

**REMARKS BEFORE THE
CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA**

April 2, 2004

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I INTRODUCTION

Thank you for inviting me here this morning to share the U.S. Chamber's views on establishing a program to support commercial rule of law development in China. As the largest business federation in the world, with member companies of every size, sector, and region, the U.S. Chamber is well placed to offer its views on issues of commercial significance in the U.S.-China relationship.

The U.S. Chamber believes that there would be great value in establishing a Commercial Law Development Program (CLDP) in China consistent with Section 511 of U.S.-China Relations Act of 2000. New initiatives and technical assistance provided under such a program would help China strengthen its capacity to more fully implement its WTO commitments and to create a more predictable and transparent business environment for U.S. companies.

II U.S. CHAMBER SUPPORT FOR CHINA'S WTO ACCESSION

The U.S. Chamber strongly supported China's accession to the World Trade Organization.

It did so because of its belief that China's entry into the global trading body would encourage the growth of private enterprises in China, foster greater openness, deepen the country's reform efforts, and help to create a sound business and legal framework.

The trade and investment liberalization measures to which the Chinese government has committed itself are impressive and the steps required to implement them are enormous. Well over 1,000 Chinese trade laws, rulings, and regulations have been reviewed for WTO consistency, and many new laws and regulations are being written to cover industries previously off-limits to foreign participants.

Throughout the Chinese government, major departments have set up WTO committees to review industry-specific laws. Meanwhile, millions of officials, legislators and judges are being trained to regulate a market economy. The challenge is particularly difficult in China's interior, where few officials are familiar with the WTO's mandates. Hundreds of WTO case studies are being translated into Chinese and WTO training centers have been established in a number of cities.

Implementation of obligations as broad as China's was always understood to be difficult, and American businesses have never assumed that it would be a short or easy ride. In some respects, China's implementation efforts have been impressive, and the rapid growth in two-way trade and investment into China reflects this. But in other areas, including intellectual property rights

protection, transparency, standards, and government procurement, among others, additional progress is needed and a CLDP in China could be very beneficial.

China's leaders have made a serious commitment to WTO compliance and to more transparent decision-making. But these same leaders acknowledge that they don't have the depth of experience or trained personnel on hand in many areas to carry through with the major commitments the country has made in such areas as financial services or the expansion of distribution rights. Having the opportunity to work with Chinese officials outside the framework of a specific negotiation or decision will allow U.S. officials to share expertise and best practices, frame issues in a broader context, and generally encourage greater cooperation in the future.

III CONTINUING COMPLIANCE CHALLENGES

Over the first two years of China's WTO membership, the U.S. Chamber has undertaken to observe and encourage the country's progress with implementing its WTO commitments through its China WTO Implementation Working Group chaired by corporate leaders in a range of industries. In its 2002 and 2003 reports, the Chamber highlighted both China's areas of progress and its shortcomings. Without going into a long list of sector-specific issues, let me highlight a small number of the broad challenges faced by our member companies in China and the changes that we hope to see before offering some thoughts on the potential benefits of a commercial rule of law program in addressing these issues.

Transparency

Transparency in the legal and regulatory environment remains a key concern for U.S. Chamber members operating in China. Improvements in regulatory clarity and the consistent use of advance consultations would do much to advance the prospects for success in industries ranging from autos to direct selling to insurance to telecom.

In line with its WTO commitments, as well as internationally accepted standards and good business practices, China should give both local and foreign professionals a reasonable period of time to review and comment on proposed new measures. The international experience that many foreign professionals bring to China can be of great assistance in the development and acceptance of market-oriented and economically sound policies. Ministries should establish and maintain a regular dialogue with industry experts to address the needs of various sectors.

Regulators must not also be competitors in the marketplace. In the area of express delivery services, for example, China Post's regulatory functions must be separated from its business functions. Similarly, in the telecommunications sector, additional measures are necessary to increase the independence of the regulator, the Ministry of Information Industries, from the major state-owned operators in the telecom industry.

China's transparency obligations will make its governing institutions more accountable, thus limiting opportunities for corruption. Government procurement transparency, for example, will help stimulate competition and reduce the likelihood that business opportunities will be directed to well-connected enterprises.

Intellectual Property Rights

After nearly two years of membership in the WTO, it is clear that the China's intellectual property rights (IPR) enforcement system still has significant weaknesses and is far from effective. Foreign investors in China lose billions of dollars each year due to piracy and counterfeiting.

Enforcement of IPR will not be effective until civil, administrative, and criminal penalties are routinely applied to infringers of IPR. While China's government at the central and provincial levels carries out raids and other enforcement actions, administrative penalties are small or nonexistent and there is no commitment to pursue criminal prosecutions with deterrent penalties.

Counterfeit pharmaceuticals are a significant problem in China, especially in the area of over-the-counter products sold outside of hospitals, and the agriculture sector reports evidence of counterfeit fertilizer. Pirated music, books, business software, movies, and video games are also readily available on the market, and unauthorized use of software by businesses is rampant, hindering the ability of both indigenous and U.S. creators and rights holders to build successful businesses. Newly emerging problems include Internet piracy, such as the illegal and unauthorized download of online journals and other materials. Moreover, counterfeiting is taking place in industrial sectors such as the automobile industry, where there is increasing theft of industrial designs.

The U.S. Chamber would like to see China undertake a coordinated nationwide IPR enforcement campaign. The government should make revisions to the penal code such that it fully applies to all rights under copyright as well as all other piracy-related crimes. At the same time, China should take more effective customs and border measures to curtail the massive importation of pirated materials into the country. To support these efforts, China should continue with its efforts to train judges in IPR laws; provide adequate resources to relevant police, prosecutors, and administrative agencies; and ensure that penalties for intellectual property violations are sufficiently strong to serve as a deterrent.

Standards

The U.S. Chamber is concerned about China's use of discriminatory standards to erect barriers to fair competition. For example, China's adoption of mandatory national technology standards that are out of step with international standards efforts and that don't consistently respect intellectual property rights are troubling to the U.S. IT industry, many members of which have made significant investments in China. With its strong manufacturing capabilities and rapidly growing consumer base, China will play an increasingly important role in the development of the Asian and global IT industry.

The U.S. Chamber would like to see the Chinese government participate more actively in international standard setting bodies and align China's national standard development efforts with internationally recognized and developed standards and practices. In addition, we hope to see the government foster respect for intellectual property rights embodied in standards, including through the adoption of rules that are consistent with international practice for the treatment of intellectual property in standards negotiations. For China, these steps will ensure the interoperability of products used and/or produced in China with those in the rest of the world.

Government Procurement

The U.S. Chamber is also concerned about China's use of the government procurement law to protect local industry. The procurement law came into force on January 1, 2003, and applies to all goods and services procured by government entities. Implementing rules will eventually be developed for all sectors, but the government is beginning with the software sector. The way in which the law is implemented for software will set a precedent for the way the other sectors are treated. An open, competitive, transparent, nondiscriminatory and technology-neutral government procurement regime is in China's interest and in the interest of China's major trading partners.

Detailed implementing regulations and a definition of local software are expected to be released in May. U.S. industry has proposed definitions of “domestic” to Chinese authorities for their consideration, but it is unclear whether this input will be utilized. We encourage the Chinese government to make the threshold for what constitutes “domestic” as low as possible to maximize the number of U.S. companies that can participate in the government procurement market for software.

IV VALUE OF A COMMERCIAL LAW DEVELOPMENT PROGRAM IN CHINA

Since the passage of the U.S.-China Relations Act in 2000, the U.S. Department of Commerce has conducted a number of technical assistance seminars in China, including valuable training programs focused on intellectual property rights, standards, and franchising. Private sector commercial rule of law efforts also exist, such as the U.S.-China Legal Cooperation Fund established by the U.S.-China Business Council in 1998. The latter program has extended a number of important grants over the years to support the further development of strong, transparent, impartial, and equitable legal institutions in both nations.

But despite the impressive efforts being undertaken by the U.S. government and private sector to address China WTO compliance and commercial rule of law issues, significant challenges remain. And in the case of intellectual property protection, the challenges seem to be expanding, not shrinking, in size and dimension. Beginning a Department of Commerce-run Commercial Law Development Program (CLDP) in China would make a much-needed contribution to the long-term improvement of the business landscape faced by American companies in China.

CLDP programs operating in other parts of the world are helping political, regulatory, judicial, and commercial leaders to make important improvements in their policies, laws, and organizational structures. Significantly, a major portion of CLDP’s efforts support WTO accessions and implementation of WTO disciplines, including in areas like intellectual property rights, product standards, and market access, among other areas. One can quickly see a link between the types of challenges encountered by the U.S. business community in China and the beneficial role that a CLDP program could play.

With respect to transparency and the need for a more consistent use of advance consultations, for example, CLDP is working with host countries to promote more transparent decision-making and to involve businesses in the development of policies that impact them. CLDP efforts resulted in the first-ever public outreach programs conducted by the Russian Ministry of the Interior and regular business outreach programs by the Albanian Ministry of Trade and Industry, to name but two examples. And a CLDP program in Egypt has increased the acceptance of U.S. standards by initiating a relationship between ASTM International and the Egyptian Organization for Standardization and Quality Control.

The importance of having a sustained U.S. government program along these lines in China becomes more clear when one considers the commercial rule of law efforts being undertaken by other Chinese trading partners, like the European Union. The EU is investing significant efforts into the development of cooperative programs in China that are geared toward improving the business prospects for European companies in China. Currently, for example, the European Union runs a EU-China Legal and Judicial Cooperation Program that helps to address the concerns of European companies in China and raises the profile of the EU in that market.

Launched in March of 2000, the program’s focus is on reform of laws in the criminal, trade/commercial, and administrative areas and on capacity building in China’s legal and judicial organizations. China’s Ministry of Commerce is the main executing agency, but other implementing agencies include the Ministry of Justice, the Supreme People’s Court, and the National People’s Congress. These are important

partners for the U.S. government to be engaging in a more sustained way, through a program like CLDP, on commercial rule of law issues.

Standards represent a key issue on which the U.S. government must adopt a more active and strategic approach in China. The EU, the Japanese, and others in many instances have a natural advantage on standards because of their domestic industrial policies, and they work hard to advance their companies' interests. Though in some cases U.S. companies are involved in competing standards, which restricts the U.S. government's ability to intervene, through a program like CLDP the U.S. government could marshal its advocacy resources for those sectors and technologies in which there exists a unified U.S. company position.

V SUPPORT FOR OTHER NGO EFFORTS

Beyond the efforts that Commerce could carry out itself with its own internal expertise, a CLDP could make new funds available for other business, academic, and other non-governmental efforts focused on promoting private sector participation in trade policy formation and efforts to strengthen the commercial rule of law.

As one example, the U.S. Chamber-affiliated Center for International Private Enterprise (CIPE) has expressed interest in expanding its rule of law programs in China. CIPE's mission is to promote democracy through economic reform and private-sector development. CIPE would be effective in organizing a series of workshops in China to explore mechanisms and policies appropriate for the new economic and social environment created by China's WTO membership. With participation by local government officials, business executives, legislators, economists, and lawyers, CIPE programs could, for example, focus on the economic impact of China's WTO membership, emphasizing the need for specific institutional changes including making the judicial system more independent of government and political interests.

A CLDP also could support such initiatives as the new U.S.-China Business Mediation Center, just launched in the fall of 2003. The U.S. Chamber serves on an advisory committee to the Center, a commercial dispute resolution facility that helps U.S. and Chinese companies develop alternatives to adjudication of disputes that may arise between them. The greatest obstacle to increased use of mediation between Chinese and American businesses is a lack of awareness among companies and lawyers of how mediation works and the business benefits that mediation can offer. A CLDP could be useful in this regard.

A CLDP could also play an important role in coordinating these various non-governmental efforts by sharing access to relevant players and promoting consistent messages in ways that would make each effort more effective.

VI CONCLUSION

The U.S. Chamber believes China has made a sincere commitment and effort to comply with WTO obligations. But China does not currently have sufficient personnel with the experience or technical background and training needed to develop and implement market-oriented laws and regulations. As one considers China's WTO shortcomings, it is important to distinguish between areas where the country is willfully not carrying through with a commitment versus those where there is a legitimate effort underway but there is a lack of technical capacity to get the job done. A CLDP program could be of great assistance in the latter cases.

CLDP programs have made a meaningful contribution in countries all around the globe, from Central and Eastern Europe to the Middle East to Africa to the former Soviet Union. They certainly belong in China, a country that holds so much opportunity for American companies of all sizes and for the global economy. China's WTO compliance and economic reform challenges are enormous and the U.S. government should be deploying all available resources and working cooperatively with China on these efforts. Clearly the American business community has a strong stake in China's success.