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The US-China Business Council Board of Directors' Statement of Priorities in the US-China Commercial Relationship

January 20, 2016

The US-China Business Council (USCBC) supports a strong, mutually beneficial commercial relationship between the United States and China. The relationship has made many positive strides over the past three decades, thanks to the collaborative work of the governments, business communities, and other stakeholders in both countries. Trade and investment are delivering important benefits to both economies and are the foundation of the US-China relationship.

This is the fifth priorities statement issued by USCBC's board of directors. Several of the issues raised in previous statements have seen progress during the past year, such as during President Xi Jinping's successful state visit to the United States. At the same time, progress remains insufficient on other critical issues, including several new concerns that have developed since last year's statement.

USCBC calls upon both governments to work closely with the business community to address these priority issues with tangible progress in the coming year, in order to further strengthen and expand commercial relations between the US and China.

Further Solidify the Foundation for Mutually Beneficial Commercial Relations

- **Finalize a high-standard Bilateral Investment Treaty (BIT) in 2016** A BIT provides one of the best opportunities to reduce investment barriers in both countries, ensure a level playing field among all enterprises, and improve protections for US and Chinese investors in each other's markets. Finalizing a high-standard BIT with very limited exceptions in the negative list would provide a forward-looking framework for the commercial relationship and should be a top priority for both governments.
- **Prioritize reducing foreign investment ownership restrictions** China still maintains numerous foreign investment ownership restrictions across many sectors of its economy, including manufacturing, services, agriculture, and resources, despite modest modifications to the Catalogue Guiding Foreign Investment in 2015. Reducing foreign ownership restrictions now, rather than later would allow American companies to contribute more to China's economic reforms and economic rebalancing goals. In addition, China would build critical support in the United States for a BIT, both in government and in the broader business community, by taking early steps to reduce investment barriers in areas meaningful to American companies.
- **Prohibit cyber-enabled commercial espionage and strengthen cybersecurity** We applaud the agreement by Presidents Xi and Obama not to engage in cyber-enabled commercial espionage and to create a high-level dialogue to fight cybercrime. Cybersecurity is a national security priority for both countries. Cybersecurity laws and regulations are strongest when they provide system operators the maximum flexibility to assess emerging risks and to adapt to ever-changing threats. Industry can serve as a valuable resource for the development cybersecurity, in particular, be consistent with WTO agreements and other

international norms; be narrowly-tailored, and nondiscriminatory; and not impose unnecessary nationality-based conditions or restrictions on the purchase, sale, or use of ICT products.

- **Apply national security exceptions only when essential and narrowly-targeted** Both governments have made important commitments to promote more open trade and investment environments and apply national security exceptions only in limited circumstances to advance legitimate security objectives. Toward that end, the United States and China should incorporate these commitments in existing and future laws and regulations, and refrain from taking steps that would contradict these commitments, such as using “national security” for economic or commercial objectives, including protecting or promoting domestic companies versus foreign companies. Measures used to protect national security should be narrowly-tailored and necessary to protect genuine security goals. In particular, China should address concerns about the scope of its National Security Law when detailed implementation regulations are promulgated.
- **Promote a level playing field for foreign and domestic companies in China** Companies legally established under China’s Company Law should all be treated equally by regulators, regardless of ownership nationality. China’s leadership has stated repeatedly that it will treat domestic and foreign companies on an equal basis, but work still must be done to implement those commitments.

In addition, we recommend a simple approach that would make a significant difference: China’s policymakers should move toward eliminating terminology in its laws and regulations that distinguish between domestic and foreign-owned companies, such as “foreign-invested enterprises.” Continued use of this term invites discriminatory treatment of various types of domestic legal entities, based solely on ownership.

- **Maintain a robust and effective bilateral dialogue** The United States and China have established a robust annual schedule of bilateral meetings at all levels of government that supports expanded economic and commercial relations and resolves issues of concern. The United States and China should continue this coordinated dialogue structure, which includes the US-China Strategic and Economic Dialogue (S&ED), the US-China Joint Commission on Commerce and Trade (JCCT), the US-China Innovation Dialogue, and the US-China Investment Forum.

The successful meeting in September 2015 between Presidents Obama and Xi demonstrated the value of annual presidential summits. USCBC encourages both governments to schedule as early as possible a presidential meeting in 2016 to build on the progress that has been made in the relationship and ensure that implementation of bilateral commitments receives the highest level attention.

- **Take steps to build confidence in the bilateral relationship** We applaud the United States’ approval of International Monetary Fund reforms in late 2015 and urge additional steps to foster positive momentum and confidence-building in the US-China relationship:
 - Eliminate counterproductive, China-targeted provisions in US appropriations bills, such as those restricting the Office of Science and Technology Policy from interactions with its counterparts in China, and China-specific language included in IT procurement risk assessments by the Departments of Commerce and Justice, the National Academy of Sciences, and the National Aeronautics and Space Administration; and
 - Confirm that the US will begin using market economy methodology in China trade remedy proceedings on or before December 11, 2016, as specified in China’s World Trade Organization (WTO) entry agreement.

Reduce Trade Barriers and Enforce Globally Accepted Trade Rules

- **Ensure that government decisions are not politicized** Government reviews and decision making in areas such as investment security and antitrust reviews, government procurement decisions, administrative licensing, and trade remedies such as anti-dumping and countervailing duties cases must be fact-based, shielded from political pressures, and non-retaliatory.
- **Improve transparency and processes in Antimonopoly Law (AML) investigations and merger and acquisition reviews** It should be expected that China, with its large economy, will develop into the third leg of the global antitrust regime, along with the United States and the European Union. China should build upon the progress it has made over the past year and fully implement its bilateral commitments on this issue, specifically regarding fair treatment and nondiscrimination, improving due process and regulatory transparency, reducing time periods for merger and acquisition (M&A) reviews, and the determination of remedies and fines. Ongoing and future antitrust investigations and M&A reviews must be transparent, non-discriminatory, follow internationally-accepted due process procedures, and allow legal counsel participation.
- **Implement laws and regulations consistently across localities** As part of its economic reforms, China's central government has streamlined and decentralized many approvals necessary to establish and operate businesses throughout the country. These efforts are welcome, but implementation of laws and regulations by provincial and local authorities remains uneven and therefore problematic.
- **Increase the use of transparent, internationally harmonized standards for goods and services sold in China's market** The use of internationally harmonized standards in China will ensure that Chinese consumers and end users have access to the best products and services, and that Chinese products and services are accepted and competitive internationally. China should adopt more science-based, fair, equal, transparent, and market-led approaches to standards setting and development that is open to all companies regardless of nationality, including domestic, foreign-invested, and foreign-based manufacturers.
- **Eliminate import barriers to facilitate economic rebalancing and consumption** China maintains high import duties and taxes on a wide array of consumer goods. These high tariffs and taxes inhibit China's economic rebalancing and lead Chinese consumers to purchase such products overseas. Reducing or eliminating tariffs and taxes on consumer goods would be a simple yet powerful stimulant of domestic consumption. Removing restraints on imports, such as increasing or eliminating the cap on imported movies, would stimulate services sector growth and employment.
- **Accelerate sensible US export control reforms** Export controls are an important part of ensuring the security of the United States. The Obama administration should continue reform efforts that will ensure US security is not undermined, while boosting US exports to help support and create jobs. The United States should allow greater exports of items that do not present a security risk and are already available on open markets from non-US sources.
- **Promote mutual cooperation on environmental technologies and the Environmental Goods Agreement** The United States and China should seek more opportunities for mutual cooperation in developing and deploying energy efficiency and environmental sustainability technologies, which will benefit both nations and set an example for the rest of the world. As part of that effort, the United States and China should be ambitious in their efforts to conclude the WTO Environmental Goods Agreement in 2016 to eliminate tariffs on environmental goods and services.

- **Implement climate pledges** China's government is pursuing policies that support efforts to develop a low-carbon, energy efficient economy. Implementing pledges to reduce emissions, support green growth and install a transparent verification system can spur investment in climate-friendly, energy efficient technologies and applications. The United States and China should continue to work closely to implement internationally-accepted climate rules.

Ensure Competitive Neutrality and Improve Transparency

- **Ensure equal treatment for American technology companies and products in China** Technology and innovation play a critical role in creating stronger commercial environments that are capable of meeting the needs of 21st century economies. It is important that companies operating in this space are regulated in ways that reflect the complex, global value chains they maintain, and that regulations governing the sector are based solely on sound commercial and technical factors.

China has recently implemented several policies that effectively exclude many US technology companies from commercial opportunities in China for reasons unrelated to the quality and security of their products and services. We fully support the agreement reached during President Xi's 2015 state visit to address these concerns and urge rapid implementation. Both governments should implement origin-neutral technology security policies in order to foster truly innovative economies.

- **Ensure equal treatment in licensing** Over the past decade, USCBC's annual membership survey has highlighted licensing barriers as one of the top areas of discriminatory treatment in China. These licenses include business licenses, branch licenses, product approval licenses, import licenses, and other licenses and permits in sectors such as banking, healthcare, insurance, construction, legal, and value-added telecom services (such as data centers). In many cases, Chinese companies are able to receive these licenses without the same restrictions or delays faced by foreign companies and foreign-invested companies.

American companies support the State Council's efforts to reduce licensing requirements, although many of the licensing barriers impacting foreign companies remain unaddressed. We encourage further efforts to reduce licensing barriers and ensure equal treatment in licensing reviews and approvals. Licensing and other government approval decisions should be made without prejudice against type of ownership and without influence from competing entities.

- **Ensure equal treatment in government procurement for all legal entities in China, regardless of ownership** China should finalize the draft Administrative Measures for Government Procurement of Domestic Products with modifications recommended by USCBC to ensure that goods and services provided by all legal entities in China are treated equally during procurement processes, regardless of ownership. If appropriately revised, the rules would roughly parallel similar rules applied to Chinese companies in the United States.

China should also take the necessary steps to join the WTO's Government Procurement Agreement in 2016. Doing so under meaningful terms will positively address many concerns with "Buy American" and "Buy Chinese" procurement practices in each country, as well as create additional positive momentum for concluding the BIT.

- **Ensure an inclusive and transparent process in the development of China's ecommerce law** China's electronic commerce market has grown at a remarkable rate in recent years, creating new opportunities for both traditional and online retailers, as well as for China's consumers and its economic rebalancing goals. Companies, both domestic and foreign, support the development of this sector in China and can provide important

input into how proposed Chinese regulations will impact business operations. China should ensure that both domestic and foreign companies are allowed to provide input and share global best practices during the process of finalizing China's ecommerce law.

- **Further improve rule-making transparency** China's central government has made some progress on improving rule-making transparency over the past several years, but further improvements are needed. China should fully implement its commitment to publish all draft trade and economic related laws, administrative regulations, and departmental rules for a full 30-day comment period, but it should also consider going further by posting draft regulations on a designated website for a 60- or 90-day public comment period.
- **Curb overcapacity** China's complex and non-transparent credit allocation system serves only to spur inefficient and non-competitive overproduction of key commodities. China should, in the near term, revise such policies that encourage overcapacity and take tangible steps to curtail energy-intensive and inefficient production facilities.
- **Ensure safe and reliable food and agriculture trade** American agriculture companies are strongly committed to supporting China's food and agriculture needs and bring the latest in agriculture technology to the China market. A predictable regulatory environment is needed to achieve that mutually-beneficial goal. To that end, the allocation of trade-related quotas (TRQs) and approval policies for genetically-modified organisms (GMOs) should be based on science and international standards such as CODEX, thereby ensuring safe and reliable food and agriculture trade.

Strengthen Intellectual Property Rights (IPR) Protection and Adhere to Mutually Beneficial Innovation Policies

- **Continue to strengthen China's IPR regime and enforcement of IPR in China** Stronger IPR protection brings mutual benefits. China should continue to improve its IPR legal regime by updating laws and regulations to reflect the latest developments in IPR protection and enforcement. It should also continue to expand resources devoted to IPR enforcement and adopt stronger deterrents against IPR infringement. Adopting the WTO-consistent deterrent of criminal penalties in all cases of commercial-scale infringement and broadening 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—will benefit all companies and IPR holders in China.
- **Improve enforcement against online counterfeiting and piracy** Internet platforms are a growing means for counterfeiters to market and sell counterfeit goods and distribute pirated content, but they present special challenges for rights-holders and enforcement officials alike. China should increase enforcement of Internet-related IPR to ensure its laws, regulations and enforcement efforts cover areas such as use of trademarks on websites, trademark-related aspects of domain name registrations, and the use of websites, Internet services, and apps as platforms for counterfeit and pirated products. Such rules and their enforcement should establish a framework that promotes accountability while balancing the needs of legitimate IPR holders and Internet intermediaries.
- **Strengthen trade secrets protection** The protection of trade secrets is a core component of innovative economies. China can take positive steps to encourage innovation by expanding its efforts to address trade secrets concerns, including the development of a Trade Secrets Law, broader use of judicial procedures on preliminary injunctions and evidence preservation orders, clearer measures requiring government agencies to protect

confidential information collected from companies during government review processes, and reducing the high evidentiary burden that plaintiffs face during trade secrets cases.

- **Harmonize patent review processes with international best practices** China should ensure that government reviews of patents are consistent with international patent practice, including provisions governing company submissions of supplemental data, and that government authorities do not unreasonably reject applications or revoke existing patents under discriminatory or improperly applied criteria.
- **Follow internationally proven, effective innovation incentives** In place of discriminatory government procurement preferences, China should pursue other policy approaches that would more effectively promote innovation:
 - Revise criteria in the existing High- and New-Technology Enterprise (HNTE) program that currently requires IP ownership in China or a five-year global exclusive license to allow legally acquired, non-exclusive license or usage rights, or exclusive license rights in China only. These revisions would positively impact company decisions about where to locate innovation activity.
 - Ensure that provisions related to how companies compensate inventors, such as the draft Service Invention Regulations, fully recognize the legitimacy of existing company policies and contracts that address inventor compensation, and allow room for companies and inventors to freely negotiate compensation on market terms as an important component of an active innovation ecosystem in China.