



**United States Council for International Business**

**STATEMENT**

**on**

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

**Submission to the United States Trade Representative (USTR)**

September 17, 2014

**Docket Number: USTR-2014-0015**

## Introduction

The United States Council for International Business (USCIB) welcomes the opportunity to provide comments and recommendations on China's compliance with its World Trade Organization (WTO) commitments. In this response to the August 15<sup>th</sup> Federal Register notice, USCIB provides the Office of the United States Trade Representative with member feedback received to date concerning China's fulfillment of its commitments in several key industry areas and more broadly with regard to regulations related to intellectual property enforcement, transparency and standards.

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

USCIB commends the U.S. and Chinese governments for important and consistent work in ongoing bilateral dialogues such as the U.S. China Joint Commission on Commerce and Trade (JCCT) and Strategic and Economic Dialogue (S&ED), as well as in support of working relationships between U.S. and Chinese agencies which provide invaluable opportunities for exchanging information, technical exchanges and addressing agency-specific issues. In particular, USCIB applauds the positive outcomes from the sixth round of S&ED talks held in Beijing on, July 9-10, 2014. USCIB and USCIB members strongly support continued and strong U.S. efforts to engage China.

We also urge both countries to utilize the full range of multilateral forums in addition to the WTO, including Asia-Pacific Economic Cooperation (APEC) Forum and the Organisation for Economic Co-operation and Development (OECD), to work toward improved commercial relations.

USCIB appreciates the significant efforts China has made since joining the WTO in 2001 to meet its obligations under the terms of its accession agreement. However, there still remain general WTO obligation compliance concerns. This USCIB submission contains comments related to these concerns in two parts. The first part addresses horizontal areas of concern that transcend industry sectors, and the second section includes specific sectoral industry concerns. We have listed some important concerns below that are further detailed, with examples, in this document:

- **China's Antimonopoly Law (AML):** Chinese authorities are using a variety of policy tools, which include technology standards, antitrust rules and intellectual property policies to protect and promote Chinese companies. USCIB members urge the U.S. government to commit to more focus on this issue and its effects on U.S. companies.

- **Intellectual Property Rights (IPR):** While USCIB members acknowledge improved IPR laws and combating of IPR violations in China, there continue to be major concerns across industry sectors such as in audiovisual, software, agricultural biotechnology and chemicals. USCIB members urge the U.S. to continue to press for increased protection of IPR through better coordination and enforcement by Chinese authorities.
- **National Treatment:** USCIB members continue to call on China to abide by their WTO commitments of national treatment and non-discrimination and ensure a competitive market that allows for foreign business participation.
- **Regulatory Environment:** USCIB members expect Chinese authorities to fairly and transparently develop, promulgate and enforce regulations and other legal norms. However, USCIB members continue to experience business obstacles related to institutions, frameworks and regulatory enforcement. Improved coordination among regulators in China would benefit USCIB member companies by creating a more transparent and predictable framework.
- **State-Owned Enterprises (SOEs):** As they increasingly compete with Chinese SOEs, both in China, third markets and in the United States, companies believe that it is critical that the U.S. government use all available tools in dialogues with China and in other forums to press for level playing fields as they compete with these entities globally.

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

***About USCIB:***

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

## I. CROSS-SECTORAL BUSINESS ISSUES

### **Anti-Monopoly Law (AML)**

While the Chinese leadership continues to pledge that the market will play a greater role in China's economy, government actions continue to advance industrial policies in a coordinated manner. Recent developments suggest that Chinese authorities are using a variety of policy tools – including technology standards, antitrust rules, and intellectual property policies –to reduce China's perceived dependence on foreign IP while protecting and promoting domestic Chinese companies.

One example of this trend is China's use of the Anti-Monopoly Law (AML) as an industrial policy tool, which is affecting a range of U.S. companies. National Development Reform Commission (NDRC) officials have been publicly outspoken about the important role that industrial policy considerations should play in antitrust enforcement in China and their intention to broaden significantly the scope of their review of competitive practices in a wide range of "strategic sectors," including automobiles, telecommunications, banking and petroleum.

Indeed, China has used the AML to prevent undue concentrations of market power, combat cartels and abuse of market dominance, and pursue other goals that enhance the overall competitive environment in China. However, in many cases involving foreign companies, China's anti-monopoly enforcement agencies have skewed implementation of the AML and related statutes to support China's industrial policy goals, including through discrimination and protectionism.

The Chinese companies that benefit from these policies are often national champions in industries that China considers strategic, such as commodities and high-technology. Through the AML, China seeks to strengthen such companies and, in apparent disregard of the AML, encourages them to consolidate market power, contrary to the normal purpose of competition law.<sup>1</sup> By contrast, the companies that suffer are disproportionately foreign. In fact, all transactions blocked or conditionally approved by MOFCOM to date have involved foreign companies, and the curtailment of IP rights appears designed to strengthen the bargaining position of domestic licensees. While USCIB welcomes the 2014 Strategic & Economic

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<sup>1</sup> NDRC, Ministry of Industry and Information Technology ("MIIT"), and other agencies have an official policy to achieve industrial concentrations in the automobile, steel, cement, shipbuilding, electrolytic aluminum, rare earths, electronic information, pharmaceuticals, and agriculture industries. *See* Guiding Opinions on Accelerating the Promotion of Mergers and Reorganizations of Enterprises in Key Industries, issued by MIIT, NDRC, Ministry of Finance; Ministry of Human Resources and Social Security, Ministry of Land and Resources, MOFCOM, People's Bank of China ("PBC"), State-owned Assets Supervision and Administration Commission ("SASAC"), State Administration of Taxation ("SAT"), SAIC, China Banking Regulatory Commission ("CBRC"), and China Securities Regulatory Commission ("CSRC") (Jan. 22, 2013), Gong Xin Bu Lian Chan Ye [2013] No. 16 (*hereinafter* "2013 MIIT Joint Opinions"). Indeed, all three AMEAs are among the authors of this document. Companies and local governments may oppose this policy, but there is no indication that the AML constitutes an impediment to implementing it. *See* David Stanway, "China ditches steel industry consolidation targets in new plan," Reuters (Mar. 25, 2014) (quoting Xu Leijiang, the chairman of Baoshan Iron and Steel, as stating that the policy created "huge monsters" lumbered with debt and unprofitable investments).

Dialogue (S&ED) outcome recognizing that the objective of competition policy is to promote consumer welfare and economic competition, continued U.S. government focus on this important issue is warranted.

### **Certification, Licensing and Testing Barriers**

In a number of areas, the Chinese government has established certification, licensing, and testing requirements on products, services, and production materials. In most cases, these requirements involve government approval of in-scope products and materials before these are allowed to enter the market (i.e., "pre-market" approvals or certifications). Even where such pre-market requirements apply equally to domestically and internationally (i.e., China and non-China) originating items, the fact that China's system for checking imports is more comprehensive than the system for checking products and materials already within China, (e.g., coming off production lines), potentially enhances the negative effects of any pre-market requirements on imports into China.

Some USCIB members have observed recent improvements in certification program recognition of the market-access burdens that pre-market approvals and certification programs impose on companies. These recognitions include laudable efforts by certain regulatory authorities to encourage the development of compliance or product conformity assurance programs that would reduce burdens for companies with good compliance program/product conformity track records.

That said, due to a continuing lack of capacity to administer the requirements in an efficient manner, infrastructure (e.g., qualified laboratories) to carry out certification, licensing and testing requirements, certification requirements that mandate disclosure of confidential business (including supplier or competitor) information, and/or China's refusal to recognize testing results and comparable certification issued in other major markets, these requirements raise costs for foreign suppliers and often function as barriers to those products' and materials' access to the Chinese market.

- These requirements affect a broad cross-section of U.S. industry such as the chemical registration regime, the battery registration regime, the imported pharmaceuticals program, the regime (multiple chemical classes), for restricting the material content of electronic products, the mandatory entry-exit inspection and quarantine authority (CIQ) inspections for wearing apparel and the cybersecurity certification requirements for information technology products (known as the Multi-Level Protection Scheme, or MLPS).
- Chinese agencies resist less burdensome approaches which do not require pre-market certification or approval, in part, because it is easier to "over-build" the system to address "bad actors" than to recognize that such a system needlessly overburdens companies with excellent compliance records and programs. At present, the systems still tend to be overbuilt, requiring that all covered products or materials, regardless of the presence of

any indicators of non-compliance with Chinese law, undergo expensive and lengthy reviews or tests.

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

## **Government Procurement**

When China joined the WTO, it simultaneously became an observer to the WTO GPA and committed to begin accession negotiations thereafter. USCIB members welcomed and applauded progress on China GPA accession at the 24th U.S.–China Joint Commission on Commerce and Trade (JCCT) in Beijing, China on December 19th–20th, 2013. Following an agreement at the JCCT to accelerate China’s negotiation on accession to the WTO GPA and put forward a revised offer in 2014, Chinese officials submitted an offer that is intended to be on the whole commensurate with the coverage of GPA parties.

Nevertheless, until China officially accedes to and implements the GPA, government procurement program concerns remain among USCIB members. In particular, USCIB members note the following:

- U.S. suppliers are being excluded from government procurement particularly at the provincial and local levels on the basis of government procurement “product catalogues” that require government agencies to extend procurement preferences to domestic suppliers and IP owners for several categories of products. We urge USTR and other U.S. government officials to monitor the government procurement situation closely and to insist that China abandon efforts to exclude foreign products, suppliers, or innovations from the government procurement market.
- While we welcome the steps that China has taken following the 24<sup>th</sup> JCCT, USCIB urges USTR to continue to encourage China to apply its regulations and rules in an open, non-discriminatory, and transparent manner to complete China’s accession to the WTO GPA. USCIB asks USTR to strongly encourage Chinese officials to see that such practices are also put in place at regional and local levels of government.

## **Intellectual Property Rights**

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

### **1. Copyright**

- Unlicensed software use and optical media products, CD, VCD and DVD, and counterfeit goods continue to be a major problem. The existing Copyright Law provides inadequate criminal liability for copyright offenses, and high and unrealistic thresholds, which make bringing a criminal copyright case virtually impossible, and enforcement in line with international standards is sorely lacking.
- We urge the U.S. to continue to press the Chinese government to establish reasonable and appropriate thresholds for commercial-scale piracy consistent with trade-related aspects of intellectual property rights (TRIPs) standards, in particular to address the digital piracy problems. Also, enterprise end-user unlicensed software use should be clarified as a criminal offense to allow for prosecutions against unlicensed software use by commercial actors, with adequate penalties to deter further infringement.
- There is a great need for better coordination between agencies to protect copyright.
- There is also a need for better coordination between administrative and criminal measures to protect copyright. China's criminal law provisions have rarely been used to prosecute piracy because of the high thresholds for criminal liability established by the People's Supreme Court in its interpretations of the criminal copyright provisions. Additionally, both the Copyright Law and the Criminal Code should be revised to be fully compliant with TRIPs, or a new judicial interpretation should be promptly issued to clarify the scope of these laws if amendment is not practicable in the near future. Most importantly, these laws should be revised to provide criminal penalties "that are sufficient to provide a deterrent" (TRIPs, Art. 61) against piracy and counterfeiting.
- Both the civil Copyright Law and the Criminal Code need to be revised to reflect the development of new technologies and international standards/practice of enforcement, especially with respect to digital piracy issues involving copyright.
- Enforcement remains slow, cumbersome and rarely results in deterrent punishment. Effective enforcement will not become a reality if there is inadequate attention, investment and training by the Public Security Bureaus (PSB), Prosecutors and Criminal Judges. The PSB needs to treat criminal enforcement of IPR offenses as a top priority.
- Despite adopting Copyright Law measures to implement the World Intellectual Property Organization (WIPO) Internet Treaties, current policies fail adhere to these international

standards in several important areas, including but not limited to, failing to include all exclusive rights granted to rights holders by the Treaties.

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

## **2. Trademark and Counterfeiting**

- For branded products, trademark protection is crucial to maintaining high-quality goods and services in order to build and strengthen customer loyalty. Counterfeiting damages the reputation of companies; compromises the safety and quality of products (which affects Chinese as well as foreign consumers); results in the loss of tax revenue to the government; and harms China's reputation among foreign companies as a desirable place to do business.
- Another challenge faced by major U.S. brand holders is the approval and status of certain trademarks in China; China only very rarely grants "well known" or "famous mark" status depriving foreign trademark owners of the ability to fully protect and enforce their trademarks against infringement and piracy in China.
- Recent updates to China's Trademark law, effective earlier this year, increase the risk that brand owners will be held hostage to pirates registering marks in bad faith. Marks opposed by brand owners are immediately registered. Brand owners can spend years waiting for a Trademark Review and Adjudication Board (TRAB) decision to invalidate. While waiting, bad-faith registrants build up years of use improving its chances for permanent use based on existing Chinese judicial policy. These bad faith registrants may even be able to take enforcement action against a brand owner's own use of its trademark under these circumstances. This undermines the confidence of potential investors and can result in the building of an export offensive launched from behind the barrier of delayed enforcement.
- China should establish a formal mechanism to respond to embassy requests for expedited cancellation for internationally important cases through the Trademark Review and Adjudication Board (TRAB), considering increased procedures and staffing for important international trademark cancellation cases.
- Areas of concern in China's judicial interpretations related to trademark protections and counterfeiting: lack of clarity regarding valuation of seized goods and liability of accomplices; failure to define adequately key concepts; removal of provisions allowing for criminal prosecution based on repeated administrative offenses; use of numerical

thresholds for criminal liability; and differing thresholds for liability of individuals and enterprises.

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

### **3. .cn Country Code Top-Level Domain Name (ccTLD)**

- China fails to provide adequate protection for .cn ccTLD disputes due to the limited time period, two years, offered to trademark owners to object to .cn infringements, and USCIB supports the removal of this time period. The two year limit is a violation of the provisions of GATT-TRIPS, Article 41(2), which prohibits “unreasonable time-limits” that would prevent the fair and equitable enforcement of intellectual property rights.

### **4. Fraudulent Domain Name and Internet Brand/Keyword Application Notices and Non-Solicited Marketing**

- China fails to address Chinese domain name registrars and fraudsters, who, through email scams and marketing ploys, attempt to solicit trademark owners to purchase domain names and Internet brands/keywords at exorbitant registration rates by sending false notices regarding individuals who purportedly are seeking to register the trademark owner’s trademarks as domain names and Internet brands/keywords.
- The registrars solicit the trademark owners to register such domain names and Internet brands/keywords. These solicitations attempt to create a false sense of urgency and a need for trademark owners to react because they often set a specific deadline for response.
- These scams are widely directed to many large and small U.S. companies and continue to cause considerable confusion and disruption to business operations. In the latest iteration of these scams, Chinese registrars are even posing as law firms, with a working fraudulent website, soliciting companies to register domain names or keywords.

### **5. Patent Concerns, Trade Secrets and Protection of Confidential Test Data**

- Although China has put into place a legal and regulatory framework that is substantially in compliance with TRIPS, implementation of those regulations is inadequate. Local public officials evince a stronger interest in protecting their local economy than in policing IPRs and have been known to act uncooperatively in patent infringement suits.

- Attempts to enforce patent rights through patent administrative departments are largely ineffective because the administrative agencies only have the power to stop infringements in their local territories and because they act slowly, cannot collect damages and suffer from a lack of transparency. Enforcement actions through the court system are sometimes more effective in certain jurisdictions, but capacity and effectiveness of the courts varies by province and damages are not calculated in such a way as to compensate for all the actual expenses of a rights-holder in stopping infringing acts.
- While patent infringement is decided through the judicial process, patent validity is decided at the Patent Reexamination Board (PRB) of the State Intellectual Property Office (SIPO). While many countries separate the infringement and validity determinations in a similar way, the PRB has accepted challenges to validity based on arguments already decided during the original patent examination process, and has permitted multiple, simultaneous challenges by the same party, making enforcement and defense of valid patent rights difficult, especially with respect to pharmaceutical and biotech patent applications. The use of the patent system to thwart originator-proprietary companies is also troubling.
- USCIB members have concerns regarding provisions on the application of the AML to administrative monopolies, and that could be interpreted to exempt certain SOEs from AML enforcement, which could create a huge loophole given the tremendous power and influence that SOEs have in many sectors of the Chinese economy.
- As the State Administration for Industry and Commerce (SAIC) continues to update its drafts of the IP Rules<sup>2</sup>, concerns remain for its potential to harm long-term competitiveness. In particular, the draft rules require that intellectual property relating to “essential facilities” be licensed by companies in a “dominant” market position. The definition of what constitutes an essential facility is broad and could apply to a wide range of technologies. At the same time, it is very difficult to determine if a company is in a dominant market position with a high degree of certainty. As a result, IP owners may find it difficult to make full use of their IP rights, especially when it comes to the right to exclude others. Such regulations, if enacted, could greatly impair the value of the underlying intellectual property.
- China recently announced that it will introduce an intellectual property court as part of its comprehensive 2020 economic reform plan. “The Decision on Major Issues Concerning Comprehensively Deepening Reforms” released on November 15, 2013 states that “[w]e will strengthen the utilization and protection of intellectual property rights, improve mechanisms for encouraging technological innovation, and explore ways to establish an intellectual property court.” The introduction of such a specialized court in China, which could be similar to the Federal Circuit in the U.S., is expected to improve the enforcement of intellectual property rights in China.

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<sup>2</sup> China’s Anti-Monopoly Law against the abuse of intellectual property rights.

## **6. Trade Secrets and Protection of Confidential Test Data**

- Enforcement of trade secrets is very difficult because the evidentiary burden is very high, ability for discovery is minimal, damages are so low as to lack deterrent value, and local protectionism can be a serious obstacle. Foreign companies are often reluctant to transfer key trade secrets into China because of the serious threat of misappropriation by competitors and employees and the near impossibility of enforcement.
- As a practical matter, proving trade secret misappropriation is extremely difficult and can result in additional damage. Under criminal law, theft is determined not by the conduct itself, but by the consequences of the loss. Providing the required proof to initiate a criminal investigation may not only be difficult, but can require waiting until a more significant and possibly irreparable injury materializes, beyond the initial breach. From a civil perspective, it is unclear whether cyber-attacks, such as hacking, actually constitute misappropriation. Trade secret owners may also face additional hurdles, depending on the individual court, such as the requirement to prove their intellectual property was used in a business undertaking. Such proof is both challenging to obtain and prevents early action by trade secret owner who detect potential issues near the time of the breach.
- The legal infrastructure for the enforcement of trade secrets needs to be significantly strengthened, including by providing effective measures to prevent the leakage of evidence presented during civil enforcement the availability of damages to trade secret owners when pursuing administrative enforcement.
- The value of trade secrets may also be weakened by Chinese regulations that sometimes require companies to submit technical and functional features of their products as well as confidential test data for recordal with local quality and technical supervision authorities. Failure to provide the invention may prevent access to the Chinese market. The information furnished, however, is unprotected from further disclosure. In fact in many circumstances, local agencies will provide the information to anyone who asks. This requirement and practice puts technical secrets at significant risk of leaking into the public domain.

## **7. Proposed Changes to Service Invention Regulations**

- Recent drafts of Regulations on Service Inventions published by China's State Intellectual Property Office (SIPO) indicate potentially negative effects to long term competitiveness, in particular preventing innovative firms from making the best commercial choices when determining how to protect their intellectual property and how to best incentivize their own employees to innovate. For example:
- Recent drafts imply significant limitations and uncertainty with respect to setting internal policies for inventor remuneration. While it appears possible to contract around *some* of the default terms, employers would do so at great risk considering an inadvertent

revocation of inventor rights would result in the policy's invalidation. The default rules, while well intentioned, appear to be quite onerous and potentially costly, especially for larger innovative companies.

- The proposed regulations also put trade secrets in potential jeopardy. Inventors of trade secrets have a significant incentive to take their employers to court if they are unhappy with the offered remuneration. If litigation is threatened, employers would face a difficult decision, to either agree to the employee's terms or risk exposure of their trade secrets. Both choices may have a significant impact on long-term competitiveness.
- Similarly, the proposal is likely to result in the compulsory disclosure of confidential business information, in some circumstances, providing those details directly to competitors. The draft provides inventors the right to know the economic benefit of their invention, even if there is no longer a service relationship. Besides the reality that this calculation will often be difficult if not impossible to determine or otherwise forbidden by the agreement to monetize the underlying intellectual property, it may also result in providing critical details to ex-employees now working for the competition.
- In addition, employees must be informed if the company intends to abandon the intellectual property rights that embody their inventions. Such restrictions undermine the right of a company to dispose of its property, particularly when an inventor has later gone to a competitor.

## **Market Access**

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

## **National Treatment and Non-Discrimination**

In accepting the obligations inherent in WTO membership, China essentially agreed to treat imported goods no less favorably than goods produced in country. As part of this agreement, China agreed to repeal all rules and regulations that were inconsistent with this "most favored nation" obligation. Implicit in this is that China would not adopt requirements that effectively treated import goods less favorably.

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

## **Regulatory Environment**

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

### **1. Fair and Independent Regulators**

USCIB applauds recent efforts, such as those reflected in China's amended Environmental Protection Law, to strengthen frameworks for transparency and uniformity in enforcement practices. Nonetheless, USCIB members have noted that numerous obstacles remain to achieving uniform practices in the enforcement area in China. We call for resolution and further focus in this area, and expect fair, transparent and independent regulators in China. USCIB members remain concerned regarding an apparent lack of coordination between the central and local authorities. In some cases, inconsistencies in regulations and enforcement exist on a regional basis. Improved coordination among regulators would benefit USCIB and domestic companies, creating a more transparent and predictable framework.

### **2. Transparency and Notice**

- There are positive signs that transparency in the development of rules and regulations is on an upward trend in China. One area to note is a recent requirement that government entities are more transparent in their decision making process.
- China agreed in its accession to the WTO to allow for a reasonable period of time for public comment in most sectors where it adopts new or amends existing laws and regulations relating to foreign trade. It also committed to regularly publish such measures in one or more of the WTO official languages. This commitment strongly reflects that transparency is a crucial element in creating a stable and predictable environment for foreign investment.
- While USCIB appreciates the improvement in opportunities to comment on proposed rules, the timeframe is often too short to allow for translation, sometimes offered only by invitation and comments may only be provided at the early stages of the rulemaking process. One improvement to the process would be for agencies to respond to substantive comments made by interested parties.
- USCIB members ask that China move away from approaches whereby it issues measures and interpretations of those measures on the same date that they enter into effect. We

encourage USTR to press for more meaningful and predictable rulemaking notice and comment opportunities.

### **3. Consistency of Regulatory Approvals**

- USCIB members observe that there is a strong need for consistency among Chinese agencies with respect to the approaches for regulatory approvals of materials used in products.
- Ambiguity in legal measures issued at the national level concerning regulatory approvals can result in problematic misinterpretation at the local level that creates delays in production and loss of sales for companies that must obtain approvals for materials for use in certain products.

## **Standards**

USCIB recognizes the value of standards in setting technical requirements but is concerned with issues such as the rapid proliferation of standards, ambiguities over the applicability of standards, and the varying degree of openness of the standard development process to foreign stakeholders. We provide examples of these concerns below and call for a dialogue on this issue to help U.S. stakeholders address these concerns, which cover multiple sectors and multiple agencies and affiliated organizations in China.

### **1. Proliferation of Standards at a Rapid Rate**

- Standards are generally the most numerous measures, often with legal effect, in areas that involve highly technical issues, and are issued with increasing rapidity, which often can significantly affect company China operations and the China market access of company products. It is increasingly important to monitor the development of such measures, covering individual agencies as well as China's primary standard publisher, the Standardization Administration of China (SAC), and WTO notification bodies.
- Tracking standard development is easier in some aspects, such as via the SAC web site. However, this only helps monitor certain types of national standards. The problem, which warrants discussion via the JCCT dialogue, necessitates outreach to the Chinese government for solutions.
- The proliferation of standards calls for a mechanism, such as a Chinese government database, to provide comprehensive and timely access to standards of all kinds. Further, high level dialogue on how existing standards are being implemented can help assess options for developing China's science and technology regulatory foundation in a manner that provides USCIB members with meaningful notice, access to, and understanding of the standards that affect the member operations and their products.

## **2. Access to Standards**

- USCIB members applaud improvements in the transparency of and access to standards in China. Many more standards than in the past are now published for public comment. However, concerns remain. For instance, there is no single web site posting all draft standards that are published for comment.
- The laws also encourage the adoption of international standards where appropriate and possible. This reference is laudable. However, it remains the case that insufficient details are provided on how international standards should be incorporated into the Chinese standardization regime.
- Also problematic is that some Chinese standard development authorities treat standards as "proprietary" documents, rather than as public laws. Full texts of such standards, or at least texts of recent, national (GB) standards, are not generally accessible in full text on government or other public web sites in China. Such standards, as part of Chinese law, should be as accessible to the public to facilitate compliance.

## **3. Participation by Foreign Stakeholders**

- Regulations issued by the Standards Administration of China provide that foreign-invested enterprises registered in China are qualified to join Chinese standardization bodies and participate in the drafting of standards. However, the decision whether to allow participation by foreign-invested companies is in practice left to individual technical committees (TCs) and technical subcommittees (SCs), some of which do not permit foreign-invested enterprises to participate in the drafting of standards or technical regulations at all, or require very specific expertise for participation that may create hurdles for some foreign stakeholders with legitimate interests and useful inputs to join the TCs and SCs.
- Others only permit foreign-invested enterprises to be observers or participants without voting rights, and even in cases where foreign-invested enterprises are permitted to join a TC, they often are not notified when new working groups (WG) under a given TC are created to develop a new standard. Through more equal participation by foreign-invested companies Chinese standards may have a better chance of acceptance in the global marketplace.

## **4. Mandatory Versus Voluntary Standards**

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

- However, this leaves significant room for variation in the interpretation of whether a standard is voluntary or mandatory. Despite the fact that this standard has an alphanumeric designation typically associated with a voluntary standard, Chinese government authorities have nonetheless carried out enforcement actions against products that are not labeled according to this standard.

### **State-Owned Enterprises (SOEs)**

U.S. businesses are increasingly competing with Chinese SOEs not only in China but also in important third markets and here in the United States. Whether state-owned or controlled or “state-championed” these entities often benefit from preferential treatment by Chinese authorities at the national and sub-national level. It is critical that the U.S. Government use all available tools, including the JCCT and S&ED to press aggressively for level playing fields for U.S. companies as they compete with Chinese entities. These U.S. Government bilateral efforts with China should be carefully coordinated with other U.S. Government efforts regarding SOEs, including in the TransPacific Partnership (TPP) negotiations, in the OECD and in other forums.

We strongly urge the U.S. Government to:

- Aggressively press China to come into full compliance with its WTO obligations to notify to the WTO all its subsidies and industrial policies at the national and provincial level which impact trade and investment.
- Use the JCCT Dialogue on SOEs to raise U.S. concerns over preferential treatment accorded to Chinese SOEs. Seek clear explanations from the Chinese authorities on its policies on the treatment of its SOEs and state-championed enterprises when they compete with private sector companies, including U.S. companies. Obtain concrete Chinese Government commitments to the principle of a level playing field when SOEs are competing in the commercial space with private enterprises.
- Seek binding commitments from the Chinese Government on real transparency of Chinese SOEs – including all measures of support from national and provincial government entities, their treatment on tax, regulatory, procurement policies, and other key criteria to assist in international assessment of Chinese SOE practices. This transparency, especially for the largest and most competitive SOEs, should begin immediately.
- U.S. negotiators should seek the strongest possible SOE provisions (including transparency, level playing field/national treatment, and limitations on subsidies and other preferential treatment for SOEs) in the U.S.-China Bilateral Investment Treaty (BIT).
- Secure Commitment from Chinese authorities that appropriate representatives from the Chinese government and Chinese SOEs will participate actively and constructively in international organizations (*e.g.* the OECD, WTO) as well as in seminars and research

projects organized by U.S. Government agencies conducting serious analytical work and policy debates on the global issues related to SOEs.

## **Taxation**

Tax laws should be administered in a manner that promotes consistency, certainty and transparency. Coordination between the central and local authorities in China, while improving, is not as strong as it should be and this creates uncertainty and inconsistency across jurisdictions throughout the country. A central tax ruling process, where resulting rulings would be made publicly available, would be the ideal method to tackle this issue.

- Tax rulings would provide certainty on particular issues and prevent local administrators from taking a different view of a given transaction. Consistently trained, independent tax regulators whose decisions are transparent and subject to review for fairness are needed. The decentralized regulation enforcement practices create opportunities for inconsistent, unfair and unlawful practices among tax regulators.
- In the tax area, rulemaking transparency and participation concerns are similar to those described in the Regulatory Environment section of this Statement. In particular, regulations involving changes adverse to USCIB members in the tax area have been applied on a retroactive basis, which represent problems with respect to notice and fair application of the law. Further, regulations should be specific enough that taxpayers have notice of what is required or prohibited.

## **II. SECTORAL ISSUES**

### **Agricultural Biotechnology**

China is one of the largest markets for U.S. grain exports in addition to being a growing market for seed. However, China's regulatory import approval system is becoming a barrier to international trade. Furthermore, its IP system is less than amenable to the growth and development of biotechnology within China's borders, and indeed poses a threat to the progress of the U.S. biotechnology industry.

#### **1. International Grain Trade and the Regulatory Import Approval Process**

- In 2013, the U.S. exported roughly \$17 billion worth of soybeans and corn products to China, accounting for 12% of total U.S. agricultural exports to China. For oilseeds and grain, the U.S.-China trade relationship is a success story – in 2001 U.S. soybean exports to China were roughly \$1 billion. In 2013 they were approximately \$13 billion; about 25 percent of total domestic soy production and more than the total value of U.S. agricultural exports to the European Union. For corn, in just the past five years, U.S. exports to China have grown from under \$50 million to over \$1 billion in 2013.

- However, in a trend over the last several years, China's regulatory import approval system has nearly shut down, and at times a defacto moratorium on approvals has been in place. It is clear that economic and political factors have driven this trend which calls into question whether China is meeting its obligations under the WTO. China's use of its regulatory process to control imports has more recently resulted in a widely reported trade disruption in U.S. corn and DDG exports. The U.S. agricultural value chain needs predictable implementation and enforcement of Chinese regulatory decisions to maintain and grow the China market. Our trade relationship is too important to not resolve this issue.
- While China's actions can directly and unnecessarily restrict access of U.S. oilseeds and grain to its market, this is only part of the story. China's regulatory delays have widespread impacts that will ripple throughout the U.S. agricultural value chain by directly influencing whether or not U.S. farmers will have access to the latest technologies to help increase their efficiencies and yield, put a damper on investment in U.S. innovation and overall competitiveness, and finally, every year of delay that results in a product not going to market, translates to the loss of patent life and intellectual property protection for U.S. companies.
- While there is much to improve in the Chinese import approval regulatory process, at a minimum, China should immediately resume following its own established laws and regulations, which include:
  - Follow its own statutory requirement that a regulatory decision be issued within 7 months following submission of an application
  - Return to its past practice of accepting applications and issuing regulatory decisions three times a year

## **2. Transgenic Seed Business and IPR Protections**

- While China has made strides toward strengthening its IP protections, biotechnology companies continue to experience problems with counterfeiting and effective enforcement of intellectual property in certain provinces. USCIB members have noted an increase in the trafficking of counterfeit pharmaceuticals and biopharmaceuticals in China, which is a threat to public health, as well as resulting in economic costs.
- Intellectual property is fundamental to innovation in the seed industry. Patent and Plant Variety Protection (PVP) requirements and expertise in China are key areas for companies that are trying to enter the market in China. China's patent law continues to preclude the possibility of patenting plant varieties. Many varieties are protected neither under patent nor under PVP.

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

### **3. Transgenic Seed Business and the Regulatory Approval Process**

- China's foreign direct investment catalogue and prohibition of foreign direct investment in the transgenic seed business denied millions of Chinese farmers' access to numerous agricultural biotech products.
- Current foreign direct investment regulations should be modified to repeal and lift the prohibition on plant biotechnology so that new technologies can be made available to Chinese farmers more rapidly. Currently in China, each plant variety containing a biotech trait has to undergo a separate production approval, resulting in significant redundancy.
- China has maintained a quarantine of corn and has banned corn seed exports to China from the U.S. and Mexico. The corn seed import/export restrictions with U.S. and Mexico should be reevaluated based upon up-to-date, science-based criteria to allow for greater movement of seed across borders for corn breeding and production.
- Industry would like a science based regulatory approval process for multiple events (stacks) products.

## **Audiovisual**

Intellectual property rights violations and the limitations on market access for providing legitimate product into the market constitute the greatest impediments to the development of a healthy Chinese media and entertainment market. Without a proper, functioning market where intellectual property rights are respected and laws are enforced, investment and growth will not reach their full potential. The factors cited above leave the general population little choice but to turn to the black market to satisfy their demand for audiovisual works.

### **1. Intellectual Property Rights Violations**

- Media box piracy continues to be a growing problem and threat to the continued development and sustainability of a vibrant legitimate TV marketplace that informs and entertains consumers. Two types of devices currently pose grave challenges to copyright owners and licensed providers. The latest device is the Internet-enabled set top boxes that are typically pre-loaded with apps to unlicensed and illegally pirated content. These devices also enable consumers to access unlicensed online streaming websites and load apps to pirate content. Another device is the illegal free-to-air decoders that facilitate unauthorized access to pay-television service. The illegal decoders essentially gain access to stolen keys that unlock signals via real-time Internet or satellite transmissions, mimicking the services of a legitimate set-top box.

- China remains a hub for manufacturing and distributing these devices and technologies that interfere with the ability of copyright owners to manage a variety of business models that offer consumers lawful access to products and services. Criminalization as well as targeted, deterrent actions against manufacturers, distributors and facilitators of media box piracy is critical to minimizing the negative impact on the legitimate media sector around the world and the global economy. Additionally, governments and law enforcement should coordinate on efforts to address the importation of these illicit media boxes.
- Enforcement with respect to all forms of intellectual property theft in China remains inefficient and often ineffectual, with low penalties for violators. However, we are encouraged by steps the Chinese government has taken since the launch of the special campaign of intellectual property rights enforcement, and the establishment of the IPR Leading Group and we look forward to ways to cooperate to address areas of mutual concern.
- Despite steps to improve enforcement, piracy persists at very high levels. Piracy has a negative impact on the Chinese movie industry as shown by own operating results that are in inverse proportion to the size of the pirated movies market.
- Internet piracy is another major challenge. Online infringers have used the Internet to distribute a wide range of illegal products that violate copyright protections, particularly those for films and television shows. Without a comprehensive approach to this problem, both domestic and foreign producers of media content will continue to perceive China as an unattractive place to make investments. However, we are encouraged by the current review by the State Council Legislative Affairs Office of the current Copyright Law.
- Necessary elements of this comprehensive approach include measures such as, encouraging consistency with the framework in the DMCA, adoption of rules addressing responsibilities and limitations of liability for Internet Service Providers (ISPs) for copyright offenses and measures for notice-and-takedown of websites offering pirated material prohibiting the use of an audiovisual recording device in a cinema to make or transmit part or whole of an audiovisual work.

## **2. Market Access Restrictions**

- Market access restrictions inhibit the ability of content providers to build a legitimate market and satisfy consumer demand. Although these restrictions affect each sector differently, the situation is most acute in the sound recording, film, TV and online media markets.
- Present rules in the music sector prevent the establishment of wholly owned subsidiaries, or even equity joint ventures, for the production, advertising, promotion and distribution

of sound recordings. As a consequence, the infrastructure for the production and distribution of legitimate recordings is severely underdeveloped, greatly exacerbating the piracy situation.

- U.S. films have not participated fully in the growth of total box office receipts due to restrictions China maintains on access to its market. U.S. films which do enter the market have generally performed well, but the impediments to the free release and impediments to U.S. producers' ability to release more films is a substantial factor in driving Chinese audiences to pirated sources.
- The Chinese government should refrain from interfering in commercial negotiations, including licensing agreements, and change policies that restrict legitimate access for foreign films and fuel demand for pirated product. Additionally, limits on foreign content in television programming in China should be eased.
- Censorship clearance procedures for films, optical media and on-line distribution should be streamlined and discriminatory treatment toward foreign product abolished, which severely restrict the ability to distribute timely and legitimate film, CD, VCD, DVD and online products in China, and provide yet another unfair and unintentional advantage to pirate producers.
- With respect to sound recordings, the current investment regime greatly restricts the ability of foreign record companies to enter the Chinese market, and USCIB requests that the Chinese government reforms its investment and censorship provisions in the music market to facilitate the growth of a healthy record industry in China.

## **Chemicals**

USCIB recognizes that China is a major growing world producer and market for chemicals and downstream manufacturers. We would like to highlight areas of ongoing concern for the chemicals sector as well as businesses that use chemicals in the manufacture or formulation of their products, which include New Chemical Regulatory Programs, GHS Implementation and import restrictions. USCIB member feedback on chemicals issues is set forth below.

### **1. New Chemical Regulatory Programs**

- An example of key, USCIB member concerns with respect to the existing Guidelines on the Notification of New Chemical Substances is that "read across" from toxicology studies with similar chemicals is accepted, but members have indicated that, in practice, it appears that such read across is not accepted. (The "read across" approach refers to a situation where endpoint information for one, source chemical is used to predict the same endpoint for another, target chemical, which is considered to be "similar in some way, such as with respect to structural similarity).

- USCIB members understand that the MEPSCC (Ministry of Environmental Protection, Solid Waste and Chemical Management Center) starts the preparation of adding notified new chemical substances which were approved under previous MEP (SEPA) Order No.17 into the Inventory of Existing Chemical Substances in China (IECSC). However, members also understand that the actual adding process will start sometime in 2015 or later. Since the new chemical substance notification law of Order No.17 was effective in 2003, many of the notified new chemical substances under Order No.17 have already qualified for the 5-year timeline. Additionally, more approvals under the MEP Order No.7, which was effective in 2010, will be qualified for inventory adding soon. USCIB members urge the MEP to start the IECSC listing for those qualified substances as soon as possible according to regulatory requirements. It is important that the Chinese authority publish the transparent process and timeline for the IECSC listing, so companies can make long term plans about their business with new substances in China.
- USCIB members also note and support China's announcement of plans to launch procedures to update the Inventory of Existing Chemical Substances in China (IESCD) with respect to previously registered new chemical substances.

## **2. Globally Harmonized System (GHS) Implementation**

- USCIB recognizes and appreciates China's adoption of the most current version of the UN GHS – 4<sup>th</sup> edition, and for updating related Chinese technical standards.
- Of concern is the voluntary Safety Data Sheet (SDS) guidance given in GB/T 17519-2013. There are indications that the standard, with the voluntary designation “GB/T”, may become mandatory. However, to our members' knowledge, the standard has not yet been redesignated as mandatory or otherwise publicly announced as a binding aspect of China law. Some CIQ inspectors treat the new standard as the reference for their Customs compliance checks. Also, the new information requirements will have to be met when supplying an SDS in support of Hazardous Material Registration applications under Decree 591, or face rejection of the application.
- The implication is that companies must convert all SDS formats to the new standard. The changes are primarily format (removing section numbers) and duplication of information in multiple sections. The general consensus of industry is that:
  - a. GB/T 17519-2013, if enforced as mandatory, puts China SDS out of alignment with the UN guidance and adoption of GHS in other countries;
  - b. The work load and financial cost is prohibitive to modify the format and reissue all their Chinese SDS;
  - c. The perceived benefits of implementing the requirements is outweighed by costs;
  - d. The lead time required to accomplish these changes is insufficient; and,
  - e. Without all of the above, it will be difficult and expensive to implement the proper training to ensure compliance.

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

## **2. Import Restrictions**

- USCIB members report growing concerns with the inconsistent application of China's laws governing chemical hazard communication and labeling among different localities within China. For instance, members observe that inspection requirements with respect to so-called "dangerous chemical" imports issued by the national authorities is applied differently at different ports of entry into China, and even sometimes differently at the same port depending on the time and customs/import inspection official overseeing a particular import. USCIB asks USTR to reinforce the critical importance of consistent application of national requirements with Chinese counterparts, using this area as a key example. Inconsistent application of laws raises the complexity and cost of ensuring conformity with requirements and increases the barriers to market access for U.S. companies. USCIB would be pleased to discuss specific details of this situation with our colleagues at USTR upon request.
- USCIB members also report that chemicals under certain Harmonized Tariff Schedule (HTS) codes must go through compulsory local testing by CIQ (China Inspection and Quarantine) inspection with hazard identification. The local hazard test and identification reports are issued with a period of validity, e.g. 1 year. This is a duplicative step that creates delays when trying to get products to the market in China. Additionally, companies would benefit from the lengthening of the period of validity for products where hazards have been tested and identified in local agents. CIQ should remove or adjust the HTS codes under compulsory local testing for products if they have no hazards found during local testing.

## **Customs**

USCIB encourages China to continue to pursue customs reform, modernization and simplification to promote the fast, streamlined movement of goods across borders. Improved customs facilitates the rapid movement of goods throughout the world.

- Consultation with industry at an early stage will allow for open discussions on reform measures and the smooth implementation of such measures. While GAC has met with industry in the past, those meetings usually consist of GAC explaining their policy rather than engaging in dialogue to seek practical solutions.
- It is acknowledged that changing IT systems is time-consuming, difficult and expensive. China's IT systems for customs clearance, however, do not match China's economic growth needs.

- These deficiencies introduce uncertainty and inefficiencies for the logistics and transportation industry and local customs authorities alike. It will be mutually beneficial to industry and customs to be more engaged with a view to reform, modernize, and keep pace with global developments so that the Chinese economy and society may benefit from fast and efficient trade.
- An additional customs issue with respect to China relates to ATA Carnets. China implemented the ATA Carnet convention on Exhibitions & Fairs in 1998, joining 70 other countries who are contracting parties. However, China is still not a fully participating member of the ATA chain. USCIB urges the U.S Government to work with China on signing and accepting all ATA Carnets under the umbrella of “Professional Equipment (PE)” and “Commercial Samples (CS)”. Once China accepts carnets under the PE and CS conventions, U.S. companies, and all members of the ATA system, both small or medium sized companies and those with a global presence would see immediate, measurable, and positive bottom-line benefits.

### **Express Delivery Services (EDS)**

Fast, reliable and secure express delivery services (EDS), are a key component of the vibrant, competitive logistics industry that is crucial to China’s economic growth. The Chinese government has publicly recognized the importance of EDS to the Chinese economy by supporting modern supply chains through reliable and highly efficient links between distant producers, suppliers and consumers – both internationally and domestically. A robust domestic EDS industry will help China achieve its goals of promoting domestic consumption and reducing its economic dependence on exports.

Despite recent progress in the sector whereby some foreign-owned EDS companies have obtained licenses to expand their domestic express services in China, the continued use of geographic licensing and discriminatory limitations on services are counter to China’s WTO obligations. China must follow through on its WTO commitments and ensure a competitive, robust EDS industry without discriminatory practices.

Below are recommendations in policy areas critical to the competitiveness of express delivery services:

#### **1. Customs, Reform, Modernization, and Simplification**

- Establish a U.S.-China government-industry customs working group (similar to the successful U.S.-China Express and Postal Symposium) to address customs bottlenecks. For example, General Administration of Customs (GAC) Order No. 33 (May 2010) introduces a cumbersome importer registration system discouraging individuals and smaller traders in China from importing goods.
- Collaborate with the U.S. government and the EDS industry to develop GAC measures that enable EDS providers to effectively connect other points in China to their hubs and

major markets, and to sort shipments on those connecting flights at those locations, consistent with U.S. cargo carriers' aviation rights under the U.S.-China air transport agreement.

- Pursue standards that are aligned with global practices (e.g., World Customs Organization, World Trade Organization guidelines and standards).
- To facilitate trade and simplify paperwork for traders, we encourage China to establish a competitive and commercially meaningful *de minimis* level such as suggested and endorsed by APEC. In the Asia Pacific region, competitive *de minimis* levels include Australia's AUD\$1000; Singapore's S\$400; and Malaysia's RM500.
- Establish a system similar to the United States' to enable the 24-7 customs handling that China's volumes require. China Customs is too understaffed to handle the volume of trade moving through China's ports and airports. Local customs offices are responding to this problem by cutting customs hours, but modern traders need 24-7 customs service. We suggest that the U.S. government invite Chinese Customs to study the U.S. user-fee system with a view toward regularizing the payment of similar charges in China.
- To practice more effective risk management, we propose removing the GAC's and State Post Bureau's (SPB) 100% open-box inspection requirements for express delivery packages, as well as provisions that shift liability for inaccurate descriptions of a shipment's contents from shippers/recipients to transportation service providers.

## **2. Market Access**

- Clarify that China's Postal Law and related SPB measures allow foreign EDS providers to contract with Chinese domestic delivery permit holders to provide local pick-up and delivery, trucking and other services related to express delivery.
- Remove restrictions in China's Postal Law that prevent foreign EDS providers from providing their Chinese customers with domestic document delivery services.

## **3. Postal/Express Regulatory Issues**

- The EDS industry still struggles with over-regulation by China's State Post Bureau (SPB), an agency largely staffed and managed by former China Post employees and officials. The U.S. government is already familiar with many examples, including: the 2009 Postal Law barring U.S. and some other foreign firms from the domestic express document market; SPB's overly burdensome and paternal implementing rules, regulations and standards; and the SPB's theory of competitor "self-regulation" through national, provincial and local express associations, which make SPB-issued "voluntary" guidelines mandatory as a practical matter.

- SPB’s expansive vision of its responsibilities is beyond what USCIB views as efficient and appropriate for an industry regulator. Continued bilateral dialogue and productive discussion is necessary.
- Ensure timely processing of EDS license approvals, in particular the establishment of affiliated sub-branches, warehousing, or other operations that are within the scope of the business license.

## Software

China and the United States share a common interest in promoting software development, use, and protection in China because information technology holds the key to increasing productivity and solving so many pressing global issues, including in areas such as health, education, and energy.

### 1. Intellectual Property Rights Enforcement

- In October 2010, China’s State Council launched a Special IPR Enforcement Campaign, one goal of which was to legalize software in government agencies. In November 2011, the State Council made this Campaign permanent by establishing the National Leading Group (NLG) Against IPR Infringement, which is operated through the Ministry of Commerce. At the July 2013 S&ED, China committed that the NLG will “strengthen actions to fight counterfeiting and piracy” and specifically committed to “foster a better environment for the increased sales of legitimate IP intensive products and services, *including software*” (emphasis added). U.S. Treasury Department, *Joint U.S.-China Economic Track Fact Sheet of the Fifth Meeting of the U.S.-China Strategic and Economic Dialogue* (July 12, 2013). China reaffirmed its commitment to facilitate sales of legitimate IP intensive goods and services at the December 2013 JCCT. *See* U.S. Trade Representative, *Fact Sheet: 24th U.S.-China Joint Commission on Commerce and Trade Fact Sheet* (Dec. 20, 2013).
- Although the Campaign and the NLG have achieved some incremental progress on government software legalization, and initially indicated a desire to help address the much greater problem of illegal software use in SOEs the rate of unlicensed software use within China--particularly among sub-central government agencies and in SOEs and private enterprises--remains extremely high. Also, greater readiness recently by Chinese courts to enable software owners to protect their IPRs in civil cases, government enforcement efforts against unlicensed software use remain inadequate, and China’s legal regime makes it difficult and often impossible for software owners to enforce their rights effectively. China also has yet to make any measurable progress on or take meaningful steps to implement its July 2014 S&ED and December 2013 JCCT commitments to foster a better environment for legitimate sales of software and other IP intensive goods and services.

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

## 2. Unlicensed Software Use

- Although China has repeatedly committed to eliminate unlicensed software use within government agencies, SOEs, and private enterprises, U.S. software developers continue to face high rates of unlicensed software use in all three sectors. Specifically at the May 2012 S&ED, China “committed to extend its efforts to promote the use of legal software by Chinese enterprises, in addition to more regular audits of software on government computers.” U.S. Treasury Department, *Fourth Meeting of the U.S.-China Strategic and Economic Dialogue U.S. Fact Sheet—Economic Track* (May 4, 2012). And at the December 2012 JCCT, China built upon this commitment by “confirm[ing] that it requires state-owned enterprises under the authority of the China Banking Regulatory Commission and central state-owned enterprises directly supervised by the State-Owned Assets Supervision and Administration Commission of the State Council to purchase and use legitimate software, including but not limited to operating system and office suite software.” Office of the USTR, *23rd U.S.-China Joint Commission on Commerce and Trade Fact Sheet* (Dec. 19, 2012). This commitment was further developed at the July 2013 S&ED, where China committed to “further promote the use of legal software by SOEs, including by strengthening supervision of central SOEs and large state-owned financial institutions by establishing software asset management (SAM); enforcing China’s requirement to purchase and use legitimate software by these SOEs; providing budget guarantees for software and promoting centralized procurement.” U.S. Treasury Department, *Joint U.S.-China Economic Track Fact Sheet of the Fifth Meeting of the U.S.-China Strategic and Economic Dialogue* (July 12, 2013).
- Despite these and many other commitments in response to U.S. industry and U.S. government concern, and notwithstanding some incremental progress, China has not lived up to these commitments and continues to tolerate high levels of unlicensed software use in governments, SOEs, and enterprises. For instance, China appears to not yet have provided adequate budget to government agencies to enable them to legalize the software they use. There are also reports that China has quietly encouraged government agencies and SOEs to purchase only Chinese software—even though most continue to use unlicensed copies of U.S. software. Moreover, there is evidence that China is using measures on centralized procurement by SOEs as a means to preference domestic software suppliers and discriminate against U.S. and other foreign software suppliers.
- The need for concrete and measureable progress on software legalization in China remains critical--especially given the clear correlation between stronger IP in China and increased jobs and economic growth in the United States. Areas for further progress include stronger and audible measures to ensure that all Chinese SOEs use only

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

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

### **3. Discriminatory Treatment of U.S. Suppliers**

- As part of its WTO Accession agreement, and in joining the WTO, China agreed not to discriminate against foreign goods or foreign IPR owners—*i.e.*, to treat imported goods and foreign IPR and IPR owners no less favorably than domestic goods, IPRs and IPR owners. China was under an obligation to remove all rules and regulations that were inconsistent with this non-discrimination obligation. This commitment applies not only to tariffs and other “at-the-border” measures, but also to internal laws, regulations, and other “behind-the-border” measures. Despite its commitments, China continues to pursue policies that favor domestic software products, IPRs, and IPR owners over foreign products, IPRs, and IPR owners.
- A prime example of discriminatory treatment has been China’s “indigenous innovation” policies, which discriminate against U.S. software suppliers in the government procurement market and in access to various governmental benefits.
- Despite commitments over the past few years to delink its indigenous innovation policies from government procurement preferences, there is still widespread concern that discrimination against foreign software suppliers and products continues to exist in practice, particularly at the provincial and local levels. Moreover, U.S. software suppliers continue to face discrimination in access to subsidies, tax advantages, and other benefits that are available to domestic Chinese firms. Furthermore, China has pressed government agencies to preference domestic software suppliers over foreign suppliers, and there is evidence that China is quietly seeking to extend these same discriminatory policies onto SOEs.
- It is critical that China immediately cease all preferences for domestic software suppliers and products immediately and that it adhere to its WTO commitments to open its markets to U.S. software suppliers. The United States should press China to provide greater transparency on its implementation of its existing S&ED and JCCT commitments. China also should commit not to influence the software purchasing decisions of SOEs in any

way, including through measures such as preferences for certain licensing models or licensing terms or through price controls.

#### **4. Copyright and Criminal Law Reform**

- The current enforcement environment against unlicensed software use in China is deficient. Although the Copyright Administration (CA) has administrative authority to do surprise audits of companies suspected of using illegal software, CA offices are reluctant to exercise their authority and are plagued by inadequate manpower, training and resources. When they do take action, most CA offices have been unwilling to issue a formal punishment with deterrent penalties. Also, because the Copyright Law limits administrative penalties to copyright violations that harm the public interest, administrative authorities often refuse to act against unlicensed software use by enterprises based on their assertion that such piracy fails to meet this requirement.
- China's efforts to amend its Copyright Law provide an important opportunity to modernize China's IP regime for software and to address a number of key deficiencies in the existing regime that prevent software owners from effectively enforcing their copyrights against infringers. To address these deficiencies, China should ensure that the final amendments to the Copyright Law (and/or in the Criminal Law, as appropriate):
  - Clearly establish that unlicensed software use by enterprises and other commercial end-users violates the reproduction right of the copyright holder and may be subject to criminal penalties. Criminal penalties are currently unavailable against unlicensed software use by commercial enterprises given how Chinese courts have interpreted the requirements that such copyright infringement must have a "profit motive" and be conducted on a "commercial scale" to be subject to criminal penalties.
  - Provide higher statutory damages for infringement and punitive damages for willful or repeated infringement.
  - Provide more effective procedural mechanisms to enable rights holders to collect evidence of unlicensed software use, including by adopting clear rules for civil discovery, lowering the barriers for acquiring and executing evidence preservation orders, and reducing the burdens of proof on rights holders.
  - Provide criminal liability for pre-installation of unlicensed software on PCs by retailers and distributors, and for circumventions of effective technological measures.

#### **5. Customs and Trade Administration**

- As part of its accession agreement, China agreed to undertake the obligation to adhere to the Agreement on Customs Valuation, immediately upon accession, without transition. Accordingly, China issued a measure requiring duties on software to be assessed on the

basis of the value of the underlying carrier medium, meaning, for example, the floppy disk or CD-ROM itself, rather than on the imputed value of the content, which includes, for example, the data recorded on the floppy disk or CD-ROM. For several years, China did not uniformly implement this measure. However, more recently, China Customs has become more consistent in imposing duties based on the value of the carrier medium, which represents important progress by China on this issue.

- U.S. importers have encountered situations in which customs authorities use prices set forth in a Customs database (a “reference” price) instead of actual prices to determine customs value. Customs authorities have rejected transaction values because they were lower than the Customs’ “reference” price, and some authorities have imposed an “uplift” of the customs value accompanied by a threat that the shipment would be held until such price was accepted. Use of such a reference price violates China’s WTO commitments. Furthermore, the valuation process varies from port to port and is not transparent. There also has been some lack of consistency in the imposition of software fees and license fees, particularly with regards to imports of hardware pre-loaded with software and imports of CDs containing software.

### **Telecommunications (Services and Equipment)**

China has failed to open its Telecommunications market. China maintains market access restrictions in its licensing categories, high capitalization requirements for basic telecommunications services and a lack of an independent regulator. These remain key outstanding issues for USCIB members. China’s WTO commitments to liberalize telecommunications services became effective upon its accession to the WTO on December 11, 2001. These commitments include a six-year schedule, which ended in 2007, for phasing in direct foreign participation in value-added network services and basic telecommunications.

- USCIB recognizes and appreciates the positive steps China has taken to implement its WTO commitments. However, China’s overly narrow interpretation of market access opportunities for foreign participants and a lack of an independent regulator have negatively impacted market opportunities for U.S. telecommunications companies, contrary to China’s WTO commitments. We are especially concerned by China’s unreasonably high capitalization requirements for basic services, its broad interpretation of services that are in the basic services category, and the prohibition on resale, which greatly limit market access.

#### **1. High Capitalization Requirements**

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

## **2. Market Access**

- China has failed to open its telecommunications market for both Basic and Value Added services. For example, China has restricted market access for certain cloud services under the Shanghai Free Trade Zone and has proposed further limiting market access for cloud services which are not categorized as Value Added Services today.
- China should remove its joint venture requirements for Value Added Services. Moreover, in classifying service characteristics as Basic or Value Added, China should eliminate the intentionally restrictive distinction between international and domestic services as a determinate of whether a service is Basic<sup>3</sup>. It is critical that MIIT interpret the definition of VAS in a manner that is consistent with China's explicit WTO commitment and widely accepted international standards.
- We urge USTR to encourage China to take the following steps to remove the bottlenecks to development of value added services in China:
  - Expand the list of value-added services in the Catalogue to include such services as managed International IP VPN, in conformity with international standards for categorizing basic and value added services;
  - Lift the prohibition on resale, enabling all carriers to acquire capacity at wholesale rates and interconnect their networks to deliver services to a broader reach of the country;
  - Remove remaining caps to Foreign Direct Investment;
  - Allow full market access for resale of mobile services; and
  - Oppose the proposed revisions to the Telecommunication catalogue that would redefine cloud and data hosting in a more restrictive way as Value Added Services.

## **3. Independent and Impartial Regulator**

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

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<sup>3</sup> For example, China defines International Virtual Private Line service as a Basic Telecommunications Service, whereas the exact same VPN service provided domestically is defined as Value Added. This distinction is material, because foreign companies are required to partner (50% joint venture) with domestic telecommunications company (that holds a Basic License), as compared to VAS licenses where foreign companies can partner (49% joint venture) with any Chinese company irrespective of whether it holds a Basic Telecommunications license or not.

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

#### **4. State-Owned Enterprise - Joint Venture Partnership Requirement**

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

#### **5. Geographic Restrictions**

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

#### **6. Cyber Security Product Requirements**

- China’s broad and non-international approach towards cyber security technical standards has created serious market access barriers for foreign IT firms in the China market. The CCCi China Mandatory Certification for Information Security Products, and the Ministry

of Public Security (MPS) administered Multi-Level Protection Scheme (MLPS), are clear examples of China adopting these non-standard approaches.

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