



## Coalition of Service Industries

VIA FACSIMILE

March 21, 2006

The Honorable Rob Portman  
U.S. Trade Representative  
600 17th Street, N.W.  
Washington, DC 20508

The Honorable Carlos Gutierrez  
Secretary of Commerce  
U.S. Department of Commerce  
14<sup>th</sup> & Pennsylvania Ave., N.W.  
Washington, DC 20230

Dear Ambassador Portman and Secretary Gutierrez:

At the last JCCT Plenary, USTR and DOC succeeded in obtaining the Chinese government's commitments to take meaningful steps to improve transparency, open its insurance and telecom markets, initiate discussions on government procurement, and enforce intellectual property rights. However, China has made slight progress in resolving the many important sectoral market access concerns that remain outstanding.

On behalf of Coalition of Service Industries (CSI) members, we would like to call your attention to the following services trade concerns to be raised at the JCCT Plenary session this April.

### **Transparency**

Despite China's extensive transparency commitments, US companies in some cases have been denied the right to comment on new regulations, or have been unable to do so because comment periods have been too short. Rather than specifying all criteria that foreign firms must satisfy, China's rules often provide regulators with broad discretion, resulting in varying rules and decisions. Chinese laws, regulations, and administrative practices frequently change without warning, and are frequently not applied uniformly, especially at the local level. Therefore, we hope that the April JCCT Plenary will make further progress in improving China's transparency in drafting and implementing sectoral regulations.

### **Government Procurement**

At the 2005 JCCT, the US secured China's valuable commitment to delay implementation of discriminatory procurement software regulation, and initiate technical consultations to join the WTO Agreement on Government Procurement (GPA). We understand that China has indeed delayed implementation of the software regulations, but has yet to begin technical GPA consultations. Therefore, it is critical that at this April's

JCCT, China commit to begin by June 2006 and agree to complete by December 2007 formal GPA negotiations. It is also important to obtain China's commitment to withhold implementing new procurement regulations that do not conform to GPA principles.

China's launch of negotiations and ultimate adoption of the GPA would be an important step forward. Non-discriminatory, open, transparent, merit-based and technology-neutral procurement of goods and services will facilitate an increase in U.S. exports to China. China's accession on commercially strong terms also provides an important opportunity to advance both countries' economic growth and technological progress.

### **Intellectual Property Rights Protection**

China's piracy and counterfeiting at the wholesale and retail levels, end-user piracy, and Internet and multi-channel signal piracy remain rampant due to lenient penalties, uncoordinated enforcement among local and national authorities, and the lack of transparency in administrative and criminal enforcement.

The piracy rate for optical media products and software is reported to be over 90 percent. Though China has provided useful plans of action at the JCCT to improve its IPR regime and bring its legislation into compliance with TRIPS, the law still stipulates inadequate criminal liability for copyright offenses, e.g. corporate end-user and Internet piracy, unclear protection for temporary copies, and overly broad exceptions to protection of computer software. Criminal prosecution of piracy also remains restricted by the Chinese criminal code, which requires a demonstration that piracy is occurring for the purpose of making a profit.

We are also concerned that unauthorized access to foreign 'overspill' satellite programming is creating a growing illegal pay-TV market, discouraging the creation of quality programs for Chinese audiences.

At the JCCT Plenary this year, we hope the Chinese Government will report on implementation of its action plans proposed at the JCCT meetings in 2004 and 2005. To ensure that improvements in China's enforcement regime yield meaningful gains for U.S. right holders, industry also suggests that the US Government establish evaluation criteria that provide an objective and verifiable mechanism to measure progress in China's IPR protection. These criteria should assess (i) criminal, civil and administrative enforcement against all forms of piracy and counterfeiting; (ii) end-user compliance with IPR laws; and (iii) government-sponsored public education and awareness programs about compliance with IPR laws.

Increases in China's purchases of legitimate U.S. IPR products are an important way to measure progress in IPR protection. Further market access in audiovisual, software, and IT goods and services can indeed help eliminate China's piracy problem and foster sound investment and economic growth.

## Sectoral Issues

### Insurance

The JCCT Plenary in 2005 played a crucial role in holding the December meeting of the US-China Insurance Dialogue to discuss our industry's regulatory concerns and further liberalization in China's insurance sector. We hope the upcoming Plenary will build upon this success. We also hope the US can secure China's commitment to an ongoing dialogue to resolve the following sectoral impediments to US insurers, re-insurers and intermediaries.

- Branching. The ability to grow business geographically through branch and sub-branch expansion is the most important issue for many foreign insurance companies in China. We are concerned that branch approvals for US providers are still being granted consecutively rather than concurrently, while established and start-up Chinese companies receive concurrent approvals to open multiple branches. This practice is contrary to international practice, impedes competition, and is unfair.
- Acquired Rights. We would also like to confirm that existing branches and other non-life insurance operations may, but are not required to, continue to operate under the conditions existing, and pursuant to the approvals granted, prior to the recently issued regulations and implementing rules on administration of foreign insurance companies, including with regard to operations, financial structure, capital and mode of establishment. Non-life companies already established in China (whether as a branch or otherwise) should also be able to open branches and sub-branches even if they do not first establish as a subsidiary.
- Capitalization Requirements. The China Insurance Regulatory Commission (CIRC) should confirm that the RMB 200 million capital requirement for initial establishment, whether as a subsidiary or a branch, includes the right to establish sub-branches without limitation on numbers, and without having to satisfy any additional capital requirements. The Chinese government is yet to provide its rationale for requiring additional capital of RMB 20 million for each additional branch, particularly given that any additional branches would still be backed by the full asset base of the parent foreign company.
- Overseas Utilization of Insurance Foreign Exchange Funds. CIRC's *Provisional Measures on the Administration of the Overseas Utilization of Insurance Foreign Exchange Funds* establish a qualifying threshold (total assets of RMB 5 billion) for companies to be able to invest their foreign exchange capital in overseas funds or equities. Even though this limitation applies to both domestic and foreign providers, only the largest insurers, i.e., mostly domestic companies, will have necessary assets to qualify. Many foreign-invested insurers invariably will not qualify unless CIRC recognizes the assets of the parent foreign company when determining the asset level of a foreign-invested company.

- Insurance Asset Management Restrictions. Under Article 8 of CIRC's *Interim Regulations for Insurance Assets Management Companies*, only providers that have held licenses for more than eight years are permitted to apply to establish an insurance asset management company. Although China previously stated that this limitation applies to both domestic and foreign providers, it effectively excludes all foreign companies entering the market since China's WTO accession in 2001.
- Reinsurance. China should suspend implementation of the 2005 Regulations on Administration of Reinsurance Business, so that primary companies can plan and contract accordingly as part of their global reinsurance programs. The regulation discriminates against foreign reinsurance companies by requiring right of first refusal for 50% of each primary company's reinsurance program with domestically admitted reinsurers. CIRC should also clarify that for purposes of these measures a 100% owned subsidiary is considered an extension of the parent company's operation and, therefore, the reinsurance ceded to the parent company should be allowed.

We appreciate that in 2004 CIRC allowed interested parties to provide comments on the draft Insurance Law. US industry associations called in their comments for CIRC to harmonize regulations on domestic and foreign invested insurers and eliminate discriminatory treatment. We hope these suggestions will be incorporated in the final draft.

### **Pensions**

CSI is pleased that Chinese regulators have started implementation of China's WTO commitment to open its private pension market by issuing "enterprise annuity" licenses. However, the application and approval processes for these licenses seem cumbersome and non-transparent, and the sectoral rules and standards remain unclear. To ensure companies' compliance, China should clarify details of existing regulations, including the licensing process and procedures, as well as information on the regulatory and supervisory authorities and operation requirements.

China should also ensure a level playing field for banks, securities firms, asset management companies, and insurers when they apply for "enterprise annuity" licenses to an appropriate financial services regulatory body (China Securities Regulatory Commission, China Banking Regulatory Commission, and China Insurance Regulatory Commission) before securing approval from the Ministry of Labor and Social Security (MOLSS).

In May 2005, it was reported that MOLSS had stopped accepting applications for enterprise pension funds. Although MOLSS has indicated that there will be future application periods, it has not identified the date when applications will be accepted again, nor has it explained how long the next period for submitting applications will be.

## **Asset Management and Securities**

For asset management firms, the Chinese Joint Venture Rules require foreign firms to have at least RMB 300 million (US\$ 36 million) in paid-in capital to qualify as a joint venture partner. This requirement is significantly higher than other jurisdictions, and serves as a market barrier to US companies. Asset management firms do not need large amounts of capital to protect investors because their business is not capital intensive, and client assets typically are not at risk if the asset manager experiences financial difficulties.

A high regulatory capital requirement disproportionately affects foreign asset managers because their operations in a country are typically not as significant as their operations in their home country. As a result, domestic firms will be able to comply with a large capital requirement more easily than foreign firms. Additionally, while large banks or broker dealers may not find it difficult to meet high capital requirements, many smaller, independent firms are part of the highly successful asset management industry in the United States. It would be unfortunate if the high capital requirements continued to operate to prevent these US firms from participating in China's asset management industry.

We also hope that China will go beyond its WTO commitments by allowing foreign firms to choose their form of establishment and equity participation levels, and permitting competition in the sector on the same basis as domestic firms.

We are pleased that China took steps to open the A-share market to foreign investors by adopting rules on qualified foreign institutional investors (QFIIs). However, many institutional investors have been unable to take advantage of the rules because some provisions of the rules limit their practicality. We understand that the CSRC and SAFE are reviewing several aspects of the QFII rules and are preparing revisions that would address many of our concerns, including a reduction of the lock-up period from one year to three months, and a simplified approval process for remittances. We look forward to the issuance of the new QFII rules, and hope that China will continue to remove restrictions such as its high minimum account size that discourages investment by QFIIs.

## **Express Delivery**

CSI members are concerned that the Chinese government has not yet released the seventh draft of the pending Postal Law for public comment as required by GATS rules on transparency and China's WTO accession commitments on notice and comment.

The current Draft Postal Law attempts to narrowly define express delivery services contrary to China's WTO commitments, and includes national treatment violations for domestic parcel delivery services. It will impose a minimum weight restriction of 350 grams, below which China Post will have an absolute monopoly for domestic shipments. Except for an undefined "express mode", the bill will also prevent foreign-invested

companies from engaging in domestic delivery of parcels weighing less than 50 kilograms with specified dimensions. This measure would effectively preclude US companies from markets in which they currently have the right to operate.

The draft law would apply a tax on all entities operating under the expanded postal monopoly. Unlike previous drafts, the current draft does not seem to include specific percentages for a universal postal service fund tax. We are concerned that this measure would result in millions of dollars of lost revenue for US companies, and would increase the cost of trade.

The draft would grant new powers to the State Postal Bureau (SPB) to regulate the international express industry. However, based on companies' past experiences, we are concerned the SPB will use its new powers to burden US companies with unnecessary reporting requirements and inspections.

Despite the Chinese government's assurances that entrustment certificates from China Post would be renewed automatically, the SPB granted these certificates for a limited time only, most recently for the calendar year 2006. The entrustment regime violates China's WTO commitments not to roll back companies' market access rights and not to use licensing procedures to restrain foreign competition.

### **Telecommunications**

China's narrow interpretation of market access opportunities for foreign participants and a lack of an independent regulator seem to contradict its WTO accession commitments. The JCCT telecom dialogue offers a useful vehicle to ensure China's WTO compliance and advance industry interests in liberalizing its telecommunications market.

Specifically, foreign market entry is being delayed by the Ministry of Information Industry's definition of value-added services (VAS) for international value added network service licensing. The regulator has construed the meaning of VAS in China's WTO commitments so narrowly that any commercially important sectors, such as IP-virtual private networks (IP-VPN) services demanded by global enterprises, are excluded.

China's unreasonably high capitalization requirements for basic services and the prohibition on resale have also greatly limited market access in both basic telecommunications and VAS. We believe that resale should be permitted, and subject to appropriately lower market entry requirements. Further, the requirement that foreign telecom service providers may only enter into a joint venture with one of the existing state-owned enterprise telecom providers is problematic.

China has not implemented its WTO Reference Paper commitment to establish an independent regulator. The Chinese Government still owns and controls all major telecom operators, and the Ministry of Information Industry still regulates the sector. China has not enacted pending telecommunications legislation that could mandate a separate regulatory body. Despite its WTO commitment to discuss further sectoral

liberalization, China has yet to submit an improved telecom offer with meaningful market access provisions.

### **Market Access for IPR Products**

Elimination of China's trade barriers in audiovisual, software, and IT goods and services can help solve China's piracy problem. Current rules make it difficult for US services companies to enter the Chinese market to supply legitimate products, thereby ceding the market to counterfeit producers. Therefore, we encourage China to remove its limitations on foreign ownership in distribution and video replication, publishing, TV stations, and theater holding companies.

China's existing quota on foreign revenue-sharing films, along with the lengthy approval process, also promotes the spread of illegal pirated content. China should consider increasing revenue sharing beyond 20 films, eliminate the import monopoly and the distribution duopoly, and eliminate or reduce the blackout periods for foreign film screening. Primetime broadcasting and foreign content restrictions for pay and non-pay television broadcasters should also be reduced.

China's censorship clearance procedures for optical media should be streamlined. These procedures give another advantage to pirate producers by severely hindering timely distribution of legitimate CD, VCD, and DVD products in China. China should institute a film rating system to facilitate expedited censorship.

Foreign investment in the Chinese publishing sector should also be allowed. Guidelines have been issued to permit Chinese private equity in publishing enterprises, which were previously controlled exclusively by the state. We had hoped that these guidelines would facilitate a move to allow foreign investment, but new regulations issued in August 2005 put progress on hold.

Retail chain stores should be granted a national license to distribute CDs and other media products, instead of requiring separate licenses in each jurisdiction. China should also clarify the authority and procedures for the issuance of retailers' AV licenses.

### **Digital Products Customs Valuation**


China made WTO commitments to apply tariffs on digital products based on the value of the underlying carrier medium rather than on the imputed value of the content (i.e. on the basis of projected royalties). In June 2003, however, China issued regulations, which do the exact opposite. Chinese authorities should reverse these regulations and ensure that customs valuation for all forms of digital products is based on the value of the underlying carrier medium.

Since the JCCT's establishment in 1983, China has committed to significant improvements in its trade regime, and we hope that services will play a prominent role in China's plan of action this year. China's experience shows that its economy greatly

benefited from liberalized services trade, foreign investments, and technology transfer. To ensure sustainable growth and development, and to facilitate its further integration into the world's economy, China should continue to open its market through substantive services commitments.

Thank you for this opportunity to share our suggestions for the JCCT agenda this year.

Sincerely,



Robert Vastine  
President

cc: Timothy Stratford  
Henry Levine