



STATEMENT  
of the  
UNITED STATES COUNCIL  
FOR INTERNATIONAL BUSINESS

**Suggestions for Agenda Priorities for the United States – China  
Joint Commission on Commerce and Trade (JCCT)**

March 27, 2006

UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS  
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## Executive Summary

USCIB welcomes the opportunity to submit suggestions on priorities and agenda items for the upcoming U.S.-China Joint Commission on Commerce and Trade (JCCT) meetings that will be held in April before President Hu Jintao's visit later that month. USCIB actively supports China's participation in the international trading system, after supporting the granting of Permanent Normal Trade Relations status to China. It called for China's entry into the WTO, and annually submit comments to the U.S. Trade Representative's office on China's compliance with its WTO commitments.

We appreciate the efforts and accomplishments achieved so far through the JCCT forum. In particular, we welcome the commitments on intellectual property right protection, software procurement, distribution, insurance, and telecom market access. However, there remain general compliance concerns. Among the factors cited by our members as affecting their investment decisions are lack of transparency in rulemaking, failure to consult adequately with stakeholders, non-compliance with WTO obligations, lax enforcement of intellectual property rights, and unfair protection of domestic industries.

USCIB appreciates the opportunity to give suggestions for this bilateral forum, and the program staff are ready to meet with officials at U.S. agencies to discuss recommendations and concerns of specific issues outlined below at greater length.

USCIB members have raised numerous compliance issues, specific issues which include the following:

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## Priority Topics

### Air Freight

#### *Issue*

- In June 2004, the Chinese and US governments agreed to an air services protocol that is intended to substantially increase, over a six-year period, the number of carriers permitted to fly passenger and/or cargo flights between the countries, as well as the total number of flights flown. The 2004 agreement also provides that China and the U.S. will meet in 2006 "...with the ultimate objective of fully liberalizing the civil aviation relationship..." between the two countries. The first round of these negotiations is scheduled for mid-April in Beijing.
- Although the current China-US air services agreement will lead to a significant increase in the number of flights between the two countries, the recent growth in trade between the two countries threatens to render the agreement inadequate. According to U.S. Census Bureau data, US imports from China increased by a factor of nearly two between 2000 and 2004. Airborne exports from China increased by more than a factor of three, according to Chinese data. U.S. exports to China have more than doubled in that same period. The airborne portion of U.S. exports to the U.S. is up 40 percent during that same period.
- Should current trends continue or accelerate, the shortage of flight capacity will place constraints on trade and economic growth in both countries. Particularly harmful would be constraints on airfreight capacity. Increasingly, supply chains in high tech and other industries are integrated world-wide. Production facilities in China and the U.S. are interrelated. The need to move product between countries is critical to growth in many sectors, including high tech and retail. Already, some U.S. companies with operations in China have run into air capacity constraints in the fourth quarter when the need to ship product is greatest due to holiday market demands. Near-term constraints are somewhat accentuated because the Chinese have not fully utilized their full share of flight frequencies under the current agreement.
- The U.S. government has signaled its commitment to further liberalization of China-U.S. aviation. The U.S. is seeking an early start to the 2006 re-evaluation of the current expansion provided in the 2004 agreement.

#### *Desired Action*

The JCCT talks should encourage Chinese agreement to full all-cargo liberalization. In addition to articulating the case for lifting the limit on all-cargo flight frequencies between the two countries, the Chinese government should be encouraged to fully utilize all of its current frequencies under the current regime.

### Anti-Monopoly Law

#### *Issue*

- Industry continues to monitor with concern the development of the draft Anti-Monopoly Law (AML). While appreciating the opportunity afforded to consult on prior iterations of the draft, industry would very much like the opportunity to comment on the current draft, and any successors.

#### *Desired Action*

Industry would like the opportunity for additional input before the draft is finalized. Industry recognizes, however, that the draft is in front of the National People's Congress for its review and approval, and thus the opportunity for further input may not be possible. The outcome of the JCCT discussions should include a commitment by China that industry (local and international) will have meaningful opportunities to comment on all drafts of the AML's implementing regulations. Such a commitment is especially

critical since most competition policy details will be determined in those regulations. USCIB also requests that the U.S. government stress at the April JCCT meetings the importance U.S. industry places on promulgation of an AML and implementing regulations that are applied in a nondiscriminatory manner and that promote fair competition, respect for intellectual property, and compliance with international standards and practices.

### **Capital Markets Modernization**

#### ***Issue***

- Both U.S. and Chinese companies could benefit from the increased breadth and depth of the Chinese capital markets. While China's WTO accession commitments in the securities sector were an important first step toward liberalizing its capital markets, U.S. securities firms still face significant barriers to market access.

#### ***Desired Action***

China should take steps in two distinct, but reinforcing, areas for reform in order to deepen and strengthen its capital markets.

The first step should be to ensure greater market access for foreign securities firms, by reducing the number of restrictions to entry, such as on ownership limitations, so that they can compete in an open and fair manner with local firms.

The second step, which is complimentary to the first in ensuring greater market access, should entail ensuring market reform, which would include improving regulatory transparency. The current barriers impede the development of China's financial markets, and hamper the ability of China to create markets where domestic and foreign entrepreneurs can access equity and debt capital.

The U.S. Treasury Department's establishment of a U.S.-China Financial and Regulatory Dialogue promises to serve as a forum in which significant progress can be made to advance China's financial modernization, as well as to reduce and eventually eliminate remaining discriminatory barriers. We recommend that the U.S. government continue to engage the Chinese government in this dialogue that focuses on the modernization of the Chinese capital market, which would ultimately benefit all with stability and greater access to capital for both U.S. and Chinese firms.

### **Energy Sector**

#### ***Issue***

- Specific to its commitments made during the WTO accession process, and despite some progress in opening China's oil sector, U.S. business interests still face important obstacles.
- Crude oil and petroleum products trading is still highly restrictive for foreign investors; China makes it difficult for non-state traders to import petroleum products by imposing specific requirements for wharf size and product storage capacity and stockpiles.
- China places strict regulatory controls on foreign investment in petroleum product wholesale and retail operation.
- Foreign companies need a Chinese JV partner to expand retail networks beyond 30 stations.
- While the wholesale market will be opened by the end of 2006, according to draft regulations, high thresholds for foreign entrants, including ownership of specific numbers of retail stations and levels

of storage capacity, are proposed for the sector; in addition it is unclear if supply contracts with state-owned firms are mandatory and if foreign wholly-owned investment is allowed.

#### ***Desired Action***

The Chinese WTO commitments in the energy sector were a small first step to a more open energy market in China. The Chinese should be encouraged to meet, and even surpass, their commitments and to do so in the agreed-upon time frame. The commercial interests of both the U.S. and China would benefit from increased bilateral energy cooperation given the importance of affordable reliable energy supplies.

### **Government Procurement**

#### ***Issue***

- At last year's JCCT, the Chinese government agreed to accelerate its efforts to join the WTO Government Procurement Agreement and to initiate technical discussions with other WTO members. It is important to ensure that where commitments are made, they are fulfilled.
- China's launch of negotiations and ultimate adoption of the GPA represents an extremely important facet of balancing U.S.-China trade relations. Non-discriminatory, open, transparent, merit-based and technology-neutral procurement of goods and services in all sectors from information technology, to energy, to infrastructure would increase opportunities for U.S. companies.

#### ***Desired Action***

Industry urges the U.S. government to secure from China a commitment to launch negotiations to join the GPA in advance of the next JCCT meetings, and to set a goal of December 2007 as the target for China to complete those negotiations.

### **Insurance**

#### ***Issue***

- China has made important efforts to promulgate and implement laws and regulations consistent with its WTO commitments and its desire to strengthen China's rapidly expanding insurance industry. The process began in January 2003 when the National People's Congress amended the *Insurance Law*. China Insurance Regulatory Commission (CIRC) followed with a host of implementing rules and regulations, including those dealing with the administration of insurance companies, asset management, risk control in the use of insurance funds, and, in collaboration with other financial service regulatory bodies, enterprise pensions.
- The long-awaited promulgated *Regulations on the Administration of Insurance Companies* and *Detailed Rules on the Regulation for the Administration of Foreign Invested Insurance Companies*, which took effect in June 2004, were key steps forward in these efforts. Another very positive step was taken in December 2004 when China announced that, consistent with its WTO commitments, it would abolish all geographic restrictions within China. This step will open the health, group and pension/annuity insurance markets to foreign insurers, and will allow foreign brokerage companies to increase their shareholding in brokerage companies to 51%.
- All these actions have strengthened the insurance regulatory environment and have helped to provide greater clarity regarding WTO-related and other issues of critical importance to foreign insurers. At present, of primary concern to foreign insurers are the achievement of broad national access and a level of transparency, openness and predictability that will permit the establishment and development of sound, successful insurance companies throughout China. These primary objectives have and will continue to be the subject of bilateral dialogues with CIRC and the Chinese insurance industry, encouraged by U.S. industry and U.S. government officials. The first of these dialogues was held in

December 2002. The second took place in April 2005 and provided the forum for Chinese and U.S. industry experts to join Chinese and U.S. government and industry representatives for discussion of a broad range of industry issues and concerns. A third dialogue took place in December 2005.

- For the above reasons and because it remains unclear how China will implement several of its fundamental WTO commitments, USCIB would recommend further and more focused actions in the areas set out below, which are our highest priorities for discussion and clarification:

- Branch and Sub-branch Establishment and Approvals: This is perhaps the most significant issue that foreign insurers operating in China face at the present time. Specifically,

- How many branch licenses may a company apply for and expect to receive at one time—will licenses be issued on a consecutive or concurrent basis?
- Is CIRC's approval of a provincial license sufficient for operation in the entire provincial jurisdiction? Once a provincial branch has been established, will provincial sub-branch licenses be approved on a consecutive or concurrent basis?
- Will China permit non-life insurance companies a choice of corporate form and thereby permit insurers to choose whether or not to convert to a subsidiary company or to continue to operate and expand their operations through a direct, branch structure?

- Consecutive or Concurrent Branch Licensing

The rules and regulations governing branch establishment do not address the issue of how many branch licenses a company may apply for at one time, or whether those licenses applied for must be issued consecutively or concurrently. However, numerous established Chinese domestic insurers have been issued multiple branch licenses on a concurrent basis and a number of more recently established Chinese domestic insurers have benefited from the same favorable treatment. The current practice of approving foreign insurers' applications for branch licenses on a consecutive basis is contrary to international standards and may violate China's WTO national treatment commitments. This practice also denies consumers access to a broader range of insurance services.

- Provincial Branch and Sub-Branch Establishment

Like many other companies, domestic and foreign insurance companies access the market through networks of branches, sub-branches and subsidiary companies. Full access to China's provinces and municipalities, including those with special status under the central government, is essential if foreign and domestic insurers in China are to achieve their business objectives. As mentioned above, rules and regulations governing branch establishment do not specify whether CIRC's approval to establish a branch in a province is sufficient authority to operate throughout the provincial jurisdiction. In addition, it is unclear whether—following the establishment of a provincial/municipal branch—insurers may apply for and expect to receive multiple sub-branch approvals at one time.

- U.S. Non-life Insurance Companies Branch/sub-branch Establishment

Prior to China's WTO accession, a number of foreign insurance companies were allowed to set up operations in the PRC. All of these companies were requested by the Chinese government to establish as operational branches, not as subsidiaries. However, in both of the two new sets of draft regulations (the *Draft Administrative Regulations* and the recently released *Draft Trial Implementing Rules*), there does not appear to be any article that addresses the maintenance, development and/or expansion of branch operations. Instead, CIRC has encouraged branch operations to convert to subsidiaries.

The guaranteed branch/sub-branch structure is a well-established international norm appropriate

for application in China. (By "guaranteed branch/sub-branch structure" we mean branches and sub-branches whose solvency is guaranteed and supported by the total assets of the parent company.) As the foregoing implies, while subsidiaries suit some business models well, the branch structure offers certain advantages. Unlike a subsidiary company, a branch operation is one and the same legal entity as its parent. Therefore, in the case of a branch of a foreign insurer, the rights and obligations of the branch are those of the foreign parent and all policies and liabilities of the branch are backed by the foreign parent's full asset base. We would also add that, China's WTO commitments specifically state that China will permit branching consistent with the phase-out of geographic restrictions.

Several U.S. non-life insurers have indicated their intention to convert branch operations into subsidiary operations, but others prefer a branching structure. USCIB members would encourage flexibility and the provision of a choice of corporate form that would permit insurers to convert to a subsidiary operation or to continue and to expand operations through a branch/sub-branch structure, whichever best suits their business model.

- **Reduction In The Threshold For Utilization:** With respect to the *Provisional Measures on the Administration of the Overseas Utilization of Insurance Foreign Exchange Funds* released on August 9<sup>th</sup> by CIRC, USCIB members view the threshold for utilization as unjustifiably high. Specifically paragraphs 4 and 5 of the article which permit only the largest domestic companies and no foreign companies to access overseas funds and equities. USCIB believes this has significant national treatment implications, and this treatment should be expanded to allow utilization by participating foreign companies.
- **Further Lowering of Capitalization Requirements:** As noted earlier in the document, USCIB recognizes the positive change that has occurred in the insurance sector with respect to China's lowering of capital requirements for initial establishment and branching. However, we continue to maintain that an initial requirement of RMB200 million, and RMB20 million for each additional branch up to a cap of RMB500 million (provided that all solvency issues have been addressed in any subsequent efforts to expand), are too prescriptive in nature and still much higher than international norms for many lines of business. Excessive reserve, deposit and capital requirements serve no prudential purpose and largely impact new investors—domestic and foreign alike—thereby limiting the development of the sector as a whole. USCIB understands that China may consider adoption of a Risk Based Capital approach and welcomes this news. However, we would suggest that solvency in the insurance sector is best assured by a comprehensive risk management approach that promotes sound professional management, and prudential practice in the industry. Additional clarification on capitalization and related issues such as permissible investment and operating activities would also be welcome.
- **Group Product Issues – Group Life Insurance and Supplementary Pensions:** The phase-in period for China's WTO commitment on group life, pension/annuity and health insurance ended in December 2004.
  - **Group Life Coverage:** Most important at present is the promulgation of guidelines covering group life insurance coverage, specifically, what geographic area is covered by a master-contract.

At present, it seems that domestic and foreign insurers who wish to provide group life insurance may only issue master contracts to companies who have a "substantial presence" or are headquartered in the jurisdiction for which the insurer holds a group license. We would urge the Chinese government to consider issuing guidelines that would permit any insurer with a group license to provide coverage to a principal policyholder under a master contract and to members of

the group represented by the principal policyholder, wherever the principal policyholder or its group members may be located in China.

- **Supplementary Pensions:** The Enterprise Annuity Regulations were issued in May 2004 and USCIB applauds this first important step toward clarifying China's supplementary pension system. Supplementary pensions play a very important role in any economy as they provide additional, employer-sponsored retirement income at no expense to the government. For this reason, we favor private supplemental pension schemes. We would encourage the Chinese government to issue further regulations that clarify how private pensions are established and that remove fee caps such that fees are market-driven. We would also suggest that tax incentives be provided to promote the purchase of supplementary pensions.
- **Improving the transparency of the rulemaking process as well as the equal application of licensing and solvency rules with domestic companies:** This is especially true as new generations of regulations are being released that appear to have unreasonable provisions that will put many new entrants at a competitive disadvantage in the marketplace. Specifically, recent regulations that allow companies with licenses for more than eight years to invest in a much broader range of assets than companies entering the market since China joined the WTO discriminate against foreign invested companies and have no prudential rationale. This appears to be arbitrary and inconsistent with China's national treatment commitment obligations. We would urge a transparent discussion of this prudential justification.
- **In addition, while China invited insurers to comment on revisions to the Insurance Law in December 2004, it neglected in early 2005 to solicit industry comment on a variety of regulations covering administration of insurance agencies, asset management, stock investment transactions, and investment in subordinated bonds. More recently, it failed to provide adequate public notice and meaningful comment periods with the publication of Regulations on the Administration of the Reinsurance Business on its website in Chinese on October 31 2005 with an effective date of December 1, 2005.**
- **2005 Regulations on the Administration of the Reinsurance Business**  
Reinsurance is vital for the adequate spread of risk. Therefore rules and regulations governing reinsurance must permit diversification and rely on increased transparency, accounting, audit and disclosure standards to ensure best practices and prudential supervision. In addition, reinsurers provide expertise in underwriting, asset management, pricing and risk management. China's recent Reinsurance Regulations limit the spread of risk and access to this additional expertise in three ways.
  - 1) Article 11 (1) requires direct insurers to first solicit reinsurance from two domestic insurers. How this article will be enforced is not clear. USCIB urges the Chinese Government to interpret this article in such a way as to permit the simultaneous solicitation of reinsurance offers from foreign reinsurers so as to seek the best possible reinsurance arrangements and spread of risk.
  - 2) Article 12(1) prohibits direct insurers from reinsuring more than 80% of any one risk.
  - 3) Article 22 prohibits direct insurers from reinsuring with affiliates, except as approved by CIRC. Insurers with foreign investment alone are required to obtain CIRC's prior approval before ceding risk to an affiliate company.

### ***Desired Action***

USCIB strongly supports the objectives of the U.S.-Chinese dialogues and believes that intensifying bilateral dialogue, with review and comment on legislation in the early stages of the drafting process, is central to the development of a world-class insurance regulatory regime in China and to China's ultimate fulfillment of its WTO obligations. USCIB recommends that regulations be developed to govern existing and future expanded branch operations in China. We further recommend that these regulations conform to the internationally accepted branch/sub-branch operating structure. USCIB strongly encourages a more vigorous effort on the part of CIRC and the Chinese government to consult with industry in the legislative making process on a routine basis. It suggests that the reinsurance regulations are inconsistent with China's WTO national treatment commitments, and asks the U.S. government in the JCCT process to urge for China's compliance.

### **Intellectual Property Rights**

#### ***Specific Issues and Suggested Actions***

Serious concerns continue to exist with respect to China's protection and enforcement of intellectual property. Key areas that need attention include the following:

- **Market Access**

Significant existing market access restrictions inhibit the ability of content providers to build a legitimate market and satisfy consumer demand. It is critical to the fight against copyright piracy that these restrictions be loosened to allow consumers timely access to legitimate products. Restrictions include, but are not limited to, investment/establishment restrictions, film import and broadcast content quotas, "blackout" periods, customs valuation procedures not in compliance with WTO commitments, state control of imports and distribution and burdensome censorship clearance and licensing procedures.

- **Centralized Authority**

The lack of a central authority with accountability for achieving demonstrable results fundamentally hampers China's efforts to improve IP protection.

- **Transfer of Administrative Cases for Criminal Prosecution**

Despite promises to increase the number of cases transferred for criminal prosecution, more demonstrable progress needs to be made. Regulations similar to those being contemplated by the Procuratorate need to be developed by Customs and other authorities. In addition, supervision of case transfers by national and provincial police should be enhanced. Meanwhile, the government is encouraged to closely monitor the successful implementation of new State Administration for Industry and Commerce (SAIC) regulations on case transfers. But in the absence of the planned Supreme People's Procuratorate (SPP) regulations and clarification of a number of other ambiguities relating to the valuation of case (see below), we question whether the new regulations on case transfers will fully meet their intended objectives.

- **Enforcement Framework, Resources and Focus**

Commitment should be made to enforce existing laws through administrative and criminal channels. In this regard, enforcement authorities must have adequate resources and be encouraged to be more proactive and enforcement activity should be stepped up in areas where counterfeiting and piracy are known to be rampant, such as Guangdong Province. Moreover, enforcement efforts would benefit from the issuance of new regulations to fill gaps in the existing legal framework, concerning, for example, strengthening rules governing landlord liability.

- **Criminal Enforcement Thresholds and Amendment of the Criminal Code**

Numerical thresholds under the current Criminal Code and 2004 judicial interpretation should be clarified and lowered and additional criteria introduced to encourage criminal prosecutions against targets where

the evidence of prior production and sales is circumstantial. In the longer term, we believe the current “thresholds” approach to liability is misguided and inconsistent with the TRIPS Agreement. The State Council and NPC should therefore undertake to commence a full examination of deficiencies in the current Criminal Code provisions on IP protection.

- **SAIC Enforcement Rules**

Administrative penalties should be strengthened through the issuance of new SAIC enforcement guidelines which could, inter alia, help to increase fines and provide more detailed criteria for determining whether to seize production equipment and raw materials used to make fakes. These had been promised by the government since 2002, but it remains unclear if they will ultimately be issued.

- **Transparency**

More detailed information on government IP enforcement should be released on a regular basis, both to help measure trends and to increase public awareness of the problem. For example, decisions arising from IP litigation would ideally be made publicly available.

- **Internet Regulations**

There is a need for further consultations with industry before the draft Internet regulations are finalized, in part to ensure concerns about anti-circumvention devices and electronic rights management are adequately addressed.

- **Civil Litigation**

IP owners increasingly need to rely on Chinese civil courts to deal with enforcement, but find many procedural rules to be outdated and unnecessary. Industry recognizes that many procedural obstacles in IP litigation in China present much wider issues of legal reform that are not limited to IP. But we strongly recommend the Chinese government and legislature focus on them sooner, rather than later. Examples of issues of key concern include deadlines for filing notarized and legalized powers of attorney and evidence; the lack of clear rules concerning the admissibility of expert testimony to allow judges to identify competent and unbiased experts; the lack of an effective discovery process and use of contempt powers to compel cooperation by litigants in generating critical evidence; the lack of more detailed regulations to facilitate preliminary injunctions in IP cases and to calculate the appropriate level of bonds and statutory damages. Moreover, many judges in China are not lawyers and have received very little training on how to manage complex litigation; the U.S. government may be able to help in this regard.

- **Retail and Wholesale Market Rectification**

Counterfeiting of all kinds of products is endemic in Chinese retail and wholesale markets. The problem that draws the most attention concerns sales of luxury and apparel products, but the issue is of equal concern in almost all industries. Building on limited success in Beijing, the Chinese government should issue new regulations to clarify the risks of administrative, civil and criminal liability for failing to effectively monitor and intervene in markets where IP violations are rife.

- **Patent System**

The State Intellectual Property Office (SIPO) should promote legal certainty of the patent examination and validity challenge processes, including by increasing transparency and raising the threshold for validity challenges. In this regard, it is important that SIPO engage in consultations with industry on the ongoing amendment to the Chinese Patent Law.

- **Data Protection**

China has yet to implement meaningful data protection provisions for pharmaceutical or agricultural chemical products as required by Article 39 of the TRIPS Agreement and China’s WTO accession agreement obligations.

- **Camcording**

There is currently no mechanism by which to sanction either those who record films in theaters, or theaters that fail to curb the practice. Criminal sanctions would be ideal; at a minimum, a commitment to issue guidelines and decrees with appropriate administrative sanctions should be given.

- **Plant Variety Protection**

Despite China's accession to the 1978 Act of the International Union for the Protection of New Varieties of Plants (UPOV), significant gaps remain in the protection regime for IP related to plant varieties key to innovation in biotechnology. At a minimum, China should accede to the 1991 Act of UPOV.

- **Joint Capacity Building**

In partnership with industry, the Chinese government should further efforts to educate enforcement officials, retailers and consumers on health and safety risks associated with counterfeit products and ways to distinguish between genuine and counterfeit products such as agricultural chemicals and pharmaceuticals.

- **IP Standards**

USCIB members are tracking with concern the development of the draft 'Provisions for Patent Issues Relating to National Standards' and the draft 'Antimonopoly Law', which could interact so as to pave the way for the compulsory licensing of technologies required for compliance with a national standard, in contravention of TRIPS limits on compulsory licensing. The U.S. government should use the JCCT forum to remind senior Chinese officials of their commitments to respect the legitimate exercise of IP rights, whether by domestic or foreign companies (small or large).

## **Labor Contract Law**

### ***Issue***

- A draft of a new Labor Contract Law for China was passed by the State Council in October 2005 and was scheduled for further action in the National People's Congress before becoming law in late 2006. The draft law, if enacted in the current form, will cause significant issues for entities employing individuals in China, including foreign-invested enterprises.

- Issues of particular concern include: (1) numerous new restrictions on the ability to terminate employees; (2) new restrictions regarding contractual non-competition requirements stipulating that they can be no longer than two years, that they must be geographically limited, and that the exiting employee must be paid the equivalent of no less than one hundred percent of the employee's annual salary; (3) the limitation of damages recoverable by an employer to only three times the amount paid by the employer to enforce the non-compete restriction if there is a former employee breach.

### ***Desired Action***

The proposed Labor Contract Law would seriously compromise the ability of an employer to impose fair and reasonable policies and work rules. The appropriate authorities should consider modifications to the proposed law that give employers more discretion as to the terms of such employment and that provide more flexibility for an employer's decisions as to when it needs to terminate an employee. Employers also need the ability to protect their trade secrets. It is an undue burden upon the employers to stipulate an amount equal to salary must be paid to enforce non-competition obligations when the employer receives no work product from the former employee. The compensation received by an employee during employment, together with any other benefits and severance payments that are paid by the employer, are adequate compensation for an employee to maintain an obligation to not compete with the employer for a reasonable, finite, period of time.

Additionally, given the significant impact the draft law would have on the employment policy, the draft law should be the subject of wider consultation with employers, including foreign-invested enterprises.

## **Legal System**

### *Issue*

- Local political authorities and State Owned Enterprises (SOEs) continue to use Chinese police to seize and detain foreign businessmen or their local advisors in China in attempts to intimidate them into resolving commercial disputes on terms favorable to the Chinese parties. These detentions often last many months and frequently ignore the rules of Chinese criminal procedure, and sometimes lack even the pretext of criminal charges. Several U.S. citizens are currently being held under such circumstances.
- In some cases, these situations are very open and obvious, particularly in some of the provinces outside Beijing and Shanghai. There have been cases of locally politically influential Chinese citizens successfully prevailing upon local officials to improperly imprison consultants to foreign investors on false charges, which were later dismissed as false. However, resolution of the matter took five days in one instance and over five months in another instance, during which time the consultant remained in prison without trial.

### *Desired Action*

The solution is to stop the use of criminal proceedings to influence the outcome of commercial disputes, and address these rule of law issues quickly and encourage a fair, corruption-free and transparent legal system in China which will require many legislative reforms, better trained and compensated judges and more accountability in many governmental offices. Once these issues are addressed, the improved system within China will foster increased trade and benefit all nations.

## **Postal and Express Delivery Service (EDS) Regulation**

### *Issue*

- When China acceded to the WTO, it made unlimited GATS commitments for international and domestic courier services to operate outside of China Post's "private letter" monopoly. Furthermore, China made a broad commitment not to "roll back" the liberal market-access rights that it had granted to foreign express delivery suppliers. Recent measures, some proposed, some already implemented, restrict foreign firms' participation in China's EDS business in direct violation of China's WTO commitments.
- The EDS industry's concerns are with three distinct, but related issues: China's current postal entrustment system, China's postal reform plan, and the new draft postal law.
- On December 20, 2001 – only nine days after China became a WTO Member – the Chinese government began implementing postal entrustment regulations that undermine its WTO commitments. After many complaints from the EDS industry and vigorous interventions from the U.S. government, a compromise on this issue was reached in 2003 at the JCCT meeting chaired by USTR Zoellick and Vice Premier Wu Yi. The industry was required to submit applications for "entrustment" from China Post to continue what China Post newly defined as "postal operations." In return, the industry received assurances from both the U.S. and Chinese governments that entrustment (1) would be a "one-time only action," (2) would not limit existing express delivery operations, and (3) would fully comply with China's WTO obligations. These assurances were enshrined in regulations (Postal Document 556 of 2002) jointly issued by the State Postal Bureau (SPB), Ministry of Commerce (MOFCOM) and the Ministry of Information Industry (MII).
- Those regulations were never implemented by the Chinese government and the SPB has refused to acknowledge their existence. Instead, the SPB granted EDS firms' entrustment certificates for limited

time periods only, most recently for the calendar year 2006, in effect imposing annual licensing requirements.

- China's entrustment regime and the expansion of China Post's monopoly violate China's WTO accession commitment not to "roll back" market access rights that had been granted to foreign express delivery suppliers and violate GATS rules on Monopolies and Exclusive Service Suppliers (Article VIII) and Market Access (Article XVI). China's failure to publish measures affecting trade in services violates GATS rules on transparency (Article III). China is also violating GATS rules on domestic regulation (Article VI) by attempting to use licensing procedures (*i.e.*, entrustment) to limit market access in committed sectors.
- One of the reasons that China Post has given for not implementing its commitments on the entrustment issue is the existence of a State-Council approved plan to reform China's postal system. China Post claims that this plan authorizes a new licensing system and that they cannot implement the existing regulations while new regulations are being drafted. According to the official press, the State Council approved a postal reform plan on July 22, 2005, but the details of the plan have not been released to the public. Numerous attempts by the industry to obtain a copy of this plan have been politely rebuffed – the plan is secret. The existence of a secret reform plan, which is used to justify the non-implementation of published regulations, is deeply disturbing.
- Also secret is the latest draft – the seventh draft – of China's proposed new postal law, which was issued on January 5, 2006. Although the industry has not been allowed to keep a copy of the law, local EDS company staff has been shown a copy of the law and has been briefed on its contents by a local trade association to which foreign firms belong.
- The seventh draft would seriously inhibit the orderly development of China's EDS industry and violates China's WTO commitments in numerous areas. The draft law would impose a minimum weight restriction of 350 grams below which China Post would have an absolute monopoly for domestic shipments. The law would also prevent foreign-invested companies from engaging in domestic delivery of any parcel weighing less than 50 kilograms and smaller than a specified dimension (other than in an undefined "express mode"). These provisions would preclude foreign EDS firms from markets that they have the right to serve today.
- The law would also create a new "licensing" system to replace "entrustment" and grant new, unsupervised powers of inspection and enforcement to a state postal regulatory agency staffed by former China Post officials. China Post would serve as both competitor and the enforcer of regulations governing express carriers. The draft would grant numerous competitive advantages (no taxes, allocated land, expedited dispatch, etc.) to the competitive as well as monopoly businesses of China Post. Finally, the law would impose a tax (a "fee" in the draft law) on EDS firms other than China Post. The details of how and on what businesses this tax would be levied and how the funds raised would be used would only be clarified in regulations drafted after the law has been passed.
- These provisions would not only impose an undue burden on foreign EDS firms inconsistent with China's WTO commitments; they would also inhibit the orderly growth of China's domestic and international logistics services industry, thereby damaging the competitiveness of Chinese users of EDS. They would deny national treatment to EDS companies and encourage the expansion of China's postal monopoly, contrary to China's commitments.

#### ***Desired Action***

The EDS industry urgently requests that the U.S. government forcefully raise these issues with the Chinese government during the upcoming meeting of the Joint Committee on Commerce and Trade. Specifically, China should commit to:

1. Implementing Postal Document 556 and the agreement reached at the 2003 JCCT meeting by extending U.S. firms' entrustment licenses to the length of their MOFCOM issued IFFA certificates.
2. Sharing with industry the draft postal reform plan that was passed by the State Council in July of 2005 and committing to consulting with industry on the detailed implementation of this plan.
3. Releasing to the public for comments the 7<sup>th</sup> draft postal law as required by the "notice and comment" commitment under China's Protocol of Accession to the WTO and general transparency principles contained in GATS Article III. This should be done at the State Council level and not when the law is pending before the NPC. Considering the legislative process of China, notice and comment at the NPC level is not appropriate as it is too late in the process for substantive changes.
4. Working with industry and other concerned parties to draft a new postal law that honors China's WTO commitments by:
  - not imposing any new taxes, fees, or other charge on the EDS industry to support China Post or postal services;
  - clearly and narrowly defining China's postal monopoly through a weight and price limit, as is common in other jurisdictions;
  - implementing China's commitment to open freight forwarding and courier services, without restrictions, to foreign invested firms; and
  - retaining MOFCOM as the regulator of the EDS industry and not providing expanded regulatory powers to the SPB.
5. Any postal reform should lead to pro-competitive regulations in postal and related sectors, in particular, with respect to the size of the reserved area, the universal service obligation, which should be cost-based and as pro-competitive as possible to achieve regulatory goals. The reform should prevent anti-competitive cross-subsidization by inclusion in the regulatory structure of rigorous accounting mechanisms that take into account the common costs associated with the provision of various services by China Post.

### **Removal of Certification, Licensing, and Testing Barriers to Accessing the China Market**

#### *Issue*

- The Chinese government has established in a number of areas certification, licensing, and testing requirements on products and production materials. In most cases, these requirements involve government approval of all covered products and materials before these are allowed to enter the market. Due to the lack of capacity to administer the requirements, the requirements often function as barriers to those products' and materials' access to the China market.
- These requirements impact a broad cross-section of U.S. industry and are a concern to a growing number of sectors. Examples include the new chemical registration regime, the battery registration regime, and the regime for restricting the material content of electronic products. A more extensive list of requirements and areas affected are listed in Annex 1 of this document.

- In such cases, particularly as Chinese certification, licensing and/or testing organizations are involved, the ability of a product or material to enter the Chinese market is typically subject to the following, often unpredictable, situations:

- (a) payment of excessive fees for certification or testing;
- (b) limited availability and choice in laboratories, where laboratory testing is required;
- (c) limited capacity of designated laboratories, or licensing or certification bodies to review applications in a timely manner;
- (d) limited or no mutually agreed, written confidentiality protections;
- (e) no expedited review processes for products that have limited life cycles;
- (f) expensive and often time-intensive facility audits by government designated auditing personnel.

- Addressing these challenges directly with the agencies involved has provided limited relief thus far. Chinese agencies resist less burdensome approaches, in part, to maintain fee revenues. At present, the systems tend to be "overbuilt," requiring that all covered products or materials, regardless of the presence of any indicators of non-compliance with Chinese law, undergo expensive and lengthy reviews or tests.

#### ***Desired Action***

A higher-level dialogue via the JCCT process is called for to identify a less burdensome approach to balancing China's compliance assurance needs with industry's needs for predictability, fairness, and minimally burdensome access to Chinese markets. Examples of less burdensome approaches would include expanded market surveillance programs, including incentives for corporate compliance programs and more severe fines for violators. Additional examples would include (i) expanding the CB scheme to include acceptance of Recognized Manufacturer Testing and Supervised Manufacturer Testing; and (ii) eliminating mandated in-country testing to allow testing for EMC, safety, wireless, etc. from nationally accredited labs.

### **Trading and Distribution Rights for Foreign Books, Magazines, and Newspapers**

#### ***Issue***

- China pledged when joining the WTO to permit foreign-invested enterprises in China to import and distribute foreign books, magazines, and newspapers. Current Chinese law, however, restricts the importation of foreign publications to a select few state-owned enterprises in violation of China's WTO commitments. Although the USTR raised this issue with the Chinese Government in 2005, the issue has not been resolved, and industry urges the U.S. government to place this as a high priority agenda item for the JCCT meetings. This issue is ripe for inclusion in the JCCT agenda.

- China's WTO obligations with respect to books, newspapers, and magazines entail several discrete commitments.

- The Chinese Government agreed to permit foreign-owned enterprises in China to engage in the domestic distribution of "books, newspapers, and magazines" within three years of accession.
- The Chinese Government agreed to grant "all enterprises in China" the right to import and export "all goods" except for the products listed in Annex 2A of the *Accession Protocol*. Annex 2A1 does not include publication products of any sort. Thus, China agreed to grant the foreign-owned distributors of books, newspapers, and magazines the right to import these publications.
- The Chinese Government expressly stipulated that there would be no limitations on the national treatment of foreign distributors of "books, newspapers, and magazines." The

Chinese Government thus committed to treat foreign and domestic distributors of publications equally.

- The Chinese Government also pledged that "only those laws, regulations and other measures pertaining to or affecting trade in goods [and] services . . . that are published and readily available to other WTO Members, individuals and enterprises, shall be enforced." The Chinese Government thus committed to regulate the importation and distribution of publications in a transparent manner.

- Together, the Administrative Regulations on Publishing, approved on December 12, 2001, and the Administrative Measures on Subscription of Imported Publications, approved on December 9, 2004, confine the importation of foreign publications and their distribution to subscribers in China to small group of state-owned enterprises. These measures prevent U.S. printers, publishers, and subscription companies from realizing the full benefit of the rights secured by the United States in admitting China to the WTO.

#### ***Desired Action***

This issue should be included on the JCCT Agenda. It is an issue that can be resolved with discrete, targeted commitments by the Chinese Government to allow foreign-invested publication distributors to import foreign publications and to administer existing content restrictions in a transparent and non-discriminatory fashion.

#### **U.S. Visas**

#### ***Issue***

- Another issue that has significantly undermined efforts when it comes to China and many other countries is the issue of immigration procedures that result in denied visas for legitimate foreign visitors. We urge those in the U.S. government to come up with a more logical approach in the granting of visas for high-level, or even mid-level technical, financial, policy and other government-to-government and academic exchanges that are in the interests of the business community, science, and government relations. The business community certainly supports sound and strong security measures, but the application of our immigration procedures when it comes to the above-mentioned important measures is counterproductive.

#### ***Desired Action***

This issue, while not necessarily needing to be raised with the Chinese, should be placed high on the U.S. Government list of goals in working towards a better balance between security and the application of immigration procedures to allow not only our business and academic guests from China, but from our global partners in trade and investment.

## **ANNEX I: EXAMPLES OF CERTIFICATION LICENSING AND TESTING REQUIREMENTS**

**Material Content Restriction Regime.** Management Methods on the Control of Pollution in Electronic Information Products [电子信息产品污染控制管理办法] promulgated by the Ministry of Information Industry February 28, 2006 and effective March 1, 2007. Law drafters are considering the establishment of an inspection and lab testing regime, to confirm compliance with the Management Methods, potentially linking the system to the existing CCC Mark regime described below.

**New Chemical Registration Regime.** Regulations on Environmental Management of New Chemical Substances [新化学物质环境管理办法], promulgated by the State Environmental Protection Administration September 2, 2003 and effective October 15, 2003. This rule establishes a regime for registration of all substances not reflected on the inventory of existing chemical substances (e.g., "new substances") in China. Ecotoxicological testing for registration must be conducted by Chinese labs using Chinese test subjects.

**Compulsory Certification Mark (CCC Mark) Regime.** Management Methods on Compulsory Product Certification Marks [强制性产品认证标志管理办法], promulgated by the Certification and Accreditation Administration December 12, 2001 and effective May 1, 2002. (See also, Regulations on Certain Arrangements to Implement the Compulsory Product Certification System [实施强制性产品认证制度有关安排的规定] promulgated by the Certification and Accreditation Administration December 12, 2001 and effective on same date; Public Notice No. 38 of 2003 [2003 年公告第 38 号] issued by the Administration for Quality Supervision, Inspection and Quarantine and the Certification and Accreditation Administration April 21, 2003 and effective on same date). These rules establish a system for safety licensing of 132 product categories. Among other requirements, these rules set forth deadlines and requirements for product testing at accredited Chinese laboratories, factory inspections by Chinese government representatives at applicant's expense, and follow-up inspections every 12 to 18 months.

**Paint Registration Regime.** Imported Coatings Inspection and Supervision Management Methods [进口涂料检验监督管理办法] promulgated by the Administration of Quality Supervision, Inspection and Quarantine April 19, 2002 and effective May 20, 2002. This rule requires application for approval and testing of designated coatings at laboratories in China.

**Restricted Chemicals Regime.** Catalogue for Severe Restriction of Imported and Exported Toxic Chemicals [中国严格限制进出口的有毒化学品目录] promulgated by the State Environmental Protection Administration and General Administration of Customs December 27, 2005 and effective January 1, 2006. Among other requirements, the Catalogue identifies products still used in commercial applications for which registration and export fees must be paid.

**Imported Alcohol Registration Regime.** The Methods on Administration of Domestic Market for Imported Alcohol [进口酒类国内市场管理办法] jointly promulgated by the Ministry of Commerce, State Administration for Industry and Commerce, General Administration of Customs, Ministry of Health and the National Agency for Import and Export Commodity Inspection and Quarantine September 9, 1997 and effective the same date. Imported alcohol, other than beer, and the importing organizations are subject to inspection, testing and import approval by government authorities.

**Imported and Exported Toy Testing Regime.** The Regulations on Administration of Inspection for Import and Export of Toys [进出口玩具检验管理规定] promulgated by the National Agency for Import and Export Commodity Inspection and Quarantine May 27, 1996 and effective the same date. Among other requirements, the designated imported toys (fabric and woolen toys, mechanical toys, electronic toys, plastic toys, pump toys, wood toys, baby carriers and other toys included in a catalog attached thereto) must pass testing before being released for sale in the Chinese market.

Imported and Exported Battery Registration Regime. The Inspection and Management Methods on the Import and Export on Battery Products Containing Mercury [进出口电池产品汞含量检验监管办法] promulgated by the National Agency for Import and Export Commodity Inspection and Quarantine December 4, 2000 and effective January 1, 2001. This rule establishes a regime for battery registration and special testing of battery products containing mercury.