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USCBC



THE US-CHINA BUSINESS COUNCIL
美中贸易全国委员会

**SECTION 301 PROPOSED DETERMINATION OF ACTION: CHINA'S ACTS,
POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER,
INTELLECTUAL PROPERTY AND INNOVATION**

Docket No. USTR-2018-0018

US-China Business Council

June 29, 2018

The US-China Business Council (USCBC) represents 200 American companies across all industries and sectors that are engaged in business with China, which support millions of American jobs. As we have noted in previous submissions, ensuring market-based decisions on technology transfer and protecting intellectual property (IP) are priorities for many of our members. Eliminating policies that harm US companies, such as those identified in USCBC's submission for USTR's Section 301 investigation, is a goal that USCBC supports. We urge the administration to seek measurable, commercially meaningful outcomes that will improve the business environment in China and level the playing field for American workers and companies.

Constructively working with like-minded partners has proven to be an effective method to altering adverse Chinese policies. The WTO dispute settlement case filed by the United States in March is a good example of how the United States should seek those types of outcomes. USTR's request for consultation, based on the evidence detailed in the 301 investigation report, has been joined by five WTO members. This is a clear indication that our like-minded global trading partners are eager to work with the United States in ways consistent with international agreements to address common concerns regarding China's trade and investment policies. We encourage you to undertake more actions that include this kind of cooperation.

The proposed tariff actions outlined to date by the administration, including those set to be implemented on July 6, to deal with the numerous challenges that American companies face in China, as well as those that challenge the global economy such as overcapacity, are unlikely to eliminate the policies that harm American companies. Tariffs are also likely to do significant damage to US economic interests, both in preventing necessary imports as well as through retaliatory tariffs, such as those that have already begun to be implemented by China and the European Union.

A holistic approach that considers the economic effects of US actions is needed to effectively address China's explicit and implicit trade and investment barriers. As a consequence, we urge you to reconsider the possible broad imposition of tariffs to achieve targeted trade goals. We urge a comprehensive and strategic approach that clearly articulates the goals we are trying to achieve, setting short, medium, and long-term negotiating objectives to address industry concerns and build much-needed confidence that China will follow through on its commitments.

To be clear: the Section 301 investigation launched in August 2017 into China's IP and tech transfer policies accurately identified key issues that need to be addressed. The problem of

overcapacity in steel, aluminum, and other sectors, exacerbated by Chinese oversupply, also needs to be effectively addressed. China should substantially improve market access and competitive conditions for foreign companies selling to and investing in China. Such steps should include increased policy transparency, predictability, and implementation lead times in China, as well as elimination of explicit and implicit localization requirements that often favor domestic companies. Unilateral tariffs will address none of these issues, however, and will inflict real economic harm on US businesses and consumers. A better approach would be to work with like-minded countries to develop common or parallel approaches that address these issues with China, rather than singularly expose US companies and workers to retaliation. Working with our trading partners will also keep the focus where it should be: resolving China's problematic policies in ways that will bring about positive change in the commercial relationship.

The administration's planned actions in response to the 301 investigation results also include investment restrictions. USCBC is pleased that the administration announced on June 27 that it will use existing tools for investment reviews and technology export controls to manage the concerns about technology transfers to China. At the same time, we need to ensure that we have the right balance between our national security and economic interests. Inbound and outbound investment are important drivers of employment, economic growth, and tax base expansion in the United States. As USCBC said in testimony during previous phases of this case, national security restrictions on economic activity, including investment, should be as narrowly applied as possible and tied to credible, identified security risks. Implementation of revisions to US foreign investment review mechanisms, once passed by Congress, and the review of US export controls called for by the president in his June 27 announcement should maintain this approach and incorporate the best advice from all stakeholders, including the business community.

In addition, an undefined and broad use of national security as justification for US actions damages US credibility as a leader of the global trading system and validates China's approaches that have used these same justifications. Neither the United States nor its trading partners should implement policies that parse WTO commitments into simply the letter of the rules. We must push ourselves and our trading partners to implement policies that reflect the spirit of those commitments as well. If existing rules fall short, we should not abandon them, but instead should take the lead to improve them.

In support of the mutually held goal of resolving these issues for the long-term benefit of US companies and the global economy, USCBC recommends that the United States put in place with China a regularized, results-oriented dialogue focused on measurable, commercially meaningful outcomes that address the valid concerns of American and other foreign companies. Successful negotiations would include the following elements, and would bring about fundamental change in how foreign companies are treated in China:

- **Treat all companies legally established under China's Company Law equally, regardless of ownership nationality.** Separate but equal licensing systems for domestic and foreign companies are never equal. Terminology in China's laws and regulations that distinguish between domestic and foreign-owned companies, such as "foreign-invested enterprises," invites discriminatory treatment of various types of domestic legal entities,

based solely on ownership. China is developing a new draft foreign investment law, providing a timely opportunity to address this issue.

- **Eliminate joint venture requirements and foreign equity limitations.** Investment restrictions remain not only in China's foreign investment negative list, but also in catalogues such as for telecommunications. Allowing foreign companies to own 100 percent of their operations in China would eliminate the risks of transferring technology to a JV partner and enable companies to better protect their IP.
- **Adopt the WTO-consistent deterrent of criminal penalties in all cases of commercial-scale infringement and broaden the use of higher penalties and stronger deterrents in both civil and criminal cases against all types of IPR infringement—including patent, copyright, trademark, and trade secrets violations.** Currently, China maintains a system of thresholds that determine whether an IP violator will be subject to a fine versus the stronger deterrent of criminal sanctions. IP violators exploit these thresholds to avoid criminal sanctions; for those who get caught, paying a fine merely represents a cost of doing business and does little to deter piracy. Implementing a genuine deterrent would benefit all companies and IPR holders in China, as President Xi Jinping just stated in a speech in early April. In addition, China should clarify that the rights to the intellectual property should be designated to the inventor.
- **Require officials involved in licensing and approval processes to implement regulations based on the explicit details included in those measures, rather than allowing interpretation of rules and intent.** Companies regularly report that implementation of laws and regulations remains uneven and inconsistent, impacting both Chinese and foreign companies. While most companies in USCBC's annual membership surveys report that the licensing problems they have experienced have been at the central government level, about one-third of companies have also experienced these problems with provincial and local authorities. Regardless of the level, when officials make such requests, companies should have a reliable channel to report abuses and to appeal adverse decisions when their applications are denied due to those factors, without fear of retaliation. Merger reviews and other licensing and regulatory decisions should be based on consistent, scientific, market-based calculations and not on US-China politics.

USCBC's submission for the Section 301 investigation includes additional, specific recommendations of actions China can take that would also address the IP and tech transfer concerns. A summary of those recommendations is attached for reference. We encourage you to use these recommendations as the basis for measurable, commercially meaningful outcomes.

USCBC looks forward to working with the Trump Administration to effectively address trade issues with China through bilateral dialogues and other means. To be effective, a comprehensive approach is indeed necessary – one that addresses tariffs, licensing and other non-tariff barriers, and prioritizes bilateral trade and investment agreements to create a more level playing field for American companies to protect intellectual property and access the Chinese market.

Attachment



ATTACHMENT: US-China Business Council recommendations to address issues identified in Section 301 investigation

To act quickly to address immediate concerns, but to also allow reasonable negotiation and implementation timelines for other needed changes, the US-China Business Council recommends the following recommendations for actions to address the issues raised in the Section 301 investigation. Short term goals should be implemented by the end of 2018, medium term goals by the end of 2019, and long term goals within a period of three to five years.

Issues identified in 301 investigation	USCBC Recommendation	Timeframe
General		
Section 301 provides a variety of options that the United States may use when it finds that trading partners' policies are unreasonable or discriminatory	<ul style="list-style-type: none"> Any related trade actions taken by the United States should be compliant with US international trading obligations, able to withstand a challenge at the World Trade Organization, and address the concerns of American companies about the protection of their intellectual property and technology 	Short term
	<ul style="list-style-type: none"> Prioritize bilateral or multilateral agreements such as a bilateral investment treaty (BIT) and the Trans-Pacific Partnership (TPP) with enforcement options tailored to deal with specific concerns, to ensure that progress made in these areas can be effectively locked in 	Medium term
	<ul style="list-style-type: none"> If existing agreements do not cover all of the United States' concerns, new agreements should be negotiated to do so 	Long term
	<ul style="list-style-type: none"> Work with like-minded countries in an effort to address China's policies that are inconsistent with both the letter and the spirit of the WTO's rules on national treatment, non-discrimination, IP protection and technology transfer 	Short term
Intellectual property protection		
Use of thresholds for determining IP infringement penalties does not deter theft	<ul style="list-style-type: none"> Adopt criminal penalties for IP theft on a commercial scale 	Short and Medium term
	<ul style="list-style-type: none"> Continue to vigorously prosecute IP violations that occur on US soil 	Short term
Government approval processes		
Requests for technology transfers by foreign companies during the approval process	<ul style="list-style-type: none"> Treat all companies legally established under China's Company Law equally, regardless of ownership nationality 	Short term

Issues identified in 301 investigation	USCBC Recommendation	Timeframe
	<ul style="list-style-type: none"> Eliminate terminology in China’s laws and regulations that distinguish between domestic and foreign-owned companies, such as “foreign-invested enterprises” 	Medium term
	<ul style="list-style-type: none"> Require officials involved in licensing and approval processes to implement regulations based on the explicit details included in those measures 	Short term
	<ul style="list-style-type: none"> Create a reliable channel to report abuses and to appeal adverse decisions when applications are denied due to inappropriate requests for technology transfer, without fear of retaliation 	Short term
Inadequate protection of trade secrets	<ul style="list-style-type: none"> Develop a trade secrets law with stakeholder input 	Short and Medium Term
	<ul style="list-style-type: none"> Make broader use of judicial procedures on preliminary injunctions and evidence preservation orders 	Short term
	<ul style="list-style-type: none"> Implement clearer measures requiring government agencies to protect confidential information collected from companies during government review processes 	Short term
	<ul style="list-style-type: none"> Reduce the high evidentiary burden that plaintiffs face during trade secrets cases 	Short term
Expert panels may expose proprietary technology during the review process	<ul style="list-style-type: none"> Prohibit expert panelists that have potential conflicts of interest and enhance trade secret protection mechanisms in review processes for any third-party reviews 	Short term
	<ul style="list-style-type: none"> Institute a formal process for applicants to dispute expert panel nominations where conflicts of interest exist, including a public timeline for consideration, review, and resolution of the dispute to minimize disruptions in the investment process 	Medium term
	<ul style="list-style-type: none"> Allow companies undergoing reviews to provide input on expert panel nominations 	Short term
	<ul style="list-style-type: none"> Require regulating agencies to provide updated and complete lists of approved experts to companies and allow them to nominate a certain number of experts to the panel 	Short term
	<ul style="list-style-type: none"> Require experts to support information requests with substantiated facts, commercial experience, and sound science 	Short term
Government reviews favor domestic companies and may be influenced by political pressure	<ul style="list-style-type: none"> Licensing and other government approval decisions should be made without prejudice against type of ownership, without influence from competing entities, and with consistent interpretation 	Short term

Issues identified in 301 investigation	USCBC Recommendation	Timeframe
	<ul style="list-style-type: none"> Finalize a high standard US-China bilateral investment treaty (BIT), including a performance requirement to bar use of incentives to encourage IP and tech transfers, investor-state and state-state dispute settlement 	Medium term
Joint venture requirements and foreign equity limitations		
China's JV requirements and equity caps create opportunities for Chinese companies to request IP/tech transfers as a condition of partnerships	<ul style="list-style-type: none"> Eliminate JV requirements and equity caps 	Short term
	<ul style="list-style-type: none"> Finalize a high standard US-China bilateral investment treaty (BIT) that eliminates JV requirements and equity caps 	Medium term
	<ul style="list-style-type: none"> In sectors where JV requirements remain, eliminate official and unofficial requirements to transfer sensitive trade secrets as a prerequisite for market access 	Short term
Procurement		
Procurement-related policies that act as de facto IP or technology transfer requirements	<ul style="list-style-type: none"> Mandate that regulations at all levels of government comply with China's WTO commitments on nondiscrimination and national treatment 	Short term
	<ul style="list-style-type: none"> Actively monitor the implementation at the provincial and local level of its commitments to treat IP owned and developed in other countries on an equal basis as IP owned or developed in China 	Short, Medium and Long Term
	<ul style="list-style-type: none"> Finalize the draft Administrative Measures for Government Procurement of Domestic Products, with modifications to ensure that goods and services provided by all legal entities in China are treated equally during procurement processes, regardless of ownership 	Short term
	<ul style="list-style-type: none"> Set a near term negotiating target for China to join the WTO's Government Procurement Agreement 	Short term
Provincial and local innovation policies that include preferences for products using "indigenous" innovation are frequently interpreted as meaning products made by Chinese companies	<ul style="list-style-type: none"> Mandate that sector-specific measures that promote or require the use of secure and controllable technologies as well as future implementing regulations and standards for the Cybersecurity Law, comply with China's WTO commitments on nondiscrimination and national treatment 	Short term
Other mechanisms to regulate or intervene in U.S. companies' operations in China		
Domestic preferences		
Made in China 2025 (MIC 2025)	<ul style="list-style-type: none"> Eliminate all official and unofficial targets for global market share in specified sectors 	Short term
	<ul style="list-style-type: none"> Mandate that subsidies provided under MIC 2025 are nondiscriminatory and comply with China's obligations under the WTO Subsidies agreement by publicly reporting all assistance provided under the program to domestic and foreign companies to allow independent verification of compliance 	Short, Medium and Long term

Issues identified in 301 investigation	USCBC Recommendation	Timeframe
	<ul style="list-style-type: none"> ● Ensure that decisions on production of goods in sectors targeted by MIC 2025 are based on market demand to prevent global overcapacity 	Short, Medium and Long term
Innovation policies imply or require ownership of IP in China to qualify for sale in its domestic market	<ul style="list-style-type: none"> ● Mandate that regulations at all levels of government comply with China’s WTO commitments on nondiscrimination and national treatment 	Short term
	<ul style="list-style-type: none"> ● Actively monitor the implementation at the provincial and local level of its commitments to treat IP owned and developed in other countries on an equal basis as IP owned or developed in China 	Short, Medium and Long term
HNTE program presents a de-facto bias against foreign companies that forces them to change their global corporate IP structure to transfer ownership of IP to China-based operations	<ul style="list-style-type: none"> ● Eliminating requirements for ownership of core proprietary IP in China or expanding the criteria to includes legally acquired, non-exclusive licensee or usage rights 	Short term
<u>Import restrictions</u>		
Import restrictions on legitimate products promote the sale of counterfeit products	<ul style="list-style-type: none"> ● Reduce import and distribution barriers of IP-intensive products 	Short and Medium term
	<ul style="list-style-type: none"> ● Let the market determine imports and remove import quotas/tariff rate quotas (TRQs) 	Medium term
<u>Rulemaking transparency</u>		
Laws and regulations are not consistently released for public comment prior to implementation	<ul style="list-style-type: none"> ● Fully implement commitment to publish all draft trade and economic related laws, administrative regulations, and departmental rules for a full 30-day comment period 	Short and Medium term
	<ul style="list-style-type: none"> ● Go further by posting draft regulations on a designated website for a 60- or 90-day public comment period 	Short term
<u>Data flows</u>		
China’s internet restrictions create barriers to cross-border data flows	<ul style="list-style-type: none"> ● Promote a reliable and open internet to allow the flow of information necessary for companies to engage in innovation and international commerce 	Short, Medium and Long term
	<ul style="list-style-type: none"> ● Work with companies that operate internet-based businesses to develop data flow solutions that will allow them to bring their services to Chinese users 	Medium term
	<ul style="list-style-type: none"> ● Conduct a detailed analysis of the costs associated with restricting the efficient flow of data in an innovative and global digital economy and remove unnecessary security review regimes and data security licensing in order to allow its transfer across national borders 	Medium term
	<ul style="list-style-type: none"> ● Align data flow policies with internationally-proven cybersecurity best practices, including revising provisions in the Cybersecurity Law that unnecessarily restrict the efficient flow of information 	Medium term

Issues identified in 301 investigation	USCBC Recommendation	Timeframe
	<ul style="list-style-type: none"> ● Allow copies of data to be sent abroad for analysis and processing in order to ensure operational efficiency and encourage innovation by using big data 	Short term
	<ul style="list-style-type: none"> ● Consult with international industry on global best practices for secure data management and develop related policies in a clear and transparent manner 	Medium term
	<ul style="list-style-type: none"> ● Become a party to the APEC Cross Border Privacy Rules System (CBPRS) 	Medium term
<u>TIER</u>		
The Technology Import and Export Regulations (TIER) and China’s Contract Law includes conflicting provisions on dealing with IP infringement	<ul style="list-style-type: none"> ● Change both TIER and the Contract Law to clarify that parties may negotiate who will bear the responsibility for infringement 	Medium term
<u>Market-based terms for licensing and technology-related negotiations</u>		
China’s JV requirements and foreign equity limitations create an unequal negotiation for foreign companies	<ul style="list-style-type: none"> ● Eliminate JV requirements and equity caps 	Short term
	<ul style="list-style-type: none"> ● Finalize a high standard US-China bilateral investment treaty (BIT) that eliminates JV requirements and equity caps 	Medium term
	<ul style="list-style-type: none"> ● In sectors where JV requirements remain, eliminate requirements to transfer sensitive trade secrets as a prerequisite for market access 	Short term
China’s capital controls are sometimes interpreted to cover current account transactions such as the payment of dividends, royalties, and routine trade payments	<ul style="list-style-type: none"> ● Issue further policy clarifications would be appropriate to ensure consistent application of the rules 	Short term
Accounting procedures at some Chinese companies make it difficult for licensors to know if royalties have been paid in full	<ul style="list-style-type: none"> ● Improve compliance with generally accepted accounting procedures (GAAP) or GAAP-like controls 	Medium term
<u>Acquisition of US companies and assets</u>		
Chinese companies may be acquiring US assets to obtain technology and IP	<ul style="list-style-type: none"> ● Use national security exceptions only when essential and narrowly targeted, and not for economic or commercial objectives or to protect or promote domestic companies versus foreign ones 	Short, Medium and Long term
	<ul style="list-style-type: none"> ● Proceed cautiously when considering expanding existing investment reviews to cover specific types of investment structures or business arrangements 	Short, Medium and Long term
<u>Cyber theft for commercial gain</u>		
China’s government may be conducting or supporting unauthorized intrusions into US commercial computer networks or cyber-enabled theft of IP, trade secrets or confidential business information	<ul style="list-style-type: none"> ● Full implementation of previous commitments to stop attempted intrusions, regardless of the source 	Short, Medium and Long term

