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Impact of the China-U.S. Trade Deal on Intellectual Property Protection

On Jan. 15, 2020, Phase One of the Economic and Trade Agreement between the United States and China was signed, hopefully signaling the beginning of the end of the trade war that has significantly impacted both countries for the past few years. The agreement seeks to strengthen the economic and trade relationship of the two nations by promoting adherence to international norms that contribute to harmonious development of world trade. Rather than establish new laws or regulations, the agreement details a set of promises made by both the United States and China that, if implemented, will benefit the economies of both nations. Under the agreement, China committed to purchasing an additional $200 billion in American agricultural and energy exports and eliminating certain agricultural health standards that were previously seen as a barrier to trade with the United States. China also agreed to overhaul its scheme of intellectual property protection as it relates to trade secrets, trademarks, counterfeiting, and piracy. Further, China plans to make several significant changes to its trial process to streamline the admission of evidence, and to more closely conform its system to the laws and procedures in place in the U.S.

The United States also made several important commitments under the agreement. First, the U.S. pledged to investigate additional means of combatting the sale of counterfeit and pirated goods and to cooperate with China in the global fight to end the manufacture of counterfeit products with negative impacts on public health and safety. Additionally, the U.S. will engage with the Chinese government through experience-sharing and criminal enforcement under the bilateral Intellectual Property Criminal Enforcement Working Group and the China-United States Scientific Cooperation and Exchange Program.

Moreover, the U.S. pledged to strengthen communications with China on biotechnology regulation, including initiating biennial cooperation work plans between the China National Intellectual Property Administration and the United States Patent and Trademark Office.

The agreement also contains critical provisions curtailing the common Chinese practice of requiring foreign companies to transfer or license proprietary information or intellectual property to Chinese entities as a predicate to doing business. Finally, the agreement contains provisions that will have a material impact on the treatment of pharmaceutical-related intellectual property in China.

It is important to note that the agreement covers many topics for which the United States already has comprehensive regulations in place. Thus, the onus lies largely with China to see the agreement through by passing legislation pursuant to the agreement.

Enforcement of Intellectual Property

With regard to trade secret protection, the agreement emphasizes that anyone in either country can be subject to liability for trade secret misappropriation. By the agreement, China committed to enumerating several specific acts that constitute trade secret misappropriation, including electronic intrusions, breach or inducement of a breach of a duty not to disclose certain information, and unauthorized disclosure or use of a trade secret. By defining these acts to constitute trade secret misappropriation, China's trade secret protections will be more consistent with the Uniform Trade Secrets Act and the Defend Trade Secrets Act, already in place in the U.S.

China also agreed to sweeping changes in its judicial process specifically relating to trade secret matters. First, where the holder of a trade secret produces initial evidence, whether direct or circumstantial, that the accused party has misappropriated trade secrets, the burden of proof shifts to the accused party in a civil proceeding to show that it did not misappropriate a trade secret. Additionally, preliminary injunctions will be made available as remedies for trade secret theft (or risk thereof) in China. Finally, criminal procedures and penalties may be assessed for willful trade secret misappropriation, and the holder of a trade secret need not establish actual loss as a prerequisite to initiation of such a criminal investigation.

The agreement also provides for civil remedies and criminal penalties to deter intellectual property theft and infringement generally. In addition, China agreed to loosen its requirements for authenticating evidence in civil judicial procedures, including eliminating certain formalities requiring a consular official's seal and streamlining processes for notarization. Chinese civil judicial proceedings will also afford parties reasonable opportunities to present witnesses and experts and allow for cross-examination of those witnesses. These changes to the Chinese judicial process represent an alignment with the judicial process in the United States. The modifications should allow American patent owners to more effectively and expediently enforce intellectual property rights in China. The improved consistency for foreign litigants may also encourage additional investment in the Chinese market.

Pharmaceutical Patents

Currently, a branded drug manufacturer in China must wait until allegedly infringing generic drugs are approved and on the market before filing suit. By contrast, the American Hatch-Waxman Act provides a mechanism by which branded drug patent owners can file suit against generic drug makers before the generic receives regulatory approval, thereby blocking any products from entering the market until after a court determines if the relevant patents are valid and infringed. China agreed to adopt pharmaceutical pre-market enforcement procedures similar to those in place under the U.S. Hatch-Waxman Act in order

to implement "effective mechanism[s] for early resolution of patent disputes," as per Article 1.11 of the agreement. China additionally plans to allow for supplemental data, such as test results, to aid patent applicants in showing a pharmaceutical patent to be new and non-obvious, key pillars of patentability. Chinese patent law will further mirror U.S. patent law by providing for patent term extensions due to unreasonable delays not attributable to the applicant, including for delays both at the patent office and by any marketing approval processes.

The contemplated changes to Chinese patent laws should also result in loosening of the requirements for entry into the Chinese market. For instance, Chinese law currently requires that drug prices in China be lower than prices in other countries. Combined with unrestricted generic competition under current Chinese law, American drug manufacturers are discouraged from marketing their drugs in China. However, with the changes expected from the agreement, there should be an influx of drug manufacturers from the U.S. securing Chinese patent protection and marketing their drugs in China. Because U.S. manufacturers will be permitted to rely on supplemental data to prove patentability, U.S. manufacturers will be able to apply for patents in China using the same supporting documents that they already used in the United States. Additionally, due to the contemplated imposition of restrictions on generic competition, American drug companies will be able to more readily accept the lower drug pricing mandated by Chinese law.

Tech Transfer

One of the additional vital benefits of the agreement is a provision that curtails the present practice requiring outside companies doing business in China to mandatorily transfer or license their IP to the Chinese government. Specifically, Chapter Two of the agreement provides that any transfer or licensing of technology between the United States and China shall be "without any force or pressure" and "based on market terms that are voluntary and reflect mutual agreement." Both countries also agreed to make their administrative and licensing requirements and processes transparent, to ensure that technology transfer is not required as a condition precedent to obtaining a license approval or to enter into an acquisition, joint venture, or investment activity in the region.

Implementation

While the agreement gives both the United States and China reason to celebrate, the guidelines for implementation are vague and permissive. The agreement enters into force on Feb. 14, 2020, by which time China is required to promulgate an "Action Plan," which will include measures that China will take to implement obligations under the agreement and the dates by which those measures will go into effect. It appears that the Chinese government may have already begun issuing new rules to implement many facets of the agreement, albeit with some latitude that may permit Chinese regulators some discretion about whether to adopt some or all of the provisions. Moreover, the leaders of several groups created under the agreement, including the Trade Framework Group and the Bilateral Evaluation and Dispute Resolution Office, are scheduled to meet periodically to evaluate implementation of the agreement.

Summary

The anticipated harmonization of the new Chinese patent laws with those already in place in the United States will likely give American patentees more predictability and easier access to the Chinese market, and should also help to "ensure fair, adequate, and effective protection and enforcement of intellectual property rights," as provided for in Chapter One of the agreement. Moreover, the new technology transfer regulations, combined with China's increased efforts to prevent trade secret theft, should give American

companies additional comfort that their intellectual property will be protected, and that they can engage in good-faith negotiations and investment activities in China.

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