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

Submission to the United States Trade Representative (USTR)

October 3, 2011

UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS
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Introduction

U.S.-China economic relations are complex and multi-faceted, and USCIB companies have a direct and important stake in this relationship and in its success. Engagement and exchange of best practices with the Chinese government and business community will likely prove more productive than an approach treating China as an adversary. As China's economy has grown to second largest in the world, it is clear that there are strong incentives to working together on our common challenges and responsibilities.

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

In this response to the August 12th Federal Register notice, our members report on concerns with China's compliance with its WTO commitments in several key industry areas and more broadly with regard to regulations related to **indigenous innovation**, **intellectual property enforcement**, **transparency and standards**. At the same time we note encouraging signs that the U.S.-China relationship is growing in a positive direction. President Hu Jintao's visit to Washington, DC in January 2011 and on-going bi-lateral dialogues such as the U.S. China Joint Commission on Commerce and Trade (JCCT) and Strategic and Economic Dialogue (S&ED) as well as several working relationships between U.S. and Chinese agencies provide invaluable opportunities for exchange of information and resources.

We welcome the opportunity to submit comments on China's compliance with its World Trade Organization (WTO) commitments. USCIB actively supported the granting of Permanent Normal Trade Relations status to China, and called for its entry into the WTO. We appreciate the significant efforts China has made since joining the WTO in 2001 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 concern across sectors**, including anti-dumping, certification, licensing, discriminatory and burdensome standards, testing barriers, intellectual property rights, government procurement, market access restrictions, national treatment and non-discrimination, taxation and the regulatory environment. The second section includes **specific sectoral concerns** for various industries, and highlights the effects of the horizontal areas of concern specific to each industry. Finally, in the third section, we have included an annex that provides **examples of barriers to accessing the Chinese market in certification and licensing.**

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-discriminatory treatment** and **inadequate intellectual property laws** and lax enforcement of those laws. USCIB members have also called on China to provide sound regulatory environments for a host of sectors, including agricultural biotechnology, audiovisual, chemicals,

customs, electronic payments, express delivery services, software and telecommunications sectors.

In light of the continued development of **chemical and environmental regulatory systems** in China, as well as work to develop plans under the U.S.-China Ten Year Energy and Environment Cooperation Framework at the S&ED, USCIB strongly urges the Obama Administration to discuss the placement of Environmental Protection Agency (EPA) and other relevant U.S. officials in the Embassy and consulates in China. The local placement of such agency officials, even on a short term basis, provides our agency representatives with advance notice of and critical insights into challenges for U.S. companies and other stakeholders in China, increases the ability of our representatives to assist such stakeholders, and minimizes the likelihood that extensive resources will need to be applied to address crises that could have been avoided through earlier notice and engagement.

We appreciate the Administration's efforts in addressing industry's concerns regarding the protection and enforcement of intellectual property rights in China as well as China's Indigenous Innovation Policies. We have detailed throughout several sections of our statement the various issues our member companies are facing as a result of a combination of policies that are not in line with China's WTO commitments. Although we acknowledge that the Chinese government has been receptive to input regarding their proposed Indigenous Innovation policy, our submission outlines industry's remaining concerns. We look forward to further progress at the next U.S.-China Joint Commission on Commerce and Trade (JCCT) meeting, and in particular look to the JCCT IPR Working Group to ensure that all agencies come to the table on relevant issues and would welcome greater inclusion of industry moving forward.

We would be pleased to meet with officials at U.S. agencies to discuss recommendations and concerns at greater length.

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I. CROSS-SECTORAL BUSINESS ISSUES

I. CROSS-SECTORAL BUSINESS ISSUES

ANTI-DUMPING

USCIB urges the Chinese government to incorporate transparency and procedural fairness into the anti-dumping process. USCIB remains concerned that anti-dumping cases at times are being used 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 anti-dumping cases, particularly as it pertains to the submissions by Chinese petitioners. Chinese authorities proceed to accept incorrect and misleading statistics without disclosing actual data submitted, and not in a summarized form. This practice is especially true in the injury phase of the anti-dumping procedure.

Chinese customs authorities struggle with proper classification procedures, misclassifying products, resulting in erroneous conclusions based on inaccurate statistics in both the dumping and injury phases of anti-dumping cases.

- **Procedural Transparency**

Specifically, both WTO and Chinese laws and regulations have requirements of procedural transparency. Pursuant to Article 6.9 of the *WTO Anti-dumping Agreement*, the authorities shall inform all interested parties of the essential facts under consideration that form the basis for the decision whether to apply definitive measures. Moreover, according to Article 54 of the Chinese *Anti-dumping Regulations,* a public announcement shall state important situations, facts, reasons, evidence, results and conclusions. However, during actual anti-dumping investigations, the Ministry of Commerce (MOFCOM) usually conceals the facts and reasons for which determinations are based.

- **Transparency in Accepting Applications**

Article 5.2 (i) of the WTO *Anti-dumping Agreement* and Article 17 of China's *Anti-dumping Regulations* provide criteria for accepting an application: "Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements" (Art. 5.2, WTO Agreement). However, MOFCOM rarely explains facts and reasons for the acceptance of applications in anti-dumping practices. Rarely is evidence provided for dumping, injury, and the causal link between them, as required by the WTO agreement, nor is evidence provided with respect to the output of supporters, output of opponents, and total output of the same domestic product, as required by the Chinese regulation.

Moreover, MOFCOM has not explained why petitions were qualified as "supported by those domestic producers whose collective output constitutes more than 50 percent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application", as required by Article 5.4 of the WTO Anti-dumping Agreement and Article 17 of China's Anti-dumping Regulations.

- **Transparency in Disclosure of Information Used by MOFCOM**

Article 6.4 of the WTO *Anti-dumping Agreement* gives requirements for information disclosure during anti-dumping investigations, "The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information."

Nevertheless, in Chinese anti-dumping investigations, MOFCOM rarely provides all relevant information to interested parties. For example, MOFCOM always treats data of Chinese domestic industry in petitions as confidential, which is not "by nature confidential" and should be open to all interested related parties instead. As a result, MOFCOM impairs interested parties by denying their right to know and corresponding remedial right.

- **Transparency in Information as Basis of Determination**

Article 12.2 of the WTO *Anti-dumping Agreement* states that "Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein."

In Chinese anti-dumping investigations, MOFCOM usually keeps the facts used in the determination of the findings confidential. Particularly in its notice of information disclosure before preliminary or final determination, MOFCOM seldom explains explicitly the calculation method of dumping margin and gives a rough summary instead, which makes it impossible for interested parties to know each step of the calculation course, nor the facts and reasons of the method for calculating. As a result, interested parties have to deduce from MOFCOM's determination and speculate facts and reasons as basis of determination, and the ultimate effect on the findings.

- **Transparency in Injury Determination**

Article 3.1 of the WTO *Anti-dumping Agreement* states that a determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent

impact of these imports on domestic producers of such products. Meanwhile, Article 3.4 of the WTO *Anti-dumping Agreement* also states: "The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance. Article 8 of China's *Anti-dumping Regulations* is similar in outlining the conditions to determine injury.

Nevertheless, MOFCOM rarely provides the aforementioned data, thus interested parties know little about the basis on which the injury determination was made, nor the way to seek appropriate relief.

- **Transparency in Best Available Information**

Article 6 of Annex II of the WTO *Anti-dumping Agreement* states that "If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefore, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations." In Article 21 of China's *Anti-dumping Regulations*: "When the Ministry of Commerce conducts an investigation, the Interested Parties shall report the situation accurately and provide relevant information. If an Interested Party fails to report the situation accurately or to provide relevant information, or fails to provide necessary information within a reasonable period of time, or adopts other means to impede the investigation, the Ministry of Commerce may make a ruling based on the facts already obtained and the best information available."

It is quite common for MOFCOM to preclude evidence provided by interested parties without giving any reason for the rejection of such evidence or information. Similarly, MOFCOM seldom explains the best available information and why it can be accepted to replace information provided by interested parties.

MOFCOM frequently conceals relevant facts and evidence that its findings and conclusions are based on in its anti-dumping investigations, which not only violates the WTO principle of transparency and the requirements from specific provisions in China's anti-dumping regulations, but also impedes procedural rights and substantive interests of related parties.

CERTIFICATION, LICENSING, AND TESTING BARRIERS

In a number of areas the Chinese government has established certification, licensing, and testing requirements on products in services, 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, infrastructure (e.g., qualified laboratories) to carry out the requirements, and/or certification requirements that mandate disclosure of confidential business information, the requirements often function as barriers to those products' and materials' access to the Chinese market.

These requirements affect a broad cross-section of U.S. industry and are a concern to a growing number of sectors. Examples include the chemical registration regime, the battery registration regime, the imported pharmaceuticals program, the regime for restricting the material content of electronic products, and the cybersecurity certification requirements for information technology products (known as the Multi-Level Protection Scheme, or MLPS). A more extensive list of requirements and areas affected are listed in the Annex of this document.

In such cases, particularly as in 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 to collect information that could be obtained through less-burdensome and costly means;
(h) requirement in some certification programs that the importer undergo annual certification reevaluations, including at the fourth and fifth years after certification, extensive repeats of the entire certification process (including sampling and site visits).
(i) burdensome testing and certification requirements that diverge from and/or duplicate established international testing and certification procedures.

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. Also, certain testing requirements, such as the MLPS regime for information technology products, create market access barriers based on domestic intellectual property ownership or other discriminatory factors and impose invasive testing requirements that make it difficult for foreign suppliers to compete on a level playing field in China.

We have noted an increase in voluntary certification programs. While "voluntary" programs can sometimes be perceived as less burdensome for the regulated community, these programs can present many of the same attributes described above and also present challenges for the regulated community, particularly if the programs are linked to government procurement or are otherwise encouraged or mandated by the government or particular industry sectors. Such voluntary schemes may also be structured in ways that artificially advantage domestic suppliers and discriminate against foreign suppliers.

We have also observed a new term called "voluntary certification promoted by the State" which has recently appeared in some Chinese regulations. This has manifested recently in the form of a voluntary materials restriction certification program under the "Management Methods on the Control of Pollution in Electronic Information Products" (popularly referred to as "China RoHS"). The Certification and Accreditation Administration (CNCA) and Ministry of Industry and Information Technology (MIIT) announced this program via the Circular on Issuing Opinions on the Implementation of the Unified Voluntary Certification Program for Electronic Information Products Subject to Pollution Control, issued May 18, 2010, and effective the same date. These Opinions made it clear that the Chinese government would potentially use means such as linking the voluntary certification program to the country's government procurement program to incentivize industry participation in the program. On August 25, 2011, CNCA promulgated the Implementation Rules for Voluntary Certification in Controlling Pollution from Electronic Information Products Uniformly Promoted by the State. These Implementation Rules enter into effect November 1, 2011. In addition, also on August 25, 2011, CNCA issued a catalogue of products and exemptions list for the voluntary certification program. These documents were issued one day following the deadline for comments on the draft versions of these documents.

In reviewing the voluntary certification program rules and other documents mentioned above, USCIB members are concerned that the voluntary certification raises the following key issues for industry in the area of conformity certification in China:

- The certification rules require disclosure of proprietary and confidential business information. Divulging information such as the identity of raw materials, supplier names, the list of build materials and material trade names for each product would result in such disclosures. Access to such proprietary and confidential business information is not necessary to demonstrate a product's conformance to substance restrictions, which can be demonstrated instead through other means, such as product testing and market surveillance.

- Factory inspections and on-site sampling, included in the certification rules, as well, are also not necessary for certifying conformity of products to substance restrictions. As mentioned above, product testing (off site) and market surveillance should alone be sufficient to address risks and determine conformity of the products to the certification requirements.

- The certification rules also present lengthy product or complex component testing times. This may be especially problematic for products that have short product lives (e.g., 3 months). Industries goal would be to have RoHS certification process completion at under 10-15 business days.

- The voluntary certification program would employ only China-based, qualified laboratories for testing under the program. This would channel the world's supply of materials, commodities, parts and products to a very small number of labs, potentially causing massive barriers for delivery of affected industry products into China. Further, added requirement to test using China-based, qualified labs also increases cost for delivery of the product to market, resulting in a negative economic impact.

- Generally speaking, the above concerns would be less cause for alarm if the certification program were legally, and in practice, voluntary. However, the aforementioned 2010 Circular on Issuing Opinions on the Implementation of the Unified Voluntary Certification Program for Electronic Information Products Subject to Pollution Control, suggest that linkages with China's government procurement program, as well as other methods that may make participation in the voluntary certification program *de facto* mandatory, may develop. Further, industry members have observed from discussions of the voluntary certification program with the Chinese government that the voluntary certification program will serve as a "test model" for the pre-market *mandatory* certification program that is being developed for future implementation. This model of "voluntary" evolving into "mandatory" raises trade agreement compliance concerns. If the voluntary certification program is, in a sense, the first stage of evolution toward a mandatory certification program, then stakeholder notice of and participation in the program is critical to ensure that stakeholders are sufficiently aware of the requirements and have opportunities to address compliance concerns. However, as a voluntary program, notice and public participation has been limited, at best, supported with the claim that participation in the program is not mandatory.

A higher-level dialogue is called for to identify a less burdensome approach to balancing the compliance assurance needs of China's multitude of agencies with industry's needs for predictability, fairness, meaningful opportunity to comment on proposed rules, 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 international scheme operated by the IEC System for Conformity testing and Certification of

Electrotechnical Equipment and Components (CB scheme) to include acceptance of Recognized Manufacturer Testing and Supervised Manufacturer Testing; (ii) promoting the agency acceptance of company self-declarations of conformity (with relevant regulatory requirements); and (iii) eliminating mandated in-country testing to allow testing for electromagnetic compatibility (EMC) safety, wireless, chemical ecotoxicity, 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). 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 committed to formal negotiation to join the GPA and submit its first GPA offer of coverage. However, this initial offer of coverage and accompanying regulations issued in December 2008 were very disappointing and heavily skewed toward 'buy Chinese first' and technology transfer conditions.

In July 2010 China made a revised offer to the WTO Government Procurement Committee which had some improvements from their 2008 offer. China's new offer added fifteen central government agencies including the National Bureau of Energy and the General Administration of Civil Aviation of China to the coverage. They also reduced the threshold for purchasing contracts by central government entities to a lower amount and also reduced the implementation period to five years from fifteen years. While USCIB views these revisions as a step forward, we note that the offer still does not cover sub-central government agencies or state-owned enterprises (SOEs). The proposed final threshold for central government purchasing is still three times the level of most other GPA members.

During his January 2011 visit to the United States, President Hu announced that China would submit a renewed GPA proposal by the end of the year. Given the overwhelming role of the Government in the Chinese economy and the size of the government procurement market relative to the overall Chinese market, the United States should press China to submit a revised and improved GPA offer at the earliest possible date. Among other things, the revised offer should:

- *<u>Ensure that China commits to reasonable thresholds</u>*. China's prior GPA offers have set unreasonably high monetary thresholds for coverage, meaning that many sales with respect to which U.S. suppliers seek access to China's government procurement market would fall below the thresholds and thus be subject to discriminatory treatment or other trade barriers. The United States should insist that China accept at least the same procurement thresholds that the United States has extended to other parties under the GPA.

- *Cover all applicable procurement by state-owned enterprises (SOEs)*. China has previously taken the position that SOE procurement should be excluded from China's GPA commitments. However, under current GPA rules, procurement (by state-owned enterprises or otherwise) qualifies as government procurement, and therefore is subject to the GPA, if the procurement is made by a "covered entity" (*i.e.*, one listed in one of the Appendix I annexes) and is for governmental purposes. A substantial amount of procurement by Chinese SOEs is arguably "for governmental purpose" and therefore should fall within the scope of China's GPA commitments. The USG should insist that China include, in its Appendix I annexes, *all* SOEs that procure goods or services "for governmental purposes" and should resist any effort by China to place such SOE procurement outside the scope of the GPA. At the same time, to the extent SOEs procure for purposes other than governmental purposes, they should be subject to the applicable commitments set out in the China WTO Accession Agreement.

The United States should also urge China to commit that Chinese government agencies will use only non-infringing software. The United States already has such a commitment in place with respect to U.S. federal agencies through Executive Order 13103, and recent U.S. FTAs include similar commitments._These commitments promote trade in information technology and help instill respect for intellectual property rights--areas in which China urgently needs to make further progress. China repeatedly has committed, in the JCCT and elsewhere, that its governmental entities *and* SOEs would use only legally licensed software. Codifying this commitment in China's accession to the GPA would give it the stature of binding international law and provide a neutral forum to resolve future disputes over this issue.

Ultimately, 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 also remain concerned that U.S. suppliers are being excluded from government procurement--particularly at the provincial and local levels--on the basis of government procurement "product catalogues" that require government agencies to extend procurement preferences to domestic suppliers and IP owners for several categories of products. China initially issued these catalogues in an effort to advance its Indigenous Innovation policies, set forth in its 2006 *Outline of the Medium- and Long-Term Planning for the Development of Science and Technology* and since then reiterated in many other Chinese proposals and other documents.

At the 21st annual JCCT in December 2010, China stated that it would abandon these policies, specifically committing that it "will not adopt or maintain measures that make the location of the development or ownership of intellectual property a direct or indirect condition for eligibility for government procurement preferences for products and services." In direct response to U.S. "concerns that . . . product lists could be used to provide government procurement preferences to indigenous innovation products," China committed that, "[i]n government procurement, China will give equal treatment to all innovation products produced in China by foreign-invested

enterprises and Chinese-invested enterprises alike." President Hu, during his visit to Washington, DC in January 2011, reiterated these commitments. Shortly thereafter, at the conclusion of the third Strategic and Economic Dialogue (S&ED) in May 2011, China reiterated its "pledge" to eliminate all of its government procurement indigenous innovation products catalogues and revise Article 9 of the draft Government Procurement Law Implementing Regulations as part of its implementation of President Hu's January 2011 commitment not to link Chinese innovation policies to government procurement preferences."

Despite these multiple commitments, there are signs that Chinese government agencies--particularly at the provincial and local levels--are continuing to rely on the product catalogues and are continuing to discriminate in favor of local suppliers and against U.S. and other foreign suppliers. To ensure that China's JCCT and S&ED commitments are implemented in practice, China's leadership should issue a directive to all government agencies, including provincial and local agencies, clarifying that China has expressly reversed its policy of extending procurement preferences to domestic products and suppliers and that all government policies (national, provincial, and local) linking the product catalogue to procurement should be terminated. The United States should also press China to issue a clear statement--to all levels of government and to SOEs--prohibiting discrimination on the basis of nationality or origin in procurement, subsidies, or related measures.

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 and otherwise ensure the use of open, fair, and transparent procurement procedures and related measures.

INTELLECTUAL PROPERTY RIGHTS

Since acceding to the WTO and taking on obligations in the area of intellectual property rights (IPR) protection, China has improved most of its key IPR laws, and has made some limited progress in combating copyright piracy and trademark counterfeiting. However, despite these improvements, piracy and counterfeiting at the wholesale and retail level, and over the Internet, remain rampant due to continued deficiencies in criminal thresholds law, inadequate penalties, uncoordinated enforcement among local, provincial and national authorities, burdensome procedures, and 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 about infringers and infringing activities. 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 the 2007 intellectual property (IP) regulations were 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. We are also concerned about the rapid growth in damages primarily for Chinese companies in IPR litigation, with continuing burdens for foreign litigants, as well as patent trends which encourage the development of relatively low quality, unexamined patents which may be asserted against foreigners (e.g., design and utility model patents).

- **Copyright Concerns**

Pirated software and 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 remains nearly 80% for business software (down from 92% in 2003). The copyright law provides inadequate criminal liability for copyright offenses, and high and unrealistic thresholds which make bringing a criminal copyright case virtually impossible. Criminalization without a profit motive needs to be accomplished.

On April 5, 2007, the Chinese government issued revised Judicial Interpretations (JI) but these revised interpretations continue to fail to criminalize all copyright piracy conducted on a commercial scale. Enforcement in line with international standards is sorely lacking. We urge the U.S. to continue to press the Chinese government to establish reasonable and appropriate thresholds for commercial scale piracy consistent with trade-related aspects of intellectual property rights (TRIPs) standards, in particular to address the digital piracy problems.

Piracy of business software, in particular by enterprises and government agencies, remains a major problem as well. According to a leading research firm, China's PC software piracy rate in 2010 was nearly 80%, representing stolen software with a commercial value of nearly $7.8 billion. China has made numerous commitments and launched multiple campaigns over the past several years to require all government agencies, SOEs, and other enterprises to use only legal software. So far, however, these have resulted in only incremental progress. Moreover, there are reports that China has encouraged government agencies and SOEs, when they legalize their software, to discriminate in favor of domestic suppliers and against U.S. and other foreign suppliers. The United States should continue to press China to make concrete progress in eliminating software theft in China and should insist upon clear metrics for measuring progress. We discuss these issues further in the section on "Software," below.

In newspaper and magazine and journal publishing, copyright and trademark protection remains lax. Copyrighted content for domestic sale and distribution is still regularly pilfered from competing U.S. and foreign sources with impunity, making it both impractical and unprofitable for American publishers and authors to invest in high-quality research and editorial content. Chinese entities are profiting at the expense of U.S. publishers' investment and intellectual property.

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. 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), Prosecutors and Criminal Judges. The PSB needs to treat criminal enforcement of IPR offenses as a top priority. Enforcement remains slow, cumbersome and rarely results in deterrent punishment. Although Chinese authorities have undertaken some administrative enforcement actions against pirates, the government's refusal to share information about the activities of these pirates, to cooperate in the verification of the source of pirated goods, or to publish the ultimate outcomes of these actions makes it very difficult for right holders to assess the deterrent impact of China's enforcement efforts. A lack of information sharing and a sound case-transfer system between administrative agencies and PSBs is also a serious hindrance in bringing more cases into criminal prosecution and conviction with higher penalties.

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 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 generally are reluctant to issue decisions in corporate end user infringement cases, instead urging the parties to settle. Despite some recent successes by U.S. rights holders in civil infringement cases, civil enforcement remains unpredictable 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, with adequate penalties to deter further infringement.

China adopted regulations to its Copyright Law in order to implement the World Intellectual Property Organization (WIPO) Internet Treaties effective on July 1, 2006. The regulations 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 technological protection measure (TPM) provisions only protect against circumvention in relation to the right of making available.

Both the civil Copyright Law and IPR provisions of the Criminal Code need to be revised to reflect the development of new technologies and international standards/practice of enforcement, especially with respect to digital piracy. In this regard, we would like to highlight the growing importance of piracy on Chinese User Generated Content and P2P streaming sites.

Specific areas where the Copyright Law should be revised include (but are not limited to):

(1)The law attaches minimal protection to unapproved works because of censorship, which was recently held incompatible with TRIPS by a WTO panel; (2) the "right of communication through information network" is limited to interactive on-line transmissions, which is narrower than the "right of communication" set out in the WIPO Copyright Treaties; (3) the law should provide for clear protection against unauthorized on-line retransmission of live TV broadcasts and especially sports programming; (4) the law should reflect a clear policy to encourage and/or mandate streaming video sites to implement more sophisticated and effective anti-piracy solutions including filtering and automatic takedowns; (5) the law should prohibit camcording of motion pictures by redefining the "personal use" exemption; and (6) the law should increase penalties against violations by providing higher maximum statutory damages, setting forth a minimum threshold for statutory damages, and providing for punitive damages against willful infringers.

The IPR provisions in the Criminal Code have not been revised since 1997, even after China joined the WTO in 2001, even though other key IPR laws, including the Patent Law, Trademark Law, and Copyright Law, have been amended since 2001 to bring them into compliance with China's TRIPs commitments. We believe the IPR provisions in the Criminal Code should be revised to be fully compliant with TRIPs—most importantly, to provide criminal penalties "that are sufficient to provide a deterrent" (TRIPs, art. 61) against piracy and counterfeiting. For example, Chinese courts currently interpret the "for profit" requirement that exists under Article 217 of the Criminal Code in a manner that is significantly narrower than the "on a commercial scale" requirement of Article 61 of TRIPs. As a result, it is effectively impossible to obtain criminal remedies against corporate end user software piracy (despite the clear commercial impact and purpose of such piracy), hard disk loading software piracy, and online software piracy. Such loopholes should be fixed either by amending the IPR provisions in the Criminal Code or by clarifying its scope in a new judicial interpretation. Otherwise, China will continue to violate its obligations under Article 61 of TRIPS to provide criminal remedies "sufficient to provide a deterrent" to these forms of commercial-scale piracy.

- **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. Moreover, in certain areas, such as pharmaceuticals, counterfeiting not only deprives the owners of intellectual property of the value of their assets, but further poses a threat to public health, along with the consequent economic costs.

Another challenge faced by major U.S. brand holders is the approval and status of certain trademarks in China. For example, 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.) When China refuses to grant "well known" or "famous mark" status to internationally renowned trademarks originating outside China, it deprives foreign trademark owners of the ability to fully protect and enforce their trademarks against infringement and piracy in China.

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.

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

China fails to provide adequate protection for .cn ccTLD disputes due to the limited time period offered to trademark owners to object to .cn infringements. If a domain name has been registered for more than two years, a China Internet Network Information Center ("CNNIC") dispute

resolution service provider will not accept a CNNIC Domain Name Dispute Resolution Policy ("CNDRP") complaint. The only option available to trademark owners who identify such infringements outside of this limited time period is to file a lawsuit in court. We wish to see this time period removed so that trademark owners may file a CNDRP complaint at any time. Anything less is violative of the provisions of GATT-TRIPS, Article 41(2), which prohibits "unreasonable time-limits" that would prevent the fair and equitable enforcement of intellectual property rights.

- **Fraudulent Domain Name and Internet Brand/Keyword Application Notices and Non-solicited Marketing**

China fails to address Chinese domain name registrars and fraudsters, who, through email scams and marketing ploys, attempt to solicit trademark owners to purchase domain names and Internet brands/keywords by sending false notices regarding individuals who purportedly are seeking to register the trademark owner's trademarks as domain names and Internet brands/keywords. The registrars then solicit the trademark owners to register such domain names and Internet brands/keywords at exorbitant registration rates. These solicitations attempt to create a false sense of urgency and a need for trademark owners to react because they often set a specific deadline for response.

By way of illustration, one large company has documented the recent receipt of twenty six (26) separate email scams. In each case, the domain name(s) and Internet brand(s)/keyword(s) touted for purchase by a particular deadline were either available for registration or, were already owned by the same company who was being solicited. In fact, all the solicited domain names and Internet brands/keywords listed on the attached chart were never registered and continue to remain available today, thus further confirming the fraudulent nature of these solicitations.

These scams are widely directed to many large and small U.S. companies and continue to cause considerable confusion and disruption to business operations. Many companies have informed each Chinese registrar/fraudster that they have no interest in registering any domain names or Internet brands/keywords with them. As stated above, contrary to their fraudulent emails, many companies often already own the domain names and the Internet brands/keywords identified in their emails or have no interest in registering other domain names. Unfortunately, the sending of cease and desist letters does not appear to deter these scammers from continuing to inundate executives and employees of U.S. companies with similar fraudulent emails.

A number of complaints regarding this unlawful activity have been submitted to the United States Federal Trade Commission and the Office of the Telecommunications Authority of the Hong Kong Special Administrative Region ("OFTA"). We have yet to see the OFTA, the Hong Kong police or the Chinese police take any action to address this matter. This activity constitutes trafficking in trademarks and unfair competition in violation of Article 10bis of the Paris Convention (1967), and, often times, unlawful use of a trade name contrary to the provision of the Paris Convention (1967) Article 8 or unlawful use of a famous mark contrary to the provisions of Paris Convention (1967) Article 6bis. All relevant provisions of the Paris

Convention (1967) have been adopted by reference into the GATT-TRIPS agreement by operation of GATT-TRIPS Article 2(1).

- **Seized Storage Costs**

U.S. corporations have been 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 rights-holder 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.

One significant concern is the PRB's application of raised patentability standards ("sufficiency" standard) with respect to pharmaceutical and biotech patent applications. While the Chinese Patent Law and Implementing Regulations appear on their face to be in alignment with international patentability and TRIPS standards, in practice, both SIPO and PRB follows the "Patent Examination Guideline" which sets out a 'convincing' standard clearly higher than the TRIPS standards provided in Article 29.1 . When the PRB's decision is appealed to the Courts,

the Courts in practice always follow the "Patent Examination Guideline" standard or extrapolate further. This results in the requirement of additional data that is often not required in other major jurisdictions. The data is moreover required at the time of filing, giving the applicant no opportunity to supplement with data they were not aware would actually be required. The sufficiency standard is becoming the most common tool by which the PRB rejects pharma and biotech applications, or narrows them to such limited scope so as to be worthless. The PRB will also use the sufficiency standard once again after patent grant as a means by which to invalidate the patent.

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 amendments to the Patent Law, which became effective in 2009, impose additional burdens on foreign inventors and create barriers to trade. For instance, the 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, in fact expand the scope of compulsory licensing in several ways that are inconsistent with TRIPS. The amendment to Article 20 will require foreign parties intending to file patents abroad to obtain first a foreign filing license from the Chinese patent office. This requirement may not only be in conflict with requirements of other countries, thereby resulting in complex, unsolvable legal conflicts for inventions with multiple inventors from different countries, it is also administratively challenging for multinational firms and therefore would deter foreign R&D investment. For example, since there is no mechanism for a retroactive foreign filing license, the requirement can potentially invalidate a patent in which Chinese inventorship is only discovered afterwards. Moreover, the term 'made in China' is vague and ambiguous, such that it is not clear as to what inventive activities fall within the scope of Article 20 and would require such a license. Many companies must go through considerable expense and uncertainty in order to ensure compliance.

Further, the amendments to Article 5 of the Law (together with Rule 65 of the Implementing Regulations) provides for invalidation of patent rights if the completion of the invention depended on the acquisition and exploitation of genetic resources that is contrary to the "relevant laws and regulations of the state." Applicants are provided little guidance as to what the relevant laws and regulations are, and many laws and regulations, such as the 1998 Interim Measures on Human Genetic Resources themselves contain provisions that can be unclear. Article 26 of the Law requires patent applicants to indicate the source and origin of genetic resources if the completion of the claimed invention depended on genetic resources. The failure to identify the geographical source and origin of a biological material used in the invention can be a basis for rejecting a patent application. The potential for invalidation by unintended or accidental improper acquisition, together with these special disclosure requirements impose unreasonable

burdens on patent applicants and subject valuable patent rights to great uncertainty. Moreover, these amendments raise serious issues of consistency with China's obligations under the TRIPS Agreement, as well as under the Convention on Biological Diversity. Under Article 27.3b TRIPS WTO members are required to provide for protection of plant varieties under patents or sui generis system or a combination of both. China is excluding from patentability any claims on plants. On the other hand China does not provide for protection under the Plant variety Protection law for all plant species but only for a limited list which lacks many varieties especially in the ornamental and vegetable sector. In consequence there is a protection gap which is non-compliant with TRIPS.

In addition, the amendment of Article 63 of the Patent Law now codifies parallel importation by stating that it is not an act of infringement when "anyone uses, offers, to sell, sells or *imports* a patent product or a product directly obtained from a patented process…" The language does not distinguish between restricted sales and unrestricted sales. Members of USCIB are concerned that the adoption of parallel importation has the potential to introduce unmanageable safety risk, as well as create great distortions in the marketplace.

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 the area of pharmaceuticals that is subject to time-consuming and demanding regulatory requirements, there needs to exist an effective linkage between the regulatory agency and the enforcement of patents to protect the significant investment of innovator pharmaceutical companies to losses from approval of patent infringing generic drug products. Effective patent linkage provides transparency to the drug approval process, for example by offering information about generic drug regulatory applications and approvals. Some of these requirements are part of SFDAs own regulations (e.g., Ch. II, Art. 18) but are not actually practiced.

China also instituted a Bolar exemption which effectively reduces the patent term by enabling infringement by generic manufacturers without providing patent term restoration to innovators for their delay in obtaining patents and regulatory approval.

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 research and licensing. A number of overlapping statutes governs technological contracts in China: the *Contract Law* and the Supreme People Court's 2005 *Interpretation of Contract Law;* the *Rules Promoting the Transformation of Scientific and Technological Achievements*, and the *Regulations on Technology Import and Export Regulations* each govern an aspect of technology contracts but cumulatively create uncertainty and impose obstacles for foreign companies

conducting research activities with Chinese companies. In particular, the *Regulations on Technology Import and Export Regulation* of January 1, 2002 defines 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 *Antimonopoly Law* (AML), which came 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).

As the implementation process moves forward, USCIB members urge for fair, transparent, consistent, and coherent enforcement of the AML implementing regulations. We appreciate China's willingness to issue draft implementing guidelines respecting several AML provisions and urge China to make available for review and comment, as soon as possible, all future implementing guidelines. 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 to clarify remaining ambiguities in the legislation and to ensure that the AML fosters 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 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, damages are so low as to lack deterrent value, and local protectionism can be a serious obstacle. Foreign companies are often reluctant to transfer key trade secrets into

China because of the serious threat of misappropriation by competitors and employees and the near impossibility of enforcement. The legal infrastructure for the enforcement of trade secrets (including breaches of contracts relating to 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.

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 to be open to any firm able to meet objective criteria. Market access should not be hindered through licensing systems subject to arbitrary government decisions. Recent efforts and initiatives to rollback existing market access for foreign companies are particularly alarming.

NATIONAL TREATMENT AND NON-DISCRIMINATION

In accepting the obligations inherent in WTO membership, China essentially agreed to treat imported goods no less favorably than goods produced in country. As part of this agreement, China agreed to repeal all rules and regulations that were inconsistent with this "most favored nation" obligation. Implicit in this is that China would not adopt requirements that effectively treated import goods less favorably. USCIB members call on China to abide by these commitments of national treatment and non-discrimination. Moreover, where China has allowed foreign business participation in a market currently, China should not reform legislation in a manner that prohibits future participation in that market by foreign-owned enterprises.

REGULATORY ENVIRONMENT

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

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. Further, on April 29, 2008, the General Office of the State Council issued the *Opinions on Several Issues Concerning Implementing the Regulations on Publication of Government Information*. The Opinions clarify a number of issues that arose during implementation of the Regulations on Publication of Government Information.

More recently, the State Council and State Council agencies continue to reinforce transparency with the publication of their lawmaking plans. For instance, see Circular Printing and Distributing the State Council Legislative Work Plan for 2010 (issued by the State Council General Office). The Circular sets out the State Council legislative work plan and related requirements for 2010. Additionally, the State Council released a Circular on Further Strengthening the Management of Government Websites on April 21, 2011 that requires that local governments and government departments, among other things, timely disclose on their websites material decisions relevant to the interests of the people and any interpretation of important policy and responses to any critical social concerns.

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. Chinese agencies may also, for instance, provide notice of and comment opportunity for a framework regulation, but decline or neglect to provide notice and comment opportunities for the administrative measure that implements the framework regulation. Key compliance details are typically in the implementing administrative measure, not the framework regulation. 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 and do not allow time for translation, 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, on August 16, 2011, the Ministry of Industry and Information Technology (MIIT) and the Certification and Accreditation Administration (CNCA) posted on the MIIT website a draft catalogue of products, components and materials that would be part of China's proposed voluntary materials restriction certification program. The deadline for comments was August 24, 2011 (roughly one week later). The final version of the Catalogue, however, was published on

August 25, 2011, one day following the comment deadline. It remains uncertain whether and how USCIB member comments on this important scoping document were incorporated into the final version. We encourage USTR to press for more meaningful and predictable notice and comment opportunities.

STANDARDS

Standards set forth technical requirements and metrics often associated with legal norm-setting documents such as statutes and regulations. Therefore, standards are commonly viewed as a key component of "implementing measures" associated with China. Standards are typically "stand alone" documents (i.e., separate documents from the regulations or other laws that the standards may implement) that are marked with varied, alphanumeric designations and can be either mandatory (i.e., set forth regulatory requirements) or voluntary (i.e., viewed as technical information or non-mandatory guidelines). National mandatory standards, for example, can have alphanumeric designations starting with the letters "GB" or "GWKB" followed (for more recently issued standards) with a four-digit year indicating the year of issuance (e.g., 2009). National voluntary standards, for instance, can have alphanumeric designations starting with letter/hyphen combinations such as "GB/T", or "SJ/T", etc., followed with a year designation.

China has committed to moving from a low-cost manufacturing country to an innovation country by 2020. Because China views innovation as the foundation for developing science and technology, China is increasingly utilizing standardization, or the development of standards, as a key element of the national innovation drive.

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

- **Proliferation of Standards at a Rapid Rate**

Standards are generally the most numerous legal measures in areas that involve highly technical issues, such as environment (including chemicals), labor safety, health, and food and product quality. These measures are issued with increasing rapidity and often can significantly affect company China operations and the China market access of company products. Therefore, it is increasingly important to monitor the development of such measures. This monitoring activity would need to cover individual agencies as well as China's primary standard publisher, the Standardization Administration of China (SAC), and WTO notification bodies. Tracking standard development is easier in some aspects, such as via the SAC web site. However, this only helps monitor certain types of national standards. The problem, which warrants discussion via the JCCT dialogue, warrants outreach to the Chinese government for solutions, involves the development of standards affecting members at potentially each of the many Chinese agencies

regulating USCIB member company operations and products, and at the local level, with different designations and limited access and stakeholder input.

Over the last seven years, at the national level alone, standards on all subjects have been developed at an increasingly rapid rate. For instance, in April 2002, the Ministry of Health issued 157 occupational health standards that the government and other observers regard as the forefront of a "new era of occupational health standards." In the product quality area, the Chinese government announced in January 2008 that it would speed up legislation and frame 10,000 national product quality standards to help battle against shoddy products. Additionally, highlighting the massive volume of standards affecting USCIB members that are being generated in China, the SAC's most recent standard development plan (ending in 2010) involved development of approximately 650 national standards and more than 270 "industrial" standards.

The proliferation of standards calls for a mechanism, such as a Chinese government database, to provide comprehensive and timely access to standards of all kinds. Further, high level dialogue on how existing standards are being implemented can help assess options for developing China's science and technology regulatory foundation in a manner that provides USCIB members with meaningful notice, access to, and understanding of the standards that affect the member operations and their products.

- **Access to Standards**

A number of China's laws addressing the development of standards state that opportunities for "public comment" should be provided during the standard-drafting process. USCIB members have reported recently that there have been many opportunities to comment on standards before they are finalized. However, the laws do not mandate a standardized process for the public comment process where standard drafting is concerned. The laws also encourage the adoption of international standards where appropriate and possible. Similarly, insufficient details are provided on how international standards should be incorporated into the Chinese standardization regime. The lack of detail in the laws on these key issues, similar to ambiguities that are present in China's legal measures as a whole, actually give standard drafters significant discretion to decide how they will or will not solicit public comments and incorporate international standards.

Also problematic is that some Chinese standard development authorities treat standards as "proprietary" documents, rather than as public laws. For instance, published voluntary or mandatory standards typically include statements as to copyright (e.g., at end of the standard document, above the price for the standard) and are watermarked in color to hinder copying. This is also why full texts of such standards, or at least texts of recent, national (GB) standards, are not generally accessible in full text on government or other public web sites in China. While this proprietary treatment may be defensible for voluntary certification and other standards such as those developed under the auspices of entities such as the International Organization for Standardization (ISO), such treatment is not logical where compulsory or related standards are concerned. Such standards, as part of Chinese law, should be as accessible to the public to

facilitate compliance. Treating such standards as proprietary documents complicates access and frustrates the compliance assurance process.

- **Participation by Foreign Stakeholders**

Regulations issued by the Standards Administration of China provide that foreign-invested enterprises registered in China are qualified to join Chinese standardization bodies and participate in the drafting of standards. However, the decision whether to allow participation by foreign-invested companies is in practice left to individual technical committees (TCs) and technical subcommittees (SCs).

Some SCs and TCs do not permit foreign-invested enterprises to participate in the drafting of standards or technical regulations at all, while others only permit foreign-invested enterprises to be observers or participants without voting rights. Even in cases where foreign-invested enterprises are permitted to join a TC, they often are not notified when new working groups (WG) under a given TC are created to develop a new standard. This lack of transparency results in persistent unequal, under-participation of foreign-invested enterprises in standards development in China.

SAC and other relevant authorities should require greater transparency in the standards development process and commit to equal, non-discriminatory participation of foreign-invested companies in China standards development bodies. This should include seeking foreign companies' input in technical standards from the initial drafting stage. In this way, Chinese standards may have a better chance of acceptance in the global marketplace.

- **Mandatory Versus Voluntary Standards**

It is presently not possible for USCIB members to rely on the alphanumeric designation of a standard (e.g., GB or GB/T) as evidence that the standard is mandatory or voluntary in nature. The best approach available at the present time is to review the content of a particular standard to determine whether the language therein requires particular behavior, or merely suggests such behavior. Where the language is ambiguous, recourse to the drafters of the standard (typically indicated in the text of the standard) and the agency with interpretive authority for the standard (also typically indicated in the standard) can of course provide insights. However, this leaves significant room for variation in the interpretation of whether a standard is voluntary or mandatory. An example is the standard with the title "Marking for Control of Pollution Caused by Electronic Information Products" and designation "SJ/T 11364-2006" (this designation being associated with the Ministry of Industry and Information Technology, formerly the Ministry of Information Industry). Despite the fact that this standard has an alphanumeric designation typically associated with a voluntary standard, and the fact that the Ministry of Industry and Information Technology has publicly indicated that this is a voluntary standard, Chinese government authorities have nonetheless carried out enforcement actions against products that are not labeled according to this standard.

Adding to the confusion is the fact that if a voluntary standard is referenced in a regulation that requires that you label your products, the Chinese authorities will typically consider that conformity with the voluntary standard is "mandatory" via this reference in the regulation.

TAXATION

Tax laws should be administered in a manner that promotes consistency, certainty, and transparency. Coordination between the central and local authorities in China is lacking in this regard and creates uncertainty and inconsistency across jurisdictions throughout the country. A central tax ruling process would be the ideal method to tackle this issue. Tax rulings provide certainty and prevent local administrators from taking a different view of a given transaction. Consistently trained, independent tax regulators whose decisions are transparent and subject to review for fairness are needed. The decentralized regulation enforcement practices create opportunities for inconsistent, unfair and unlawful practices among tax regulators.

In the tax area, rulemaking transparency and participation concerns are similar to those described in the Regulatory Environment section of this Statement. In particular, regulations involving changes adverse to USCIB members in the tax area have been are often applied on a retroactive basis, which represent problems with respect to notice and fair application of the law. Further, regulations should be specific enough that taxpayers have notice of what is required or prohibited.

II. SECTORAL ISSUES

AGRICULTURAL BIOTECHNOLOGY

- **Intellectual Property Rights Issues**

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.
The new amendment to the Chinese patent law on the patentability of inventions using genetic resources Article 5, ("No patent right shall be granted for an invention-creation whose completion depends on genetic resources, but the acquisition or exploitation of said genetic resources or is contrary to the relevant laws and regulations of the State.") could prove problematic. This provision is so open-ended as to create huge uncertainty in any biotechnology research area as to what is patentable or not, and goes far beyond the scope of any discussions within the Convention on Biological Diversity (CBD).

Intellectual property is fundamental to innovation in the seed industry. Patent and Plant Variety Protection (PVP) requirements and expertise in China are key areas for companies that are trying to enter the market in China. China's patent law continues to preclude the possibility of patenting plant varieties. 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. However, currently the PVP system of China only protects a limited number of varieties (about 141 varieties), which may be in contrast to Art.27 (3) of TRIPS. Under Art.27(3) of TRIPS, members shall provide protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. Actually many varieties are protected neither under patent nor under PVP. In addition, 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.

Industry would like China to implement the UPOV 1991 Convention in its national law. Additionally, industry would like China to allow patent claims on seeds and plants, which are

currently non-patentable subject matter. Patentability standards should be consistent with European law under the biotech directive (Directive 98/44/EC) and U.S. law.

Current registration requirements take at least three to four years of both provincial and national testing and review for new, conventional hybrids. The current process causes significant delays in bringing new, conventional hybrids to market. Business would like to see a more timely and efficient seed/hybrid registration process. China should be encouraged to move toward a two year, merit-based, transparent hybrid review and registration process that is in line with requirements in other countries. For biotech traits, if the variety has been previously approved then the traited variety should be advanced so that it would require only one year of public filed trials.

- **Transgenic Seed Business and Regulatory Approval Process**

On April 22, 2002, China issued a foreign direct investment catalogue and prohibited foreign direct investment in the transgenic seed business in China. Furthermore, the ban was reaffirmed its revised catalogue twice in November 2004 and April 2007 respectively. The catalogue was published jointly by the National Development Reform Committee and the Ministry of Commerce. The foreign direct investment ban has denied millions of Chinese farmers access to numerous agricultural biotech products. Current foreign direct investment regulations should be modified to repeal and lift the prohibition on plant biotechnology so that new technologies can be made available to Chinese farmers more rapidly**.**

Currently in China, each plant variety containing a biotech trait has to undergo a separate production approval. There is significant redundancy in the process and paperwork that could be avoided. Many countries have a separate variety approval process but the trait does not have to go through re-evaluation. The current approach makes neither scientific nor practical sense.

Furthermore, the separate variety registration system is not compatible with the current gene safety approval system, resulting in a cumbersome process that could take more than 7-8 years to commercialize transgenic hybrid corn. Business believes there is a need for event-based approvals instead of variety-based approvals.

Currently, national and provincial testing and assessments for new conventional hybrids are required. This process is redundant and also has the consequence of shifting central government control of biotech approvals to the local level once the trait is approved. Increasing the efficiency of these regulations, while still meeting safety standards, will result in faster adoption of these new hybrids. Approval of corn hybrids at the provincial level need to be coordinated with the national approval system for agricultural biotechnology products. Risk assessment regulations for biotech corn should be based on a specific event and not on individual hybrid. This is the practice in almost all countries where biotech crops are grown. Efficient regulation of corn hybrids containing combined events is also necessary as this will become more common in the future.

For many years, China has maintained a quarantine of corn and has banned corn seed exports to China from the U.S. and Mexico. Additionally, corn seed cannot be exported from China to either country. This restriction has been predicated upon phytosanitary concerns and significantly impacts corn seed breeding and production. The corn seed import/export restrictions with U.S. and Mexico should be reevaluated based upon up-to-date, science-based criteria to allow for greater movement of seed across borders for corn breeding and production.

For the approval of transgenic products for importation, processing and use in foods and feeds, China's Ministry of Agriculture (MOA) has in place a requirement that the biotech product be first approved in the country of development before an application for approval can be made in China. Additionally, the MOA process is lengthy, as a result of the multiple steps involved. These include review of the application by the national Biosafety Committee, approvals for seed import, local safety testing and further review of the results of this local testing. The asynchronicity of the approval processes in the producing country and China poses significant risks to trade. The overall process needs to be reviewed to reduce trade risks, for example by allowing applications to be submitted to MOA once a valid application for commercialization has been made in the country of development. At the August 2005 USDA-MOA Biotech Working Group meeting in Beijing, MOA committed to address this issue by allowing local studies to commence while those traits were in the review process in the U.S. This would help close the gap in the timelines between U.S. and Chinese approvals. It would be useful for follow-up on determining if sufficient progress is being made on this commitment at the next scheduled Biotech Working Group meeting between USDA and MOA.

Another area to consider in improving the efficiency of the approval process for the importation of transgenic products is the seed import rules. Currently the process is administratively complex, unpredictable and time consuming. Furthermore, applications requesting permits for the importation of seed for the purposes of local safety testing cannot start until completion of the initial biosafety assessment. We encourage the MOA to allow the seed import permitting process to be run independently (i.e. in parallel) of the biosafety assessment.

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

Industry would like a science based regulatory approval process for multiple events (stacks) products. In particular applicants should be given the choice whether to apply for single events and then some kind of simplified approach for the multiple events or to apply first off with the multiple events if one or more single events have not been previously approved.

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 not only hurt 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**

Enforcement with respect to all forms of intellectual property theft in China remains inefficient and often ineffectual, with low penalties for violators.

Piracy 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). 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. Notwithstanding Memorandum of Understandings (MoU's) between MPAA and the Chinese Government to improve enforcement, piracy persists at very high levels. The MPAA also reports that export and transshipment of pirate optical discs from and through China continues to grow resulting 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 widespread.

Internet piracy is another major challenge. Online infringers have used the Internet to distribute a wide range of illegal products that violate copyright protections, particularly those for films and television shows. Notwithstanding recent positive measures undertaken by some UGC sites and B-2-B e-commerce sites, as well as the Chinese Government's recent Internet Enforcement campaign, the U.S. should continue to encourage more vigorous and systematic enforcement of Chinese laws and regulations regarding the obligations of Internet services, and UGC and P2P streaming video sites in particular.

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.

Necessary elements of this comprehensive approach include:
- Leadership direction to strengthened focus, coordination and effectiveness enforcement agencies;

- Full transparency in all kinds of enforcement including set up a centralized website to publish all the decisions in civil, administrative and criminal cases;
- Where regulation is required ensure that it is consistent, centralized and transparent;
- Intensified governmental supervision of licensed optical disc manufacturers and initiation of criminal prosecutions against those engaged in illegal copying;
- Consumer awareness efforts regarding the dangers and penalties of engaging in piracy;
- Establishment of credible deterrents to piracy including deterrent fines and lower thresholds for commercial piracy;
- Improved protections in the digital environment, including:
    - Criminalizing end-user piracy;
    - Adding reference to all the exclusive rights now provided in the law, including the WIPO Internet Treaties rights and unauthorized importations;
    - Adding criminalization of violations of anti-circumvention provisions for TPMS and rights management information;
- Adoption of rules regarding potential liability and related limitations[1] for Internet Service Providers (ISPs) for piracy related offenses and measures for notice-and-takedown of websites offering pirate material;
- Immediate action to stop the rising volume of pirate exports from China.

- **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.

[1] Any framework that provides for limitations on liability for service providers should be restricted to damages and other monetary relief. Injunctive relief and other forms of equitable relief should be available subject to the evolving laws governing such relief. *See* International Chamber of Commerce (ICC), IP Roadmap 2008, at 37, at: http://www.iccwbo.org/policy/ip/id2950/index.html.

Film import quotas, non-transparent censorship processes and procedures and the delayed 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 increased substantially, growing an average of 30% per year over the last 6 years, and in 2010, increasing 64% to make China one of the top 10 theatrical markets in the world, US films have not participated fully in this growth due to restrictions China maintains on access to its market. US films which do enter the market have generally performed well, but the impediments to the free release and impediments to US producers' ability to release more firms is a substantial factor in driving Chinese audiences to pirated sources. While still a comparatively "underscreened" market, in view of the number of screens to population, the rapid growth of screens in recent years indicates a growing potential market for US and foreign films, provided these market restrictions are liberalized.

A number of actions are needed to build a more viable market and to improve market access in the entertainment industry. First, China should implement the decision of the WTO dispute settlement panel related to trading and distribution rights. This decision provides legal authority to our longstanding calls for the introduction of competition into the film import and distribution sector.

However, for the impact of the decision to harness the potential of the Chinese film industry and the ability to satisfy Chinese consumers' demands current investment/establishment restrictions in the music, cinema and video distribution industry should be lifted. 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. In addition, market-distorting policies such as the imposition of "black-out" periods during peak seasons 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. The Chinese government 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, optical media and on-line distribution should be streamlined and discriminatory treatment toward foreign product abolished. The censorship by different agencies should also be coordinated and any product that has been approved by one agency should also be automatically allowed to be distributed on other types of media. 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 unintentional 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 further limits the industry's ability to provide consumers with timely and convenient access to legitimate product.

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.

CHEMICALS

USCIB recognizes that China is a major growing world producer and market for chemicals and downstream manufacturers. We would like to highlight eight 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 (IPR) protection, anti-dumping, chemicals regulation, transparency, non-discrimination and national treatment, import licensing, confidentiality and data protection, and mutual acceptance of data.

- **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.

- **Anti-dumping**

Since 1997, 17 of the 23 anti-dumping investigations initiated against U.S. imports by China's Ministry of Commerce (MOFCOM) have been of chemicals and chemical products, and 12

currently have anti-dumping measures in effect.[2] 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 anti-dumping 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 Anti-dumping.

- **Chemical Regulations- General Comments**

USCIB supports chemical control legislation that protects humans and the environment. We also believe that it is critically important to strive for consistency with already-established national chemicals management programs when enacting new laws. In October 2010 the Ministry of Environmental Protection (MEP) issued revisions to the Regulations on Environmental Management of New Chemical Substances and the associated implementing Guidelines that address several previously identified industry concerns. USCIB appreciates the willingness of Chinese authorities to engage in meaningful dialogue with the U.S. government and industry on these concerns. Additional comments on the revised Regulations and the draft Guidelines, as well as other areas of concern are provided below.

- **Transparency**

The original Regulations came into force in 2003 without implementation Guidelines in place and without a notification review process established and effectively communicated to stakeholders. Information and experience improved the situation. A draft version of the revised Guidelines was made available before promulgation, but the promulgation version of the Guidelines was released only a few weeks before entry into effect on October 15, 2010. If the implementing Guidelines are issued only days or weeks before entry into effect, uncertainties are bound to be intense and make it difficult for companies to make sound business decisions about introducing new chemical products to China and, in general, to understand what is expected of them in terms of compliance. The apparent changes may still not be sufficient to introduce new chemicals in China, and supply those chemicals to all downstream manufacturers in China.

- **Non-Discrimination and National Treatment**

Although the Regulations apply to domestically manufactured substances as well as imports, the requirements have not been widely communicated and are virtually unknown to local industry.

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

Along with inadequate testing facilities, this calls into question the expectation for compliance by domestic companies. There continues to be evidence that domestic companies offer for sale in China substances that are not listed on the *Inventory of Existing Chemical Substances (IECSC.)* Importers wishing to use those same chemicals must undertake costly and time consuming testing in order to comply with the Regulations. New provisions in the amended Guidelines unnecessarily single out imported new chemicals for proof of compliance. There is no discussion of equivalent proof of compliance for domestic manufacturers.

USCIB applauds the apparent strengthened enforcement measures and a possible mechanism for reporting of violations mentioned in the revised Regulations. The effectiveness and implementation of the measures remains to be seen.

- **Import Licensing**

Chloroform, also known as trichloromethane (TCM) or methyl trichloride, has myriad uses as a reagent and a solvent. The major use of chloroform today is in the production of the refrigerant R-22, commonly used in the air conditioning business.

Chloroform can be used as an anesthetic and is commonly under national control as a precursor chemical. In China, chloroform is in Category II of the Precursor Chemical List and subject to the import/distribution license control (on provincial level).

As a major producer and exporter of R-22 China imports and consumes a large amount of chloroform. The annual import reaches about 200,000 tons.

Currently, there is no regulation or rule to restrict foreign companies from participating in the precursor chemical trade. There is no existing restriction for foreign companies not to be able to apply for the required import/distribution license. However, to date, no foreign companies except foreign manufacturing JV/WOFE using precursor chemical as feedstock have been able to successfully apply for an import/distribution license.

USCIB members cannot import or sell chloroform in China and thus cannot provide door-door service to the local customers. The indirect export also adds significant cost due to transportation and other related costs, for some members it can be up to $3 million.

The decentralized import, storage and transportation can also lead to risks such as storage safety, environmental effects, and piracy. Issuing import/distribution licenses to large suppliers could better help Chinese authorities control precursor chemicals through eliminating the risks of decentralized imports and transportation.

USCIB urges the U.S. government to discuss with the Chinese government existing policies and support allocation of import/distribution licenses for companies that meet the terms of the regulations.

- **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. The protection of confidential business information (CBI) requires legal, administrative and procedural care. This is further magnified as CBI is shared with and across agencies in China. Transparent administrative processes when handling, storing and communicating new chemical information are needed when this information is transferred to the provinces and local sites.

The revised Regulations indicate that certain information about R&D applications and results of new chemical notification will be posted on the MEP website. This raises new concerns for USCIB members regarding the protection of CBI. Disclosure of some of this information on the MEP website is not appropriate. To link a new chemical identity, including generic name, with the company name, location, etc. jeopardizes confidential business information for all of industry in China – domestic and importers. The content is not appropriate and not necessary for global internet access. This gives competitors easy access to information not only on the chemical, but also about potential market and use of new technologies. These concerns manifested in 2011 when MEP released lists on the MEP web site providing company names and chemical names associated with "polymer" and "research and development" registrations made under the amended Regulations on Environmental Management of New Chemical Substances. The information required by the users (customers) of the new chemical, will be found on the MSDS and label for the new chemical or the product containing the new chemical.

- **Mutual Acceptance of Data**

The Regulations stipulate that ecotoxicological testing of new chemicals must be undertaken only in China on Chinese species at certified laboratories. USCIB members report that requirements for ecotoxicological testing to be done in China cause delays in the introduction of new chemicals because laboratories are at capacity and unable to complete testing in a timely manner. Duplicative testing occurs when tests already completed must be repeated since results are not accepted outside China. Doing studies in China on Chinese species does not meaningfully advance scientific understanding of the substances in question. MEP should accept scientifically valid studies conducted in accordance with international norms; e.g., Good Laboratory Practice (GLP) and Organisation for Economic Co-operation and Development (OECD) methodology. The principle is that data generated in a Member country in accordance with OECD Test Guidelines and 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, costs and minimizes unnecessary animal testing.

- **Predictability of Regulatory Requirements, including Available Exemptions**

The Regulations, via the associated Guidelines, provide for acceptable testing data waivers. USCIB members report that certain data waiver requests associated with new chemical registration applications have been rejected, even though such waivers are set out in the Guidelines. This adds an additional element of unpredictability to China's new chemical process which has a negative effect on USCIB member business decisions. For instance, if the waivers set out in the Guidelines are not available (i.e., test data waiver availability is instead made on case-by-case basis), it is not clear to USCIB members whether the time for such tests, which can add many months to the registration process, must be factored into China investment, sales and other business decisions involving new chemicals.

CUSTOMS

USCIB fully supports the American Chamber of Commerce 2011 White Paper in their chapter on Customs and their proposed recommendations and encourages China to pursue customs reform, modernization and simplification to promote the fast, streamlined movement of goods across borders. Improved customs facilitates the rapid movement of goods throughout the world.

An additional issue with respect to China 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 urges the U.S Government to work with China on signing and adhering to the ATA Carnet conventions for "Professional Equipment" and "Commercial Samples".

On May 27, 2010, China's General Administration of Customs (GAC) issued Announcement No. 33, which came into effect on July 1, 2010. This regulation has given rise to much concern within the express industry as it will severely impact on costs and service performance, and ultimately the industry's customers.

- The Announcement introduced a new importer and exporter registration system and HS code for Low Value Shipments, which contradicts the WCO Immediate Release Guidelines (IRG), which prescribes limited data to simplify and expedite clearance for low value shipments.

- The Announcement also changed the base of the duty free threshold from an amount of duties rather than the value of a consignment (the latter being the practice of almost all countries in the world), so that every consignment will need to be assigned a tariff classification (HS Code) in order to determine whether the amount of duties is below or

above the threshold. This means a significant increase in consignments requiring a tariff classification.

The requirement effectively subjects more samples and advertising materials to duties and taxes, and to more complicated import and export customs clearance requirements. Samples and advertising materials are key requirements for businesses either for market access, introducing new products, manufacturing or R&D. New restrictions on these will severely impact the end-to-end supply chain, affecting many companies, not just importers and exporters.

Customs reform, modernization and simplification are critical to a Chinese economy that relies heavily on the fast, efficient movement of goods across borders. Local Chinese customs, practices and procedures vary widely and are often inconsistent with the national General Administration of Customs (GAC) rules and regulations. Conversely, GAC retains final approval authority regarding customs agreements but often rejects practical recommendations by regional customs administrators. While GAC has met with industry in the past, those meetings usually consist of GAC explaining their policy rather than engaging in dialogue to seek practical solutions. Details are left to local customs offices that, again, often do not have authority to finalize an agreement.

Customs clearance is performed at origin or destination, not at port-of-entry or exit, promoting additional fragmentation of customs authority and supervision. While changing IT systems is admittedly time-consuming, difficult and expensive, China's IT systems for customs clearance do not meet modern standards or China's economic growth needs.

These deficiencies introduce uncertainty and inefficiencies for Express Delivery Service (EDS) providers and local customs authorities alike. Each local customs authority may adopt divergent practices. Deadlines may be ignored in practice; flights may be able to depart without all necessary approvals; data requirements may be simplified. Much of this "flexibility" is unofficial and not codified in any written agreements or published regulations and, therefore, leaves industry open to arbitrary and inconsistent treatment.

Specific Industry Example

Current tariffs for importation of natural fats limit trade between the USA and China provide significant advantage to Pacific Rim countries. Specifically, tariff rates for Tall Oil Fatty Acids (HS Code 3823.13) exported from the United States to China are imposed with a value added tax of 16%. Under a signed trade agreement between New Zealand and China, tariff on Tall Oil Fatty Acids (HS Code 3823.13) will gradually reduce from 16.0% to 0% in 2012. Additional trade agreements between ASEAN countries and China have temporarily reduced tariff rates for Oleic Acid (HS Code 3823.12) from 16.0% to 8.0% and other fatty acids (HS Code 3823.19) from 16.0% to 5.0% which are competitive materials to Tall Oil Fatty Acids. Indonesia and Malaysia are the dominant providers for these products in the region.

These rates when compared to other local markets including South Korea, Taiwan, and Japan

hinders export opportunities where rates in these other regional markets range between 2.5% to 4.0% for the above Harmonized Codes. This significant advantage in tariffs disfavors the competitively priced Tall Oil Fatty Acids produced in the United States.

ELECTRONIC PAYMENTS

According to its WTO General Agreement on Trade in Services (GATS) Financial Services Schedule, China is required to grant full and unlimited market access and national treatment to foreign electronic payments providers. Despite its WTO commitments, China continues to restrict market access for U.S. and other foreign electronic payments providers by maintaining a government-protected, domestic monopoly, China Union Pay ("CUP"), in the domestic RMB bank cards market. By contrast, CUP has full access to the domestic bank cards market in a growing number of foreign countries such as Japan, Korea and Singapore and within the European Union. The upcoming JCCT meeting between the U.S. and China represents an appropriate forum to address this important issue to the benefit of Chinese consumers, Chinese banks, the further development of China's electronic payments industry, and the Chinese economy in general.

CUP was established by the People's Bank of China (PBOC) in March 2002. Owned by over eighty of China's largest banks (and other state owned enterprises), its initial objective was to enable national cross-bank bank card transactions (for both point-of-sale and ATM) via one common inter-bank switch system and a unified logo (CUP mark on all RMB bank cards and at the point of sale/ATMs). Since December 2006, PBOC steadfastly refused to allow other foreign and domestic electronic payments services providers to issue non CUP-branded RMB-denominated bank cards (e.g. credit, debit, pre-paid), build merchant acceptance networks to support such cards, and process inter-bank point-of-sale transactions involving such cards in China. The main reasons that were consistently cited were national security, non-convertibility of the RMB, and the need to build a strong CUP before allowing competition. As a result, foreign electronic payments companies' businesses in China have been limited to the issuance of foreign currency-denominated bank cards and acceptance of foreign-issued bank cards. Due to demands from Chinese consumers and banks for greater convenience, such foreign currency bank cards are typically co-branded with CUP on one single card that features a foreign payment brand linked to a foreign currency account and the CUP logo linked to a RMB account. This is called a dual-currency, dual-branded (dcdb) card. DCDB cards are exclusively processed by CUP as CUP transactions when used in China and are processed over the foreign payment company's network when used outside of China.

Operating from its protected home market, CUP has been rapidly expanding its card acceptance and issuance internationally since 2003. Unlike foreign electronic payments companies in China, CUP is able to have full and unencumbered access to the domestic bank card market in a growing number of foreign countries (more than 50, including the United States) in which it has chosen to operate. Full access includes the issuance and merchant acceptance of CUP branded bank cards denominated in the local currency of the host country (e.g. Korea, Japan). No foreign governments are known to have refused CUP access to their domestic electronic payments

markets on the grounds of national security, or protection of a domestic player, or on-shore processing requirements.

China's failure to allow foreign electronic payments providers to independently operate RMB-denominated electronic payments businesses in the Chinese domestic market violates its WTO commitments and hinders progress toward achieving its stated economic goals. Independent evidence demonstrates that an open and competitive electronic payments system would benefit China and its economy. For instance, a study by the McKinsey Global Institute concluded: "Fixing the payments system problems and encouraging the use of electronic payment vehicles [in China] would result in savings for banks and corporations and would simplify the life of individuals. It would also improve the government's control on the economy (as most black market activities are cash based), offer new business opportunities for the banks, and increase the stability of the financial system."

These market access restrictions and discriminatory limitations on foreign suppliers seeking to engage in the supply of electronic payment services appear to violate Articles XVI and XVII of the General Agreement on Trade in Services. In China's GATS schedule, it made open commitments in "banking services" to allow unrestricted market access and national treatment for "payments and money transmission services, including credit, charge, and debit cards" beginning in 2007. This means that China must allow financial institutions to issue (RMB) payment cards of their choice. Banks cannot be required to issue only CUP cards or co-branded CUP cards. In addition, China committed to allow unrestricted market access and national treatment for "advisory, intermediation, and other auxiliary financial services" for other financial services listed in its schedule, including payments. China also committed to open market access for the "provision and transfer of financial information, and financial data processing …by supplier[s] of other financial services." Equally importantly, China took no exceptions that would allow CUP to operate as a monopoly.

A competitive payments system will best serve China's overall economic interest by enhancing consumer choice, spurring innovation, and stimulating consumer spending. Such a competitive system in China also will promote banking and retail industries, lower costs and improve services while protecting against risks to China's financial sector. Opening China's electronic payments sector to multiple players also will bring China into compliance with its WTO commitments and foster increased economic activity within China.

U.S. electronic payments providers have invested heavily in their clearance and settlement networks over the past fifty years. As a result, they have created the fastest, most secure, and most reliable worldwide networks for electronic payments, which allow for the processing of billions of electronic payments every year. U.S. providers should be able to operate through their own clearance and settlement networks in China. The U.S. electronic payments industry is committed to the Chinese market and expects full market access as guaranteed by China's WTO commitments. Despite numerous efforts by the U.S. Government to convince China to open its market to foreign electronic payments systems, China has not done so. As a result in September 2010, USTR filed a WTO case for China's failure to comply with its WTO commitments in

electronic payment services. A WTO panel has been formed in the case. The upcoming JCCT provides an opportunity for the U.S. Government to further address this issue.

EXPRESS DELIVERY SERVICES (EDS)

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

Chinese government policies appear to be designed to split the EDS industry into its multiple parts – logistics, freight forwarding, trucking and aviation – which undermines the benefits realized by the sum of those integrated parts. EDS combines the best in information technology, multiple modes of transport, and service commitments to provide customers with a complete package of premium, time-definite, money-back guaranteed transportation services. Unnecessarily splitting up the components of EDS stunts the healthy growth of this important industry in China, raises costs to Chinese producers and consumers that rely on EDS, and constrains the overall competitiveness of China's economy. Our members have identified several issues below regarding China's compliance with its WTO commitments.

- **Customs, Reform, Modernization, and Simplification**

In the wake of last year's security events, the global customs environment has significantly changed, posing a serious threat to the functioning and well-being of international business. The EDS industry understands and accepts the renewed focus on security that has been reflected and sometimes anticipated by China Customs. China's increasing prominence in global supply chains, however, makes it critical for China Customs to work with industry to create customs procedures that are safe, secure and efficient.

The EDS industry has invested heavily in secure, reliable and highly efficient transport systems and technologies and is supporting regulators and governments nationally and internationally to find reasonable and effective measures to enhance air cargo security.

We assume the following:

1. China Customs goals will continue to be increasing revenue, stopping smuggling and "strengthening the management of import/export cargo & goods, transport equipment and customs-supervised facilities."[3]

[3] Report on the January 2010 national customs chiefs meeting from China's General Administration of Customs website.

2. Customs will continue to accept the concept of risk management, but insist on measures and practices that imply a "no-risk" point of view.

3. Customs practices will continue to vary significantly from office to office and local customs officials will continue to ignore or evade, when possible, restrictive central regulations.

Customs Registration Codes The *Announcement of the General Administration of Customs of China, No. 33: Strengthen the Management on Import and Export Samples and Advertising Articles* (Order 33) issued on May 25, 2010 (effective January 1, 2011) contains, *inter alia*, a requirement that all import consignees and export consignors in China (regardless of value and category of clearance) will have to register and be approved by China's General Administration of Customs (GAC) and obtain a Customs Registration (CR) Code.

The registration process is very onerous and bureaucratic, requiring long periods to obtain approval. In general, the following documents are required:

- Liability Certificate
- International Trade Registration File
- Organization Constitution and Policy
- Organization Tax Registration Certificate
- Bank Account Information
- Organization Code Certification
- Brokerage Registration File
- Brokerage Management Team File
- Approval Certificate for Foreign Investment
- Organization Asset Evaluation Report

De Minimis

Order 33 also removed the *de minimis* on Chinese advertising materials and samples. The *de minimis* in China is now a uniform 50 RMB (~7 USD). Moreover, that number is pegged to duties and taxes rather than the value of the imported goods, which means those imports must be classified by a qualified broker before they are eligible to be considered for this extremely low *de minimis* exemption. In other words, as a practical matter, China has no *de minimis* exemption for customs clearance.

Customs Work Hours

China Customs is understaffed to handle the volume of trade moving through China's ports and airports. Local customs offices are responding to this problem by cutting customs hours, but modern traders need 24-7 customs service.

A possible solution to this problem would be to allow China Customs to collect reasonable, transparent user fees from EDS firms and others who wish to have customs services beyond normal working hours or in special locations. A user fee system is common in many jurisdictions, including the United States.

Unfortunately, the payment of user fees, overtime charges, etc. to customs officials is not permitted under current regulations. Although these fees are sometimes being paid by local entities, such as airports, express warehouse operators, etc., those payments are in violation of customs regulations.

Recommendations
USCIB recommends that the U.S. government suggest a joint, industry-government working group to look at the impediments – such as the requirement for a CR number – to increased Chinese consumer imports of U.S. goods. The Postal-Express Delivery Symposia the two governments and their respective industries have held over the last few years could serve as a model.

China Customs Order 33 was specifically implemented to make it more difficult for individuals and smaller traders to import goods. Individuals are not eligible to obtain a CR Code, and although there is a procedure to allow individuals to import own-use goods, those procedures are cumbersome and limit individuals to shipments of a value less than 1,000 RMB (~150 USD). The EDS industry notes with interest that e-Bay, China Post and the U.S. Postal Service are cooperating to promote Chinese ***exports*** to individual U.S. consumers, yet a similar facilitation is unavailable to promote individual Chinese consumer imports from the United States.

The U.S. government is well aware of the benefits an increased *de minimis* can bring to traders. With broad industry support, the USG is currently sponsoring an initiative to raise *de minimis* levels throughout APEC. This initiative provides a perfect opportunity for USG to engage China in this multilateral effort at bilateral meetings. As the second largest economy in the world, China should be making greater efforts to encourage trade and reduce trade barriers.

We suggest that USG invite China Customs to study the U.S. user-fee system with a view toward regularizing the payment of similar charges in China. We believe that such an initiative would be welcomed by China Customs as well as assist industry in resolving a difficult problem.

- **Postal/Express Regulatory Issues**

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

Needless to say, SPB's expansive vision of its responsibilities is beyond what USCIB views as efficient and appropriate for an industry regulator. Continued bilateral dialogue and productive discussion is necessary.

The U.S. government has worked hard over the last few years to establish and hold bilateral Postal-Express Delivery Symposia with SPB, U.S. industry and Chinese industry. The 4th Symposium, held in San Francisco in December 2010, was particularly successful in promoting increased frank, candid dialogue between regulators and industry about issues of mutual interest. U.S. industry looks forward to the 5th Symposia this fall and appreciates the U.S. government's efforts on behalf of the industry.

Collaboration with Chinese Agent Carriers

In accordance with WTO obligations and the provisions of China's Postal Law, express companies should have the freedom to form commercial relationships with agents so long as those agents are properly licensed for the services they provide.

U.S. EDS firms often find great value in partnering with local Chinese service providers. Given the current regulatory structure, the Chinese market is rich in a wide variety of domestic carriers offering geographically-specific services under a variety of licenses.

The Postal Law contemplates foreign carriers and Chinese carriers working together, but it fails to clearly explain that carriers with international delivery permits may contract with carriers with domestic delivery permits to provide local pick-up and delivery services.

Domestic Express Permits

China's WTO commitments and the self-imposed obligations established in its 2009 Postal Law clearly grant foreign express companies the right to offer domestic express services in China (excluding, of course, documents). The Postal Law established a new permitting system for express firms to be administered by the SPB. Unfortunately, however, SPB has yet to issue a domestic express permit to a foreign firm more than a year since the passage of the law.

In accordance with SPB instructions, U.S. industry filed applications for domestic express permits a year ago. To date, however, neither U.S. firm has received a required confirmation letter of acceptance from SPB. SPB's actions are not in accordance with Article 32 of China's own Administrative Procedures Law, which requires agencies to explain to applicants within five days of submission if their application is deficient. Under Article 32, if the agency does not act within five days, the application is considered to have been submitted.

Recommendations

The U.S. government should confirm with the SPB that holders of international express delivery services permits should be able to contract with holders of domestic express delivery services permits to provide local pick-up and delivery services. This will allow firms with different

license types to interconnect their services and work together to serve their customers, including the people and businesses of China.

If SPB deems an application for a domestic express permit to be deficient, SPB should notify the applicants immediately of any necessary corrections or additional required information in their application. Otherwise, in accordance with Chinese law and regulations, EDS firms must assume their respective applications have been properly submitted, and SPB will grant them the requested permits in the very near term.

PHARMACEUTICALS AND BIOTHERAPEUTICS

- **Transparency**

While China has made strides toward strengthening its IP protections, pharmaceutical and 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 pharmaceutical and 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 Article 69(5) provides a "Bolar exemption" to patent infringement for pharmaceutical and biotherapeutic 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.

Furthermore, the new amendment to the Chinese patent law on the patentability of inventions using genetic resources Article 5, ("No patent right shall be granted for an invention-creation whose completion depends on genetic resources, but the acquisition or exploitation of said genetic resources or is contrary to the relevant laws and regulations of the State.") could prove problematic. We believe this provision to be so open-ended as to create huge uncertainty in the biomedical research area as to what is patentable or not, and goes far beyond the scope of any discussions within the Convention on Biological Diversity (CBD).

As stated under 'Patent Concerns' the PRB's application of raised patentability standards ('sufficiency' standard) with respect to pharmaceutical and biotech patent applications often results in either narrow patent claims that significantly diminishes their value or in further invalidity attacks. The data is often not required in other jurisdictions, and moreover must be included in the application at the time of filing, leaving Applicants no avenue to supplement for data that they were not aware would be required.

- **Pharmaceuticals Regulations**

Under the SFDA rule (effective June 2006), the SFDA will not approve the use of a trade name for a pharmaceutical unless it is a new chemical compound and there is a patent in force in China on the compound. This is an arbitrary regulatory requirement which is counter to general trademark law and practice worldwide. Trademarks are designed to identify the source or origin of the product, not whether it is novel and patented.

In regulated product areas such as pharmaceuticals, the State Food and Drug Agency (SFDA) approval procedure lacks transparency; there is no effective linkage between the regulatory agency for approving of generic products and enforcement of an innovator's patent rights. Some of these requirements are part of SFDAs own regulations (e.g., Ch. II, Art. 18) but are not actually practiced.

- **Data Exclusivity**

Although the SFDA in 2001 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 and unevenly applied. The timing of approvals of third party products is often manipulated in a non-transparent manner such as to place the innovator/originator company in direct market competition with generic copies that rely on the innovator's test data. Moreover, members of USCIB are concerned that China's data exclusivity measures in regards to the length in term and application are inadequate to address the emergence of a global biosimilars market.

SOFTWARE

China and the United States share a common interest in promoting software development and protection in China because information technology holds the key to increasing productivity and solving so many pressing global issues, in areas such as health, education, and energy. China recently concluded a Special Campaign to Combat IPR Violations, which included specific commitments to improve software legalization within government agencies. Although the Campaign resulted in some incremental progress on software legalization, the rate of software piracy within China--particularly among state-owned and private enterprises--remains extremely high. Despite a welcome recent increase in China's IPR enforcement efforts and a greater readiness by Chinese courts to hear civil IPR cases, rampant theft of U.S. software remains a major challenge. China's continued failure to make significant progress on software piracy, combined with efforts by the Chinese Government to favor national champions and discriminate against foreign suppliers under the guise of "indigenous innovation" and other protectionist policies, means that U.S. software firms continue to face major barriers to accessing the Chinese market.

- **Software piracy**

In 2011, China will overtake the United States to become the largest PC market in the world. U.S. software products are extremely popular with Chinese PC users: industry data indicate that over 95% of Chinese PCs run a U.S. operating system and well over 80% of Chinese PCs run U.S. office productivity software. There is also no doubt that Chinese companies and consumers can afford to pay for the software they use--indeed, several of the world's richest companies are located in China, and China's middle class is now roughly equal in size to the entire population of the United States.

Unfortunately, the vast majority of software used in China, including by state-owned and private enterprises, is pirated. According to IDC's Eighth Annual Global Software Piracy Study, prepared for the Business Software Alliance and published in May 2011, China's PC software piracy rate in 2010 was nearly 80%, with a commercial value of nearly $7.8 billion.

China has made numerous commitments to improve software legalization in China. For instance, China has repeatedly committed to ensure that all government agencies and state-owned enterprises would use only legal software. At the December 2010 JCCT, China reaffirmed those commitments and specifically committed to: (1) Establish software asset management systems for government agencies and to treat software as reportable property in China's existing asset management system; (2) Ensure that government agencies would have the necessary budget for current and future purchasing, upgrading, and replacing agency software; (3) Establish a pilot program with 30 major SOEs to use software asset management; and (4) Work with the USG to address the verification and compliance of software purchases.

Despite some incremental progress, China has not lived up to these commitments. For instance, China has not yet provided adequate budget to government agencies to enable them to legalize the software they use. There are also reports that China has quietly encouraged government agencies to purchase **only** Chinese software -- even though most continue to use U.S. software.

The need for concrete and measureable progress on software legalization in China remains critical--especially given the clear correlation between stronger IP in China and increased jobs and economic growth in the United States. Areas for further progress include making sure that all Chinese SOEs use only legitimate, fully licensed software, and for China to refrain from encouraging SOEs, either directly or indirectly, to preference domestic over foreign software suppliers. To that end, China should require all SOEs and publicly listed companies in China to certify annually, based on an independent, third-party audit, that all of the software they use in their business operations is properly licensed. This certification should be subject to verification both by the government and by affected software suppliers. Continued work is also needed to ensure that government agencies have the funds they need to purchase the software they use and on China's commitment to treat software as an asset for auditing purposes.

- **Discriminatory Treatment of U.S. Suppliers**

In acceding to the WTO, China agreed not to discriminate against foreign supplies or suppliers—*i.e.*, to treat imported goods and foreign suppliers no less favorably than domestic goods and suppliers. As part of its WTO Accession agreement, China was under an obligation to remove all rules and regulations that were inconsistent with this "national treatment" obligation. This commitment applies not only to tariffs and other "at-the-border" measures, but also to internal laws, regulations, and other "behind-the-border" measures.

Despite these commitments, China continues to pursue policies that favor domestic software products and suppliers over foreign products and suppliers. For several years, a prime example has been China's "indigenous innovation" policies, which discriminate against U.S. software suppliers in the government procurement market and in access to various governmental benefits. Recently, China indicated that it might be willing to dismantle at least some of these protectionist policies. For instance, at the 2011 S&ED, China committed "to eliminate all of its government procurement indigenous innovation products catalogues and revise Article of the draft Government Procurement Law Implementing Regulations as part of its implementation of President Hu's January 2011 commitment not to link Chinese innovation policies to government procurement preferences." And in June of this year, the Ministry of Finance reportedly announced that it would "stop enforcing" aspects of the discriminatory government procurement preferences for domestic suppliers and products.

Nonetheless, there is widespread concern that discrimination against foreign software suppliers and products remains alive and well in practice, particularly at the provincial and local levels. Moreover, U.S. software suppliers continue to face discrimination in access to subsidies, tax advantages, and other benefits that are available to domestic Chinese firms. It is critical that China immediately cease all preferences for domestic software suppliers and products

immediately and that it adhere to its WTO Accession Agreement commitments to open its markets to U.S. software suppliers.

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

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

TELECOMMUNICATIONS (SERVICES AND EQUIPMENT)

China’s narrow interpretation of value added services, high capitalization requirements for basic telecommunications services and a lack of an independent regulator remain key outstanding issues. 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 Chinese bureaucracy, and that provides a modicum of hope that China may take such steps as overhauling its licensing regime and establishing an independent 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, which ended in 2007, for phasing in direct foreign participation in value-added network services and basic telecommunications. USCIB recognizes and appreciates the positive steps China has taken to implement its WTO commitments. However, China's overly narrow interpretation of market access opportunities for foreign participants and a lack of an independent regulator have negatively impacted market opportunities for U.S. telecommunications companies, contrary to China's WTO commitments. We are especially concerned by China's unreasonably high capitalization requirements for basic services, and the prohibition on resale, which greatly limit market access.

- **High Capitalization Requirements**

China's unreasonably high capitalization requirement for basic telecommunications services has greatly limited market access. In 2003, China's regulator, the Ministry of Industry and Information Technology (MIIT), 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. USCIB considers the existing capitalization requirement in basic services an excessively burdensome and unjustified restriction that violates Article VI of the GATS. A foreign service provider otherwise meeting the licensing qualifications is unlikely to allocate such capital to a new and risky enterprise, and a Chinese joint venture partner is unlikely to divert this capital from its core business.
In early September of 2008, the Chinese government announced a reduction in the capitalization requirement for a basic service license from 2 billion RMB (approximately US$291 million) to 1 billion RMB (US$145.9). While the reduction in the capitalization requirement for a basic service license is a step in the right direction, China's requirement is still very high and continues to be a significant barrier to entry. The reduced capitalization requirement is 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. The reduced capitalization requirement in basic services continues to be excessively burdensome and unjustified restriction that violates the GATS. A narrowly tailored performance bond would be sufficient to address any existing concerns. China should take additional steps to reduce the capitalization requirement to a reasonable level.

- **Market Access**

Market entry is being impeded by the MIIT's extremely narrow views of what constitutes a value-added service for purposes of international value added network service licensing. China's regulator, the Ministry of Information Industry ("MII") defines the meaning of value-added services (VAS) in China's WTO commitments narrowly to exclude commercially important

services, such as international IP-virtual private networks (IP-VPN) services demanded by global enterprises, by limiting VAS virtual private networks to "domestic" services. Thus, although domestic IP-VPN services are classified as VAS, inexplicably international IP-VPN services are classified as basic. China should expand the list of VAS to include such value-added services as international IP-VPN services. China also treats a narrow positive list of identified services as the only VAS, thereby limiting service expansion opportunities of VAS providers. 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.

It is critical that MIIT interpret the definition of VAS in a manner that is consistent with China's explicit WTO commitment and widely accepted international standards. The definition within China's commitment includes several tests of what qualifies as a VAS. Whereas some of the alternative tests are specific services (e.g., electronic mail, voice mail, electronic data interchange, other of the alternative tests are functionalities that can exist in a variety of innovative services (e.g., code and protocol conversion, on-line information and data base retrieval, on-line information and/or data processing). The inclusion of these functionality tests in the China commitment on VAS is consistent with the VAS definitions applied internationally, and China should follow through to interpret their definition in accordance with international standards and expectations.

China limits foreign direct investment in telecommunications to 49 percent for basic services (provided the company enters into a joint venture with a SOE) and 50 percent for value-added services (VAS). Ideally, China should commit to relaxing or eliminating foreign direct investment restrictions in all licenses, going beyond present WTO commitments by allowing 100 percent foreign direct investment in telecommunications licenses. This would promote more efficient, more profitable operations capable of providing the best quality service.

In addition to encouraging a more expansive licensing approach to VAS in China, another approach that the US Government should consider is distinguishing between facilities telecommunications service and non-facilities based services. Replacing the current conservatively applied vertical service classification guidelines (i.e., basic/value-added) with more objective and transparent guidelines for Type I (facility based) and Type II (non-facility based) licenses that accelerate service provider market entry. Any service that is non-facility based would be permitted as a VAS. This approach would provide certainty to investors, allowing companies to innovate and provide services as technology evolves.

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)

Furthermore, liberalization of pay TV platforms, including cable and Direct-to-Home would expand the opportunity for more foreign content to be broadcast.

Liberalizing VAS not only is a non-threatening way to liberalize a market; it is also an excellent means of improving profit margins for all operators. Allowing foreign investment in VAS would increase the revenue opportunities for basic service providers and attract the types of innovative businesses and institutions that China desires.

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;
- 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; and
- Remove remaining caps to Foreign Direct Investment.

- **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 MIIT 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 in February 2003.

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.

USCIB also encourages USTR to press China to provide reasonable notice and the opportunity for public comment on proposed regulations. 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.

- **State-Owned Enterprise - Joint Venture Partnership Requirement**

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

- **Geographic Restrictions**

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

- **Cyber Security Product Requirements**

China's broad and non-international approach towards cyber security technical standards has created serious market access barriers for foreign IT firms in the China market. The CCCi China Mandatory Certification for Information Security Products, and the Ministry of Public Security (MPS) administered Multi-Level Protection Scheme (MLPS), are clear examples of China adopting these non-standard approaches. CCCi is a mandatory scheme for the certification of 13

types of information security products within the scope of the PRC Government Procurement Law. Certification requires testing of product source code in Chinese government operated laboratories. MLPS, which is China's critical infrastructure protection regime, mandates that a portion of China's IT systems only procure IT security products with domestic IP.

Information communications technology (ICT) suppliers rely on global standards and norms that allows for a high degree of reliability, interoperability, and compatibility that is required to ensure that the Internet delivers goods and services to users worldwide. The U.S. government should strongly encourage China to adopt international norms and approaches in the area of information security. This could include the removal of any and all IP related procurement requirements for the purposes of national security for civilian and non-sensitive government networks, and the adoption of the globally recognized Common Criteria Recognition Agreement (CCRA), for the security certification and evaluation of IT products.

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: EXAMPLES OF CERTIFICATION LICENSING AND TESTING REQUIREMENTS

Food Product and Animal Feed Additive Import/Export Clearance Regime.[4] 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 (China RoHS) promulgated by the Ministry of Information Industry (now called Ministry of Industry and Information Technology) February 28, 2006 and effective March 1, 2007. Law drafters are considering the establishment of a certification and lab testing regime, to confirm compliance with the materials restrictions aspects of the Management Methods, potentially drawing from the existing CCC Mark regime described below. China's Ministry of Industry and Information Technology (MIIT) released a draft amendment to the Management Methods on the Control of Pollution from Electronic Information Products for public comments on July 19, 2010. Comments were due by August 19, 2010. The recently proposed amendments to China RoHS will, if promulgated, greatly expand the scope of China RoHS and potentially create other compliance and market access burdens for those in or supplying to the electrical and electronic products industry. MIIT issued the first batch of the Catalogue for priority control of pollution by electronic information products on September 29,

[4] 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, the Ministry of Commerce, and the General Administration of Customs (GAC) on April 30, 2007 and effective May 15, 2007. This Announcement has been abolished by the Public Announcement No. 5 of 2008 issued by the Administration for Quality Supervision, Inspection and Quarantine (AQSIQ) and the General Administration of Customs on January 10, 2008 and effective January 1, 2008, which has then been abolished by the Public Announcement on Adjusting the Catalog of Imported and Exported Commodities Subject to Inspection and Quarantine by Entry-exit Inspection and Quarantine Agencies (2009) issued by the AQSIQ December 24, 2008 and effective January 1, 2009. The Catalogue of Imported and Exported Commodities Subject to Inspection and Quarantine by Entry-exit Inspection and Quarantine Agencies (2009) was adjusted by AQSIQ and GAC on December 30, 2009 and took effect January 1, 2010. It was further adjusted by AQSIQ and GAC on December 17, 2010 and took effect January 1, 2011.

2009 for public comments. The catalogue covered three types of products: mobile subscriber terminals, telephones and printing equipment connected with computers. On May 18, 2010 the Certification and Accreditation Administration (CNCA) and MIIT issued a Circular on Issuing Opinions on the Implementation of the Unified Voluntary Certification Program for Electronic Information Products Subject to Pollution Control. The Opinions describe the China voluntary materials restriction certification program, including possible steps to encourage participation in that program, such as linking the program to government procurement. The Opinions also provide that a certification organization will certify that the electronic information products comply with relevant pollution control standards and technical norms. The national government will promote and administer the certification activities. A unified product catalogue, certification technical norms, certification implementing rules, assessment procedures and marks will also be adopted, per these Opinions. These implementing rules and USCIB member issues associated with the voluntary certification program are described further in this Statement in the section on Certification, Licensing and Testing Barriers.

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, and associated Guidelines, 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. These Regulations and the associated Guidelines have been abolished and replaced by the amended Regulations issued January 19, 2010 and Guidelines issued September 16, 2010, that both entered into effect October 15, 2010, See: http://www.gov.cn/flfg/2010-02/04/content_1528001.htm.

Compulsory Certification Mark (CCC Mark) Regime. Management Methods on Compulsory Product Certification Marks, promulgated by the Certification and Accreditation Administration July 3, 2009 and effective September 1, 2009. (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 since 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, amended December 30, 2006, December 31, 2008, December 31, 2009 and further amended December 29, 2010 and effective January 1, 2011.
See: http://www.mep.gov.cn/gkml/hbb/bgg/201012/t20101231_199380.htm.

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 Measures for the Inspection, Supervision and Administration of Import and Export Toys issued by the General Administration for Quality Supervision, Inspection and Quarantine May 30, 2008 (New Toys Measures) replace 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 (1996 Toys Regulations) upon becoming effective September 15, 2009. Under the New Toys Measures among other requirements, the imported toys included in the Catalog of Imported Toys Subject to China Compulsory Certification (children's carriages, electric toys, plastic toys, metal toys, projectile toys and toy dolls) must pass testing before being released for sale in the Chinese market. AQSIQ issued the Detailed Rules for Inspection, Supervision and Administration of Toys for Import and Export on November 25, 2010 which became effective the same date.

Imported and Exported Battery Registration Regime. The Inspection and Management Methods on Mercury Content of the Import and Export of Battery Products promulgated by the National Agency for Import and Export Commodity Inspection and Quarantine December 4, 2000[5] and effective January 1, 2001. This rule establishes a regime for battery registration and special testing of battery products containing mercury.

[5] The Methods were not released to the public until March 5, 2001.