

COMMITTEE ON TRADE-RELATED INTELLECTUAL PROPERTY RIGHTS

24 October 2011

China's Transitional Review Mechanism

Statement of the United States

1. When China signed its Protocol of Accession to the WTO 10 years ago, it agreed to an annual Transitional Review Mechanism (TRM) to be conducted before 16 committees and councils for 8 years, with a final review in year 10. We have now reached year 10. For this final TRM, the United States would like to share its observations on China's first 10 years of WTO membership.
2. As Members may recall, the TRM was created largely because China was invited to join the WTO before it had revised or adopted laws and regulations necessary to implement its WTO obligations, and because China was allowed a variety of transition periods before it had to implement certain WTO obligations. The annual TRM meetings therefore provided Members with opportunities to review with China, in a multilateral setting, the efforts that China had taken to implement specific commitments made in its Protocol of Accession as well as the obligations that it had assumed under the many agreements that make up the WTO Agreement and its efforts to comply with those obligations.
3. As we look back on past transitional reviews, we can see that the focus of these reviews changed over time. For the first five years of China's WTO membership, the transitional reviews focused predominantly on the scheduled phase-in of key commitments that China had made in its Protocol of Accession. However, once that phase-in period ended, the focus of the TRM shifted. At that point, the transitional reviews focused more on China's compliance with its full range of WTO obligations.
4. During the initial phase-in period, China implemented a set of sweeping commitments, including reducing tariffs, eliminating non-tariff barriers identified in its working party report that denied national treatment and market access for goods and services imported from other WTO members, and making legal improvements in intellectual property rights (IPR) protections and in transparency. These actions deepened China's integration into the international trading system, facilitating and strengthening China's rule of law and economic reform. Trade and investment also expanded dramatically between China and its many trading partners.
5. Since its accession to the WTO, China has put in place a framework of laws and regulations aimed at protecting the IPR of domestic and foreign right holders, as required by the TRIPS Agreement. However, some critical reforms are still needed in a few areas, such as further improvement of China's measures for the protection of copyrights and trademarks in the context of the Internet, correction of continuing deficiencies in China's criminal IPR enforcement measures, and providing remuneration to authors for the broadcast of their works that occurred between 2001 and 2009, when China finally set forth default licensing rates for broadcasting recorded works.

6. Additionally, the United States continues to have concerns about the extent to which China provides effective protection against unfair commercial use and unauthorized disclosure of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products. In its Protocol of Accession, China agreed to provide six years of protection against unfair commercial use to undisclosed test or other data submitted to authorities in support of applications for marketing approval of pharmaceutical and agricultural chemical products which utilize new chemical entities. This protection would prevent any person other than the original applicant from relying on the submitted data for subsequent approvals for at least six years from marketing approval of the original product. Examples of marketing approval granted to applications for follow-on products prior to the expiration of the six-year period, and in some cases before approval of the originator product, indicate that further work needs to be done to ensure consistent and effective application of this obligation. The United States looks forward to continuing to work with China on this and related matters.

7. While China's laws on the books have been extensively overhauled to better reflect international standards for IPR protection, the inability or lack of political will in China to enforce these laws and to deter continued IP theft has led to sustained and unacceptably high levels of retail and wholesale counterfeiting, online piracy, and software theft, with severe adverse effects in the United States and third-country markets to which Chinese IPR infringing goods are exported. Widespread IPR infringement continues to affect products, brands, and technologies of a wide range of industries, including movies, music, publishing, entertainment and business software, apparel, athletics footwear, textile fabrics and floor coverings, consumer goods, chemicals, electrical equipment, industrial products, information technology, and clean energy technology, among many others.

8. There also continue to be a number of legal obstacles to effective enforcement that result in limited deterrence under Chinese law. These impediments include high value and volume thresholds that must be met before IPR infringement may be subject to criminal prosecution. Rules designed to promote the transfer of cases to criminal authorities do not appear to have solved the problem. Moreover, the vast majority of enforcement in China is channeled to administrative authorities, where administrative penalties are too low and unpredictably awarded to provide an effective deterrent; and infringers continue to consider administrative seizures and fines as simply a cost of doing business. In addition, IPR enforcement at the local level is hampered by poor coordination among Chinese Government ministries and agencies, the aforementioned high thresholds for initiating investigations and prosecuting criminal cases, lack of training, inadequate and non-transparent processes, local protectionism, and, in some cases, corruption.

9. However, the United States is encouraged by events in China in the past year to focus efforts on improving IPR enforcement in China. The United States has been following closely the efforts being made under China's "Special Campaign on Combating IPR Infringement and Manufacture and Sales of Counterfeiting and Shoddy Commodities" (Special Campaign), and believes that the new coordination and leadership structure developed for the Special Campaign has enhanced the effectiveness of IPR enforcement during the period of the Special Campaign. The United States urges China to create a high-level management team that can drive lasting improvements in IPR enforcement by making permanent the temporary leadership structure created to manage the Special Campaign, including the key role of the Vice Premier.

Institutionalizing this structure would give greater credibility to China's efforts to make a sustained, long-term improvement in IPR enforcement.

10. The United States understands that as a result of the Special Campaign, several websites and online portals were shut down, and three website operators were arrested, convicted, and sentenced to prison terms and assessed significant fines. The United States urges China to sustain its work on stemming piracy over the Internet. With respect to use of the Internet to distribute counterfeits, the United States notes several positive developments that have occurred in the past year, including new measures issued by the State Administration of Industry and Commerce that require Internet Service Providers to verify the identity of online traders and to take "necessary measures to protect registered trademarks." The United States also finds encouraging reports indicating that local Administrations of Industry and Commerce (AICs) have demonstrated greater willingness to intervene directly against online advertisements of counterfeit and pirated products, previously a rare occurrence.

11. To effectively stem the manufacture of counterfeits, the United States urges the Chinese Government to ensure that the equipment used to manufacture counterfeit products is seized and destroyed. If such equipment is not seized and destroyed, counterfeiters can resume their operations as soon as law enforcement officers leave their premises. It is also important for China to permit direct acceptance of serious IPR infringement cases by the Public Security Bureau (PSB); while administrative agencies such as the local AICs can seize counterfeits, only PSB has the power to search and arrest. Following on the Special Campaign, the PSB should be given the authority to directly accept all cases involving manufacturers of counterfeit and pirated products.

12. In addition to the need for significant further progress to fight counterfeiting and piracy, effective enforcement of IPR in China also requires attention to the protection and enforcement of patents, trade secrets, and other IP rights. For example, the United States is troubled by several recent media reports of major cases of trade secret theft affecting U.S. firms doing business in China. The United States also remains concerned about the enforcement implications of a range of challenges affecting patent quality in China. Patents that are of low quality, or unexamined, or both, can pose obstacles to Chinese and foreign innovators who seek to protect and enforce rights in legitimate inventions. Effective enforcement of patents and trade secrets is not only key to the success of foreign companies; it is an essential part of the business climate needed to support investment from the kind of innovative industries that China hopes to attract and build.

13. China's goal of becoming an innovative society by fostering "indigenous innovation" has created a troubling trend toward increased discriminatory policies aimed at coercing technology transfer.

14. The United States recognizes the critical role of innovation in development and in improving living standards in the United States and China. However, the United States has also expressed concerns to China regarding its innovation-related policies and other industrial policies that discriminate against or otherwise disadvantage U.S. exports or U.S. investors and their investments. The United States has been following the development of China's indigenous innovation and other intellectual property-related industrial policies and is paying particularly

close attention to China's policies that require or compel U.S. parties to transfer their IPR to Chinese parties or to Chinese subsidiaries of U.S. firms. Chinese regulations, rules and other regulatory measures frequently call for technology transfer, and in certain cases, condition, or propose to condition, eligibility for government benefits or preferences on intellectual property being owned or developed in China, or being licensed, in some cases exclusively, to a Chinese party.

15. Innovation will produce greater societal and global gains when market participants, irrespective of their nationality or the places where they may own or develop intellectual property, are able to enjoy the fruits of their investments without the danger that their efforts, including in developing and commercializing intellectual property, will be undermined, or misappropriated by others who did not undertake the initial risks associated with development and commercialization. The United States encourages China to adopt policies that eliminate improper government intervention in intellectual property licensing and other lawful contractual business arrangements, as well as standards setting, and that welcome imported products and services and foreign investments without ownership and other restrictions in China, irrespective of where the relevant intellectual property is owned or has been developed.

16. As we consider developments over the past 10 years relating to the protection, enforcement and treatment of IPR and look toward the future, the United States notes that China's legal framework for the protection and enforcement of IPR has been improved, but there are still many areas where further improvements are required. While there is a growing awareness in China of the critical role of IPR protection and enforcement to China's long term economic development, it is important that this awareness be translated into sustained efforts to protect and enforce IPR of both domestic and foreign rightholders. It is equally important that China's desire to develop an innovative and IP intensive economy not drive policies that discriminate against foreign IPR holders, either by according preferences to firms with indigenous IPR and thereby limiting participation by foreign IPR holders, or by implementing government policies to compel technology transfers and other arrangements relating to the terms and conditions of IPR licenses, which should instead be left to the commercial considerations of the parties with out undue government interference.

17. Going forward, the United States will continue its work with China, both bilaterally and here at the WTO, on IPR protection and enforcement strategies, innovation policies, and the range of other important IPR-related matters to ensure that China fully complies with its WTO obligations, to the benefit the United States, China and their trading partners.