CHAPTER 6

CHINA'S COMPLIANCE WITH AGREEMENTS PERTAINING TO ITS EXPORT TO THE UNITED STATES OF PRISON LABOR PRODUCTS

"The Commission shall investigate and report exclusively on—
. . .
"UNITED STATES–CHINA BILATERAL PROGRAMS—Science and technology programs, the degree of non-compliance by the People's Republic of China with agreements between the United States and the People's Republic of China on prison labor imports and intellectual property rights, and United States enforcement policies with respect to such agreements. . . ."

The Political and Economic Role of China's Prison System

The Background of the Prison Labor System

Contemporary prison labor in China is a legacy of the "reform by labor" or "*laogai*" system that was created with assistance from the Soviet Union after the Chinese Communist Party (CCP) successfully defeated the Nationalists on the mainland in 1949. It was modeled after the Soviet gulags, intended to punish those identified as opponents of the Communist regime. It also was based on Mao Zedong's premise that, through labor, opponents of Communism could be transformed into "new socialist beings."[1] Throughout Mao's rule, and in particular during repressive mass campaigns such as the 1957 Anti-Rightist Campaign and the 1966–1976 Cultural Revolution, those accused of being on the wrong side of prevailing political currents were subject to imprisonment with heavy labor, with the purported intent of reforming their corrupted thinking.

Although the prison camp system has served an obvious purpose as a tool of harsh repression against the enemies of the CCP—either real or imagined—party leaders likely believe at least some of their own propaganda surrounding the reformative nature of the forced labor system. The element of forced manual labor as a tool of thought reform has been deeply ingrained in the political culture of the CCP throughout its history, as seen in practices such as the mass deportation of young people and intellectuals to the countryside to "learn from the peasants" during the Cultural Revolution. The clearest expression of this impulse may best be seen today in

China's prison labor system, where prisoners are still exposed to a physically and psychologically exhausting regimen of physical labor and political propaganda sessions, backed by the threat of harsher punishment and even physical violence for those prisoners who fail to adapt themselves readily to efforts at "thought reform." [2]

Definitions of "Prison Labor" vs. "Forced Labor"

Part of the Commission's legislative mandate is to investigate and report on the state of compliance "by the People's Republic of China with agreements between the United States and the People's Republic of China on prison labor imports." However, China employs a system of multiple classifications for forced labor detention facilities, not all of which are officially classified as "prison" facilities by the Chinese government. The Commission believes that issues related to "prison labor" must be considered within the broader context of government-administered facilities in China in which detainees perform forced labor under penal conditions, regardless of whether such facilities are officially designated as "prisons" by the Chinese government. Therefore, the Commission has adopted this broader interpretation of *forced labor under penal conditions* as equating to "prison labor" for its consideration of issues related to alleged prison labor imports into the United States.

Its twin political purposes of repression and "reform" aside, the *laogai* system also has performed a significant economic role throughout the history of the People's Republic. This role was openly discussed by early CCP leaders, who espoused forced prison labor as a natural means of extracting economic advantage from those class enemies subject to the "dictatorship of the proletariat." In 1951, the *Renmin Ribao* (People's Daily) editorialized that "Looking at it from a political perspective, these counter-revolutionary criminals, if not executed right off, are a source of labor, and if we organize them and force them into the service of the nation . . . they will have a definite effect on national development." [3] Continuing with this idea, in 1954 Luo Ruiqing, the head of the Ministry of Public Security, stated in a speech that

> *. . . the process of reform through labor of criminals . . . is essentially an effective method of purging and eliminating all criminals. Labor reform production . . . directly aids in the development of the nation's industries, and also saves the nation a great deal in expenses. It is a dependable source of wealth. . . .* [4]

These intertwined political and economic goals served as the ideological foundation for the creation of a vast network of prison camps throughout China in which material production occupied a central role as both a symbol of "reformed" prisoner thinking and a significant economic contribution toward building a "new socialist society." This economic role of the camps was directly incorporated in the centralized economic planning of the Communist regime.[5] The proliferating system of prison labor camps also served to pro-

vide cheap corvée[6] labor for many of the public works and other social engineering projects of the CCP, particularly in less settled and more inhospitable interior and frontier areas such as Qinghai, Gansu, Guizhou, and Xinjiang provinces.[7]

Although the CCP initiated an ambitious program of economic reform under the leadership of Deng Xiaoping in the late 1970s, Deng continued to use the network of forced labor camps to suppress political opposition.[8] The continuing dual political and economic role of the prison labor system in the Deng era was expressed in a 1988 Chinese government document that stated

> *The nature of our [laogai] facilities, which are a tool of the people's democratic dictatorship for punishing and reforming criminals, is inevitably determined by the nature of our socialist state, which exercises 'The People's Democratic Dictatorship.' The fundamental task of our [laogai] facilities is punishing and reforming criminals. To define their functions concretely, they fulfill tasks in the following three fields: 1. Punishing criminals and putting them under surveillance. 2. Reforming criminals. 3. Organizing criminals in labor and production, thus creating wealth for society. Our [laogai] facilities are both facilities of dictatorship and special enterprises.*[9]

Furthermore, despite the traditional *laogai* slogan of "reform first, production second,"[10] in the decades immediately following Deng's economic reforms, prison labor became a significant source of Chinese manufactured goods. The economic reform process provided further impetus for prison labor production as individual institutions of the penal system were given greater responsibility for being financially self-sufficient, with reduced or eliminated allocations from the central government.[11] This process paralleled similar pressures in the same period upon other institutions of the party-state such as the People's Liberation Army, in which military units suddenly made responsible for economic self-sufficiency launched themselves into a wide array of commercial ventures.[12]

As a result, administrators of *laogai* camps and other units within the penal system were faced with both new incentives and new opportunities to use their facilities to produce goods that could be sold at a profit. Rampant corruption among local-level CCP officials and the collusion of these officials with business interests have accelerated this trend in recent years to the extent that, as described by The Laogai Research Foundation, a nonprofit organization headed by a former *laogai* prisoner that conducts research on the Chinese prison labor system, "... *Laogai* enterprises in certain regions ... have developed into small economic empires. These camps produce hundreds of millions of yuan in profit and pay millions in taxes. The international community and even the ordinary Chinese citizen is completely unaware of how the economic function of the *laogai* often supersedes the legal purpose."[13]

Classifications of Prisoners within the Chinese Prison Labor System

There are three broad classifications in China for prisoners sentenced to forced labor under penal conditions. In its original and

most literal sense, the term *laogai* referred to the punishment meted out to those prisoners who had been arrested and formally sentenced to reform through manual labor in a prison factory, farm, or other such production facility.[14] In 1994, the Chinese government formally dropped usage of this term in favor of the word for "prison,"[15] possibly in response to negative connotations that had come to be associated with the term *laogai* in the international arena.[16]

A second category, "reeducation through labor,"[17] refers to the sanctions regime meted out to offenders judged to be guilty of crimes of a less serious nature. Sentencing to "reeducation through labor" does not require any formal judicial proceedings; rather, police or courts can sentence a prisoner arbitrarily to up to three years of "reeducation through labor" without the need for a trial.[18] A third category, "forced job placement,"[19] applies to prisoners who have completed their terms of sentencing but still may be kept confined within the same facility under prison labor conditions as a post-sentence "work assignment."[20] While "forced job placement" prisoners have some greater privileges as compared to other prisoners, they still are kept confined within prison facilities under restricted conditions and may be mixed together with other prisoners without noteworthy distinction of status.[21] The practice of "forced job placement" has been decreased in recent years but has not been completely abolished.[22] Irrespective of such formal administrative classifications, however, *laogai* remains a commonly used term to refer to the prison labor system as a whole.

The composition of the prisoner population within the *laogai* system also has changed over time. While political prisoners composed a large part of China's prison population during the earlier years of the People's Republic—particularly following the mass arrests of Mao's political campaigns—the ratio of political prisoners to ordinary criminal offenders has diminished over time. One estimate from the early 1990s assessed that political prisoners composed roughly 10 percent of the population of the *laogai* system.[23] Another more recent estimate has asserted that the crackdown on Falun Gong from 1999 to the present has produced a "reeducation through labor" prison population in which 15 percent of the inmates were practitioners of Falun Gong,[24] although such estimates are difficult to verify independently.

The Extent of the Chinese Forced Labor System Today

Accurate information on the size of the Chinese forced labor system, the scope of its economic production, and the demographic composition of its prisoner population is difficult to obtain from official sources. The Chinese government classifies such information related to the prison system as a state secret.[25] Furthermore, the decentralized nature of contemporary management of prisons and prison economic production—in which local and provincial officials bear primary responsibility for these facilities and processes—means that national-level officials themselves may not have a consistently accurate picture of the extent of economic production in the prison labor system.

As stated in one recent diplomatic cable from the U.S. embassy in Beijing, "information about forced and child labor in China,

'based on reliable, sound research methodologies,' . . . is simply not available. . . . In the absence of current official data, or even reliable unofficial data, we cannot quantify the scale of the problem."[26] This same cable specifically identifies artificial flowers, Christmas lights, shoes, garments, and umbrellas as products allegedly produced in prison factories for middlemen companies that subsequently would market them with the presumed possibility of export.[27] Similarly, a 2005 report by a U.S. government interagency task force noted that "While the volume of prison-made goods entering the U.S. market is believed to be a very small percentage of total U.S. trade with the PRC, more . . . enforcement actions involving prison or forced labor facilities have been issued for the PRC than for any other country."[28] Testimony presented to the Commission this year indicated that U.S. Immigration and Customs Enforcement (ICE), an agency of the Department of Homeland Security that has the lead within the U.S. government for investigating prison labor cases, maintains no central database of prison facilities that allegedly produce goods for export to the United States. Amid other competing priorities—including money laundering, human trafficking, and illicit weapons sales—ICE has not made Chinese prison labor a high-priority issue.[29]

Some of the most detailed information regarding prison labor production in China is published in the most recent *Laogai Handbook* of The Laogai Research Foundation. This report includes the list of detention orders issued for Chinese prison-made products in the 1991–1996 time frame by the U.S. Customs Service (the predecessor organization to U.S. Customs and Border Protection [CBP] that was made an agency of the Department of Homeland Security upon its establishment in 2003).[30] However, the handbook notes that gathering information on prison labor products exported to the United States became more difficult after 1995 due to deteriorating Chinese government cooperation with U.S. officials, thereby making accurate information harder to obtain.[31] A more recent report from The Laogai Research Foundation employed information from the Dun & Bradstreet commercial database to identify Chinese prison manufacturing facilities that are dual-hatted as commercial enterprises.[32] By searching in the database for the names and addresses of previously identified *laogai* facilities, researchers at The Laogai Research Foundation found Dun & Bradstreet entries for 314 prison facilities, suggesting the involvement of these facilities in ongoing commercial activity.[33] This study is not exhaustive, however, as it identifies prison enterprises based only on their addresses or based on their use of the word "prison" in their names. It is a distinct possibility that even more prison enterprises are involved in international trade but are not explicitly identified as prison enterprises by Dun & Bradstreet. This research methodology also could not identify front companies or middlemen that may obtain products from prison labor that subsequently are marketed under the names of those companies or middlemen.

Much of what is known publicly about alleged specific instances of prison labor exports to the United States comes from individuals in the private sector and nongovernmental organizations. For example, in testimony presented to the Congressional-Executive Commission on China in 2005, Gregory Xu, who has researched the

treatment of Falun Gong practitioners in Chinese government custody, described the case of Charles Lee, a Falun Gong practitioner and U.S. citizen of Chinese heritage. According to Mr. Xu's statement, Mr. Lee was arrested by Chinese authorities, confined in a prison labor facility, and forced along with other prisoners to spend long hours making Christmas lights intended for export to the U.S. retail market.[34] The allegation of Chinese prison factories producing Christmas lights also is mentioned in a U.S. embassy Beijing cable from May 2008.[35]

In a similar vein, representatives of Falun Gong abroad have made the specific accusation that Henan Rebecca Hair Products, a company that exports wigs to the United States and Europe, employs "slave" labor from prisoners at the Henan Province No. 3 Labor Camp and the Shibalihe Female Labor Camp in Zhengzhou City, Henan Province. One such source quotes a guard from the No. 3 Labor Camp as stating, "A while back, when the labour camp was short of funding and was about to be shut down, many Falun Gong practitioners were relocated there to compensate. The government allocated 20,000 RMB [approximately $2,934][36] to 'reform' each practitioner." This source further alleges that Falun Gong practitioners were "purchased" at 800 RMB apiece from other correctional institutions to serve as forced labor for wig production under a contract with Henan Rebecca, a project that proved very profitable for the camp and its officials.[37]

Although it is difficult to obtain independent verification of many of these claims, the accumulated weight of such evidence suggests a Chinese forced labor system that is both very large in scale and heavily involved in commercial export activity.

The Legal Framework Relating to China's Prison and Forced Labor Products

U.S. Government Prohibitions on Prison Labor Products

Importing goods into the United States that are the products of prison labor is illegal, according to section 307 of the Tariff Act of 1930 (19 U.S.C. 1307), which explicitly prohibits the importation of "all goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions."[38] Furthermore, section 1761 of title 18 of the U.S. Code makes it a criminal offense knowingly to import goods made by convicts or prison labor. Article 20 of the 1994 General Agreement on Tariffs and Trade (incorporated into the treaty of the World Trade Organization [WTO]), to which the United States is a party, does not ban the export of prison labor products but states that member governments retain the right to restrict imports "relating to the products of prison labour" if they so decide.[39]

Prison Export Manufacturing in the United States

While the Tariff Act of 1930 bans the importation of prison labor products into the United States, there is no parallel provision in U.S. law that prohibits the export of products made in U.S. prison factory facilities and, indeed, some U.S. prison-made products *are* exported abroad. One example of such a line of products is Prison Blues, a brand of denim clothing manufactured by inmates at the Eastern Oregon Correctional Institution in Pendleton, Oregon. This enterprise is run by a company named Inside Oregon Enterprises, a division of the Oregon Department of Corrections, and was founded as a means of defraying the incarceration costs of inmates in the state of Oregon. The jeans and other denim products of the Prison Blues line are exported to Japan, where their associations with prison and perceived associations with American West Coast gang culture apparently give them a hip cachet among fashion-conscious young Japanese.[40]

The fundamental distinction between such products and those of Chinese prison factories, however, lies in the matter of *forced* labor: U.S. inmates involved in light manufacturing enterprises participate on an entirely voluntary basis and are paid wages (albeit minimal) for their work. Chinese prisoners laboring in *laogai* enterprises, on the other hand, are compelled to work and are exposed to far more inhumane conditions. Furthermore, manufacturing in U.S. prisons does not play the central economic role it plays in *laogai* prison enterprises, where the imperatives of punishment and economic production on behalf of the CCP-controlled state are deep seated and inextricably linked.

U.S.-China Agreements on Prison Labor and Enforcement

In response to U.S. pressure, in 1991 the Chinese government issued a law banning the export of prison labor products. Following this, in August 1992 Chinese Vice Foreign Minister Liu Huaqiu and U.S. Under Secretary of State Arnold Kanter met and signed a "Memorandum of Understanding Between the United States of America and the People's Republic of China on Prohibiting Import and Export Trade in Prison Labor" (hereafter "MOU"). The 1992 MOU established the following terms:

- Upon the request of one party, the other party will conduct investigations into forced labor allegations on the requesting party's behalf.
- Upon request, the two parties will exchange information on compliance with labor laws and regulations.
- Upon request, each party will share information on suspected violations of labor laws or regulations.
- Upon request of one party, the other party will facilitate visits of officials from the requesting party to conduct its own investigation into forced labor allegations.[41]

While the MOU was intended to clarify operating procedures for investigating—and preventing—cases of prison labor exports, enforcement of the agreement was weak in the years immediately fol-

lowing its signing. According to Jeffrey Bader, the then-deputy assistant secretary of State for East Asian and Pacific Affairs, the Chinese government's implementation of the MOU was "spotty." Chinese officials responded slowly to American requests for information, and when they did respond—generally several months after the requests—the reports were vague and without great detail.[42]

To seek some resolution of this problem—and to fulfill a "must do" condition for renewing Most Favored Nation trading status for China—the U.S. government sought and successfully negotiated with China a supplementary agreement in March 1994, a Statement of Cooperation that more specifically delineated the procedures each side would follow in implementing the provisions of the MOU. The Statement of Cooperation included the following provisions:

- Each party, after being requested to investigate prison labor allegations by the other party, must issue an investigation report within 60 days of the request.
- If the United States requests an official visit to a suspected facility, the Chinese government will arrange for such a visit within 60 days of the request.
- The U.S. government, after conducting a visit to a suspected facility, will issue an investigation report within 60 days after the visit is completed.
- If the U.S. government is made aware of new information about a suspected facility that already has been visited, the Chinese government will launch a new investigation.
- When the United States is granted permission to visit a suspected Chinese facility, it agrees to provide to Chinese authorities all necessary information, and China will assist the United States in arranging the visit and ensuring access to all necessary materials.
- The two sides agree in principle that a visit to a suspect facility will occur after the visit to the previously listed suspected facility has been completed and a report indicating the results of the visit to the previously listed suspected facility has been submitted.[43]

At its June 2008 hearing on June 19 to examine China's compliance with the MOU and Statement of Cooperation, the Commission hoped to receive testimony from a representative of the Department of State who could discuss the provisions of both documents and offer an official assessment of Chinese government compliance with them. Regrettably, however, despite multiple invitations made through both formal and informal channels, the State Department declined either to send a witness to the Commission's hearing or to submit a written statement related to these issues.

U.S. Government Procedures for Investigating Prison Labor

Following the creation of the Department of Homeland Security in 2003, the Office of International Affairs of the U.S. Customs Service initially was placed within U.S. Customs and Border Protection. The Office of International Affairs transitioned to Immigration and Customs Enforcement in 2003, although Customs and

Border Protection continued to hold Congressionally allocated funds for forced/child labor investigations through fiscal year 2004. In fiscal year 2005, the funding for such programs was shifted to ICE and controlled by the ICE Office of Investigation, of which the Office of International Affairs had been made a subcomponent. In fiscal year 2006, this funding totaled approximately $430,000.[44]

In February 2007, the Office of International Affairs became a stand-alone division within ICE and currently bears primary responsibility for investigating alleged cases of prison labor exports to the United States. To pursue prison labor investigations in China, ICE must depend on a total of seven personnel stationed in China—five in Beijing, and two in Guangzhou. According to standard procedure, when ICE receives an allegation of prison labor in China, the ICE attaché in Beijing should open an investigation in accordance with the 1992 MOU and the 1994 Statement of Cooperation. If, based on its investigation, ICE determines that there is sufficient evidence to suggest probable cause that the goods in question are produced with prison labor, ICE may make a finding to that effect. If approved by the secretary of Homeland Security, the finding results in denial of entry into the United States of the merchandise in question. If the investigation yields reasonable but not conclusive evidence of prison labor, ICE may request a detention order from CBP. If approved, such a detention order requires CBP to detain the merchandise for up to three months, during which time the importer may seek to prove that the goods in question were not manufactured with prison labor. In such a situation, the importer may elect instead to reexport the merchandise in question to another country.[45]

The procedures detailed above describe the ideal way in which the system is supposed to work. However, as noted below, in actual practice this process has resulted in only eight approved visits by U.S. officials to suspected prison export manufacturing facilities in the PRC since these agreements were signed, and none since 2005. Further, this process appears to have produced no quantifiable progress in stopping the export of prison labor goods from China to the United States.

Chinese Government Compliance with the Provisions of the Memorandum of Understanding and the Statement of Cooperation

Despite signing the 1992 MOU and 1994 Statement of Cooperation, the Chinese government has displayed no willingness to implement the provisions of these agreements. The inspection aspects of the Statement of Cooperation are completely reliant on the cooperation of Chinese government officials, with U.S. investigators having no real recourse in the face of Chinese government inaction or obstructionism. According to ICE officials, China presents a very difficult operating environment for their work on prison labor issues. ICE officials also have indicated that it is difficult to obtain sufficient evidence to gain approval from the PRC Ministry of Justice to conduct investigations into alleged prison labor facilities.[46] Following the signing of the 1994 Statement of Cooperation, U.S. officials in Beijing opened 12 cases based on allegations of prison labor exports. From 1996 to 2002, the PRC Ministry of Justice

granted just three of 18 prison site visits requested by the U.S. Customs attaché in Beijing, none of which occurred within the period of 60 days prescribed in the agreements. U.S. officials found no evidence that these particular facilities were producing goods bound for export to the United States.[47] Five site visits were made between September 2002 and April 2005; each of these visits resulted in that particular case being closed without issuance of any product detention order or formal findings.[48] The very long delays between U.S. requests for site visits and the small number of visits actually approved suggest the possibility that U.S. officials are granted permission to visit only selected prison labor facilities from which all evidence of export manufacturing has been removed. This points out a fundamental weakness of the investigation and enforcement provisions of the Statement of Cooperation: it is unrealistic to expect the very Chinese government authorities who have control over prison labor facilities to provide to U.S. officials evidence incriminating themselves or the facilities for which they are responsible.

According to testimony presented to the Commission by James Ink, deputy assistant director of the Office of International Affairs at ICE, there remain 13 outstanding requests that date back to 1994 for site visits to suspect facilities.[49] This represents the failure of Chinese officials to abide by the terms of the Statement of Cooperation and, specifically, by its commitment to respond to visit requests within 60 days. Some human rights observers maintain that China is denying access to these prisons in order to maintain production that has become a vital part of the Chinese economy or because such operations directly benefit influential officials and business interests.[50] Additionally, China's Ministry of Justice continues to deny access to facilities with respect to which it claims there is "insufficient evidence" of prison labor violations. U.S. officials—as well as representatives of the International Red Cross—remain barred from all "reeducation through labor" sites. The Chinese government maintains that "reeducation through labor" is a nonjudicial, administrative sanction and therefore is not covered by agreements related to prisons.[51] The Chinese government has used this distinction as a major loophole, which leaves large sectors of the Chinese penal system outside the scope of any enforcement provisions of the two agreements. The U.S. government does not concur with the Chinese government's characterization of "reeducation through labor" as distinct from prison incarceration.

U.S. officials describe a state of sporadic contact and cooperation with their Chinese counterparts with whom they must work on prison labor matters. For example, Mr. Ink testified to the Commission that between February and September 2003, PRC Ministry of Justice officials held monthly meetings with ICE attaché personnel to discuss prison labor issues but that these were halted in the wake of the SARS (severe acute respiratory syndrome) outbreak in the autumn of that year. These meetings resumed in 2004, with PRC officials seeking to place other prison-related issues, such as the administration of prisons, on the agenda. These meetings continued through June 2006, when they stopped again. Then they commenced once again in June 2008, but discussion of prison labor facilities was not on the agenda.[52]

The implementation by the Chinese government of the two agreements appears to have been half-hearted at best and directly obstructive at worst. With U.S. investigation of alleged prison labor cases in China entirely reliant upon Chinese official cooperation, ICE officials have no recourse but to let alleged cases grow cold while they await Chinese actions or permission from Chinese officials to proceed with steps set forth in the agreements.

A Case Study of Alleged Chinese Prison Labor Imports

The Case of Marck & Associates, Inc. v. Photo USA Corporation

In an effort to provide a case study of the alleged import into the United States of Chinese prison-manufactured products and their impact on U.S. businesses, the Commission received testimony and conducted research this year related to certain aspects of an ongoing legal dispute between Gary Marck, president of Marck & Associates, Inc., based in Toledo, Ohio, and James Peng, president of Photo USA Corporation, based in Sunnyvale, California. This Commission takes no position on the ongoing litigation between Mr. Marck and Mr. Peng, makes no judgment regarding the veracity of particular claims by either side, and does not seek to influence the outcome of this litigation in any way. The Commission's sole interest in this case lies in its public policy implications.

Marck & Associates, Inc., and Photo USA Corporation are competitors in the market for drinkware products such as ceramic coffee mugs. Mr. Marck filed a lawsuit against Mr. Peng in the Federal District Court for the Northern District of Ohio alleging, among other unfair business practices, that Mr. Peng was acting as a wholesaler and distributor of coffee mugs made with prison labor in China. The judgment of the court was that Mr. Marck failed to meet the evidentiary burden to establish that Mr. Peng's products were produced by prison labor, but the court issued a judgment against Mr. Peng pertaining to other unfair business practices. This case is currently on appeal.[53]

The issue in this case pertaining to prison labor is Mr. Marck's assertion that the Shandong Zibo Maolong Ceramic Factory (hereafter "Maolong") is a front company for the Luzhong Prison, located in Shandong Province in northeastern China. According to The Laogai Research Foundation, the Luzhong Prison is a "reeducation through labor" facility that operates a large ceramics factory producing, along with other products, approximately 70 million ceramic pieces each year.[54] An analysis performed by Mr. Marck's representatives suggests that this factory produces over 50 percent of the ceramic products imported each year into the United States.[55] Mr. Marck presented to the Commission both eyewitness testimony and photographic evidence that the Maolong facility is located in close proximity to the Luzhong Prison; that the single kiln within the Maolong facility is of insufficient capacity to produce the volume of products marketed by Maolong each year; and that it is, in fact, an inoperative showcase kiln intended to help perpetuate the fiction that Maolong manufactures its own products.[56]

Mr. Marck, who is the partial owner of another ceramics factory (the "Huaguang" factory) also located near the Luzhong Prison, has accused Mr. Peng of purchasing coffee mugs nominally manufactured by Maolong but actually produced by prison labor at Luzhong, thereby enabling Mr. Peng to undercut Mr. Marck's price for comparable mugs. (Mr. Marck also acknowledged past purchases of mugs manufactured in Luzhong but claimed that he ceased this practice once he learned of their origins.) According to Mr. Marck's attorney, Daniel Ellis, labor costs constitute 30 percent of the cost of a typical coffee mug in question, and the use of prison labor allows a price differential of approximately 16 cents per mug in comparison to a similar mug produced at a normal Chinese factory. He claims that this price differential has given Photo USA Corporation a decisive competitive advantage in the market for coffee mugs and other similar ceramic drinkware products.[57]

Mr. Marck asserts that importing prison-made coffee mugs not only violated U.S. law but also constituted an unfair trade practice that significantly impacted his own business and forced him to spend considerable time and money pursuing civil litigation. He further asserts that the current state of affairs vis-à-vis U.S. government enforcement of prison labor agreements with China has resulted in a system of perverse incentives in which those businesses that attempt to adhere to U.S. law on prison labor products lose out to competitors who do not.[58] He also indicated that in August 2006 he made a formal request to U.S. Customs and Border Protection to conduct an investigation of the alleged illegal import into the United States of ceramic products originating at Luzhong and that this had resulted in U.S. Immigration and Customs Enforcement requesting information on this facility from the PRC Ministry of Justice. As of the publication of this Report, no known further action by either the U.S. or the PRC government has resulted.[59]

Mr. Ellis told the Commission that since the start of this litigation, shipments of ceramic products originating at Luzhong have been labeled falsely to disguise their point of origin.[60] He also subsequently stated that the manufacture of ceramic products at Luzhong recently has decreased or possibly ceased, which he attributed to the unfavorable attention brought to the facility by this case.[61] The Commission saw no direct evidence in support of this statement.

Mr. Peng and his attorney have denied that the coffee mugs sold by his company were manufactured in a prison labor facility and in communications to the Commission stressed that the Federal Court that heard Mr. Marck's case ruled that Mr. Marck had not met the evidentiary burden necessary to prove his claim that prison labor was used to manufacture mugs marketed by Photo USA Corporation.[62] However, the court awarded damages to Mr. Marck on the grounds of other unfair trade practices. Photo USA Corporation has appealed the judgment.[63]

Policy Debates Arising out of the Marck-Photo USA Case

Shifting the Burden of Proof to Importers

In the course of both testimony before the Commission and subsequent communication with the Commission's staff,[64] Mr. Ellis provided a number of policy recommendations relevant to the issue of prison labor imports. The first of these is that importers should be required to sign a certification that their products are not produced by prison labor, thereby shifting the burden of proof to importers themselves rather than placing it on any third party that might raise challenges regarding the point of origin of the products in question. As described by Mr. Ellis, the evidentiary burden of U.S. courts in such matters—i.e., providing conclusive and documented proof of a direct supply chain between prison factory, U.S. importer/wholesaler, and U.S. retailer—is too high to allow for either effective criminal prosecution or civil litigation. This is especially true with respect to cases originating in China, where U.S. officials must rely on cooperation from Chinese officials and where information about the prison system is classified as a state secret. In a rebuttal to this argument, Emily Wilcheck, attorney for Mr. Peng, stated that the policy Mr. Ellis advocates contains a "guilty until proven innocent" assumption inimical to U.S. law and custom and that such a policy would "assume that all imported products are prison labor goods, simply because of their point of origin, and leaves the importer with the costly task of bearing the burden of proof on that issue." She further asserted that such a provision would "create a logistical and financial nightmare for [U.S.] Customs [and Border Protection] and importers, and impede the flow of trade between the United States and other countries."[65]

Detention Orders on Goods from Facilities Not Opened for Inspection within 60 Days

Mr. Ellis also recommended that ICE and CBP more vigorously pursue implementation of the provision of the Statement of Cooperation stating that site visits to suspect facilities will be granted within 60 days of a formal request from ICE to the PRC Ministry of Justice. The best way to achieve this, he argued, is for CBP to issue a detention order for all products originating in a suspect facility that ICE officials have not been allowed to inspect within 60 days as provided in the Statement of Cooperation. This recommendation parallels a similar recommendation presented to the Commission by ICE officials in August 2007.[66]

Expanded "Private Right of Action" for Private Citizens and Business Interests

Mr. Ellis also called for an expanded "private right of action" for businesspeople to take civil action against competitors whom they suspect of marketing prison labor products or falsifying customs information. As described by Mr. Ellis, under current U.S. customs law, private citizens do not have a private right of action if they suspect competitors are importing prison labor goods or otherwise violating U.S. laws relating to imported products; instead, all such

complaints involving international trade must be made through CBP and adjudicated by the U.S. Court of International Trade.

Mr. Ellis proposes modifying U.S. customs law to allow claims to be made under the False Claims Act (31 U.S.C., articles 3729–3733) if a complainant has grounds to suspect importation activity that violated U.S. law. Notification of the complaint to Customs and Border Protection and Immigration and Customs Enforcement would be required, and the claim would be placed on hold automatically for 60 days so that these agencies would have the opportunity to conduct an initial investigation on the claim. After this 60-day period expires, the complainant would then have the right to pursue civil litigation against his or her competitor, with monetary damages rather than criminal penalties at stake and the case to be decided based upon preponderance of evidence rather than the higher evidentiary standard necessary for criminal conviction.

Mr. Ellis also proposed legislative modifications to the Lanham Act (15 U.S.C., chap. 22) to allow a further private right of action related to the falsification of customs information. Under current law, complainants who accuse a competitor of omitting or falsifying the country of origin on customs declarations have a private right of civil litigation. Mr. Ellis proposed to allow civil litigation if any element of customs information is omitted, such as the point of manufacture of the goods in question, on the grounds that such actions could represent an unfair trade practice.

As discussed by Mr. Marck and Mr. Ellis, these proposals would allow private interests to assist the government in enforcing customs laws related to issues such as prison labor and thereby would free up government resources for higher-priority issues such as drug smuggling, weapons proliferation, and human trafficking. However, in a rebuttal to these proposals, Ms. Wilcheck recommended that the Commission reject Mr. Ellis' recommendations related to expanded private rights of action. She stated that it would set a dangerous precedent to allow private citizens to undertake such actions without substantiation by disinterested government regulatory or law enforcement agencies. She further asserted that such a step would be the "equivalent of granting citizens the right to bring a suit against another private citizen for allegedly speeding or breaking some other law in the penal code. Such a result would be contrary to our very system of justice and would endanger the careful system of checks and balances that protect our liberties." [67]

Conclusions

- The Chinese government has not complied with its commitments under the 1992 Memorandum of Understanding and the supplementary 1994 Statement of Cooperation with the United States related to prison labor exports to the United States. It particularly has failed to comply with the requirement that it grant permission for U.S. authorities to visit suspect prison labor sites within 60 days of receipt of a U.S. request to do so. Consequently, these agreements have been ineffective in enabling the U.S. government to ensure that Chinese prison labor products are not imported into the United States.

- The official PRC position that "reeducation through labor" represents an administrative sanction rather than a form of prison incarceration, and that it therefore is not covered by prison labor agreements, leaves a large portion of the Chinese penal system outside the scope of the prison labor agreements between the U.S. and Chinese governments. The U.S. government does not agree with the Chinese government's characterization of "reeducation through labor" as distinct from prison incarceration. The Chinese government's refusal to include "reeducation through labor" facilities in the scope of prison labor agreements eliminates any realistic possibility that the United States reliably can identify sources of goods manufactured with prison labor and prevent their importation into the United States.
- The import of prison labor goods into the United States is illegal. Although it is likely that prison labor products represent only a small fraction of Chinese-manufactured products imported into the United States, the preponderance of evidence suggests that Chinese prison-made goods continue to enter the U.S. market.
- The current failure effectively to enforce U.S. law prohibiting importation of prison labor products has established a perverse set of incentives for U.S. importers and their retail partners in which those willing to purchase prison labor products from Chinese suppliers may achieve and retain with impunity a competitive advantage over competitors who source from legitimate manufacturers.
- U.S. businesses that have cause to believe a competitor may be importing products manufactured with prison or other forced labor, thereby gaining an unfair competitive pricing advantage, currently have no private right of action to pursue civil claims against that competitor.