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Trade & Manufacturing Alert

United States Continues To Make Progress At The U.S. - China Strategic And Economic Dialogue

Paige Rivas

At the fourth annual U.S.-China Strategic and Economic Dialogue ("S&ED"), the United States made some headway on several Chinese commitments that would give U.S. companies increased market access to the Chinese market. The S&ED, which took place in early May in Beijing, was established in 2009 by President Obama and Chinese President Hu to provide an ongoing forum for high-level U.S. and Chinese officials to discuss issues of mutual economic and strategic interest.

At the talks, Chinese officials voiced their concern regarding the United States' restrictions on high tech exports to China and urged the United States to lift the restrictions. China views the United States' export restrictions as one of the primary causes of the United States' trade deficit with China.

Continued progress was made on behalf of U.S. companies and their ability to participate in the Chinese market and to lessen the preferential treatment accorded to China's state-owned enterprises ("SOEs").

Foreign Investment

China announced its commitment to allow foreign investors to take up to 49 percent equity stakes in domestic securities joint ventures and to shorten the waiting period to two years for securities joint ventures to expand the scope of their business to include brokerage, fund management, and trading activities. In addition, China committed to allow foreign investors to enter into a joint venture and to hold up to a 49 percent share in a trade commodity and financial futures brokerage company.

China pledged to accelerate implementation of its prior commitments to allow U.S. insurance companies to sell mandatory auto liability insurance and auto financing companies to issue local bonds to finance their operations.

State-Owned Enterprises

Treasury Secretary Geitner urged China to reduce government support for major SOEs. China committed to apply its laws and regulations in a nondiscriminatory manner across enterprises of all types in order to curb favoritism for SOEs. China also announced that it will require SOEs to pay a

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higher percentage of their earnings as dividends, similar to publicly listed companies, and will increase the number of companies that have to pay dividends. Currently, many SOEs are required to turn over less than 15 percent of their profits. Some enterprises have no obligation to hand over any of their profits.

The parties also announced the resumption of negotiations on the U.S. - China bilateral investment treaty ("BIT"). The United States recently revised its model BIT to include updated language regarding SOEs, financial services, transparency and public participation, and environmental and labor rights.

New U.S. Model Treaty Text To Promote Bilateral Investments With Emerging Economies

T. Augustine Lo

On April 20, the Office of the U.S. Trade Representative and the U.S. Department of State jointly announced the completion of a new Model BIT that will form the basis for negotiations with foreign trade partners like China, India, and Vietnam. This "high-standard" text promotes a broad range of objectives. According to the joint press release, the model BIT will "ensur[e] that U.S. companies benefit from a level playing field in foreign markets, provid[e] effective mechanisms for enforcing the international obligations of our economic partners, and creat[e] stronger labor and environmental protections."

A BIT is an international agreement by which both countries commit to reciprocal, enforceable rules concerning the treatment of investors from the other country. These agreements typically protect foreign investors from expropriation and discriminatory treatment by the host country. BITs usually stipulate to dispute resolution by arbitration. Besides protecting investors, the U.S. model text seeks to advance other interests, including access of U.S. goods and services into foreign markets, and promotion of market-based economic reforms and the rule of law in counterpart nations. The United States has over 40 BITs in force with trade partners.

In 2009, the Obama administration began a review of the existing 2004 model text to address additional concerns in the areas of labor, the environment, and foreign state-owned enterprises. Articles 12 and 13 of the new model text require foreign counterparts not to lower their labor and environmental standards to attract foreign investments. This negative obligation applies generally, thereby preventing not only U.S. investors, but all foreign investors, from obtaining labor and environmental concessions in the foreign host nation.

Despite the apparent reach of these provisions, the labor and environmental requirements are not ironclad. First, according to Articles 1 and 2(1)(c), these provisions apply only to the customs territory of the United States. In other words, some U.S. territories (such as Guam and U.S. Virgin Islands), would remain free to derogate from their own standards unless there are federal requirements. Second, critics have noticed that the provisions on labor and the environment are not subject to compulsory arbitration per Article 24(1). Thus there is no formal mechanism to directly enforce these provisions.

With respect to countries that foster state enterprises, notably China, Article 2(2) of the model text covers state enterprises that act in the place of the host government. In theory, this provision closes a potential loophole whereby a foreign country could deputize state enterprises to take harmful actions against U.S. investors. Some critics have noted, however, that the model text's definition of state enterprises is narrowly focused on express delegations of governmental authority. China, for instance, exercises control over strategic enterprises by appointing loyal persons to their boards of directors.

The completion of the model BIT coincides with increased attention in China to outbound investments. China's current national economic policy, the Twelfth Five-Year Plan for the period of 2011 to 2015, calls for Chinese companies to invest abroad. According to official sources, as of March 2012, China's cumulative outbound investments in non-financial sectors were $338.5 billion in total. In the first quarter of 2012 alone, Chinese outbound investments amounted to $16.55 billion, an increase of 94.5 percent as compared with the same period last year. Much of this outbound investment has been directed at mergers and acquisitions abroad.

The new model BIT could facilitate negotiations with China. The conclusion of a BIT may promote greater access for U.S. companies to the Chinese market. Underscoring the importance of the model BIT, the joint press release stated, "International investment is a significant driver of America's economic growth, job creation, and exports."

California Congressman Floats Draft Legislation That Would Make Fundamental Changes To Intellectual Property Litigation At The U.S. International Trade Commission

Patrick Togni

Congressman Devin Nunes (R-CA) has prepared draft legislation that would make significant changes to intellectual property litigation at the U.S. International Trade Commission. Such proceedings are conducted pursuant to Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, as amended. Litigation in this forum is commonly referred to as "Section 337" litigation.

The draft legislation is designed to address what Congressman Nunes characterizes as increased use of Section 337 by "patent assertion entities" ("PAEs")" that are a "burgeoning industry, increasingly comprised of attorneys who acquire patents for the sole purpose of asserting them against companies to financially profit from their products."

Congressman Nunes's draft legislation seeks to address the high frequency of PAE-driven Section 337 litigation in two fundamental ways. First, the draft legislation would modify a threshold requirement that must be met by any plaintiff (known as the "complainant" in Section 337 parlance) in a Section 337 case. The statute requires that relief under Section 337 is available "only if an industry in the United States, relating to the articles protected by the patent, copyright, trademark, mask work or design concerned, exists or is in the process of being established." This so-called "domestic industry" prong of the statute may be met "with respect to the articles protected by" the intellectual property at issue by showing "significant investment in plant or equipment;" significant employment of labor and capital;" or "substantial investment in its exploitation, including engineering, research and development, or licensing." *Id.* at §§ 1337(a)(2)(A)-(C).

Congressman Nunes believes that PAEs have inappropriately demonstrated domestic industry through the third prong of the statute because those entities cannot show domestic industry though significant expenditures in plant, equipment, labor, or capital. Accordingly, PAEs typically base their domestic industry case on licensing activity. As a result, Section 1(a)(B) of the Nunes's proposal would permit "substantial investment in the exploitation" of the IP at issue to be shown through licensing only where the activity by licensees "is carried out before "adoption of the claimed patented invention." This is a significant departure from the current statute, which permits the inclusion of licensing revenues or activity by a Section 337 complainant's licensees which occurs after the patent's issuance to be considered for purposes of analyzing whether a domestic industry "exists or is in the process of being established."

Second, the draft Nunes bill would incorporate into the statute the holding from the landmark Supreme Court decision in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 126 S. Ct. 1837 (2006). In *eBay v. MercExchange*, the Supreme Court held that "the traditional four-factor test applied by courts of equity" in analyzing whether to award permanent injunctive relief "applies to disputes arising under the Patent Act." This proposal addresses a fundamental aspect of Section 337 litigation, because the principal form of relief is to permanently exclude the infringing articles from entry into the United States. Specifically, the Nunes proposal would subject exclusion orders available under Section 337 to the same four-factor test that the U.S. Supreme Court held applied to permanent injunctions sought by patent holders in Federal Court.

The traditional four-factor test applied by courts in equity requires a plaintiff to demonstrate (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate compensation for the injury; (3) that, a balance of the hardships between the plaintiff and the defendant warrants such a remedy; and (4) that the public interest would not be disserved by a permanent injunction. *See id.* Section 1(a)(2) of the Nunes proposal would require the Administrative Law Judge to which a Section 337 case is assigned "to hear evidence and make a recommendation" to the full Commission concerning "the equitable principles applied by the courts in granting permanent injunctions." Any final determination regarding application of the traditional four-factor test would be made by the full International Trade Commission. Finally, the draft proposal states that the amendments would apply to Section 337 investigations commenced on or after the date of enactment of the bill.

Congressman Nunes has indicated that his proposed legislation is "a vehicle to begin the discussion of a solution." Thus, it is possible that the legislation could be modified substantially prior to any formal introduction of the bill to Congress.

White House Issues Executive Order On International Regulatory Cooperation

Josh Snead

President Obama signed an Executive Order on May 1 that requires an existing White House policy group, the Regulatory Working Group ("Working Group"), to focus on increasing regulatory cooperation between the U.S. government and the governments of other countries. The objective of Executive Order 13609, titled "Promoting International Regulatory Cooperation," is to eliminate regulatory differences with other countries in order to spur global trade and job creation.

President Obama previously signed another Executive Order in January 2011 that aimed to ensure that U.S. government regulations protect the public while also promoting growth and job creation. The May 1 Executive Order stated that "international regulatory cooperation, consistent with domestic law and prerogative and U.S. trade policy, can be an important means of promoting" the goals of the January 2011 Executive Order. To that end, the Working Group is tasked with identifying opportunities for greater international regulatory coordination.

Cass Sunstein, the Administrator of the White House Office of Information and Regulatory Affairs, spoke about the Executive Order on the Obama administration's behalf on the day it was signed. He acknowledged that members of the business community have expressed concern that economic growth and job creation can be compromised by unnecessary regulatory divergences between the U.S. and its trading partners. He noted that among Canada, Mexico, and the United States, at times there are different regulatory requirements "not because of any

different judgments about facts or values, but because of excessive red tape and inadequate cooperation and consultation." He also noted that the U.S. has already begun increasing regulatory cooperation with Canada and Mexico by forming a Regulatory Cooperation Council with each country. Although Mr. Sunstein cited Canada and Mexico as examples, the Executive Order applies broadly to all U.S. trading partners.

Sunstein leads the Working Group, which the May 1 Executive Order states must include a representative from the Office of the United States Trade Representative as well as representatives from other agencies and offices. The Executive Order tasks the Working Group with, among other things, discussing appropriate strategies for international regulatory cooperation and issuing guidelines for U.S. government agencies to use in implementing the Executive Order.

News Of Note

U.S. Manufacturing Growth in April

T. Augustine Lo

A report by the Institute of Supply Management ("ISM") signaled continuing expansion of activity in the manufacturing sector since the beginning of this year. ISM's purchasing managers' index for April was 54.8, which was at the highest level since June of last year. An index above 50 indicates growth. The ISM report for April also reported strong growth in new export orders. The manufacturing sector has contributed significantly to economic recovery for the past three years, including job creation.

Appointments and Nominations

Lee Smith & T. Augustine Lo

U.S. Commerce Secretary John Bryson appointed seven new members to the Manufacturing Council on April 21, 2012. The Manufacturing Council is the principal private sector committee advising the Commerce Secretary on the U.S. manufacturing sector. The Council consists of 25 private-sector members appointed for two-year terms. Each new appointment fills an existing vacancy. The seven new appointees are Gregory Booth, Zippo Manufacturing Company; Mark Chandler, Cisco Systems, Inc.; Peter Dorsman, NCR; Dr. Albert Green, Kent Displays / Improv Electronics; Mary Ann Hynes, Corn Products International, Inc.; Joel Lorentzen, Genesis Systems Group LLC; and Roy Sweatman, Southern Manufacturing Technologies.

On May 14, 2012, President Obama named Bradford Ward as the new director of the Interagency Trade Enforcement Center. Ward has three decades of experience as a trade practitioner at the Commerce Department, and he recently worked for the U.S. Trade Representative. Constance Handley, who has 15 years of experience in trade enforcement at the Commerce Department, was named deputy director.

Client Alert

Congressional Letter To The White House Voices "Strong Support Of Buy American Procurement Policies" In Context Of Ongoing Trans-Pacific Partnership Agreement Negotiations. (Available online.)

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