WHITE & CASE

Business, Trade and Competition

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Welcome to this month's bulletin covering updates on the regulation of business, trade and competition in China.

Intellectual Property

China Seeks Comments on Draft Patent Law

On August 10, 2012, China's State Intellectual Property Office (**SIPO**) released a notice to seek public comments on the draft Patent Law (the 4th amendment) (the "**Draft**"), aiming to address patent enforcement challenges, particularly those revealed in administrative enforcement issues related to patent infringement.

The Draft amends the current Patent Law in seven provisions, which grant more authority to the departments of patent administration (**DPA**), e.g., the SIPO and local intellectual property offices, for investigating and collecting evidence related to patent infringement as well as determining penalty amounts for compensation to victims of infringement after a finding of infringement.

The key amendments to articles 46, 47, 60, 61, 63, 64, and 65 are as follows:

- The Draft eases the plaintiff's burden of proof in bringing intellectual property infringement actions by allowing the court to initiate evidence collection and investigation based on the petitioner's application. The Draft grants the People's Court the authority to help with seeking and collecting allegedly infringing products possessed by the defendant(s). Furthermore, where the party under investigation refuses to provide evidence or disrupts the investigation process, the People's Court and the DPA will take compulsory measures or issue a warning to such party.

  To supplement and in conjunction with Article 61, the Draft further grants patent administration authorities the power to freeze or seize counterfeit products or infringing products with evidentiary support. Warnings and penalties may be given to those refusing to cooperate with authorities during their investigation (Article 64).

- The Draft addresses the issue of "low damages" awarded to plaintiffs often seen in patent infringement actions. The Draft introduces punitive compensation for intentional infringement, where the highest amount of compensation could triple the figure determined under the current law (Article 65). In addition, the Draft stipulates penalties of under RMB 200,000 or criminal liabilities in patent counterfeiting matters where no illegal revenue exists or difficult to estimate (Article 63).

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- The Draft grants the DPA the discretion to determine the amount of damages in patent infringement cases, compared to the current Patent Law where only the People's Court has the right to determine the amount of damages for patent infringement. Allowing the DPA to determine the damage amount thus helps save public resources, otherwise the infringed party would have to file a separate action regarding the damages with the People's Court (Article 60).
- The Draft addresses the issue of "overly long duration" in the patent administrative review process. The Draft requires that the DPA under the State Council should timely register and announce the decision of patent right invalid or upholding the patent right, and the decision should come into effect on the date of the announcement (Article 46).
- The Draft grants the DPA the authority to investigate and punish bad faith patent infringement, which will effectively inspect and stop bad faith patent infringement alleged of disrupting market order (Article 60).

China's Patent Law, first promulgated in 1985 and subsequently amended in 1992, 2000, and 2008, has yet to provide the enforcement authorities with "real-teeth" procedural and substantive rules to have meaningful patent right enforcement. The Draft, however, is one step towards that direction. It is one of the first initiatives under China's intellectual property rights protection regime announced during the State Council Standing Committee Meeting on November 9, 2011. The Draft aims to address specific enforcement issues such as "tendency for low damages awarded to plaintiffs" and "discretion by the court to punish bad faith patent infringement." In addition, the Draft also tackles long-standing issues in patent infringement litigation and administrative process by providing clarification on "plaintiff's burden of proof" and "overly long administrative review time."

Comments on the Draft were due by September 10, 2012 and the final version has yet to be released. For more information please visit http://www.sipo.gov.cn/tz/gz/201208/t20120810_736864.html. Please note this link is to a Chinese language website.

International Trade

China Requests WTO Consultations with United States Regarding PL 112-99, Certain AD/CVD Measures

On September 17, 2012, China requested World Trade Organization (**WTO**) consultations with the United States regarding US Public Law 112-99, "An Act to apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economies, and for other purposes" ("PL 112-99"), as well as certain antidumping (**AD**) and countervailing duty (**CVD**) measures imposed by the United States on imports from China (DS449). In a September 17 statement, Chinese Ministry of Commerce (**MOFCOM**) spokesman Shen Danyang emphasized that China has "reiterated on different occasions that China resolutely objects to abuse of trade remedy rules and trade protectionism and will firmly exercise [its rights as a WTO member] to protect [the] legitimate rights and interests of domestic industries." According to MOFCOM, the dispute covers 24 types of products amounting to US$7.23 billion, including, among others, paper, steel, photovoltaic cells, tires, magnets, chemicals, kitchen appliances, wood flooring, and wind towers.

Pursuant to the WTO Dispute Settlement Understanding (**DSU**), China and the United States have 60 days to settle the dispute through consultations. If the parties fail to settle the dispute through consultations within the designated timeframe, China may request the WTO Dispute Settlement Body (**DSB**) to establish a panel to consider whether the contested measures are WTO-inconsistent.

After it was approved by the US Congress, President Obama signed PL 112-99 into law on March 13, 2012. The legislation was passed in response to the United States Court of Appeals for the Federal Circuit's (**CAFC**) December 19, 2011 ruling in *GPX International Tire Corp. v. United States* ("**GPX case**"), which found that the US Department of Commerce (**DOC**) lacks the legal authority to impose CVDs on imports of merchandise from countries designated as "nonmarket economies" (**NMEs**), e.g., China and Vietnam, under the US antidumping law. PL 112-99 consists of the following two main components: (i) Section I amends US law to include an additional section specifically stating that CVDs can be applied to imports from NME countries, including retroactively to all proceedings initiated on or after November 20, 2006, i.e., the date on which the United States initiated its first CVD case against imports from China; and (ii) Section II authorizes DOC to address the issue of "double counting," i.e., the simultaneous application of both AD duties and CVDs on imported merchandise from NMEs. It applies prospectively to all AD/CVD investigations and reviews initiated on or after the law's enactment, i.e., March 13, 2012.

China's Request for Consultations (WT/DS449/1) makes the following claims:

- **Section 1 of PL 112-99**. China alleges that Section 1 of PL 112-99, and all CVD actions and determinations carried out between November 30, 2006 and March 13, 2012, violate the United States' transparency obligations pursuant to Articles X:1, X:2, and X:3 of the General Agreement on Tariffs and Trade 1994 (**GATT 1994**) because, among other reasons, the United States: (i) did not publish the provisions of Section 1 of PL 112-99 in a prompt manner so as to allow companies and other WTO members to become acquainted with them; and (ii) enforced PL 112-99 prior to its official publication;

- **Section 2 of PL 112-99**. As a result of the varying effective dates between Sections 1 and 2 of PL 112-99, China alleges that the United States violates Article X:3(a) of GATT 1994, which requires the United States to administer its trade remedy laws in a "uniform, impartial and reasonable manner";
- **No Legal Authority to Identify and Avoid Double Remedies**. Also as a result of the differing effective dates between Sections 1 and 2 of PL 112-99, China alleges that the United States does not currently have the legal authority to identify and avoid double remedies in the AD/CVD investigations or reviews initiated between November 30, 2006 and March 13, 2012. China considers this lack of authority an omission that prevents the United States from ensuring that the imposition of AD/CVD in these cases is consistent with key WTO commitments, including Articles 10, 15, 19, 21 and 32 of the WTO Subsidies and Countervailing Measures Agreement (**SCM Agreement**), Articles 9 and 11 of the WTO Anti-Dumping Agreement (**AD Agreement**) and Article VI of GATT 1994; and
- **Failure to Investigate and Avoid Double Remedies**. The last of China's claims makes no reference to PL 112-99. Instead it alleges that the United States has not taken steps to investigate and avoid double remedies in AD/CVD investigations and reviews initiated between November 30, 2006 and March 13, 2012. According to China's Request, this failure on the part of the United States renders such trade remedy measures inconsistent with the same WTO measures mentioned above, i.e., Articles 10, 15, 19, and 21 of the SCM Agreement, Articles 9 and 11 of the AD Agreement, and Article VI of GATT 1994.

Notably, China has already brought a successful WTO dispute against the United States' practice of imposing double remedies. In March 2011, the Appellate Body (**AB**) ruled in DS379 that the United States' imposition of double remedies in four trade remedy cases involving China-origin imports to the United States is inconsistent with the SCM Agreement. DOC issued final Section 129 determinations in July 2012 to comply with AB's ruling.

The legality of PL 112-99 is currently being contested in the US court system as well. After President Obama signed PL 112-99 into law, the CAFC remanded the GPX case to the US Court of International Trade (**CIT**) for a determination on the constitutionality of the retroactive application contemplated in Section 1 of the law.

On the same day that China made their request for WTO consultations with the United States, the United States also requested WTO consultations with China regarding certain export subsidies provided to Chinese producers of automobiles and automobile parts. DS449 comes in the context of a recent increase in the number of WTO disputes the United States and China have filed in which one country alleges that the other imposed trade remedies on its imports in a WTO-Taiwan Signs Agreements on Investment Protection and Customs Cooperation with the Mainland inconsistent manner. For example, on July 5, 2012, the United States requested WTO consultations regarding China's alleged failure to, *inter alia*, gather sufficient evidence and disclose the essential facts underlying its conclusions when it imposed AD/CVD measures on certain US automobiles. In addition, on May 25, 2012, China requested WTO consultations with the United States regarding certain US CVD practices, including, among others, DOC's alleged presumption with regard to whether state-owned enterprises (**SOEs**) can be classified as "public bodies."

For more information please visit http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds449_e.htm.

Taiwan Signs Agreements on Investment Protection and Customs Cooperation with the Mainland

The Mainland's Association for Relations across the Taiwan Straits (**ARATS**) and Taiwan's Straits Exchange Foundation (**SEF**) met on August 9, 2012 in Taipei for the 8th round of discussions on the two cross-Straits agreements: (i) the *Cross-Straits Investment Protection and Promotion Agreement* (**IPA**); and (ii) the *Cross-Straits Customs Cooperation Agreement* ("**Customs Agreement**").

IPA

The IPA is the first post-ECFA agreement since the entry into force of the Mainland-Taiwan Economic Cooperation Framework Agreement (**ECFA**) on June 29, 2010. Under the IPA, the two sides pledge to offer "just and fair treatment" and full protection and security to their respective investors and investment. Compared to earlier rounds of negotiations on the IPA, the final version of the IPA includes provisions on the protection of indirect investment from Taiwan to Mainland China via a third country or region.

With respect to the dispute settlement mechanism, both sides agree to offer several settlement options, including negotiations between disputing parties, local dispute settlement authorities, the investment division of the Cross-Straits Economic Cooperation Committee (**ECC**), and local courts. Notably, a new mechanism to solve disputes out of court will be available to both Taiwanese and Mainland private firms, who can use either a Taiwan or Mainland arbiter at a place that both parties agree upon. However, some Taiwanese social groups monitoring the cross-Straits discussions have criticized the limits of the dispute resolution mechanism under the IPA, saying that the parties should have included an international dispute resolution mechanism.

Finally, as the IPA only concerns future policies, both sides agree to gradually remove existing policies that are not in line with the IPA and gradually remove restrictions on investment projects in order to create a fair environment and promote two-way investment.

Customs Agreement

The Customs Agreement aims to promote conformability, transparency and consistency of customs procedures in line with related World Customs Organization (**WCO**) provisions, including in the areas of information exchange of classification, customs valuation and certificate of origin requirements as well as cooperation in customs supervision and smuggling investigations. It also promotes the use of radio-frequency identification (**RFID**) technology, the development of a paperless customs clearance program, and the mutual recognition of Authorized Economic Operators (**AEO**).

The two agreements are expected to take effect after both parties complete their respective internal legal procedures.

For more information please visit http://www.sef.org.tw/public/Attachment/28913352271.doc; and http://www.sef.org.tw/public/Attachment/28913354571.doc. Please note these links are to Chinese language websites.

Trade Remedy Cases Involving China (May 2012 – September 2012)

Product	Country of Origin	Petitioner Country	Announcement
Stainless cooking ware	China	Brazil	AD investigation terminated on May 17, 2012
Certain steel piling pipe	China	Canada	AD investigation initiated on May 18, 2012
Utility scale wind towers	China	US	CVD preliminary decision made on May 30, 2012
Vulcanized rubber conveyor belt	China	Argentina	AD investigation initiated on June 1, 2012
Tartaric acid	China	EU	AD investigation terminated on June 5, 2012
Single-phase alternator	China	Argentina	AD provisional decision made on June 13, 2012
Coated paper	China, Austria, Finland, US	Argentina	AD duty imposed since June 21, 2012
Seamless carbon steel pipe	China	Brazil	AD investigation initiated on June 21, 2012
Tires for truck and passenger vehicles	China	Colombia	AD investigation initiated on June 22, 2012
Certain saddles	China	EU	AD duty order expired since June 22, 2012
Clothes and accessories	China	Peru	AD investigation initiated on June 23, 2012
Motocycle tires	China, Taiwan, Thailand, Vietnam	Brazil	AD investigation initiated on June 25, 2012
Xanthan gum	China, Austria	US	AD investigation initiated on June 26, 2012
Certain seamless casing	China	Canada	AD expiry review initiated on June 28, 2012
Soy protein products (certain concentrated)	China	EU	AD investigation terminated on June 28, 2012
Basic refractory	China, Mexico, US	Brazil	AD investigation initiated on July 2, 2012

Product	Country of Origin	Petitioner Country	Announcement
Galvanized sheets and aluminum-zinc sheets	China	Australia	AD investigation initiated on July 5, 2012
Nylon thread	China, Korea, Taiwan, Thailand	Brazil	AD investigation initiated on July 9, 2012
Aluminum extrusion and plate	China, Venezuela	Colombia	AD investigation terminated on July 13, 2012
Plastic sacks and bags	China	EU	AD duty order expired since July 13, 2012
Children's bicycles	China	Mexico	AD provisional decision made on July 27, 2012
Utility scale wind towers	China	US	AD preliminary decision made on July 27, 2012
Drawn stainless steel sinks	China	US	CVD preliminary decision made on July 31, 2012
Certain unitized wall modules	China	Canada	AD & CVD investigations initiated on July 31, 2012
Glyphosate	China	Australia	AD investigation terminated on August 2, 2012
Desk fans	China	Brazil	AD expiry review initiated on August 6, 2012
RG-type coaxial-cables	China	Mexico	AD definitive decision made on August 10, 2012
Certain steel piling pipe	China	Canada	AD & CVD preliminary decision made on August 17, 2012
Ceramics	China	Argentina	AD provisional decision made on August 28, 2012
Manual hoists	China	Brazil	AD expiry review initiated on August 29, 2012
PET	China, Korea, India, Taiwan, Thailand	Argentina	AD provisional decision made on August 29, 2012
Ceramic and porcelain dishware	China	Mexico	AD investigation initiated on August 30, 2012
Bicycle tires	China	Brazil	AD investigation initiated on September 6, 2012
Single-phase alternators	China	Argentina	AD duty imposed since September 6, 2012
Solar panels (crystalline silicon photovoltaic modules and key components)	China	EU	AD investigation initiated on September 6, 2012
Aluminum-zinc galvanized steel sheets	China	Thailand	AD provisional decision made on September 8, 2012
Cold-rolled carbon steel products	China	Thailand	AD investigation initiated on September 9, 2012
Aluminum foil in small rolls	China	EU	AD provisional decision made on September 18, 2012
Organic coated steel	China	EU	AD provisional decision made on September 19, 2012

Business, Trade and Competition at White & Case

Our Firm's business, international trade, antitrust and competition, intellectual property and disputes lawyers help clients manage the risks and maximize the opportunities associated with the increasing regulation of global business and international trade in goods and services. One of the most important services we provide is to monitor legislative proposals worldwide and advise clients on the effects of legislation under multilateral agreements, bilateral agreements and US law. Because we are on top of the ever-shifting trade schemes around the world, our clients can stay out in front of their markets.

Our clients include a diverse roster of sovereign and private-sector entities, including national governments, manufacturers, exporters, importers and end users. Our insight into global business and trade laws is deepened by our immersion at the ground level. In China, we have lawyers and analysts in Beijing and Shanghai, working closely with our advisors in Brussels, Geneva, Miami, Monterrey, New Delhi, Singapore, Tokyo and Washington, DC.

Our Firm

White & Case is a leading global law firm with lawyers in 38 offices across 26 countries. We advise on virtually every area of law that affects cross-border business and our knowledge, like our clients' interests, transcends geographic boundaries. Our lawyers are an integral, often longestablished part of the business community, giving clients access to local, English and US law capabilities, plus a unique appreciation of the political, economic and geographic environments in which they operate. At the same time, working between offices and cross-jurisdiction is second nature and we have the experience, infrastructure and processes in place to make that happen effortlessly.

We work with some of the world's most respected and well-established companies—including two-thirds of the *Global Fortune 100* and half of the *Fortune 500*—as well as start-up visionaries, governments and state-owned entities.

Some of our independent accolades include:

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- Top 5 Global Law Firm—*Law360 2011*
- Top 10 US Firm—*American Lawyer 2011*
- Top International Arbitration Firm—*Chambers Global 2011*
- Top Tier in Global Project Finance—*Chambers Global 2011; Infrastructure Journal 2010*
- Law Firm of the Year—*The M&A Advisor 2011*
- Most Innovative US Firm in Europe—*International Financial Law Review 2012*