Tracking China's Push To Invalidate Foreign Patents

06/20/24

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This article was originally published by Law360.

In recent years, China has increasingly used its courts and administrative panels to nullify patents held by foreign companies in industries it deems strategically important, such as technology, pharmaceuticals and rare-earth minerals.[1] This trend has raised serious concerns among foreign businesses operating in China, as they face a heightened risk of having their intellectual property rights challenged and nullified.

In a 2021 European Union survey on global intellectual property protection, respondents expressed concerns about "a tendency of court rulings to favor Chinese stakeholders when strategic sectors or companies, particularly state-owned enterprises, are concerned."[2]

They also identified patent invalidation as a serious problem in China. The number of patent invalidation requests filed in the country has grown substantially, with the figure in 2018 being two and a half times greater than in 2008.

In 2020 alone, 6,178 requests were filed for patent invalidation, and 7,144 invalidation cases were concluded.[3] Although there are no official statistics on the outcomes of these proceedings, some unofficial estimates suggest that up to 60% of patents subjected to invalidation proceedings are declared invalid.[4]

China's courts have also begun issuing anti-suit injunctions, which function as a global bar preventing companies from pursuing patent enforcement actions outside of China.[5] A 2020 case between Japanese company Sharp Corp. and the Chinese mobile phone brand Oppo Co. Ltd. illustrates the aggressive nature of these injunctions.

When Sharp sued Oppo in Japan and in Germany for patent infringement, Oppo countersued in Shenzhen, and in 2021, the Chinese court issued an anti-suit injunction threatening Sharp with a $1 million per week penalty if it did not drop the foreign suits.

Pharma Companies Caught in the Crosshairs

China's efforts to invalidate patents have particularly affected foreign pharmaceutical companies, especially as the Chinese government has identified tackling obesity and diabetes as a top policy priority.

Chinese health officials have stated that addressing diabetes and obesity is a critical policy objective due to the toll these conditions take on the country's hospital and social care systems as the population ages.[6] China has the world's largest overweight and diabetic population, with 89 million people living with diabetes, accounting for just over 8% of the population. The Lancet forecasts that this figure will reach 108 million, or 10% of the population, by the end of the decade.

The market for diabetes and new weight-loss drugs is expected to reach $130-140 billion in sales worldwide, making China a significant market for pharmaceutical companies.[7]

In light of this, the Chinese government has taken steps to prioritize the development and approval of new treatments for obesity and diabetes. In August 2023, Beijing gave the first approval for GLP-1 weight-loss drugs made by Chinese companies Huadong Medicine Co. Ltd. and Shanghai Benemae Pharmaceutical Corp.[8] This move is indicative of the government's desire to promote domestic pharmaceutical companies in this rapidly growing market.

The Chinese government's prioritization of domestic companies, however, poses significant risks for foreign pharmaceutical companies operating in China. In 2021, Pfizer's patent for Sutent, a cancer drug used to treat cancers in the stomach, intestine, kidney and pancreas, was invalidated following a challenge from Chinese pharmaceutical company CSPC Pharmaceutical Group Co. Ltd.

Similarly, in 2022, Danish company Novo Nordisk Inc. faced a setback when Chinese company Huadong Medicine successfully invalidated its patent for the weight-loss drug Wegovy before China's National Intellectual Property Administration.[9]

But besides its legal battles, Novo Nordisk is now facing intensifying competition in the Chinese market, where the patent on semaglutide — the active ingredient in Novo Nordisk's drug Wegovy and diabetes treatment Ozempic — expires in 2026.

Reportedly, Chinese drugmakers are developing at least 15 generic versions of these drugs. With at least 11 Chinese firms having semaglutide drug candidates in the final stages of clinical trials, if these generics are shown to be as safe and effective as Novo Nordisk's drugs, they could lead to increased competition and a significant reduction in prices.[10]

As more foreign pharmaceutical companies seek to enter the Chinese market with innovative drugs for obesity and diabetes, they may face a growing risk of patent invalidation and challenges from domestic competitors. The Chinese government's policy focus on these conditions, combined with its efforts to promote domestic pharmaceutical companies, creates a complex and potentially challenging environment for foreign companies seeking to protect their intellectual property rights in China.

Investment Treaties as a Tool to Protect Foreign Investments

Investment treaties, including bilateral investment treaties and free trade agreements with investment chapters, provide substantive protections for foreign investors and their investments in host countries. These treaties are designed to mitigate the political and legal risks associated with investing abroad by giving investors the right to bring claims directly against host states before international arbitration tribunals.

As of 2024, China had signed over 120 bilateral investment treaties and 30 treaties with investment provisions, making it one of the most active countries in investment treaty participation.[11] Moreover,

China has been a member state of the International Centre for Settlement of Investments Disputes — where most investor-state arbitrations are heard — since 1993.

China's Experience With Investor-State Arbitration

While China has actively participated in the investment treaty regime, it has faced relatively few investor-state arbitrations compared to other countries. As of 2024, foreign investors have sued China in international arbitration in 10 reported cases. These cases have involved various sectors, including real estate, mining, construction and financial services.

Protections Afforded by Investment Treaties

Investment treaties typically provide foreign investors with the following a range of substantive protections. These include:

- Fair and equitable treatment: Host states must treat foreign investors and their investments fairly, and not make arbitrary or discriminatory decisions.
- Protection against unlawful expropriation: Host states cannot expropriate or nationalize foreign investments without prompt, adequate, and effective compensation.
- National treatment and most-favored-nation treatment: Foreign investors must be treated no less favorably than domestic investors and investors from third countries.
- Full protection and security: Host states must provide physical protection for foreign investments, and ensure a stable legal and business environment.
- Free transfer of funds: Foreign investors must be allowed to freely transfer funds related to their investments into and out of the host country.

In the context of patent invalidation, foreign investors may be able to argue that China's actions breach one or more of these substantive protections. For example, invalidating a patent without due process or in a discriminatory manner that favors Chinese companies could potentially violate the fair and equitable treatment standard or the national treatment obligation, and be an unlawful expropriation by the state.

The 2017 case, Eli Lilly and Co. v. The Government of Canada, is a notable example of a pharmaceutical company using investment treaty arbitration to challenge the invalidation of its patents.

In this case, Eli Lilly brought a claim against Canada under NAFTA Chapter 11, arguing that the invalidation of its patents for two drugs, Strattera and Zyprexa, by Canadian courts amounted to a breach of Canada's obligations under the treaty. The company claimed that Canada's promise utility doctrine, a legal test used by Canadian courts to determine whether a patent has sufficient utility, was inconsistent with Canada's obligations under NAFTA and resulted in the wrongful invalidation of its patents.

Although the International Centre for Settlement of Investments Disputes ultimately ruled in favor of Canada, the case highlights the potential for pharmaceutical companies to use investment treaties to challenge patent-related measures by host states.[12]

Considerations for Foreign Investors Pursuing Claims Against China

While investment treaties can provide a powerful tool for foreign investors to protect their rights, it is essential to carefully review the specific provisions of the applicable treaty before bringing a claim against China.

Some older Chinese bilateral investment treaties require investors to exhaust local remedies before pursuing international arbitration — that is, to litigate the issue before local courts until final judgment — which can be a lengthy and costly process.

Additionally, some treaties contain a so-called fork-in-the-road clause, which stipulates that once an investor has submitted a dispute to a local court or administrative tribunal, it can no longer bring the same claim in international arbitration.

Foreign investors should also be aware that China has been actively negotiating new investment treaties with more restrictive provisions, such as narrower definitions of "protected investments" and more limited access to international arbitration. As a result, investors must structure their investments strategically, considering the specific protections available under the relevant treaties and the potential limitations on their ability to bring claims against China.

Conclusion

As foreign companies face growing challenges in protecting their patents in China, investment treaties may be essential for safeguarding their intellectual property rights.

Foreign investors may better navigate the uncertain patent landscape in China, and secure more favorable outcomes in disputes with the Chinese government, by structuring their investments to take advantage of these treaties and using the threat of investor-state arbitration as leverage.

However, investors must carefully consider the specific provisions of the applicable treaties and the potential limitations on their ability to bring claims against China that maximize the chances of successfully protecting their rights in an increasingly complex, unpredictable and even hostile environment.

[1] Stu Woo & Daniel Michaels, "China's Newest Weapon to Nab Western Technology—Its Courts," Wall St. J. (Feb. 20, 2023).

[2] Stu Woo & Daniel Michaels, "China's Newest Weapon to Nab Western Technology—Its Courts," Wall St. J. (Feb. 20, 2023).

[3] IP Key China, Study on China Patent Invalidation System 11 (2022).

[4] Xinxin Wei, Yue Yuan & Ji Liu, "Patent invalidation strategies in China," World Trademark Rev. (May 20, 2019).

[5] Stu Woo & Daniel Michaels, "China's Newest Weapon to Nab Western Technology—Its Courts," Wall St. J. (Feb. 20, 2023).

[6] Eleanor Olcott, Hannah Kuchler, & Wang Xueqiao, "Chinese drugmakers develop copycat versions of 'miracle' weight-loss drug," Financial Times (Aug. 15, 2023).

[7] Eleanor Olcott, Hannah Kuchler, & Wang Xueqiao, "Chinese drugmakers develop copycat versions of 'miracle' weight-loss drug," Financial Times (Aug. 15, 2023).

[8] Eleanor Olcott, Hannah Kuchler, & Wang Xueqiao, "Chinese drugmakers develop copycat versions of 'miracle' weight-loss drug," Financial Times (Aug. 15, 2023).

[9] Eleanor Olcott, Hannah Kuchler, & Wang Xueqiao, "Chinese drugmakers develop copycat versions of 'miracle' weight-loss drug," Financial Times (Aug. 15, 2023).

[10] Andrew Silver, "Novo Nordisk braces for generic challenge to Ozempic, Wegovy in China," Reuters (June 6, 2024).

[11] See https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china.

[12] Eli Lilly and Company v. The Government of Canada, UNCITRAL, ICSID Case No. UNCT/14/2, Final Award dated March 16, 2017.

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