

2015 POLICY SPOTLIGHT SERIES | 2015年度政策聚焦系列

China's Investment Environment: Overcoming Impediments to the US-China BIT

中国投资环境： 克服阻碍，尽早达成《中美双边投资协定》



AmCham China
中 国 美 国 商 会

The American Chamber of Commerce in the People's Republic of China

- WITH THE SUPPORT OF -



Table of Contents 目录

Chairman's Message	II
主席致辞	III
Introduction	2
引言	3
Global Developments.....	2
全球的发展.....	3
Developments in China	4
中国的发展.....	5
2014 Formal FDI Restrictiveness by Sector: China vs. US.....	6
2014 官方发布的外国直接投资限制行业：中美对比.....	7
China Business Environment and Regulatory Developments	8
中国的商业环境和制度建设.....	7
Pace of Reforms and Openings	8
改革开放的步伐	7
Regulatory Developments.....	10
监管措施.....	11
US-China Bilateral Investment Treaty	18
中美双边投资协定	17
Conclusions and Recommendations.....	18
结论和建议.....	19

CHAIRMAN'S MESSAGE

China's accession to the World Trade Organization is already a footnote in history and no longer a benchmark for how American business views the future trade and investment relationship with Beijing.

The real deal going forward will be the US-China bilateral investment treaty (BIT), currently under negotiation, and China's potential future inclusion in the Trans-pacific Partnership trade agreement, for which negotiations have just concluded. Taken together, these two agreements could represent the world's largest market liberalization exercise in two decades.

While the Chinese leadership has consistently affirmed its support for greater market-based competition and reforms, the business community is concerned that China's initially proposed "negative list" of hands-off investment sectors represents a lukewarm starting position that, simply put, represents business as usual.

With unfettered access to American markets, China needs to reciprocate and, once and for all, open the doors for American business. Sectors that warrant immediate access include financial services, insurance, agricultural products, legal services, media and entertainment, engineering and construction services, and information and communications technology.

Following President Xi Jinping's first state visit to the US in September, much progress is necessary to close the gap on the BIT. And what is needed is true market access without underhanded and unwritten barriers that could potentially render the BIT meaningless.

Foreign business is indeed growing anxious about the future of doing business in China, and a new way of thinking is necessary to attract and retain foreign investment. This is especially important given that American business in China represents billions of dollars of investments, employs hundreds of thousands of employees, and brings to the market unique technology and innovative products and services. American business is well-suited to support China's development goals as outlined in the 13th Five-Year Plan.

In this report, AmCham China, with support from the U.S. Chamber of Commerce, outlines the various issues that we view as challenging foreign investment and hindering the ongoing BIT negotiations. The report also addresses a host of critical and time-sensitive issues such as the pace of economic reforms, rule of law developments, SOE reforms, cybersecurity and data localization rules, information security and national security laws, and foreign NGO oversight and management, while outlining recommendations for both the Chinese and US governments in the hopes that they will support the ongoing bilateral dialogue.



James Zimmerman
Chairman, AmCham China
October 2015

主席致辞

中国加入世界贸易组织已成为历史，不再是美国企业看待未来中美贸易和投资关系的基准。

真正推动中美贸易前进的将是正在进行磋商的中美双边投资协定（BIT）以及中国未来可能加入的泛太平洋伙伴关系贸易协议，而关于后者的磋商刚刚结束。总体来看，这两项协议可能会代表未来二十年内全球最大的市场自由化活动。

虽然中国领导人一再表示将支持更大程度的市场化竞争和改革，然而商界仍对中国最初提出的“负面清单”表示担忧。该清单提出的不干涉投资行业的举措在商界看来影响微小，也并未改变对外商的态度。

在中国企业畅通无阻地进军美国市场的同时，基于礼尚往来的原则，中国也应为美国企业打开大门，允许美国企业立即进入金融服务、保险、农业产品、法律服务、媒体和娱乐、工程和施工以及信息和通信技术等行业。

随着习近平主席九月首次对美国进行国事访问，双方需要作出更多努力才能就双边投资协定达成更多共识。我们需要真正的市场准入，因为不成文的障碍可能会使得双边投资协定变得毫无意义。

外国企业确实越来越担心在中国经商的前景，中国想要吸引和留住外商投资就亟需转换思维。鉴于美国企业在中国有上百亿美元的投资，雇佣了数以万计的员工，并为这个市场带来了独特的技术与创新性产品和服务，中国改变思考方式就显得尤为重要。而且美国企业拥有独特的条件，可以支持中国完成“十三五”计划中所概述的发展目标。

在本报告中，中国美国商会借助美国商会的支持，概述了各类我们认为具有挑战性的美商投资事宜以及不利于商谈双边投资协定的问题。此外，本报告还阐述了诸多重要、最新的议题，例如经济改革的速度、法律制定的规则、国企改革、网络安全和数据本地化的规则、信息安全和国家安全法律以及外国非政府组织的监督和管理，本报告还为中美政府提出了建议，希望有助于推动进行中的双边对话。



吉莫曼
中国美国商会主席
2015年10月

CHINA'S INVESTMENT ENVIRONMENT: OVERCOMING IMPEDIMENTS TO THE US-CHINA BIT

INTRODUCTION

AmCham China and U.S. Chamber of Commerce member companies strongly support the commitments made at the 2013 Third Plenum and the 2014 Fourth Plenum of the 18th Party Congress; namely, commitments to further open and reform the economy through giving market forces a decisive role in the economy and institutionalization of the rule of law. We look forward to cooperating with both Chinese partners and the Chinese government to enable the stated reforms to be achieved during the upcoming 13th Five-Year Plan and other ongoing reform efforts as soon as possible. The Chinese government undoubtedly faces a difficult road ahead to completing the needed transformation of its economy. We understand the complexity of the reform process, and encourage the further implementation of these ambitious reforms that will benefit China's domestic economy and the ability of our members to contribute to China's continued development.

In 2015, foreign investors in China have overall faced a challenging environment for their investments in China. While the Chinese leadership has consistently affirmed its support for market reforms and greater market-based competition, recent regulatory and policy developments have increased concern in the foreign business community regarding the trajectory of reforms, including those that would allow foreign-invested companies to provide goods and services to the Chinese people on a level playing field with their Chinese competitors. We urge the Chinese government to hasten the speed of such reforms to the benefit of its own economy and the benefit of the ongoing negotiations of a high-standard US-China Bilateral Investment Treaty (BIT).

Indeed, there were some signs in early 2015 that the Chinese government was genuinely committed to carrying out the reforms set during the Third Plenum. The draft unified Foreign Investment Law and the revised Pilot Free Trade Zone (PFTZ) Negative List were both greeted with cautious optimism. We welcome and encourage the stated intent of these initiatives and believe such reforms have the potential to substantially improve the business environment and draw further investment into China's future economy. To date, however, these developments lack the clarity necessary for business to effectively engage with these programs and do not resolve the fundamental concerns of foreign investors in China.

Despite the initial enthusiasm for these developments, economic reform efforts have not kept pace with the continued decline in investor sentiment caused by macroeconomic trends and perceived discriminatory treatment. The new reality that double-digit economic growth has run its course has led many foreign businesses to take a more pragmatic, sober assessment of China's overall business environment. As input costs for our members rise in China, the continued presence of market restrictions – both through written measures and unofficial practices – increasingly impact companies' investment decisions in China. The continuation of such barriers, exacerbated by a series of disconcerting developments during the year, present foreign investors with what is in many respects a less-favorable environment.

Our members are hopeful that the economic outcomes of President Xi Jinping's visit to the US, including commitments to limit the scope of national security reviews of foreign investments to national security concerns while excluding economic and public interest issues and to avoid the enforcement of competition law to pursue industrial policy goals, will create a better environment for our members in 2016. In particular, we are hopeful that progress announced by the two governments regarding the shortening of their respective negative lists will accelerate so the two governments can conclude negotiations on a high-standard and comprehensive BIT as soon as possible.

Global Developments

While the US economy is still not performing as well as it could, it is now comparatively stronger and more stable than most other economies. On October 4, 2015, the US and its Trans-Pacific Partnership (TPP) partners, successfully completed the final round of negotiations that will impact trade and investment flows in the region. Through the One Belt, One Road, Asian Infrastructure Investment Bank (AIIB), and other initiatives, China is charting a new course in global development efforts, which aims to inject new impetus into the world economy. At the same time, Europe continues to wrestle with issues inside the Eurozone. It is clear that the global economy is entering a new round of adjustments and preparing for a differential adjustment of monetary policy reflecting local economic fundamentals.

In addition to our members' continuing strong interest in securing a BIT with China, they are intently focused on a

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引言

中国美国商会和美国商会的会员企业非常支持中国在 2013 年十八届三中全会和 2014 年十八届四中全会上做出的承诺，即承诺通过市场力量在经济中的决定性作用和法律制度化，进一步开放和改革经济。我们期待与中国合作伙伴和中国政府合作，尽快实现第 13 个五年计划既定的改革目标以及其它正在推进的改革努力。为了完成必要的经济转型，中国政府必定要面临诸多困难。我们理解改革过程的复杂性，支持中国进一步推进这些艰巨但有利于国内经济的改革，也鼓励我们的会员企业为中国的持续发展贡献力量。

2015 年，中国的投资环境对外国投资者而言总体上充满挑战。尽管中国领导人一再重申其支持市场改革并且支持更加以市场为导向的竞争，但是，近期制订的监管政策令外国企业界越发担忧中国的改革路径，包括那些将允许外商投资企业与其中国竞争对手在公平竞争的基础上向中国民众提供商品和服务的改革。我们敦促中国政府加快此类改革的速度，这既有利于中国自身的经济发展，也有利于推进正在进行中的高标准的中美双边投资协定（BIT）谈判。

事实上，在 2015 年初，有一些迹象表明中国政府切实致力于实施三中全会设定的改革。统一后的《外商投资法（草案）》以及修订后的《自由贸易试验区（PFTZ）负面清单》都赢得了外国投资者谨慎乐观的欢迎。我们欢迎并支持这些举措所声明的目标，相信此类改革有可能切实改善中国的商业环境并为中国的未来经济吸引到更多的投资。不过，到目前为止，这些法规对于相关外国投资者而言过于模糊，也没有解决他们的基本关切。

尽管这些法规制订之初掀起了一股热潮，但是中国宏观经济趋势和投资者感受到的不公正待遇正在导致投资者情绪进一步低落，这是与经济改革举措相悖而行的。两位数增长一去不返的现实让许多外国企业对中国的整体商业环境做出

更加务实、冷静的评估。随着我们会员企业在中国的投入成本上升，持续存在的市场限制（无论是成文的措施还是非正式的做法）对企业在中国的投资决策影响越来越大。这类壁垒的继续存在，加上年内一系列令人不安的法规制订，呈现给外国投资者的是一个在许多方面适宜度下降的投资环境。

我们的会员希望，习近平主席访问美国的经济成果——包括承诺把对外资的国家安全审查限于国家安全问题之内，避免因纳入经济和公共利益问题而使审查泛化，以及避免通过实施竞争法追求产业政策目标——将为我们的会员在 2016 年创造一个更好的环境。我们尤其希望，两国政府宣布的关于删减各自负面清单所取得的进展加快，以便两国政府能够高水平地完成谈判并尽快达成全面的中美投资协定。

全球的发展

尽管美国的经济表现仍然差强人意，但是相对于其它大多数经济体而言，美国的经济发展更强劲也更稳定。2015 年 10 月 4 日，美国及其跨太平洋伙伴关系（TPP）合作国成功地完成了最终轮谈判，这将影响到这一地区的贸易和投资流动。通过“一带一路”、亚洲基础设施投资银行（AIIB）以及其他举措，中国正在为全球发展指引新航线，并致力于为世界经济注入新活力。与此同时，欧洲仍然受困于欧元区内部的种种问题。显然，全球经济正进入新一轮的调整期，并准备应对各国所采取的反映其经济基本面的货币政策做出的差异性调整。

我们的会员企业不但对确保与中国达成 BIT 抱有浓厚的兴趣，同时也非常关注正在进行的可能显著扩大全球贸易和投资的一系列谈判。TPP、跨大西洋贸易与投资伙伴关系协定（TTIP）、环境商品协定（EGA）以及诸如信息技术协议（ITA）和服务贸易协定（TISA）等其它协议都是有利于全球经济发展、扩大贸易和投资的重要机会。尤其是根据彼得森国际经济研究所的预测，到 2025 年，TPP 可使成员国的经济规模扩大约 2,850 亿美元，预计超过 20% 的

series of ongoing trade and investment negotiations that have the potential to significantly expand global trade and investment. The TPP, the Trans-Atlantic Trade and Investment Partnership, the Environmental Goods Agreement, and other agreements such as the Information Technology Agreement and the Trade in Services Agreement are significant opportunities to expand trade and investment to the benefit of the global economy. In particular, the Peterson Institute for International Economics projects that the TPP will enlarge the economies of member countries by approximately US \$285 billion by 2025. Some 20 percent of total gains would be associated with foreign direct investment (FDI). Furthermore, the Peterson Institute estimates that if China, the Philippines, South Korea, Taiwan, and Thailand were to join TPP (expanding the 12-nation zone currently under negotiation), China's economy would expand by an additional five percent by the year 2025.

Our member companies welcome and encourage China's accession to the TPP as soon as China is ready to meet the standards of the agreement. AmCham China and the US Chamber of Commerce believe the two governments should continue to pursue the APEC goal of comprehensive free and open trade and investment in the Asia Pacific region. We fully support China and the US intensifying discussion on China's potential accession to the TPP and the potential accession of the US to the Regional Comprehensive Economic Partnership, and other mechanisms to avoid the emergence of competing regional trade blocs. Our organizations believe that accelerated efforts by China to implement reform and opening, including to the benefit of our members, would greatly aid the ability of the two governments to intensify negotiations not only on a BIT, but also begin discussions on a comprehensive and inclusive vision for more far-reaching trade and investment liberalization in the APEC region.

Our member companies have also noted a number of policy developments over the past year which emphasize the Chinese government's increasing support for Chinese companies investing abroad. We encourage China's greater participation in the global economy, and look forward to working with Chinese companies as they increase their investments globally, including in the US. The further development of the AIIB, the One Belt, One Road Initiative, and the Several Opinions of the State Council on Accelerating the Development of Service Trade announced this year all guide and support Chinese industries going abroad. Our member companies look forward to partnering with Chinese companies as they increase their global presence via these initiatives, but urge that they also be granted access to the opportunities these initiatives present.

Additionally, as Chinese investment in the US continues to increase, having in recent years surpassed US investment into China, it is important to note the relative openness of US markets in comparison to the market access restrictions faced by many of our member companies in China. FDI remains an important component of the US economy, and

its open environment has allowed Chinese investors to find great success in the US, as tracked by the Rhodium Group's China Investment Monitor. From Q1 2000 through Q2 2015, China invested US \$54 billion (RMB 342 billion) in the US in a total of 1,117 deals, valued at over US \$40 billion (RMB 254 billion) in investments in a wide range of industries, including energy, real estate, hospitality, ICT, entertainment, and agriculture. This era of two-way FDI flows is benefiting firms and consumers in both countries, but requires increased policy attention and more positive steps by both sides. We fully support greater Chinese investment in the US, to the benefit of both of our economies, but urge China to provide foreign investors with market access opportunities comparable to those enjoyed by Chinese companies investing in the US.

Developments in China

Throughout 2015, AmCham China and the US Chamber have continued to emphasize the need for China to accelerate its opening and reform efforts so that it can effectively address its domestic economic pressures and to ensure that it remains competitive in the global market place. As reported in AmCham China's 2015 Policy Spotlight Series report "Opening China's Service Economy: Opportunities and Challenges" (2015 Service Spotlight), many foreign-invested enterprises (FIEs) are being squeezed out of the market, despite great opportunities for market growth and increased investment. Regional trade and investment agreements are being negotiated elsewhere in the world, and survey data and qualitative experiences indicate that more of our members are already looking to diversify their investments away from China.

In particular, AmCham China and U.S. Chamber members have continued to voice concerns about a number of policies and practices that restrict their ability to access and compete in the market as follows:

- industrial policies that discriminate against foreign-invested enterprises, including those that have fully localized production;
- opaque investment approval procedures;
- lack of effective administrative and legal recourse when an investment approval is delayed, conditioned, or denied;
- lack of transparency and due process in enforcement; and
- increased application of national security provisions in economic and commercial rules and regulations.

In addition to those concerns, the continued lack of clarity in the stated reforms and lack of resolution of the fundamental concerns of foreign investors in China has led some to doubt the stated intention to continue to reform and open the economy to the benefit of foreign investors. Our members are monitoring a variety of policy developments in draft form,

总收益将与外商直接投资（FDI）有关。此外，彼得森国际经济研究所估计，如果中国、菲律宾、韩国、台湾和泰国都加入 TPP（目前正在谈判的是 12 个国家），中国的经济到 2025 年将额外提升五个百分点。

只要中国愿意达成协定的标准，我们的会员企业欢迎并鼓励中国加入 TPP。中国美国商会和美国商会认为，两国政府应继续贯彻 APEC 目标，努力实现亚太地区贸易与投资全面自由和开放。我们完全支持中国和美国加强探讨中国加入 TPP 的可能、美国加入“区域全面经济伙伴关系”的可能以及其他旨在避免竞争性区域贸易集团的机制。我们认为，中国加快改革开放——包括惠及我们会员企业的改革开放——的步伐，不仅能够大大裨益两国政府就 BIT 和其它事项的磋商，同时也能够让两国政府以一个全面且包容的视野就更加广泛的亚太地区贸易与投资自由化进行探讨。

我们的会员企业也注意到，在过去一年内，中国政府制订了加大支持中国企业投资海外的多项政策。我们鼓励中国更多参与全球经济，随着中国企业加大在全球——包括美国在内——的投资，我们期待与中国企业合作。亚投行、“一带一路”倡议以及国务院今年颁布的《关于加快发展服务贸易的若干意见》都在引导和鼓励中国产业进军海外。随着中国企业通过这些举措越来越多地参与国际竞争，我们的会员企业期待与中国企业合作，但同时也敦促中国政府准许我们的会员企业参与这些举措所带来的市场机会。

此外，随着中国不断加大对美国的投资，最近几年甚至超过美国对中国的投资，必须注意到，相对于美国市场的开放性，我们的许多会员企业在中国仍然面临各种市场准入限制。外商直接投资（FDI）始终是美国经济的重要组成部分，根据荣鼎集团（Rhodium Group）“中国投资监测”的跟踪，美国的开放环境已经让中国投资者在美国大获成功。从 2000 年第一季度到 2015 年第二季度，中国对美投资 540 亿美元（3,420 亿人民币），交易数量 1117 笔，投向能源、房地产、酒店、信息通信技术、娱乐和农业等各种行业的资金超过 400 亿美元（2,540 亿人民币）。在此期间，外商直接投资双向流动让中美两国的企业和消费者从中受惠，但需要双方给予更多的政策关注并采取更多积极的举措。我们完全支持中国扩大在美国的投资，这对中美两个经济体都有利，但是我们也敦促中国为外国投资者提供与中国企业在美投资所享受到的同等市场准入机会。

中国的发展

在 2015 年，中国美国商会和美国商会继续强调中国必须加快改革开放力度，从而能够有效应对国内经济压力并确保其在全球市场的竞争力。根据中国美国商会 2015 年政策聚焦系列《走向开放的中国服务业：机遇与挑战》（2015 年服务行业政策聚焦），尽管有着巨大的市场增长机会和增大的投资，许多外商投资企业（FIE）正被挤出市场。世界其它地区都在磋商区域性贸易与投资协定，调查数据和定性经验表明，我们越来越多的会员企业已经在逐步减少在中国的投资，转而寻求投资多样化。

中国美国商会和美国商会会员企业尤其对以下中国政府限制其进入并参与市场竞争的诸多政策和做法表示担忧：

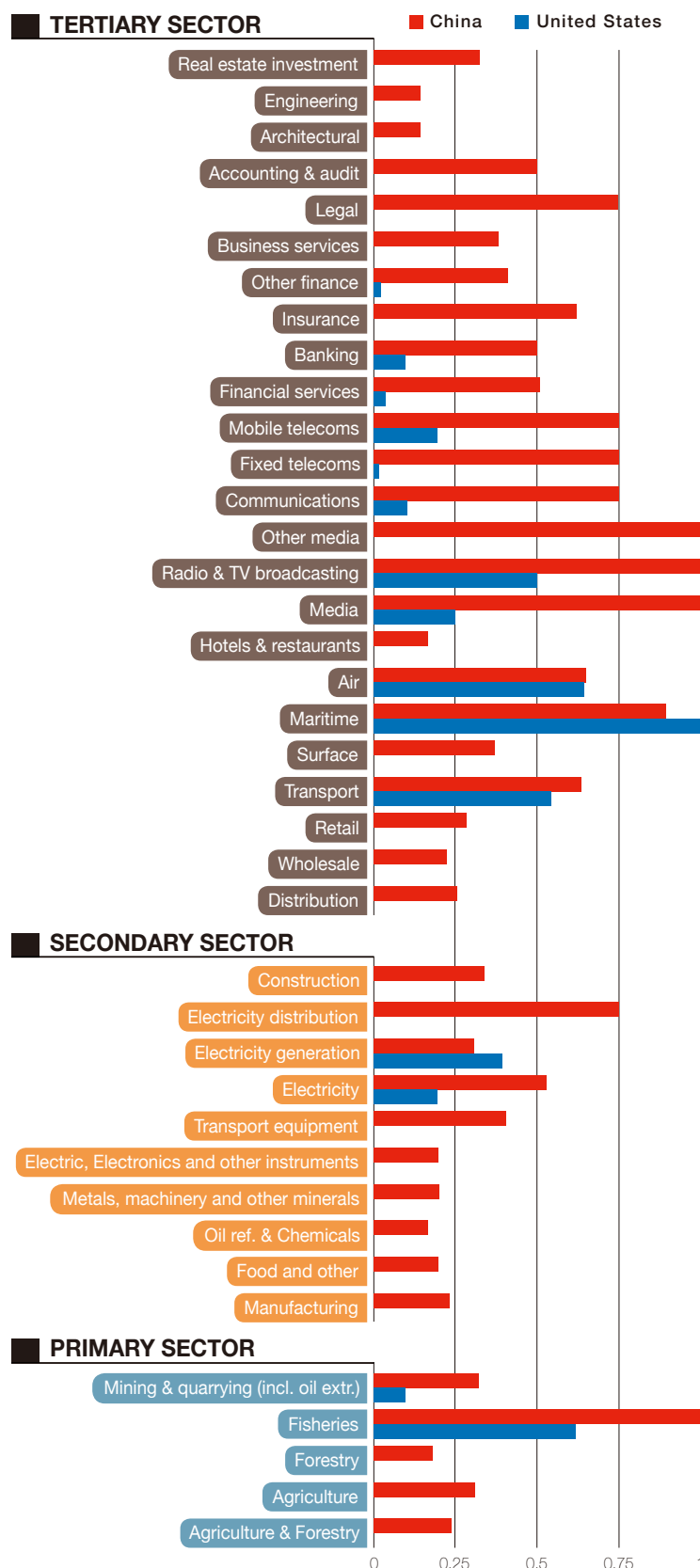
- 针对外商投资企业的歧视性产业政策，包括那些已经完全实现本地化生产的企业；
- 投资审批程序不透明；
- 当某项投资审批被延误、加设条件或否决时缺乏有效的行政和法律追偿制度；
- 执法过程中缺乏透明性和程序正当性；
- 在经济和商业规章制度中越来越多地应用国家安全规定。

除了这些问题，改革仍然模糊不清，对在中国的外国投资者也缺乏基本的关注，这让有些人不禁怀疑中国是否像其宣称的那样，有意继续推进经济改革与开放以惠及外国投资者。我们的会员企业密切关注《外商投资法》和《网络安全法》等各项拟定中的政策草案，这些政策一旦出台，可能会抵消或减少三中全会和 BIT 谈判带来的预期收益和重要利好。

因此，当得知在习近平主席最近对华盛顿特区进行国事访问期间两国政府就 BIT 谈判——包括删减各自负面清单——取得了一些进展，我们感到由衷高兴。我们对两国首脑关于加紧谈判以尽早缔结一项高标准协议的承诺表示欢迎。中国美国商会和美国商会认为，BIT 是进一步推动中国投资体制改革的重大机会，它有利于国内经济发展，帮助中国实现社会经济发展目标。它也是发展中美双边关系、提高双向直接投资并惠及中美两国的一次重大机遇。

我们的会员企业非常支持中美两国迅速达成高标准的、全面的 BIT，不过，BIT 只是解决方案的一部分。为了明确当前双边关系的趋向，使中美两国迈向更深层次的经济

2014 Formal FDI Restrictiveness by Sector: China vs. US



including the Foreign Investment Law and Cyber Security Law that, if promulgated, may negate or reduce the important benefits contemplated in the Third Plenum and BIT negotiations.

We are therefore pleased to learn that the two governments have made some progress in their BIT negotiations, including the reduction of their respective negative lists, during President Xi Jinping's recent State Visit to Washington, DC. We welcome the commitment by the two presidents to intensify negotiations and work expeditiously to conclude a high standard agreement. AmCham China and the U.S. Chamber believe that the BIT is a significant opportunity to further drive reforms within China's investment regime to the benefit of the domestic economy, and help China achieve its own social and economic goals. It is also the most significant opportunity in the bilateral relationship to increase two-way FDI and bring economic benefits for both countries.

Our members strongly support the rapid completion of a high-standard, comprehensive BIT, however, this is only part of the answer. To address the current concerning direction of the bilateral relationship, and keep both countries on a path to deeper economic integration and stronger overall ties, we strongly urge the Chinese government to implement further reforms that will create meaningful improvements in the operating environment for FIEs in the near term. Market openings and reforms by the Chinese government prior to the completion of a BIT would benefit the Chinese economy and consumers, and provide measurable signals of China's intent to achieve meaningful market access for foreign companies. Such immediate progress is essential to creating the momentum and public support needed to secure passage of a BIT once negotiations are completed. In addition, transparent and open communication with the business community is critically needed to ensure continued confidence in the direction of the government, and we welcome ongoing efforts to increase transparency and strengthen communication with our organizations and our members.

We strongly support the stated reform initiatives laid out in the Third and Fourth Plenums, and look forward to continuing to contribute to China's economy into the future. We believe the reforms recommended in this report will not only provide immediate benefit for China's economy, but will help build support for a strong BIT that can ensure that bilateral investment flows between our two countries remain strong and strengthen our economic relationship for years to come.

0 = Completely Open, 1 = Completely Closed
Source: OECD FDI Regulatory Restrictiveness Index

一体化并构筑更强有力的关系纽带，我们强烈敦促中国政府进一步实施改革，在短期内为外商投资企业创造一个切实改善的经营环境。中国政府在达成 BIT 之前继续推进市场开放和改革将有利于中国经济和消费者，并且也是向外界发出重大信号，表明中国有意愿让外国企业获得切实的市场准入。这种直接的推进能创造动能并赢得公众支持，对于确保 BIT 在谈判完成后得到顺利通过是有必要的。此外，与企业界保持透明、公开的交流是确保外界对政府趋向持续抱有信心所迫切需要的，我们欢迎中国政府不断努力，提高透明度并加强与我国组织和会员企业的沟通。

我们坚定支持中国政府在三中和四中全会上提出的改革举措，并期待继续为中国经济走向未来做出贡献。我们相信，本报告中提出的改革建议不仅直接有利于中国的经济发展，也将为 BIT 奠定坚实基础，以确保中美两国之间的双边投资流动保持强劲势头，加强两国今后几年的经济关系。

本报告描述了过去一年里，我们的会员企业在目睹中国政府的监管措施与中美双方正在进行的 BIT 谈判中设定的市场开放目标存在分歧后所产生的种种担忧。本报告最后就如何确保中国的持续改革步入有利于双边经济关系的正轨向两国提出了建议，同时也就中美 BIT 提出了建议，以确保其能够为美国企业在中国这个独一无二的市场上获得预期收益。

中国的商业环境和制度建设

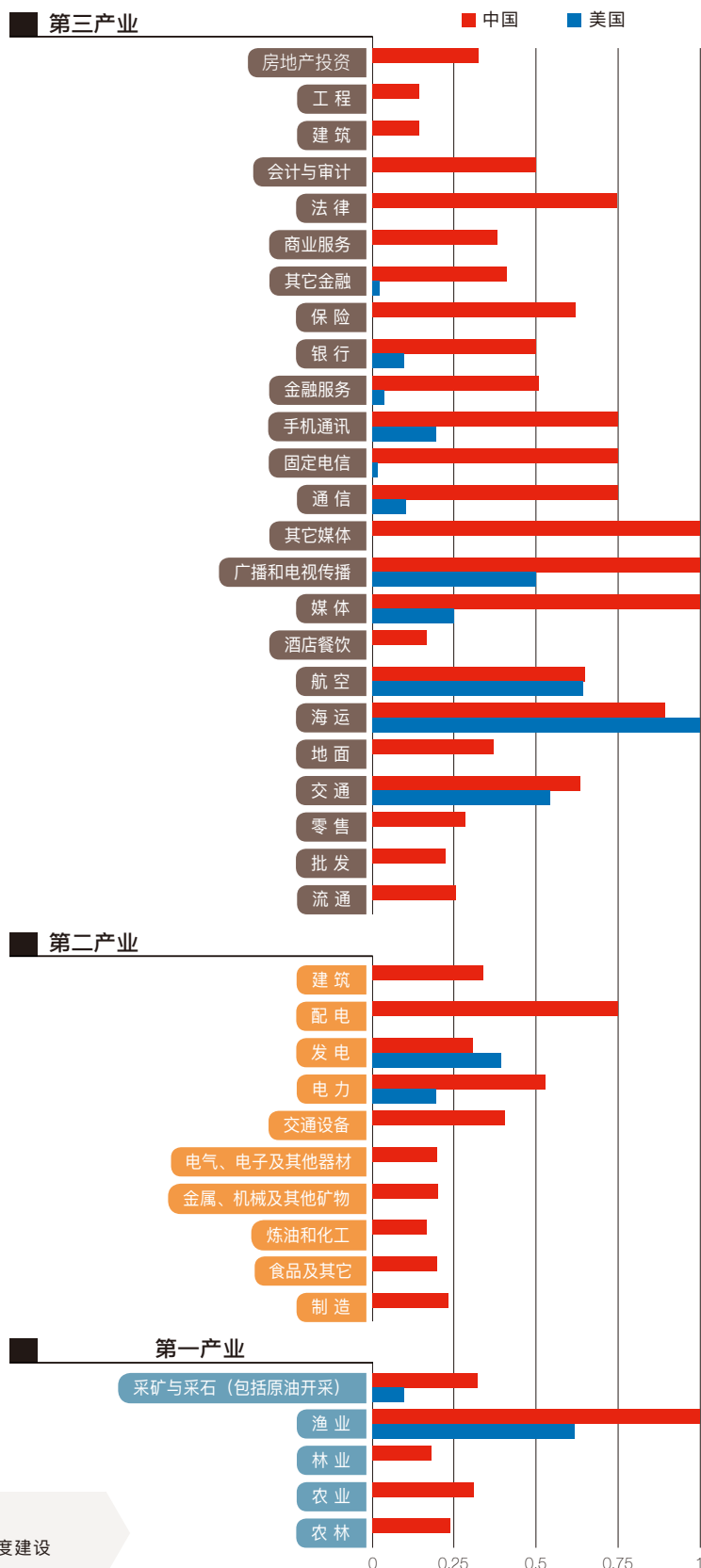
改革开放的步伐

2013 年《三中全会决定》明确了外商投资改革的四个关键方面：① 准入前国民待遇

0 = 完全开放, 1 = 完全封闭

来源：OECD FDI 监管限制指数 中国的商业环境和制度建设

2014 官方发布的 FDI 限制行业：中美对比



This report describes many of the concerns that our member companies have witnessed over the year to show the significant areas of divergence in the regulatory approaches of the Chinese government that run counter to the market-opening aims of the ongoing BIT negotiations. The report concludes with recommendations for both governments on ways to ensure the ongoing reforms in China remain on a positive track for the bilateral economic relationship, as well as recommendations for the US-China BIT to ensure that it provides the intended benefits to American companies in China's unique market.

CHINA BUSINESS ENVIRONMENT AND REGULATORY DEVELOPMENTS

Pace of Reforms and Openings

The 2013 Third Plenum Decision identified four key areas of foreign investment reform: ❶ pre-establishment national treatment with all exceptions to be published in a negative list, ❷ opening of certain service sectors for foreign investment, ❸ unification of domestic and foreign capital laws and regulations, and ❹ financial reforms. The Chinese government has shown incremental signs of progress, though often uneven and halting, in all four of these areas.

We recognize that the directives and narrative for foreign investment laid out in the Third Plenum Decision constituted a shift of emphasis and direction, not a fully developed set of new policies. To ensure success, it is critical that the National People's Congress (NPC) and the State Council, as well as the National Development and Reform Commission (NDRC), Ministry of Commerce (MOFCOM), and other central government departments, move aggressively to rapidly implement the goals through new and amended laws and regulations to further open more sectors to foreign investment on a national treatment basis.

Conversely, however, despite limited reforms within China's several PFTZs, members continue to be discouraged by the slow pace of reforms that thus far have focused more on the streamlining of administrative procedures rather than identifiable and immediately utilizable market opening. As discussed in AmCham China's 2015 Service Spotlight, China's service sector, which is essential to its future economy and growth, remains effectively closed or only partially open in many instances, with related reforms lacking clarity and resolution of the fundamental concerns of foreign investors.

Rule of Law

Our members note the importance that China is attaching to legal reform under the 2014 Fourth Plenum. We also continue to monitor the positive trend of increasing transparency on the part of some Chinese government bodies in releasing draft laws, administrative regulations, and departmental

rules for public comment. Further, we are optimistic about the establishment within the last year of the three courts focused on Intellectual Property (IP) cases, in an effort to provide more expertise and efficient attention to cases related to intellectual property rights (IPR). Our members view such focus on specialization of the court system as a positive step.

At the same time, we continue to witness numerous measures with a substantial impact on foreign trade and investment that are not circulated for notice and public comment while in draft form or are done so only at a late stage and/or with a comment period that is inconsistent with China's international commitments. Similarly, the General Office of the State Council released pilot national security vetting rules for foreign investment and a new negative list for China's four PFTZs without providing a public comment period. We encourage both governments to continue to focus on transparency in rulemaking and enforcement in bilateral dialogues. Transparency in rulemaking not only provides the best avenue to mitigate adverse impacts of regulation on the economy and commerce, but also to address trade and investment concerns before they metastasize into disputes.

We note the current revision to China's Law on Legislation, and believe this is an opportunity for China to enhance its regulatory and legislative transparency. We urge China to include mandatory transparency rules for rule-making at all levels of revision and mandate a public comment period no less than 30 days, to the benefit of policy makers and the business environment.

In the most recent "Rule of Law Index" report by the World Justice Project, China's ranking improved from the previous year to 71st out of the 102 assessed countries, although it remained only 13th out of the 15 countries in the Asia Pacific region, and just 26th of the 31 countries in its income group. This report assesses and ranks countries around the world according to their constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice. We believe that these are positive attributes for all countries, and considering the size of China's market and its role in the global economy, we hope the Chinese government will act on its recent commitments in the Fourth Plenum to rapidly raise China's standing in such rankings.

Pre-establishment: Catalogues and Negative Lists

In March 2015, the NDRC and MOFCOM jointly released a new edition of the "Guiding Catalogue on Foreign Investment in Industry" (Foreign Investment Catalogue). The new Foreign Investment Catalogue constitutes a modest step forward, though restraints were tightened in some areas and positive news for service industries was not as extensive as our members had anticipated. This was disappointing given the Third Plenum's mandate of liberalizing market

加负面清单管理，② 对外资开放某些服务领域，③ 统一内外资法律法规，以及 ④ 金融改革。中国政府在这四个方面已经表现出渐进式推进的迹象，尽管这种推进并不均衡并且步履蹒跚。

我们认识到，《三中全会决定》中阐述的外商投资指令和描述可以被视为中国对外商投资的重点和方向的一个转变，而非一整套新政策的制订。为确保成功，至关重要的一点是全国人民代表大会（NPC）、国务院、国家发展与改革委员会（NDRC）、商务部（MOFCOM）以及其他中央政府部门采取积极行动，通过制订和修订法律法规，基于国民待遇向外商投资进一步开放更多的行业领域，以便实现《决定》中设定的目标。

然而事实正好相反。尽管中国的一些自贸试验区进行了有限的改革，但是我们的会员企业仍然因中国政府缓慢的改革步伐而感到气馁。迄今为止，中国政府的改革重点更多放在精简行政程序上，而不是给予外商投资明确的、可直接利用的市场开放。正如中国美国商会 2015 年《服务行业政策聚焦》中讨论的那样，服务业是未来经济增长的关键动力，但是在许多情况下，中国的服务业仍然对外商投资完全封闭或只是部分开放，相关的改革显得模糊不清，并未解决外国投资者的基本关切。

法 治

我们的会员企业注意到，中国正在依照 2014 年四中全会的指示着力于法制改革。我们也将继续密切关注中国某些政府机构在发布法律草案、行政法规、部门规章及公开征求意见时能否表现出更加透明化的趋势。此外，我们对去年设立三家知识产权（IP）法院表示乐观，这三家法院旨在为知识产权案件提供更加专业及有效的关注。我们的会员企业认为，重视法院系统专业化是中国政府迈出的积极一步。

同时，我们仍然看到许多对于对外贸易和投资有重大影响措施在草案阶段并未向社会公布和公开征求意见，或者到了最后一刻才公开并（或）提供一个公开征求意见期，这些行为与中国做出的国际承诺并不相符。同样，国务院办公厅在提供公开征求意见期之前就发布了《自由贸易试验区外商投资国家安全审查试行办法》和中国四个自贸区负面清单。我们鼓励两国政府继续注重规则制订的透明化和双边对话的实施。规则制订的透明化不仅是减轻监管对经济和贸易造成不利影响的最佳手段，也是解决贸易和投资关切，防止其转

化为贸易争端的最佳手段。

我们注意到《中国立法法》的最新修订，并认为这是让中国提高其监管和立法透明度的一个机会。我们敦促中国在修订该法案时加入关于各级政府在制定规则时应遵守强制性透明化的规定，并规定一个不少于 30 天的公开征求意见期，这对政策制定者和商业环境都有利。

根据世界正义工程（World Justice Project）最近报告的“法治指数”，在 102 个受评国家中，中国排在第 71 位，比去年略有上升，尽管它在亚太地区 15 个国家中仅排名第 13，在同一收入组的 31 个国家中排名第 26 位。该报告根据法律对政府权力、清廉、政务公开、基本权利、秩序和安全、监管执法、民事司法和刑事司法的约束情况对世界各国进行评估。我们认为，这些对所有国家都具有积极作用，考虑到中国市场的规模及其在全球经济中的作用，我们希望中国政府根据其在不久以前的四中全会上做出的承诺，迅速提高中国在这类排名中的位置。

准入前：目录和负面清单

2015 年 3 月，国家发展与改革委员会和商务部联合颁发新版《外商投资产业指导目录》。新目录可以看成是中国向前迈出的小一步，其中对某些领域的限制收紧，并且关于服务业的利好消息不如我们的会员企业所预期的那样多。考虑到中国在三中全会上做出的放宽多个行业尤其是服务业市场准入限制的承诺，这一小步颇令人有些失望。

尽管事实证明外商投资有利于中国经济的发展，并且外商投资企业实际上是中国公司，除了适用的狭义安全关切以外，外商投资企业不应该面临其它的投资负担，但是国内投资者面对的投资限制明显比外国投资者少，审批程序也相对简化。在 2015 年版《产业目录》上 38 个行业属于“限制进入”，36 个行业属于“禁止进入”；目录中未列出的“准予进入”的行业仍然需要获得国家发改委的批准。我们鼓励中国将外商投资管理制度从基于目录的管理改变为基于负面清单形式的管理。

从中国（上海）自由贸易试验区（PFTZ）开始，中国四个 PFTZ（上海、天津、广东和福建）都已经采用负面清单来管控入境的外商投资。PFTZ 的既定目标是作为计划在全国范围实施的经济和行政改革的试验场——包括外商投资、外国资本和货币管制制度改革。特别是，PFTZ 已

access restrictions in a wide range of industries, particularly in the service sector.

Despite the proven benefits of foreign investment to China's economy, and the fact that FIEs are Chinese companies and should therefore not face additional investment burdens except where narrowly defined security concerns apply, domestic investors face significantly fewer investment restrictions and less onerous approval procedures than foreign investors. In the 2015 Catalogue, investment is "restricted" in 38 sectors and "prohibited" in 36; "permitted" industries, which are not listed in the Catalogue, also require NDRC approval. We encourage China in its efforts to move from a catalogue-based system of foreign investment management to a negative-list approach.

Beginning with the China (Shanghai) PFTZ, a negative list approach has been adopted for regulating inbound foreign investment in China's four PFTZs (Shanghai, Tianjin, Guangdong, and Fujian). The stated goal of the PFTZs is to serve as a testing ground for economic and administrative reforms contemplated for nationwide implementation, including reform of the foreign investment, foreign capital, and currency control regimes. In particular, the PFTZs have experimented with various financial reforms and have tested opening various sectors to foreign investment – a few of which have since been expanded to a national level.

While we remain cautiously optimistic regarding the role of PFTZs in introducing market reforms, we continue to be discouraged by the slow pace of implementation to date. The PFTZ negative list has since undergone two rounds of revision, with the initial negative list containing 190 prohibited and restricted sectors. The first round of revisions in July 2014 reduced the number of prohibited and restricted sectors to 139, and a second revision in April 2015 further reduced the number of prohibited and restricted items to 122. However, in both cases, many of the revisions reflected a streamlining of the negative list with other national regulations guiding foreign investment rather than a significant liberalization of the investment environment. Indeed, while many of the reforms may be new to China, they are hardly novel elsewhere in the world.

The expansion of the use of a negative list was emphasized in a guideline approved by the Central Leading Group for Deepening Overall Reform in September 2015. The announcement, however, lacked details regarding its implementation and implied a continuation of a pattern of incremental and limited progress that does not suit the needs of foreign investors. Our members are concerned that a protracted rollout of market openings will not only limit the ability of the Chinese economy to increase its efficiency and grow in needed sectors, but may have a cooling effect on the negotiations of a US-China BIT. We strongly believe that near-term, consistent, and transparent openings will increase foreign investment, particularly in the service sector.

Regulatory Developments

In 2015, China introduced a series of draft and final legislation that added considerable uncertainty to the future of the foreign investment environment. Together with the uncertainty caused by government actions in the domestic economy during the Shanghai stock market crash in July 2015 and further devaluation of the RMB in August 2015, the release of many of the following regulations – though some were positive – raises concern about further restrictions on foreign investment.

Unified Foreign Investment Law

In January 2015, MOFCOM released a draft unified Foreign Investment Law for public comment that sought to implement the Third Plenum's call for unifying domestic and foreign investment laws and regulations. Once finalized, this law will replace the three existing legal frameworks governing foreign investment – the Law on Chinese-Foreign Equity Joint Ventures, the Law on Chinese-Foreign Contractual Joint Ventures, and the Law on Wholly Foreign-Owned Enterprises – which were at times duplicative, inconsistent, and in contradiction to other laws. The introduction of a unified Foreign Investment Law is a positive and important indication of China's continuing desire to reform and further open up.

We welcome the Chinese government's effort to transform a 25-year old investment regime, commensurate with China's current and future market needs and potential while addressing multiple key proposals from the Third Plenum. We are pleased that the draft Foreign Investment Law would implement the national treatment principle allowing foreign investors to make investments on the same terms as Chinese investors, and welcome the adoption of a negative list, which will set out which foreign investments are subject to approval and at what level. Discussed in further detail in the following sections, we nevertheless remain concerned that discretion granted to government officials may be used for purposes other than protecting national security (e.g., promoting domestic economic interests).

We are encouraged that the US-China Economic Relations Fact Sheet from President Xi Jinping's recent state visit to the US included language that limits the scope of national security reviews of foreign investment to national security concerns, excluding broader economic issues. However, the ultimate measure of this commitment will depend on changes to existing and future Chinese laws and regulations, including but not limited to the draft Foreign Investment Law, that contain a broad, comprehensive definition of national security.

National Security Law

In May 2015, the NPC released a draft National Security Law for public comment, with a revised version of the law enacted in July 2015. We fully recognize that China, like

经尝试进行各种金融改革，并且尝试向外商投资开放各种行业，其中一些做法已经扩大到全国范围。

尽管我们对 PFTZ 在实行市场改革中的作用保持谨慎乐观，时至今日改革的缓慢进展仍然让我们感到气馁。PFTZ 负面清单已经经历了两轮修改，最初的负面清单包含 190 个禁止进入和限制进入的行业。2014 年 7 月第一轮修订将禁止进入和限制进入的行业减少到 139 个，然后 2015 年 4 月第二轮修订进一步将禁止进入和限制进入的行业削减到 122 个。但是，这两轮修订大多反映对负面清单的精简而非投资环境的明显自由化。虽然许多改革对中国来说也许确实有点新鲜，但是在世界其他地方，这些措施已经得到了广泛应用。

2015 年 9 月，中央全面深化改革领导小组审议通过的指导意见强调了扩展负面清单的使用范围。但是这份通告缺乏实施细节，并且隐含将继续采取与外国投资者的需求不相符的渐进和有限制的推进方式。我们的会员企业担心，拖延实行市场开放不仅限制了中国经济提高行业效率和壮大行业的能力，还可能给中美 BIT 谈判造成不利影响。我们坚信，近期的、一贯的、透明的开放将吸引更多的外商投资，尤其是对服务业的投资。

监管措施

2015 年，中国出台了一系列大大增加今后外商投资环境不确定性的草案和最终立法。除了 2015 年 7 月上海股市大跌和 2015 年 8 月人民币进一步贬值期间中国政府行动带来的不确定性以外，后续颁布的多项规定（虽然有些规定是积极的）也增加了外界对中国政府将进一步限制外国投资的担忧。

统一的《外商投资法》

为了落实三中全会关于统一内外资法律法规的决定，商务部于 2015 年 1 月公布统一内外资的《外商投资法（草案征求意见稿）》。该草案一旦定稿，这项法律将取代现有的三个外商投资管理法律框架——《中外合资经营企业法》、《中外合作经营企业法》和《外商独资企业法》——这三部法有时会出现重复、不一致和相互矛盾。一部统一的《外商投资法》的出台是一个积极而且重要的信号，表明中国政府有持续改革和进一步开放的意愿。

我们欢迎中国政府顺应当前及未来的市场需求和潜力，

有针对性地根据三中全会提出的多个重点提案，对已经延用 25 年的投资体制进行改革所做出的努力。令我们高兴的是，拟订的《外商投资法》将实行国民待遇原则，允许外国投资者在与中国投资者所享有的同等条款下进行投资。我们欢迎采用负面清单并列明哪些外商投资必须取得哪级政府的审批。尽管如此，我们仍然对政府官员被授予自由裁量权感到担忧，因为这种自由裁量权可能被用于维护国家安全以外的目的（例如，推进国内的经济利益）。

令我们感到鼓舞的是，在习近平主席最近对美国进行国事访问期间，双方发表的《美中经济关系情况说明书》中包含了“对外资的国家安全审查范围限于国家安全问题之内，不通过纳入经济问题而使审查泛化”的措辞。不过，这一承诺的最终措施将取决于中国现行及未来的对国家安全做出广义全面定义的法律法规是否会有所改变——这包括但不限于《外商投资法（草案）》。

国家安全法

全国人大于 2015 年 5 月发布了《国家安全法（草案）》向社会公开征求意见，并于 2015 年 7 月颁布新版《国家安全法》。我们完全认可，中国 and 所有国家一样有权保护自己的国家安全。与此同时，由于中国致力于实现三中全会提出的目标，即进一步开放中国经济和扩大对外投资，因此，我们认为，在保护国家安全与保持对外资开放这二个目标之间取得平衡是符合中国利益的。遗憾的是，这部《国家安全法》倾向于保护包括经济安全在内的、国际上并未广泛认定为核心国家安全问题的国家利益，并因此可能对外资进入中国产生显著的不利影响。

我们的会员企业对中国《国家安全法》中对国家安全做出的过于宽泛的定义深感担忧，定义中的国家安全包括经济安全、文化安全、社会安全和公共道德。如果与中国拟订的以及现行的有关入境外资筛查的法规结合起来看，这一定义可能会导致国家安全审查办法的膨胀化，这将进一步限制和阻碍外国投资，这类投资对中国经济的贡献也会相应减少。

《国家安全法》概述的关于国家安全的宽泛概念也与投资审查的国际准则不符。这令外界从根本上怀疑中国今后关于向外资开放市场的承诺——包括依照拟议的中美 BIT 以及正与欧盟谈判的《综合投资协定》向外资开放市场——能否产生预期效果。

all countries, has a right to protect its national security. At the same time, as China aims to achieve its Third Plenum objective of further opening up the Chinese economy and expanding foreign investment, we believe that it is in China's interest to balance the twin objectives of protecting national security and maintaining openness to foreign investment. Unfortunately, the National Security Law favors protecting national interests that fall outside the widely accepted scope of essential national security concerns, including economic security, and is therefore likely to have a significant adverse impact on the flow of foreign investment into China.

Our members are deeply concerned about the implications of China's overly broad definition of national security in the Law which includes economic security, cultural security, societal security, and public morality. Read together with other draft and existing Chinese regulations relating to the screening of inbound foreign investment, this definition could result in an expansive approach to national security reviews that will further restrict and discourage foreign investment and, in turn, reduce the benefits that such investment delivers to China's economy.

The sweeping conception of national security outlined by the Law is also inconsistent with international norms governing investment reviews. It raises fundamental questions about whether future commitments by China to open its markets to foreign investment will produce the intended results, including under the proposed US-China BIT and the Comprehensive Agreement on Investment under negotiation with the EU.

According to the OECD "Guidelines for Recipient Countries Investment Policies Relating to National Security," a national security review process should carefully circumscribe the scope of the review process, including by identifying precisely the transactions that are subject to review and the national security-based criteria on which determinations will be made. A national security-based foreign investment review law should abide by fundamental principles of non-discrimination, transparency and predictability, regulatory proportionality, and accountability. These are widely accepted norms because they allow for a review that can protect national security without unnecessarily sacrificing the benefits of foreign investment.

By comparison, the National Security Law appears to adopt broad concepts of economic security criteria that are inconsistent with these international norms and suggest an intent to pursue protectionist laws and policies. Moreover, the reference to "secure and controllable" technology, as described below in further detail, suggests the enforcement of indigenous innovation policies, which would be counter to the principle of non-discrimination and efforts to create a level playing field among domestic and foreign companies.

As the US and China negotiate the BIT, with the intended goals to expand the flow of trade and investment between

our two countries, we are concerned that the National Security Law and related regulations risk undermining the stated benefits of a BIT. A successful, high-standard BIT depends on the principles of non-discrimination, fairness, and openness, but China's evolving approach to safeguarding national security risks creating significant uncertainty for foreign investors and additional burdens on foreign trade and investment in China.

Cybersecurity Law

In July 2015, the NPC released for public comment a draft Cybersecurity Law, which displayed the Chinese government's attention to addressing network intrusions, network attacks, and terrorist acts, as well as the protection of personal information and sensitive data. We appreciate the opportunity to comment on the first reading of the draft, which we believe clarifies relevant network subjects' rights, responsibilities, obligations, and penalties for violations. We also believe it improves some aspects of the legal system for network security in China and, with revisions, can promote the healthy development of cyberspace.

While we recognize the importance of strong protections and regulatory frameworks to ensure networks can meet consumer demands without sacrificing security or efficiency, we are concerned that the draft Cybersecurity Law will be overly burdensome on companies currently doing business in China as well as users, and may negatively impact the cybersecurity that the draft law is intended to protect. In particular, our members are concerned about the lack of clear standards and scope of applicability regarding the companies that may be required to comply with the vague terms, the lack of integration with global cybersecurity standards and certifications, and the requirements for data localization; all of which may be used to discriminate against foreign-invested companies.

We appreciate the commitment made by both governments during President Xi's visit to the US, to refrain from engaging in cyber-enabled theft of IP with the intent of using it for commercial gain.

Data Localization

Over the last few years, the Chinese government has introduced a series of both legally binding regulations and voluntary standards with the aim of restricting access to certain data. These policies indicate a trend that is counter to the principles driving the BIT negotiations and will hinder China's efforts to be a leader of innovation. As discussed in the AmCham China 2015 Policy Spotlight Series report "Protecting Data Flows in the US-China Bilateral Investment Treaty," such laws include:

- "The Law of the People's Republic of China on Guarding State Secrets" [NPC, 1989, revised 2010]
- "Notice to Urge Banking Financial Institutions to

根据经合组织（OECD）《关于外资流入国制订国家安全相关投资政策的指导意见》，国家安全审查流程应审慎界定审查流程涉及的范围，准确识别出那些符合审查标准和国家安全标准的交易并据此予以确认。制订以国家安全为导向的外国投资审查法应遵守非歧视、透明、可预见、适度监管和可问责等基本原则。这些原则让外资流入国能够在避免无谓牺牲外资利益的前提下进行以保护国家安全为目的的审查，因此是被广泛接受的国际准则。

相比之下，中国的《国家安全法》似乎采用了与这些国际准则不相符的、概念宽泛的经济安全标准，表明中国有意执行带有保护主义色彩的法律和政策。此外，《国家安全法》还提及“安全可控”的技术（如后文中更详细的描述），暗示将实施自主创新政策，这违背了非歧视原则，同时也与中国政府打造一个能够让内外资公司公平竞争平台的努力相悖。

随着中美双方就 BIT 展开谈判以及因此将扩大两国之间贸易和投资流动的预期目标，我们担心《国家安全法》和相关规定有可能削弱 BIT 带来的利好。一个成功的、高标准的 BIT 取决于是否遵循了非歧视、公平、开放的原则，而中国不断升级的维护国家安全的手段可能给在中国投资和贸易的外国投资者带来极大的不确定性和更多的负担。

网络安全法

在 2015 年 7 月，全国人大公布《网络安全法（草案）》向社会公开征求意见，这显示了中国政府对网络入侵、网络攻击和恐怖主义行为，以及保护个人信息和敏感数据的关注。我们很高兴有机会对该草案的初读发表意见，我们认为该草案对有关网络主体的权利、责任、义务和违规处罚做出了明确规定。我们还认为，它完善了中国网络安全法律制度的某些方面，并且，修订后的法案能够促进网络空间的健康发展。

虽然我们认同必须要有一个强有力的保护及监管框架以确保网络在不牺牲安全或效率的前提下能够满足消费者的需求，但我们担心的是《网络安全法（草案）》过于繁琐，可能令目前在中国开展业务的企业和用户难以负担，从而可能对该法律草案意图保护的网络安全造成负面影响。特别是，我们的会员企业担心草案条款不够明确，对于哪些企业适用这些条款也缺乏明确的标准和适用范围，缺乏与全球网络安全标准和认证的整合，还有数据本地化的要求；所有这些都可以被用作区别对待外商投资企业的手段。

我们感谢在习近平主席访美期间两国政府做出的关于打击利用 IP 从事网络商业窃密行为的承诺。

数据本地化

在过去的几年中，中国政府出台了一系列具有法律约束力的规章和自愿性标准，旨在限制访问某些数据。这些政策表现出来的趋势与推动 BIT 谈判的原则相悖，会阻碍中国成为创新领导者的努力。正如中国美国商会 2015 年《政策聚焦系列报告：保护中美双边投资协定中的数据流动》中讨论的那样，这类法律包括：

- 《中华人民共和国保守国家秘密法》[全国人民代表大会，1989 年颁布，2010 年修订]
- 《关于银行业金融机构做好个人金融信息保护工作的通知》[中国人民银行（PBOC），2011 年]
- 《信息安全技术公共及商用服务信息系统个人信息保护指南》[中国国家标准化管理委员会及国家质量监督检验检疫总局，2013 年]
- 《征信业管理条例》[国务院，2013 年]
- 《征信机构管理办法》[中国人民银行（PBOC），2013 年]
- 《反恐怖主义法（草案）》[全国人民代表大会，2014 年]
- 《关于促进云计算创新发展培育信息产业新业态的意见》[国务院，2014 年]
- 《人口健康信息管理办法（试行）》[国家卫生计生委，2014 年]
- 《网络安全法（草案）》[全国人民代表大会，2015 年]

我们认为，这类数据本地化政策使得外国公司无法继续使用其现有 IT 供应商和基础设施从而增加成本，同时也切断了国内企业与全球市场潜在客户之间的联系。将数据存放于中国境内的要求将使外国公司必须在多个国家建立昂贵的数据中心，尤其对那些尝试在中国做生意但无力承受数据本地化成本的中小型外国公司产生不利影响。最后，数据本地化可能明显阻碍许多创新型信息产业和应用的发展，比如物联网、云计算和大数据。我们的会员企业坚决反对中国的数据本地化政策，因为这将对他们的生产力以及继续在中国投资的能力造成压倒性的负面影响。

Protect Personal Information” [People’s Bank of China (PBOC), 2011]

- “Information Security Technology – Guidelines for Personal Information Protection within Public and Commercial Services Information Systems” [Standardization Administration of China & General Administration of Quality Supervision, Inspection and Quarantine, 2013]
- “Administrative Regulation on Credit Information Industry” [State Council, 2013]
- “Administrative Measures for Credit Reference Agencies” [PBOC, 2013]
- “(Draft) Counter-terrorism Law” [NPC, 2014]
- “Guiding Opinions for Promoting the Innovation and Development of Cloud Computing to Cultivate New Types of Information Industry Services” [State Council, 2014]
- “Population Health Information Management (Pilot)” [National Health and Family Planning Commission, 2014]
- “(Draft) Cybersecurity Law” [NPC, 2015]

We believe such data localization policies will hamper China’s economic growth through increased costs for foreign companies that can no longer use their existing IT suppliers and infrastructure while simultaneously cutting domestic companies off from a global marketplace of potential customers. Requirements to store data in-country will also require that foreign companies build costly data centers in multiple countries, and are particularly damaging for foreign small and medium-sized companies seeking to do business in China but are unable to bear the costs of localization. Finally, data localization can significantly undermine many innovative information industries and applications such as the Internet-of-Things, cloud computing, and big data. Our member companies firmly oppose data localization policies in China because of the overwhelmingly negative impact it would have on their productivity, as well as ability to continue investing in China.

“Secure and Controllable” Regulations

In September 2014, the China Banking Regulatory Commission (CBRC), Ministry of Industry and Information Technology, Ministry of Science and Technology, and NDRC jointly released the internal “Guiding Opinions on the Application of Secure and Controllable Information Technology to Strengthen Banking Industry Network Security and Informatization” (Opinions), which was circulated among banking institutions – but not open to public comment – , requiring them to ensure that 75 percent of their ICT products are “secure and controllable” by 2019. This term was more publicly emphasized within the National Security Law, as referenced above. In December 2014, the CBRC issued “The Guidelines on Banks Using Secure and Controllable Information Technology,” requiring banking

institutions to implement “secure and controllable” information technology products. These guidelines were at no point made publically available.

These regulations effectively require foreign companies to surrender key technologies such as source code and encryption algorithms to Chinese authorities, increase substantially their manufacturing and research facilities in China, and implement Chinese standards (as opposed to global standards). Such immensely burdensome policies would overwhelmingly disadvantage foreign IT companies through such performance requirements, creating barriers for their investments in China. In addition, the regulations effectively create an unbearable cost burden to most foreign banks and limit Chinese banks’ ability to compete globally and securely, given that they will have a limited pool of software from which to choose.

After their eventual suspension in April 2015, China further committed at the 2015 US-China Strategic and Economic Dialogue (S&ED) “that such bank ICT regulations will be nondiscriminatory, are not to impose nationality-based requirements, and are to be developed in a transparent manner.” While we appreciate these commitments and note that in the intervening months some meetings have been held with foreign companies to discuss further revisions to the regulations, these meetings have been announced at very short notice and without informing participants of the issues to be discussed beforehand. Meanwhile, the draft regulations have yet to be released to the public, and similar principles regarding “Secure and Controllable” have since begun to appear in guidelines and announcements for other industries, including telecoms, medical devices, e-commerce, and insurance. The non-transparent application of such industrial policy is of great concern to our members, and creates doubt over China’s commitments made in the Third and Fourth Plenums and the principles of non-discrimination, fairness, and openness.

Foreign NGO Management Law

In May 2015, the NPC released the “Foreign Non-governmental Organization (NGO) Management Law” (Draft NGO Law). While we understand that this draft law is being considered in light of the broader reform agenda, in conjunction with other laws on national security, our members have expressed strong concern regarding the breadth and content of the Draft NGO Law as it has the potential to seriously disrupt the operations of a wide variety of organizations which provide positive services to China and its people, including foreign universities, charities, business associations, and even the corporate social responsibility (CSR) activities of many commercial enterprises.

A thriving NGO sector can help in providing an educated and healthy workforce, improving and protecting the environment, expanding access to services such as healthcare and finance, advocating for food safety, developing productive

有关“安全可控”的条例

中国银监会（CBRC）、国家工业和信息化部、科技部和国家发展改革委于2014年9月联合发布了一份仅在金融机构内部流通而不向社会公开征求意见的内部文件——《关于应用安全可控信息技术加强银行业网络安全和信息化建设的指导意见》。《意见》要求各金融机构应确保到2019年之前75%的信息通信技术（ICT）产品是“安全可控”的。如前文所述，这个词在《国家安全法》中更是多次公开强调。银监会于2014年12月发布《银行业应用安全可控信息技术指导意见》，要求各银行业金融机构落实“安全可控”信息技术产品。这些指导意见在任何时候都没有对公众开放。

这些规定实际上要求外国公司向中国主管机关交出源代码和加密算法等关键技术，大幅增加外国公司在中国的生产和研究设施，并且执行（有悖于全球标准的）中国标准。通过上述性能要求，这类繁冗的政策给外国IT企业在中国的投资制造了障碍，并让他们处于压倒性的劣势。此外，这些规定实际上也给大多数外资银行造成难以承受的成本负担，同时限制了中国银行业在全球范围内进行安全竞争的能力，因为可供他们选择的软件库有限。

在这些规定于2015年4月最终暂缓执行之后，中国在2015中美战略与经济对话（S&ED）中进一步承诺：“保证这类银行ICT规定是非歧视性的，不会强加国籍要求，并会保证政策制订的透明性。”虽然我们对这些承诺表示赞赏，并注意到在此间有关部门几次约见外国公司就相关规定的进一步修订进行讨论，但是这些会议没有提前通知，也没有事先告知参会者将讨论哪些问题。同时，这些规定的草案并未向社会公开征求意见，有关“安全可控”的类似准则已经开始出现在电信、医疗设备、电子商务、保险等其它行业的指南和公告上。我们的会员企业对中国在应用这类行业政策上的不透明感到非常担心，并对中国政府在三中和四中全会上做出的承诺以及其承诺的非歧视、公平和开放的原则产生怀疑。

《境外非政府组织管理法》

全国人大于2015年5月发布《境外非政府组织（NGO）管理法》（《NGO法草案》）。虽然我们明白该草案是出于更广泛的改革议程而进行审议的，但是结合有关国家安全的其它法律，我们的会员企业都对《NGO法草案》涉及的广度和内容表示强烈关切，因为它有可能对为中国和中国人

民提供积极服务的各类组织的运作——包括境外的大学、慈善机构、商业协会甚至是许多商业企业的企业社会责任（CSR）活动——造成严重干扰。

一个蓬勃发展的NGO行业能够提供受过教育的、健康的劳动力、改善和保护环境、扩大医疗保健和金融等服务的覆盖范围、倡导食品安全、发展生产劳动关系，并鼓励企业守法经营和承担企业社会责任。尤其是商业协会，它对支持双边关系起着不可或缺的作用，并且为中国经济创造利益。商业协会针对双向的商业机遇和政策挑战为两国政府提供建议，以促进双方的贸易投资，有效的政策磋商及高效的标准制定。美国企业是由许多不同的组织所代表的，根据新的法律草案，所有这些组织都将受到负面影响，这会严重损害中国的经济发展以及我们的会员企业在中国从事商业活动的利益。

我们的会员企业尊重中国政府在中国对境外NGO进行规管的权力，但是，他们同时意识到，拟议中的这类法规可能会限制他们正常开展促进中国发展的相关活动的的能力。我们从根本上认为NGO的定义过于宽泛；最好的方法是对现有的NGO代表处制度进行改革，而不是创建一个全新的、不确定的、以安全为重点的替代制度，这将限制这类NGO在中国工作的能力；此外，有关NGO登记制度的要求太多，行政负担过重，大多数境外NGO很难满足这些要求。

中国制造2025

国务院总理李克强于2015年3月宣布“中国制造2025”经济行动，国务院于5月发布了配套的计划。该计划旨在通过减少劳动密集型产品，代之以高科技的机器和产品，重新打造中国制造业。该计划的目标是加大创新和提高生产效率，到2025年基本实现工业化，到2035年能够与制造强国竞争，到2049年进入世界制造强国前列。因此，政府优先考虑：

- 提高制造业创新能力
- 推进信息技术与工业的整合
- 强化工业基础
- 促进中国品牌建设
- 推行环境友好型制造业
- 推进制造业结构调整
- 发展服务型制造和生产性服务业

labor relations, and encouraging corporate compliance and CSR. Business associations, in particular, play an integral role in supporting the bilateral relationship and create benefits for China's economy. Business associations advise both governments on two-way commercial opportunities and policy challenges in order to promote trade and investment, efficient policy consultations, and efficient standards development. American business is represented by many different organizations, all of which would be adversely affected under the new draft law to the serious detriment of China's economic development and the interests of our members in their commercial engagements with China.

Our members respect the right of the Chinese government to regulate foreign NGOs within the country but, at the same time, are aware that such proposed rules may limit their ability to properly conduct their activities whose objective is to contribute to China's development. We ultimately believe that the definition of NGO is overly broad; that it is best to reform the existing NGO representative office system rather than create a new, uncertain, and security-focused replacement that will restrict the ability of such NGOs to work in China; and that the extensive and administratively burdensome registration requirements will be extremely difficult for most foreign NGOs to satisfy.

Made in China 2025

In March 2015, Premier Li Keqiang announced the "Made in China 2025" economic initiative, the plan for which was issued by the State Council in May. This program seeks to remake Chinese manufacturing by reducing labor-intensive production in favor of high-tech machinery and goods. The goal is to increase innovation and manufacturing efficiency to achieve basic industrialization by 2025 in order to compete with developed manufacturing powers by 2035 and to lead the world's manufacturing by 2049. As such, the government has prioritized:

- Improving manufacturing innovation;
- Integrating information technology and industry;
- Strengthening the industrial base;
- Fostering Chinese brands;
- Requiring environmentally friendly manufacturing;
- Promoting restructuring of the manufacturing industry;
- Promoting service-oriented manufacturing and manufacturing-related service industries;
- Internationalizing manufacturing; and
- Fostering development in 10 key sectors: agricultural equipment, new-energy vehicles, aerospace and aeronautical equipment, biopharma and advanced medical products, power equipment, new advanced information technology, maritime equipment and high-tech shipping, automated machine tools and robotics, modern rail transport equipment, and new materials.

According to the plan, China intends to raise the domestic content of core components and materials to 40 percent by 2020 and 70 percent by 2025. The plan also calls for a strengthening of IPR protection for small and medium-sized enterprises, more effective use of IP in business strategy, and allowing firms to self-declare their own technology standards to help them better participate in international standards setting. Specific details of how China intends to reach these targets are unclear, as is how FIEs – particularly those that are developing and producing goods and products in China for China – will be able to participate in this plan. With the existence of numerous indigenous innovation policies mandated by the central government, our members are concerned that this policy will be used to support domestic companies and discriminate against FIEs in an exercise of industrial policy.

SOE Reform

While the outcomes of the 2013 Third Plenum and subsequent government announcements (e.g., the August 2015 "Guiding Opinions on Deepening the Reform of State-owned Enterprises (Guiding Opinions)" released by the CPC Central Committee and State Council) indicate that State Owned Enterprises (SOEs) will be charged to operate more efficiently, improve their return on capital, and be subject to more intense competition and tighter regulation, it is clear that SOEs will continue to receive strong state support and will continue to be expected to play an important role in China's economic development. Indeed, government support for SOEs continues to be overwhelmingly cited by our member companies among the industrial policies most negatively impacting their business operations.

In the 2015 Guiding Opinions, the CPC identifies capital investment, adaptability, management reform, accountability, and Party leadership as its main priorities in deepening SOE reform. Of particular note, the Guiding Opinions open SOEs to investment from private capital. In September 2015, the State Council released a blueprint for the development of mixed-ownership SOEs which suggests a welcoming of foreign participation in the reform of and reorganization of SOEs, including through the formation of joint ventures, cooperative arrangements through overseas mergers, and financing. The plan also suggests that monopoly industries will be divided into two portions: a "monopoly portion" whose assets will be mostly or solely state-owned and a "competitive portion" that will, in some industries, be open to non-SOEs. A timetable has yet to be set for the completion of these reforms.

Despite these positive reforms, it appears that the CPC will remain the "political core" of SOEs and will directly manage all reforms, though the Guiding Opinions states that the CPC is willing to allow more space for SOEs to experiment while maintaining its authority. We continue to urge that a firm commitment to fair competition among private and state-owned as well as foreign-invested and domestically invested companies be declared and implemented.

- 制造业国际化
- 促进十个重点发展领域：农机装备、新能源汽车、航空航天装备、生物医药及高性能医疗产品、电力装备、新一代信息技术、海事装备及高技术船舶、数控机床和机器人、先进轨道交通装备和新材料。

根据该计划，中国计划到 2020 年将核心部件和材料的国产比例提升至 40%，到 2025 年将这一比例提升至 70%。该计划还要求加强中小型企业的知识产权保护，在经营策略上更有效地利用知识产权，允许企业自行申报自己的技术标准，帮助他们更好地参与国际标准制定。关于中国打算如何实现这些目标的具体细节还不清楚，至于外商投资企业——尤其是那些货物和产品的研发、生产和销售都在中国的企业——将如何能够参与这个计划也还不清楚。随着中央政府颁布多项自主创新政策，我们的会员企业担心，在执行产业政策时，这一政策将被用来支持国内企业和歧视外资企业。

国有企业 (SOE) 改革

尽管 2013 年三中全会的改革成果以及后续政府通告（例如，中共中央和国务院于 2015 年 8 月颁布的《关于深化国有企业改革的指导意见》）表明中国将加强国有企业管理，以便改善国有企业的经营效率，提高资本回报率，使其面对更激烈的竞争环境并受到更加严格的监管，但是很显然，国有企业仍将继续获得政府的强力支持并有望在中国的经济发展中发挥重要作用。确实，在我们的会员企业列举的对其业务经营最具负面影响的产业政策当中，提及最多的仍然是中国政府对国有企业的支持。

在 2015 年《指导意见》中，中共将资金投入、适应性、管理改革、问责制和党的领导确定为深化国有企业改革的主要优先事项。特别值得注意的是，该《指导意见》将国有企业投资向民营资本开放。国务院于 2015 年 9 月发布了一份关于国有企业发展混合所有制经济的构想，表明欢迎外资通过成立合资企业、海外并购合作经营以及融资等形式参与国有企业的改革和重组。该计划还表明，将把垄断行业分为二种类型：一种是“垄断型”，资产绝大部分或全部由国家持有；一种是“竞争型”，某些行业将向非国有企业开放。目前，完成这些改革的时间表尚未出台。

尽管有这些积极的改革，但是看来中共仍将保持国有企业的“政治核心”并将直接掌控所有的改革，虽然《指导意见》指出，中国共产党愿意给予国有企业更大的探索空间，

同时仍将维护自身的权威地位。我们继续敦促中国政府坚定承诺并采取行动，以便私营和国有以及外资与内资企业能够在同一起跑线上参与竞争。

中美双边投资协定

投资氛围明显更加开放是改革的一个关键因素，这不仅对中国经济未来取得成功十分必要，也为正在进行的 BIT 谈判打下更坚实的基础。我们坚决支持中美双方就全面且高标准的 BIT 加紧谈判，并且认为这是两国深化双边经济和商业关系最具决定性的一步。令我们感到鼓舞的是，奥巴马总统和习近平主席同意加紧谈判，尽快达成一项高标准的协议。

一个有效的、成功的 BIT 会吸引更多的美国投资进入中国，从而为消费者带来更有价值、更加低廉的产品，并向中国引入宝贵的管理和技术人才。同样，它也将增强中国投资者对美国的信心，支持中国境外投资的增长，为美国创造就业机会和其他经济利益。不过，中国近期的改革开放步伐已经表明，现阶段可能无法如商界所希望的在短时间内达成一项高标准的协议，这同时也给中国对 BIT 原则的承诺增加了不确定性。

在一项 BIT 中，双方最看重的成果是持续的经济增长，而这只能通过扩大并保持投资的开放性来实现。中国采用负面清单的做法既是开放的一个重要措施，也体现了中国对谈判的责任感。但是，通过与中国和美国政府官员的讨论，我们了解到，中国列出的负面清单仍然比美国商界预期的要长得多。此外，许多企业都报告说，中国政府官员告诉他们，在达成 BIT 之前将暂缓进一步的市场开放。我们认为，两国应努力加快谈判进程，但我们还认为，中国政府在 BIT 达成之前继续推进市场开放和实施改革将有利于中国的经济和消费者，同时也会向外界发出明显信号，表明中国打算让外国企业获得意义重大的市场准入。这将转而利于为美国商界对正在进行的 BIT 谈判赢得更广泛的支持。

提供一份简短的、明确的负面清单及能够体现非歧视、公正、开放和透明原则的高标准的文本是确保 BIT 既定目标、解决商界共同关切、扩大投资关系以及加强双边经济关系所必不可少的。此外，我们坚决支持双方达成一个不仅能解决市场准入问题，同时也能解决那些造成不公平竞争环境或破坏游戏规则行为的协议。我们的会员企业希望 BIT 能解决以下问题：

US-CHINA BILATERAL INVESTMENT TREATY

Further significant opening in the investment climate is a key ingredient of reform and will not only be essential to China's future economic success, but will build greater support for the ongoing BIT negotiations. We strongly support the rapid negotiation of a comprehensive, high-standard BIT, and believe this is the most decisive step the two countries can take to deepen bilateral economic and commercial relations. We are encouraged that Presidents Obama and Xi agreed to intensify negotiations and work expeditiously to conclude a high-standard agreement.

An effective and successful BIT would result in increased US investment into China, leading to higher value products and lower prices for consumers, as well as introduce valuable managerial and technical expertise into China. Similarly, it would also boost the confidence of Chinese investors in the United States and support the growth of China's outbound foreign investment, bringing job creation and other economic benefits to the US. However, the recent pace of reforms and openings for foreign businesses have indicated the timeline may not meet the hopes of the business community to reach the necessary high-standard agreement, while adding doubt to China's commitment to the principles of a BIT.

The most important outcome sought by both sides in a BIT is continued economic growth, which can only be achieved through expanded and sustained investment openness. A critical measure of openness, as well as China's level of commitment to the negotiations, is China's approach to the negative list. Through discussions with Chinese and US government officials, however, we understand that the Chinese negative list remains much longer than the expectations of the US business community. Furthermore, numerous companies have reported being told by Chinese government officials that any further market opening will be held off until the completion of the BIT. We believe both countries should pursue a rapid negotiation process, but also believe that market opening and implementation of reforms by the Chinese government prior to the completion of a BIT will benefit the Chinese economy and consumers while providing measurable signals of China's intent to achieve meaningful market access for foreign companies. This will, in turn, help to build broader business support in the US for the ongoing treaty negotiations.

A short and narrow negative list offer – coupled with a high-standard core text that embodies the principles of non-discrimination, fairness, openness, and transparency – is necessary to ensure that the BIT achieves its objectives to address our shared commercial concerns, expand our investment ties, and bolster the bilateral economic relationship. Furthermore, we strongly support a treaty that not only addresses market access but also actions that create an uneven playing field or undermine the rules-based system

for foreign companies. In particular, our members hope that the BIT will address the following.

Requirements for transparency through administrative procedures and due process in enforcement and dispute settlements: Unclear investment approval procedures and licenses and the lack of information regarding regulatory decisions allow the use of superseding industrial policies that discriminate against FIEs in China. Furthermore, the inability to access open and fair dispute resolution procedures through administrative or judicial procedures dramatically limit our members' ability to receive fair treatment in China.

Limitation of performance requirements, such as data and IP localization and expanded protection against forced technology transfer: A series of recent draft laws and regulations propose measures that would greatly limit the ability of companies to effectively use data within their global infrastructures and supply chains, limiting and even negating the positive impact of future openings. Furthermore, companies continue to report both direct and indirect requests for technology transfers as a requirement for their investment approvals.

Disciplines on SOEs and designated monopolies: Numerous foreign companies in China face an unbalanced playing field due to government support for SOEs and designated monopolies within their sectors. Government preferences through regulator impartiality, subsidies, and unclear definitions of sovereign or state actions by SOEs restrict both foreign and domestic companies' ability to operate in the market.

Clarify definitions of national security to limit overly broad application of regulations: China's new National Security Law includes broad economic, cultural, and social interests in its definition of national security, raising concerns as to the potential impact of national security reviews on foreign investment in the service sector.

Guarantees for non-discriminatory application and development of standards: The frequent inability of our members to participate in standard setting organizations and the unequal treatment of FIEs through the use of standards by government entities, create barriers for our members looking to invest and operate in China. The inability of foreign companies to dispute such actions in open and fair procedures further limits the fair use and development of industry standards for foreign companies.

CONCLUSIONS AND RECOMMENDATIONS

The Chinese government undoubtedly faces a difficult road ahead to complete the reforms needed to successfully transform its economy. The regulatory environment has

要求通过行政程序确保执法和解决争端过程中的透明度和程序正当性：不明确的投资审批程序、许可证规定，以及有关监管决策信息的缺失，让有些部门可以利用替代性的产业政策歧视对待在中国的外商投资企业。此外，我们的会员企业无法通过行政或司法程序来获得公平公开的争端解决程序，极大地限制了他们在中国获得公平待遇的能力。

性能要求方面的限制，例如数据和 IP 本地化，以及加强对强迫性技术转让的保护：最近发布的一系列法律法规草案所提议的措施极大地限制了企业有效利用其全球基础设施和供应链中数据的能力，限制甚至否定未来开放的积极影响。此外，我们的会员企业不断报告说，他们被直接或间接地要求进行技术转让，否则投资无法获得批准。

约束对国有企业及特定垄断领域的支持：由于政府对国有企业及特定垄断领域的支持，许多外国企业在中国面对的是一个不均衡的竞争环境。政府对国有企业监管上的偏袒、补贴，没有明确界定国有企业的哪些行为属于主权或国家的行为，使得外国企业和本土企业的市场运作能力受到限制。

明确国家安全的定义，限制相关法规被过于广泛地应用：中国新的《国家安全法》对国家安全的定义包括宽泛的经济、文化和社会利益，令我们担心国家安全审查对外商投资的服务业可能产生潜在的负面影响。

保证标准的应用和制订不具歧视性：我们的会员企业经常无法加入标准制定组织，政府机构通过标准的应用使外资企业受到不平等的待遇，给我们试图在中国投资和经营的会员企业制造障碍。外国企业无法通过公平公开的程序质疑这些行为，进一步限制外国企业合理利用和参与制定行业标准。

结论和建议

中国政府为了成功实现经济转型而必须推进改革，这条道路无疑是艰难的。因此，我们能够理解，监管环境发生翻天覆地的变化是为了适应经济的快速发展以及改革的需要。但是，随着落后的经济结构给经济带来更多的压力，以及世界其他地区即将达成多个贸易协定以推动 21 世纪的监管体制与时俱进，中国必须加大改革的步伐，从而在未来的全球经济竞争中取得成功。

歧视性产业政策和透明的投资审批程序，一项投资的审批被加设条件或被否决时投资者缺乏有效的行政和法律手

段行使追索权，执法过程缺乏透明度和正当程序，制订的经济条例和规定越来越多地加入国家安全元素，这些现象都会增加外国商界的担忧。本报告中列举的法规揭示了中美政府的监管办法在某些方面存在分歧，这些法规也与正在进行的 BIT 谈判所追求的市场开放目标不符。此外，我们认为这些法规会削弱三中全会和 BIT 带来的利好和成果。

我们坚信，为了确保今后的市场开放为中国不断发展的经济创造必要的投资环境，必须加快和深化现有外商投资制度的改革。此外，我们也坚信，必须强化中美 BIT 谈判以确保本报告中列举的法规以及今后制订的法规不会影响 BIT 利好在中国的有效实现。我们欢迎有机会能够与中国政府机构探讨这些建议，共同推进中国市场的进一步开放，为整个经济改革议程提供支持。为此，中国美国商会和美国商会建议如下：

对于中国政府：

- 关于准入前投资制度：
 - ◆ 尽快推进切实可行的开放性政策，允许外国投资者扩大在中国的业务。
 - ◆ 删除《外商投资产业指导目录》中“鼓励类”的投资项目需要获得行政审批和许可证的规定。
 - ◆ 依照在第四轮和第五轮中美战略与经济对话（S&ED）做出的承诺，适应中国当下的经济需求，即时开放服务业和其它产业市场。
- 关于《外商投资法》
 - ◆ 确保其符合正在进行的 BIT 谈判的精神和目的——创造一个公平的竞争环境，进一步开放市场，提高外商投资制度的可预见性、透明度和公平性，给外国投资者国民待遇。
 - ◆ 明晰《外商投资产业指导目录》和根据《外商投资法（草案）》拟订的《特别管理措施目录》上的“限制类”和“禁止类”产业，并统一成一份简洁、高效、定义明确的负面清单。
- 关于国家安全：
 - ◆ 明确国家安全的定义，并从定义中删除经济安

thus understandably changed dramatically over the last two decades in relation to the rapidly evolving economy and the need for reform. However, as the economy faces added pressures from outdated structures, and the world moves forward with a number of trade agreements that will push forward the regulatory regimes of the 21st century, China must increase the pace of its reform process to successfully compete in the future global economy.

The continued presence of discriminatory industrial policies, opaque investment approval procedures, lack of effective administrative and legal recourse if an investment approval is conditioned or denied, lack of transparency and due process in enforcement, and the increasing use of national security in the development of the rules and regulations for China's economy have all led to increased concerns from the foreign business community. The developments included in this report reveal some of the areas of divergence in the regulatory approaches of the US and Chinese governments and run counter to the market-opening aims of the ongoing BIT negotiations. Furthermore, we believe many of the included developments would reduce the benefits that would otherwise result from the Third Plenum and the BIT.

We firmly believe that more rapid and deeper reforms to the existing foreign investment regime are needed to ensure that future market openings create the necessary environment for China's evolving economy. In addition, we strongly believe that US-China BIT negotiations should be strengthened to ensure that the developments raised in this report, as well as future regulations, do not limit the full benefits of the treaty from being effectively reached in China. We welcome opportunities to work with Chinese government agencies to explore these recommendations and work towards the further opening of China's markets in support of the overall economic reform agenda. Therefore, AmCham China and the U.S. Chamber of Commerce recommend the following:

For the Chinese Government:

- Regarding the pre-establishment investment regime:
 - ◆ Rapidly pursue substantial and actionable openings that will allow foreign investors to expand their operations in China.
 - ◆ Remove nationwide administrative reviews and licensing requirements for investments listed as "encouraged" in the Catalogue Guiding Foreign Investment.
 - ◆ Create immediate market openings for service sectors and other industries as committed in the fourth and fifth S&ED, and in line with China's immediate economic needs.
- Regarding the Foreign Investment Law:

- ◆ Ensure it abides by the spirit and intention of the ongoing BIT negotiations to create a level-playing field, further open the market, and improve the predictability, transparency, and fairness of the foreign investment regime with national treatment for foreign investors.
- ◆ Clarify and unify the restricted and prohibited categories within the Foreign Investment Catalogue and the proposed Catalogue of Special Management Measures under the draft Foreign Investment Law into a simple, efficient, and narrow negative list.
- Regarding National Security:
 - ◆ Clarify the definitions of national security and remove economic security (or related economic references) from the definitions to be consistent with the principles of a high standard BIT and OECD Guidelines.
 - ◆ Provide narrowly tailored definitions within laws or measures governing national security reviews to provide the greatest opportunity for inbound investment flows.
- Regarding Cybersecurity and Data Policies:
 - ◆ Provide clarifications to the definitions and scope of applicability of the draft Cybersecurity Law to guard against potential inconsistent and unclear enforcement.
 - ◆ Ensure the economy has seamless flows of data across borders and refrain from data localization policies that limit trade.
 - ◆ Publish the regulations regarding "Secure and Controllable" policies – specifically CBRC documents 37 and 319 – within the banking industry and pursue the revision of the policies in an open and transparent manner with clear opportunities for public consultation.
 - ◆ Cease the expansion of secure and controllable policies across industries without open and transparent consultations with the foreign and domestic business community.
- Revise the Draft Foreign NGO Management Law to allow NGOs to actively contribute to the bilateral relationship and create benefits for China's economy.
- Ensure China's plans for supporting the future growth of China's economy, including support for the advancement of the manufacturing sector, SOE reform, and the support of companies' outbound investment, does not discriminate against FIEs.

全（或相关经济考量），与高标准的 BIT 和经合组织《指导意见》的原则保持一致。

- ◆ 在规定国家安全审查的相关法律或措施中对其进行明确的、有针对性的定义，为入境投资流动提供最大的机会。
- 关于网络安全和数据政策：
 - ◆ 对《网络安全法（草案）》的定义和适用范围做出明确规定，以防止执法的不一致和不明确。
 - ◆ 确保经济数据跨国界的无缝流动，避免限制贸易的数据本地化政策。
 - ◆ 公布有关“安全可控”政策的规定——特别是银监会下发银行内部的第 37 号和 319 号文件，争取以开放和透明的方式修订政策，为公众征询提供明确的机会。
 - ◆ 在没有向外国和本国商界公开透明地征求意见之前，停止安全可控政策在各行业的扩散。
- 修订《境外非政府组织管理法（草案）》，允许非政府组织积极推动双边关系，并为中国经济创造利益。
- 确保在中国为支持中国经济今后增长——包括为了支持推动制造业、国企改革、国内企业境外投资——而制订的计划中，没有歧视外商投资企业的內容。

对于美国政府

- 争取 BIT 谈判，以确保协定的全部利好能够在中国这个独一无二的市场有效实现。我们特别敦促美国政府在 BIT 中要包含以下内容：
 - ◆ 要求通过行政程序确保执法和解决争端过程中的透明性和程序正当性；
 - ◆ 限制性能要求，例如数据和 IP 本地化，以及对强迫性技术转让的更多保护；
 - ◆ 约束对国有企业及特定垄断领域的支持；
 - ◆ 明确国家安全的定义，限制有关法规被过于广泛地应用于投资审查；

- ◆ 保证标准的应用和制订不具歧视性。

对两国政府

- 争取尽快达成一个高标准的 BIT，确保协定的预期利好能够在中国这个独一无二的市场实现。
- 确保两国政府列出的负面清单都是简短的，只对少数几个重要部门做出明确界定以限制投资。
- 利用即将举行的中美商贸联委会（JCCT）的对话机会，探讨外国企业在中国经济哪些领域具有机会以及需要在哪些方面做出改进，为正在进行的 BIT 谈判夯实基础。

For the US Government:

- Pursue negotiation of a BIT that ensures the intended full benefits of the treaty can be effectively reached within China's unique market. In particular, we urge the US government to include text that:
 - ◆ Requires transparency through administrative procedures and due process in enforcement and dispute settlements;
 - ◆ Limits performance requirements such as data and IP localization and greater protection against forced technology transfers;
 - ◆ Creates disciplines on SOEs and designated monopolies;
 - ◆ Clarifies definitions of national security to limit overly broad application of national security in investment reviews; and
 - ◆ Guarantees the non-discriminatory application and development of standards.

For Both Governments:

- Pursue the rapid completion of a high-standard BIT that ensures the intended benefits of the treaty can be reached within China's unique market.
- Ensure the negative lists from both governments are short with only narrowly crafted exceptions that limit investment in only a few essential sectors.
- Utilize the upcoming Joint Commission on Commerce and Trade dialogues to discuss areas of opportunities for foreign companies in China's economy and areas for improvement that can build support for the ongoing BIT negotiations.



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