

COMMUNICATION FROM THE UNITED STATES

Transitional Review Mechanism Pursuant to Section 18 of the
Protocol on the Accession of the People's Republic of China

Questions from the United States to China concerning Services

The attached paper has been received from the delegation of the United States with the request that it be circulated to Members of the Council for Trade in Services.

I. GATS NOTIFICATIONS

1. The General Agreement on Trade in Services (GATS) requires WTO Members to make several notifications to the Council for Trade in Services. To date, China has not made any of the notifications listed below. For each of them, please indicate when the notification will be supplied.

- (a) Article III:3 notification of laws, regulations, or administrative guidelines;
- (b) Article III:4 notification of inquiry points;
- (c) Article IV:2 notification of contact points to facilitate access of LDC service suppliers to market info (required of developed country Members, and to the extent possible other Members).

2. The GATS also requires notifications when certain circumstances exist. Please confirm that the circumstances that would warrant the following notifications do not exist.

- (a) Article V:7(a) notification of economic integration agreements;
- (b) Article V bis notification of agreements on integration of the labor markets;
- (c) Article VII:4 notification of existing recognition measures;
- (d) Article VII:4 notification of new or modified recognition measures;
- (e) Article VII:4 notification of commencement of negotiation of recognition measures; and
- (f) Article VIII:4 notification of grant of monopoly rights.

II. LEGAL SERVICES

On December 27, 2001, the Ministry of Justice (MOJ) issued *Regulations on the Management of Foreign Law Firm Representative Offices*. On July 4, 2002, MOJ published *Implementing Rules for the Regulations on the Management of Representative Offices of Foreign Law Firms in China*. Like several other Chinese agencies, MOJ issued these measures without providing an opportunity for interested WTO Members and foreign companies to comment before the measures were implemented, despite China's commitment in Part I, Section 2(C)2 of China's Protocol of Accession.

3. Article XVI of the GATS bars a Member from imposing an economic needs tests in a services sector in which a Member has made market access commitments, as China did with legal services. Article 7(3) of the *Regulations* and Article 4 of the *Implementing Rules* appear to permit MOJ to determine whether there is a need for a representative office based on demand and other factors. Please justify these provisions in light of China's obligations under the GATS. If you cannot do so, please describe China's plans for amending the provisions in question.

4. Foreign lawyers practising in China have traditionally been able to represent their clients before arbitral tribunals. Article 32(4) of the *Implementing Rules* defines participation in arbitrations involving Chinese law as the conduct of "Chinese legal affairs," which is proscribed for representative offices and their representatives by Article 15 of the *Regulations*. Please explain how China interprets these provisions and how China will apply them in a manner consistent with China's Services Schedule commitment not to make more restrictive the scope of activities for a licenced service supplier after China's accession to the WTO.

5. The broad definition of "Chinese legal affairs" contained in Article 32 of the *Implementing Rules* potentially restricts the ability of foreign law firms to continue to advise their clients on the impact of the Chinese legal environment. Please explain how the *Implementing Rules* will be administered in a manner consistent with China's Services Schedule commitment to allow foreign law firms to provide such advice.

6. In its Services Schedule, China committed to remove quantitative limitations on foreign law firms within one year after China's accession (i.e., by December 11, 2002). However, Article 10 of the *Implementing Rules* requires that the most recently established representative office of a foreign law firm have practiced for three years before the firm may apply to open another representative office.

- (a) How will China administer or modify this requirement in the *Implementing Rules* so that it is consistent with its commitment to remove quantitative limitations on foreign law firm representative offices?
- (b) In addition, Articles 18 of the *Regulations* provides that "representatives of a representative office may not assume representation in two or more representative offices." Please confirm that this provision will not be applied to restrict a foreign lawyer from working out of more than one representative office if that lawyer's firm has established multiple offices in China.

7. Article 9 of the *Regulations* allows the relevant authorities a total of nine months to consider an application to establish a representative office in China. This period is excessively long, given the type of requirements that a representative office of a foreign law firm must meet. China's WTO Working Party Report (in paragraph 308(f)) requires that, for those services included in China's Services Schedule, "Decisions would be taken promptly on all applications." In addition, with this nine-month period, China appears to have increased the burdens on foreign law firms wishing to

establish an office in China. Under the *Interim Provisions of the Ministry of Justice and the State Administration of Industry and Commerce on the Setting Up of the Offices of Foreign Law Firms in China*, MOJ previously was required to decide on an application within 60 days. The nine-month period is also much longer than what appears to be the comparable period for approval of establishment of Chinese law firms under the *Lawyer's Law*, which provides for a 30-day approval process. From a WTO perspective, the increased burdens for foreign law firms are of concern.

- (a) Please explain why China needs nine months to consider an application to establish a representative office.
- (b) Would China be willing to adopt a 30-day period for Chinese authorities to decide on a foreign law firm's application, as is done with Chinese law firms?

8. Article 34 of the *Regulations* contemplates the issuance of separate rules governing representative offices of law firms of separate customs territories. If those rules provide differential treatment to firms from Hong Kong, China, Macao, China, and Chinese Taipei, they are likely to run afoul of China's non-discrimination obligation under GATS Article II:1 as well as China's commitment in paragraph 19 of the Working Party Report (in which China committed to "provide non-discriminatory treatment to all WTO Members, including Members of the WTO that were separate customs territories").

- (a) What are China's plans for implementing Article 34 of the *Regulations*? If China has issued any rules for representative offices of Hong Kong, China, Macao, China, and Chinese Taipei law firms, please identify them.
- (b) Please explain how China will ensure that any rules issued will be consistent with the GATS and China's Working Party Report commitment.

9. China committed in its Services Schedule to permit representative offices to entrust, on behalf of foreign clients, Chinese law firms to deal with Chinese legal affairs and also to enter into contracts to maintain long-term entrustment relations with Chinese law firms for legal affairs. However, Article 40 of the *Implementing Rules* restrict representative offices from paying Chinese lawyers remuneration or fees. Please explain how China will implement these provisions in a manner consistent with its commitments on entrustment.

10. Article 16 of the *Regulations* provides that representative offices may not employ "lawyers who practice Chinese law." This differs from the language that China agreed to in its Services Schedule, which states that the representative office shall not employ "Chinese national registered lawyers." The meaning of the term "Chinese national registered lawyers" was clarified in the Working Party Report (at paragraph 319), as "Chinese nationals who had obtained a lawyer's certificate and were holding a Chinese practising permit and were registered to practice in a Chinese law firm." The term used in the Services Schedule ("Chinese national registered lawyers") should be used in Article 16 (rather than "lawyers who practice Chinese law"), and it should be defined as it is defined in the Working Party Report.

- (a) Please provide China's interpretation of Article 16.
- (b) What plans does China have to revise Article 16 or otherwise clarify this matter?

11. Please clarify whether Article 20 of the *Regulations* requires that fees be paid in RMB.

III. TELECOMMUNICATIONS

12. In paragraph 309 of the Working Party Report, China agreed that, upon its accession to the WTO, the organizations regulating services industries in China would be independent of the services suppliers they regulate. Section 5 of the Basic Telecommunications Reference Paper also specifically calls for an independent telecommunications regulator that is separate from, and not accountable to, any supplier of basic telecommunications and makes decisions on an impartial basis. In the telecommunications sector, however, China has not yet established an independent regulator, as the Ministry of Information Industries is not structurally and financially separate from all telecommunications operators and providers. Please explain China's plans for establishing an independent regulator in the telecommunications sector.

13. China's *Administrative Measures for International Gateway Facilities*, which were issued on June 26, 2002, limit the ownership and operation of international telecommunications gateway facilities to wholly state-owned telecommunications providers. However, in its market-access commitments for telecommunications services, as set forth in its Services Schedule, China committed to allow minority foreign investment in basic telecommunications providers on a phased-in basis, and it did not include any limitation on foreign ownership with regard to gateway services. Please explain how this measure is consistent with China's commitments.

IV. EXPRESS DELIVERY SERVICES

Shortly after acceding to the WTO, China issued two problematic notices in the area of express delivery services, i.e., *Notice No. 629*, issued by the Ministry of Information Industries (MII), the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) and the State Post Office (SPO) on December 24, 2001, and *Notice No. 64*, issued by the SPO in February of 2002. These notices placed restrictions on the operation of foreign express delivery companies despite China's commitment not to make more restrictive the operation or scope of activities of a licensed service provider (as set forth in the horizontal commitments in China's Services Schedule). China has also sought to implement many of these restrictions through proposed changes to its Postal Law. Despite the many concerns raised by the United States and other WTO Members and affected Chinese and foreign companies and their associations, MII, MOFTEC and SPO issued a new notice on September 5, 2002, i.e., *Supplemental Notice on the Engagement in Postal and Delivery Services for Cross-border Letters and Materials of Letters in Nature* (No. 472).

14. Do foreign-invested express couriers already licensed by MOFTEC to provide international express delivery services (except for private letters) have to file entrustment applications with China Post? If so, what is the purpose of this duplicative requirement?

15. Please explain how the requirement in *Supplemental Notice No. 472* that foreign-invested express couriers already licensed by MOFTEC now obtain entrustment authority from the postal authorities does not conflict with China's WTO commitments, particularly the horizontal commitment in China's Services Schedule not to reduce market access by imposing conditions on ownership, operation or scope of activities that are more restrictive than those in place on the date of China's accession?

16. Under paragraph 2 of *Supplemental Notice No. 472*, do foreign-invested express couriers have the option of filing for entrustment with either the provincial authorities where they are headquartered or with the SPO? Please explain.

17. *Supplemental Notice No. 472* contains provisions that seemingly conflict with previous notices. For example, it states that, "[i]n case of discrepancy between this Supplemental Notice and

any previous documents issued by relevant governmental authority, the Supplemental Notice shall prevail.” Does this mean that the weight and rate restrictions appearing in *Notice No. 64* are no longer applicable?

18. Please explain how China intends to safeguard against the possibility that the postal authorities, in the future, will place WTO-inconsistent restrictions on foreign-invested express couriers, as they previously attempted to do with the weight and rate restrictions found in *Notice 64*.

V. LOGISTICS

On June 20, 2002, the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) issued a *Notice on Establishing Foreign-invested Logistics Companies in Trial Regions*, to be effective 30 days later.

19. Logistics services is not a defined term for WTO purposes, and the actual scope of this term as used in the *Notice* is not clear. It appears that the *Notice* may include several types of services for which China made commitments in its Services Schedule within the scope of logistics services. Please define the term “logistic services” as used in the *Notice*, and explain to what extent it includes other services addressed in China’s Services Schedule.

20. The rules in the *Notice* cap foreign participation in a foreign-invested logistics company at 50 percent. In its accession agreement, however, China committed to allow foreign majority ownership for freight forwarders and providers of auxiliary services within one year of accession, or by December 11, 2002. Please describe China’s plans for amending these rules to comply with this commitment.

21. Are companies engaged in all or part of the activities enumerated in the *Notice’s* rules required to register as “foreign-invested logistics companies,” even if they are already registered with MOFTEC or other government agencies under different regulations?

22. Can “foreign-invested logistics companies” operate both as “international logistics companies” and “3PL companies?” The descriptions of the scope of business of these two types of entities appear to overlap. How are international logistics companies differentiated from 3PLs?

23. Do the rules in the *Notice* apply only to new entrants or to firms already operating in the trial regions?

VI. LICENSING

24. Paragraphs 307 and 322 of the Working Party Report require China to publish all of its licensing procedures and conditions. Please identify each services sector for which this information has been published, and indicate where this information has been published.

VII. TRANSLATIONS OF MEASURES

25. In paragraph 334 of China’s Working Party Report, China committed that it “would make available to WTO Members translations into one or more of the official languages of the WTO all laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of forex, and to the maximum extent possible would make these laws, regulations and other measures available before they were implemented or enforced, but in no case later than 90 days after they were implemented or enforced.” To date, China has not provided translations of several measures pertaining to trade in services, including those listed below, most of which were implemented more than 90 days ago:

- (a) Measures on Administration of Representative Offices of Foreign Financial Institutions;
- (b) Measures on Administration of Business Networks in Same City Set Up by Commercial Banks;
- (c) Implementing Rules on Administration of Foreign Exchange Purchases by Domestic Residents;
- (d) Administrative Measures on International Telecommunications Entry/Exit Stations;
- (e) Regulation on Foreign Investment in Civil Aviation Industry;
- (f) Interim Regulation on Establishment of Foreign-Invested Printing Companies;
- (g) Provisional Regulation on the Administration of Internet Publishing;
- (h) State Council Decision on the Revision of the Regulations on the Administration of Travel Agencies; and
- (i) Regulation on the Administration of Overseas Intermediary Employment Agencies.

26. Please provide translations of these measures in advance of the October 21-25, 2002 meeting at which the Council for Trade in Services and the Committee on Trade in Financial Services will be reviewing the implementation by China of the WTO Agreement and the relevant provisions of China's Protocol of Accession.
