



## CHINA - CERTAIN MEASURES ON THE TRANSFER OF TECHNOLOGY

### REQUEST FOR CONSULTATIONS BY THE EUROPEAN UNION

#### *Revision*

The following communication, dated 20 December 2018, from the delegation of the European Union to the delegation of China, is circulated to the Dispute Settlement Body in accordance with Article 4.4 of the DSU.

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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. This request replaces the European Union's request for consultations with China dated 1 June 2018 and circulated to the WTO Members on 6 June 2018, on certain measures on the transfer of technology.<sup>1</sup>

Through its domestic legislation, China restricts the access and operation of foreign investment in its territory, by conditioning the approval of foreign investments upon performance requirements, including requirements related to the transfer of technology and the conduct of research and development in China. In addition, China imposes measures that adversely affect the protection of intellectual property rights of foreign companies, which transfer technology into China, including in the context of joint ventures with Chinese companies. In this respect, China discriminates against foreign companies by imposing on them conditions, which are less favourable than those applicable to the transfer of technology between Chinese companies.

Investment into China is regulated *inter alia* through a system of negative lists/catalogues which, depending on the sector concerned, classify investments as "encouraged", "restricted" or "prohibited". In certain sectors Chinese legislation requires foreign investors to establish joint ventures with Chinese companies, and/or imposes caps on the equity that foreign investors can hold. Joint ventures between foreign and Chinese companies need to obtain the necessary approvals by the Chinese authorities to be established in China. Chinese legislation also imposes a number of sector-specific requirements on companies, including Sino-foreign joint ventures and other types of foreign-invested companies, to obtain certifications, licenses, permits or other types of administrative approvals to operate their businesses in China.

Through its domestic legislation, China conditions the right to invest in China, including the possibility to access and operate in the Chinese market by foreign investors, foreign invested companies and joint ventures between foreign and Chinese companies, upon performance requirements, including in relation to the transfer of technology and the conduct of research and development in China, contrary to China's WTO obligations.

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<sup>1</sup> WT/DS549/1, G/L/1244, IP/D/39.

In addition, 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 discriminate against foreign holders of intellectual property rights, and 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 appears to impose 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 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:

- *Notice on Issuing the National Medium-and Long-Term Science and Technology Development Plan Outline (2006-2020)* (State Council, Guo Fa [2005] No. 44, issued December 26, 2005);
- *Opinions on Encouraging Technology Importing and Innovation and Promoting Changes in Pattern of Trade Growth* (MOFCOM, NDRC, MOST, MOF, GAC, SAT, SIPO, SAFE, Shang FU Mao Fa [2006] No. 13, issued July 14, 2006);
- *State Council Decision on Accelerating and Cultivating the Development of Strategic Emerging Industries* (State Council, Guo Fa [2010] No. 32, issued October 10, 2010);
- *CCP Central Committee Decision on Several Major Issues for Comprehensively Deepening Reform*, CCP Central Committee, issued November 12, 2013 (Third Plenary Session of the 18<sup>th</sup> National Congress of the CCP);
- *Notice of the State Council on Printing and Distributing the "China Manufacturing 2025"*, (State Council, Guo Fa [2015] No. 28, issued May 8, 2015);
- *The 13<sup>th</sup> Five-Year Plan for Economic and Social Development of the People's Republic of China (2016-2020)*, translated by Compilation and Translation Bureau, Central Committee of the Communist Party of China Beijing, China, available at <http://en.ndrc.gov.cn/>;
- *Auto Industry Development Policy*, NDRC Decree No. 8, issued in 2004, revised in 2009;
- *Energy-Saving and New-Energy Automotive Industry Development Plan (2012-2020) (NEV Plan)* (State Council, Guo Fa [2012] No. 22, issued June 28, 2012);
- *Notice on printing and issuing Medium and Long Term Development Planning of Vehicle Industry*, Ministry of Industry and Information Technology, National Development and Reform Commission and Ministry of Science and Technology, MIITLZ [2017] No. 53, issued on April 25, 2017;
- *Catalogue of Industries for Guiding Foreign Investment (2017 Revision)* (Order No. 4 NDRC, MOFCOM, promulgated on 28 June 2017, effective on 28 July 2017);
- *Special Management Measures for the Market Entry of Foreign Investment (Negative List) (2018 Version)*, (Order No. 18, NDRC, MOFCOM, promulgated on 28 June 2018, effective on 28 July 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, effective on October 1, 2016);

- *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);
- *Seed Law of the People's Republic of China* (amended and adopted at the 17th Session of the Standing Committee of the 12th National People's Congress of the People's Republic of China on November 4, 2015, in Order No. 35 of the President of the People's Republic of China, promulgated on 11 April 2015, effective on 1 January 2016);
- *Measures for the Administration of Crop Seed Production and Operation Licenses*, (Order No. 5 of 2016 of the Ministry of Agriculture of the People's Republic of China, issued on 15 August 2016);
- *Administration of the Examination, Approval and Registration of Foreign-invested Crop Seed Enterprises Provisions* (promulgated by the Ministry of Agriculture, State Planning Commission, MOFTEC and State Administration for Industry and Commerce on and effective as of 8 September 1997);
- *New Energy Vehicle Production Enterprises and Product Admissions Regulations* (including *Annex 1 on Review Requirements for Access of New Energy Vehicle Manufacturers*), (Decree of the Ministry of Industry and Information Technology No. 39 of 6 January 2017, reviewed and passed at the 26<sup>th</sup> Ministerial Meeting of the Ministry of Industry and Information Technology of the People's Republic of China on October 20, 2016 and adopted on 6 January 2017, effective 1<sup>st</sup> of July 2017);
- *Provisions on Administration of Newly Established Pure Electric Passenger Vehicle Enterprises*, Order No. 27 of the National Development and Reform Commission and the Ministry of Industry and Information Technology, issued and effective on July 10, 2015;
- *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*, (Order No.3 [2009] of the Ministry of Commerce, promulgated on February 1<sup>st</sup>, 2009, effective on March 3<sup>rd</sup>, 2009) (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);
- *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);

- *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);
- *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;
- *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);
- *Provisions for Administrative Authorities for Industry and Commerce on Prohibiting Abuses of Dominant Market Positions* (Order No. 54 of the State Administration of Industry and Commerce (SAIC), adopted on December 31, 2010, effective February 1, 2011);
- *Provisions on Prohibiting the Abuse of Intellectual Property Rights to Exclude and Restrain Competition* (Order No. 74 of the State Administration for Industry and Commerce (SAIC), adopted on April 7, 2015, effective August 1, 2015);
- *Catalogue of Technology Restricted or Prohibited from Import* (Order No. 7 [2007] of the Ministry of Commerce, promulgated on October 23, 2007, effective on November 22, 2007);
- *Catalogue of Technology Restricted or Prohibited from Export* (Order No. 12 [2008] of the Ministry of Commerce and Ministry of Science and Technology, promulgated on September 16, 2008, effective on November 1<sup>st</sup>, 2008);
- *Encouraged Catalogue of Technology and Products for Import*, issued by NDRC and MOFCOM on 9 September 2016;
- *Several Opinions of the Ministry of Commerce and the Ministry of Science and Technology on Encouraging Technology Export* (Shang Fu Mao Fa [2009] No. 584, issued on July 12, 2009);
- *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);
- Unpublished measures through which China imposes and administers the above referred restrictions;
- as well as any annexes or schedules thereto, amendments, supplements, extensions, replacement measures, renewal measures, related measures, or implementing measures.

In particular, the European Union considers that:

- (1) 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, notably the *Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures* ("JV Law"), is inconsistent with China's commitments under Paragraph 7.3 of Part I of the *Protocol on the Accession of the People's Republic of China*<sup>2</sup> ("Accession Protocol") and Paragraph 1.2 of Part I of the Accession Protocol, which incorporates the commitments under Paragraph 49 and Paragraph 203 of the Report of the *Working Party on the Accession of the People's Republic of China to the WTO*<sup>3</sup> ("Working Party Report"). This is

<sup>2</sup> WT/L/432.

<sup>3</sup> WT/ACC/CHN/49.

because China conditions the right of a foreign investor to invest in China upon the transfer of certain technology to the joint venture with a Chinese partner. In particular, by imposing requirements on the type of technology to be transferred to the joint venture, China prevents or restricts the possibility for a foreign investor to freely decide or freely agree with the joint venture partner on the type of technology to be transferred to the joint venture. China makes such requirements conditional on obtaining the necessary approvals by the national or sub-national authorities. For example,

- Article 5 of the *JV Law* requires that the technology and equipment contributed by a foreign partner to a joint venture be advanced and suitable to the needs of China. Moreover, Article 5 of the *JV Law* requires the foreign partner to the joint venture to pay compensation if losses occur due to the intentional supply of outdated technology or equipment;
- Article 41 of the *JV Regulation* provides that the technology acquired by the joint venture must be appropriate and advanced and enable the joint venture's products to display conspicuous social and economic results domestically or be competitive on the international market;
- Pursuant notably to Articles 7, 11, 26 and 27 of the *JV Regulation*, details about the technology transferred to the joint venture by the foreign partner are part of the information that must be submitted to the Chinese authorities for examination to obtain approval of the joint venture. In particular, Article 27 provides that the technology contributed by the foreign parties shall be subject to the examination and approval by the competent authorities.
- The *JV Regulation* and notably its Article 4(3), operating solely or together with other listed instruments, precludes the approval of a joint venture by the authorities if the project is not in conformity with the development of China's national economy.

Pursuant to Paragraph 7.3 of its *Accession Protocol*, China committed to eliminate and cease to enforce performance requirements made effective through laws, regulations or other measures. Moreover, China committed not to enforce provisions of contracts imposing such requirements. China also committed to ensure that the means of approval by national and sub-national authorities of the right of investment would not be conditioned on performance requirements of any kind, such as local content, offsets, the transfer of technology, export performance or the conduct of research and development in China. Pursuant to Paragraph 203 of its *Working Party Report*, China committed that the allocation, permission or rights for importation and investment would not be conditional upon performance requirements set by national or sub-national authorities, or subject to secondary conditions covering, for example, the transfer of technology.

Contrary to the afore mentioned commitments, the *JV Law* and the *JV Regulation*, operating separately or together with other listed instruments, impose performance requirements related to the transfer of certain technologies. Compliance with these requirements is a precondition for obtaining the necessary approvals by the Chinese authorities.

Pursuant to Paragraph 203 of its *Working Party Report* China committed that, consistently with its obligations under the WTO Agreement and the Protocol, the freedom of contract of enterprises would be respected by China. Furthermore, in Paragraph 49, second sentence, of its *Working Party Report* China committed that the terms and conditions of technology transfer, production processes or other proprietary knowledge, particularly in the context of an investment, would only require agreement between the parties to the investment.

The European Union considers that China interferes in the technology transfer between enterprises contrary to Paragraph 1.2 of Part I of China's Accession Protocol, which incorporates China's commitment under the second sentence of Paragraph 49 of the Working Party Report, by subjecting to examination and approval by the Chinese authorities the technology contributed to the joint venture, and the joint venture contracts incorporating such technology. The European Union further considers that through the afore mentioned restrictions China violates Paragraph 1.2 of Part I of the Accession Protocol, which incorporates

commitments under the second sentence of Paragraph 49 and fifth sentence of Paragraph 203 of the Working Party Report, because these restrictions limit the freedom of contract of enterprises in China.

- (2) The *New Energy Vehicle Production Enterprises and Product Admissions Regulations* ("NEV Regulation"), operating separately or together with other listed instruments, are inconsistent with China's commitments under Paragraph 7.3 of Part I of China's *Accession Protocol* and Paragraph 1.2 of Part I of the *Accession Protocol*, which incorporates the commitments under Paragraph 49 and Paragraph 203 of its Working Party Report. This is because, through the NEV Regulation, operating separately or together with other listed instruments, China imposes performance requirements on foreign auto manufacturers as conditions for foreign investors to access and operate in the New Energy Vehicle (NEV) market in China; notably, the mandatory requirements to understand and master relevant technologies, and to possess specific tools, equipment, software, facilities, production capacity and other capabilities. China also imposes a set of general requirements to access and operate in the NEV market that include, among others, the localisation of relevant production, operations and research and development activities in China. Through the approval processes established under Chinese law and carried out by the relevant Chinese authorities, China interferes in the technology transfer between enterprises and conditions foreign investment on performance requirements. For example,
- Under Item I(2), first paragraph, of Annex 1 of the *NEV Regulation*, enterprises applying for access to the NEV market in China are required to understand and master technologies pertinent to the development and manufacturing of NEVs;
  - Under Item I(2), point (5) of Annex 1 of the *NEV Regulation*, enterprises applying for access to the plug-in hybrid electric vehicle (PHEV) market are required to also understand and master technologies of the control systems for engine and electromechanical coupling devices;
  - Under Item I(2), point (5) of Annex 1 of the *NEV Regulation*, enterprises applying for access of the fuel cell electric vehicle (FCEV) market are required to understand and master technologies related to fuel cell system control and hydrogen storage system control;
  - Under Item I(5) of Annex I of the *NEV Regulation*, enterprises applying for access to the NEV market in China are required to possess necessary tools, software and equipment for the development of vehicles and related systems, and to have certain development capabilities.
  - Under Item II(9) of Annex I of the *NEV Regulation*, enterprises applying for access to the NEV market in China are required to have certain production capacity, including specific production tools, equipment and machinery.
  - Under Item I(1), first paragraph of Annex I of the *NEV Regulation*, enterprises applying for access to the NEV market in China are generally required to set up a design and development institution exclusively for product design and manufacturing process development in China;
  - Under Item I(3), first paragraph of Annex I of the *NEV Regulation*, enterprises applying for access to the NEV market in China are generally required to establish and maintain on the Chinese territory specific software and hardware, manuals and other design documentation;
  - Under Item I(4) points (1) to (3) of Annex I of the *NEV Regulation*, enterprises applying for access to the NEV market in China are generally required to establish product information databases in China that include a number of specific data and information, such as performance data, drawings, technical and design specifications;

The European Union considers that China violates its commitments under Paragraph 7.3 of Part I of the *Accession Protocol* and Paragraph 1.2 of Part I of the *Accession Protocol*, which

incorporates the commitments under Paragraph 203 of the Working Party Report, which require China not to condition approval by Chinese authorities of the right of investment on performance requirements of *any* kind, such as the transfer of technology or the conduct of research and development in China. This is so, because the requirements established under the *NEV Regulation*, condition access to the NEV market in China, on the transfer of technology, software, tools and equipment to the joint ventures in China, and to localise production capabilities in China. Through the NEV Regulation, China also establishes a set of general requirements for approval, which include the establishment of design and development facilities in China, and the conduct of research and development activities in China.

- (3) The *Administration of the Examination, Approval and Registration of Foreign-invested Crop Seed Enterprises Provisions* ("Seed FIE Approval Provisions"), operating separately or together with other listed instruments, is inconsistent with China's commitments under Paragraph 7.3 of Part I of China's *Accession Protocol* and Paragraph 1.2 of Part I of the *Accession Protocol*, which incorporates the commitments under Paragraph 203 of its Working Party Report. This is because this law imposes requirements which relate to the transfer of technology, genetic material and biotechnology to China as conditions for the approval of foreign-invested crop seed enterprises. For example,

- Article 4(1) requires that the foreign party to a foreign-invested crop seed enterprise shall be an enterprise that possesses a high level of scientific seed breeding, and seed production technology and enterprise management. The same requirement does not apply to the Chinese party of the foreign-invested crop seed enterprise.
- Article 4(2) requires that the foreign-invested crop seed enterprise be capable of introducing or adopting superior varieties (germplasm resources), advanced seed technology and equipment from abroad.

In addition, the *Measures for the Administration of Crop Seed Production and Operation Licenses* ("Seed Measures"), operating separately or together with other listed instruments, are inconsistent with China's commitments under Paragraph 7.3 of Part I of China's *Accession Protocol* and Paragraph 1.2 of Part I of the *Accession Protocol*, which incorporates the commitments under Paragraph 203 of its Working Party Report. These Measures require foreign-invested enterprises applying for seed production and business licenses to meet specific targets in the investment in scientific research, thus conditioning the approval for the granting of the necessary licenses on the conduct of research and development in China. For example,

- Article 9(4) establishes specific research and development investment targets as percentages of the company's income or in absolute financial terms, as conditions to meet in order for a company to obtain the necessary licenses for seed production;
- Article 12 requires that companies applying for a seed production license submit detailed documentation including descriptions of the company's research and development activities.

The European Union considers that China violates its commitments under Paragraph 7.3 of Part I of the *Accession Protocol* and Paragraph 1.2 of Part I of the *Accession Protocol*, which incorporates the commitments under Paragraph 203 of the Working Party Report, which require China not to condition approval by Chinese authorities of the right of investment on performance requirements of *any* kind, such as the transfer of technology or the conduct of research and development in China. This is so, because the requirements established under the *Seed FIE Approval Provisions* and the *Seed Measures* condition access to the seed market in China, on the transfer of technology, biotechnology, valuable genetic material and valuable equipment to the joint ventures in China, as well as on the conduct of research and development activities in China.

- (4) 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, are inconsistent with Article 28.1(a) and (b), Article 28.2, Article 33,

Article 39.1, 39.2 and with China's commitment to provide national treatment under Article 3(1) of the TRIPS Agreement (each Article either solely or in conjunction with the others). Furthermore, they are inconsistent with China's commitment under Paragraph 1.2 of Part I of China's Accession Protocol, which incorporates the commitments of Paragraph 49 and Paragraph 203 of the Working Party Report. This is 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:

- 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;
- 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.

With respect to foreign patent holders, China violates Article 33 of the TRIPS Agreement, according to which the term of patent protection should be at least 20 years. In addition, it violates Article 28.1(a) and (b) of the TRIPS Agreement, because it unduly limits the exclusive rights of foreign patent holders. Furthermore, China limits the rights of foreign patent holders to assign or transfer by succession patents and to conclude licensing contracts, contrary to its obligations under Article 28.2 of the TRIPS Agreement. Because of these restrictions, China also fails 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.

Domestic intellectual property right holders are not subject to such restrictions; China thus affords less favourable treatment to foreign intellectual property rights holders as compared to Chinese intellectual property rights holders, contrary to Article 3(1) of the TRIPS Agreement.

Because the restrictions at issue are contrary to China's obligations under the TRIPS Agreement, China also violates Paragraph 1.2 of Part I of the Accession Protocol, which incorporates China's commitments under the first sentence of Paragraph 49 of China's Working Party Report on Accession.

The European Union considers that China interferes in the technology transfer between enterprises contrary to Paragraph 1.2 of Part I of China's Accession Protocol, which incorporates China's commitment under the second sentence of Paragraph 49 of the Working Party Report, by subjecting to examination and approval by the Chinese authorities any technology transfers agreements entered into by a joint venture.

The European Union further considers that through the afore mentioned restrictions China violates Paragraph 1.2 of Part I of the Accession Protocol, which incorporates commitments under the fifth sentence of Paragraph 203 of the Working Party Report, because the restrictions set out in the JV Regulation as regards the terms and conditions of technology transfer limit the freedom of contract of enterprises in China.

- (5) 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, are inconsistent with Article 28.1(a) and (b), Article 28.2, Article 39.1 and 39.2 and with China's commitment to provide national treatment under Article 3(1) of the TRIPS Agreement (each Article either solely or in conjunction with the others). Furthermore, they are inconsistent with China's commitment under Paragraph 1.2 of Part I of the Accession Protocol, which incorporates, the commitments of Paragraph 49 and Paragraph 203 of the Working Party Report. This is 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:

- 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 restricts the terms of import technology contracts by prohibiting certain 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;

Foreign transferors of technology are subject to certain administrative burdens pursuant to Articles 10 through 21 TIER. Notably, importers of technologies that are restricted from imports are required to obtain a technology import license from the competent Chinese authorities. Moreover, copies of all contracts must be provided to the Chinese authorities and all contracts for the import of freely importable technologies must be notified to and registered by the Chinese authorities. These administrative requirements apply again, if a contract is subsequently amended or terminated;

China unduly limits the exclusive rights of foreign patent holders contrary to Article 28.1(a) and (b) of the TRIPS Agreement. China also limits the rights of foreign patent holders to assign or transfer by succession patents and to conclude licensing contracts, contrary to its obligation under Article 28.2 of the TRIPS Agreement. Because of these restrictions, China also fails to ensure an 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.

Domestic intellectual property right holders are not subject to these restrictions in the context of domestic technology transactions. As a result, through the measures at issue China accords less favourable treatment to foreign intellectual property right holders compared to Chinese intellectual property right holders, contrary to Article 3(1) of the TRIPS Agreement.

Pursuant to the first sentence of Paragraph 49 of China's Working Party Report on Accession, China committed to only impose, apply or enforce laws, regulations or measures relating to the transfer of technology, production processes, or other proprietary knowledge to an individual or enterprise in its territory that were not inconsistent with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"). Through the measures at issue, which are contrary to China's obligations under the TRIPS Agreement, China thus also violates its commitments under the Working Party Report and thus violates Paragraph 1.2 of Part I of the Accession Protocol, which incorporates Paragraph 49 of China's Working Party Report.

The European Union considers that China interferes in the technology transfer between enterprises contrary to Paragraph 1.2 of Part I of China's Accession Protocol, which incorporates China's commitment under the second sentence of Paragraph 49 of the Working Party Report, by requiring importers of technology to re-/submit their contracts to the Chinese authorities for licensing or registration and to obtain the required approvals. Furthermore, China violates Paragraph 1.2 of Part I of the Accession Protocol, which incorporates commitments under the fifth sentence of Paragraph 203 of the Working Party Report, because the restrictions set out in the TIER as regards the terms and conditions of technology transfer, limit the freedom of contract of enterprises in China.

- (6) Finally, China applies and administers 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 Accession Protocol, because it does not constitute impartial and reasonable application and administration of its laws, regulations and other measures.

China's measures adversely affect exports to China of technology, including intellectual property rights, by European Union undertakings and also 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.

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