UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

September 17, 2007

Ms. Gloria Blue
Office of the U.S. Trade Representative
1724 F Street, N.W.
Washington, D.C. 20508
FR0713@ustr.eop.gov

RE: China's WTO Obligations

Dear Ms. Blue:

USCIB is pleased to respond to the United States Trade Representative's Federal Register notice of July 25, 2007, soliciting comments on China's compliance with the commitments it made in its accession to the World Trade Organization (WTO). USCIB represents over 300 U.S. corporations, professional firms, and business associations, many with substantial trade and investment interests in China. As the exclusive American affiliate of three key global business groups – the International Chamber of Commerce (ICC), the International Organisation of Employers (IOE), and the Business and Industry Advisory Committee to the OECD (BIAC) - USCIB provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade and investment with China from a global perspective.

The U.S.-China relationship is complex and multi-faceted, and USCIB companies have a direct and important stake in this engagement. USCIB's involvement on China trade and investment issues takes place at both the multilateral and bilateral levels. In each case, our approach is one of collaboration with China as a trade partner rather than as an adversary.

On the multilateral front, USCIB has been actively supporting the OECD's outreach and enhanced partnership with China. Of particular interest have been the OECD's innovation review, the OECD's regulatory review of China, the OECD China investment review focusing on responsible business conduct, and most recently the OECD's environmental review of China.

USCIB also represents members' interests in bilateral dialogues, including the U.S.-China Joint Commission on Commerce and Trade (JCCT) and Strategic Economic Dialogue (SED). USCIB is tracking legislative developments in the National People's Congress and regulatory developments within China's State Council agencies, and also actively contributing to industry coalitions following China-related legislation in the U.S. Congress.

We would welcome further collaboration with the administration on the U.S.-China cooperative work related to the environment, and would be pleased to take part in the

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discussion of a framework for a possible bilateral investment agreement. We also welcome collaborating with the U.S. government in future innovation work with the Chinese, including its plan in the next six months to identity new areas of cooperation to strengthen those capabilities and to enhance laws, policies and programs that encourage innovation. We look forward to success at the next JCCT and also at the third SED, planned for Beijing in December 2007.

It is a pleasure to express our views to both the Chinese and U.S. governments, as we are doing today in our submission to USTR, and we are also enhancing our engagement in business-to-business dialogues, worldwide within the ICC community, and with other OECD businesses at BIAC on China's greater economic role globally, as well as with Chinese businesses. USCIB has initiated cooperation with USCIB's sister business organizations in China to learn and discuss key topics common to any large multinational. Our Chinese affiliate organization at the ICC is the China Chamber of International Commerce (CCOIC) of the China Council for the Promotion of International Trade (CCPIT), and the China Enterprise Confederation (CEC) is the Chinese counterpart at the IOE.

We recognize that the discussion in the attached statement is not exhaustive, and that there may be significant issues that our members have not raised with us for various reasons. Similarly, the differences in length and detail provided in the following statement of specific issues should not suggest that shorter entries are less important than longer entries with more details.

USCIB has additional issues with respect to China that are not related to its commitments with the WTO and that we plan to raise with USTR and other appropriate agencies. One example relates to the ATA Carnet conventions for temporary, duty-free imports, to which China has only partially adhered since joining in 1998. Adherence to the conventions for "Professional Equipment" and "Commercial Samples," in addition to the "Fairs and Exhibitions" convention that China has already signed, would have immediate bottom-line benefits for U.S. companies, be they large multinationals or small- and medium-sized firms.

USCIB appreciates this opportunity to express its views on China's WTO obligations. We stand ready to meet with U.S. agencies to discuss our recommendations and concerns at greater length.

Yours truly,

Peter M. Robinson
President & CEO

Clarence T. Kwan
Chair, China Committee

STATEMENT
of the
UNITED STATES COUNCIL
FOR INTERNATIONAL BUSINESS

Submission to the United States Trade Representative (USTR) on China's Compliance with its World Trade Organization (WTO) Commitments

September 17, 2007

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Introduction and Executive Summary

USCIB welcomes the opportunity to submit comments on China's compliance with its WTO commitments. USCIB actively supported the granting of Permanent Normal Trade Relations status to China, and called for its entry into the WTO. USCIB continues to work with China on both a bilateral and multilateral basis, tracking domestic U.S. and Chinese legislation, and engaging with the global business community, including our Chinese counterpart organizations and their businesses.

We appreciate the significant efforts China has made to meet its obligations under the terms of its accession agreement. There remain, of course, general compliance concerns. Our submission contains comments in three parts. The first part describes several horizontal areas of concerns across sectors, including antidumping, capital markets, certification, licensing, and testing barriers, intellectual property rights, government procurement, market access, national treatment and non-discrimination, and the regulatory environment. The second section includes specific sectoral concerns for eight industries, and highlights the effects of the horizontal areas of concern specific to each industry. Finally, in the third part, we have included annexes that provide examples of barriers to accessing the Chinese market in certification and licensing, as well as examples of lack of transparency in rulemaking.

Among the factors cited by our members across sectors as affecting their investment decisions are problems with the regulatory environment, including the lack of transparency in rulemaking and the judiciary process, the need for fair and independent regulators, market access, non-national treatment, and inadequate intellectual property laws and lax enforcement of intellectual property rights. USCIB members have also called on China to provide sound regulatory environments for a host of sectors, including audiovisual, biotechnology, chemical, energy, express delivery services and logistics, publishing, software and telecommunications sectors.

USCIB recognizes that almost all of China's WTO commitments should have been implemented, and that USTR requested that stakeholders specifically identify unresolved compliance issues that warrant review and evaluation by USTR's China Enforcement Task Force. USCIB members do have many concerns that are contained in this statement, but while reserving the right to raise issues in the future, USCIB does not at this time have any unresolved compliance issues that warrant raising our concerns to merit review and evaluation by USTR's China Enforcement Task Force.

USCIB appreciates the resolutions that have been achieved over the last year to previous issues that we have raised regarding China's WTO commitments. While we look forward to success at the fall U.S.-China Joint Commission on Commerce and Trade (JCCT) meeting in Beijing and the third Strategic Economic Dialogue (SED) in Beijing in December, we welcome the progress announced after the second SED in May, which included several commitments on financial services, as well as an agreement to expand the existing bilateral aviation agreement. We also note that the China's General Administration of Customs and U.S. Customs and Border Protection, signed a Memorandum of Cooperation on IPR Enforcement in May. We also welcome the agreement of both parties to continue to cooperate on transparency in government legislation, and to continue work on energy and the environment.

Lastly, we appreciate the administration's efforts in addressing industry's concerns regarding the protection and enforcement of intellectual property rights in China. We look forward to a speedy resolution of the two pending WTO cases regarding IP and market access restrictions to the benefit of American and Chinese rights holders alike.

USCIB appreciates the opportunity to comment for this 2007 submission, and the program staff would be pleased to meet with officials at U.S. agencies to discuss recommendations and concerns at greater length.

Current Compliance Issues

While there has been progress thus far, USCIB members have raised numerous compliance issues, which include the following:

I. CROSS-SECTORAL BUSINESS ISSUES

ANTIDUMPING

USCIB urges the Chinese government to incorporate transparency and procedural fairness into the antidumping process. USCIB remains concerned that antidumping cases at times are being utilized as a means of domestic protectionism. Appropriate opportunities for business to comment and provide input to the government's deliberative process are essential to continue to achieve one of the goals for all members of the WTO: transparency in the regulatory processes affecting trade among members.

Transparency remains a serious issue in antidumping cases, particularly as it pertains to the submissions by Chinese petitioners. Chinese authorities, without disclosing actual data submitted, not even in a summarized form, proceed to accept incorrect and misleading statistics. This is especially true in the injury phase of the antidumping procedure.

Chinese customs authorities struggle with proper classification procedures, misclassifying products, which results in erroneous conclusions based on inaccurate statistics. This applies to both the dumping and injury phases of antidumping cases.

CAPITAL MARKETS

While China's WTO accession commitments in the securities sector were an important first step toward liberalizing its capital markets, and even though USCIB members are aware that discussions are being held in other forums, it is important to note in this submission that U.S. securities firms still face significant barriers to market access.

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.

CERTIFICATION, LICENSING, and TESTING BARRIERS

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) requirement that the importer disclose confidential contract or other information as proof that the items for import are not within a particular regulated class of goods;
(g) 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.

A higher-level dialogue 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.

GOVERNMENT PROCUREMENT

Since 1996, China has been steadily working to reform its government procurement regime to bring it more strongly in line with global norms in areas such as transparency, fair competition, national treatment, accountability, and Value for Money (VFM). At the same time, when China joined the WTO, it simultaneously became an observer to the WTO's Government Procurement Agreement (GPA) and committed to begin accession negotiations "as soon as possible" thereafter. USCIB members welcomed China's announcement at the JCCT meetings in April 2006 that it commits to commence formal negotiation to join the GPA and submit its Appendix I GPA offer of coverage by no later than December 2007. USCIB seeks an open, fair, and transparent procurement regime and encourages Chinese officials to see that such rules and practices are put in place at regional and local levels of government as well.

USCIB members are also concerned with reports that Chinese officials do not always recall China's agreement that state-owned enterprises would not be treated as government entities for the purpose of government procurement exceptions to national treatment obligations. Furthermore, China has issued several draft regulations and other instruments in recent months directing government agencies to favor domestic products and suppliers in their procurement and to disfavor or even exclude foreign products and suppliers. For instance, article 24 of the draft *Regulation on Development of the Software and Integrated Circuit Industry*, which U.S. industry became aware of in June 2007, directs Chinese ministries to establish a system for extending procurement preferences to domestic ("independent") innovations. This article is but one example of the Chinese Government's implementation of a broader goal set out in its 2006 *Outline of the Medium- and Long-Term Planning for the Development of Science and Technology* – namely to promote innovation by Chinese firms. Promoting domestic innovation is, of course, a worthy goal. But China should not be permitted to use this goal as an excuse to impose market access restrictions or other trade barriers.

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. We likewise urge the U.S. government to ensure that formal negotiations commence for China to join the GPA and submit its Appendix I GPA offer of coverage by no later than December 2007.

INTELLECTUAL PROPERTY RIGHTS

Since acceding to the WTO and taking on obligations in the area of intellectual property rights protection, China has made some limited progress in combating copyright piracy and trademark counterfeiting, especially through legislation. However, despite these improvements, piracy and counterfeiting at the wholesale and retail level, and over the Internet, remain rampant due to continued deficiencies in law, inadequate penalties, uncoordinated enforcement among local, provincial and national authorities, and the lack of transparency in China's administrative and criminal enforcement system. The patent law has also improved significantly over the past few years, but much work remains concerning implementation. Work is also needed to enhance cross-border cooperation between Chinese enforcement agencies and their non-Chinese counterparts, as well as between the private and public sectors, through greater voluntary information sharing. Moreover, rights-holders would benefit by having access to large-scale infringers' banking information, to enable tracing of money flows for purposes of identifying laundered funds.

While recently promulgated IP regulations are an important step towards improvement, inadequacies remain which result in a shortfall in the legal protection necessary for IP in the current context of rampant piracy and counterfeiting. Furthermore, what potential effectiveness those measures may have largely depends on the implementation and enforcement thereof. If implemented and enforced effectively, these measures will benefit the development of China's own IP-dependent industries, not just those of its foreign trading partners.

Following the 2005 JCCT meetings, where China made a number of commitments to address U.S. concerns with respect to IPR, the outcomes of the 2006 JCCT meeting were disappointing, particularly since little progress was registered throughout the course of 2005. The main progress was registered in the area of software, where the Chinese government undertook to issue a notice requiring the pre-loading of legal software operating systems on all computers produced or imported into China, as well as a notice requiring government agencies to purchase computers with pre-loaded software. These are welcome developments and have had a noticeable and positive impact on sales of U.S. software in China – demonstrating that China can take effective action when it wants to. Other than that, however, there were few concrete commitments with China falling back on general pledges to step up enforcement to combat copyright piracy and to clean up public markets selling infringing products. To its credit, China has launched a comprehensive IP action plan encompassing stepped-up enforcement, legislation, public awareness and education. In the area of legislation, the plan includes drafting or revising 17 laws and regulations relating to trademarks, copyrights, patents and customs. China implemented its internet law on July 1, 2006 in fulfillment of its commitment to accede to the WIPO Internet Treaties to protect content in the online environment. While a welcome step forward, the drafting and consultation process was less than transparent and a number of concerns remain with respect to potential loopholes in this law

- **Copyright Concerns**

Pirated optical media products, CD, VCD and DVD, and counterfeit goods continue to be a major problem. The piracy rate for optical media products is well in excess of 90%, and still exceeds 80% for business software (down from 92% in 2003). While recent copyright law amendments and regulations made significant progress toward bringing Chinese law into statutory compliance with TRIPS, the law remains deficient in several important respects, including wholly inadequate criminal liability for copyright offenses, high and unrealistic thresholds which make bringing a criminal copyright case virtually impossible and overly broad exceptions to protection for computer software. We recognize that on April 5, 2007, the Chinese government issued revised Judicial Interpretations (JI). Unfortunately, the revised interpretations continue to fail to criminalize all copyright piracy conducted on a commercial scale. Enforcement in line with international standards is sorely lacking.

Moreover, in newspaper and magazine publishing, copyright (and trademark) protection remains lax. Content is still regularly pilfered from competing sources with impunity, making it both impractical and unprofitable for publications to invest in high-quality research and editorial content. This, in turn, yields many virtually identical publications, thereby depriving consumers of meaningful choice.

There is a great need for better coordination between agencies, as well as better coordination between administrative and criminal measures. There have been some successes in bringing civil actions, but sentences in criminal cases continue to be insignificant and therefore do not act as a deterrent to piracy. China's criminal law has 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. As noted above, the April 5, 2007 amendments to the JI's remain inadequate. One major problem is that illegal business volume is calculated using the price of the infringing work instead of the price of the genuine product. It is unclear how to prosecute repeat offenders and how the thresholds apply to online piracy. Effective enforcement will not become a reality if there is inadequate attention, investment and training by the Public Security Bureaus (PSB). Unfortunately, our members to date have not witnessed any marked increase in the number of criminal cases brought for copyright infringement as a result of the revised Interpretations. The PSB needs to treat criminal enforcement of IPR offenses as a top priority. Enforcement remains slow, cumbersome and rarely results in deterrent fines. Although Chinese authorities have undertaken some administrative enforcement actions against pirates, the government's refusal to share information about the activities of CD plants, to cooperate in the verification of the source of infringing disks, or to publish the ultimate outcomes of these actions makes it very difficult for rightholders to assess the deterrent impact of China's enforcement efforts.

With respect to software, the Copyright Administration (CA) has administrative authority to do surprise audits of companies suspected of using illegal software, but CA offices are reluctant to exercise their authority and are plagued by inadequate manpower, training and resources. Moreover, when they do take action, most of the 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 corporate end-user piracy on the ground that such piracy fails to meet this public harm requirement. Although the Chinese Government, in a recent JCCT meeting, declared that software end-user piracy in fact harms the public interest, the government has done nothing to communicate this view to administrative authorities or to amend Chinese laws or regulations to codify this view. Although the Administration of Industry Commerce has greater resources than the CA, it lacks clear legal authority to investigate copyright crimes and thus has refused to take actions against piracy by end-users and PC manufacturers.

In the case of civil enforcement, courts are likewise reluctant to issue decisions in corporate end user infringement cases, instead urging the parties to settle. Civil enforcement is also far from predictable, due to the courts' general reluctance to grant civil *ex parte* search orders for securing evidence of piracy. To date, there have been very few instances of such *ex parte* search orders being granted against a corporate end user. Organizational end user piracy should be clarified as a criminal offense to allow for prosecutions against software piracy on a commercial scale and penalties must be high enough to actually deter further infringement.

China adopted amendments to its Copyright Law in order to implement the WIPO Internet Treaties to effectively deal with online piracy and create a safe online environment for electronic commerce. The amendments became effective on July 1, 2006. The amendments are a step in the right direction but fail to implement the Treaties according to international standards in several important areas, including but not limited to, failing to include all exclusive rights granted to rights holders by the Treaties (for example, it does not cover all reproductions, and the TPM provisions only protect against circumvention in relation to the right of making available).

- **Trademark and Counterfeiting Concerns**

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 that China only very rarely grants "Well Known" or "Famous Mark" status under Article 6bis of the *Paris Convention to non-Chinese trademarks/brands*. (This article provides that contracting countries agree to refuse or invalidate a trademark that creates confusion with a mark considered by the competent authority of the country of registration to be well known as a mark of a national of another contracting country.)

A third challenge faced by major U.S. brand holders is that it can take five or six years to cancel trademarks that are registered in bad faith either by the violation of a contract by a former licensee or through other assorted schemes and conspiracies adopted by identity pirates. This delay undermines the confidence of potential investors and can even result in the building of an export offensive launched from behind the barrier of delayed enforcement. While some embassies have successfully requested the Trademark Review and Adjudication Board (TRAB) to exercise their discretion to expedite internationally important cancellation cases, there is no formal mechanism for such requests. China should be responsive to such embassy requests in the short term, and in the long term should consider additional procedures and staffing to expedite important international trademark cancellation cases.

While USCIB welcomed the issuance in December 2004 of the promised judicial interpretation, the interpretation does not resolve all, and in some cases even introduces new, areas of concern, including: 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.

While recent implementing rules on bond requirements mark an improvement in transparency regarding bond amounts, IP owners may be required to file for an IP seizure in order for the published calculation methods to apply. In the context of storage costs, recent implementing rules still provide for U.S. corporations to be assessed fees for the storage and disposal of seized goods.

- **Seized Storage Costs**

U.S. corporations are unexpectedly assessed fees for the storage of seized counterfeit goods. As with the bond amounts, 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. 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. Uniform requirements in a clear, published form, are essential.

- **Patent Concerns**

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. Moreover, 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 generally more effective, but damages are not calculated in such a way as to compensate for all the actual expenses of a rightholder in stopping infringing acts. Procedures for evidence exchange where trade secrets are alleged are not fully defined, and courts have referred matters to appraisal panels without input from parties involved, despite the clear TRIPS mandate that parties are entitled to see any evidence used to determine their rights. A 2003 Chinese Supreme Court case overturning a high court decision related to an appraisal conclusion based on evidence withheld from the opposing party and holding that parties must have an opportunity to review and challenge relevant underlying evidence, however, may herald improvements in this regard.

Further, 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. Moreover, the PRB has improperly generated and applied its own patentability standards that are more restrictive than those in the Chinese Patent Law and Implementing Regulations.

The use of the patent system to thwart originator-proprietary companies is also troubling. For example, some companies have faced the situation where a local manufacturer has obtained patents on a foreign company's commercial products in addition to knocking off the product. This has caused the originator-proprietary company to expend time and money to invalidate the pirate's patents. A great deal of effort is required by the administrative agency to prove beyond reasonable scope the invalidity of the patent.

USCIB members likewise have concerns that certain proposed amendments to the Patent Law, issued jointly by the State Intellectual Property Office and the State Council Legislative Affairs Office (SCLAO) in December 2006, could impose additional burdens on foreign inventors and create barriers to trade. For instance, proposed amendments to articles 48 through 57 of the Law, while apparently intended to bring China's compulsory license rules for patents more closely in line with China's TRIPS commitments, would in fact expand the scope of compulsory licensing in several ways that are inconsistent with TRIPS. The amendments would also require inventions made in China to be filed first in China – a requirement that is administratively challenging for multinational firms and therefore would deter foreign R&D investment. Several U.S. industry organizations have filed comments with SIPO and the SCLAO expressing these and many other concerns, but we are concerned that the SCLAO (who apparently controls the process going forward) might lack the expertise to evaluate these comments and/or make appropriate changes to the text.

As for design patents, some infringers obtain a design patent registration based on a copied product designed by utilizing the non-substantive examination system in China, and insist the legality of their infringing conduct based on the invalid design patent right, notwithstanding the existing procedures available to invalidate such design patents. In regulated product areas such as pharmaceuticals, there is no linkage between the regulatory agency and the enforcement of patents. Thus, the State Food and Drug Agency approves generic versions of patented medicines without regard to the patent protection that covers the product.

Moreover, the judicial enforcement system lacks transparency. All courts should follow the same rules and guidelines, and decisions should be published so that companies can learn how the rules and guidelines are implemented.

In addition to enforcement concerns, foreign companies face impediments to technology licensing. The *Regulations on Technology Import and Export Regulation* of January 1, 2002 define the procedures for technology licensing contracts between a Chinese company and a foreign company. There have been many criticisms, however, that these regulations impose unfair burdens on foreign licensors, requiring them to make excessive warranties.

Finally, USCIB members are tracking the development of China's new *Antimonopoly Law* (AML), which was passed on August 30 and is scheduled to come into force in August 2008. USCIB welcomed the opportunity to meet with visiting delegations from China over the last several years during the drafting of the legislation, including representatives from the National People's Congress (NPC), Ministry of Commerce (MOFCOM), and the State Intellectual Property Office (SIPO) We look forward to opportunities in the future to review and comment upon drafts of the AML's implementing rules and guidelines.

As the implementation process moves forward, USCIB members urge for fair, transparent, consistent, and coherent enforcement of the implementing regulations. We urge China to make available for review and comment, as soon as possible, implementing guidelines that can serve as a practical guide for compliance. We will continue to monitor several provisions in the AML that could be of concern depending on implementation, including on abuse of dominance, mergers and acquisitions, application of the AML to administrative entities, state-owned enterprises (SOEs) and trade associations, and "abuse" of intellectual property rights. For instance, the AML provides that the law is not applicable to conduct taken to protect a company's intellectual property rights, but that the law is applicable to "abusing" IP -- a term that is not defined -- raising concerns that actions such as refusal to license proprietary technology to a competitor might be considered "abuses" subject to the law. It is our hope that we might work with Chinese policymakers in developing implementing guidelines that clarify remaining ambiguities in the legislation itself in order to foster a level of predictability consistent with international norms and China's WTO and other international commitments.

As noted, USCIB members also have concerns regarding provisions on the application of the AML to administrative monopolies (we believe the AML *should* apply to such monopolies), and that could be interpreted to exempt certain SOEs from AML enforcement. Given the tremendous power and influence that SOEs have in many sectors of the Chinese economy, such a broad exemption could create a huge loophole in China's competition regime and allow SOEs to engage in monopolistic, anticompetitive behavior with impunity. We would also appreciate greater clarification on the 'national security review' clause and the intentions of application of such a clause.

We urge USTR and other U.S. officials to keep abreast of the implementation of the AML, and work with the Chinese government to ensure compliance with China's WTO commitments and convergence with international competition principles.

- **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 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. The legal infrastructure for the enforcement of trade secrets (including breaches of contracts including confidentiality provisions) needs to be significantly strengthened. This would include requiring that Chinese government agencies and affiliated institutions establish protocols for protection of trade secrets and confidential test data submitted to them and that these protocols are recorded in writing and made publicly available. In addition, although China's State Drug Administration issued regulations to implement China's commitment to provide six years of data exclusivity pursuant to TRIPS Article 39.3, protection of such data provided to the government from 'unfair commercial use' is inconsistent.

MARKET ACCESS

Market access restrictions inhibit the ability of USCIB members to build legitimate markets in China and satisfy consumer demand. In many sectors, as demonstrated in the second part of this submission, USCIB members call for Chinese markets be open to any firm able to meet objective criteria. Market access should not be hindered through licensing systems subject to arbitrary government decisions.

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 corollary 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.

REGULATORY ENVIRONMENT

USCIB, as the American affiliate to the Business and Industry Advisory Committee (BIAC) to the OECD, has been providing 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.

- **Fair and Independent Regulators**

Numerous obstacles related to institutions, regulatory frameworks, and regulatory enforcement remain for USCIB members in China. In particular, USCIB members have had issues across sectors with regulators, as witnessed in section two of this submission in the specific sectoral examples. USCIB members call for resolution in this area, and expect fair, transparent and independent regulators in China.

In addition, USCIB members have witnessed a lack of coordination between the central and local authorities. Regional inconsistencies in regulations and enforcement is a concern, and if there is a fair central regulator for each sector as appropriate, both USCIB and Chinese businesses would benefit from knowing what the rules are, how to follow them, and who to ask if they have questions.

- **Transparency and Notice**

There are positive signs that China is improving the transparency of the lawmaking process and related activities that affect USCIB members. For example, the Party's and State Council's

General Offices issued *Opinions on Further Promoting the Transparency of Government Affairs* in March 2005. These Opinions require that government organizations at all levels expand the scope of transparency of their decision-making processes. The Opinions specify that government organization transparency efforts should be focused on key project approvals, government procurement, mineral resource development, land use, and the development of permitting requirements/procedures. Further, the State Council issued the *Circular on Improving Work Toward the Fulfillment of Transparency Obligations in the Protocol on the People's Republic of China's Accession to the WTO* on March 30, 2006. The Circular designates the China Foreign Trade and Cooperation Gazette published by Ministry of Commerce as the official publication for announcement of trade-related laws. Among other things, the Circular requires that all local and central government agencies notify the Ministry of Commerce of promulgated trade-related laws, so that these laws will be published in the China Foreign Trade and Cooperation Gazette, and thereby be notified to the public. More recently, the State Council published the Regulations on Publication of Government Information on April 5, 2007. These Regulations aim to enhance government transparency, protect the private information rights, and improve administration in accordance with the law.

Despite these policy and regulatory developments, however, there is still not sufficient transparency with respect to China's implementation of its commitments. It is apparent that there is still significant work that must be done to put the policy and law commitments into practice in China and to ensure consistency in practice among various agencies on transparency and related issues. This lack of transparency is despite the fact that enquiry points have been established as required by the Protocol and Working Party Report. For example, MOFCOM continues to wage battles internally with other ministries as to the interpretations of China's commitments and the necessary implementation requirements. China needs, therefore, to ensure that MOFCOM or another State Council unit is given authority to make a final interpretation of WTO commitments and to ensure implementation consistent with this interpretation among China's myriad law-making entities.

China also agreed to allow for a reasonable period for public comment on most categories of new and revised laws and regulations relating to foreign trade and to regularly publish such measures in one or more of the WTO languages. This commitment strongly reflects the fact that transparency is a crucial element to creating a stable and predictable environment for foreign investment. Yet U.S. firms continue to be blindsided by new measures without notice and prior to any meaningful consultation with those most affected. In certain instances, Chinese agencies and ministries seem to view their obligations to comply in the most nominal of terms, allowing a hasty and poorly publicized comment period to go forward shortly before new rules are announced and go into effect. This situation is exacerbated by deficiencies in Chinese-agency capacity to support robust notice and comment practices. Experience elsewhere has shown that allowing for an adequate public comment period prior to final decisions on regulation tends to lead to a better regulatory framework and enforcement. If the views of business and other interests are solicited and taken into consideration during the drafting process, and if the Chinese government provides its agencies with the staffing and training to support this process, fewer problems will occur during implementation and the overall level of compliance will improve.

In China, it normally takes 1-2 years or more for an agency to promulgate a new regulation. USCIB applauds the fact that many Chinese agencies are providing opportunities for USCIB members to comment on proposed rules. Nonetheless, such opportunities are brief, are sometimes offered only by invitation, are often provided at only the early stages of the rulemaking process, and rarely involve agency feedback on submitted comments. Chinese rulemaking agencies generally do not provide USCIB members with notification of a final draft rule before promulgation.

For instance, since the National Development and Reform Commission (NDRC) commenced drafting of the Management Regulations on Recycling and Disposal of Waste and Used Household Electronic Products in early 2004, the regulated community was provided with only two official opportunities to view and comment on the draft law. NDRC commenced the first comment period in late September 2004. This comment process was notified to the public via the NDRC web site. In December 2004, the State Council Legislative Office provided certain invitees with opportunity to comment on the second draft. These comment periods lasted roughly one month and it remains uncertain whether and how USCIB member comments on this law were incorporated into the draft. The State Council Legislative Office also provided an invitation-only comment opportunity to certain stakeholders in January 2005. The State Council is still considering the draft law, which may be promulgated by the end of 2007, per NDRC plans.

Common problems encountered in China stemming from the lack of transparency in rulemaking are illustrated by several examples attached as Annex 2 to this document.

II. SECTORAL ISSUES

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 industry. The situation has hurt not only foreign businesses, but has also left many areas of the domestic industry in a state of general crisis. Without a proper, functioning market where intellectual property rights are respected and laws are enforced, investment will remain depressed, and Chinese content quality will continue to suffer. All of the factors cited above leave the general population little choice but to turn to the black market to satisfy their demand for audiovisual works.

- **Intellectual Property Rights Violations**

It is important to note that piracy indeed has a negative impact on the Chinese movie industry as confirmed by a recent study conducted by the Center for American Economics Studies, Institute of World Economics and Politics, Chinese Academy of Social Sciences (CASS Study). First, over 77% of the enterprises interviewed noted that their own operating results are in inverse proportion to the size of the pirated movies market. In addition, 65% of the respondents from the

Chinese movie industry believed that piracy has severely hindered the development of China's movie industry.

According to the Motion Picture Association of America (MPAA), piracy is rampant in China, whose cities have become open markets for illicit DVDs, VCDs, music CDs, and video games. Not withstanding MoU's between MPAA and the Chinese Government to enhance enforcement, piracy persists at very high levels. The MPAA also reports that the emergence of China as an export country for pirated DVDs has resulted in thousands of illicit copies of the latest American movies being exported globally. Piracy of broadcast signals and the underlying content incorporated into broadcasts remains rampant in China.

Internet piracy has emerged as 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. In fact, all of the major streaming peer-to-peer services that transmit pirated broadcast content are headquartered in China. Enforcement with respect to all forms of intellectual property theft in China remains inefficient and often ineffectual, with low penalties for violators.

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. The commitments given by Premier Wen Jiabao and Vice Premier Wu Yi in meetings in the spring of 2004 and 2005 to take a number of measures to address piracy in China are welcome, but real progress will depend on the successful implementation of these commitments by government agencies and the effectiveness of interagency coordinating mechanisms. (See "Intellectual Property Rights", below for further discussion of intellectual property rights enforcement).

- **Market Access Restrictions**

In addition to lax enforcement of intellectual property rights, 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 and TV 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. While USCIB understands that the Chinese government has concerns about content in the cultural arena, the current investment restrictions do little to secure control over content, and merely serve to allow wholly unregulated sources (the pirate market) to provide access to cultural materials outside of censorship channels. USCIB calls upon the Chinese government to lift its investment restrictions in this area, allowing U.S. companies to bring their expertise in production, promotion and advertising to the Chinese market, thus expanding opportunities for U.S. and Chinese companies and creators alike.

Film import quotas and the tardy distribution of approved film and video products also serve to create a vacuum being filled by copyright violators. While total box office receipts in China have declined by 40% since the advent of VCDs and DVDs (from 1996 to 2003 with a slight uptick in 2004), the box office in countries with much smaller populations and numbers of screens is far more valuable on a per capita basis than China's, simply because there are few if any restrictions on the number of films that can be imported.

A number of actions are needed to build a viable market and to improve market access in the entertainment industry. Current investment/establishment restrictions in the music industry should be lifted immediately. The cap on the number of foreign-revenue-sharing films allowed for exhibition in China each year, which is set at a maximum of 20, should be eliminated, given that an unofficial exhibition quota of two Chinese films for each foreign film already exists. Moreover, the "master contract" which sets the terms for revenue-sharing should be eliminated or, at a minimum, be revised to make it comparable with revenue-sharing in other markets given that the current "master contract" is not commercially reasonable as evidenced by other markets. China's entertainment market is starved for content and this artificial limit simply drives consumers to the black market to satisfy their desire to see the latest films. In addition, market-distorting policies such as the imposition of "black-out" periods when releases of foreign films are suspended in order to give an artificial advantage to domestically produced films should be eliminated. These policies only further restrict legitimate access for foreign films and the delay in release dates further fuels demand for pirated product. China should also introduce competition into the film import and distribution sector by breaking the state controlled monopoly on imports and duopoly on distribution. It should also refrain from interfering in commercial negotiations, including licensing agreements.

Limits on foreign content in television programming in China (25% of total dramatic programming, a de facto ban on foreign content during prime time, and restrictions on the availability of foreign channels) should be eased. Chinese broadcasters are working hard to develop a commercially viable industry free of state subsidies, and existing restrictions deprive broadcasters of access to content with which they could build their business. As China rolls out digital broadcasting and pay-TV channels, there will be a huge increase in the demand for content. Shortsighted policies that limit access to content, handicap the development of the local broadcasting industry. Correspondingly, liberalization of pay TV platforms, including cable and Direct-to-Home would expand the opportunity for more foreign content to be broadcast. However, the very slow growth in digital subscriptions to date is largely a result of a lack of specialized, compelling content.

Censorship clearance procedures for films and optical media should be streamlined. These procedures severely restrict the ability to distribute timely and legitimate film, CD, VCD and DVD products in China, and provide yet another unfair and unnecessary advantage to pirate producers, who are able to bring their products to market long before legitimate film or DVDs are available for viewing or sale. This, combined with a prohibition on issuing retail AV licenses to foreign controlled retail outlets further limits the industry's ability to provide consumers with timely and convenient access to legitimate product. The prohibition on the ability of foreign controlled retail outlets to obtain AV licenses appears to be a violation of China's WTO commitment to provide national treatment in this area.

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. While current regulations permit foreign partners 49% ownership in certain joint ventures (JVs), these JVs do not have the right to publish recordings in China, greatly limiting their vitality and resulting in a number of releases that is greatly limited compared to other markets around the world. This seriously inhibits the emergence of a prosperous retail environment and promotes the sale of pirated goods.

In addition, every release in China must go through a complicated and time-consuming censorship process, which often is an operational nightmare. As with film and optical media, it effectively limits the number of releases and it gives a further unintentional advantage to the pirates, who are not subject to this process. As a result, the pirates can come to the marketplace before the legitimate industry can, and offer products that were partly or completely banned for distribution by the censorship authorities. The censorship process must be made more efficient by, for example, the institution of a film rating system, so that it does not impair the marketing of legitimate materials and create unintended advantages for the distribution of pirated materials.

BIOTECHNOLOGY

China is one of the largest markets for biotechnology products. However, China's 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.

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. This is troubling as it improperly deprives the owners of intellectual property of the value of their assets. However, the threat to public health, together with the economic costs of responding to clinical emergencies associated with the use of impure or ineffective pharmaceuticals, are of greater concern.

Counterfeit medications place the public at unnecessary risk, and they divert the resources of industry and government agencies from productive uses. Chinese government agencies and municipalities lack the coordination and cooperation necessary to address enforcement issues. USCIB urges more effective interdiction and enforcement against traffickers and distributors of counterfeit biopharmaceuticals. A reliable dispute resolution system that produces objective decisions and enforcement coupled with a public record of precedent would greatly enhance China's IP rights regime.

There has been progress toward establishing a comprehensive statutory scheme of intellectual property protection, however, significant gaps in existing law remain. Ambiguities in China's intellectual property laws hinder patent procurement and enforcement. Such deficiencies in the legal framework contribute to a failure of the Chinese system to provide adequate and effective protection for intellectual property rights.

Specifically, some recent Chinese patent law amendments (Articles 48 and 49) may pose unique problems for the biotechnology sector. Chinese patent law currently provides for compulsory licensing, but the considerations that would trigger compulsory licensing as well as the scope and duration on the license need significant clarification.

In addition, the new Article 63(5) provides a "Bolar exemption" to patent infringement for pharmaceutical products. However, unlike the law of most countries, this exemption is not balanced by any provision for extending the terms of pharmaceutical patents to compensate patent owners for delays encountered in the regulatory approval process. In the absence of such a provision, the Chinese patent law fails to provide adequate and equitable treatment to the owners of intellectual property relating to pharmaceutical inventions.

Intellectual property is also 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. The amendments to China's patent law preclude the possibility of patenting plant varieties. Therefore, the seed industry must currently rely on the Plant Variety Protection (PVP) process to protect the intellectual property of seed companies conducting business in China. The manner in which the PVP process in China has been implemented has resulted in little or no security around a plant variety's germplasm. Plant germplasm constitutes the plant's genetic make-up and is essentially equivalent to the product formula for that plant variety. The inability of companies to export certain kinds of germplasm from China severely inhibits their capacity to expand their business throughout the region.

Also during the approval process, China requires that a sample of the biotechnology-derived seed be submitted with no Material Transfer Agreement stating how these samples will be used. This raises concerns around intellectual property protection, which must be seriously considered by a company prior to expansion into the Chinese market.

There are additional problems experienced by the agricultural biotechnology industry related to China's agricultural biotechnology regulations. One example concerns additional regulations by the Ministry of Agriculture for obtaining safety certificates for import of biotech crops, which involve considerable delays. In addition, the Ministry of Agriculture has a requirement that a biotech product to be imported into China must be approved in the country of development before the authorization process in China can begin. There is no scientific basis for delaying the start of the authorization process in China solely because a product is not yet approved in the country of export.

CHEMICALS

USCIB recognizes that China is a major growing world producer and market for chemicals and downstream manufacturers. We would like to highlight three areas of ongoing concern for the chemicals sector as well as businesses that use chemicals in the manufacture or formulation of their products: intellectual property rights protection (IPR), antidumping, and chemicals regulation.

- **Intellectual Property Rights Protection for Chemicals**

Concerns about IPR protection in China fall into three categories. First is the prevalence of IPR violations in China. U.S.-based companies have been subjected to the counterfeiting of their products and the theft of their proprietary data, including not only product formulations but also patented production processes. Second, U.S. companies are concerned about China's lack of efficient and timely IPR enforcement in chemicals and related industries consuming chemicals, such as artificial turf and turf fibers. Finally, we are concerned that Chinese national and local regulatory and licensing regimes do not include adequate provisions for IPR and confidential business information protection.

- **Antidumping**

Since 1997, 17 of the 23 antidumping investigations initiated against U.S. imports by China's Ministry of Commerce (MOFCOM) have been of chemicals and chemical products, and 12 currently have antidumping measures in effect.[1] USCIB members are concerned about China's application of its trade remedy laws and want to ensure that investigations are conducted in a transparent and non-discriminatory manner. Of particular concern to our members is the process for determining injury in antidumping cases. In several cases, MOFCOM has not been able to demonstrate a clear link between allegedly dumped imports and injury to the domestic Chinese industry. It has relied on data that was not current and, in some cases, appears to have ignored data contradicting the domestic industry's claims of injury.

With China's growing use of its trade remedy laws, it is important that exporters be assured that the administration of these laws remains transparent and complies with China's obligations under the WTO's Agreement on Antidumping.

- **Chemical Regulations**

USCIB supports chemical control legislation that protects humans and the environment. We also believe, however that it is critically important to strive for consistency with already-established national chemicals management programs when enacting new laws. Unfortunately, implementing regulations to accompany China's *Provisions on the Environmental Administration of New Chemical Substances*, which entered into force on October 15, 2003, have been either deficient or confounding to U.S. businesses, the result of which has been a negative impact on exports of chemicals and chemical products into China. After nearly two years, U.S. exporters still await meaningful guidance for complying with the Provisions and the resolution of a number of inconsistencies with other similar regulations worldwide.

In addition, on December 27, 2005, China's State Environmental Protection Agency and General Administration of Customs jointly issued Circular 65 on the "Highly Restricted Imported Toxic Chemicals List," which went into effect on January 1, 2006. The circular was issued only in Chinese, and there is as yet no official English translation available.

[1] Source: Website of Trade Remedy Compliance Staff, Import Administration, International Trade Administration, U.S. Department of Commerce, http://ia.ita.doc.gov/trcs.

Circular 65 revises and expands China's Toxic Chemicals List and requires exporters of chemicals on the Toxic Chemicals List to China to comply with the "Registration of Environmental Management on the First Import of Chemicals and the Import and Export of Toxic Chemicals." According to this regulation, a foreign company that exports a listed toxic chemical to China must register the chemical and pay a fee of $10,000 "for each of the toxic chemicals contained in every contract."

Also, the rules for the registration of toxic chemicals apply only to exporters and importers, and only foreign companies importing toxic chemicals into China are required to pay the $10,000 registration fee. Customs is the primary enforcement agency of this regulation, and there does not seem to be a similar requirement for domestic producers marketing within China, which may involve a violation of the national treatment principle of the WTO. Exporters bear a significant, disproportionate financial and logistical burden in marketing listed chemicals in China. Such programs, focusing only on imports, may not be the least trade-restrictive means of addressing the border protection goals in question.

- **Transparency**

The new chemical registration regulations came into force without implementation guidelines in place and without a notification review process established and effectively communicated to stakeholders. Uncertainties continue in the form of a lack of a reliable time frame for chemical registration and registration exemption review and approval. These uncertainties in both the regulations and in the time frame for the resolution of outstanding issues make it difficult for companies to make sound business decisions about introducing new chemical products to China. This adversely affects not only chemicals but also all downstream products manufactured in China that require chemical inputs.

- **Non-Discrimination and National Treatment**

Although the new chemical regulations apply to domestically manufactured substances as well as imports, the requirements have not been widely communicated and are virtually unknown to local industry. Along with the severely inadequate testing facilities, this calls in question the expectation for compliance by domestic companies.

- **Confidentiality and Data Protection**

Protection of confidential business information is an important and fundamental element in any chemical control program and, as mentioned above, a serious concern for U.S. chemical companies in China.

- **Mutual Acceptance of Data**

The Chinese regulations stipulate that some required testing of new chemicals must be undertaken only in China on Chinese species at certified laboratories. The principle should be that data generated in a Member country in accordance with OECD Test Guidelines and Principles of Good Laboratory Practice (GLP) shall be accepted in other Member countries for assessment purposes and other uses relating to the protection of human health and the environment. This process reduces unnecessary inefficiencies, duplication, additional system costs and minimizes unnecessary animal testing. To fully participate in the world trading system, China should readily accept test data generated in other countries under international guidelines for the mutual acceptance of data.

ENERGY

Specific to China's commitments made during the WTO accession process, and despite some progress in the opening of 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, there is a 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.

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.

EXPRESS DELIVERY SERVICES AND LOGISTICS

Fast, reliable express delivery services (EDS) are a key component of the vibrant, competitive logistics industry that China has recognized as crucial to its economic growth. While the Chinese government has publicly recognized the importance of EDS to the Chinese economy, many of the actions taken or proposed by the Chinese government will not only violate China's WTO commitments, but will also stunt the healthy growth of this important industry in China, raise costs to Chinese producers that rely on EDS, and harm the overall competitiveness of China's economy. Our members have identified several issues below regarding China's compliance with its WTO commitments.

- **Transparency**

As with many USCIB members across sectors, there has been a lack of transparency for the EDS sector. The Chinese government has never supplied the EDS industry with a copy of its 2005 postal reform plan or with recent drafts of its postal law, including the most recent draft. The government should share these drafts, the draft State Postal Bureau's (SPB) postal express rules and regulations, and the draft of international freight forwarding enterprises (IFFEs) rules and regulations with the U.S. EDS industry and provide it with a meaningful opportunity to comment upon those drafts and to engage in a dialogue with relevant Chinese government agencies.

- **Market Access**

The Chinese government must ensure that its EDS market is open to any firm able to meet objective criteria under a simple registration system, and that market access is not frustrated through a licensing system subject to government discretion. Pending legislation and regulations would limit the ability of foreign-invested enterprises to participate in China's domestic EDS market in violation of China's WTO commitments. Proposals to create a new licensing system for EDS are contrary to the spirit of China's administrative licensing law, as well as China's overall economic interests, and appear to include violations of GATS rules on domestic regulation. Additionally, China's Civil Aviation Administration's (CAAC) existing regulations should be revised to allow wholly foreign-owned enterprises (WFOEs) to obtain an Air Freight Sales Agency License in order to meet China's commitments on air freight forwarding.

- **Fair and Independent Regulator**

As part of its secret postal reform plan, and despite numerous U.S. government and industry requests to the contrary, the Chinese government formally established the new SPB as a regulator of the EDS industry in 2007. Although the new SPB is in theory separate and apart from China Post, the two are still closely linked. Additionally, the SPB has not provided the EDS industry with an opportunity to review and comment upon implementing regulations it is drafting to ensure, among other things, that a level playing field will be established for fair competition among China Post, private domestic delivery companies, and foreign-invested EDS companies. Furthermore, the SPB is empowering local express associations to serve as local regulators of the industry, and these associations are often chaired by the local postal authority. This creates a situation where private express companies are subject to the regulatory authority of a government-supported competitor. China must provide a level playing field for all market competitors, and must not give special advantages or treatment relative to China Post or local Chinese delivery companies, as foreseen in pending proposals.

- **Efficient Regulatory Environment**

Regulatory lines of authority should be streamlined, clarified, and centralized. Firms that are licensed to provide EDS should have the right to perform all of the functions necessary to provide that service without having to seek additional licenses and approvals. MOFCOM, the SPB and other agencies should coordinate with one another and their local offices to ensure that conflicting or redundant regulatory requirements are not imposed.

Also, reporting requirements should not be more burdensome than necessary to ensure the quality of the service. For example, the SPB's proposal to require monthly reports from EDS firms would impose an unnecessary burden and should be abandoned.

- **Non-Discrimination and National Treatment**

The draft postal law includes a provision that would bar market access by foreign-invested EDS companies for delivering all letters, regardless of weight, and is lacking a clear definition of "letter." China Post and domestic delivery companies, however, would be allowed to deliver letters greater than 150 grams, violating China's national treatment commitments. The draft would also grant China Post numerous other competitive advantages to both its competitive and monopoly businesses (no taxes, government-allocated real property, expedited dispatch, etc.)

The draft also includes a fee on EDS companies for China Post's Universal Postal Service Fund, without clarifying details on how the tax will be levied or revenues will be used. USCIB members call on the government to ensure that no taxes, fees, or other charges are levied against the EDS industry which are used directly or indirectly to support China Post's competitive or monopoly products. Any such measures applied to foreign EDS companies could result in violations of GATS national treatment and monopoly rules.

- **Expansion of State-Owned Postal Monopoly**

In joining the WTO, China made unlimited GATS commitments for international and domestic courier services to operate outside of China Post's private letter monopoly, and it made a broad commitment not to "roll back" the liberal market-access foreign EDS companies already enjoyed. However, since joining the WTO, China has expanded the private-letter restriction to include a greater variety of items, and recent drafts of the postal law propose to restrict the delivery of all items weighing less than 150 grams to China Post. Such grants of monopoly rights regarding the supply of services covered by China's specific commitments would violate its WTO commitments. The development of China's postal law should be carefully monitored. China Post's monopoly on the delivery of letters should be clearly and narrowly defined consistent with its WTO commitments through a weight and price limit in the draft postal law. Such definitions are common in other jurisdictions and China should remain open to discussions with the industry on how to implement such a solution.

PUBLISHING

In the publishing industry, control over content remains strict and China has stated that it will not approve any more foreign titles under Chinese publishing licenses except technical and scientific publications.

China has published guidelines permitting the injection of private equity into publishing enterprises, previously controlled exclusively by state entities. This liberalization is currently limited to domestic Chinese private investment. It had been hoped that this would be an indicator of a future move to allow foreign investment, but new regulations issued in August 2005 have put any such hopes on hold. China should allow foreign investment in publishing.

SOFTWARE

- **Import Regulation: 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. Despite China's issuance of 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, China had not uniformly implemented this measure. The implementation of this policy remains alarmingly inconsistent in the country, with the impact of discriminating against software and the type of delivery media chosen by exporters to China.

- **Internal policies: Non-discriminatory Treatment**

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 corollary that China would not adopt requirements that effectively treated import goods less favorably. In fact, China has embraced a policy of virtually prohibiting the import of software and other IT goods that contain any type of encryption technology. The impact of this practice is that most new software offerings can be blocked from import into the country, given the widespread use and demand for encryption to protect the software's intellectual property and data storage and transmission functions.

TELECOMMUNICATIONS (BASIC AND VALUE-ADDED)

China has made no meaningful progress towards complying with its WTO telecommunications commitments in the past year, so many of our comments will of necessity be repetitive. There are reports that a long-awaited Telecom Law is making its way through the Chinese bureaucracy, and that provides a modicum of hope that China may take such steps as overhauling its licensing regime and establishing an independent telecom regulator. Offsetting this apparent development, there has been regression in other areas such as the regulation of value-added services. In most other liberalizing countries, the concept of value added services was introduced as a way to open up the telecom market to competition. By contrast, China has become more conservative with the concept of basic versus value added services since WTO accession, shuffling some very important value-added services into the highly protected basic category. It would be an improvement if the pending law were to replace these conservatively applied vertical service classifications with more objective and transparent guidelines for Type I (facility-based) and Type II (non-facility based) services. Further, China should seize this opportunity to grant equivalent national treatment to both domestic and foreign investors, boldly taking advantage of the gains that an open telecom market can bring to the economy as a whole.

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 for phasing in direct foreign participation in value-added network services and basic telecommunications. China also agreed to be bound by the obligations in the Reference Paper to establish an independent, impartial regulatory authority and a pro-competitive regulatory regime. 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, and the prohibition on resale, which greatly limit market access.

- **High Capitalization Requirements**

In 2003, China's regulator, the Ministry of Information Industries (MII), reclassified several international value-added services as basic services. This action had the undesirable effect of delaying and impeding the ability of foreign entrants to offer these services, thus subjecting any would-be entrant to the excessively high capitalization requirements placed on new basic services providers. This reclassification has had an unwelcome market constraining effect. A basic services license is subject to a 2 billion RMB (approximately US$250 million) capitalization requirement, or 100 times the capital requirement for value added service licensees, which is itself many times the actual level of capital investment needed to build a national, non-facilities-based value added network. USCIB considers the existing capitalization requirement in basic services an excessively burdensome and unjustified restriction that violates Article VI of the GATS. The requirement was effected by State Council Order No. 333 of December 11, 2001, the day of China's accession to the WTO, and "could not reasonably have been expected" when China made its commitments, as stipulated by Article VI 5 (a)(ii). A narrowly tailored performance bond would be sufficient to address any existing concerns. In addition, the approval process for equity joint ventures is cumbersome and lengthy: four separate government authorities are required to approve such ventures pursuant to a long and complicated process. Although the issue of high capitalization requirements has been acknowledged on the agenda of the JCCT, China has not made meaningful steps to reduce the capitalization requirement to a reasonable level.

- **Market Access**

Market entry is being impeded by the MII’s extremely narrow views of what constitutes a value-added service for purposes of international value added network service licensing. The regulator has construed the meaning of value-added services in its WTO commitment schedule so narrowly that several offerings, such as international IP-VPN services demanded by global enterprises, are excluded. The Catalogue of Telecommunication Services defines basic and value-added services in a manner that discourages and severely limits new providers from entering China’s telecommunications market. The narrowing of the scope for value added services represents a counter-liberalization trend inconsistent with China’s WTO commitments. For example, it limits virtual private networks to “domestic” services, and deletes “resale” services. Furthermore, liberalization of pay TV platforms, including cable and Direct-to-Home would expand the opportunity for more foreign content to be broadcast.

Most markets around the world including many with the Asia Pacific region have fully liberalized their VAS markets – along Type 1 (facilities-based) and Type 2 (service-based resale) classifications – and permit 100% foreign ownership of VAS enterprises. This approach would have the positive effects as outlined in the document tabled by the United States and other WTO member countries on the benefits of telecommunications liberalization. (Document TN/S/W/50)

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, IP VPN, in conformity with the international norm; and,
- Lift the prohibition on resale enabling incumbent carriers, as well as new entrants, to acquire capacity at wholesale rates and interconnect their networks to deliver services to a broader reach of the country.

- **Independent and Impartial Regulator**

China is far from achieving its Reference Paper Section 5 commitment to establish an independent regulator. The Chinese Government owns and controls all of the major operators in the telecommunications industry, and the MII still occupies dual roles as protector of state enterprise operators and as industry regulator. The pending Telecom Law could improve this situation by mandating a regulatory body that is organizationally separate from government agencies that are focused on developing the state-owned telecommunications industry. Because this new law has been pending for a long time, finalizing and adopting it should be a top priority for the government. Interested parties must also be provided a reasonable period for review and comment on the Ministry's regulations and decisions as required by China's accession documents. For example, virtually no notice was given, and no comments invited, before the revised Telecom Catalog went into effect last year.

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;
- 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.

At present the regulatory environment in China is discouraging new entrants from participating. This will continue until foreign investors have confidence that China has a clear intention and a demonstrated plan to implement its WTO commitments.

- **Geographic Restrictions**

Notwithstanding the business model of the Internet, MII 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.

CONCLUSION

We appreciate the opportunity to express our concerns about China's WTO obligations and trust they will be useful in the Administration's on-going efforts to encourage China's compliance. USCIB stands ready to meet with U.S. agencies to discuss our recommendations and concerns at greater length.

ANNEX 1: EXAMPLES OF CERTIFICATION LICENSING AND TESTING REQUIREMENTS

Food Product and Animal Feed Additive Import/Export Clearance Regime. Public Announcement on the Import and Export Inspection and Quarantine of Human Food Products and Animal Feed Additives and Raw Material Products, jointly issued by the Administration for Quality Supervision, Inspection and Quarantine (AQSIQ), the Ministry of Commerce, and the General Administration of Customs on April 30, 2007 and effective May 15, 2007. This Announcement establishes a system whereby local port authorities under AQSIQ undertake product inspections of imports and exports considered to include products and materials in an associated list of goods/substances. The port authorities would only issue an "import/export goods clearance" document for those products and materials that they determine are not used for human food product or animal feed additive and associated raw material purposes. Only with this document can the Chinese Customs authority release the products in question for import or export. Many of the goods/substances on the list associated with the Announcement are used for both human food/animal feed and general industrial purposes.

Material Content Restriction Regime. Management Methods on the Control of Pollution in Electronic Information Products 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 drawing from the existing CCC Mark regime described below as a model for the new inspection, testing and certification regime.

New Chemical Registration Regime. Regulations on Environmental Management of New Chemical Substances, 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, 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 promulgated by the Certification and Accreditation Administration December 12, 2001 and effective on same date; Public Notice No. 38 of 2003 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 an increasingly wide variety of 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 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 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 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 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. The imported toy and other import and export testing and certification programs are under review and will expand in light of the ongoing concerns involving product quality.

Imported and Exported Battery Registration Regime. The Inspection and Management Methods on the Import and Export on Battery Products Containing Mercury 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.

ANNEX 2: TRANSPARENCY IN RULEMAKING

Common problems encountered by USCIB members in China stemming from the lack of transparency in rulemaking are illustrated by the following examples from the area of environmental regulation.

1. Rulemaking practices in China still favor the use of government agency-approved academic and technical experts who are often unable to impart into the rulemaking process the full range of industry experience relevant to a particular issue. Thus, many rules present very challenging compliance situations to foreign investors.

- Example: China Compulsory Certification (CCC) product quality marking regime. Exemptions from the marking requirements are available for certain products. However, in many cases, companies must apply for these exemptions and the exemptions must be renewed *each* month.

2. Insufficient industry input into the rulemaking process also facilitates the creation of product standards that are based on Chinese or other national models. Two problems result; i) Chinese industry is not designing for an international market and may eventually find itself hampered when it desires to find purchasers outside China, and ii) the resulting standard may prohibit import products that do not conform to these models.

- Example: The use of Chinese food products as the models for chemical content in certain standards included in the *Circular on Seeking Comments on the Hygiene Standard for Raw Milk*, [and other standards in a total of] *90 National Standards* (MOH).

3. Lacking insight into the realities of business, Chinese rulemakers often develop regulatory requirements that are aspirational in nature. This approach can serve as a barrier to compliance, especially for companies with U.S. and EU-type compliance cultures.

- Example: The *Regulation on Mercury Content Limitation for Batteries* (promulgated Dec. 31, 1997) sets 1 ppm mercury content restriction for certain battery chemistries. Chinese law drafters involved in the development of this Regulation indicated that one of their key goals in setting the very low mercury-content restriction was to spur local industry to reduce battery mercury content. However, the 1 ppm limit actually requires manufacturers to reduce the limit of mercury in batteries subject to the rule *below natural background levels*.

4. Often, a significant period of time passes before key implementing measures and documents are issued that enable compliance with a particular Chinese law.

- Example: October 18, 2002, the State Economic and Trade Commission (SETC) (now disbanded) issued *Regulations on the Registration of Dangerous Chemicals, Regulations on Licensing for Business and Sale of Dangerous Chemicals*, and *Regulations on the Manufacturing of Packaging and Containers for Dangerous Chemicals*. These regulations entered into effect November 15, 2002. However, the implementing rules for these laws were not released until November 21, 2002, and the associated registration/license application forms were not published until January 2003.