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Committee on Trade-Related Investment Measures

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COMMUNICATION FROM THE UNITED STATES

The following communication, dated 12 September 2005, is being circulated at the request of the Delegation of the United States.

TRANSITIONAL REVIEW MECHANISM PURSUANT TO PARAGRAPH 18 OF THE PROTOCOL ON THE ACCESSION OF THE PEOPLE'S REPUBLIC OF CHINA ("CHINA")

Questions From the United States to China
Concerning Trade-Related Investment Measures

I. FOREIGN INVESTMENT CATALOGUE

1. In November 2004, the National Development and Reform Commission (NDRC) and the Ministry of Commerce issued a revised *Catalogue for the Guidance of Foreign Investment Industries*. This catalogue became effective in January 2005. The new catalogue places the "importing of books, newspapers and periodicals" under the category of "prohibited" foreign investment, even though China committed in its Protocol of Accession (at paragraph 5) to make full trading rights, i.e., the right to import and the right to export, automatically available for all Chinese-foreign joint ventures, wholly foreign-owned enterprises and foreign individuals, including sole proprietorships, within three years of its accession, or by 11 December 2004, subject only to exceptions applied to products listed in Annexes 2A and 2B (primarily grains, cotton and tobacco), for which China reserved the right to engage in state trading. Please explain how this provision of the new catalogue is consistent with China's trading rights commitments.

2. China committed in the Services Schedule accompanying its Protocol of Accession that, within three years after accession (or by 11 December 2004), it would permit foreign service suppliers to supply wholesaling services, commission agents' services and retail services through wholly foreign-owned enterprises without any market access or national treatment limitations, with only exceptions for certain products (chemical fertilizers, processed oil and crude oil, salt and tobacco) and certain chain stores. Meanwhile, the new *Catalogue for the Guidance of Foreign Investment Industries* places the "wholesale or retail business of books, newspapers and periodicals" in the "restricted" investment category.

(a) Please describe the restrictions that apply.

(b) Please explain how these restrictions are consistent with China's services commitments.

(c) Do any restrictions apply to subordinate services such as sales promotion, advertising with regard to the wholesale or resale of books, newspapers and periodicals?

3. The new *Catalogue for the Guidance of Foreign Investment Industries* places the "printing of publications" in the "restricted" investment category.

(a) Please describe the restrictions that apply.

(b) In this context, does "printing" include "binding", or is the "binding of publications" not part of any "restricted" investment category?

4. The new *Catalogue for the Guidance of Foreign Investment Industries* places the "publishing, producing [and] master issuing of books, newspapers and periodicals" in the "prohibited" investment category.

(a) Please explain what "publishing" means in this context.

(b) Please explain what "producing" means in this context.

(c) Please explain what "master issuing" means in this context.

5. The new *Catalogue for the Guidance of Foreign Investment Industries* continues to reflect China's decision to adhere to most of its commitment to open up certain sectors to foreign investment, including travel agencies, human resources companies, cinemas, railway cargo and publications distribution, while it also signalled the opening-up of a number of other sectors not covered by China's accession agreement. As in the case of the previous version of this catalogue, however, one notable exception to this progress is the area of "production and development of genetically modified plants seeds", which China places in the "prohibited" category. Does China have any plans to remove this area from the "prohibited" category?

II. AUTOMOBILE INDUSTRIAL POLICY

6. In Article 47 of its automobile industrial policy, published on 1 June 2004, and entitled "Development Policy of the Automobile Industry", China states that a new automobile production plant requires a minimum investment of RMB 2 billion, of which owned capital should not be less than RMB 800 million. According to this article, the new plant should also include an R&D facility, investment in which should not be less than RMB 500 million. Article 47 additionally requires the establishment of an R&D facility in connection with new automobile engine manufacturing.

7. In its WTO accession agreement, however, China committed not to condition the right of investment on the conduct of research and development. Specifically, in paragraph 7.3 of its Protocol of Accession, China committed: "China shall, upon accession, comply with the TRIMs Agreement, without recourse to the provisions of Article 5 of the TRIMs Agreement. Without prejudice to the relevant provisions of this Protocol, China shall ensure that the distribution of import licences, quotas, tariff-rate quotas, or any other means of approval for importation, the right of importation or investment by national and sub-national authorities, is not conditioned on: whether competing domestic suppliers of such products exist; or performance requirements of any kind, such as local content, offsets, the transfer of technology, export performance or *the conduct of research and development in China*". (Emphasis added). Similarly, in paragraph 203 of its Working Party Report, China committed: "The allocation, permission or rights for investment will not be conditional upon performance requirements set by national or sub-national authorities or subject to secondary conditions covering, for example, *the conduct of research*, the provision of offsets or other forms of industrial compensation including specified types or volumes of business opportunities, the use of local inputs or the transfer of technology". (Emphasis added).

8. Previously before this Committee (see G/L/708 and G/TRIMS/M/19), China stated that while Article 47 of the automobile industrial policy "did not stipulate specific and mandatory requirements on product R&D performance", it did "require[ ] the newly-established enterprises to set up their own Research and Development institutions" in order to "equip the enterprises with basic technical ability in order to ensure that the newly-established enterprises be able to conduct technical reconstruction and research and development on their own products, and that they could meet the increasing technical and legal requirements on safety, environmental protection and energy saving, as well as customer demand in China".

9. Given that Article 47 of the automobile industrial policy appears to condition the right of investment by mandating the conduct of research and development in China, please explain how this provision complies with China's commitments in paragraph 7.3 of China's Protocol of Accession and paragraph 203 of China's Working Party Report.

III. STEEL POLICY

10. Articles 16 and 18 of the steel industrial policy, released by the NDRC on 8 July 2005, appear to discriminate against foreign equipment and technology imports by encouraging the use of domestic products when competing domestic suppliers exist. Specifically, Article 16 provides for state support in the form of "tax refunds, discounted interest rates, funds for research and other policy support for major iron and steel projects utilizing newly developed domestic equipment", while the first part of Article 18 reads: "Policy on Import of Technology and Equipment: Encourage industry to use domestic equipment and technology; reduce imports. For equipment and technology that must be imported due to the lack of domestic ability to produce such or due to insufficient domestic supply, such equipment and technology must be modern and practical. For current and future large scale equipment, localization of production must be organized". Please explain how Articles 16 and 18 are consistent with the commitments made by China in paragraph 7.3 of its Protocol of Accession; paragraphs 22 and 203 of its Working Party Report; Article 2 of the Agreement on Trade-Related Investment Measures; and Article III of the General Agreement on Tariffs and Trade 1994.

11. Article 23 of the steel industrial policy mandates certain requirements as conditions for investments. These include requirements for certain production levels in the previous year, self-financing of 40 per cent or above, modern technology and management, strong supply and distribution networks, transportation, and water, mineral and power resources. Furthermore, these requirements appear to apply only to domestic enterprises seeking to operate in cross-regional domestic steel operations, while foreign enterprises must meet these requirements for any investment in China. In addition, domestic enterprises only need to meet a 5 million ton previous year quantity threshold for investments in common steel and a 0.5 million ton previous year quantity threshold for investments in special high-allow steel. The corresponding thresholds for foreign enterprises are 10 million tons and 1 million tons. Article 23 also does not allow foreign enterprises to invest in new business sites, but limits participation to reform or relocation of existing enterprises and to non-controlling stakes. Please explain why there is a need for such discrepancies in the treatment of foreign enterprises and domestic enterprises.

12. The steel industrial policy places other restrictions on foreign investment, such as by requiring that foreign investors possess proprietary technology/intellectual property in the processing of steel. Given that foreign investors are not allowed to have a controlling share in steel and iron enterprises, this requirement would seem to constitute a *de facto* technology transfer requirement. Please explain how these restrictions are consistent with the commitments made by China in paragraph 7.3 of its Protocol of Accession and paragraph 203 of its Working Party Report.

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