US-China Trade Secrets and Trade Developments

- 1992: Section 301 MOU commits China to enact Anti Unfair Competition Law enacted (AUCL) (eff. 1995)
  - TRIPS-Minus Provisions required “practical applicability” of trade secret to be protected and that only “business operators” are covered; implementing administrative enforcement rules only protect “citizens” (1995/98) 禁止侵犯商业秘密若干规定
- 2001: China Joins the WTO - Principle request in accession in trade secrets is for China to remove protection only for “citizens”. No consideration of PI’s for TS. No mention of practical applicability or business operators.
- 2007: US brings WTO case against China. Trade secrets are not part of the case (DS/362)
- 2012: US-China SED: China commits to strengthen trade secret protection/initiate a special campaign through State Council Leading Group on IP.
- 2013: Eli Lilly v. Huang: first preliminary injunction in a civil trade secret matter in China (12 years after WTO accession to have first PI case!).
- 2014-16: US-China JCCT’s: China to study legislative reform; China will protection confidential information submitted to administrative agencies; commits to improve judicial system through model cases, availability of preliminary injunctions; China will include “individuals” within the scope of trade secret misappropriators (business operators), improve evidence preservation, damages based on market value.
- 2018: 301 Report announced on forced technology transfer/trade secret protection/trade war begins.
- 2019: AUCL amended: numerous reforms/reversal of burden of proof/5x damages/business operator problem addressed
- January 15, 2020: Phase 1 Trade Agreement
- 2020: Revisions to ‘98 rules on trade secret infringement which require citizenship expected in 2020-2021.
Did sanctions work/was it worth the cost?

• Currently on the Agenda (Phase 1 Agreement):

  • 1.3: Scope of Actors Liable for Trade Secret Misappropriation 1. The Parties shall ensure that all natural or legal persons can be subject to liability for trade secret misappropriation

  • 2. China shall define “operators” in trade secret misappropriation to include all natural persons, groups of persons, and legal persons.

  • 1.5: Burden of proof shifting in civil proceedings where p has made prima facie case of misappropriation

  • 1.6: Preliminary Injunctions (‘urgent’ situations in Chinese law)

  • 1.7: Actual losses not required for t/s criminal cases

  • 1.26-1.27 – General criminal IP reforms/improve admin coordination/deterrent penalties.

• Most of the civil reforms were accomplished before the Phase 1 Agreement.

• No provision in the Phase 1 Agreement mandating increased transparency/publication of cases

• Optimal strategy? (possible WTO case “Members shall protect undisclosed information…” TRIPS Art. 39)
Conclusions: Last Enacted/Last Amended

- US approach has underemphasized t/secrets including role of WTO.
- T/secrets have often been the last enacted/last amended of Chinese IPR laws, with long periods of no movement and regression.
- Trade war / sanctions precipitated reforms – but at what price? Did they need to persist through January 2020? Did the trade war itself affect enforcement?
- Monitoring, enforcement of existing commitments continues to be a problem
  - Crim t/secret cases dropped during the trade war, as did overall civil transparency in IP
  - US did not push for increased transparency of trade secret cases so data will continue to be limited and difficult to reconcile.
  - Trade wars end best with thoughtful implementation of agreements.
  - Private sector should engage on enforcement/legislative comments/SPC JI comments

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