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CHINA FORMALIZES NATIONAL SECURITY REVIEW REGIME

On February 3, 2011, the China State Council issued the *Notice of the General Office of the State Council on the Establishment of a Security Review System for the Acquisition of Domestic Enterprises by Foreign Investors* (*Guo Ban Fa* [2011] No. 6) ("**Circular 6**"). Circular 6, setting out the details of a national security review system that applies to acquisitions of Chinese enterprises by foreign investors, will come into effect on March 5, 2011.

Under the 2006 *Regulations on the Acquisition of Domestic Enterprises by Foreign Investors* and the 2008 *PRC Anti-Monopoly Law* ("**AML**"), references were made to the requirement for a national security review in M&A transactions. However, there had been no formal process for making a national security filing. The significance of Circular 6 is that foreign investors engaging in M&A transactions in certain sectors may now need to go through a formal national security review process, which could affect deal time-table and, more importantly, deal certainty.

Scope of Application

Affected sectors

The affected sectors are:

- **Defense sector:** any acquisition of domestic entities in the defense industry, domestic enterprises acting as suppliers to enterprises in the defense

industry, domestic enterprises in the periphery of key or sensitive military installations, or other domestic entities with a bearing on national defense security; and

- **Non-defense sectors:** any acquisition of actual control by foreign investors of domestic enterprises that involve items such as major agricultural products, major energy sources and resources, major infrastructure facilities, major transportation services, key technologies, the manufacture of major equipment or other such items, to the extent that such items have a bearing on national security. The acquisition of financial institutions will be subject to separate regulations to be promulgated.

"Actual control"

Transactions in non-defense sectors are subject to this national security review system only if the foreign investor will acquire "actual control", which is defined as:

- ownership of 50% or more equity interest by the foreign investor, its controlling parent company and controlled subsidiaries;
- ownership of 50% or more equity interest by multiple foreign investors;

- ownership of less than 50% of equity interest but having the voting right to exert major influence at shareholders' or directors' meetings; or
- a transfer of actual control, including control over business decisions, finance, human resources, technology, to foreign investor(s).

Applicable transactions

The following domestic acquisitions by foreign investors will be caught under Circular 6:

- acquisition of existing or new equity of a non-foreign-invested enterprise;
- acquisition of existing equity of a foreign-invested enterprise ("**FIE**") from the domestic Chinese shareholder or the subscription of equity of an FIE;
- acquisition of assets or equity of a domestic enterprise through a newly established FIE; and
- direct acquisition of assets of a domestic enterprise and injection of the same to a newly-established FIE.

It is worth noting that contrary to the provisions in relevant guidelines issued by the Ministry of Commerce ("**MOFCOM**") in December 2008, the acquisition of existing equity of an FIE from a domestic Chinese shareholder would constitute a domestic acquisition by foreign investors

under Circular 6. In addition, while in practice a sale of assets by an FIE to another FIE normally is not treated as a domestic acquisition by foreign investors, it is not clear whether the acquisition of assets by a foreign investor or its FIE from another FIE would be caught under Circular 6.

Review Criteria

National security review will assess the impact of the acquisition on:

- national defense;
- national economic stability;
- social order; and
- research and development capabilities of key technologies affecting national security.

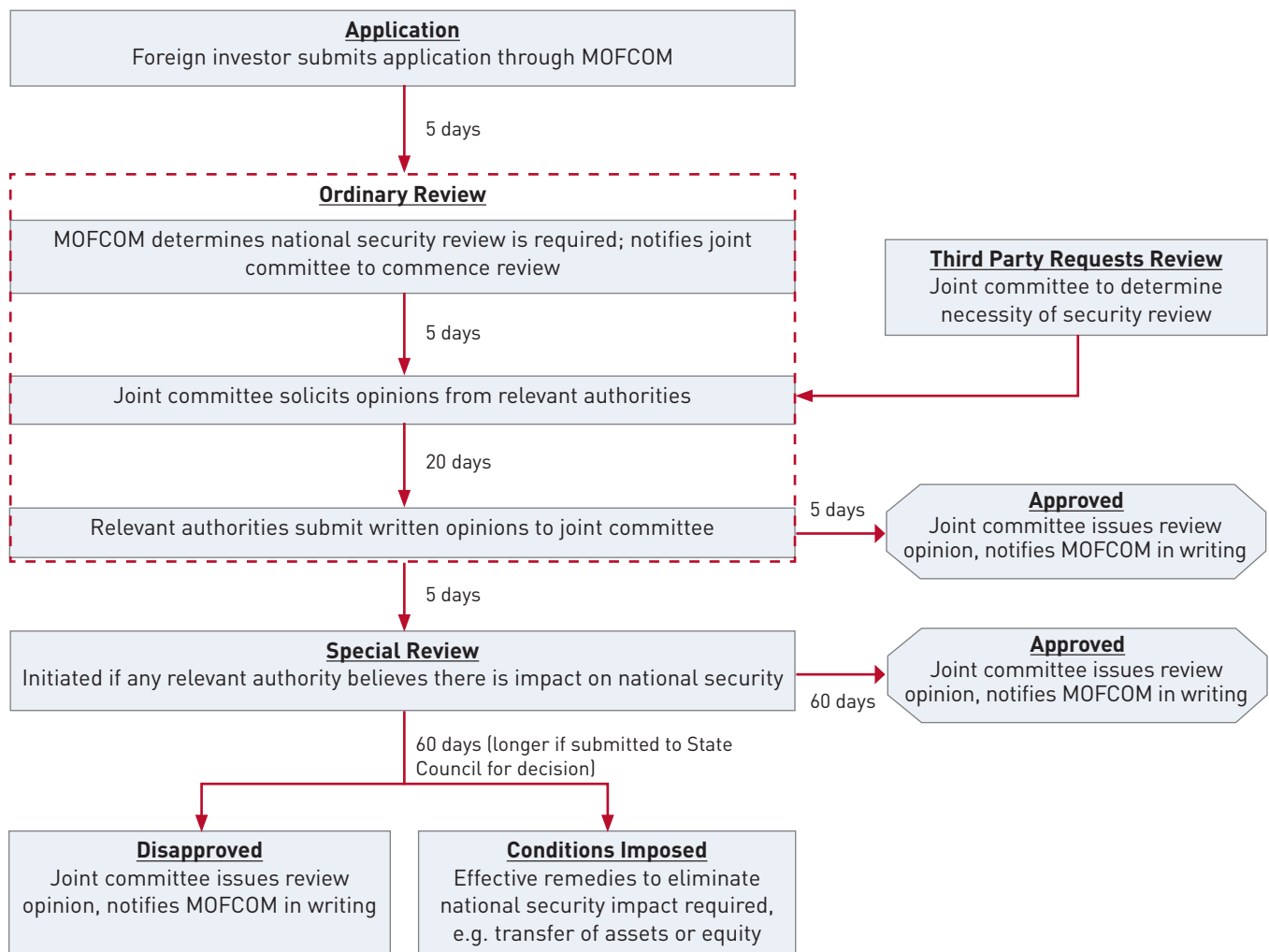
Filing Process

If a domestic acquisition falls under the scope of national security review, the foreign investor should make an application through central MOFCOM. MOFCOM will submit cases that fall under the scope of security review to a joint committee led by MOFCOM and the National Development and Reform Commission (“**NDRC**”).

Relevant government departments, national trade associations, competitors and upstream or downstream enterprises can also apply to the joint committee through MOFCOM to request a national security review, and the joint committee will determine whether a review is necessary.

The review process could take the form of an ordinary review process (which could take at least 35 working days) or a special review process (which could take at least 95 working days). If an acquisition has or may have major impact on national security, the joint committee may request MOFCOM to eliminate such impact by terminating a transaction or employing other measures, including a transfer of equity or assets. During the review process, the foreign investor could also apply through MOFCOM to amend the proposed acquisition plan or withdraw from the transaction.

The diagram below summarizes the review process:



Note: Actual time for review process may be longer than indicated in this diagram

Issues for Further Consideration

Coordination with AML review

The AML also allows MOFCOM's Anti-Monopoly Bureau to consider economic development as part of its review, and raises the question of whether there may be overlapping scrutiny under the national security regime and the antitrust review under the AML. It remains to be seen how the different governmental authorities will coordinate their reviews, and apply the national security and competition standards.

Other issues awaiting further clarification

Currently, Circular 6 requires applications to be submitted through central MOFCOM. However, it is expected that local MOFCOM officials would also play a key role in monitoring the compliance of the national security review requirement for acquisitions that are locally approved. Hopefully, local MOFCOM officials will be given clearer guidelines in due course.

Circular 6 is silent on whether greenfield Sino-foreign joint ventures will be caught. It is not inconceivable for MOFCOM officials to broadly interpret "purchase of assets" to include capital contribution in the form of assets made by a Chinese asset seller, but we await more specific guidance as the new regime is implemented.

Some aspects of the security review remain to be further elaborated. Certain terms, such as "domestic enterprises", as well as the different factors for assessment of impact on national security, are not clearly defined. The specific industries under the scope of review and details on the ordinary review and the

special review also need further elaboration. Circular 6 also does not spell out thresholds, if any, in terms of value of assets to be acquired, market share, the transaction price or other criteria. This means a small-size deal in any of the relevant sensitive sectors could be subject to scrutiny of central MOFCOM. Furthermore, Circular 6 has not stated whether there are pre-review consultations available to the foreign investor.

It is also unclear whether the security review can apply retroactively to transactions signed before the effective date of Circular 6, although we anticipate that transactions that have not been approved by the relevant government authorities could be subject to review.

Concluding Remarks

Circular 6 should be welcomed for shedding light on the Chinese national security review regime and how filings and reviews will be conducted. Going forward, dealmakers doing M&A transactions in the affected sectors need to be attentive to this new regime, and anticipate possible concerns arising from national security and socio-economic impacts. Thorough analysis and legal advice should help prepare parties to secure approval under this national security system, as well as foreign investment, antitrust, state-owned asset administration and other regulatory requirements that may be triggered.

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OFFSHORE DEPOSIT OF FOREIGN EXCHANGE INCOME FROM EXPORT TRADE

Introduction

With an aim of expanding offshore funding sources of domestic entities and encouraging outbound investment by domestic entities, the State Administration of Foreign Exchange (“SAFE”) published the *Provisional Measures regarding Administration of Offshore Deposit of Incomes of Export Trade of Goods* (《货物贸易出口收入存放境外管理暂行办法》) (the “**Provisional Measures**”) in August 2010, which were implemented as a pilot scheme in four cities and provinces from October 1, 2010.

On December 31, 2010, SAFE further published the *Circular on Issues regarding Administration of Depositing Incomes under Export Trade of Goods Offshore* (《国家外汇管理局关于实施货物贸易出口收入存放境外管理有关问题的通知》) (the “**Circular**”). According to the Circular, effective from January 1, 2011, the Provisional Measures are implemented on a nationwide basis, and any eligible domestic entity may apply to SAFE to deposit into offshore accounts their foreign exchange income derived from export trades of goods. For the purpose of this article, domestic entity includes both Chinese-funded entities and foreign-funded entities. In light of the above regulatory developments, we provide in this article a brief introduction to the Provisional Measures.

What are the Resources that may be Deposited Offshore?

A domestic entity may deposit the following kinds of income in offshore accounts:

- a. export trade income, including advance payments;
- b. interest accrued on export trade income;
- c. income related to trade financing;
- d. export insurance proceeds; and
- e. subject to SAFE approval, income derived from offshore contracting projects, transportation, etc.

What are the Permissible Uses of Foreign Exchange Deposited Offshore?

The foreign exchange deposited offshore may be used by a domestic entity for the following purposes:

- a. payments for import trades, including advance payments;
- b. offshore expenses, such as offshore contracting projects, commission, transportation and insurance expenses;
- c. capital account items, including making outbound investment, extending loans to foreign parties and repaying foreign debt borrowed by the domestic entity; and

- d. repatriation foreign exchange in offshore accounts to onshore current items foreign exchange account.

Note that, item (c) (capital account items) above is also subject to the following requirements.

(i) Outbound investment

A domestic entity may apply for approval from the Ministry of Commerce (“**MoC**”) of China to engage in outbound investment activities, such as establishing an offshore entity or acquiring equity interest in an offshore entity. Before the Provisional Measures were implemented, a domestic entity was only permitted to remit foreign exchange outside of China for outbound investment if it had first completed its registration with SAFE. Now, however, when approved by the MoC, a domestic entity may use its foreign exchange in offshore deposits for outbound investment before it completes its registration with SAFE. The domestic entity still must complete the registration with SAFE, but it has twenty working days from the time of making the payment to do so.

For expenses incurred during the preparatory stage of outbound investment, such as bidding fees and office rentals, a domestic entity must still obtain a quota from and complete its registration with SAFE before the domestic entity may use the foreign exchange in its offshore account to make the relevant

payments. The amount of the payments made must stay within the SAFE approved quota.

(ii) Extension of loans

After obtaining a quota verified by SAFE and completing SAFE registration, a domestic entity may use foreign exchange deposited in its offshore account to provide financing to its offshore subsidiary or an offshore entity in which it owns a stake, within the SAFE approved quota.

(iii) Repayment of foreign debt

Subject to prior SAFE verification, a domestic entity may use the foreign exchange deposited in its offshore account to repay principal *and/or* interest under any loan borrowed from a foreign party.

How to Open Overseas Account(s) to Deposit Foreign Exchange Income from Export Trade?

In order to open an overseas account to deposit foreign exchange income from export trade, a domestic entity must have its qualifications verified by a local SAFE and register the account with that local SAFE. To pass the qualification stage, the domestic entity must comply with various requirements under the Provisional Measures, including, among others, no violation of any foreign exchange control regulations in the previous two consecutive years before application.

A Chinese group company may authorize one member company to handle the account opening process at SAFE. Once the offshore account is opened, all member companies in the group may deposit export trade income into the account. Please note that each member company that plans to deposit foreign exchange income

into the first account opened must pass qualification verification with the local SAFE where its place of business operation is located.

A domestic entity (including a group company) is generally allowed to open no more than five offshore accounts and must complete SAFE registration before opening each new account. However, once the initial account is opened, the account opening registration process is relatively easier for the subsequent accounts. Foreign exchange may be transferred between different offshore accounts opened in the name of the same domestic entity. But the domestic entity may not remit foreign exchange from its onshore foreign exchange accounts to its offshore accounts unless SAFE grants a special approval for the transaction.

How does SAFE Control Foreign Exchange Deposited Offshore?

SAFE controls foreign exchange deposited offshore by the following measures.

- a. The total amount of the offshore deposit must be registered with SAFE. Any increase in that amount must be verified by SAFE.
- b. SAFE ensures enforcement of this requirement by having the offshore account bank execute an agreement to report the account information (账户收支信息报送协议). A copy of this agreement is one of the required application documents for registering the offshore account with SAFE. One mandatory clause in the agreement states that the offshore account bank agrees to provide account statements to SAFE within ten working days after the end of each month by courier.

- c. The offshore account bank is required to be an affiliate of an onshore bank (including Chinese- and foreign-funded banks), by means of which, SAFE can “control” the offshore account bank by leveraging its authority over the onshore affiliate.
- d. The domestic entity must report the payments and receipts from its offshore accounts to SAFE at least on a monthly basis in the form prescribed by SAFE.
- e. The domestic entity must retain for five years all transaction documents and other evidence related to the foreign exchange deposited offshore so that SAFE may inspect them.

Conclusion

Although the PRC government hopes its implementation of the Provisional Measures will help to alleviate the pressure that it is facing from its high foreign exchange reserve rate, the recent trend of RMB appreciation may prevent this hope from being realized. It is true that the Provisional Measures will encourage outbound investment with their simplified SAFE procedures, but the domestic entities, while they have the right to do so, may look to convert the foreign currency income into RMB in order to take advantage of the expected appreciation of the RMB against most foreign currencies.

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SHANGHAI ISSUES RULES ON FOREIGN INVESTED ONSHORE FUNDS

On December 24, 2010, the Shanghai Financial Services Office (“**SFSO**”), the Shanghai Commission of Commerce (“**SCOC**”) and the Shanghai Administration of Industry and Commerce (“**SAIC**”) jointly issued the *Implementing Measures on the Pilot Programme for Foreign-invested Equity Investment Enterprises* (the “**Pilot Rules**”).

A joint effort by various Shanghai key governmental departments, the Pilot Rules, which will come into force on January 24, 2011, represent a regulatory breakthrough for foreign investors looking to raise or invest in onshore RMB denominated PE funds.

Highlights of the Shanghai Pilot Rules

The Pilot Rules is a major step forward for Shanghai’s RMB fund industry. With the Pilot Rules coming into effect shortly, Shanghai will be the first Chinese city to introduce rules which seek to address some of the major roadblocks to foreign investors’ investment into China’s PE funds.

Highlights of the Pilot Rules include:

1. the introduction of a clear regulatory framework in respect of the requirements and procedures for the formation of:

- i) Shanghai domiciled foreign-invested general partners or fund management vehicles, known as “foreign-invested equity investment management enterprises”, both in company and partnership forms (“**Foreign-invested GP**”); and
 - ii) Shanghai domiciled foreign-invested fund vehicles, known as “foreign invested equity investment enterprises”, in the form of a partnership (“**Foreign-invested Fund**”); and
2. the introduction of a pilot programme which grants “pilot” status (i.e. qualified status) to:
 - i) a Foreign-invested GP (“**Pilot GP**”), which would allow the Pilot GP to use foreign currency to make capital contributions to an RMB fund established by it (up to 5% of the fund size);
 - ii) a Foreign-invested Fund (“**Pilot Fund**”), which would allow the Pilot Fund to use the foreign currency capital contributed by its partners to make private equity investments in China; and
 - iii) foreign institutional investors that meet certain qualifying criteria

(“**Qualifying Partners**”), which would allow them to invest in Pilot Funds as LPs.

The implementation of the Pilot Rules is supervised by a joint committee (“**Joint Committee**”) consisting of 14 Shanghai governmental departments, led by the SFSO.

Criteria/Procedures to Set Up a Foreign-invested Fund

Under the Pilot Rules, a Foreign-invested Fund may be established in the form of a partnership, and may (i) use its capital for making private equity investments, (ii) provide management consulting services to its portfolio companies and (iii) engage in other related businesses permitted by the registration authority.

Key requirements for establishment

- minimum fund size: US\$15 million
- minimum capital commitment per LP: US\$1 million
- partnership form
- name to contain the words “equity investment fund”
- appointment of a qualified Chinese bank as custodian

Investment restrictions

A Foreign-invested Fund is generally required to comply with China's foreign investment laws, and is specifically prohibited under the Pilot Rules from:

- investing in industries where foreign investment is prohibited;
- trading in securities or bonds on secondary markets (except for securities held following the listing of its portfolio companies);
- trading in futures or other derivative products;
- investing in real estate (except for self-use);
- making an investment by diverting capital that it does not own; and
- providing loans or security to a third party.

Registration and approval

A Foreign-invested Fund is established upon registration. The registration authority is the SAIC, which will first consult with the SFSO before approving any registration.

Criteria/Procedures to Set Up a Foreign-invested GP

A Foreign-invested GP may be established in the form of either a company or a partnership. Under the Pilot Rules, Foreign-invested GPs are permitted to (i) sponsor the establishment of RMB funds, (ii) provide investment management, investment consulting and related services to RMB funds and (iii) engage in other related businesses permitted by the registration authority.

Key requirements for establishment

- minimum registered capital: US\$2 million
- name to contain the words "equity investment fund management"
- one investor (i.e. shareholder or partner) who is, or whose affiliate is, engaged in PE investment or PE investment management business
- two senior management personnel who meet the following requirements:
 - at least 5 years' experience in PE investment or PE investment management business;
 - at least 2 years' experience in senior management position;
 - work experience in China-related PE investment or in Chinese financial institution; and
 - not the subject of any legal or regulatory action or other proceedings or pending civil proceedings in the past 5 years.

Registration and approval

A Foreign-invested GP is established upon registration. If established as a company, it will first need to be approved by the SCOC before registration with the SAIC. If established as a partnership, the Foreign-invested GP will only need to be registered with the SAIC. Both the SCOC and the SAIC will first consult with the SFSO before granting the approval or completing the registration.

The Pilot Programme

The Pilot Rules allow Shanghai registered Foreign-invested GPs and Foreign-invested Funds to apply for a "pilot" status (i.e. a qualified status) and to participate in the pilot programme.

Under the Pilot Rules, applications for pilot status are required to be submitted to the SFSO, which will, following its receipt of the application, convene a meeting with the Joint Committee to assess the application. The application for pilot status is required to be made by the GP of the RMB fund, which must have at least 3 years of good track record investing in onshore enterprises in China or have an affiliate who possesses such track record.

Qualified partners

In the months leading up to the publication of the Pilot Rules, there were a number of news reports and an air of keen anticipation among market participants regarding the likely introduction of a Qualified Foreign Limited Partner ("QFLP") pilot programme to be rolled out in Shanghai.

There is, however, no mention in the Pilot Rules of any QFLP quota nor any reference to the QFLP concept. The Pilot Rules only provide that certain categories of foreign institutional investors that meet certain qualifying criteria (i.e. Qualifying Partners) will be allowed to participate in the pilot programme that would allow them to invest in Pilot Funds.

The Joint Committee is empowered under the Pilot Rules to determine whether a foreign investor meets the qualifying criteria to be a Qualifying Partner. These are expected to include sovereign

wealth funds, pension funds, endowment funds, charitable funds, funds of funds, insurance companies, banks, securities companies and other institutional investors approved by the Joint Committee.

Under the Pilot Rules, foreign investors wishing to apply for a Qualifying Partner status are required to meet the following requirements:

- in the fiscal year preceding its application, it must own assets of at least US\$500 million or have assets under management of at least US\$1 billion;
- have good corporate governance and internal control systems, and is not subject to any judicial or regulatory penalties in the preceding 2 years;
- it or its affiliate has more than 5 years' relevant investment experience; and
- any other conditions imposed by the Joint Committee.

Pilot status

Pilot GPs and Pilot Funds are entitled to certain benefits under the Pilot Rules.

A Pilot GP is allowed to use foreign currency to make capital contributions to an RMB fund established by it (up to 5% of the fund size), and any such contribution will not affect the original "nature" of the RMB fund. Whilst there is no further elaboration on this term, a possible interpretation is that the fund (assuming it has no other foreign investors) will still be treated as a domestic investor (and hence not subject to the foreign investment restrictions).

Prior to the issue of the Pilot Rules, foreign sponsors faced difficulties contributing to and participating in the economic interest in their RMB funds in view of the restrictions imposed by SAFE Circular 142 which prohibits the conversion of foreign currency into RMB for equity investment purposes. Whilst the Pilot Rules do not appear to have removed or provided for any waiver from the currency conversion restrictions imposed by SAFE Circular 142, the Pilot Rules seem to have addressed this issue although in a different manner. The Pilot Rules clarify that a Pilot Fund will be able to use the foreign currency capital contributed by its foreign LPs to make private equity investments. Prior to the Pilot Rules, there was no regulation which addressed how a Foreign-invested Fund could deploy its foreign currency capital for private equity investments.

There are recent news reports suggesting that the Pilot Rules go a step further in that they allow a Pilot Fund to convert the foreign currency capital contributed by its foreign LPs into RMB at the fund level, and to use the converted RMB for investment in portfolio companies. Such details are not mentioned in the Pilot Rules, and remain to be clarified.

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CHINA PUBLISHES ANTI-MONOPOLY REGULATIONS PACKAGE

China's competition authorities have published regulations, providing important guidance on how a wide range of practices will be viewed under the China Anti-Monopoly Law ("AML").

The most significant changes are:

- A tightening of the rules which prohibit price-fixing by competitors, with a particular focus on trade association activities;
- Guidance on what constitutes a "concerted practice" with
- Greater clarity on when competitors may infringe the AML by agreeing to restrict the use of new technology or by curtailing R&D activity; and
- More details on conduct which can amount to an abuse of dominance, including the setting

real implications for markets characterised by parallel pricing;

of unfairly high selling prices or unfairly low purchase prices; loyalty rebates; and refusing to give access to an "essential facility".

What This Means For You?

Prevention is better than cure, and multinational corporations operating in China should tighten their compliance programmes in light of the new regulations. Lax compliance could open the door for antitrust complaints to the Chinese enforcement agencies which will inevitably involve

China's Latest Package of Regulations on the Anti-Monopoly Law

The National Development and Reform Commission ("NDRC"), in charge of enforcing pricing-related infringements of the AML, issued the following regulations that will become effective on February 1, 2011:

1. *Anti-Pricing Monopoly Regulations* ("**NDRC Pricing Regulations**"), substantive regulations detailing various forms of illegal price-fixing among competitors, and in vertical relationships with distributors and others, and pricing-related abuses of dominance; and
2. *Procedural Regulations for Administrative Enforcement of Anti-Pricing Monopoly* ("**NDRC Procedures**"), procedural rules including leniency treatment for cartel members volunteering information to NDRC.

The State Administration of Industry and Commerce ("**SAIC**"), in charge of enforcing "non-pricing" related infringements of the AML, issued the following regulations that will become effective on February 1, 2011:

3. *Regulations Prohibiting Monopoly Agreements* ("**SAIC Monopoly Regulations**"), substantive regulations detailing various forms of illegal non-pricing related agreements among competitors, including restrictions on new product development and R&D;
4. *Regulations to Prohibit Abuses of Dominant Market Position* ("**SAIC Dominance Regulations**"), substantive regulations detailing various forms of non-pricing related abuses of dominance; and
5. *Regulations to Prevent Abuses of Administrative Abuses that Eliminate or Restrict Competition* ("**SAIC Administrative Regulations**"), substantive regulations safeguarding against trade and investment barriers through imposition of illegitimate licensing schemes, applying differential standards or review criteria against companies outside the province, or through other devices.

disruption and the diversion of management time. Even if no antitrust violation is ultimately uncovered, the complaint might trigger an investigation into other types of behaviour. For example, a complaint about anti-competitive loyalty rebate schemes might uncover potential bribery or tax non-compliance once the officials have thoroughly examined the company accounts. Companies also need to be aware that they could be vulnerable if they are perceived to be dominant in their market. Companies with strong market positions are therefore advised to undertake an assessment to determine whether they might be regarded as dominant, and to re-calibrate the risks in light of the new regulations.

Dealings with competitors

Concerted practices and implications for parallel pricing

Pricing Regulations issued by the National Development and Reform Commission (“**NDRC**”) now clarify that illegal agreements among competitors include not only the fixing of prices directly, but also fixing formulae for determining prices; the level of discount; handling fees and other factors that affect the overall pricing.

The Pricing Regulations also explain that the NDRC will explore whether companies have engaged in a “concerted practice” by examining whether competitors’ pricing actions are consistent, and whether they have communicated with each other. Although the Regulations indicate that the NDRC will examine other factors including market structure and developments for the purpose of evaluating whether there is

concerted practice, the language is broad, and situations involving parallel price increases may well come under scrutiny. Companies in concentrated markets where parallel market conduct is not uncommon will need to approach their pricing decisions with extra caution. This is a complex area which tends to result in controversial cases. Competition authorities in other jurisdictions have often struggled to distinguish between parallel pricing reflecting market structure/conditions and parallel pricing resulting from illegal competitor contacts.

There is also renewed emphasis in Article 9 of the NDRC Pricing Regulations aimed at regulating the activities of trade and industry associations to prevent them from becoming a platform to facilitate cartels among their association members. A number of previous NDRC cartel investigations have targeted illicit trade associations meetings. In the same week NDRC issued the Pricing Regulations, it also sanctioned a local Chinese paper product manufacturer trade association for coordinating price-fixing and production quota among paper suppliers. Multinational companies should therefore tighten their compliance programmes in China to ensure that their executives participate in Chinese trade associations in a prudent manner - to avoid being implicated in the event of improper discussions at trade association meetings.

Leniency

The NDRC has now introduced a leniency regime - which sets out percentage reductions in penalties for cartel members coming forward to self report. The first-to-confess may be

entitled to receive 100% immunity, the second to do so, possibly more than a 50% reduction, with subsequent companies potentially receiving a reduction of up to 50% (though precise percentages not specified)¹.

“Important” evidence will be required to qualify for leniency, but, critically, the regulations do not guarantee that a cartel member coming forward will receive immunity automatically (on fulfilling certain objective criteria). Careful planning and coordination on-the-ground with NDRC officials will therefore be critical for ensuring a successful leniency plea.

Abuse of dominance

Unfairly high or low pricing

The AML prohibits a dominant company from setting unfairly high or low prices. The NDRC Pricing Regulations now offer guidance on the factors that will be taken into consideration in the assessment of whether an abuse has occurred. The NDRC will effectively compare the cost and price of comparable products/services with reference to the following criteria:

- whether the selling (or purchase) price is manifestly higher (or lower) than that of other suppliers (or buyers) of “similar goods”;
- in times when costs are stable, whether the price adjustment exceeds the “normal range”; and
- whether the price adjustment manifestly exceeds the extent of a change in cost.

The NDRC’s approach - effectively looking for a cost/price benchmark by examining similar products

¹ This contrasts with procedural rules issued by SAIC which do not provide for any specific percentage reduction in fines for self-reporting, meaning that leniency (in respect of non-price infringements) would only be available on an ad-hoc basis.

- is not straightforward. Even assuming a similar product exists, it may be sold in very different market conditions (to different customers etc). The issue is particularly challenging in respect of hi-tech, pharmaceutical and IT products where apparently “premium” prices simply reflect the manufacturer’s need to recoup significant sunk costs (e.g. from major R&D expenditure). It is difficult to compare their prices with those of competitors which have not invested to a similar degree. Complying with this provision will present challenges for businesses seeking to make significant price changes, in particular, what measure will be used to determine “cost”? In certain sectors, the stated “cost” can vary widely depending on the calculation method used.

Predatory pricing

The NDRC Pricing Regulations prohibit below-cost selling by dominant firms except where there are “legitimate reasons” to do so. A non-exhaustive list of legitimate reasons permits below-cost selling for new product launches, the sale of perishables, distressed sales, etc.

However, “cost” is not defined, and companies need to be mindful when making pricing decisions that they do not trigger complaints from competitors. Future guidance from NDRC would be extremely useful to enable a better understanding of how to measure “cost”, e.g. whether it is average variable cost, average total cost or some other measure.

Constructive refusal to deal

The NDRC Pricing Regulations prohibit a dominant company from dealing with actual or potential transaction counterparties by setting an “excessively high”

or “excessively low” price. “Excessive” price is not defined, and, confusingly, is distinct from the term “unfairly” high or low price (see commentary above).

Dominant companies will need to exercise caution when pricing their technology or trademark license fees, and when approached by interested licensees - to avoid accusations of constructive refusal to deal.

Loyalty rebates

The Pricing Regulations prohibit a dominant firm from offering discounts to customers as a means of inducing those customers to deal only with the dominant firm, or third parties designated by the dominant firm, unless justified by legitimate reasons which, according to the Pricing Regulations, include ensuring quality or safety of the products, protecting image of the products, or for purpose of raising level of services.

Rebates from suppliers to distributors are quite prevalent practice in China, so firms with a dominant market position will need to exercise caution.

SAIC Regulations

Dealings with competitors

SAIC (in charge of enforcing against illegal agreements between competitors that do not have a “pricing” element) has adopted SAIC Monopoly Regulations which provide further guidance on what forms of horizontal agreements between competitors will be illegal:

- restricting production volumes by suspending production or other means, or by restricting sales volumes by refusing to supply;

- market sharing by dividing customers or types or volume of goods to be sold; and
- a collective boycott in selling to, procuring from or dealing with a third party.

The AML prohibits agreements between competitors to restrict the purchase of new technology or new equipment, or to restrict the development of new technology or new products. The new SAIC Monopoly Regulations now enumerate additional instances of such horizontal restraints affecting new technology:

- restricting the usage of new technology or process;
- restricting the use or rental of new equipment;
- restricting the investment in or the R&D of new technology, process or product;
- refusing to use new technology, process or equipment; and
- refusing to adopt new technical standards.

If companies and their licensees sell the same products, and thus are competitors, they need to be careful that contractual restrictions in license agreements are not anti-competitive under these provisions.

Supply chain - no blanket prohibition of geographic allocation but...

In the first version of the SAIC Monopoly Regulations circulated in 2009, SAIC contemplated a strict prohibition against geographic territorial allocation, raising widespread concern among domestic and foreign companies operating in China.

The removal of a blanket prohibition of geographic allocation in the final version is a welcome

relief, otherwise many existing distribution models, where appointing exclusive distributors to certain cities/provinces/regions in China are fairly common practice, would have to be overhauled. Instead of a blanket prohibition against geographic territories in distribution agreements, the SAIC has reinforced Section 5 of the AML, which deals with administrative abuses by governmental bodies, to safeguard against trade barriers across provinces/regions in China, and there are new provisions in the SAIC Administrative Regulations to regulate trade and investment barriers through imposition of illegitimate licensing schemes, applying differential standards or review criteria against companies outside the province, or through other devices.

Companies still need to be vigilant about geographic territorial allocations if they are considered dominant in their markets, and this is further discussed in the next section below.

Abuse of a dominant market position

“Attaching unreasonable conditions to a transaction”

The SAIC Dominance Regulations outlawing the attachment of unreasonable conditions to a transaction could potentially apply to firms that are dominant if the clauses in their distribution agreements impose geographic or customer restrictions. Therefore it cannot be excluded that a clause for example requiring a distributor to sell only to designated accounts or to certain cities or provinces in China could be challengeable.

The SAIC Dominance Regulations also extend the definition of

abuses to include the attaching of unreasonable conditions relating to:

- duration of a contract;
- method of payment;
- method of transportation and delivery of goods; and
- method of providing services.

Refusal to supply

The SAIC Dominance Regulations enumerate the following forms of refusal to supply that could give rise to an abuse of dominance:

- reducing the trading volume with a counterparty;
- delaying or discontinuing existing transactions with a counterparty;
- refusing to enter into a new transaction with a counterparty;
- prescribing restrictive conditions that make it difficult for the counterparty to continue the transaction; and
- refusing to let a counterparty use essential facilities [*emphasis added*] for business operation under reasonable conditions.

A difficult issue to contend with under the SAIC Dominance Regulations is abusive conduct in the form of denying access to “essential facilities”. While the term clearly includes physical infrastructure, and subjects the operators of ports, railways, etc to a higher standard, it is also possible that intangible properties could come within the scope of the provision - for example, Internet marketplace platforms like Taobao or Alibaba, or search engines like Baidu. The question is how wide the interpretation of “essential facilities” could stretch, and whether it would extend

to “technology or know-how”, obliging intellectual property owners to grant licenses under reasonable conditions? This will be an area to watch as more guidance comes from SAIC when the regulations are implemented going forward.

Tying and bundling

While abuse in the form of tying or bundling is already identified under the AML, the SAIC Dominance Regulations further elaborate by specifying that coercive [*emphasis added*] tying or bundling of different types of goods, contrary to trade customs, consumption habits or without regard to the functionality of the goods, constitute a form of abuse.

It is interesting to note that the provision refers to tying or bundling that is “coercive”. This raises the question of whether offering products in a piecemeal manner, and giving customers the choice of buying the bundled products at more attractive combined pricing or other terms (so-called “mixed bundling”) will be permissible.

Other forms of abuse of dominance

The SAIC Dominance Regulations also prohibit:

- exclusive dealings in the form of requiring a counterparty to transact exclusively with itself or with a designated third party, or restricting a counterparty from dealing with the dominant firm’s competitor.
- discriminatory treatment through applying dissimilar terms with respect to quantity, quality or type of goods, terms of discount, payment terms, terms or duration of guarantee, maintenance services, supply of

spare parts, technical guidance or other forms of after-sales services.

General exceptions for usual business practices, efficiencies, etc

The SAIC Dominance Regulations do however take a practical approach, noting that an alleged abuse may be justified in light of usual business practice, economic efficiency, social benefits and economic development. It remains to be seen how SAIC will apply these exceptions, and what standard of proof is expected.

Conclusion

With China's key antitrust enforcement agencies adopting rules on the AML's key behavioural prohibitions, it is likely that China is about to embark on a new phase of antitrust enforcement. With the recent delegation of authority to municipal-level NDRC branches, major resources are expected to be beefed up for price-related anti-monopoly enforcement activities.

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ARTICLES

HOW THE NETHERLANDS BILATERAL INVESTMENT TREATY WITH CHINA OFFERS PROTECTION OF YOUR CHINESE INVESTMENTS

Introduction

When investing abroad, one should not only take tax considerations into account, but also the protections offered by Bilateral Investment Treaties (“BITs”). These protections are often overlooked when structures for foreign investments are created until the value of existing investments is threatened by hostile government action. However, as shown by the recent ExxonMobil case, one would be mistaken not to take the protection of BITs into account when structuring investments in countries with a political climate with a higher risk profile.

After the expropriation of ExxonMobil’s assets in Venezuela, ExxonMobil was able to freeze USD 12 billion of Venezuela’s state owned oil company’s assets after claiming the protection of the Netherlands – Venezuela Bilateral Investment Treaty (“BIT”).¹ The arbitration is still pending, but this clearly shows that BIT protection is worth taking into account when structuring future or existing foreign investments.

What is a Bilateral Investment Treaty?

A BIT is a treaty between two states establishing terms and conditions for the protection of investors of one state and

their investments in the other state. BITs may be seen as “free insurance” since BIT protection can often be achieved at minimal cost, for example by interposing a holding company in a jurisdiction that has a favorable BIT with the country in which the investment is made.

BITs generally include substantive guarantees regarding the treatment of investors, which should be fair, equitable, non-discriminatory and not less favorable than the treatment of domestic investors or investors from other states. Furthermore, BITs may provide protection from expropriation; a BIT is a commitment of a contracting state to observe any obligation it has assumed with regard to investments in its territory by investors of the other contracting state.

The investor directly benefits from these commitments as they establish direct rights of the investor vis-à-vis the host state, which can be enforced against the host state to reduce the impact of political or legal changes and risks.

As the Netherlands is both a favorable holding jurisdiction and has one of the few BITs with China that offers direct access to international arbitration,

we will discuss below how the Netherlands BIT with China may offer protection for investments in China.

The Netherlands Bilateral Investment Treaty with China

The US does not have a BIT with China. Therefore US investors could seek the protection of other BITs with China by structuring their investments through an intermediary holding company in another jurisdiction. In our view this jurisdiction should satisfy two conditions. First, the respective BIT should be investor friendly. Second, interposing the intermediary holding company should not create any additional tax exposure. Below we will explain that the Netherlands satisfies both requirements.

Direct access to international arbitration

The Netherlands has one of the few BITs with China that offers direct access to international arbitration as opposed to being obliged to exhaust proceedings with a Chinese court first. Under the Netherlands – Chinese BIT, the investor should first try to work out an amicable solution. If the dispute is not settled within six months, the investor has direct access to arbitration under the auspices of the International Centre for

¹ Venezuela has terminated the BIT with the Netherlands as per November 1, 2008. However, the BIT will remain into force for a period of 15 years with respect to investments that existed prior to the termination.

the Settlement of Investment Disputes (“**ICSID**”) or under the rules of the United Nations Commission on International Trade Law (“**UNCITRAL**”). The ICSID is an autonomous international organization based in Washington, D.C. with close links to the World Bank group and was founded in 1966 pursuant to the ICSID Convention.

What kind of protection is offered?

The Netherlands - Chinese BIT offers the following protections:

- *Fair and Equitable Treatment and the Obligation to Provide Full Protection and Security*

China has the obligation to treat Netherlands investments in a manner that is just, non-discriminatory and conducive to fostering the promotion of foreign investment.

- *No Arbitrary or Discriminatory Treatment*

Arbitrariness could be considered a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety. A measure could be considered discriminatory if the intent of the measure is to discriminate or if the measure has a discriminatory effect.

- *No Expropriation without Compensation*

China is not allowed to expropriate, nationalize or take similar measures against Netherlands investors unless the expropriation is (a) in the public interest; (b) not discriminatory; and (c) done for compensation. Such compensation must be equivalent to the fair market value of the investment.

Tribunals have found that an expropriation can arise from (i) a direct act resulting in a taking of property, or (ii) an indirect taking that deprives in significant part the investor of the use or benefit of its investment, even if ownership of the asset remains formally with the investor. The state action (or inaction) amounting to an expropriation can take any form. Expropriations notably can occur gradually through a series of measures eventually resulting in expropriation. The key is the extent to which the measures taken have deprived the owner of the normal control of his or her property.

- *National Treatment and Most-Favoured Nation Clause*

The Netherlands – Chinese BIT also requires China to treat Netherlands investors at least as favorably as national investors (“**National Treatment**”) and to treat Netherlands investors no less favorably than other foreign investors (“**Most Favored Nation Treatment**”).

- *Umbrella Clause*

Furthermore, the BIT includes a commitment by China to observe all commitments it has entered into with regard to investments in its territory by Netherlands investors (“**Umbrella Clause**”).

To whom is the protection of the Netherlands – Chinese BIT offered?

Another reason why the Netherlands – Chinese BIT is considered to be investor friendly is that it not only offers protection to Netherlands companies investing in China but also to legal entities in a third state that are owned

or controlled by a Netherlands investor. Consequently, under the Netherlands BIT, a Netherlands intermediate holding company interposed between the US parent company and the direct holding company affords protection.

Which investments are covered?

The Netherlands – Chinese BIT defines the term “investment” broadly, referring to “every kind of asset” and including an extensive, non-exhaustive list of examples such as:

- movable and immovable property;
- shares;
- claims to money;
- intellectual property rights, in particular copyrights, patents, trade-marks, trade-names, technological process, know-how and goodwill; and
- business concessions including concessions to search for, cultivate, extract or exploit natural resources.

Intellectual property

Because of the broad definition of investments, intellectual property rights would be subject to the general guarantees offered to investors under the Netherlands - Chinese BIT, including protection in case of expropriation, national treatment and most favored nation treatment. The BIT would provide a legal basis to investors for action against China if it fails to protect their intellectual property. If companies decide to transfer intellectual property to China to benefit from Chinese tax incentives, the Netherlands – Chinese BIT may provide additional protection when the investment is structured through a Netherlands holding company.

Tax Consequence of Interposing a Netherlands Holding Company

In general, interposing a Netherlands holding company will often be possible without creating additional Netherlands tax exposure because of (i) the participation exemption which provides for a full exemption from Netherlands corporate income tax on income realized through qualifying subsidiaries and (ii) an exemption from Netherlands dividend withholding tax on dividends paid to qualifying parent companies or dividends paid by a Netherlands Cooperative.

However, the China – Netherlands tax treaty only limits Chinese dividend withholding tax to a rate of 10%, whereas some other Chinese tax treaties limit the Chinese dividend withholding tax to 5%. From a tax perspective, it would therefore not be attractive to use a Netherlands holding company to own Chinese subsidiaries directly. However, when setting up a new structure, it should be possible to own the direct holding company through a Netherlands intermediate holding company in order to profit from the protection of the Netherlands – Chinese BIT without adverse tax consequences.

New structures

A US investor would ordinarily own its investment in a Chinese company through an offshore holding company, for example in Hong Kong, in order to benefit from the 5% withholding tax rate on dividends under the Hong Kong – Chinese tax agreement. If a Netherlands company is interposed between the US investor and the Hong Kong company when setting up a new structure, this should not cause an additional tax burden.

Hong Kong does not impose any withholding tax, regardless of whether the dividend is distributed to a US shareholder or a Netherlands shareholder. Provided certain conditions are satisfied, the Netherlands would exempt dividends and capital gains under the participation exemption. Furthermore, dividend distributions to the US could be exempt from Netherlands dividend withholding tax, either because the US investor satisfies the treaty requirements for the 0% rate or because the investment is structured through a Netherlands Cooperative.

Existing structures

For existing structures, selling the Netherlands holding company instead of the Chinese company directly may avoid the Chinese capital gains tax at a rate of 10%. The capital gains tax is imposed upon any direct transfer of shares in a Chinese company. However, if the Netherlands holding company is a shell company, sale of the Netherlands holding company may be re-characterized as a direct sale of the Chinese company for PRC tax purposes. It is very difficult for cross-border reorganizations to qualify for tax-free treatment under the Chinese reorganization rules.

Notice 698

Under Chinese Notice 698, the use of a Netherlands intermediary holding company has an advantage in addition to the BIT protection.

Pursuant to Notice 698, a foreign company is obliged to report an indirect transfer of an interest in a Chinese company to the Chinese tax authorities if the intermediary holding whose shares are transferred is subject to less than 12.5% tax or if that jurisdiction exempts foreign-sourced income

from tax. A transfer of shares in a Netherlands intermediary holding company would not have to be reported due to the 25% corporate income tax rate in the Netherlands, notwithstanding the Dutch participation exemption regime.

A foreign company that indirectly transfers an interest in a Chinese company by transferring the shares in a Netherlands intermediary holding company may still be considered to have realized a capital gain with respect to the interest in the Chinese company, unless certain requirements are satisfied, such the capital gain being subject to 10% income tax. However, if these requirements are satisfied, the advantage of the use of a Netherlands intermediate holding company would be that the transaction would not have to be reported to the Chinese tax authorities and potentially elaborate discussions would be avoided.

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LEGISLATION SUMMARIES

REPRESENTATIVE OFFICES

Regulations for Administration of the Registration of Resident Representative Offices of Foreign Enterprises

The Regulations for Administration of the Registration of Resident Representative Offices of Foreign Enterprises, 外国企业常驻代表机构登记管理条例, were adopted at the 132nd Ordinary Meeting of the State Council on November 10, 2010, and published by the State Council with Order No. 584 on November 19, 2010, with effect from March 1, 2011.

CHAPTER 1. GENERAL PROVISIONS

Article 1. These Regulations have been formulated in order to regulate the establishment and business activities of resident representative offices of foreign enterprises.

Article 2. For the purposes of these Regulations, the term “resident representative office of a foreign enterprise” (“**Representative Office**”) means an office that is established in China in accordance with these Regulations by a foreign enterprise and that engages in not-for-profit activities in connection with the business of the foreign enterprise. Representative Offices do not have legal personality.

Article 3. Representative Offices shall abide by the laws of China and may not harm China’s national security or public interest.

Article 4. The establishment and closing of, and changes in,

Representative Offices shall be registered in accordance with these Regulations.

Foreign enterprises that apply for the registration of a Representative Office are liable for the authenticity of their application documents and materials.

Article 5. The State Administration for Industry and Commerce and the local Administrations for Industry and Commerce authorized thereby are the agencies in charge of the registration and administration of Representative Offices (“**Registries**”).

Registries shall establish information sharing mechanisms with other relevant authorities, for purposes of mutual provision of information concerning Representative Offices.

Article 6. Representative Offices shall submit annual reports to their Registries between March 1 and June 30 each year. The content of an annual report shall include information on the lawful existence of the foreign enterprise, the business activities of the Representative Office, charges collected and paid (audited by an accounting firm) and other such relevant information.

Article 7. Representative Offices shall keep account books according to law. The account books shall truthfully record the funds

allocated by the foreign enterprise and the charges collected and paid by the Representative Office. The account books shall be kept at the place of residence of the Representative Office.

Representative Offices may not use the accounts of other enterprises, organizations or individuals.

Article 8. The chief representative and representatives appointed by the foreign enterprise and the Representative Office’s working staff shall abide by the provisions of laws and administrative regulations concerning entry and exit, residence, employment, tax payment, foreign exchange registration, etc. Those who violate such provisions shall be dealt with by the relevant authorities in accordance with the relevant provisions of laws and administrative regulations.

CHAPTER 2. REGISTERED PARTICULARS

Article 9. The registered particulars of Representative Offices include the name of the Representative Office, the name of the chief representative, the scope of business, the place of residence, the term of residence and the name and domicile of the foreign enterprise.

Article 10. The name of a Representative Office shall be composed of the following

elements in the following sequence: nationality of the foreign enterprise, Chinese name of the foreign enterprise, name of the city of residence and the words "Representative Office". The name of a Representative Office may not include content or text that is:

1. detrimental to China's national security or public interest;
2. the name of an international organization; or
3. prohibited by laws, administrative regulations or the State Council.

Representative Offices shall engage in their business activities using the name registered with the Registry.

Article 11. The foreign enterprise shall appoint a chief representative. The chief representative may sign the application documents for registration of the Representative Office on behalf of the foreign enterprise, to the extent of his written authorization by the foreign enterprise.

The foreign enterprise may appoint one to three representatives, based on business requirements.

Article 12. None of the following persons may serve as chief representative or representative:

1. persons who have been sentenced to criminal punishment for harming China's national security or public interest;
2. persons who served as chief representative or representative of a Representative Office that had its registration of establishment canceled or its registration certificate revoked

in accordance with the law, or that was ordered closed by a relevant authority in accordance with the law, by reason of its engagement in illegal activities such as those that harm China's national security or public interest, where less than five years have passed since the date of cancellation or revocation or the date of the closure order;

3. other persons as specified by the State Administration for Industry and Commerce.

Article 13. Representative Offices may not engage in for-profit activities.

If an international treaty or agreement concluded or acceded to by China provides otherwise, such treaty shall prevail, except for those of its terms in respect of which China has expressed its reservations.

Article 14. A Representative Office may engage in the following activities in connection with the business of the foreign enterprise:

1. market research, exhibition and publicity activities in connection with the products or services of the foreign enterprise;
2. liaison activities in connection with the sale of products, provision of services, procurement in China or investment in China by the foreign enterprise.

Where laws, administrative regulations or State Council regulations provide that a Representative Office's engagement in any of the business activities mentioned in the preceding paragraph is subject to approval, approval shall be obtained therefor.

Article 15. A foreign enterprise shall select the place of residence of its Representative Offices on its own.

Relevant authorities may require a Representative Office to adjust its place of residence for reasons of national security or the public interest, in which case the Registry shall be given timely notice thereof.

Article 16. The term of residence of a Representative Office may not exceed the term of existence of the relevant foreign enterprise.

Article 17. The Registry shall record the registered particulars of Representative Offices in its register of Representative Offices, and make the same available to the public for consultation and copying.

Article 18. The registration certificate of a resident representative office of a foreign enterprise ("**Registration Certificate**") issued by the Registry shall be prominently displayed at the place of residence of the Representative Office.

Article 19. No unit or individual may forge, alter, lease out, lend or transfer a Registration Certificate or the representative certificate of a chief representative or a representative ("**Representative Certificate**").

If a Registration Certificate or Representative Certificate is lost or damaged, the Representative Office shall declare it void in the designated media and apply for a replacement.

If the Registry decides according to law to permit a change of registration or deregistration or to revoke a change of registration or a Registration Certificate, the original Registration Certificate

of the Representative Office and the Representative Certificates of its chief representative and other representatives will automatically become void.

Article 20. The establishment of, or a change in, a Representative Office shall be publicly announced by the foreign enterprise in the media designated by the Registry.

The deregistration of a Representative Office or the lawful revocation of its registration of establishment or its Registration Certificate shall be announced by the Registry.

Article 21. When investigating and handling a Representative Office's conduct that is suspected of being in violation of these Regulations, the Registry may exercise the following functions and powers according to law:

1. investigating, and finding out information from, relevant entities and individuals;
2. consulting, copying, placing under seal or impounding contracts, documents evidencing the payment of money or delivery of goods, account books and other materials relating to the illegal conduct;
3. placing under seal or impounding the property such as tools, equipment, raw materials, products (merchandise), etc. used exclusively in the illegal conduct;
4. making inquiries about the bank accounts of the Representative Office engaged in illegal conduct and about the accounting vouchers, account books, statements of account, etc. relating to its deposits.

CHAPTER 3. REGISTRATION OF ESTABLISHMENT

Article 22. The establishment of a Representative Office shall require submission to the Registry of an application for registration of establishment.

Article 23. A foreign enterprise applying for establishment of a Representative Office shall submit the following documents and materials to the Registry:

1. application for registration of the establishment of a Representative Office;
2. proof of the foreign enterprise's domicile and of its having been lawfully carrying on business for not less than two years;
3. articles of association or establishment agreement of the foreign enterprise;
4. the foreign enterprise's instruments of appointment of the chief representative and the representatives;
5. the proofs of identity and *curricula vitae* of the chief representative and the representatives;
6. a reference letter issued by a financial institution that does business with the foreign enterprise; and
7. proof of lawful use of the place of residence of the Representative Office.

Where laws, administrative regulations or State Council regulations provide that the establishment of a Representative Office is subject to approval, the foreign enterprise shall apply to the Registry for registration of

establishment, and submit the relevant approval document, within 90 days from the date of approval.

If an international treaty or agreement concluded or acceded to by China provides that it is permitted to establish Representative Offices engaged in for-profit activities, the foreign enterprise shall additionally submit the related documents as required by laws, administrative regulations or the State Council.

Article 24. The Registry shall decide whether to grant registration within 15 days from the date of acceptance of the application. The Registry may, as necessary, solicit the opinion of the relevant authority prior to making its decision. If the Registry decides to grant registration, it shall issue a Registration Certificate and Representative Certificates to the applicant within five days from the date of its decision. If it decides to deny registration, it shall issue a notice of rejection to the applicant, specifying the reason for the denial of registration, within five days from the date of its decision.

The date of issuance of the Registration Certificate shall be the date of establishment of the Representative Office.

Article 25. Representative Offices, chief representatives and representatives shall carry out the relevant procedures such as those relating to residence, employment, tax payment, foreign exchange registration, etc. on the strength of their Registration Certificates and Representative Certificates.

CHAPTER 4. CHANGE OF REGISTRATION

Article 26. In the event of a change in any of the registered particulars of a Representative Office, the foreign enterprise shall apply to the Registry for change of registration.

Article 27. To change a registered particular, the application for change of registration shall be filed within 60 days from the date on which the change in the registered particular occurred.

Where laws, administrative regulations or State Council regulations provide that the change of the registered particular is subject to approval prior to registration, the application for change of registration shall be filed within 30 days from the date of approval.

Article 28. If a Representative office is to continue engaging in business activities after the expiration of the term of residence, the foreign enterprise shall apply to the Registry for change of registration within 60 days prior to the expiration of the term of residence.

Article 29. When applying for a change in the registration of a Representative Office, the applicant shall submit an application for change of the registration of a Representative Office and the related documents that the State Administration for Industry and Commerce requires to be submitted.

Where laws, administrative regulations or State Council regulations provide that the change of registration is subject to approval prior to registration, the relevant approval document shall be submitted as well.

Article 30. The Registry shall decide whether to grant the change of registration within 10 days from the date of acceptance of the application. If the Registry decides to grant the change of registration, it shall issue a new Registration Certificate and new Representative Certificates to the applicant in exchange for the old ones within five days from the date of its decision. If it decides to deny the change of registration, it shall issue a notice of rejection to the applicant, specifying the reason for the denial of change of registration, within five days from the date of its decision.

Article 31. If a change occurs in the authorized signatory, form of corporate liability, capital (assets) or scope of business of a foreign enterprise, or if it replaces its representative, the foreign enterprise shall record the change with the Registry within 60 days from the date on which the change or replacement occurred.

CHAPTER 5. DEREGISTRATION

Article 32. A foreign enterprise shall apply to the Registry for deregistration within 60 days from the date of occurrence of any of the following events:

1. the foreign enterprise closes its Representative Office;
2. the term of residence of the Representative Office has expired and the Representative Office does not continue engaging in business activities;
3. the foreign enterprise closes down; or
4. the approval for the Representative Office is revoked, or the Representative Office is ordered closed, according to law.

Article 33. A foreign enterprise applying for deregistration of its Representative Office shall submit the following documents to the Registry:

1. application for deregistration of a Representative Office;
2. proof of cancellation of the tax registration of the Representative Office;
3. documents issued by Customs and the foreign exchange authority certifying that the relevant matters have been settled completely or that the Representative Office has not carried out the relevant procedures;
4. other documents that the State Administration for Industry and Commerce requires to be submitted.

Where laws, administration regulations or State Council regulations provide that the Representative Office's termination of activities is subject to approval, the relevant approval document shall be submitted as well.

Article 34. The Registry shall decide whether to grant deregistration within 10 days from the date of acceptance of the application. If the Registry decides to grant deregistration, it shall issue a notice of grant of deregistration and collect the Registration Certificate and the Representative Certificates within five days from the date of its decision. If it decides to deny deregistration, it shall issue a notice of rejection to the applicant, specifying the reason for the denial of deregistration, within five days from the date of its decision.

CHAPTER 6. LEGAL LIABILITY

Article 35. If anyone establishes a Representative Office or carries out Representative Office business activities without registration, the Registry shall order cessation of the activities and impose a fine of not less than RMB 50,000 and not more than RMB 200,000.

If a Representative Office engages in for-profit activities in violation of these Regulations, the Registry shall order it to rectify the situation, confiscate the illegal income, confiscate the property such as tools, equipment, raw materials, products (merchandise), etc. used exclusively in the for-profit activities, and impose a fine of not less than RMB 50,000 and not more than RMB 500,000. If the circumstances are serious, the Registry shall revoke the Registration Certificate.

Article 36. If anyone obtains registration or recordal of a Representative Office by submitting false information or concealing the truth by other fraudulent means, the Registry shall order rectification of the situation, impose a fine of not less than RMB 20,000 and not more than RMB 200,000 on the Representative Office, and impose a fine of not less than RMB 1,000 and not more than RMB 10,000 on the leading officials directly in charge and the other persons directly responsible. If the circumstances are serious, the Registry shall cancel the registration, or revoke the Registration Certificate and collect the Representative Certificates.

If the annual report submitted by a Representative Office conceals the truth or contains false information, the Registry shall order it to rectify the situation and impose on it a

fine of not less than RMB 20,000 and not more than RMB 200,000. If the circumstances are serious, the Registry shall revoke the Registration Certificate.

If anyone forges, alters, leases out, lends or transfers a Registration Certificate or a Representative Certificate, the Registry shall impose a fine of not less than RMB 10,000 and not more than RMB 100,000 on the Representative Office and a fine of not less than RMB 1,000 and not more than RMB 10,000 on the leading officials directly in charge and the other persons directly responsible. If the circumstances are serious, the Registry shall revoke the Registration Certificate and collect the Representative Certificates.

Article 37. If a Representative Office violates Article 14 hereof by engaging in activities other than its business activities, the Registry shall order it to rectify the situation within a time limit. If the Representative Office fails to rectify the situation within the time limit, the Registry shall impose a fine of not less than RMB 10,000 and not more than RMB 100,000. If the circumstances are serious, the Registry shall revoke the Registration Certificate.

Article 38. In the event of:

1. failure to submit an annual report in accordance with these Regulations;
2. failure to engage in business activities under the name registered with the Registry;
3. failure to adjust the place of residence as required by the relevant authorities of the Chinese government;
4. failure to announce the establishment of, or a change

in, a Representative Office in accordance with these Regulations; or

5. failure to carry out change of registration, deregistration or recordal in accordance with these Regulations;

the Registry shall order rectification of the situation within a time limit and impose a fine of not less than RMB 10,000 and not more than RMB 30,000. If the situation is not rectified within the time limit, the Registry shall revoke the Registration Certificate.

Article 39. If a Representative Office engages in seriously illegal activities, such as those that are detrimental to China's national security or public interest, the Registry shall revoke its Registration Certificate.

If the registration of establishment of a Representative Office is canceled or its Registration Certificate is revoked by reason of a violation of these Regulations, or if it is ordered closed by relevant Chinese authorities according to law, the foreign enterprise that established it may not establish a Representative Office in China within five years from the date of cancellation or revocation or the date of the closure order.

Article 40. If a Registry or personnel thereof abuse their power, commit dereliction of duty, practice graft, fail to carry out registration or investigate and deal with illegal conduct in accordance with these Regulations or support, cover up or connive at illegal conduct, punishment shall be imposed thereon according to law.

Article 41. If a violation of these Regulations constitutes a violation of public order, punishment shall be imposed in accordance with the *Law of the People's Republic of China*

on Punishment in Connection With the Administration of Public Order. If a criminal offense is constituted, criminal liability shall be pursued in accordance with the law.

Commerce on March 15, 1983 are repealed with effect from the same date.

CHAPTER 7. SUPPLEMENTARY PROVISIONS

Article 42. For the purposes of these Regulations, the term “foreign enterprise” means a for-profit organization established outside China in accordance with foreign law.

Article 43. The items of the fees charged in connection with the registration of Representative Offices shall conform to the relevant regulations of the department of finance and the price control authority of the State Council. The rates of the fees charged in connection with the registration of Representative Offices shall conform to the relevant regulations of the price control authority and the department of finance of the State Council.

Article 44. The establishment of representative offices in China by enterprises from the Hong Kong Special Administrative Region, the Macao Special Administrative Region and Taiwan shall be administered with reference to these Regulations.

Article 45. These Regulations shall be implemented from March 1, 2011. The *Measures for the Administration of the Registration of Resident Representative Offices of Foreign Enterprises* approved by the State Council on March 5, 1983 and published by the State Administration for Industry and

LEGISLATION SUMMARIES

INTELLECTUAL PROPERTY RIGHTS

Opinions of the Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security on Several Issues in the Application of the Law to the Handling of Criminal Intellectual Property Infringement Cases

The Opinions of the Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security on Several Issues in the Application of the Law to the Handling of Criminal Intellectual Property Infringement Cases, 最高人民法院、最高人民检察院、公安部关于办理侵犯知识产权刑事案件适用法律若干问题的意见, were issued on January 10, 2011.

These Opinions have been prepared in accordance with the Criminal Code, the Criminal Procedure Code and related judicial interpretations and in the light of investigation, prosecution and adjudication practice, in order to resolve the new situations and issues encountered in recent years by the public security authorities, People's Procuratorates and People's Courts in their handling of criminal intellectual property infringement cases, to punish criminal intellectual property infringements according to law and to prevent disruption of the socialist market economy.

1. The Issue of Jurisdiction Over Criminal Intellectual Property Infringement Cases

Criminal intellectual property infringement cases should be opened and investigated by the public security authority of the *locus delicti*. If necessary, the case may be opened and investigated

by the public security authority of the place of residence of the criminal suspect. The *loci delicti* in criminal intellectual property infringement cases include the place of manufacture, the place of storage, the place of transportation and the place of sale of the infringing products, the location of the website server used in disseminating the infringing work or selling the infringing products, the place where the Internet is accessed, the location of the website establisher or administrator, the location of the uploader of the infringing work and the place of occurrence of the criminal result that causes actual harm to the rights holder. If there is more than one *locus delicti* in a given criminal infringement of intellectual property, the public security authority that was the first to accept the case or the public security authority of the main *locus delicti* should take jurisdiction. If several public security authorities dispute the jurisdiction over a criminal infringement of intellectual property with more than one *locus delicti*, jurisdiction should be assigned by the public security authority that is their common superior. If a request needs to be made for approval to make an arrest, or for transfer for investigation and prosecution or for the institution of public prosecution, such request should be accepted by the People's Procuratorate or People's Court

of the location and at the level of the above-mentioned common superior.

If a criminal infringement of intellectual property such as the manufacture, storage, transportation or sale, etc. of a given batch of infringing products is perpetrated by different criminal suspects or criminal gangs across different regions, and the conditions for the combining of cases are satisfied, the relevant public security authority may open a combined case and investigation. If a request needs to be made for approval to make an arrest, or for transfer for investigation and prosecution or for the institution of public prosecution, such request should be accepted by the People's Procuratorate or People's Court of the location and at the level of the above-mentioned relevant public security authority.

2. The Issue of the Validity of Evidence Collected and Taken by Administrative Law Enforcement Authorities During the Handling of Criminal Intellectual Property Infringement Cases

Physical evidence, documentary evidence, audio-visual evidence, test reports, expert conclusions, crime scene investigation records and scene records collected, taken or prepared according to law by administrative law enforcement

authorities may serve as criminal evidence if examined by the relevant public security authority and People's Procuratorate and confirmed after cross-examination during trial in the People's Court.

If a public security authority considers it necessary to use as criminal evidence testimony of witnesses, statements of parties or other such investigation records that were prepared by an administrative law enforcement authority, it should collect such evidence and prepare such records anew in accordance with the law.

3. The Issues of the Taking of Evidence Samples and the Requesting of Expert Opinions in the Handling of Criminal Intellectual Property Infringement Cases

When handling criminal intellectual property cases, public security authorities may take evidence samples, or consult with administrative law enforcement authorities and relevant testing institutions at the same level and request that they assist with the taking of evidence samples, as the work may require. Where laws or regulations contain requirements on the sampling institution to be instructed or the sampling method to be used, the sampling institution instructed and the sampling method used should conform to such requirements.

If a public security authority, People's Procuratorate or People's Court requires an expert opinion on a certain matter in the course of handling a criminal intellectual property infringement case, it should entrust the giving of such expert opinion to an expert appraisal institution that is qualified to give such an opinion and recognized by the state.

The public security authority, People's Procuratorate or People's Court should examine the expert conclusion and listen to the rights holder's and the criminal suspect's or defendant's opinions thereon, and it may require the expert appraisal institution to provide relevant explanations

4. The Issue of the Collecting of Evidence in Private Prosecutions of Criminal Intellectual Property Infringements

If, in a private prosecution of a criminal intellectual property infringement accepted by a People's Court in accordance with the law, the party that instituted the prosecution is unable to collect certain evidence due to objective circumstances and, having been able to provide a relevant lead at the time of instituting the prosecution, requests that such evidence be taken by the People's Court, the People's Court should take the evidence in accordance with the law.

5. The Issue of Determining Whether Goods Are "the Same Type of Goods" Within the Meaning of Article 213 of the Criminal Code

Goods with identical descriptions and goods with descriptions that are different but nonetheless refer to the same article may be determined to be "the same type of goods". The term "descriptions" means the descriptions that the Trademark Office of the State Administration for Industry and Commerce uses for the goods in the course of trademark registration, which usually are the goods descriptions specified in the *International Classification of Goods and Services for the Purposes of the Registration of Marks*. The phrase

"descriptions that are different but nonetheless refer to the same article" means goods that are identical, or by and large identical, in terms of function, purpose, principal raw materials, intended consumers, sales channels, etc. and that are usually considered one and the same article by the relevant public.

When determining whether goods are "the same type of goods", a comparison should be made between the goods for which the rights holder's registered trademark is designated and the goods actually produced and/or sold by the author of the infringement.

6. The Issue of Determining Whether a Trademark Is "Identical to a Registered Trademark" Within the Meaning of Article 213 of the Criminal Code

A trademark may be determined to be "identical to a registered trademark", if:

1. the font, the case of the letters or the direction of the text of the registered trademark has been changed, such that there is only a minimal difference with the registered trademark;
2. the spacing of the text or between the letters and/or numerals of the registered trademark has been changed without affecting the embodiment of the distinctive features of the registered trademark;
3. the color of the registered trademark has been changed; or
4. in any other way it is by and large not visibly different from the registered trademark and is thus misleading to the public.

7. The Issue of Whether the Value of Infringing Products Should Be Included in the Amount of Illegal Turnover, If Passed-off Representations of the Registered Trademark Have Not Yet Been Affixed to Any or Some of Those Products

If, when calculating the value of manufactured, stored, transported or unsold infringing products that pass off a registered trademark, counterfeit representations of the registered trademark have not yet been affixed to (including stuck to) any or some of the products whose manufacture has been completed, then the value of the said products that do not yet bear the counterfeit representations should be included in the amount of the illegal turnover to the extent that there is substantial and sufficient evidence that these products will pass off another's registered trademark.

8. The Issue of Conviction and Punishment in Cases Involving the Criminal Sale of Goods Passing Off a Registered Trademark, Where All or Some of the Goods Have Not Yet Been Sold

In either of the following circumstances, anyone that sells goods with the clear knowledge that they pass off a counterfeit registered trademark should be convicted of and punished for the crime of (attempted) sale of goods that pass off a registered trademark pursuant to Article 214 of the Criminal Code:

1. none of the goods that pass off a registered trademark was sold, and the value of the goods is not less than RMB¥150,000; or
2. some of the goods that pass off a registered trademark were

sold and the sales amount is less than RMB¥50,000, but the sum of the sales amount and the value of the unsold goods that pass off a registered trademark is not less than RMB¥150,000.

If none of the goods passing off a registered trademark was sold and their value is (a) not less than RMB¥150,000 but less than RMB¥250,000 or (b) not less than RMB¥250,000, the perpetrator should be convicted and punished according to the appropriate statutory sentencing range provided for in Article 214 of the Criminal Code.

If the sales amount and the value of the unsold goods fall in different statutory sentencing ranges or in the same statutory sentencing range, the People's Court should use its discretion to impose heavy punishment when imposing punishment within the heavier of the statutory sentencing ranges or within the same statutory sentencing range, as the case may be.

9. The Issue of Conviction in Cases Involving the Criminal Sale of Representations of a Registered Trademark Illegally Manufactured by Others, Where All or Some of the Representations Have Not Yet Been Sold

In any of the following circumstances, anyone that sells representations of a registered trademark that others forged or manufactured without authorization should be convicted of and punished for the crime of (attempted) sale of illegally manufactured representations of a registered trademark pursuant to Article 215 of the Criminal Code:

1. none of the representations of a registered trademark that

others forged or manufactured without authorization was sold, and the quantity of such representations is not less than 60,000;

2. others forged or manufactured without authorization representations of two or more registered trademarks, none of which was sold, and the quantity of such representations is not less than 30,000;
3. some of the representations of a registered trademark that others forged or manufactured without authorization were sold and the quantity of sold representations is less than 20,000, but the sum of the sold and unsold quantities of the representations is not less than 60,000; or
4. others forged or manufactured without authorization representations of two or more registered trademarks, some of which were sold, and the quantity of the sold representations is less than 10,000 but the sum of the sold and unsold quantities of the representations is not less than 30,000.

10. The Issue of Determining, in Criminal Copyright Infringement Cases, Whether an Act Was Done "for the Purpose of Obtaining Profit"

In addition to sales, an act may be determined to be done "for the purpose of obtaining profit" in any of the following circumstances:

1. direct or indirect charging of a fee by means such as publishing a paid advertisement in another's work or bundling another's work with a third party's work;

2. direct or indirect charging of a fee for the dissemination of the works of others through an information network or for the provision of paid advertising services on a website or webpage using an infringing work uploaded by another;
3. charging of a membership or other fee for the dissemination of the works of others over an information network using a membership system; or
4. other circumstances where another's work is used to seek profit.

11. The Issue of Determining, in Criminal Copyright Infringement Cases, Whether an Act Was Done "Without the Permission of the Copyright Owner"

Generally, the issue of whether an act was done "without the permission of the copyright owner" should be determined comprehensively on the basis of a document authenticating the copyright in the implicated work issued by the copyright owner or an agent authorized thereby, or by an organization for the collective administration of copyright, or by a copyright authentication organization designated by the state's administrative authority in charge of copyright, or evidence showing that the publisher or the reproducer/distributor forged or altered the licensing document or exceeded the scope of the license, and in the light of other evidence.

In cases where it is genuinely difficult to obtain each of the above-mentioned items of evidence because there are many

different types of implicated works and the rights holders are located far apart from one another, but where there is evidence showing that the implicated reproductions were published, reproduced and distributed illegally and where the publisher(s), reproducer(s) and/or distributor(s) are unable to provide relevant evidence showing that permission was obtained from the copyright owners, the relevant act may be determined to have been done "without the permission of the copyright owner", unless there is evidence showing that a rights holder waived his rights or that the copyright in an implicated work is not protected by China's copyright law, or the copyright protection period has expired.

12. The Issue of the Determination of "Distribution" Within the Meaning of Article 217 of the Criminal Code and Related Issues

The term "distribution" includes activities such as general distribution, wholesale, retail, dissemination through an information network, lending, sale by means of display, etc.

If copyright is infringed by illegally publishing, reproducing or distributing another's work and such infringement constitutes a criminal offense, the perpetrator should be convicted and punished for the crime of copyright infringement, and the illegal act should not be determined to be another criminal offense such as illegal engagement in business operations.

13. The Issue of the Conviction and Punishment Criteria for the Dissemination of Infringing Works Through an Information Network

Any of the following situations in the dissemination to the public, for the purpose of obtaining profit, of written works, musical, cinematographic or television works, works of fine art, photographic or videographic works, audio or video recordings, computer software or other works through an information network without permission from the copyright owners constitutes "another serious circumstance" for the purposes of Article 217 of the Criminal Code:

1. the amount of the illegal turnover is not less than RMB¥50,000;
2. the total disseminated number of works of others is not less than 500;
3. the actual number of clicks on the disseminated works of others is not less than 50,000;
4. works of others are disseminated using a membership system, and the number of registered members is not less than 1,000;
5. the amounts and quantities involved do not meet the criteria set forth in items (1) to (4), but they do meet at least half of each of the criteria set forth in two or more of the said items;
6. other situation that constitutes a serious circumstance.

If an amount or quantity involved in the perpetration of an act as set forth in the preceding paragraph

is not less than five times the corresponding criterion set forth in items (1) to (5) of the preceding paragraph, such situation constitutes “another exceptionally serious circumstance” for the purposes of Article 217 of the Criminal Code.

14. The Issue of the Cumulative Computation of Amounts in Repeated Intellectual Property Infringements

Pursuant to the second paragraph of Article 12 of the *Interpretation of the Supreme People's Court and the Supreme People's Procuratorate of Several Issues in the Concrete Application of the Law in Handling Criminal Intellectual Property Infringements*, if anyone repeatedly commits intellectual property infringements and has not been subjected to administrative handling thereof or criminal punishment therefor, the illegal turnover and the illegal income or amount of sales should be computed cumulatively.

If anyone repeatedly commits illegal acts of intellectual property infringement within a two-year period without being subjected to administrative handling thereof, and the cumulative amount constitutes a criminal offense, the offender should be convicted and punished according to law. The time limit for prosecution of criminal infringements is governed by the relevant provisions of the Criminal Code and is not subject to the aforementioned two-year limit.

15. The Issue of Determining the Nature of Acts Such as the Provision of Raw Materials, Machinery or Equipment, Etc. for Another's Criminal Infringement of Intellectual Property Rights

Anyone that is well aware of another person's criminal infringement of intellectual property but nonetheless provides such person with assistance in the form of the main raw materials, auxiliary materials, semi-finished products, packaging materials, machinery, equipment, labels, marks, production technology or formulas, etc. for the production or manufacture of infringing products, or with services such as Internet access, server hosting, online storage space, communication and transmission channels, payment collection or fee settlement, etc., should be punished as an accomplice in the criminal infringement of intellectual property.

16. The Issue of Handling the Concurrence of Criminal Intellectual Property Infringements

If the commission of a criminal intellectual property infringement also constitutes criminal production or sale of counterfeit or shoddy goods, the perpetrator should be convicted and punished according to the heavier of the punishments provided for criminal intellectual property infringement and criminal production or sale of counterfeit or shoddy goods.

LEGISLATION HIGHLIGHTS

Banking

Notice of the China Banking Regulatory Commission on Further Regulating the Wealth Management Cooperation Business Between Banks and Trust Companies.

中国银监会关于进一步规范银信理财合作业务的通知

Issued on: January 13, 2011

E-Commerce

Notice of the Ministry of Commerce on Regulating Online Sales Promotion.

商务部关于规范网络购物促销行为的通知

Issued on: January 5, 2011

Employment

Measures for the Determination of Work-Related Injuries.

工伤认定办法

Issued on: December 31, 2010

Effective from: January 1, 2011

Environment

Law of People's Republic of China for the Preservation of Water and Soil.

中华人民共和国水土保持法

Adopted on: December 25, 2010

Issued on: December 25, 2010

Effective from: March 1, 2011

Foreign Exchange

Notice of the State Administration of Foreign Exchange on Issues Relevant to Renminbi Foreign Exchange Options Trading.

国家外汇管理局关于人民币对外汇期权交易有关问题的通知

Issued on: February 14, 2011

Effective from: April 1, 2011

Foreign Investment

Notice of the Ministry of Commerce on Issuance of the *Foreign Investment Statistics System* (2011).

商务部关于印发《外商投资统计制度》(2011年)的通知

Issued on: December 30, 2010

Insurance

Notice of the National Tourism Administration and the China Insurance Regulatory Commission on Duly Implementing the *Measures for the Administration of Travel Agency Liability Insurance*.

国家旅游局 中国保监会关于做好《旅行社责任保险管理办法》实施工作的通知

Issued on: January 27, 2011

Medical and Health

Notice of the Ministry of Health and the Ministry of Commerce on Matters Concerning the Implementation of Supplementary Agreement VII to the Closer

Economic Partnership Agreements Between the Chinese Mainland and Hong Kong/Macau.

卫生部 商务部关于落实内地与香港澳门更紧密经贸关系安排补充协议七有关事项的通知

Issued on: December 14, 2010

Effective from: January 1, 2011

Mergers and Acquisitions

Notice of the General Office of the State Council on the Establishment of a Security Review Mechanism for the Acquisition of Domestic Enterprises by Foreign Investors.

国务院办公厅关于建立外国投资者并购境内企业安全审查制度的通知

Issued on: February 3, 2011

Effective from: 30 days after date of issuance

Patent

Measures for Administrative Patent Law Enforcement.

专利行政执法办法

Issued on: December 29, 2010

Effective from: February 1, 2011

Pharmaceuticals

Standards for Pharmaceutical Good Manufacturing Practice [Amended in 2010].

药品生产质量管理规范(2010年修订)

Adopted on: October 19, 2010

Issued on: January 17, 2011

Effective from: March 1, 2011

BULLETIN BOARD

Baker & McKenzie organized the **Annual China Employment Law Update** on March 17, 2011. The seminar took place at the Grand Hyatt Hotel in Shanghai.

Baker & McKenzie's China Supply Chain Annual Roundup 2011 was held on January 18, 2011 in Hong Kong and January 20, 2011 in Shanghai. Speakers include **Harvey Lau, Eugene Lim, Beatrice Schaffrath, Glenn DeSouza, Martin Commons, Kareena Teh, Anna Gamvros, Anne Peng, Chunfai Lui, Johnson Zhuang, Xiaoming Chen, Jon Cowley** and **Di Wu**.

Richard Wagner took part in a webinar entitled "When Litigating in China is Forced upon You: The Mechanics and Peculiarities of Chinese Litigation" on December 1, 2010. Richard introduced the audience of US multinationals to Chinese litigation and discussed ways of addressing the challenges presented by litigating in China's people's courts.

Richard spoke on the risks faced by Chinese enterprises in US litigation and steps they can take to manage those risks in a Law Forum on "Management of International Disputes for Chinese Enterprises" held in Xi'an on December 10, 2010.

Bing Ho presented at the "RMB Heads Cross-Border: New Opportunities for MNCs" seminar hosted by Baker & McKenzie on January 12, 2011 in Chicago.

Isabella Liu and **Martin Commons** spoke at a client event on Intellectual Property and Competition Law organized by Baker & McKenzie on January 19, 2011 in Hong Kong.

Andreas Lauffs, Jonathan Isaacs and **Douglas Darch** spoke on the topic "Managing Labor Relations in China" at a webinar hosted by GlobalAutoIndustry.com on January 20, 2011.

Joseph Simone spoke at the "Anti-Counterfeiting and Brand Protection Summit" held in San Francisco on January 24-26, 2011.

Catherine Mun presented at the seminar "Practice of International Arbitration in Asia Pacific" on January 27, 2011 in Hong Kong.

Jon Eichelberger spoke on China taxation at the International Finance Association Meeting held in London on February 16, 2011.

Harvey Lau and **Eugene Lim** spoke on the topic "Evolving Regulatory & Tax Environment in China" at the Standard Chartered - Global RMB Forum 2011 on February 23, 2011.

Paul McNulty, Steven Glanz, Cynthia Jackson, Peter Denwood, Clara Ingen-Housz, Boo Bee Chun and **Martin Commons** spoke at the "Compliance and Regulatory Forum - China Outbound Investments" on February 23, 2011 at the St. Regis Hotel in Beijing.

Jonathan Isaacs spoke at the "New Social Insurance Law" seminar organized by the German Chamber of Commerce at the Grand Mercure Hotel in Shenzhen on February 28, 2011.

Tracy Wut gave presentation to Standard Chartered Bank on the topic "PRC Merger Control Filings and National Security Review - Their Impact on M&A Deals" on February 24, 2011.

Steven Sieker and **Jason Ng** will present at the Baker & McKenzie seminar entitled "Foreign Investment in RMB Funds - An Update" to be held in Hong Kong on March 3, 2011.

Steven Sieker, Eugene Lim and **Isabella Liu** will speak at the T&C Talk on Design, Sourcing and Manufacturing organized by Baker & McKenzie on March 23, 2011.

Harvey Lau authored an article entitled "Measures for the Administration of Pilot Renminbi Settled Outbound Direct Investment" for a Client Alert of Baker & McKenzie in January 2011.

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