

PRESENTATION:

CHINA AND W.T.O. COMPLIANCE

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Good morning Ladies and Gentlemen. First of all, I am not a morning person. Secondly, I am not a weekend morning person. So, I think that with all the people showing up here, it shows how successful the conference has become. I want to take this opportunity to thank Professor Takenaka for the invitation. Also, on behalf of the Asia Pacific Legal Institute, we are very proud to be a sponsor of these events (I think, at least I can say this in front of Professor Liu).

Today, I will be talking about China and the WTO compliance. I guess the topic initially was put in the area of non-compliance. However, I believe that is somewhat of a negative outlook on things. So, I will put somewhat of a positive spin on things, and hopefully in doing so, provide a balanced evaluation. Due to time limitations I will not be able to go through the laundry list of my outline.

First of all, let us look at China's process for getting into the WTO. Perhaps I should go back in history a little bit. China was one of the 23 original signatories of the first General Agreement on Tariffs and Trade—also known as “the General Agreement on Trade and Trade.” But with the 1949 Civil War, China withdrew from this organization; when the communists took power, it never bothered to get into the GATT, for obvious reasons. Then, in 1986, China filed an application to become a member of GATT again. So, beginning in October 1992, bilateral negotiations began.

As of today, these negotiations are still taking place. You have to live very long to be able to get into international organizations. Since 1999, there have been 37 member states from the WTO who have engaged in bilateral talks, and so far, 32 have concluded. For example, by November 15th, the United States concluded its bilateral package with China. Then just a couple of weeks later, Canada concluded its negotiation; then the E.U. followed on May 19th (a couple of months ago). Japan's negotiations concluded in early 1999. The reason I mention all this is that these four areas form the so-called “Quad” within the WTO. This pretty much wrapped up the major negotiations that were necessary. Even though China has concluded its talks with the European Union, it still has to talk to individual member states within

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the E.U. That process is still continuing, but no one really believes that there should be any problem, given the fact that the basic work has already been done, and it is quite elaborate.

Now, let's look at the multilateral side. Just this past June, WTO held its latest so-called Working Group Meeting, to decide on the legal framework and the necessary collection of documentation, based on which China would be formally accessed to this organization. The next meeting was scheduled for mid-July. However, it has not taken place yet, and we are already in late July. So, we will see how it goes.

We don't know yet, but it appears that China is poised to become a full member of the WTO, probably by the end of the year, or early next year. There is one last hurdle, at least here in the United States: the U.S. Senate has not passed H.R. 4444, which would grant China the so-called "Permanent Normal Trade Relationship Status" (internationally, it is known as "Most Favored Nation" status.) Passage would make the United States itself in full compliance with its part of the bargain: full obligation. They are making China's accession to WTO much easier. Regardless of U.S. action, China would be a member due to the international arrangement. Equal arrangement would be better for China if the United States granted the PNTR. Then China would be sent through the process and into the WTO.

Now, an interesting note is that, at the beginning of this talk, China insisted upon being treated as, at most a developing economy. The United States insisted, however, that China be treated as a developed economy. Obviously, China disagreed with the U.S.

In terms of the TRIPS, I think there is a consensus that China is in compliance with the agreement. There are technicalities, small details that probably still need some further amendments. However, by and large, China is complying with the TRIP agreement. When we talk about compliance and so forth, it is not just the TRIPS compliance. Since the developments in WIPO, we should be asking China to think about more. In fact, China is not taking into consideration the so-called "Digital Agenda," because China believes it probably won't make much sense given the serious backlog that is currently piling up before the National People's Congress.

In terms of enforcement, China clearly has improved its efforts on an overall scale. A large number of people are being punished. A huge amount of pirated CDs, DVDs, VCDs, and other items have been confiscated. However, the efforts do not seem to be catching up with the rate of piracy growth. Since there is such a big gap between the rate of enforcement and the rate of growth in piracy, the Chinese government is unsure about the effects of this gap. However, there has been a drastic improvement since 1993.

We clearly need a long-term strategy, particularly on education and fundamental changes in societal thinking. Bill Alfred, a famous scholar in China published a book in 1994, *To Steal a Book is an Eloquent Offense*. Even though this is not a Chinese proverb, he did describe quite accurately

the way business was conducted back then. In the book he describes that there were some disagreements, especially strong disagreement within China.

Moving on, I want to talk a little about some of the latest developments in China—which can be quite interesting, given the magnitude of what’s happening. First of all, China clearly wants to amend its Copyright law. However, due to several cases in the court and the debate concerning the scope of fair use, the National People’s Congress, in a very unusual move, tabled the copyright bill amendment and sent the whole thing back to the State Council or the Cabinet for reconsideration. So everything is back on the drawing board. At least some of the things that will be addressed in the new copyright bill will be to level the playing field between what the Chinese consider unfair treatments concerning their own people. They want to bring up protection levels to the Chinese nationals, but not so much concerning foreign nationals. So, the government may call for a national treatment in reverse. Secondly, they want to establish a collective mechanism for royalty collection and distribution. Then, they want to consider the Digital Agenda, including whether or not China wants to fully implement the two WIPO treaties: the Copyright Treaty and the Treaty on the Performance of Phonograms.

Another development, which just took place by the end of March, is that the State Council passed the bill concerning Patent Law. Some of the highlights include to add “offer for sale” to make it in compliance with the TRIPS requirements; to recognize contributory infringement liability; to establish the mechanism for the registration of patent licensing agreements; and to stipulate a statutory damage.

On the administrative side, we just finished the legislation, and there are a couple of things that occurred. I just want to pick one or two to give you an idea about what has happened. First, there is something called the “March Notice,” which is more or less like an executive order and concerns online audio-video business transactions. Based on this regulation, all AV, including MP3 files (as long as it involves someone and online service provider which has foreign capital) cannot be taken online. I don’t know how they are going to enforce this regulation, but that is the rule now. So I guess in that regard, China is one step ahead of the MP3 case.

Also, the government has installed a “reporting award.” If you tip off the authorities that something is going on, such as piracy, a huge award can be given to you, provided that it really leads to successful prosecution. Even though it may not seem like a lot of money (U.S. \$12,500.00) it is a significant amount when you consider the *per capita* income of a normal Chinese citizen. For example, the money awarded amounts to about 10 years of salary for a normal citizen. The “reporting award” has led to many raids and busts.

We do see some problems in terms of local protection, in terms of how evenly these new regulations are enforced. That of course goes to the very bureaucratic problem within China.

We do have a couple of judicial actions here in the U.S. One involves an online service provider and one involves the Microsoft trial case, testing the Chinese government's will to enforce what one may refer to as "corporate end-user liability." This is a brand new issue. It may also generate worldwide precaution, and also a huge case involving a suit about 1.2 billion *Rimimbi* in China regarding end-user liability.

Another issue that arises concerns domain names. The Chinese court has been confronted with a very simple question: whether domain names should be treated as trademark *per se*. The most recent case is the return of *IKEA.com*. *IKEA* won the case and the Chinese judge stated its obligations to the international conventions to back up the fact that Chinese domestic laws do not have anything concerning domain names. This ruling was the first of its kind in China.

Meanwhile, there is an official U.S. comment on the Chinese compliance on WTO/TRIPS Agreement. I can only tell you this: at least a laundry list gives you all kinds of things regarding what should be done and what should not be done. Some of the points are valid but some of the points are very questionable. First of all, the Chinese cannot understand the version of the U.S. official comment. The comments have to be fully translated. Secondly, some of facts have been stretched too far, thus resulting in a lot of haggling back and forth amongst the two countries.

I want to skip a few pages down to my conclusion. But I do want mention Taiwan because it is in much better shape than China in terms of TRIPS compliance. However due to political consideration, Taiwan cannot enter into WTO until China is first offered membership. So, everything that was pending now has been wrapped up, both bilateral and multilateral negotiations.

In conclusion, China is not a monolithic society or market. Anyone who wants to do business, or have anything to do with Chinese markets should not think that way. It is actually a capsule of both time and space. And therefore, in terms of TRIPS compliance, it is one hell of a job. You are talking about people along the Yang Tze River living lives similar to the Chinese people in the early 20th century (only people who live in Beijing and Shanghai live in a modern world). Furthermore, if you cross one mountain into the inland right by the Yang Tze River the people in that area live similar to those 1500 years ago. People don't even have electricity. Also, the people in these regions speak about 2400 or so different dialects. So, when dealing with China you are not dealing with one unified country in terms of cultural living and language. Therefore you have different "push and pull." But it will pass.

The United States is always pushing China to get into the world organization, to push them to do this and to do that. It seems like we are banging on their heads, by trying to move them (so to speak) from here to there. Now the internal growth of the high-tech industry is clearly taking shape, which has formed a very interesting “pulling” force within China. Interestingly, the two forces are now combining, and it will no longer be under “the push” scenario. However, if you want to work with China in the present, this force is clearly something that everyone has to reckon with.

Finally, there is the issue of expediency versus consistency. Expediency deals with the court's struggles with the fact that there is not enough law in China. Furthermore, the courts are trying to do whatever they can to put the pieces together, and are trying to come out with whatever inferences they may make within a rigid regime. Even though judges are struggling they still want to come down with what they consider to be the right conclusion of the law. However, the danger of this specific course is that it may be considered as being expedient. The problem for us is that the law would undermine consistency in terms of enforcement. So that is something the Chinese judicial system clearly needs to do something about. However, the outside world clearly can provide strong assistance to make this process easier for the Chinese, and make the Chinese market a truly attractive market for global competition.

It's been said that all politics are local. Which means we would have to work through the local level in order to make changes in a particular society. Political considerations aside, China is just as fearful as the rest of the world. It is fearful of the WTO, and that is the reality. So who is the real winner here? Well it is funny. Everybody says, “Oh if we join the WTO our economy would suffer and other people would take advantage of this vulnerable market.” But if everybody says the same thing, then who is the winner? Why join the WTO in the first place? So, the winner would be the people and not the Government *per se*.

Unfortunately, I don't have time for some other key issues I would have liked to address. However, I would be more than happy to entertain your questions at a later time.

Again, thank you.