

April 2009

Regulation of Business, Trade and Competition in China

Welcome to this month's bulletin of updates on the regulation of business, trade and competition in China.



Antitrust & Competition

MOFCOM approved Mitsubishi Rayon's purchase of Lucite with conditions

On April 24, 2009, the Anti-Monopoly Bureau (**AMB**) of the Ministry of Commerce (**MOFCOM**) announced its conditional approval of the purchase of Lucite International Group Ltd. (**Lucite**), based in the United Kingdom, by Mitsubishi Rayon Co., Ltd. (**MRC**), headquartered in Japan. The approval came after earlier media reports speculating that MOFCOM's review of the deal had stalled.

In the public notice announcing its conditional approval of the deal, MOFCOM set out its main concerns regarding the potential anti-competitive effects of the transaction. MOFCOM noted that, as originally proposed, the transaction would create a company with 64% of the market for methyl methacrylate (**MMA**) in China. As such, MOFCOM was concerned that MRC could use its dominant position in the MMA market acquired through the combination to restrict and eliminate competition in that market.

In addition, MOFCOM observed that MRC operates not only in the MMA market but also in downstream markets. MOFCOM was therefore also concerned that MRC could leverage its market power in the MMA market to lock out competition in the downstream markets.

MOFCOM noted that during the review, it requested the parties to propose "corrective" measures that would alleviate the perceived negative competitive effects of the transaction, and the parties complied. Ultimately, MOFCOM accepted the parties' proposed measures and approved the transaction with the following conditions:

1. Lucite is to sell half of its China MMA production capacity over the next five years at cost to one or more third-party buyers within six months – extendible to twelve months subject to MOFCOM's approval – of closing, failing which MOFCOM will appoint a trustee to sell Lucite's entire China business.
2. After closing, the parties' respective China MMA businesses must remain independent, with separate management teams and board members until the required divestment is completed.
3. The combined entity cannot build new manufacturing facilities or make further acquisitions in China within the next five years without MOFCOM's prior approval.

MOFCOM's approval came after all other reviewing jurisdictions had cleared the transaction. The ultimate acceptance of the parties' proposal to address the concerns raised has generally been welcomed as a sign of flexibility by MOFCOM in exercising its merger control authority.

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Court accepted private enforcement suit filed against China Mobile for alleged abuse of dominance

On March 30, 2009, the Beijing Dongcheng District People's Court accepted for adjudication a case against China Mobile Communications Corp. and its Beijing subsidiary, Beijing Mobile, filed on March 4, 2009 by a subscriber for alleged abuse of a dominant position. This followed a similar suit filed on August 1, 2008 – the date the *Anti-Monopoly Law (AML)* came into effect – against China Netcom's Beijing branch for alleged abuse of dominance. That case was accepted by the Beijing Chaoyang District People's Court on September 19, 2008 and is still pending.

In the current case, the plaintiff claims that Beijing Mobile has been charging him a "basic monthly fee" since he signed up for a particular service package. According to the plaintiff, Beijing Mobile has since introduced other service offerings with lower or no monthly fees, but has continued to charge him the higher monthly fee. The plaintiff claims that, under these circumstances, Beijing Mobile's action amounts to "imposing unreasonable terms of transaction" and "discriminatory pricing" under Article 17(5)-(6) of the AML. He is seeking an injunction against Beijing Mobile's allegedly infringing behavior and a refund of monthly fees charged to him over the past two years.

Intellectual Property

SPC issued Opinion on the Implementation of the National Intellectual Property Strategy

The Supreme People's Court (SPC) issued its *Opinion on the Implementation of the National Intellectual Property Strategy (Opinion)* on March 30, 2009. The Opinion sets out the SPC's views on effective judicial implementation of the *Outline for the National Intellectual Property Strategy (IP Strategy)* promulgated by the State Council on June 5, 2008. The Opinion discusses a number of issues, including:

Remedies for infringement

The Opinion emphasizes the importance of effective judicial remedies, which include: (1) awarding money damages and non-monetary relief to IP rights holders to fully compensate their economic and non-economic losses; (2) granting pre-trial, interlocutory and permanent measures and orders as appropriate to provide prompt and pragmatic relief; and (3) imposing punitive fines and confiscating assets of infringers to deprive them of the ability to continue infringing activities. In particular, the Opinion urges the courts to award enhanced damages in cases of willful, repeated or large-scale infringement.

Uniformity in judicial interpretation and application of IP laws

The Opinion highlights the importance of uniformity and transparency in the courts' interpretation and application of the laws. Efforts to achieve uniformity and transparency will include timely promulgation of judicial interpretation and related guidance,

establishment of a system of precedents for IP cases, as well as systematic publication of IP-related decisions.

Proper balance between the exercise of IP rights and the public interest

In discussing the protection of patent rights, the Opinion urges the courts to guard against improper expansion of patent rights that would stifle competition and harm the public interest. As an example, the Opinion asks the courts to refrain from overly generous application of the doctrine of equivalents. The Opinion also directs the courts to use caution in recognizing well-known trademarks and in delineating the scope of protection across different trademark classes. Likewise, the Opinion instructs the courts to protect the legitimate rights of defendants in trade secret disputes and to guard against potentially abusive use of the litigation process by plaintiffs to unlawfully obtain defendants' trade secrets.

Judicial enforcement of the Anti-Monopoly Law

The Opinion includes a specific discussion of the judicial enforcement of the *Anti-Monopoly Law (AML)*. It states that the courts should accept and adjudicate civil cases brought by private parties that meet the criteria set forth in the AML and the *Civil Procedure Law*. The Opinion directs the courts to properly consider the interrelationship between competition policy and industrial policy in adjudicating AML cases, including those that involve abuses IP rights. However, the Opinion provides no further details on what would constitute an abuse of IP rights.

Specialized IP courts

The Opinion states that the establishment of specialized IP courts, which would handle all civil, administrative and criminal IP trials, should be carefully considered. The Opinion also recommends an in-depth study of the feasibility and necessity of establishing a specialized IP appeals court. The Opinion offers no additional information or proposed timelines for such studies.

In sum, the Opinion presents a comprehensive overview of the SPC's plan and vision regarding the courts' role and responsibilities in implementing the IP Strategy. This represents another step in China's ongoing effort to improve its IP enforcement regime. We expect the courts to look to the Opinion for general guidance in adjudicating IP cases while further implementation details are pending.

International Trade

MOFCOM issues guiding opinions on National Economic and Technical Development Zones

On March 26, 2009 the Ministry of Commerce (MOFCOM) issued the *Guiding Opinions on the 2009 Work of China National Economic and Technical Development Zones (the Opinions)*. The Opinions aim in part to cushion China's special economic zones from the recessionary effects of the global economic slowdown through a variety of measures to boost domestic demand, promote

employment, and increase and improve the quality of foreign direct investment (FDI).

China began to establish special economic zones in the late 1970s, and in the mid-1980s expanded the program to include National Economic and Technological Development Zones (**Zones**). By early 2006, the government had established 49 National Economic and Technological Development Zones and five other development zones with the same status. The Zones, usually located in provincial capital and coastal cities, provide complete infrastructure and an internationally competitive investment environment for firms the government deems essential for the country's economic development.

The Opinions are largely consistent with the government's medium-term development goals, such as the encouragement of self-innovated technologies and goods and the development of the services sector. They are also consistent with the series of economic stimulus efforts the government has announced in recent months. Although the Opinions identify a number of directives that the Zones and enterprises located therein should follow, there is little detail regarding how these measures should be implemented and financed.

For more information please visit <http://www.mofcom.gov.cn/aarticle/b/f/200904/20090406145873.html?106527184=3261289171>. Please note this link is to a Chinese language website.

China announces plans to boost domestic auto consumption

On March 30, 2009, MOFCOM, the Ministry of Industry and Information Technology, the Ministry of Public Security, the Ministry of Finance, the State Administration of Taxation, the State Administration of Industry and Commerce, China's Banking Regulatory Commission, and China's Insurance Regulatory Commission jointly issued the *Opinions on Boosting Auto Consumption (the Opinions)*. The Opinions outline measures to boost domestic auto consumption through the promotion of auto sales, the development of second-hand auto markets, the acceleration of disuse and renovation of used autos, the expansion of auto consumption in rural areas, and the enhanced support for auto credit. The auto industry is a pillar industry in China, and boosting automobile consumption is expected to help promote the industry's development, reduce unemployment, maintain social stability, and sustain overall economic growth. The Opinions are consistent with a series of recent government measures aimed at boosting domestic demand to cushion the domestic economy from slowdown in global demand.

For more information please visit http://www.gov.cn/gzdt/2009-04/02/content_1276014.htm. Please note this link is to a Chinese language website.

China simplifies importation formalities for used electromechanical equipment

On April 10, 2009, MOFCOM, the General Administration of Customs (**GAC**) and the General Administration of Quality Supervision, Inspection and Quarantine (**AQSIQ**) jointly released the *Notice on Further Simplifying the Importation Formalities for Used Electromechanical Equipment (the Notice)*. The Notice applies to the import of a reasonable quantity of used electromechanical equipment with advanced technologies and comparatively long service life by enterprises (including various types of research institutes, colleges and universities, etc.) for self-use in production, research and development and exhibition. The Notice provides (i) simplified formalities for obtaining importation certificates for used electromechanical equipment, (ii) customs clearance facilitation for type AA and A enterprises that import used electromechanical equipment, and (iii) inspection and quarantine facilitation for the import of used electromechanical equipment.

The Notice took effect on April 10, 2009. Its issuance is part of the government's move to facilitate the implementation of stimulus packages for ten key industries released in January and February this year.

For more information please visit <http://www.mofcom.gov.cn/aarticle/b/e/200904/20090406165576.html?22641104=3261289171>. Please note this link is to a Chinese language website.

Obama administration's China policy begins to take shape, but uncertainty and challenges remain

A series of developments in April provide an early indication that the Obama Administration's economic and trade policy towards China is unlikely to be as confrontational as some observers had initially feared. Nevertheless, the developments underscore the uncertainty that remains regarding the details of the Administration's China policy and foreshadow some of the challenges that the Administration is likely to face in the coming months.

Following President Obama and President Hu Jintao's first face-to-face meeting on April 1 during the Group of 20 Summit in London, the two Leaders confirmed rumors that the United States and China would continue the bi-annual, high-level dialogue begun under the Bush Administration. The dialogue will feature a new "strategic" track to complement the economic track and will be renamed the US-China Strategic and Economic Dialogue (**SED**). Secretary of State Hillary Clinton and Chinese State Councilor Dai Bingguo will co-chair the strategic dialogue, while Treasury Secretary Timothy Geithner and Chinese Vice Premier Wang Qishan will co-chair the economic dialogue. It remains unclear what issues will fall under the purview of each dialogue and which government agency will take the lead on key cross-cutting issues such as energy and the environment. The first meeting of the new SED will likely be held in mid- to late-July in Washington, DC. The

two Leaders also confirmed that they would continue the US-China Joint Commission on Commerce and Trade (**JCCT**), a working-level dialogue initiated in 1983, which deals largely with trade-related issues. A number of US business groups, including the US-China Business Coalition welcomed these announcements.

A second development perceived as positive by many US business observers came on April 15, when the US Treasury Department failed to cite China as a “currency manipulator” in its semi-annual Report to Congress on International Economic and Exchange Rate Policies.¹ Although the report stated Treasury’s view that the renminbi remained “undervalued,” it acknowledged that the Chinese government had taken a number of steps to “enhance exchange rate flexibility” and welcomed the positive effects of the Chinese government’s November 2008 fiscal stimulus package. Prior to the report’s release, a series of remarks from Administration officials, including the President and Secretary Geithner, had led some observers to speculate that Treasury might reverse course from the previous Administration’s practice and begin to cite China for currency manipulation in the report. Treasury’s decision suggests that the Obama Administration has begun a shift away from its tough initial stance and is moving toward a more pragmatic China policy that reflects the reality and importance of the bilateral economic relationship.

Although the Administration avoided, or at least postponed, a potential conflict with China on the issue of currency, both sides have continued to take issue with other aspects of the relationship. On April 8 US industry filed a petition with the US International Trade Commission (**ITC**) to request antidumping and countervailing duty (**CVD**) investigations on imports of oil country tubular goods (**OCTG**) from China. The CVD petition targets subsidies that the petitioners allege result from the Chinese government’s granting of value-added tax (**VAT**) rebates that exceed the initial amount of the tax paid, a practice not permitted under WTO rules. Because the Chinese government often uses VAT rebates as an economic policy tool to encourage or discourage exports of certain goods, if the US petitioners’ case is successful other US industries could file similar petitions to seek the imposition of duties on Chinese imports of other products.

On April 17, the Chinese government filed a request with the World Trade Organization (**WTO**) for dispute settlement consultations with the United States over the latter’s ban on Chinese imports of processed poultry. The United States imposed the ban in 2004 following an outbreak of avian influenza in China. Although the Bush Administration agreed in 2006 to a rule that would have permitted re-imports of cooked chicken from certain processing plants, a March 2009 bill passed by Congress included a provision that blocked implementation of the rule. If the United States and China

¹ The full report is available in English on the Treasury Department website at: <http://www.treasury.gov/press/releases/reports/fxreportfinalfor%20webapril152009.pdf>

fail to resolve the dispute through consultations within 60 days, China may request the formation of a Panel to review the facts of the dispute. The WTO consultation request marks China’s fourth against the United States, and is the first to occur during the Obama Administration.

While traditional trade remedies and WTO cases have the potential to escalate tensions, such practices have during the past two years become a normal and accepted means of addressing disagreements in the Sino-US relationship. Of greater concern is the decision that President Obama might face this fall if the ITC determines that a surge of consumer tire imports from China has resulted in a “market disruption” that contributes to material injury of the US industry. The ITC must issue the determination as part of a Section 421 investigation requested on April 20 by the United Steel Workers (**USW**) Union. The decision could result in the imposition of a three-year quota that would limit imports to 21 million tires the first year, with five percent increases in the second and third years, or other similar safeguard measures. These China-specific safeguards are authorized under Section 421 of the Trade Act of 1974, as amended, and are permitted under WTO rules.² Before such measures may be implemented, however, the President must by law issue the final decision to accept or reject import relief based on whether he considers it in the US national economic interest to do so.

President Obama stated during his candidacy that he would not reject Section 421 safeguards on ideological grounds³ but would instead consider them on their merits. Given the apparent softening of his position on the currency issue, it is possible that President Obama would reject recommendations to impose the safeguards; however, his agreement to their imposition would signal to US industry that his Administration supports the use of Section 421 safeguards and could trigger a flood of new petitions. The Chinese government might perceive such a decision, the first by any US President since the provision was added to the Trade Act, as a resort to protectionist measures by the United States. Such a decision could set a dangerous precedent that in the words of Chinese Commerce Minister Chen Deming will “seriously test China-US economic and trade relations.”⁴

² Section 421 was added to the Trade Act by the U.S.-China Relations Act of 2000 as part of China’s accession to the WTO.

³ Obama’s statement referenced to the previous Administration’s alleged “ideological rejection” of import relief under Section 421. President Bush rejected all four recommendations to impose Section 421 safeguards.

⁴ Chen Deming. “Strengthen U.S.-China Trade Ties: Now is no time for protectionism.” *Wall Street Journal*. April 27, 2009.

Trade Remedy Cases Involving China

| Circular welded carbon quality steel line pipes | China | US | Final determination on AD duty made on March 24, 2009 |
|-------------------------------------------------|--------------------------------------------------|-----------|----------------------------------------------------------------|
| Certain nickel stainless steel sheets | China, Brazil, South Korea, South Africa, Taiwan | Russia | AD investigation initiated on March 27, 2009 |
| Citric acid and certain citrate salts | China, Canada | US | Final determination on AD and CVD duties made on April 7, 2009 |
| Certain molybdenum wires | China | EC | AD investigation initiated on April 8, 2009 |
| Cold rolled stainless steel sheets | China | EC | AD investigation terminated without AD duty on April 16, 2009 |
| Certain matters innerspring units | China | Canada | Petitioner requested for AD investigation in April, 2009 |
| Malleable casting steel pipes | China | Argentina | Petitioner requested for AD investigation in April, 2009 |
| Consumer tires | China | US | Petitioner initiated Section 421 case on April 20, 2009 |

Business, Trade and Competition at White & Case

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- Top International Law Firm 2008 Vault Guide to the—*Top 100 Law Firms*
- Tier One for International Arbitration—*Chambers Asia*, 2009
- International Arbitration Team of the Year 2007—Chambers USA
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