law, which mandates data server localization, data flow restrictions, and security reviews for industries deemed critical information infrastructure (CII), express delivery services do not yet know officially if they will be deemed critical information infrastructure, however their regulator, State Post Bureau (SPB), appears to agree that current security measures, including the vast array of data the bureau already collects from us (on shipments, facilities, vehicles, and staff), meets CII cybersecurity needs. However, other agencies are also expected to roll out their own CII criteria which may impact EDS. For example, China's Civil Aviation Authority has issued draft regulations mandating data localization and certification of IT products and services for those who access and use the China air network system. China's draft e-Commerce Law also requires local data storage for e-Commerce companies.
- USCIB members would like to secure a commitment that security measures and requests for information and access to company IT and other systems be not only risk-based and balanced, 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. Additionally, any requests for new data reporting should be posted for public comment in advance of implementation, providing firms with sufficient time (at least six months) to prepare for implementation.
- Finally, the principal unresolved WTO issue relates to China's current prohibition on U.S. express delivery service suppliers entering the domestic letter and document delivery service market.[6] 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." USCIB members hope to see China remove this segment from its Negative List. This was the EDS industry's number one ask during the Bilateral Investment Treaty negotiations.

Recoverable Materials

In 2017, China notified the WTO of its intent to prohibit imports of certain scrap materials, and those measures came into force early in 2018. The first was an intent to ban imports of mixed recovered paper and plastic scrap collected from households that went into effect on January 1, 2018. The second was the imposition of tight quality standards on all scrap materials that went into effect on March 1, 2018. These two measures had been notified to the WTO Technical

[6] Although the Chinese term "xinjian" (信件) is defined as "letters and postcards" in the law, it is commonly interpreted by the postal authorities to include any documents other than books and periodicals.

Barriers to Trade (TBT) Committee not only with very short public comment periods but also very short implementation timelines.

On April 19, 2018, the Chinese Government announced that it would impose additional scrap import prohibitions at the end of 2019 and 2020. Specifically, China will prohibit the import of industrial-sourced plastics, small motors and insulated wire (the latter two having significant valuable metal content) starting on January 1, 2019. Beginning in early 2020, some of the cleanest streams of metal scrap (such as stainless steel scrap) will be prohibited to import into China. All told, these measures will affect more than $278 million worth of U.S. exports. These measures were not – and are not likely to be – notified to the WTO, and thus, no comment period was provided.

The Chinese Government is not receptive to dialogue on these measures claiming they are required for "environmental protection." Unfortunately, as Chinese manufacturers are still in great need of these materials to produce consumer, construction and other high demand goods, these producers are instead filling their feedstock shortages with primary materials that are more carbon-intensive and harmful to the environment to make than had they been able to continue relying on environmentally-friendly recyclable materials.

Software

China and the United States share a common interest in promoting software development, use, and protection in China because information technology holds the key to increasing productivity and solving so many pressing global issues, including in areas such as health, education, and energy. Unfortunately, China continues to pursue a wide range of measures that disadvantage U.S. software suppliers in the Chinese marketplace and that deprive them of the ability to protect and commercialize their rights in China.

1. **Intellectual Property Rights Enforcement**
   - In November 2011, the State Council established the National Leading Group (NLG) Against IPR Infringement. In 2013, China committed that the NLG will "strengthen actions to fight counterfeiting and piracy" and specifically committed to "foster a better environment for the increased sales of legitimate IP intensives products and services, *including software*" (emphasis added).[7] China reaffirmed its commitment to facilitate sales of legitimate IP intensive goods and services in 2014.[8]

   - Although the Campaign and the NLG have achieved some incremental progress, the rate of unlicensed software use within China – particularly among government agencies and in SOEs and private enterprises – remains extremely high. Rather than direct government agencies and SOEs to legalize the copies of software that they already use, however,

[7] U.S. Treasury Department, *Joint U.S.-China Economic Track Fact Sheet of the Fifth Meeting of the U.S.-China Strategic and Economic Dialogue* (July 12, 2013).
[8] *See* U.S. Department of Commerce, *Fact Sheet: 25th U.S.-China Joint Commission on Commerce and Trade* (Dec. 19, 2014).

China has in several cases directed them to purchase domestic copies of software in place of legalizing these in-use copies. This does nothing to remedy the existing problem of infringement, and instead simply replaces one trade barrier (inadequate IP protection) with another (discrimination against foreign products and suppliers).

- Also, despite somewhat greater readiness recently by Chinese courts to enable software owners to protect their IPRs in civil cases, government enforcement efforts against unlicensed software use remain inadequate, and China's legal regime makes it difficult and often impossible for software owners to enforce their rights effectively. This includes excessively high evidentiary burdens for granting evidence preservation orders against suspected infringers, and damage awards that are too small to act as a deterrent to infringement. China also has yet to make any measurable progress on or take meaningful steps to implement its 2014 commitments to foster a better environment for legitimate sales of software and other IP intensives goods and services.

- China's ongoing failure to make significant, concrete progress on unlicensed software use, combined with efforts by the Chinese Government to favor national champions and discriminate against foreign suppliers under the guise of "indigenous innovation" and other protectionist policies, means that U.S. software firms continue to face major barriers to accessing the Chinese market.

2. Unlicensed Software Use

- Although China has repeatedly committed to eliminate unlicensed software use within government agencies, SOEs, and private enterprises, U.S. software developers continue to face high rates of unlicensed software use in all three sectors. According to recent studies, the rate of unlicensed software use in China was 66% in 2017. This rate is far higher than both the regional rate (57%) and the global rate (37%). The estimated commercial value of unlicensed software in China was over $6.8 billion in 2017, higher than that of any other U.S. trading partner by a wide margin.[9]

- Over the years, China has made many commitments to promote legal software use within government agencies and SOEs, including more regular audits and other requirements.[10]

[9] The figures in this paragraph are taken from the 2018 BSA Global Software Survey, at https://gss.bsa.org/wp-content/uploads/2018/05/2018_BSA_GSS_Report_en.pdf.

[10] In 2012, China "committed to extend its efforts to promote the use of legal software by Chinese enterprises, in addition to more regular audits of software on government computers." (U.S. Treasury Department, *Fourth Meeting of the U.S.-China Strategic and Economic Dialogue U.S. Fact Sheet—Economic Track* (May 4, 2012)). Building upon this commitment, China "confirm[ed] that it requires state-owned enterprises under the authority of the China Banking Regulatory Commission and central state-owned enterprises directly supervised by the State-Owned Assets Supervision and Administration Commission of the State Council to purchase and use legitimate software, including but not limited to operating system and office suite software." (Office of the USTR, *23rd U.S.-China Joint Commission on Commerce and Trade Fact Sheet* (Dec. 19, 2012)). This commitment was further developed in 2013, where China committed to "further promote the use of legal software by SOEs, including by strengthening supervision of central SOEs and large state-owned financial institutions by establishing software asset management (SAM); enforcing China's requirement to purchase and use legitimate software by these SOEs; providing budget

Despite these and many other commitments, China has not lived up to these commitments and continues to tolerate high levels of unlicensed software use in governments, SOEs, and enterprises. China appears to not yet have provided adequate budget to government agencies to enable them to legalize the software they use. Chinese agencies have also issued a variety of decrees and other measures instructing government agencies and SOEs to purchase only Chinese software – without first legalizing their unlicensed copies of U.S. software and even though most continue to use unlicensed copies of such U.S. software. Moreover, there is evidence that China is using measures on centralized procurement by SOEs as a means to preference domestic software suppliers and to discriminate against U.S. and other foreign software suppliers.

- The need for concrete and measurable progress on software legalization in China remains critical. Areas for further progress include stronger and auditable measures to ensure that all Chinese SOEs use only legitimate, fully licensed software, and for China to refrain from encouraging SOEs, either directly or indirectly, to preference domestic over foreign software suppliers. China should also be required to demonstrate that it has lived up to its government software legalization commitments by providing all government agencies with sufficient budget to purchase licensed copies of the software they actually use and to treat software as an asset for accounting purposes. China should also crack down on Original Equipment Manufacturers (OEMs) that sell computing devices pre-installed with "free" operating systems that are then replaced with pirated copies of proprietary operating systems.

- Over the past several years, China has made numerous far-reaching commitments to legalize software in governments, SOEs and private enterprises. It should now be required to demonstrate concrete progress on these commitments based on measurable results and benchmarks and to achieve such results on specific timelines and deadlines.

3. Discriminatory Treatment of U.S. Suppliers

- As part of its WTO Accession agreement, and in joining the WTO, China agreed not to discriminate against foreign goods or foreign intellectual property right (IPR) owners – *i.e.*, to treat imported goods and foreign IPR and IPR owners no less favorably than domestic goods, IPRs and IPR owners. China was under an obligation to remove all rules and regulations that were inconsistent with this non-discrimination obligation. This commitment applies not only to tariffs and other "at-the-border" measures, but also to internal laws, regulations, and other "behind-the-border" measures. Despite its commitments, China continues to pursue policies that favor domestic software products, IPRs, and IPR owners over foreign products, IPRs, and IPR owners.

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guarantees for software and promoting centralized procurement." (U.S. Treasury Department, *Joint U.S.-China Economic Track Fact Sheet of the Fifth Meeting of the U.S.-China Strategic and Economic Dialogue* (July 12, 2013)).

- A prime example of discriminatory treatment has been China's "indigenous innovation" policies, which discriminate against U.S. software suppliers in the government procurement market and in access to various governmental benefits.

- Despite commitments over past years to delink its indigenous innovation policies from government procurement preferences, U.S. software suppliers continue to confront numerous instances in which Chinese authorities are directing government agencies and SOEs to favor Chinese over U.S. software products and suppliers. Moreover, U.S. software suppliers continue to face discrimination in access to subsidies, tax advantages, and other benefits that are available to domestic Chinese firms.

- Furthermore, as noted above (in the section on "IT Security Measures"), Chinese authorities have over the past several years proposed or enacted a wide variety of trade-restrictive and discriminatory requirements on IT under the guise of protecting national security. These measures, which often require the use of IT products that are "secure and controllable," disadvantage U.S. firms by requiring the use of domestic Chinese products or suppliers, imposing domestic R&D or content requirements, requiring the transfer or disclosure of source code, encryption algorithms, or other IP, restricting cross-border data transfers, and other measures.

- The United States should not tolerate the use of IT security as a pretext for discriminating against U.S. suppliers and imposing illegal barriers to market access. USCIB members urge the U.S. government to continue to press for full suspension of all existing and proposed measures involving trade-restrictive requirements in this area.

- More broadly, it is critical that China immediately cease all preferences for domestic software suppliers and products immediately and that it adhere to its WTO commitments to open its markets to U.S. software suppliers. The United States should press China to provide greater transparency on its implementation of its existing WTO commitments. China also should commit not to influence the software purchasing decisions of SOEs in any way, including through measures such as preferences for certain licensing models or licensing terms or through price controls.

4. Copyright and Criminal Law Reform

- The current enforcement environment against unlicensed software use in China is deficient. Although the Copyright Administration (CA) has administrative authority to do surprise audits of companies suspected of using illegal software, CA offices are reluctant to exercise their authority and are plagued by inadequate manpower, training and resources. When they do take action, most CA offices have been unwilling to issue a formal punishment with deterrent penalties. Because the Copyright Law limits administrative penalties to copyright violations that harm the public interest, administrative authorities often refuse to act against unlicensed software use by enterprises based on their assertion that such piracy fails to meet this requirement.

- China's efforts to amend its Copyright Law provide an important opportunity to modernize China's IP regime for software and to address a number of key deficiencies in the existing regime that prevent software owners from effectively enforcing their copyrights against infringers. To address these deficiencies, China should ensure that the final amendments to the Copyright Law (and/or in the Criminal Law, as appropriate):
    - Clearly establish that unlicensed software use by enterprises and other commercial end-users violates the reproduction right of the copyright holder and may be subject to criminal penalties. Criminal penalties are currently unavailable against unlicensed software use by commercial enterprises given how Chinese courts have interpreted the requirements that such copyright infringement must have a "profit motive" and be conducted on a "commercial scale" to be subject to criminal penalties.
    - Provide higher statutory damages for infringement and punitive damages for willful or repeated infringement.
    - Provide more effective procedural mechanisms to enable rights holders to collect evidence of unlicensed software use, including by adopting clear rules for civil discovery, lowering the barriers for acquiring and executing evidence preservation orders, and reducing the burdens of proof on rights holders.
    - Provide criminal liability for pre-installation of unlicensed software on PCs by retailers and distributors, and for circumventions of effective technological measures.

5. Licensing of Online Services

- Chinese authorities currently prohibit companies from offering online services from within China – which Chinese authorities classify as "Value-Added Telecommunications Services" (VATS) – without first obtaining a license from the Ministry of Industry and Information Technology (MIIT). However, foreign-invested enterprises are ineligible to obtain such a license. Instead, foreign enterprises wishing to offer online services within China must first establish a foreign-invested telecommunications entity (FITE), which must contain less than 50% foreign equity. Moreover, MITT in practice has not issued any new licenses to any FITE to offer online services within China. However, MIIT has fully opened two areas of activity to foreign investment- online data processing and transaction processing (for e-commerce) and offshore call center services. Foreign investors may hold up to 100% shares or equity in these areas.

- This deprives foreign-invested enterprises of the ability to compete in the provision of online services within China. Given the pace at which many traditional methods of providing content and services are moving online, it is imperative that China remove these restrictions and that foreign-invested enterprises are permitted to compete in the Chinese market on a level playing field with domestic Chinese firms.

Telecommunications (Services and Equipment)
China has failed to open its Telecommunications market in accordance with its WTO commitments. The publication of a new Telecom Services catalog in late 2015 extended telecom regulation with its corresponding foreign equity limitations to new services, including cloud, online platforms and content delivery services, which are not typically regulated and fall under computer and related services classification. China's increasing regulation of newer services makes it increasingly difficult for foreign providers of digital services to participate in the Chinese market. In addition, China's increasingly restrictive approach to the Internet is negatively impacting services that rely on the cross-border flow of data and, as a result, is impeding the operations of foreign companies in China that depend on online communications. China's WTO commitments to liberalize telecommunications services became effective upon its accession to the WTO on December 11, 2001. These commitments include a six-year schedule, which ended in 2007, for phasing in direct foreign participation in value-added network services and basic telecommunications.

1. **Market Access**

- China's updated Telecom Services Catalog incorrectly classifies a wide range of ICT technologies and services as telecom services, when in fact they are computer or business services that utilize the public telecom network as a method of delivery. Examples include:
    - Cloud computing is improperly classified as a telecommunication services. While cloud computing services may use telecommunications networks and services, they are supplying computer related services (CRS).
    - Content Delivery Services are classified as a Value Added Service (VAS).
    - Information Services (including services delivered through online platforms) are classified as a VAS. The broad definition of these services potentially captures many different online services, from social media to online news and other information services.

- China has generally failed to open its telecommunications market for both Basic and VAS. VAS licenses are limited to 50% foreign equity and require a local JV partner. Basic Telecommunications Licenses are even more restrictive, with a 49% foreign equity cap and a requirement that the foreign company partner with one of China's incumbent telecommunications operators.

- China should eliminate the FDI limits and joint venture requirements for VAS. Moreover, in classifying service characteristics as Basic or Value Added, China should eliminate the intentionally restrictive distinction between international and domestic services as a determinate of whether a service is Basic[11]. It is critical that MIIT interpret the definition

[11] For example, China defines International Virtual Private Line service as a Basic Telecommunications Service, whereas the exact same VPN service provided domestically is defined as Value Added. This distinction is material, because foreign companies are required to partner (50% joint venture) with domestic telecommunications company (that holds a Basic License), as compared to VAS licenses where foreign companies can partner (49% joint venture) with any Chinese company irrespective of whether it holds a Basic Telecommunications license or not.

of VAS in a manner that is consistent with China's explicit WTO commitment and widely accepted international standards.

- We continue to urge USTR to encourage China to take the following steps to remove the obstacles to development of VAS in China:
  - Revise its catalog to note regulate information services, cloud computing, content delivery networks and other services that are not typically regulated as telecom services to enable growth in these new services.
  - Adjust the list of VAS in the Catalogue to include such services as managed International IP VPN, in conformity with international norms for categorizing basic and VAS;
  - Lift the prohibition on resale, enabling all carriers to acquire capacity at wholesale rates and interconnect their networks to deliver services to a broader reach of the country;
  - Remove remaining caps to Foreign Direct Investment, and
  - Allow full market access for resale of mobile services.

2. Cross-Border Data Flows

- China's increasingly restrictive and isolationist approach to Internet based services is negatively impacting the ability of companies to offer online services and negatively impacting companies that rely on the international flow of data to operate. The 2018 National Trade Estimate report, released by USTR, highlights the impact of China's Internet restrictions on companies' ability to operate in China, which continues to be a problem. The limitations on the cross-border flow of data also impair the ability of companies to supply cross-border online services.

3. High Capitalization Requirements

- Even if U.S. companies were able to enter China's communications market, they would still face unreasonably high capitalization requirements for basic telecommunications services. USCIB considers the existing capitalization requirement in basic services an excessively burdensome and unjustified restriction that violates Article VI of the GATS. China should take additional steps to reduce the capitalization requirement to a reasonable level.

4. Independent and Impartial Regulator

- USCIB encourages USTR and others in the U.S. Government to place a high priority on working with China to establish a regulatory body that is separate from, and not administratively joined to, any basic telecoms supplier, and that is capable of issuing impartial decisions and regulations affecting the telecoms sector. In this context, it is important that the regulatory body adopts the following:
  - transparent processes for drafting, finalizing, implementing and applying telecom regulations and decisions;

- appropriate measures, consistent with the Reference Paper, for the purpose of preventing major suppliers from engaging in or continuing anti-competitive practices;
- a defined procedure – as it has done for interconnection – to resolve commercial disputes in an efficient and fair manner between public telecom suppliers that are not able to reach mutually acceptable agreements;
- an independent and objective process for administrative reconsideration of its decisions; and
- appropriate procedures and authority to enforce China's WTO telecom commitments, such as the ability to impose fines, order injunctive relief, and modify, suspend, or revoke a license.

- USCIB encourages USTR to continue to encourage China to provide reasonable notice and the opportunity for public comment on proposed regulations.

5. State-Owned Enterprise - Joint Venture Partnership Requirement

- The requirement that a foreign company must select a state-owned and licensed telecom company as a joint venture partner to obtain a Basic Telecom License is a significant market access barrier. Incumbent licensees have only limited incentive to partner with foreign competitors. It is not an ideal model for promoting competition to require foreign telecom service providers to partner with a company that may also be a horizontal competitor of their joint venture. Allowing foreign parties to partner with new entrant Chinese firms would create new opportunities for creative investment in telecom infrastructure and foster the type of competition that would benefit Chinese customers with better service and competitive pricing. China should eliminate this requirement.

6. Geographic Restrictions

- Notwithstanding the business model of the Internet, MIIT has at times suggested that a commercial presence must be established in each city where customers will be located, and that an inter-regional service, based in one city but serving customers in another, is not permitted. Such an interpretation is inconsistent with the global model of how value-added, non-facilities based Internet service providers are structured, and imposes geographical restrictions that make an inter-regional, or national scaled business model non-viable. The impact of this interpretation is to negate the benefits accorded to foreign value-added telecommunications providers under the WTO agreement. This interpretation, if implemented, will also greatly impact the cost to local Chinese businesses adding an unnecessary burden to them as they wish to become more robust and increase their participation in a broader geographic market.

7. Cyber Security Product Requirements

- China's broad and non-international approach towards cyber security technical standards has created serious market access barriers for foreign IT firms in the China market. The CCCi China Mandatory Certification for Information Security Products, and the Ministry of Public Security (MPS) administered Multi-Level Protection Scheme (MLPS), are clear examples of China adopting these non-standard approaches.

- ICT suppliers rely on global standards and norms that allows for a high degree of reliability, interoperability, and compatibility that is required to ensure that the Internet delivers goods and services to users worldwide. The U.S. government should strongly encourage China to adopt international norms and approaches in the area of information security.