



15.7.2016

## MISSION REPORT

following the visit of the Committee on Legal Affairs to Beijing, China, on 16-20 May 2016

Committee on Legal Affairs

Members of the mission:

Therese Comodini Cachia

Emil Radev

Mary Honeyball

Angel Dzhambazki

Kostas Chrysogonos

(PPE) (Leader of the mission)

(PPE)

(S&D)

(ECR)

(GUE/NGL)

## Introduction

A delegation of the Committee on Legal Affairs visited Beijing (China) on 16-20 May 2016 with the purpose of improving mutual understanding on EU and Chinese reforms as well as to address shared concerns particularly in the area of intellectual property rights.

The delegation was led by Therese Comodini Cachia (EPP, MT), and included also Emil Radev (EPP, BG), Mary Honeyball (S&D, UK), Angel Dzhambazki (ECR, BG) and Kostas Chrysogonos (GUE, EL).

The JURI delegation was authorised to organise a five-day mission, including time for travelling, and consequently the delegation held meetings with the Chinese authorities and other private interlocutors from Tuesday 17 May noon until Thursday 19 May in the evening.

## Summary account of meetings

### *1. Interlocutors and main topics discussed*

- *Briefing at the EU delegation*

The EU Delegation in Beijing organised a briefing over lunch for the members of the delegation at the Ambassador's residence. In addition to **Ambassador Hans-Dietmar Schweisgut**, **Laurent Bochereau**, Head of Science, Technology and Environment Section, **Charles Parton**, Counsellor in Political Affairs and **Benoit Lory**, Minister Counsellor at the Trade Section and specialised in IPR, participated in this meeting.

After a general explanation of the Sino-EU relations, the briefing focussed on IPR, including enforcement, robotics, environmental issues and on the Chinese legal system.

- *Meeting with the Law Committee of the Standing Committee of the National People's Congress (NPC)*

The aim of this meeting was to visit JURI's counterpart at the National People's Congress and exchange views on the respective works carried out by the two committees.

After a visit of the "Great Hall of the People" (NPC premises), the members of the JURI delegation met the representatives of the **Law Committee**, one of the nine special committees of the National People's Congress. The Chinese delegation was composed of elected members of the Law Committee as well as members of the **Legislative Affairs Commission of the Standing Committee of the NPC (LAC)**, which carries out the technical work. **Mr An Jian**, Vice Chairperson of the Law Committee chaired the meeting. **Ms Cheng Donghong**, Member of the Law Committee and Chairperson of China Association for Science and Technology, **Mr Xu Anbiao**, Deputy Director of LAC, **Mr Du Tao**, Deputy Director of the Civil Law Department of LAC, **Mr Yang Heqing** (corporate law and insurance), **Mr Tung** (environmental legislation) and **Mr Wang Xiang** (commerce and economic law) completed the Chinese delegation.

The two delegations presented their respective role, functions and area of competence, as well as the decision-making process in the two systems. They had a long discussion about the current works carried out in both committees, especially on copyright. Regarding copyright infringement on the internet, the Chinese delegation enquired about the safe harbour mechanism and the “notice and take down” procedures and about the ongoing reform on copyright. The JURI delegation heard about the EU-China relationship in the area of trade. The NPC showed also interest in the TTIP negotiations, in the EU anti-dumping investigations rules and in nuclear safety technology, addressing some questions to the JURI delegation. The Chinese delegation raised the issue of the Market Economy Status (MES) for China in the context of the Parliament Resolution against the granting of MES to China adopted a few days before the visit took place. They insisted on the need for members of WTO to respect the rules and honour their commitments.

The exchange of views was followed by a dinner hosted by the NPC, allowing the discussion to continue on a less formal basis.

- ***Meeting at the Ministry of Commerce of the People's Republic of China (MOFCOM)***

The aim of the meeting was to discuss with the Ministry in charge of leading international negotiations on IPR issues in trade agreements.

The meeting was organised with **Ms Li Yongjie**, Deputy Director General of the **Department of Treaty and Law**, **Mr Niu Jinqnam**, Chief of division at the **Office of the National Leading Group on the Fight against IPR infringement and counterfeiting** and **Mr Yu Yuantang**, Deputy Director at the **Department of European Affairs**.

The discussion focused on IPR enforcement. MOFCOM representatives presented the initiatives launched in this regards and explained how different agencies and institutions are involved in the fight against counterfeiting through the interagency working group on the fight against IPR infringement and counterfeiting. Access to internet and the protection of sensitive data when purchasing goods online, as well as portability, were among the topics discussed. The issue of the regulation of digital platforms and how to strike a balance between commercial value and IPR was also raised. MOFCOM indicated that storage, processing of data, and the use of big data raise important legal questions in terms of privacy and security of the nation and asked the EP position on social media and Facebook.

- ***Meeting with business 'representatives***

The aim of the meeting was to discuss with EU companies in China the current situation with regard to intellectual property issues.

Representatives of the **EU Chambers of Commerce in China**, a number of companies - e.g. in the **telecom and pharmaceutical** sectors (Ericsson, Nokia, Unifab) as well as **lawyers** (Starke, Spruson & Ferguson, Hogan Lovells) shared their experience and presented case studies illustrating the difficulties faced by EU companies in registering and enforcing their rights. Then the EU-funded **IPR SME Helpdesk** and the EU-China cooperation initiative **IP Key** presented their activities. Although the meeting focused on IPR, a few points were made on corporate governance.

- *Meeting with the Legislative Affairs Office of the State Council of the People's Republic of China (SCLAO)*

At this meeting, the JURI delegation met the Legislative Affairs Office of the State Council, one of the department dedicated to the implementation and review of laws in different areas, including IPR. Despite the limited competence of JURI in the field of environmental protection, the Chinese authorities insisted in discussing the legislative framework in this area, underlying that China is paying great attention to environmental protection. The meeting was, as a matter of fact, chaired by **Ms Zuo Li**, Director-General of the **Department of Agricultural, Forest, Urban Construction and Environmental Protection**. The discussion with **Mr He Ping** and **Mr Yuan Liang**, both IPR experts at SCLAO, focussed on copyright in the light of the development of new technologies, including digital platforms and the compensation of right holders. The meeting ended with an exchange of views on the consultation process in both the EU and the Chinese systems.

- *Meeting with the State Intellectual Property Office (SIPO)*

The aim of the meeting was to meet the Chinese office competent for patent, for coordinating IPR protection in the Chinese territory and for drawing up the policies of foreign-related IP works.

The delegation first met in a restricted meeting with **Mr He Zhimin**, **Deputy Commissioner, responsible for international affairs and cooperation**. He made an extensive presentation of the overall framework of the Chinese legal system in IPR and the recent progress made in this field. He underlined the partnerships established with EPO and EUIPO as well as with different EU Member States and other countries for making the Chinese system compatible with the global system. The exchange of views touched upon different aspects, including patent and investment in R&D. Mr Zhimin said that China saw the unified patent system in the EU as positive and that it would lead to a closer EU-China cooperation in this field.

Then the delegation met with SIPO's officials, **Mr Liu Jian**, **Ms Song Jianhua**, **Mr Wang Ying**, **Mr Wu Xiaoming** and **Ms Lei Xiaoyun**. They presented the administrative system for protecting IPR and SIPO's responsibilities. They intended to demonstrate how the overall IP protection environment has been improved in China detailing the different measures taken in order to get better enforcement capacities, including a nationwide network allowing people to report infringement cases (reporting hotline). The EU delegation insisted in the importance of investment in R&D and the protection of rightholders and investors. It also raised a number of concerns shared by EU businesses, such as the difficulty for inventor to get fair return of rights, the threat of invalidation of patents, the difficult recognition in China of the international registration of trademarks and IPR infringements. The unified patent system in the EU and the role played by the EP in this file was also discussed.

- *Meeting with Jeremy Daum, Beijing Director of Yale Law School's Paul Tsai China Center*

The discussion focussed on judicial procedures and the rule of law in China. The topics discussed include the consulting process in the passing of law, the reform of the judicial system, the training and appointment of judges, the setting up of IP specialised courts, the conflict of law and the Hague Convention of 2005. It was mentioned that transparency had

improved in China (e.g. open trials, judgments published online). The role of lawyers in the criminal context was considered important as it is one of the few possible checks on State power. Mr Daum also evoked how policies can affect judgements in China.

The open and fruitful discussion the delegation had with Mr Daum was a good preparation ahead of the delegation's visit to the Supreme People's Court.

- *Meeting with Judges of the Supreme People's Court (SPC)*

The meeting was chaired by **Mr Song Xiaoming**, member of the Judicial Committee and **Chief Judge of Intellectual Property Right Division at the SPC**. Other judges of the SPC completed the Chinese delegation: a **judge of the IPR special chamber** as well as two other **judges of the special chambers on environmental resources and on commerce**. The discussion had a strong focus on IPR although the two delegations discussed other topics of common interest, such as the Hague Convention of 2005, environmental resources protection law, corporate governance and robotics and artificial intelligence. The JURI delegation could exchange views on the procedures - including criminal procedure - to be followed in case of infringement and on the issue of consistency in judgements.

## *2. Summary of content*

The key message delivered by the Chinese authorities all along the visit is that China attaches great importance to IPR and is carrying out **reforms to further improve the Chinese legal framework**, strengthening IPR legislation and further promoting the management system for IPR. In March 2016, NPC passed a 5-year plan with IPR as one of the 20 key elements. The legislative work carried out to further enhance IPR protection includes the implementation of amended trademark law, further development of plant variety protection, and the current review of legislation on patent, copyright and anti-unfair competition (trade secrets). The EU Delegation confirmed the improvement of the Chinese legal framework and mentioned that the updated legislation on trademark goes even beyond EU standards.

However, the issue of **enforcement** is still a challenge. Business representatives indicated that foreign companies face discrimination and that the dual system (administrative and judicial) of IPR enforcement that prevails in China makes it a complex situation. Some progress have been made however, especially with the **setting up of three specialised IP courts** in 2014 in Beijing, Shanghai and Guangzhou which is a positive signal for IP enforcement in China. This pilot project for IP-related cases integrates the three judicial channels (administrative, civil and criminal) into one with one judge carrying out the trial on all three aspects in order to guarantee consistency of judgements. So far, the system seems to meet EU standards and no obvious discrimination towards EU companies has been reported. However, problems remain in the territories where there is no IP court. The Supreme People's Court confirmed the wish to create additional IP Courts or a specialised court of appeal in 2017. Another initiative on which China insisted, is the setting up in 2011 the **State Council Leading Group on the Fight against IPR infringement and counterfeiting**, an interagency that coordinates the work of about thirty agencies and institutions dealing with IPR enforcement, including the SPC and highest prosecutor. In addition, an online platform enabling IP enforcement authorities to share information on infringing cases was established in 2015. Replying to a question on the high number of infringing products originating from China, a SIPO representative said that progress have been made but acknowledged that there is still

room for improvement. Judges at the Supreme People's Court stressed that China is also impacted by counterfeiting and that the majority of the cases handled by the Chinese courts are initiated by Chinese companies.

Regarding the procedure to be followed in case of infringement, parties are encouraged to engage in civil law suits but if certain criteria are met, the case is referred to the criminal court. There are seven types of criminal offence existing in China and elaborated on the procedure and actors involved (public security bureau, procuratorate, judge). NPC introduced criminal penalties in line with TRIPS provisions. Judges indicated that foreign related cases mainly deal with equal treatment and copyright, competition issues and trade secrets to a lesser extent.

Among the problems pointed out by the SPC Judges is that IP judges in IP courts provide technical assistance but have no right to vote and rule. This fact was confirmed by Mr Daum who explained that the person who hears the case is not necessarily the one who makes the judgement, the decision being taken on the basis of a written document. The judges also mentioned the difficulty for judges to assess damages as well as their willingness to improve the system of burden of proof. Consistency in the courts' decisions is also a concern, and the recent creation of specialised IP courts aims at addressing it. China issued a strategy in 2008 and an action plan for 2014-2020 on IPR enforcement aiming to unify IPR protection at all levels in the whole Chinese territory. China seeks to strengthen administrative and judicial procedures to promote coordination of the two sides.

Regarding cooperation, China has been maintaining for more than 10 years a close **dialogue with the EU** to improve cooperation in IP matters. The NPC explained that Chinese authorities have learnt from the experience of other countries, including EU Member States, in all areas, including competition, IP law consumer protection and protection of civil rights. Chinese NPC pointed out the cooperation with the European Parliament and the visits organised between the two institutions.

Another element that was highlighted throughout the meetings is the existence of extensive **consultation** in the law making process, via public consultations on draft legislation as well as working groups and public hearings. EU Chambers of Commerce are interlocutors in this process.

On **copyright**, both the Chinese and the JURI delegations recognised that the protection of copyright was a common objective. The Chinese government is preparing a revision introducing the possibility for the author to register his/her work. The Chinese authorities acknowledged the difficulty to deal with copyright infringement on the internet and that the Chinese law has not yet taken this element into account. The Chinese authorities admitted that they take a prudent approach in the introduction of new laws in order not to block the development of new technologies. Regarding infringement, they indicated the existence of clear infringements of copyright in computer gaming and in other areas. In 2009, China passed a law on torts. Safe harbour is being considered and NPC asked about the EU's experience regarding to it. The Chinese initiative "Action 2015" in the area of music and cloud illegal products obtained good results on illegal downloading. It was stressed that while EU is quite reluctant to close down illegal sites, the Chinese administration has the power to shutdown platforms that allow downloading.

On patent, SPC indicated that they started research and gave additional interpretation on **patent law** (e.g. for technology investigator system) that will provide better protection to the owner of new technology and to research outcomes. SPC is studying the legal basis for the protection of new business models associated to new technologies and works on IP related issues (games, websites, content, cloud, software sharing platforms and other platforms). China use IP legislation as an industrial policy tool to favour technology transfer for a low price, and investment by foreigners to be used in Chinese interests.

Investors in R&D&I require a fair return on their investment enabling them to reinvest in new technologies and develop further but the licensing system in China does not allow EU companies to make a fair return for their rights. EU businesses (pharmaceutical sector) mentioned the mandatory disclosure of biological data at the early stage of patent application (in the EU it can be provided at a later stage) and the risk of patent invalidation when this information is lacking. They also claimed that local companies enjoyed an established relationship with local judges and politicians with a more favourable treatment in the recognition of patents. SCLAO explained that application examiners have a certain degree of discretion in the interpretation of the rules and the handling of individual cases depends on the individual judgement of examiners.

Problems have also been reported on **trademarks**, in particular the difficult recognition of international registration owing to the fact that China requires separate national registration. The classification system for trademarks is also a source of problems as well as the practice consisting for infringers in registering trademarks in Chinese characters. Finally, the internet portal for accessing Chinese trademark database for verification purpose seems not to be functioning.

The Chinese government pays attention to **robotics and artificial intelligence**. MOFCOM indicated that China wanted to become a global leader in the area of robotics. The area constitutes a huge potential and there is no regulatory barriers in this field. With regard to legislation, NPC said that China lacked behind EU with regard to development of Artificial intelligence. There is no regulation but a couple of legislation can be used (e.g. transport safety law for driverless cars). A law on transformation of science and technology research results was passed in 2016. Robotics is not a priority in EU-China cooperation even if specific cooperation programmes can take place (e.g. Robot Law project under FP7) or specific agreements signed (e.g. in 2015, an EU-China agreement was signed on 5G to support technology). Chinese courts have very little experience in the area and no robotics-related cases have been handled owing to the lack of special law on robotics.

With regard to **environmental issues**, today significant attention is put on environment, especially on legislation and education. If air pollution is the most noticeable problem, water and soil pollution are more serious ones. NPC showed interested in the issue of nuclear safety, China facing environmental problems as 70% of the energy is produced by fossil energy. NPC has just approved a plan including green energy to improve energy mix and is currently formulating nuclear safety law. Environmental courts have been set up in China but huge discrepancies remain between the capital and the provinces. The possibility to award environmental damages and the possibility for an NGO to sue a polluter are among the recent improvements pointed out. SPC expressed its interest in cooperating with other competent authorities abroad, including with the EP ENVI Committee.

**Regarding corporate governance and company law**, since China's accession to the WTO and to multilateral and bilateral agreements, China has had to abide by the laws for the administration of foreign companies in China. A judge at SPC stressed that they target transparency, quality, efficiency, and benefits for the investments of foreign companies in China. However, EU Business representatives consider that corporate governance is not enforced and that no equal treatment is given to joint ventures companies involving EU partner and Chinese competitor companies. They also warned of a forthcoming change in the legislation that will oblige a number of companies to fall under Chinese company law, eliminating joint-venture ownership and independence. This was seen as an attempt to take over EU know-how.

The Chinese representatives were also enquired whether China would sign the **Hague Convention of 2005** and introduce rules on the recognition and enforcement of judgements at international level. SPC replied that China was considering it and IPR Chambers of the SPC participated in the reflection.

## **Conclusions**

China and EU face similar concerns with regard to IPR, which provides for a large ground for cooperation in this field. Therefore, the mission's objective was to learn further on the current IPR reform in China and deepen dialogue on how common concerns could be addressed. The visit allowed putting into perspective the works carried out by the EU and China. The JURI delegation appreciated the Chinese's efforts for reforms and their commitments to improve IPR enforcement. However, there is room for improvement and there are still sectors where dialogue and cooperation could be strengthened.

The visit of the JURI Committee coincided with the adoption by Parliament of a resolution against the granting of the MES to China. This might have had an impact on the Chinese interlocutors' position towards the delegation and determined the agenda and topics discussed in some meetings. Nonetheless, the JURI visit will contribute to further cooperation between the two parties, and especially with the Law Committee of the National People's Congress.