

China – Certain Measures on the Transfer of Technology

Request for Consultations by the European Union

My authorities have instructed me to request consultations with the Government of the People's Republic of China ("China"), pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and Article 64 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPS Agreement") (to the extent that Article 64 of the TRIPS Agreement corresponds to Article XXII of the *GATT 1994*), with respect to certain Chinese measures pertaining to the transfer of foreign technology into China. These measures adversely affect the protection of the intellectual property rights of foreign companies transferring technology to China.

Through its domestic legislation, China imposes a different set of rules on the import of technology, including industrial property rights, other intellectual property rights and undisclosed information ("intellectual property rights"), than the rules which are applicable to technology transfers occurring between Chinese companies. The Chinese measures at issue appear to: (i) discriminate against foreign holders of intellectual property rights, and (ii) restrict the foreign right holders' ability to protect certain intellectual property rights in China, contrary to China's WTO obligations.

China imposes restrictions on the rights of foreign intellectual property right holders to freely negotiate market-based contractual terms in licensing and other technology-related contracts concerning the transfer of technology to China. Notably, China imposes mandatory contract terms for contracts concerning the import of technology into China that discriminate against and are less favourable for foreign intellectual property rights holders. In addition to being discriminatory, these mandatory contract terms also appear to restrict intellectual property right holders who import technology into China in their ability of protecting their intellectual property rights in China.

Furthermore, in the context of joint ventures established with Chinese partners, China imposes mandatory contract terms that discriminate against and are less favourable for foreign intellectual property right holders, as well as restricting their ability to protect their intellectual property rights in China.

The legal instruments through which China imposes and administers these measures, include the following, operating separately or collectively:

- *Foreign Trade Law of the People's Republic of China* (adopted at the Eighth Session of the Standing Committee of the Seventh National People's Congress on May 12, 1994, effective July 1, 1994, in Executive Order No. 22, amended by the Eighth Session of the Standing Committee of the Tenth National People's Congress on April 6, 2004, effective July 1, 2004, in Executive Order No. 15, further amended November 7, 2016, in Executive Order No. 57);

- *Regulations of the People's Republic of China on the Administration of the Import and Export of Technologies* (Order of the State Council No. 331, issued December 10, 2001, effective January 1, 2002, amended January 8, 2011, in Order of the State Council No. 588);
- *Measures for the Administration of Registration of Technology Import and Export Contracts of the People's Republic of China*, Decree of the Ministry of Commerce of the People's Republic of China [2009] No. 3, issued December 30, 2001, effective January 1, 2002 (repealing the *Measures for the Administration of Technology Import and Export Contracts Registration* (Decree No. 17, 2001 of the Ministry of Foreign Trade and Economic Cooperation));
- *Working Measures for Outbound Transfer of Intellectual Property Rights (For Trial Implementation)*, (State Council, Guo Ban Fa [2018] No. 19, issued March 18, 2018, effective March 29, 2018);
- *Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures* (adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, effective July 8, 1979, in Order No. 7 of the Chairman of the Standing Committee, amended April 4, 1990, in Executive Order No. 27, further amended March 15, 2001, in Executive Order No. 48, and September 3, 2016, in Executive Order No. 51);
- *Regulations for the Implementation of the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures* (State Council, Guo Fa [1983] No. 148, issued September 20, 1983, effective September 20, 1983, amended January 15, 1986, in Guo Fa [1986] No. 6, further amended December 21, 1987, in Guo Fa [1987] No. 110, July 22, 2001, in Order of the State Council No. 311, January 8, 2011, in Order of the State Council No. 588, and February 19, 2014, in Order of the State Council No. 648);
- *Contract Law of the People's Republic of China* (adopted at the Second Session of the Ninth National People's Congress on March 15, 1999, effective October 1, 1999, in Executive Order No. 15);
- *Interpretation of the Supreme People's Court concerning Some Issues on Application of Law for the Trial of Cases on Disputes over Technology Contract* (Judicial interpretation promulgated by Supreme People's Court on 16 December 2004 and effective as of 1 January 2005);
- *Anti-Unfair Competition Law of the People's Republic of China* (Order of the President of the People's Republic of China No. 77, adopted on November 4, 2017, effective January 1, 2018);
- *Anti-Monopoly Law* (Order of the President of the People's Republic of China No. 68 adopted on August 30, 2007, effective August 1, 2008);
- *Regulations of December 31, 2010, for the Industry and Commerce Administrations on the Prohibition of Abuse of Dominant Market Position* (issued by Order No. 54 of the

State Administration of Industry and Commerce (SAIC), adopted on December 31, 2010, effective February 1, 2011);

- *Regulation on the Prohibition of Conduct Eliminating or Restricting Competition by Abusing Intellectual Property Rights* (Order No. 74 of April 7, 2015, of the State Administration for Industry and Commerce (SAIC), adopted on April 7, 2015, effective August 1, 2015);
- *Notice of the State Council on Printing and Distributing the "China Manufacturing 2025"*, (State Council, Guo Fa [2015] No.28, promulgated May 8, 2015, effective May 8, 2015);
- *Law of the People's Republic of China on Progress of Science and Technology*, (Order of the President of the People's Republic of China, No. 82, amended and adopted at the 31st Meeting of the Standing Committee of the Tenth National People's Congress of the People's Republic of China on December 29, 2007, effective July 1, 2008);
- *Opinions on Encouraging Technology Importing and Innovation and Promoting Changes in Pattern of Trade Growth*, July 14, 2006;
- *Several Opinions of October 9, 2014, of the State Council on Promotion of the Development of the Science and Technology Service Industry* (promulgated by Order No. 49 of October 28, 2014, of the State Council of the People's Republic of China);
- *Questions and Answers around Regulations on Administration of Technology Import and Export of People's Republic of China*, Finance Law Department of the Legislative Affairs Office of the State Council, April 2002;
- Unpublished measures through which China imposes and administers the above referred restrictions;
- as well as any amendments, supplements, extensions, replacement measures, renewal measures, related measures, or implementing measures.

In particular:

- The *Regulations of the People's Republic of China on the Administration of the Import and Export of Technologies* ("TIER"), operating separately or together with other listed instruments, appear to be inconsistent with Article 3 (National Treatment) of the TRIPS Agreement, solely or in conjunction with Article 28.1(a) and (b), Article 28.2 and Article 39.1 and 39.2 of the TRIPS Agreement respectively, because China imposes restrictions on the rights of foreign intellectual property right holders, notably, on their right to freely negotiate and agree on market-based contractual terms in licensing and other technology-related contracts concerning the import of technology to China. For example,
 - Foreign transferors of technology are subject to certain administrative burdens pursuant to Articles 18 through 21 TIER. Notably, all technology import contracts must be notified

to and registered by the Chinese authorities and copies of the contracts must be provided. These formalities apply also if the contract is subsequently amended or terminated.

- Article 24 TIER requires that licensors of imported technology indemnify licensees for all liabilities for infringement resulting from the use of the transferred technology.
- Article 27 TIER requires that any improvements to imported technology belong to the party making the improvement.
- Article 29 TIER appears to restrict the terms of import technology contracts by prohibiting a number of clauses in import technology transfer contracts. In particular, Article 29(3) TIER provides that a technology import contract cannot contain clauses restricting the transferee from improving the technology supplied by the supplying party, or restricting the receiving party from using the improved technology.

Domestic intellectual property right holders are not subject to such restrictions in the context of domestic technology transactions. As a result, through the measures at issue China appears to accord less favourable treatment to foreign intellectual property right holders compared to Chinese intellectual property right holders, contrary to Article 3 of the TRIPS Agreement. In addition, it appears to limit the exclusive rights of non-Chinese patent holders, contrary to Article 28.1(a) and (b) of the TRIPS Agreement. It also appears to limit the rights of non-Chinese patent holders to assign or transfer by succession patents and to conclude licensing contracts, contrary to Article 28.2 of the TRIPS Agreement. Finally, as a result of these restrictions China also appears not to ensure effective protection for foreign intellectual property rights holders of undisclosed information contrary to its obligations under Article 39.1 and 39.2 of the TRIPS Agreement.

- The *Regulations for the Implementation of the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures* ("JV Regulation"), operating separately or together with other listed instruments, appear to be inconsistent with Article 3 (National Treatment) of the TRIPS Agreement, Article 28.1(a) and (b), Article 28.2, Article 33 and Article 39.1 and 39.2 of the TRIPS Agreement (each Article either solely or in conjunction with the others), because China imposes restrictions on the rights of foreign intellectual property right holders, notably, on their right to freely negotiate and agree on market-based contractual terms in licensing and other technology-related contracts concerning the import of technology to China. For example:

- The first paragraph of Article 43 of the JV Regulation provides a general examination and approval requirement for any technology transfers agreements entered into by a joint venture.
- Point (3) of the second paragraph to Article 43 of the JV Regulation provides that the duration of a technology transfer agreement is generally no longer than 10 years.
- Point (4) of the second paragraph to Article 43 of the JV Regulation provides that the technology importing party retains the right to use the transferred technology continuously, after the expiration of the technology transfer agreement.

China thus appears to afford less favourable treatment to foreign intellectual property rights holders as compared to Chinese intellectual property rights holders, contrary to Article 3 of the TRIPS Agreement. With respect to foreign patent holders, China appears to violate Article 33 of the TRIPS Agreement, according to which the term of patent protection should be at least 20 years, and to limit the exclusive rights of foreign patent holders, contrary to Article 28.1(a) and (b) of the TRIPS Agreement. Furthermore, China appears to limit the rights of foreign patent holders to assign or transfer by succession patents and to conclude licensing contracts, contrary to Article 28.2 of the TRIPS Agreement. Furthermore, as a result of these restrictions China also appears not to ensure effective protection for foreign intellectual property rights holders of undisclosed information contrary to its obligations under Article 39.1 and 39.2 of the TRIPS Agreement.

- Finally, China appears to apply and administer its laws, regulations and other measures governing the transfer of technology into China with a view of inducing the transfer of foreign technology to China, which is contrary to China's obligations under Article X.3(a) of the GATT 1994 and Paragraph 2(A)2 of the Protocol on the Accession of the People's Republic of China to the WTO, because it does not constitute impartial and reasonable application and administration of its laws, regulations and other measures.

China's measures appear to adversely affect exports to China of technology, including intellectual property rights, by European Union undertakings and also appear to nullify or impair the benefits accruing to the European Union and its Member States directly or indirectly under the cited agreements.

The European Union reserves its rights to raise additional measures and claims regarding the above matters during the course of these consultations and in any future request for panel proceedings.