Technology Transfer to China
Advantage Austria Support Measures

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Geht's der Wirtschaft gut, geht's uns allen gut.
Overview

- Applicable Laws
- Voluntary Technology Transfer
- Forced Technology Transfer
- Illegal Technology Transfer
- China‘s Objective
- Remedies based on int. Law
- Advantage Austria Support
Definition Technology Transfer

- Structured transfer of scientific and technological know how between persons and organizations

- Technology means technological know how AND required organizational management and marketing skills to manufacture a product or provide a service

- Transfer - usually in exchange for a reward - between two parties - typically by patent transfer, product license, JV capital investment, etc.
Economic Role of Technology Transfers

- important prerequisite for the development and growth of national economies

- In combination with foreign direct investment, local innovation potential, competent R&D landscape, etc.

- Technological progress promotes the invention of new products or efficient production processes

- In economic history and theory regarded as the main factor for the economic development and achieved living standard of industrialized countries.
Applicable Chinese Laws and Regulations

- Art. 342 et seq. Contract Law 1999
- Art 14 et seq. Foreign Trade Law 2004
- State Council Regulations on the Control of Import & Export of Technologies 2001
- NDRC catalogues on permitted, restricted and prohibited technologies
- State Council Regulations on the Administration of FIE 2002
- Government Procurement Law 2002
Applicable International Laws

- **TRIPS - Agreement on Trade Related Aspects of IPR**
  - Minimal IP protection standards in regard to registration and enforcement

- **TRIM - Agreement on Trade Related Investment Measures**
  - Contents of TT contract is solely defined by parties
  - Conditions in regard to FDI are not allowed

- **Bilateral Austrian-Chinese Investment Protection Agreement 1986**
  - Mutual protection of FDI

- **TBT - Technical Barriers to Trade Agreement**
  - Arbitrarily set regulations shall not be used as an excuse for protectionism

- **GPA - Plurilateral Agreement on Government Procurement**
  - Equal treatment of foreign and domestic companies
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Voluntary Technology Transfer

Conscious transfer of know-how to take advantage of a large internal market that is perfectly suitable as an export basis

Transfer modalities:
- Joint Venture
- Licensing
- Transfer of IPR
- Professional training and education
- R&D cooperations
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Forced Technology Transfer

- **Requirement to set up a JV**
  - WFOE are prohibited by authorities in certain industries
  - potential JV partners are selected by NDRC
  - do not match the business requirements of the foreign JV partner, but the strategic national development plan
  - e.g. SAIC is JV partner from both, VW and GM
  - JV partner transfers as a consequence gained know how into separate enterprise (e.g. Chery)
  - > Violates TRIM
Involvement of Design Institutes

- obligatory examination of respective technology for government approval by departments of government research- and development institutes
- provided documents become automatically property of the design institutes or certification agency
- examination staff acquires detailed knowledge of technology during examination procedure and disseminates gained information strategically to competing Chinese companies

> Not compliant with TBT
Forced Technology Transfer

- local content regulations
  - obligatory involvement of local suppliers
  - to promote diffusion of know how
  - and make full usage of national production capacities
  - change of supplier only under special circumstances and upon government approval possible
  - Exit mode: home market suppliers need to join production chain abroad

> Violates TRIM
Forced Technology Transfer

- public procurement regulations
  - large investments, in particular infrastructure and environmental protection projects
  - give the government a high leverage against competing tenderer
  - technology transfer concession decides which company makes the deal
  - detailed information is required already during the bidding process and is prone to slip away

> China has not yet acceded GPA
Main Involved Authorities - FDI

- **NDRC / 发展和改革委员会**
  - promulgates „Foreign Investment Guidance Catalogue“ (promoted, permitted, prohibited investments)
  - approving authority (in collaboration with MOFCOM) concerning foreign - promoted or permitted - investment exceeding USD 100 mio and - restricted - investment exceeding USD 50 mio.

- **MOFCOM / 商务部**
  - approving authority (in collaboration with NDRC) concerning foreign investment
  - approving authority concerning technology import and export contracts (free, restricted, prohibited technology)

- **Provincial authorities**: additional legislative and executive competence in regard to FDI
Main Involved Authorities - Certification

- **SAIC** - 工商行政管理总局
  - Market surveillance

- **Administration for Quality Supervision, Inspection and Quarantine (AQSIQ)** - 质量监督检验检疫总局
  - releases the “China Compulsory Product’s Certification Management Regulation“ (CCC)
  - recalls defective products that have entered the Chinese market
  - Market surveillance in regard to technical compliance

- **Ministry of Industry and Information Technology (MIIT)** - 工业信息化部
  - Sets standards in the ICT industry
Main Involved Authorities - Certification

- National Regulatory Commission for Certification and Accreditation (CNCA) - 认证认可监督管理委员会
  - Approval and Inspection of design institutes & certification organizations

- SAC - 标准化委员会
  - management, supervision and overall coordination of standardization works

- MOH / FDA - 卫生部
  - Certification of food and drug product
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China‘s official position is ...

- Legally forced technology transfer is pro-actively applied in order to promote the economic development and implement necessary structural changes.

- Art 4 State Council Regulations on the Control of Import & Export of Technologies:
  - Technology import has to comply with government development guidelines (NDRC)
  - needs to serve the national development and must secure China‘s rights and interests in regard to it‘s economy and technological progress.
... a complicated balance between

- using government authority to legally speed up technology transfer from foreign entities to selected domestic enterprises and research institutions

- and rapidly developing a domestic legal environment which ensures the protection of the intellectual property of Chinese entrepreneurs

Conclusion

- the Chinese government consciously undermines its own efforts to increase the efficiency of IP protection with a sophisticated legal framework which forces foreign enterprises to disclose and factually transfer IP.
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WTO Remedies

- **Dispute Settlement Understanding (DSU)**
  - Combination of diplomatic negotiations and contentious proceeding under the DSB; applies to all WTO agreements
  - Complaints by EU (common trade policy), industry associations and individual enterprises

- **Transitional Review Mechanism (TRM)**
  - 2001-2011 in addition to TPRM (since 2006)
  - Annual review of WTO implementation with duty to furnish information
WTO Remedies

- **TRIPS**
  - Art 63/3: obligation to provide information on administrative and judicial measures
  - Art 41: non compliance with IP enforcement standards
    > DSU

- **Governmental Procurement Agreement (GPA)**
  - Violation of foreign-domestic equal treatment principle by requiring FIE to team up with a Chinese JV partner for public procurement deals
  - Not yet enforceable
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International Technology Cooperation

a new Advantage Austria business support emphasis:

- Provide Information on New Technologies
- Promote Scientific & Technological Cooperations
- Facilitate Technology Transfer
Output Objectives

- on demand:
  - IO 3.6. Technology transfer support („Gazellenförderung“)
    - Up to EUR 20k government aid for technology commercialization
    - Free commercialization support
  - First stop advice on IP issues

- monthly:
  - news on technology development in China
    - available @ www.wko.at/cn

- quarterly:
  - industry specific reports
    - Intelligence on new technology industries and their environment

- twice a year:
  - IO 3.2. trend-, design- or technology mission
    - get to know cutting edge industries, possible partners and competitors
New Technology Reports - Schedule

- 31.3.2010: renewable energy - solar
- 30.6.2010: new mobility
- 30.9.2010: renewable energy - wind
- 31.12.2010: aviation & aerospace
- 31.3.2011: nanoscience / new materials
Industry Specific Network Methodology

- trade fairs
- universities
- symposia
- Public Authorities
- Companies
- scientific congresses
- competence centers
- business associations

XY technology 技术

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IO 3.2. Trend-, Design- or Technology Missions

- Industrial automation
  - 19-24.4.2010
  - BJ, SH

- New mobility
  - 18-23.10.2010
  - YRD, PRD

- Aviation & aerospace technologies
  - 14.-19.3.2011
  - BJ
Thank you for your attention!

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Further Reading

  - Standards and Conformity Assessment WG (p 134 et seq)
  - Intellectual Property Rights WG (p 74 et seq)
- Technologietransfer nach China, Marcus Dinter, Schriftenreihe des Institute for International Business & Law 2006
- Rahmenbedingungen für den internationalen Technologietransfer von Deutschland nach China, Winfried Huck, Schriftenreihe des Institute for International Business & Law 2005
- Die Neuordnung des internationalen Technologietransfers in der VR China, Thomas Pattloch, Max Plank Institut für Geistiges Eigentum 2003
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