National Policies Toward Foreign Investment and the Economic Crisis:

Another Excuse for Protectionism?

ABA Spring Meeting, New York

Amy L. Sommers, April 2010
Recent Events Suggesting Protectionist Tendencies by China:

- China adopts regulations for government to publish catalog of ‘accredited’ domestic products that will receive priority in government procurement tenders.

Recent Events (cont.): Accreditation Program

- Preference in procurement/infrastructure projects will be given to accredited domestic technologies where:
  - Products are sourced from domestically-owned IP rights
  - Not subject to foreign restriction
  - Trademark must be registered in China and not restricted by related foreign brands

- Catalog submissions had to be completed by December 10, 2009
Recent events (cont.): Accreditation Program

• The Accreditation Program was started on a trial basis in 2008 for companies located in national high-technology industrial zones.

• Starting in 2009, the Program will be nationwide and will focus on 6 high- and new-technology fields:
  – Computers and application equipment;
  – Communications products;
  – Modern office equipment;
  – Software;
  – New energy and new energy devices; and
  – High-efficiency and energy-saving products.
Export Duties/Quotas

• The EU filed a complaint against China with the WTO in 2009, alleging that it was improperly discouraging exports of commodities of which China is a major producer to give Chinese manufacturers using the commodities an advantage.

Note dates of adoption however…

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<thead>
<tr>
<th>Commodity</th>
<th>Duties</th>
<th>Effective date</th>
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<tbody>
<tr>
<td>Magnesium</td>
<td>10%</td>
<td>Jan.1, 2008</td>
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<tr>
<td>Coke</td>
<td>40%</td>
<td>Aug, 20, 2008</td>
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<tr>
<td>Silicon Mental</td>
<td>15%</td>
<td>Dec.1, 2008</td>
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<tr>
<td>Manganese</td>
<td>15%-20%</td>
<td>June 1, 2007</td>
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<tr>
<td>Fluorspar</td>
<td>15%</td>
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Domestic Standards as a Trade Tool

• When Apple introduced its iPhone in China in 2009, the phone did not have WIFI capability because the approval authority required that handsets include WAPI, a domestic wireless internet standard.

• Note, this is not a written requirement in a regulation – rather, the Ministry of Information and Information Technology has an internal requirement that in order to obtain a Network Approval License (the required approval for telecoms equipment to be sold in China), the handset must include WAPI.
Domestic Standards as a Trade Tool

- Starting in 2003, China announced that it would adopt a policy of requiring handsets sold in China include WAPI – US protested and after discussion, China agreed to delay implementation of this requirement.

- In 2009, MIIT agreed that handsets could have both WIFI and WAPI (so inclusion of WIFI didn’t disqualify them from being sold in China) – but MIIT is requiring that WAPI be included and Apple had to disable the WIFI function on China phones until it produces one with WAPI.
What do these events show?

• China’s use of standards, legislative/regulative tools to give preference to domestic products and certain tax policies all reflect efforts to benefit or protect Chinese companies.

• All the efforts mentioned here started before the onset of the financial crisis, however. This suggests several potential conclusions:
  – The financial crisis did not necessarily precipitate protectionism;
  – Protectionist tendencies are nonetheless real; and
  – As the crisis was not the catalyst, this suggests the tendencies may not abate when the economic crisis is over.
Amy L. Sommers’ strong skills in corporate structuring, governance and operations issues in China make her a valued resource to the clients she counsels. A former Chair of the China Committee of the American Bar Association’s Section of International Law, Ms. Sommers is a frequent speaker and commentator on China issues. Her involvement in China goes back over 25 years, when she first started studying Mandarin, later developing deep appreciation of China’s history, politics, culture and legal system. Her clients benefit from her ability to bring these insights to bear on their strategic China projects. Ms. Sommers is the recipient of the 2007 award for Professional Excellence from the Expatriate Professional Women’s Society of Shanghai. She is the current Chair of the Real Estate Committee of the American Chamber of Commerce – Shanghai. The Shanghai Financial Arbitration Centre has appointed her one of only 14 foreign arbitrators asked to serve the Centre.
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