TRADE

Memorandum of Understanding
Between the
UNITED STATES OF AMERICA
and CHINA

Signed at Geneva November 29, 2007

NOTE BY THE DEPARTMENT OF STATE

Pursuant to Public Law 89—497, approved July 8, 1966 (80 Stat. 271; 1 U.S.C. 113)—

". . .the Treaties and Other International Acts Series issued under the authority of the Secretary of State shall be competent evidence . . . of the treaties, international agreements other than treaties, and proclamations by the President of such treaties and international agreements other than treaties, as the case may be, therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further proof or authentication thereof."

CHINA

Trade

Memorandum of understanding signed
at Geneva November 29, 2007;
Entered into force November 29, 2007.

Memorandum of Understanding Between the United States of America and the People's Republic of China Regarding Certain Measures Granting Refunds, Reductions or Exemptions from Taxes or Other Payments

Whereas the United States of America ("United States") filed requests for consultations with the People's Republic of China ("China") on 2 February 2007 and 27 April 2007 pursuant to Articles 1 and 4 of the World Trade Organization (WTO) Understanding on Rules and Procedures Governing the Settlement of Disputes, Article XXII:1 of the WTO General Agreement on Tariffs and Trade 1994, Articles 4 and 30 of the WTO Agreement on Subsidies and Countervailing Measures, and Article 8 of the WTO Agreement on Trade-Related Investment Measures, regarding certain measures granting refunds, reductions or exemption from taxes or other payments (DS358);

Whereas the United States and China held constructive consultations in Geneva on 20 March and 22 June 2007;

The United States and China have agreed as follows:

1. During the consultations, the United States described its concerns about the WTO-consistency of tax preferences provided under:

(a) the *Circular of the Ministry of Finance and the State Administration of Taxation Concerning the Issues of Tax Credit To Enterprise Income Tax for Purchase of Domestically Produced Equipment by Enterprises with Foreign Investment and Foreign Enterprises*, CaiShuiZi [2000] No. 49, issued on 14 January 2000, and the *Circular of the State Administration of Taxation on Printing and Issuing the Measures On Tax Credit To Enterprise Income Tax for Purchase of Domestically Produced Equipment by Enterprises with Foreign Investment and Foreign Enterprises*, GuoShuiFa [2000] No. 90, issued on 18 May 2000; and

(b) the *Circular on Printing and Issuing the Interim Measures on Credit and Exemption of Enterprise Income Tax for Investment in Domestically Made Equipment for Technological Renovation*, CaiShuiZi [1999] No. 290, issued by the Ministry of Finance and the State Administration of Taxation on 8 December 1999.

In this regard, China has explained that legal instruments of at least equal legal stature to the circulars identified in sub-paragraphs (a) and (b) above, will contain provisions stating that these circulars are repealed, and will be issued by the competent authorities, by 31 December 2007, effective no later than 1 January 2008. China confirms that the tax preferences under the circulars identified in sub-paragraphs (a) and (b) above will not be reinstated.

2. During the consultations, the United States described its concerns about the WTO-consistency of tax preferences provided under:

(a) Article 9 of the *Provisions of the State Council on the Encouragement of Foreign Investment*, GuoFa [1986] No. 95, issued on 11 October 1986 (hereinafter "*State Council Provisions*"); Article 6 of the *Income Tax Law of the People's Republic of China on Enterprises with Foreign Investment and Foreign Enterprises*, Order No. 45, promulgated on 9 April 1991 (hereinafter "*FIE Income Tax Law*"); and Article 75, paragraph 1, section 8 of the *Rules for the Implementation of the Income Tax Law of the People's Republic of China on Enterprises with Foreign Investment and Foreign Enterprises*, Decree No. 85, issued by the State Council on 30 June 1991 (hereinafter "*FIE Income Tax Implementing Rules*");

(b) Article 8 of the *State Council Provisions*; Article 6 of the *FIE Income Tax Law*; and Article 75, paragraph 1, section 7 of the *FIE Income Tax Implementing Rules*; and

(c) Article 10 of the *State Council Provisions*; Articles 6 and 10 of the *FIE Income Tax Law*; and Article 81 of the *FIE Income Tax Implementing Rules*.

China confirms that, effective 1 January 2008, the *Enterprise Income Tax Law of the People's Republic of China*, Order No. 63, promulgated on 16 March 2007 (hereinafter "*Enterprise Income Tax Law*"), repeals the *FIE Income Tax Law*. In addition, China has explained that legal instruments to be issued by, and made effective no later than, 1 January 2008, will contain provisions stating that the *FIE Income Tax Implementing Rules* are repealed. With the abolition of the *FIE Income Tax Law* and the *FIE Income Tax Implementing Rules*, Articles 8, 9 and 10 of the *State Council Provisions* will no longer be valid. China has further explained that, in accordance with its schedule of administrative regulations revision, Articles 8, 9 and 10 of the *State Council Provisions* will be eliminated by a legal instrument no later than 1 January 2009. The legal instruments repealing the *FIE Income Tax Implementing Rules* and Articles 8, 9 and 10 of the *State Council Provisions* will be issued by the competent authorities and be of at least equal legal stature to the legal instruments being repealed. China confirms that the tax preferences under the legal provisions identified in sub-paragraphs (a), (b) and (c) above will not be reinstated.

3. During the consultations, the United States described its concerns about the WTO-consistency of tax and other preferences provided under:

(a) Article 7 of the *FIE Income Tax Law*; Article 73, paragraph 1, section 6 of the *FIE Income Tax Implementing Rules*; and Section XIII of the *Catalogue of Encouraged Foreign Investment Industries* (hereinafter "*Encouraged Catalogue*") within the *Catalogue for the Guidance of Foreign Investment Industries*, Order [2004] No. 24, issued by the National Development and Reform Commission and the Ministry of Commerce on 30 November 2004 (hereinafter "*Catalogue*"); and

(b) the *Circular of the State Council Concerning the Adjustment in the Taxation Policy of Imported Equipment*, GuoFa [1997] No. 37, issued on 29 December 1997; and Section XIII of the *Encouraged Catalogue*.

In this regard, China has explained that, in accordance with its economic and social development, it revised the *Catalogue* on 31 October 2007, which revision will take effect as of 1 December 2007. China confirms that Section XIII of the *Encouraged Catalogue* dated 30 November 2004 will not be reinstated.

4. During the consultations, the United States described its concerns about the WTO-consistency of the *Enterprise Income Tax Law*, including Articles 25, 28, 31 and 57 thereof. China has explained that these provisions do not provide for the offering of any income tax preference contingent upon the use of domestic over imported goods or upon export performance. China has further explained that, notwithstanding the fact that Article 57 of the *Enterprise Income Tax Law* authorizes the continuation of certain income tax preferences beyond 1 January 2008, it will not be implemented or applied so as to introduce or permit the continuation of the income tax preferences being repealed by virtue of the actions described in paragraphs 1 through 3 of this Memorandum of Understanding. These limitations will be made explicit under fully authoritative legal measures, and will be effective, no later than 1 January 2008.

5. During the consultations, the United States described its concerns about the WTO-consistency of an exemption for certain foreign-invested enterprises from payments to the State for worker allowances, provided under Article 3 of *State Council Provisions*.

China has explained that, at the time the State Council promulgated the *State Council Provisions*, Article 11 of the *State Council Regulations on Labor Management in Sino-Foreign Joint Ventures*, Guo Fa [1980] No. 199 (26 July 1980), required foreign-invested enterprises to make such payments to the State. China has confirmed, however, that because this requirement was eliminated by the *State Council Decision on Abolition of Certain Administrative Regulations Promulgated Prior to the End of 2000*, Order No. 319 (6 October 2001), the exemption provided under Article 3 of the *State Council Provisions* is no longer operative. China confirms that Article 3 of the *State Council Provisions* may no longer serve as a legal basis to exempt foreign-invested enterprises from making payments required by Chinese law, regulation, or other official measure.

6. During the consultations, the United States described its concerns about the WTO-consistency of value-added tax (VAT) refunds provided under the *Circular of the State Administration of Taxation on Printing and Issuing the Interim Measures for the Administration of Tax Refund to Enterprises with Foreign Investment for the Purchase of Domestically Produced Equipment*, GuoShuiFa [1999] No. 171, issued on 20 September 1999, and the *Circular of the State Administration of Taxation and National Development and Reform Commission on Printing and Issuing the Interim Measures for the Administration of Tax Refund for the Purchase of Domestically-Produced Equipment in Foreign Investment Projects*, GuoShuiFa [2006] No. 111, issued on 24 July 2006.

In this regard, China has stated that these circulars do not create a preference, either in law or on a *de facto* basis, for the use of domestic over imported goods in connection with purchases of domestically-produced equipment when viewed in relation to the *Circular of the State Council Concerning the Adjustment in the Taxation Policy of Imported Equipment*, GuoFa [1997] No. 37, issued on 29 December 1997, in connection with purchases of imported equipment. China has confirmed that, in implementing the above-mentioned legal instruments as well as any new legal instruments that affect the operation of the above-mentioned legal instruments, it will ensure that imported equipment receives VAT treatment under terms and conditions no less favorable than those applicable to domestically-produced equipment.

7. The United States and China agree to communicate in a timely manner with respect to the implementation of the actions described above, including provision of related new legal instruments.

8. This Memorandum of Understanding is without prejudice to the rights and obligations of the United States and China under the WTO Agreement.

Done in Geneva, on 29 November 2007, in two copies in English and Chinese respectively, each text being equally authentic.

Peter F. McGee

For the Government
of the United States of America

For the Government
of the People's Republic of China

美利坚合众国和中华人民共和国关于给予退还、减少或者免除税收或其他支付的某些措施的谅解备忘录

鉴于2007年2月2日和2007年4月27日，美利坚合众国（“美国”）根据世界贸易组织（WTO）《关于争端解决规则和程序的谅解》第1条和第4条、WTO《1994年关税和贸易总协定》第22条第1款、WTO《补贴和反补贴措施协定》第4条和第30条以及WTO《与贸易有关的投资措施协定》第8条，请求与中华人民共和国（“中国”）就给予退还、减少或者免除税收或其他支付的某些措施进行磋商（DS358）；

鉴于美中两国于2007年3月20日和6月22日在日内瓦举行了建设性的磋商；

美国和中国协议如下：

一、磋商中，美国表达了其对下述文件规定的税收优惠与WTO规则的一致性的关注：

（一）《财政部、国家税务总局关于外商投资企业和外国企业购买国产设备投资抵免企业所得税有关问题的通知》（财税字[2000]49号，2000年1月14日颁布）和《国家税务总局关于印发〈外商投资企业和外国企业购买国产设备投资抵免企业所得税管理办法〉的通知》（国税发[2000]90号，2000年5月18日颁布）；以及

（二）财政部和国家税务总局于1999年12月8日颁布的《关于印发〈技术改造国产设备投资抵免企业所得税暂行办法〉的通知》（财税[1999]290号）。

对此中国已解释，有权机关将于2007年12月31日前颁布与上述（一）、（二）两段所述通知至少处于同一法

律层级的法律文件，该等文件将含有废止这些通知的规定并将不迟于 2008 年 1 月 1 日生效。中国确认，上述（一）、（二）两段所述通知中的税收优惠将不会被恢复。

二、磋商中，美国表达了其对下述文件规定的税收优惠与 WTO 规则的一致性的关注：

（一）《国务院关于鼓励外商投资的规定》（国发[1986]95 号，1986 年 10 月 11 日颁布，以下简称“《国务院规定》”）第 9 条、《中华人民共和国外商投资企业和外国企业所得税法》（主席令第四十五号，1991 年 4 月 9 日颁布，以下简称“《外商投资企业所得税法》”）第 6 条以及《中华人民共和国外商投资企业和外国企业所得税法实施细则》（国务院令第 85 号，国务院 1991 年 6 月 30 日颁布，以下简称“《外商投资企业所得税法实施细则》”）第 75 条第 1 款第 8 项；

（二）《国务院规定》第 8 条、《外商投资企业所得税法》第 6 条和《外商投资企业所得税法实施细则》第 75 条第 1 款第 7 项；以及

（三）《国务院规定》第 10 条、《外商投资企业所得税法》第 6 条和第 10 条以及《外商投资企业所得税法实施细则》第 81 条。

中国确认，2008 年 1 月 1 日起生效的《中华人民共和国企业所得税法》（主席令第六十三号，2007 年 3 月 16 日颁布，以下简称“《企业所得税法》”）废止了《外商投资企业所得税法》。另外，中国已解释，将于 2008 年 1 月 1 日之前颁布且不迟于 2008 年 1 月 1 日生效的法律文件将含有废止《外商投资企业所得税法实施细则》的条款。随着《外商投资企业所得税法》和《外商投资企业所得税法实施细则》的废止，《国务院规定》第 8、9、10 条将不再有效。中国已进一步解释，根据其行政法规清理工作的进

程，《国务院规定》第8、9、10条将不迟于2009年1月1日被法律文件废止。废止《外商投资企业所得税法实施细则》和《国务院规定》第8、9、10条的法律文件将由有权机关颁布并至少与被废止的法律文件处于同一法律层级。中国确认，上述（一）、（二）、（三）段所述法律规定中的税收优惠将不会被恢复。

三、磋商中，美国表达了其对下述文件规定的税收和其他优惠与WTO规则的一致性的关注：

（一）《外商投资企业所得税法》第7条、《外商投资企业所得税法实施细则》第73条第1款第6项以及《外商投资产业指导目录》（国家发展和改革委员会、商务部令[2004]第24号，2004年11月30日颁布，以下简称"《目录》"）中的《鼓励外商投资产业目录》（以下简称"《鼓励目录》"）第十三类；以及

（二）《国务院关于调整进口设备税收政策的通知》（国发[1997]第37号，1997年12月29日颁布）和《鼓励目录》第十三类。

对此中国已解释，根据自身经济和社会发展，已于2007年10月31日修订了该《目录》，该修订于2007年12月1日生效。中国确认，2004年11月30日颁布的《鼓励目录》第十三类将不会被恢复。

四、磋商中，美国表达了对《企业所得税法》，包括其第25、28、31和57条，与WTO规则的一致性的关注。中国已解释，这些条款没有规定提供以使用国产而非进口产品为条件或以出口实绩为条件的所得税优惠。中国已进一步解释，尽管《企业所得税法》第57条授权某些所得税优惠可延续至2008年1月1日以后，但执行或适用该条规定将不会被用于引入由本备忘录第一至三段所述行动所废止的所得税优惠或者允许该等优惠继续存在。该等限制将

由具有充分权限的法律措施明确，并不迟于 2008 年 1 月 1 日生效。

五、磋商中，美国表达了对《国务院规定》第 3 条给予部分外商投资企业免缴职工补贴的优惠与 WTO 规则的一致性的关注。

中国已解释，在国务院颁布《国务院规定》时，《中外合资经营企业劳动管理规定》（国发[1980]199 号，1980 年 7 月 26 日）第 11 条要求外商投资企业向国家支付职工补贴。但是中国已确认，由于《国务院关于废止 2000 年底以前发布的部分行政法规的决定》（国务院令第 319 号，2001 年 10 月 6 日）取消了该要求，《国务院规定》第 3 条所规定的该种免缴已不再执行。中国确认，《国务院规定》第 3 条已不再构成外商投资企业免缴中国法律、法规或其他官方措施要求的支付的法律依据。

六、磋商中，美国表达了对《国家税务总局关于印发〈外商投资企业采购国产设备退税管理试行办法〉的通知》（国税发[1999]171 号，1999 年 9 月 20 日颁布）、《国家税务总局、国家发展和改革委员会关于印发〈外商投资项目采购国产设备退税管理试行办法〉的通知》（国税发[2006]111 号，2006 年 7 月 24 日颁布）规定的增值税退税与 WTO 规则的一致性的关注。

对此，中国已声明，该等通知在与有关购买进口设备的《国务院关于调整进口设备税收政策的通知》（国发[1997]37 号，1997 年 12 月 29 日颁布）一并理解时，未在法律上或事实上导致有关购买国产设备的进口替代优惠。中国已确认，在实施上述法律文件以及影响上述法律文件运作的新法律文件时，中国将确保给予进口设备增值税待遇的条件不低于给予国产设备的条件。

七、美中两国同意就上述行动的实施情况及时进行沟通，包括提供相关的新法律文件。

八、本谅解备忘录不影响美国和中国在《WTO 协定》下的权利和义务。

本谅解备忘录一式两份，分别以英文和中文书就，于 2007 年 11 月 29 日在日内瓦签署，两种文本具有同等效力。

Peter F Allgeier

美利坚合众国政府代表

中华人民共和国政府代表