

# Regulation of Business, Trade and Competition in China

June 2011

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

### Antitrust & Competition

#### Supreme Court Seeks Public Opinion on Draft Judicial Interpretation on AML Civil Procedure

On April 25, 2011, China's Supreme People's Court issued the *Draft Rules on Several Issues about Application of Law in Hearing Monopoly Civil Cases* (the "**Draft Rules**"). The Draft Rules, consisting of 20 articles, provide clarification on jurisdiction; standing to bring civil cases; burden of proof; civil liability; confidentiality of business secrets; and statute of limitations for handling Anti-Monopoly civil cases. The Draft Rules also clarify the relationship between court enforcement and administrative enforcement of the Anti-Monopoly Law (**AML**), which was promulgated in 2008. Below is a summary of some of the noteworthy issues addressed by the Draft Rules.

Consistent with a previous pronouncement, the Draft Rules designate the Intermediate People's Courts as the court of first instance for adjudicating AML civil cases. The Intermediate People's Courts, which already have jurisdiction over intellectual property litigation, are believed to be better equipped to handle AML-related cases that will likely involve novel legal issues and complex economic analyses.

The Draft Rules take a rather broad view on who can bring an action for alleged harm suffered due to an AML violation. In particular, the Draft Rules appear to permit indirect purchasers to bring a claim against sellers for damages caused by allegedly anticompetitive conduct. The Draft Rules also allow plaintiffs to bring AML-related claims in "collective actions" as permitted under China's Civil Procedure Law.

As set out in the Draft Rules, administrative enforcement against an alleged AML violator, and a civil action against the same party, can proceed in parallel. An aggrieved party may bring an action at any time, whether before, during or after an administrative investigation against the alleged violator, although the court has discretion to stay or terminate the litigation if an administrative investigation is ongoing. Where an AML enforcement authority has not found an AML violation, a court should still adjudicate the case and render a decision based on the evidence before it.

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According to the Draft Rules, the burden of proof generally rests with the plaintiff, with the burden shifting to the defendant under certain circumstances. The Draft Rules also specify when dominance of a defendant, accused of abusing such dominance, may be presumed. In addition, the Draft Rules provide guidance on when a plaintiff may seek the court's assistance in obtaining evidence from a defendant. This is helpful for plaintiffs given the generally limited discovery that is available in Chinese litigation.

Under the Draft Rules, a claimant has two years to bring an AML civil case, counting from the date that the claimant knew or should have known of the alleged AML violation, or where the relevant AML enforcement authority has determined the accused conduct constitutes an AML violation, from the date that the claimant knew or should have known of such determination. The statute is tolled if the claimant reports the alleged violation to the relevant AML enforcement authorities for investigation. The two-year limitations period is restarted from the date when the claimant knew or should have known that the enforcement authorities decline to initiate, dismiss or terminate an investigation.

Since the promulgation of China's first AML in 2008, many civil monopoly cases have been filed in court. Although administrative authorities have supplemented the AML with various implementing rules, China is still in need of clear procedural and substantive rules to guide those courts tasked with handling monopoly proceedings. The Draft Rules are part of China's on-going effort to refine applicable procedures and substantive rules. After finalization, the Draft Rules should enhance AML enforcement in China.

For more information please visit [http://www.court.gov.cn/gzhd/zqyj/201104/t20110425\\_19850.htm](http://www.court.gov.cn/gzhd/zqyj/201104/t20110425_19850.htm). Please note this link is to a Chinese language website.

## International Trade

### New Efforts to Improve Standards for Steel, Petrochemicals and Other Sectors in China

The Ministry of Industry and Information Technology (MIIT) issued the *Work Priorities on Standardization in 2011* (the "**Priorities**") on May 9, 2011 to guide efforts to develop and implement a state-of-the-art standard system in China that addresses each step in the supply chain or the production process and covers all products and new technologies. As part of this initiative, the government is calling for efforts to enhance strategic research in the development of standards in a number of key sectors, including among others, petrochemicals, iron and steel, construction materials, machinery, electronics, aviation, shipbuilding, telecommunications and energy conservation. The government will also encourage the adoption of international standards and active participation in the standards formulation process at the international level.

The Priorities emphasize incorporating self-reliant intellectual property rights into technical standards and formulating standards on indigenous innovation, which might be problematic for foreign-invested enterprises (FIEs). And, although China recently agreed to delink indigenous innovation policies from government procurement during the recent US-China Strategic and Economic Dialogue, FIEs will still need to proactively participate in the standards development and revision process to ensure continued access to markets beyond the government procurement sector.

For more information please visit <http://www.miit.gov.cn/n11293472/n12822216/n12822250/13750671.html>.

Please note this link is to a Chinese language website.

### China Continues African Trade and Investment Push, Despite Some Public Backlash

China's already significant trade and investment interests in the African continent are expected to surge in 2011, with total trade value likely to exceed the US\$115 billion in Sino-African trade in 2010. China's trade and investment dealings with a long list of African nations have seen a ten-fold increase over the last decade, with trade and investment driven by forty-five bilateral trade and investment deals, including a "comprehensive strategic partnership" agreement that China's president, Hu Jintao, signed last August with South African president Jacob Zuma.

In addition to its growing interests in South Africa, China is focused on expanding trade and investment with Zambia, Zimbabwe, Sudan, Algeria, Nigeria, Tanzania and Kenya. Last April, China and Kenya signed ten bilateral trade agreements, including a deal for the construction of a five-hundred bed hospital, which will be Kenya's first full-scale university hospital. Although Kenya lacks the natural resources that many Chinese investors have sought, Chinese investors view Kenya as a critical access market, particularly given the country's proximity to southern Sudan. The hospital initiative in Kenya is part of a long-term Chinese initiative to provide billions of dollars in grants and loans to African governments in exchange for access to critical raw materials and large-scale infrastructure investment opportunities.

The Chinese government views its expanding trade and investment relationship with Africa as mutually beneficial, with China accessing the raw materials it needs while exporting low-cost products to a growing consumer population in Africa. Chinese emigration to the African continent has tracked this rapid growth in trade and investment, with close to one million Chinese citizens now living and working in Africa. However, despite exponential growth in trade, investment, and the move of hundreds of thousands of Chinese nationals to Africa, the expanding Sino-African trade relationship has not been without controversy.

Some observers believe that Chinese investors have severely limited their ability to succeed on the ground in Africa by disregarding local cultural, labor and environmental interests. In Zambia, for instance, a Chinese manager of a Chinese-invested coal mine shot two Zambian employees in a wage dispute. The incident led to public outrage that Chinese investors are consistently willing to disregard humanitarian and labor rights in a full-speed push to maximize profits. Some African governments have had to respond to growing and widespread public concern that Chinese investors - particularly in the mining sector - are destroying national parks and other natural treasures, while depleting valuable natural resources and failing to ensure the safety of African miners and laborers.

The quality of Chinese infrastructure construction in Africa is also a growing concern. Some African officials have discovered that the roads, hospitals and other substantial facilities built by Chinese construction companies often are of poor quality, and deteriorate quickly, suggesting a direct connection between sub-standard construction and alleged bribery schemes involving local officials and inspectors. As one example, the Luanda General Hospital in Angola was closed after severe cracks developed in the building. In addition, a Chinese-built highway connecting two Angolan cities was closed after rains swept away large portions of the roadbed.

Foreign policy and international economists believe that China can maximize its investments in Africa by working harder on the public relations front, including a more dedicated effort to preserve natural resources, protect the rights and safety of workers and build cultural goodwill in local communities. Although large-scale mining and other natural resource deals can be executed directly with African governments and leaders, and with little regard for any negative public reaction that might stem from these projects, long-term Chinese success in the African market hinges on the ability of investors to operate successfully at the local level. In recent years, China has invested in more than nine-hundred small-scale goods and services projects in the farming, fishing, animal husbandry, light industry, radio communication, textile, water and power generation sectors. Long-term investment growth and success in these areas increasingly will depend on the ability of Chinese investors to enrich rather than exploit local resources and communities.

### [Virginia Governor's Recent China Visit Augurs Trend by US States to Engage with China](#)

Commonwealth of Virginia governor Bob McDonnell spent three days in Shanghai and Beijing last month in a high-profile effort to expand the state's trade relationship with China. McDonnell was joined by a delegation comprised of Commonwealth business and government leaders. The governor met with major Chinese manufacturing, engineering, electrical and venture capital firms with an eye toward drawing Chinese direct investment to Virginia.

In addition, McDonnell used his time in China to promote Virginia tourism, and to increase tobacco, wine and other exports to China. McDonnell also used the visit to promote the strength of Virginia ports, announcing that one "major Chinese shipping company" had agreed to increase the number of stops in the Commonwealth. On May 5, McDonnell opened Virginia's official trade office in Shanghai, setting the operation in motion with two employees and an initial annual operating budget of US\$250,000.

According to the US-China Business Council (**USCBC**), Virginia did not rank among the top fifteen exporting states to China in 2010. The top three included California, Washington and Texas, respectively. Each of these states exported at least US\$10 billion in goods to China and have each experienced at least 250 percent growth in exports to China over the last ten years. Although Virginia did not rank among the top China exporting states in 2010, China is the Commonwealth's second largest export market.

Like Virginia, other states have been reaching out to China in recent years. Former California Governor Arnold Schwarzenegger and Washington Governor Christine Gregoire made similar trips to China in September 2010, leading delegations of business and government officials to major Chinese cities, including Hangzhou and Shanghai. California established a trade office in Shanghai in 2000. The State of South Carolina also maintains an active trade office in China, and has drawn high-profile investments to the state, including a significant investment from Chinese consumer appliance manufacturer Haier. Michigan moved its Asia economic development office to Shanghai in 2005 and has also worked to draw Chinese direct investment to the state. Both South Carolina and Michigan ranked among the top fifteen American exporting states to China in 2010, according to USCBC statistics.

The state trade offices of Virginia, California, South Carolina and Michigan now operating in China are poised to serve as catalysts for these states to expand exports to meet growing demand from a rapidly expanding Chinese consumer class. Agricultural exports from many US states are already growing exponentially and demand for non-commodity consumer goods is also expected to increase dramatically in the next several years. More significantly, the US state offices now operating in China are well positioned to work directly with Chinese manufacturing and investment interests to articulate and promote the tax, land cost, labor cost and other benefits of direct Chinese manufacturing investment in their states.

## Trade Remedy Cases Involving China from March 20 to May 20, 2011

Product	Country of Origin	Petitioner Country	Announcement
Compressors	China	EU	Partial interim review initiated on March 20, 2011
Steel grating	China	Canada	AD & CVD final determinations made on March 21, 2011
Multilayered wood flooring	China	US	CVD preliminary determination made on March 22, 2011
Ethyl acetate	China, Japan, Singapore	Korea	AD investigation initiated on March 24, 2011
Float glass	China	Korea	AD final determination made on March 24, 2011
Tungsten carbide and fused tungsten carbide	China	EU	AD expiry review final decision made on March 24, 2011
Pentaerythritol	China, Sweden	India	AD sunset review final decision made on March 25, 2011
Aluminum extrusions	China	US	AD & CVD final determinations made on March 29, 2011
Certain flat hot-rolled carbon and alloy steel sheet and strip	China	Canada	AD expiry review final decision made on March 31, 2011
Refrigerators	China	Ukraine	Safeguard investigation terminated on April 1, 2011
Citric acid and salts	China	Brazil	AD investigation initiated on April 6, 2011
Glasses	China	Argentina	AD investigation initiated on April 7, 2011
Copper pipe fittings	China	Canada	CVD interim review final decision made on April 8, 2011
Inner springs	China	Canada	AD interim review final decision made on April 18, 2011
Concentrated soy protein	China	EU	AD investigation initiated on April 19, 2011
Certain carbon steel fasteners	China, Taiwan	Canada	AD re-investigation initiated on April 28, 2011
Wire nails	China	New Zealand	Provisional decision of AD investigation made in May 2011
Switch voltage regulators	China	Argentina	Negative decision of AD investigation made on May 2, 2011
Poly vinyl chloride paste resin (PVC paste resin)	China, Japan, Korea, Malaysia, Russia, Taiwan, Thailand	India	Definitive decision of AD investigation made on May 2, 2011
Sodium tripoly phosphate (STPP)	China	India	Definitive decision of AD investigation made on May 3, 2011
Electric heaters	China	Argentina	Definitive decision of AD investigation made on May 4, 2011
1,1,1,2-Tetrafluoroethane or R-134a of all types	China, Japan	India	Definitive decision of AD investigation made on May 10, 2011
Steel tubes	China	Argentina	Negative decision of AD investigation made on May 12, 2011
Furfuraldehyde	China	EU	Definitive decision of AD investigation made on May 12, 2011
Melamine	China	EU	Definitive decision of AD investigation made on May 13, 2011
Coated fine paper	China	EU	Definitive decision of AD & CVD investigations made on May 14, 2011
Steel nails	China	Mexico	Definitive decision of AD expiry review made on May 16, 2011
Canned mushrooms	China	Mexico	AD expiry review initiated on May 17, 2011

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Our Firm's business, international trade, antitrust and competition, intellectual property and disputes lawyers help clients manage the risks and maximize the opportunities associated with the increasing regulation of global business and international trade in goods and services. One of the most important services we provide is to monitor legislative proposals worldwide and advise clients on the effects of legislation under multilateral agreements, bilateral agreements and US law. Because we are on top of the ever-shifting trade schemes around the world, our clients can stay out in front of their markets.

Our clients include a diverse roster of sovereign and private-sector entities, including national governments, manufacturers, exporters, importers and end users. Our insight into global business and trade laws is deepened by our immersion at the ground level. In China, we have lawyers and analysts in Beijing and Shanghai, working closely with our advisors in Brussels, Geneva, Miami, Monterrey, New Delhi, Singapore, Tokyo and Washington, DC.

## Our Firm

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Some of our independent accolades include:

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- Top 10 US Firm—*American Lawyer* 2010
- Top 10 Global Firm—*American Lawyer* 2009
- Won Five Firm of the Year Awards—*Asian Counsel* 2009
- Top International Arbitration Firm—*Chambers Global* 2011; *Global Arbitration Review* 2009
- Corporate/M&A Team of the Quarter (Q3)—*Financial News* 2009
- Top Tier in Global Project Finance—*Chambers Global* 2011; *Infrastructure Journal* 2010
- Leading Innovative US Firm in M&A, Restructuring, Litigation, Financial Services and Pro Bono and Leading Innovative UK Firm in Financial Services—*Financial Times* 2010