THE US-CHINA BUSINESS COUNCIL
美中贸易全国委员会

Legal Market Access Issues in China

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As the US-China commercial relationship has developed over the past four decades, US law firms have increasingly invested in China, and have sought to help foster a compliant and mutually beneficial business environment for foreign and Chinese clients. US law firms expanding into China provide distinct benefits to a wide clientele, not only supporting foreign multinationals but also increasingly working with Chinese investors and companies that operate both in China and abroad. These law firms have helped contribute to the growth and development of China's legal services sector, and offer unique expertise in China's market.

Currently, US law firms face significant barriers in China that prohibit them from fully contributing their expertise to both Chinese and foreign clients. The challenges discussed in this paper are among the most prominent faced by law firm members of the US-China Business Council (USCBC) in China.

USCBC continues to raise its concerns about legal market access issues with the US and Chinese governments, and remains active in promoting US legal industry interests with each government. USCBC will also continue to underscore these issues in its recommendations to the US-China Joint Commission on Commerce and Trade (JCCT) and its Commercial Law Working Group (CLWG).

Barriers to US Law Firms in China

Several regulations restrict US law firms' ability to provide comprehensive legal services in China's market. The challenges described in the following sections can generally be classified into three categories: market access barriers, discriminatory tax policies, and the inability to represent clients in government meetings.

Market Access Barriers

Current regulations prohibit US law firms from employing lawyers licensed to practice in China. Chinese lawyers hired by foreign law firms are required to turn over their legal licenses to China's Ministry of Justice (MOJ) upon being hired, effectively stripping them of their ability to practice law. In contrast, US regulations permit Chinese law firms in the United States to hire US-licensed lawyers who may practice in the United States without similar restriction.

China's policies have a negative impact on law firms, lawyers, and their clients. Such restrictive policies impede US law firms' practice, and also restrict the growth of China's legal service market. These policies therefore limit the quality and quantity of the choices available in the legal services market for clients, both foreign and domestic. Separately, these policies also restrict employment opportunities for Chinese-licensed lawyers, who may contribute to the expertise and practices of US law firms while also gaining valuable experience working with
multinational clients in an international workplace. Allowing Chinese lawyers working at US law firms to retain their licenses would provide China-based clients broader access to skilled legal professionals, and help expand employment opportunities in China's legal services market.

USCBC recommends allowing lawyers with Chinese licenses the ability to retain their licenses when joining foreign firms, thus contributing to the development of China's legal industry by keeping qualified lawyers fully participating in and contributing to the advancement of the legal system.

Discriminatory Tax Policies

US law firms in China are subject to discriminatory tax treatment that puts them at a competitive disadvantage against Chinese law firms. In China, US firms are taxed as "permanent establishments" of non-resident entities under the Corporate Income Tax Law (CITL), and are required to pay a 25 percent corporate tax rate. In contrast, Chinese firms are treated as "individual businesses" for tax purposes, and pay 5-35 percent according to a five-tier system. In addition, employees of US firms must pay a progressive tax on compensation under the Individual Income Tax Law, which can range up to 45 percent. However, Chinese partners with local firms are often free from paying individual income tax. In contrast, PRC law firms operating in the United States and their employees are treated equally under US tax law without discrimination.

The discrepancies between US and Chinese firms' tax laws create an uneven playing field that distorts competition in the legal services sector and leaves US firms at a significant disadvantage. USCBC recommends that China eliminate burdensome and inequitable taxes on foreign law firms, and treat foreign law firms as "pass-through entities" to avoid discriminatory income tax requirements.

Participation at Government Proceedings

US law firms in China are limited in their dealings with Chinese agencies. As mentioned previously, attorneys working at US law firms cannot represent their clients directly in court as they are not permitted to hold MOJ practice licenses. Additionally, however, many ministries, including the Ministry of Commerce, prohibit foreign firms from accompanying their clients to proceedings regarding their clients' business. Such exclusion hinders US law firms' ability to provide comprehensive legal services to their clients, and uniquely targets foreign firms. In addition, these restrictions appear to conflict with China's World Trade Organization (WTO) accession commitments.[1]

USCBC recommends that foreign and domestic law firms be given equal access to Chinese government agencies on matters affecting their clients and ensure that policies are in accordance with China's WTO commitments.

Conclusion

Allowing US firms equal and fair access to China's legal services market will help promote a robust legal services industry that expands the pool of qualified domestic lawyers, thus strengthening China's legal services sector so that Chinese and US companies are fully equipped to engage in the global marketplace.

[1] Report of the Working Party on the Accession of China (2001), *Professional Services (a, b);* US Trade Representative, *2011 Report to Congress on China's WTO Compliance* (December 2011)