

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.

Antitrust & Competition

SIPO Publishes Draft Amendments to Patent Compulsory Licensing Rules

On October 12, 2011, the State Intellectual Property Office (**SIPO**) released for public comment draft amendments to the *Measures for Compulsory Licensing of Patents* that were promulgated in 2003 (the "**Draft Amended Measures**"). According to SIPO, the Draft Amended Measures incorporate provisions in the *Measures for Public Health Related Compulsory Licensing of Patents*, published in 2005, into the 2003 Compulsory Licensing Measures. SIPO stated that the Draft Amended Measures are intended to facilitate the implementation of the amended *Patent Law* and associated regulations, which include compulsory licensing provisions.

As a matter of background, the *Patent Law* provides that compulsory licensing can be imposed where, among other things, "the use of patent rights is found to be monopolistic". However, neither the *Patent Law* nor its implementing regulations define what conduct or use would be considered monopolistic in the compulsory licensing context. They also make no express reference to the *Anti-Monopoly Law (AML)* in this regard. The Draft Amended Measures are intended to fill the gap.

If adopted in the current form, the Draft Amended Measures will likely broaden the existing compulsory licensing regime. While the Draft Amended Measures do not depart significantly from the two sets of existing Measures, there are subtle changes that would allow for a broader interpretation of the grounds for compulsory licensing. For example, under the Draft Amended Measures, "monopoly conduct" will be a basis for imposing compulsory licensing. However, just like the *Patent Law*, the Draft Amended Measures fail to clearly define what the term means and does not make reference to the AML. Another ground for compulsory licensing is where "the patented invention represents a major technological advancement with remarkable economic significance." The terms "major technological advancement" and "remarkable economic significance" are further examples of vague terms used in the Draft Amended Measures. Such ambiguity might give aggressive third parties more room to unfairly exploit the compulsory licensing provisions to seek access to patents technology without paying the patent owner reasonable compensation. It also leaves the government officials charged with handling

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compulsory licensing applications with too little guidance and too much discretion in reviewing and granting such applications.

The State Council Legislative Affairs Office is accepting public comments on the Draft Amended Measures on SIPO's behalf until November 13, 2011. We will continue to monitor this legislative development and provide relevant updates in future issues of this bulletin.

International Trade

A Review of China's First Decade of WTO Membership—Achievements, Shortcomings and Outlook

This year marks the 10-year anniversary of China's accession to the World Trade Organization (WTO). China's WTO accession was approved at the WTO Ministerial in Doha by unanimous consent on November 10, 2001 following 15 years of arduous negotiation. Immediately after the formal signing ceremony, China notified the WTO that it had ratified the instruments of accession, paving the way for China to become the global trading organization's 143rd member on December 11, 2001. From this point, China began a long road of implementing numerous, and oftentimes onerous, measures to fulfill its membership commitments. These measures ranged from the reduction and elimination of tariffs and non-tariff barriers, the liberalization of certain investment and services sectors, and the amendment, revocation and implementation of a myriad of laws and regulations.

China officially announced in July 2010 its fulfillment of all WTO commitments. Although few countries deny that China has implemented significant reforms and achieved impressive economic growth since joining the WTO, many countries have also raised concerns that China's policymaking and policy implementation with respect to certain key legal and regulatory issues runs counter to the spirit of the WTO. In other instances, countries have formally alleged through both bilateral and multilateral complaints that China has failed to implement certain commitments or follow WTO rules.

Today, China and the rest of the world show numerous signs of having benefited from China's WTO membership. The initial reforms China undertook as part of its accession have helped integrate the world's largest exporter deeper into the global economy and expand its role in the global production chain. China has also gradually increased its participation level in the WTO Dispute Settlement Body (DSB), and its membership has given rise to a number of other trends, including increased influence within the WTO Doha Development Agenda (DDA).

Current global economic trends and China's long term interests suggest that China's role in the WTO will continue to expand over the next decade of its membership. On the other hand, experts agree that whether or not China is successful in establishing itself as a core, leading member of the WTO will largely depend on China's efforts to carry out its remaining WTO commitments and comply with WTO rules in key areas.

Benefits from China's WTO Accession

After a decade of development under the WTO framework, China has shown numerous signs of having benefited greatly from accession.

Remarkable Economic Growth

The total value of China's trade with the world surged from approximately US\$300 billion in 2001 to US\$1.5 trillion in 2010. China has attempted to leverage this tremendous increase in global trade to improve its citizens' standard of living. According to Vice Minister of Commerce Wang Chao, China's gross domestic product (GDP) increased from US\$1.73 trillion in 2001 to US\$6.30 trillion in 2010, at an average annual growth rate of 10 percent, while the country's per capita GDP increased from US\$1,038 in 2001 to US\$4,481 in 2011. From a social policy standpoint, the Chinese government has also attempted to improve income distribution as well as its national social security, education and health care systems.

Greater Integration with Global Economy

The policies and reforms adopted since 2001 have helped China integrate deeper into the global economy as well as expand its role in the global production chain. While maintaining its traditional strength in the production and export of labor-intensive products, China has also started to foster the production of high value-added goods, such as electronic information products and software as well as photovoltaic cells and other environmentally friendly goods. According to statistics from the General Administration of Customs, electronic and machinery products as well as high-tech products currently comprise over 50 and 25 percent of China's total export of industrial products by value, respectively. More recently, the Chinese government has also promoted the domestic production of goods that use home-grown technologies, independent intellectual property rights and wholly domestic-owned brands. This increase in the number of emerging and competitive Chinese industries has allowed many Chinese companies to move up the value chain. As evidence of this trend, China's value-added rate of its inward processing trade increased from 56.9 percent in 2001 to 77.4 percent in 2010.

1 MOFCOM data released on January 14, 2011.

2 Disputes concerning the same subject matter and claims, and joined for purposes of dispute settlement proceedings, are counted as one for purposes of this review. Information on China's participation in the WTO DSB is available at: http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm#results

3 See http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

Relative Stability during 2008 Financial Crisis

China's steady economic growth has contributed to global stability and prosperity. After the global financial crisis hit in late 2008, China stimulated domestic demand, continued opening up its markets and pulled through the crisis without resorting to overly protectionist measures. In 2009, for example, imports increased by 2.8 percent over 2008 levels, making China the only major economy to maintain positive growth in imports amid the financial crisis. In 2010, China's total trade value was US\$2.973 trillion, a year-on-year increase of 34.7 percent.¹ China contributed to the global recovery from the crisis by helping to sustain the exports of many crisis-afflicted countries, increase overseas investments and create job opportunities.

China in the Dispute Settlement Body

China's participation in the WTO dispute settlement system, as both a respondent and a complainant, has increased since it joined the WTO. China's level of involvement during its first five years as a WTO member (2001 – 2006) was relatively low: China was a complainant in one case and a respondent in two cases.² This relatively low level of participation could be attributed to the Chinese government's expressed preference for resolving trade disputes through diplomacy and bilateral negotiations, and Chinese enterprises' unfamiliarity with the WTO Agreements, and the operation of the dispute settlement system in particular. China was generally understood at this time to be a reluctant litigant. This is evident not only from the small number of disputes in which China was a complainant, but also from China's willingness to reach a "mutually agreed solution" with the United States in 2004, in a case concerning value added tax on integrated circuits (DS 309: *China-Value Added Tax on Integrated Circuits (US)*).

From Reluctant Litigant to Active User of WTO Dispute Settlement Mechanism

During the latter part of China's first decade of WTO membership there was a significant increase in China's participation in the WTO dispute settlement system. According to WTO statistics, from 2007 – 2011, China was a complainant in 7 cases and a respondent in 13 cases. Chinese enterprises clearly had become more familiar with their rights under the WTO Agreements and learned how to use the WTO dispute settlement system to assert those rights.

Thus, from 2001 – 2011, China was a complainant in 8 cases, a respondent in 15 cases and a third party in 78 cases at the Dispute Settlement Body (DSB).³ Out of the 8 cases in which China was a complainant, the respondents were China's two largest trading partners—the United States and European

Union. Furthermore, 6 out of 8 of these cases were related to antidumping, countervailing and safeguard measures. The exceptions included a case targeted at a piece of US legislation regulating poultry imports, which had the effect of banning poultry imports from China (DS 392: *US-Poultry (China)*) and another case which concerned import tariffs imposed by the United States on certain passenger vehicle and light truck tyres from China (DS 399: *US-Tyres (China)*).

China's participation as a third party in 78 cases probably indicates, in addition to the great breadth of its trading interests, a conscious decision to learn about the system in depth by close observation.

China in the Doha Development Agenda

The dynamic of the WTO Doha Development Agenda (DDA) underwent a fundamental transformation with China's accession to the WTO. The DDA was officially launched in November 2001 and has yet to be concluded. Previous rounds of negotiations (e.g. the Kennedy Round, the Tokyo Round, the Uruguay Round) were largely dominated by similar trade agendas of developed countries such as the European Communities, the United States, Japan and Canada.

Growing Influence of Emerging Economies

The Doha Round, however, has been dominated by the conflicting ambitions of the industrialized powers on the one hand and the major emerging economies on the other, and has in effect become the first North-South round. The clearest expression of the divergence between them is in the negotiations on industrial tariffs, where the USA and others have been pressing for significant reductions by the emerging economies, whose tariffs are in general much higher than those of developing countries. This has been refused on the grounds that it would be inconsistent with development needs and the vocation of the Round.

China-US Relationship Key to Reviving DDA Agenda

Although WTO Director General (DG) Pascal Lamy originally expressed optimism regarding the opportunity to complete the DDA by the 8th Ministerial Conference in December 2011, WTO negotiators have now agreed that this will not be possible. Nor will it be possible to achieve an early harvest of results in the less controversial areas. Whether the Round can be kept alive or perhaps revived in future on the basis of a revised agenda will depend to a very significant extent on the relationship between China and the United States, which is now clearly the key factor in WTO negotiations.

Challenges Going Forward

Non-Market Economy Status

As a precondition for its entry into the WTO, China agreed in 1999 that WTO members, in applying antidumping duty laws to Chinese imports, could continue to treat China as a non-market economy (NME) country and would not have to grant China market economy status (MES) for 15 years after the date of China's accession to the WTO, or until 2016. This has created considerable difficulties for China to defend against international dumping allegations, as foreign countries are entitled to use price or production data from third countries ("surrogate country") to determine dumping margins for Chinese imports, which is often perceived as arbitrary or inappropriate, and the resulting dumping duties tend to be exceedingly high. WTO statistics show that in recent years, China has become one of the most frequent subjects of new dumping investigations. Nonetheless, China's record of continuous economic reforms since the 1970s and increased trade with other WTO members has given China some leverage in addressing its desire to change its MES. Indeed, the Chinese government has used a number of bilateral and multilateral fora to broach the issue and negotiate for change.

Government Procurement Agreement

In its Accession Protocol, China committed to initiate negotiations for accession to the WTO Government Procurement Agreement (GPA) "as soon as possible." China made its initial offer for accession to the WTO GPA in December 2007. After several rounds of negotiations with other WTO member countries, China submitted its second bid to join the GPA in July 2010. Since then, WTO members, particularly the United States, have put pressure on China to submit a third and final bid that covers sub-central government entities. According to sources, Chinese officials have committed to submit a third bid by the 8th Ministerial Conference in December 2011.

Monitoring China's WTO Compliance: Now and in the Future

Paragraph 18 of Part I of China's WTO Accession Protocol states that China shall be subject to a Transitional Review Mechanism (TRM) for the first eight years and the tenth year of its WTO membership. During the annual TRM, which takes place within each WTO committee and which is reported to the General Council, WTO members review and may voice concerns regarding China's WTO compliance efforts. Despite the alleged focus on WTO compliance issues, many member countries have also taken the opportunity to raise general concerns regarding China's trade policies. In turn, China is required to provide relevant information and may raise issues of its own regarding the WTO commitments it, or other member countries, have made.

China's 10th and Final WTO TRM

During October 2011, China began its tenth and final WTO TRM. Experts expect that the General Council report, which will contain details on the TRM, will become available in January 2012. After the final TRM is completed, China will still be required to participate in the periodic WTO Trade Policy Review Mechanism (TPRM). The objective of the TPRM is not, per se, to review a country's WTO compliance efforts. Instead, the WTO states that the Mechanism is meant to increase transparency and understanding of countries' trade policies and practices, and enable a multilateral assessment of the effects of policies on the world trading system. All WTO members are subject to the TPRM. To date, China's trade policies have been reviewed under the TPRM in 2006, 2008 and 2010.

In the coming weeks, a number of WTO member countries will make significant use of China's tenth TRM, as it represents the last time countries will be able to use this forum to address concerns regarding China's WTO compliance efforts. Although the final TRM, has not yet been completed, sources report that the United States has used this year's TRM to again raise concerns regarding China's failure to notify the WTO regarding its use of domestic subsidies. Even though the end of the TRM represents a symbolic transition in China's on-going WTO membership process, WTO observers note that: (i) China established itself as an important member of the WTO soon after it joined the Organization; and (ii) other WTO members are likely to continue to raise concerns regarding China's WTO commitments after the TRM has ended. For example, WTO members are widely expected to increase their calls for China to join the WTO GPA in the run-up to the December 2011 WTO Ministerial Meeting.

New Direction under 12th Five-Year Plan

In its 12th Five-Year Plan, the Chinese government outlines its plan to lead China's economy away from an export-led growth model and toward a more domestic demand-driven economy. The increased buying power of a growing Chinese middle class indicates that such a transition will be increasingly grassroots and natural, rather than policy driven. This effort to move China's economy away from heavy reliance on exports underscores China's interest in an open global trading system, and thus its interest in maintaining a high level of participation within and influence over the WTO. Nonetheless, China's successful transition will largely depend on its willingness to further liberalize its markets, implement structural reforms, and carry out its remaining WTO commitments.

Trade Remedy Cases Involving China from September to October, 2011

Product	Country of Origin	Petitioner Country	Announcement
Silicon carbide	China	EU	AD duty expired on August 26, 2011
Castings	China	EU	AD duty expired on September 2, 2011
Seamless steel pipe	China	Brazil	AD definitive decision made on September 8, 2011
Electric cables	China	Australia	AD investigation initiated on September 9, 2011
Certain oil tubular goods pup joints	China	Canada	AD & CVD investigation initiated on September 12, 2011
Chamois leather	China	EU	AD expiry review initiated on September 13, 2011
Ceramic tiles	China	EU	AD definitive decision made on September 15, 2011
Hollow structural sections	China	Australia	AD & CVD investigations initiated on September 19, 2011
Plastic sacks and bags	China, Thailand	EU	AD expiry review initiated on September 27, 2011
Graphite electrode systems (certain)	China	EU	AD investigation terminated on September 30, 2011
Bicycles	China	EU	Definitive decision on AD expiry review made on October 6, 2011
Thermoelectric coolers and warmers	China	Canada	AD & CVD re-investigations initiated on October 3, 2011
Barium carbonate	China	Brazil	AD duty expired on October 6, 2011
Hand pallet trucks and their essential parts	China	EU	Definitive decision on AD expiry review made on October 13, 2011
Clear float glass	China, Indonesia, Thailand	Australia	AD definitive decision made on October 17, 2011
Multilayered wood flooring	China	US	AD & CVD final determination made on October 18, 2011
High pressure steel cylinders	China	US	CVD preliminary determination made on October 18, 2011
Oxalic acid	China, India	EU	AD provisional decision made on October 20, 2011
Ring binders	China	EU	Definitive decision on AD expiry review made on October 22, 2011

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