

2009

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Recommended Citation

Adam Bobrow et al., *China*, 43 INT'L L. 1073 (2009)
<https://scholar.smu.edu/til/vol43/iss2/42>

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China

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I. Introduction

In 2008, China's State Council and its agencies tried to catch up with a significant number of new laws coming into force by issuing implementing rules and regulations. In 2006 and 2007, China's National People's Congress and its Standing Committee enacted major competition, labor, property, corporations, taxation, and bankruptcy legislation. This intensive legislating has fundamentally changed much of the economic regulatory legal landscape in China.

The changes that will occur because of that legislating, however, cannot happen overnight. In 2008, government agencies promulgated many implementing measures and interpretations while the business community and ordinary Chinese businesses and workers started to feel the effects of those dramatic legal changes. This article documents this implementation drive as the pace of major new economic legislation has slowed. This article covers the development of the implementing regulation and government structures to handle the Anti-Monopoly Law; the implementation of the broad changes that have occurred in the area of Labor Law; the Foreign Investment Catalogue's latest revision; continuing developments in the regulation of biotechnology and electronic waste; an analysis of China's loss at the World Trade Organization (WTO) in the *Auto Parts* case; and an overview of China's stimulus program, announced in November in response to the global financial crisis.

II. Implementation of the Anti-Monopoly Law

The Anti-Monopoly Law¹ (AML), adopted on August 30, 2007, finally came into effect on August 1, 2008. The AML has fifty-seven articles in eight chapters—a very brief out-

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1. Zhonghua Renmin Gongheguo Fan Longduan Fa, [Anti-Monopoly Law], (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) LAWINFOCHINA (last visited 2-26-09)(P.R.C.).

line of the basic principles of competition law in China. In this regard, it exemplifies the civil law nature of China's legal system. Before August 1, 2008, only one draft regulation had been released for consultation: the "Rules of the State Council on Notification of Concentrations of Undertakings (Draft)."² The final version of the Rules was issued shortly after August 1.

A. ENFORCEMENT AGENCIES

The AML specifies that the State Council shall create two new entities to develop and enforce the law: the Anti-Monopoly Committee³ and the Anti-Monopoly Enforcement Agency (Agency).⁴ In mid-July 2008, the news leaked out that three agencies, the Ministry of Commerce (MOFCOM),⁵ the National Development and Reform Commission (NDRC),⁶ and the State Administration for Industry and Commerce (SAIC),⁷ rather than one agency would be responsible for enforcement. About that time, it was also announced that MOFCOM would set up an "Anti-Monopoly Enforcement Bureau."⁸ This change led to considerable concern as to how these three agencies would coordinate their work.

On August 1, 2008, the State Council announced that the Anti-Monopoly Committee had been formed, but provided little further information.⁹ But, documents governing the functions¹⁰ of the three agencies suggest that MOFCOM will be responsible for mergers; NDRC will be responsible for price-related behavior, such as cartels; and that SAIC would be responsible for unilateral conduct, unfair competition, and abuse of dominant position.

On September 13, 2008, the State Council approved operating rules for the Anti-Monopoly Committee, and the Committee under the Chairmanship of Wang Qishan, a Vice Premier of the State Council, held its first meeting.¹¹ The approved main functions of the

2. GUOWUYUAN GUANYU JINGYINGZHE JIZHANG SHENBAO DE GUIDING (ZHENGQIU YIJIAN GAO) (RELEASED MARCH 27, 2008 BY THE STATE COUNCIL LEGISLATIVE AFFAIRS OFFICE).

3. Fan Longduan Weiyuanhui. The Chinese word "weiyuanhui" can also be translated as "commission." See Anti-Monopoly Law, art. 9.

4. Fan Longduan Zhifa Jigou; the Chinese word "Jigou" can also be translated as a state "authority." See *id.* art. 10.

5. Shang Wu Bu, [Ministry of Commerce (P.R.C.)], <http://www.mofcom.gov.cn/> (last visited Feb. 12, 2009).

6. Guojia Fazhan He Gaige Weiyuanhui, [National Development and Reform Commission (P.R.C.)], <http://www.ndrc.gov.cn/> (last visited Feb. 12, 2009).

7. Guojia Gong Shang Xingzheng Guanli Zongju, [State Administration for Industry and Commerce (P.R.C.)], <http://www.saic.gov.cn/> (last visited Feb. 12, 2009).

8. Fan Longduan Diaochaju as reported in Guojia Shangwubu Choujian Fan Longduan Diaochaju Bayue Yiri Qian Chengli [Ministry of Commerce established as the Anti-Monopoly Lead Investigator on August 1st], TENCENT TECHNOLOGY, July 13, 2008.

9. *Guowuyuan Riqian Chengli Fan Longduan Weiyuanhui Juyou Sixiang Zhuyao Zhize*, http://www.gov.cn/jrzq/2008-08/01/content_1062161.htm (last visited Feb. 12, 2009). See also Hu Hongwei, Yang Huayun, Guowubu Chengli Fan Longduan Weiyuanhui [State Council Establishes the Anti-Monopoly Committee], XIN JING BAO, [BEIJING NEWS], Aug. 2, 2008.

10. Known as "San Ding," which can be roughly translated as "three specifics."

11. Guowuyuan Pizhun Fan Longduan Weiyuanhui Gongzuo Guize Fan Longduan Gongzuo Youxu Tuijin [State Council Approves the Rules for the Anti-Monopoly Commission: Anti-Monopoly Work Advances in an Orderly Manner], XINHUANET, Sept. 9, 2008, available at http://news.xinhuanet.com/politics/2008-09/13/content_9982466.htm. Mr. Wang is a former Mayor of Beijing who does not appear to have had strong prior relationship with any of the three agencies that make up the Committee.

Committee include the development and publishing of anti-monopoly guidelines and to coordinate the anti-monopoly administrative and law enforcement work. At the moment, it appears that the direct link to the State Council through Mr. Wang's chairmanship will provide the Committee with its source of influence and a method for resolving inter-agency disputes. Foreign companies looking for guidance on the interpretation of the AML should pay particular attention to developments in MOFCOM for mergers and SAIC for most other matters.

B. PRIVATE ENFORCEMENT IN THE COURTS

While the regulators in the agencies are still preoccupied with getting organized, the private right of action in Article 50 of the AML has taken on a more significant role.¹² The general rule in civil law is that a party who has suffered damage as the result of another party's breach of the law has a private right of action against the party separate from any action that the regulators may take.

To prepare the courts for this new cause of action, the Regulation on Causes of Action in Civil Cases was revised¹³ by the Supreme People's Court in October, and just before the AML came into effect, the Supreme People's Court issued a notice on how such cases should be handled.¹⁴ The notice allocates AML cases to the Intellectual Property Adjudication Division of each court on the basis that the AML and the abuse of intellectual property rights are closely related to the protection of intellectual property rights, and the Anti-Unfair Competition Law is part of competition law. The intellectual property (IP) divisions of the courts are generally regarded as commercially more astute and some see this assignment as likely to be positive.

There is considerable uncertainty as to whether there is a private right of action for a breach of the administrative monopoly provisions in Chapter V of the AML. One view is that there is a private right of action using a broader civil law reading of the text of the notice and the AML. The other view uses a narrower common law type of analysis of the specific words and considers the compromises made to include administrative monopolies in the AML over the determined opposition of the state agencies. It says that only the AML Enforcement Authority can bring such an action.

In November, a senior judge at the Supreme People's Court (SPC) gave an interview on administrative monopoly issues in which he stated that an injured person could bring both administrative and civil actions. He further stated that both actions could continue simultaneously. But, if the basis for a case is primarily civil or administrative, the other pro-

12. Anti-Monopoly Law, *supra* note 1, art. 50.

13. Zuigao Renmin Fayuan Guanyu Yinfa "Minshi Anjian Anyou Guiding" de Tongzhi-Decree No. 11 (2008), (promulgated by the 1438th Sup. People's Ct. Judicial Committee Meeting on Oct. 29, 2007, effective April 1, 2008), added "No. 162 Monopoly Disputes" in "Part V-Intellectual Property Rights Disputes, Sub-Section 16-Unfair Competition and Monopoly Disputes."

14. Zui gao ren min fa yuan (Sup. People's Ct.) Guanyu Renzhen Xuexi He Guanche "Zhonghua Renmin Gongheguo Fan Longduan Fa" de Tongzhi [Notice Regarding the Study and Implementation of the Anti-Monopoly Law of the People's Republic of China] July 28, 2008, LAWINFOCHINA (last visited Mar. 12, 2009) (P.R.C.).

ceeding could be halted.¹⁵ In civil law, a clear distinction is made between private rights of actions and actions against governmental authorities.

As will be discussed in the next section, there have been two private actions against administrative monopolies. Neither was rejected on the basis that there is no private right of action. Both were resolved when the administrative organ made significant concessions.

C. INITIAL CASES, REVIEWS, AND OTHER RESPONSES

There are now reports of five private cases having been filed under the AML. In addition, eight mergers have been reviewed. There have also been a number of press reports regarding complaints to the agencies against Microsoft and other companies. And there have been reports that some automobile dealers have changed their pricing policies in response to the law.

1. Private Actions

The five private actions, as reported in the press, are as follows:

- (1) *Liu Fangrong v. Chongqing Baoxian Xiehui—Chongqing Insurance Association*, filed August 1, 2008 (Chongqing Insurance Case).¹⁶
- (2) *Zhejiang Yuyao Tax Accountants v. Yuyao City Administration*, filed on August 1, 2008 (Tax Accountants Case).¹⁷
- (3) *Beijing Zhaoxin Information Technology Ltd., Dongfang Huike Fangwei Jisbu Youxian Zeren Gongsi—Oriental Huike Anti-Counterfeiting Technology Ltd., Zhongshe Wang Meng Information Security Technology Ltd., and Heng Xin Digital Technology Ltd. v. Guojia Zhibian Jiandu Jianyan Jianyi Zongju—State General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ)*, filed on August 1, 2008 in Beijing No. 1 Intermediate People's Court, assigned file number "(2008)-Zhongang Chuizi Di 1340 Hao" (AQSIQ Case).¹⁸

15. Liu Lan, *Zuigao Fayaun Xingzheng Fuzeren: Jiaqiang Fan Longduan Sifa Shencha Yifa Baobu Gongping Jingzheng* [Supreme Court Officer: Strengthening Anti-Monopoly Judicial Review to Protect Fair Competition], available at <http://www.chinaiprlaw.cn/file/2008112113943.html> (last visited Feb. 12, 2009).

16. Zhang You, *Baoxian Fan Longdun Diyi An Chongqing Baoxian Xiehui Bei Su* [First Anti-Monopoly Insurance Case: Chongqing Insurance Association Sued], 21 Shiji Wang, 21ST CENTURY NET, Aug. 13, 2008, available at http://www.21cbh.com/HTML/2008/8/13/HTML_FLH1G1U8AIQR.html. In the Chongqing Insurance Case, the Insurance Industry Trade Association was accused of charging excessive fees and refusal to deal in contravention of arts. 3 and 13 of the AML; however, an expert providing commentary for the press story about the case suggested that the dispute is really about the contract between the parties.

17. Qin Xudong, *Zhejiang Yuyao Shi Zhengfu Zaoyu Fan Xingzheng Longduan Susong* [Zhejiang Yuyao City Administration is Served with an Anti-Administrative Monopoly Lawsuit], CAIJING NET, Aug. 5, 2008, available at <http://www.caijing.com.cn/2008-08-05/110002570.html>.

18. This case is widely reported in the press. For a summary of the case in English, see Zhu Tao, *Antitrust Claim Puts State Agency on Trial*, CAIJING, Aug. 27, 2008, available at <http://english.caijing.com.cn/2008-08-27/100077449.html>. For a copy of the Statement of Claim, see Yi Ming, *Sijia Fangwei Qiye Xiang Guojia Zhibian Zongju Tiqi Fan Longduan Susong* [Antitrust Complaint Filed by the Four Anti-Counterfeiting Companies Against AQSIQ], WANGYI KEJI, Aug. 1, 2008, available at <http://www.erpworld.net/article/2008-08-04/0P4224K2008.shtml>.

(4) *Chongqing Xibu Pochan Qingsuan Gongsì-Chongqing Western Bankruptcy Liquidation Corporation v. Jianshe Yinbang Chongqing Fenhang-China Construction Bank, Chongqing Branch*, filing date not known, Chongqing Intermediate People's Court (Chongqing Banking Case).¹⁹

(5) *Li Fangping v. China Netcom (Group) Co., Ltd.*, filed on August 1, 2008 in Chaoyang District Court in Beijing,²⁰ accepted by the court around September 19, 2008,²¹ and transferred to the Beijing No. 2 Intermediate People's Court in early November (China Netcom Case).²²

In the *Tax Accountants Case*, the Mingbang accounting firm alleges discrimination when its competitor, Yangming, was allowed to set up a window in Mingbang's new service center, resulting in an alleged loss of business. The plaintiffs cite Article 8 and Chapter V of the AML concerning administrative monopolies as the basis for their action. Ming Bang had previously applied to Ningbo Municipal Government for administrative re-consideration and lost. The State Administration of Taxation has issued a notice specifically requiring that tax offices and tax agents cannot share the same office space.²³ This case is reportedly now settled, with the municipal government promising equal space.²⁴

In the *AQSIQ Case*, a standard setting body required the use of a technology in which it had a financial interest to the detriment of the plaintiffs' technologies. In early September, the Beijing No. 1 Intermediate People's Court ruled that they would not accept the case because the limitation period for the complaint under the Administrative Litigation Law (ALL) had expired.²⁵ The plaintiffs initially said that they would appeal but later

19. Hu Junhua, *Yinbangye Fan Longduan Diyi An Jianbang Cheng Beigao* [China Construction Bank is the Defendant in the First Anti-Monopoly Case in the Banking Sector], MEIRI JINGJI XINWEN [DAILY ECONOMIC NEWS], Sept. 12, 2008, available at http://www.nbd.com.cn/_NewShow.aspx?D_ID=124006.

20. *Beijing Wangtong Keneng Chengwei Guonei Fan Longdunfa An Diyi Beigao* [Beijing Netcom may become the first AML defendant], DIYI CAIJING RIBAO [FIRST FINANCIAL DAILY], Sept. 17, 2008.

21. *Minjian Fan Longduan Diyi An Zhengshi Bei Fayaun Shouli* [First Civil AML Case Officially Accepted by Court], WUXI DAILY, Sept. 20, 2008.

22. Yuan Jing, *Fan Longduan Fan Longduan Diyi An Yisong Er Zhongyuan* [The First AML Transferred to the No. 2 Intermediate People's Court], BEIJING DAILY, Nov. 05, 2008.

23. Guojia Shui Wuzongju [State Tax Administration], *Guanyu Jinyibu Guifan Shuishou Zhifa He Shuiwu Daili Gongzuo de Tongzhi* [Notice Regarding Further Standardizing the Law Regarding Tax Enforcement and Tax Agency Work], Guoshui Hanzì [2004] 957Hao.

24. Qin Xudong and Zhu Tao, *Quanguo Shouli Fan Longduan Minshi Susong Zhengshi Li'an*, [The Nation's First Official AML Case], CAIJING-FINANCE, Sept. 19, 2008, available at <http://www.caijing.com.cn/2008-09-19/110014193.html>.

25. Zhu Tao, *Fan "Longduan Diyi An" Wei Bei Fayaun Shouli* ["First Anti-Monopoly Case" Has Not Been Accepted by the Court], CAIJING, Sept. 4, 2008, available at <http://www.caijing.com.cn/2008-09-04/110010483.html>. The decision appears to be based on art. 41 of the *Zuigao Remin Fayuan Guanyu Zhixing "Zhonghua Renmin Gongheguo Xingzheng Susong Fa" Ruogan Wenti de Jieshi* [Supreme People's Court Interpretation on Several Problems in Implementing the PRC Administrative Litigation Law], adopted at the 1088th Meeting of the Jud. Comm. on November 24, 1999 and effective beginning March 10, 2000. The actual decision is not yet available.

wrote to the State Council asking it to intervene.²⁶ In the end, AQSIQ apparently withdrew the controversial rule.²⁷

The basis for the *Netcom* case is that the local telecommunications service provider charges different rates to people with a Beijing residence permit (known as a *hukou*) and to those without.

2. *Merger Reviews*

In an interview released on November 21, 2008 by MOFCOM's Information Office,²⁸ the head of MOFCOM'S Anti-Monopoly Bureau stated that eight merger reviews had been completed and approved out of thirteen accepted (meaning the submission has been accepted as being complete), including the approval of the InBev takeover of Anheuser-Busch that had conditions attached.²⁹ The interview contains a detailed description of the process.

3. *Complaints to the Enforcement Agencies*

There have been a number of reports in the press about a complaint made by a Beijing lawyer regarding Microsoft.³⁰ On August 1, the lawyer sent letters to each of MOFCOM, NDRC, and SAIC requesting that the agencies investigate Microsoft abuse of dominant position by excessive pricing, lack of inter-operability, and bundling suggesting a fine of US\$1 billion. Reports differ on what response the lawyer has received,³¹ but it appears that SAIC, the agency most likely to be responsible for the matter had not yet responded.

There have been other complaints to the enforcement agencies, although it is not yet clear what, if anything, the agencies are doing about most of the complaints. In Hebei Province, two lawyers have complained to NDRC regarding the price of oil, based on the unfair price provision of Article 17 of the AML.³² Another lawyer has complained to SAIC accusing U.S. listed Baidu.com of abuse of dominant position for letting unlicensed

26. Zhou Kai, *Lushi Shangshu Guowuyuan Huyu Jiuzheng Xiangguan Bumen Xingzheng Longduan Xingwei* [Lawyers Release Letter to State Council Asking Relevant Departments to Rectify the Administrative Monopoly Behavior], SOHU, Oct. 8, 2008.

27. Zhu Tao, *Guojia Zhiqian Zongju Chexiao Dianzi Jianguan Tuijin Jigou* [AQSIQ Withdraws its Promotion of its Electronic Monitoring Agency], CAIJING-FINANCE, Oct. 24, 2008.

28. Shangwubu Fan Longduan Ju Fuzeren Jiu Jingyingzhe Jizhong Fan Longduan Shencha Youguan Wenti Da Jizhe Wen, [Interview with the Ministry of Commerce Anti-Monopoly Bureau Officer in Charge of Merger Review], Nov. 21, 2008, available at <http://www.mofcom.gov.cn/aarticle/zhengcejd/bj/200811/20081105906893.html>.

29. For the conditions, see Ministry of Commerce, Notice No. 95, 2008, available at <http://fldj.mofcom.gov.cn/aarticle/zxxx/200811/20081105899216.html>.

30. Zhongguo Lushi Dui Weiruan Tichu Fan Longduan Diaocha Sheqing Jianyi Fakuan 10 Yi Meiyuan [Chinese Lawyer Proposes an Anti-Monopoly Investigation of Microsoft; Suggested Fine \$1 Billion], R1 FAZHI WANG-FAZHIRIBAO [LEGAL SYSTEM NET/ LEGAL DAILY], Aug. 17, 2008, available at http://news.xinhuanet.com/legal/2008-08/17/content_9424867.htm.

31. Fan Longduan Fa Shishi Manyue Weiruan Beigao Zhenxiang Diaocha [One Month After the Implementation of the AML, the Truth About the Microsoft Investigation], 21SHIJI JINGJI BAODAO [21ST CENTURY ECONOMIC REPORTS], (Sept. 4, 2008), available at http://www.21cbh.com/HTML/2008/9/4/HTML_QQMP0JW62A04.html.

32. Cao Tianjian, Hebei Liang Lushi Xiang Guojia Fagawei Ti Shenqing Qingqiu Liji Tiaozheng Chengpin You Jiage [In Hebei Two Lawyers Request that the NDRC Immediately Adjust Refined Oil Prices], FAZHI RIBAO [LEGAL SYSTEM DAILY], Nov. 22, 2008.

suppliers of medical products pay for higher rankings on its results page without alerting users of its dominant position.³³

A complaint was made to MOFCOM, NDRC, and SAIC about telecom prices and a proposed reorganization. MOFCOM replied that the complaint about the reorganization was not within their mandate and the lawyer has applied for administrative reconsideration of that decision.³⁴

In many countries, there have been tensions between the state post office and private delivery companies. In September, a group of privately owned Chinese express delivery companies wrote to MOFCOM and others regarding alleged predatory pricing by FedEx. They later were given a closed door meeting with the State Post Office management.³⁵

Finally, the NDRC has announced an investigation into bank service fees. Although the announcement does not mention it, a Beijing lawyer complained about such fees just after the AML came into force.³⁶

The complaints regarding FedEx and Microsoft appear to be the only instances in which foreign firms in China where accused of breaching the AML. The preferred targets appear to be administrative monopolies and items such as oil charges, bank fees, and telecom rates, items of popular discontent in other countries as well.

4. Other Reports

Prior to the implementation of the AML, there were a number of press reports about foreign automobile manufacturers setting resale prices for their dealers.³⁷ Within a week of the implementation of the law, there were press reports that Toyota and Ford had in fact issued notices to dealers emphasizing that they were free to set their own prices.³⁸

D. INTELLECTUAL PROPERTY AND THE AML

Article 55 of the AML provides that the mere exercise of intellectual property rights (IPR) is not subject to the AML, but that conduct eliminating or restricting competition

33. Zhongguo Wangluo Fan Longduan Diyi An Lüshi Jianyi Fa Baidu 1.7 Yi, Nanfang Baoye Wang [China's First Internet AML Case: Lawyer Proposes Fining Baidu RMB 170,000,000] NANFANG DOU SHI BAO [S. ALL CITY REPORTS], Nov. 10, 2008; Baidu.com Fights for its Reputation, S. CHINA MORNING POST, Nov. 20, 2008.

34. Li Xinxin, *Shangwubu Yin Dianxin Chongzu Cheng Fan Longduan Zhibifa She Su Diyi An Beigao* [Ministry of Commerce Becomes the First Defendant of Anti-Monopoly Due to Restructuring, Xinwen Chenbao], MORNING NEWS, Nov. 21, 2008.

35. Zhou Lingling, [FedEx Facing Unfair Operation Charge], CAIJING, (Nov. 24, 2008), available at <http://www.caijing.com.cn/2008-11-24/110031249.html>.

36. CRIENGLSIH.com, *NDRC Investigates Bank Charges* (Oct. 10, 2008), <http://english.cri.cn/3130/2008/10/10/1861s413260.htm>.

37. Fan Longduan Fa Ba Yue Yi Ri Qi Shishi Banghe Qiche Hangye Qian Guize [The Implementation of the "Anti-Monopoly Law on August 1st Will Shout Stop to the Hidden Rules of the Automotive Industry], JINRI ZAO BAO [TODAY'S MORNING POST], July 16, 2008, available at <http://auto.fvip.com/law/200807/16-156955.html>.

38. Fan Longduan Fa Chongji Cheshi Qian Guize Peitao Guize Jidai Chutai [Implementation of the Anti-Monopoly Law Has an Impact on the Hidden Rules of the Automotive Sector: Regulations or Guidelines Are Needed], ZHONGGUO CAIJING BAO [CHINA FINANCIAL REPORTS], Aug. 06, 2008, available at <http://www.chinanews.com.cn/it/dzsw/news/2008/08-06/1337705.shtml>.

through the abuse of IPR violates the AML.³⁹ Academic writings and commentaries over the last year have regularly pointed out the lack of agreement in developed economies on balancing competition policy and IPR, suggesting that China will need to develop its own policies. One aspect of such a policy may be the application of China's civil notion of good faith, or "chengshi," to the enforcement of IPR.⁴⁰ In any event, on November 3, 2008, a vice president of the SPC gave an interview in which he stated that the SPC would soon start work on the drafting of a judicial interpretation to define the reasonable limits of intellectual property rights and what constitutes an abuse of intellectual property rights.⁴¹

III. Labor Law

The year of 2008 saw China continue to modernize its labor law system. After promulgating the Labor Contract Law and Employment Promotion Law in early 2007, the Standing Committee of the National People's Congress passed the Law on Labor Dispute Mediation and Arbitration (Labor Arbitration Law) on December 29, 2007, establishing a special dispute resolution procedure for labor disputes.⁴² Late that year, after some initial delay, the State Council also released the implementing regulation for the Labor Contract Law, marking the completion of this round of legislative efforts to upgrade China's labor law.⁴³

A. LABOR DISPUTE MEDIATION AND ARBITRATION LAW

The existing labor dispute arbitration rules were established by the Regulations on Business Enterprises Labor Dispute Resolution in 1993.⁴⁴ The new law retains the current procedural framework for labor dispute resolution, known in China as the "one mediation,

39. Anti-Monopoly Law, *supra* note 1, art. 55. There are currently no regulations, guidelines, or interpretations as to what would be considered an "abuse of intellectual property rights."

40. Zhuanjia Cheng Guowai Da Qiye Lanyong Zhishi Chanquan Xingwei Chuxian Liang Da Xin Qushi [Experts Identify Two Major Trends in the Abuse of Intellectual Property Rights by Foreign Enterprises], XINHUA NET, Oct. 10, 2008, available at http://www.cnipr.com/zxxx/yndt/t20081010_99264.html.

41. Yang Weihai, *Zuigao Fayuan Ni Qidong Fan Longduan Minsbi Susong Sifa Jieshi Qicao Gongzuo* [Supreme Court to Start Drafting a Judicial Interpretation on the AML and IP], Nov. 3, 2008, available at <http://www.chinaiprlaw.cn/file/2008110413787.html>.

42. Lao dong zheng yi tiao jie zhong cai fa [Law on Labor Disputes Mediation and Arbitration (PRC)] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2007, effective May. 1, 2008), art. 5, LAWINFOCHINA (P.R.C.) (last visited Feb. 26, 2008) [hereinafter Labor Arbitration Law].

43. The decision to modernize China's labor law was out of the growing concern that China's workers had not been benefiting as much as they deserve from China's recent economic development. China's labor market is mostly a buyer's market; market force put workers in a disadvantaged position in their bargaining with the employers. A survey found that many employers are taking advantage of this oversupply of labor by refusing to enter into long term employment contract with workers. Macro economic data corroborates this situation. The share of labor cost dwindled from 19 percent of the total GDP in 1993 to 14 percent in 2007. Xin Chunying, Vice Chairman, Legislative Office of the NPCSC, *A Worker in Job Deserves a Predictable Stable Life*, Address at the Forum on Harmonious Labor Relation and Enterprises Regulatory Innovation from the Perspective of Law (Dec. 17, 2007), available at <http://acftu.people.com.cn/GB/6661675.html>.

44. Qi ye lao dong zheng yi cu li tiao li [Regulations on Settlement of Labour Disputes in Enterprises] (promulgated by the State Council, July 6, 1993, effective July 6, 1993) LAWINFOCHINA (last visited Feb. 18, 2009) (P.R.C.).

one arbitration, two trials" framework (一调, 一裁, 两审体制).⁴⁵ Several unique features of this framework distinguish it from the normal civil litigation procedure. Arbitration is mandatory for labor disputes before litigation is possible.⁴⁶ An arbitral decision, however, does not bar subsequent court action on the same dispute, and receives no deference from the judges presiding over this dispute in the court proceeding.⁴⁷

The purpose of making arbitration mandatory is to compel the parties first to choose a less confrontational forum to resolve their dispute.⁴⁸ A less confrontational forum is particularly desirable for labor dispute resolution, because most employees would prefer a forum that can help them resolve the current dispute with their employer without unduly jeopardizing the existing employment relationship.

1. Mediation

Once a labor dispute arises, the Labor Arbitration Law calls upon the disputing parties to try to resolve the dispute through mediation.⁴⁹ The parties may use three types of mediation bodies to resolve their dispute: the mediation commission established within the employer business firm; lawfully established local People's Mediation Commissions; and, branches of local village, township or district authorities that perform the mediation function.⁵⁰

When the parties resolve the dispute through mediation, the Labor Arbitration Law requires the parties to reduce the resolution to written form. The resulting mediation agreement, however, is of limited legal effect and is disregarded if arbitration or litigation ensues.⁵¹ Allowing only limited legal effects to a mediation agreement is consistent with the intent not to create additional complications should the mediated solution fail.

45. Chao Shouye, *Several Issues on Labor Dispute Mediation and Arbitration*, THE PEOPLE'S COURT DAILY, Jan. 16, 2008, at A5.

46. See Lao dong zheng yi tiao jie zhong cai fa [Law on Labor Dispute Mediation and Arbitration] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2007, effective May 1, 2008), art.5, LAWINFOCHINA (last visited Feb. 18, 2009) (P.R.C.) [hereinafter Labor Arbitration Law]; Lao dong fa [Labor Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995), art. 79, LAWINFOCHINA (last visited Feb. 18, 2009) (P.R.C.); Guan yue shen li lao dong zheng yi an jian shi yong fa lü luo gan wen ti de jie shi [Opinion on Certain Issues Pertaining to Application of Law in Trial of Labor Disputes] (promulgated by the Sup. People's Ct., Apr. 20, 2001).

47. Labor Arbitration Law, *supra* note 46, art. 5.

48. Shouye, *supra* note 45, at A5.

49. Labor Arbitration Law, *supra* note 46, art. 5. Indeed, Chinese law generally directs the dispute resolution bodies to facilitate mediation throughout their respective proceeding.

50. *Id.* art. 10.

51. It is not clear whether a mediation agreement for a labor dispute has the legal effect of a normal civil contract. The Labor Arbitration Law does not appear to be contemplating any role for a mediation agreement in subsequent arbitration or litigation proceedings. To be sure, the Labor Arbitration Law does provide that mediation agreements relating to delayed salary payment, employment related medical costs payment, severance fee, and retribution payment are enforceable in a summary debt collection proceeding under China's civil procedure law. See *id.* art. 16. This summary debt collection proceeding, however, is itself toothless. The summary proceeding is designed to allow expeditious enforcement of undisputed debts. Once a debtor logs an objection to the claim with the court, the summary proceeding terminates automatically. See Min shi shu shong fa [Civil Procedure Law] (promulgated by the Nat'l People's Cong., Oct. 28, 2007, effective Apr. 1, 2008), art. 194, LAWINFOCHINA (last visited Feb. 18, 2009) (P.R.C.).

2. *Arbitration*

If parties cannot resolve the dispute through mediation, arbitration is the mandatory second step before either party can bring the dispute to a civil court.⁵² Labor Dispute Arbitration Commissions (LDAC) (lao dong zheng yi zhong cai wei yuan hui, 劳动争议仲裁委员会) have exclusive jurisdiction over labor disputes within their geographic area.⁵³ The government is authorized by the Labor Arbitration Law to establish LDACs at the county level. The members of these arbitration commissions are representatives from local labor administrative authorities, trade unions, and employers.⁵⁴ LDACs act as the secretariat and maintain a list of arbitrators, who must have professional background in law or labor relations.⁵⁵ Most disputes are normally heard by a three-member panel; however, certain small or straightforward disputes are handled by a single arbitrator.⁵⁶

Labor dispute arbitrations are shorter than civil actions.⁵⁷ An arbitral decision normally shall be reached within the forty-five days after a complaint is accepted. This time limit can be extended to sixty days with approval by the head of the arbitration commission.⁵⁸

In most cases, if either party disagrees with an arbitral decision, it can bring an action in the people's courts within fifteen days after the entry of the arbitral decision.⁵⁹ This is not the case for certain disputes where the claims are small in value or involve relatively straightforward matters arising out of implementing national standards on working hours, rest time and holidays, and social security obligations.⁶⁰ In these cases, the employer does not have the right to litigate the dispute anew in a civil court without first successfully vacating the arbitral decision in a court proceeding.⁶¹

If none of the parties starts a civil action within the fifteen days after the entry of the arbitral decision, the decision becomes effective and enforceable directly by a court.⁶²

3. *Employee Protection Provisions*

Protecting workers is one of the express goals of the Labor Arbitration Law and many provisions favor the employee. The new law favors the employee by extending the previous legislation's sixty-day statute of limitations to one year, and for disputes concerning delayed salary payment, the clock does not start to run until after the termination of the

52. Labor Arbitration Law, *supra* note 46, art. 5.

53. *Id.* art. 21.

54. *Id.* art. 19.

55. *Id.* art. 20.

56. *Id.* art. 31.

57. *See id.* arts. 17-51.

58. *Id.* art. 43.

59. *Id.* art. 50.

60. *Id.* art. 47.

61. The Labor Arbitration Law provides that a court can only vacate an arbitral decision for one of the six stipulated reasons, mostly procedural errors or egregious errors in both factual finding and application of law, essentially setting forth a review standard similar to the clearly erroneous standard in the U.S. system. *Id.* art. 49. The intermediate people's court for the area where the arbitral tribunal is located will have the jurisdiction over the petition to vacate the arbitral decision. *Id.*

62. *See id.* arts. 50, 51.

employment relationship.⁶³ In another change, in disputes relating to delayed salary payment, an arbitral tribunal may award payment of employment-related medical costs, severance, and restitution before the entire dispute is settled, on the condition that the tribunal concludes that there is no substantial conflict as to the parties' legal rights and obligations, and that withholding the award could result in serious negative impact on the life of the employee.⁶⁴ Employees are also exempted from their obligation to provide evidence if the evidence is within the control of their employer; in such a case, the arbitral tribunal may shift the burden to proffer evidence to the employer.⁶⁵ Finally, labor dispute arbitration is free of charge; hence, cost will not be a barrier to employees for using this dispute resolution system.⁶⁶

B. IMPLEMENTING REGULATION ON THE LABOR CONTRACT LAW

The passage of the Labor Contract Law in July 2007 stirred up a heated debate in China. Many employers viewed the law as over-protective for the employees, and feared that the provisions relating to permanent employment contracts make it overly difficult to lay off long-term employees, essentially giving long-term employees an "iron rice bowl."⁶⁷

Faced with a tepid response from an important constituency, the State Council decided to proceed with caution. Instead of having the Ministry of Human Resources and Social Security issue an implementing rule around the time the Law went into effect, the State Council issued a regulation to give it higher legal authority.⁶⁸ A proposed regulation was posted on the State Council website on May 8, 2008 for public comments; in the following two weeks, a total of 82,236 responses were received. After extensive consultation with the interested parties, the State Council promulgated the final Implementing Regulation on September 15, 2008.

A substantial portion of the Implementing Regulation clarifies the circumstances under which an employer can lawfully terminate an employment contract. The Implementing Regulation clarifies that an employer's right to lay off employees is applicable for all three types of employment contracts; the law does not grant permanent employment contracts special protection. Permanent employees can be laid off as long as the statutorily prescribed circumstances exist.⁶⁹ In an effort to further clarify the law, as well as to show even-handedness, the implementing regulation provides two summary lists of the prescribed circumstances under which parties can lawfully terminate an employment contract: fourteen circumstances for laying off employees, and thirteen circumstances for employees to fire their employer.⁷⁰

63. *Id.* art. 27, last sentence.

64. *Id.* art. 44.

65. *Id.* art. 39.

66. *Id.* art. 53.

67. *Labor Law Expert Reveals the Inside Considerations Behind the Release of the Implementing Regulation for the Labor Contract Law*, LEGAL DAILY, Sept. 19, 2008, available at http://news.xinhuanet.com/legal/2008-09/19/content_10077323.htm.

68. *Id.*

69. Lao dong he tong fa shi shi tiao li [Regulation on the Implementation of the Employment Contract Law] (promulgated by the State Council, Sept. 18, 2008, effective Sept. 18, 2008) LAWINFOCHINA (last visited Feb. 18, 2009) (P.R.C.).

70. See *id.* art. 26.

The Implementing Regulation also circumscribed the practice of using temporary workers employed by other firms to reduce labor costs. It provides that employers may not establish a subsidiary agency to service its employment needs;⁷¹ and that temp agencies are themselves covered under the Labor Contract Law⁷² and may not hire part-time workers.⁷³

The Implementing Regulation also clarifies that when an employer has been ordered to pay punitive damage because of unlawful termination of labor relationships, the departing employee is not entitled to severance pay, because it has been included in the punitive damage calculation.⁷⁴

IV. Changes to the Foreign Investment Catalogue

China's Catalogue for the Guidance of Foreign Investment Industries (Catalogue) was promulgated in 1995⁷⁵ and is the basic guide for investors of the Chinese government's attitude regarding foreign investment in particular industries.⁷⁶ During the past thirteen years, there have been three revisions of the Catalogue: 1997,⁷⁷ 2002,⁷⁸ and 2004.⁷⁹ In an attempt to align the Catalogue with the Chinese government's new policy toward foreign investment in China, a revised Catalogue was issued on November 22, 2007, which became effective December 1, 2007 (2007 Catalogue).⁸⁰ The revisions were motivated by the government's desire to slowdown rising real estate prices, clean up the environment, and redirect foreign investment into other industries.⁸¹ In approving the 2007 Catalogue, the government's objectives were to (1) upgrade China's industrial structure by encouraging investment projects that use new and high technologies and new materials; (2) reduce

71. *Id.* art. 28.

72. *Id.*

73. Part-time employees are less protected by the Labor Contract Law; most of the provisions applicable to full-time employees are not automatically extended to part-time employees. See Lao dong he tong fa [Labor Contract Law] (promulgated by the Nat'l People's Cong., Jun. 29, 2007, effective Jan. 1, 2008), arts. 68-72, LAWINFOCHINA (last visited Feb. 18, 2009) (P.R.C.).

74. Regulation on the Implementation of the Employment Contract Law, *supra* note 69, art. 25.

75. Catalogue for the Guidance of Foreign Investment Industries (promulgated by the State Planning Comm'n, the State Econ. & Trade Comm'n & the Ministry of Foreign Trade & Econ. Coop., June 28, 1995, effective June 28, 1995) (P.R.C.), available at <http://www.ahinvest.gov.cn/Html/2007-12-20/200712201412235952.html>.

76. In approving overseas investments, government authorities will review the 2007 Catalogue and industry related rules and regulations in the region where the application is filed.

77. Catalogue for the Guidance of Foreign Investment Industries (promulgated by the State Council, Dec. 29, 1997, effective Jan. 1, 1998) (P.R.C.), available at <http://www.fjfdi.com/en/cn/newmain.asp?job=show&id=1320&yuyan=en&menuid=23&txtid=37>.

78. Catalogue for the Guidance of Foreign Investment Industries (promulgated by the State Planning Comm'n, the State Econ. & Trade Comm'n, & the Ministry of Foreign Trade & Econ. Coop., Mar. 11, 2002, effective Mar. 11, 2002) LAWINFOCHINA (last visited Feb. 18, 2009) (P.R.C.).

79. Catalogue for the Guidance of Foreign Investment Industries (Revised 2004) (promulgated by the Nat'l Dev. & Reform Comm'n & the Ministry of Commerce, Nov. 30, 2004, effective Jan. 1, 2005) LAWINFOCHINA (last visited Feb. 18, 2009) (P.R.C.).

80. Catalogue for the Guidance of Foreign Investment Industries (Revised 2007) (promulgated by the Nat'l Dev. & Reform Comm'n & the Ministry of Commerce, Oct. 31, 2007, effective Dec. 1, 2007) LAWINFOCHINA (last visited Feb. 18, 2009) (P.R.C.).

81. *China Market Intelligence—China's 2007 Foreign Investment Guide*, CHINA BUSINESS REVIEW Feb. 1, 2008, <http://chinabusinessreview.com/public/0801/cmi.html>.

support for investment in the manufacturing sector using traditional technologies; and (3) enhance resource conservation.⁸² The revisions reveal a transformation from the old philosophy of welcoming most foreign investment to cherry-picking businesses that will improve China's commercial environment.

A. CATALOGUE DEFINED

The 2007 Catalogue has three specific categories: Encouraged, Restricted, and Prohibited.⁸³ Industries that are not mentioned in the 2007 Catalogue are presumed permitted.⁸⁴ The 2007 Catalogue, however, makes no reference to banned activities.

The 2007 revisions significantly increase the number of industries in each category—Encouraged (257 to 351), Restricted (78 to 87), and Prohibited (35 to 40).⁸⁵ Overall, the number of industries increased from 370 in 2004 to 478 in 2007.⁸⁶ The 2007 revisions also contained more detailed category descriptions.⁸⁷

B. THE CHANGES IN THE 2007 CATALOGUE—A SHIFT IN POLICY

Examining the following eight areas demonstrates the nature of the continuing change in policy from encouraging export-oriented manufacturing toward furthering the economic goals of recent years, which are more equal distribution of income, more even development across the regions of the country, and the reduction of environmental degradation while still encouraging economic growth.

1. *Region*

Historically, development has occurred in the coastal and first-tier cities—Shanghai, Beijing, Shenzhen, and Guangzhou.⁸⁸ Hoping to lure development away from the built-up regions, the 2007 Catalogue was amended to eliminate restrictions on investment in the Western and Central regions, which have lagged in development, and to encourage manufacturing in the rural regions.⁸⁹

82. *Id.*

83. Provisions on Guiding the Orientation of Foreign Investment (promulgated by the State Council, Feb. 11, 2002, effective Apr. 1, 2002) LAWINFOCHINA (last visited Feb. 18, 2009) (P.R.C.).

84. *Id.*

85. 2007 Catalogue, *supra* note 80.

86. *Id.*

87. *Id.* On December 7, 2005, to aid in interpreting the Catalogue, the Interim Regulation on Promoting the Adjustment of Industrial Structures and the Guiding Catalogue for the Adjustment of Industrial Structures (Adjustment Catalogue) were promulgated. The Adjustment Catalogue also divided industries into three categories but with different titles: encouraged, restricted (no new investment permitted), and to-be-eliminated (restructure and shut down as quickly as possible). From the Adjustment Catalogue, restricted has 190 industries and to-be-eliminated has 399. Therefore, the *Prohibited* category for the 2007 Catalogue is actually much larger than listed, which actually expands the number of foreign investments forbidden in China to over 600.

88. See David Dayton, *China Pricing: Sizing up Second-Tier Cities*, SMART CHINA SOURCING, July 3, 2008, <http://www.smartchinasourcing.com/china-competitiveness/china-prices-sizing-up-second-tier-c.html>.

89. See 2007 Catalogue, *supra* note 80.

2. *Conventional Manufacturing*

The 2007 Catalogue's underlying goal is to veer away from overseas investment targeting traditional manufacturing, which China has mastered.⁹⁰ Under the 2007 Catalogue, traditional manufacturing is no longer listed under the category of Encouraged. Attempts to achieve this goal are replete throughout the 2007 Catalogue and specifically mentioned by industry.⁹¹

3. *Real Estate*

The revisions dramatically affect the significant overseas investment in China's real property. The Restricted category now includes the development of large-scale property and development projects and the construction and operation of luxury hotels, villas, high-end offices, and international exhibition centers.⁹² Tract development of land is categorized as Restricted and is only permitted with an equity or cooperative joint venture.⁹³ Real estate transactions in the secondary market and real estate agent and broker businesses are also categorized as Restricted.⁹⁴ But, the construction and operation of golf courses, which previously was allowed, is now listed as Prohibited.⁹⁵

4. *Retail, Wholesale, and Services*

Exporting is now under greater scrutiny, especially for certain products.⁹⁶ Businesses solely involved in exporting products are no longer Encouraged, but rather Restricted, with some limitations of ownership for certain industries.⁹⁷ Modern logistics and outsourcing services have now been added to the Encouraged category.⁹⁸ Advertising and freight forwarding have been reclassified to Encouraged, and credit rating and ranking companies have been reclassified to Restricted.⁹⁹ Financial services, such as accounting and auditing, have remained in the category of Encouraged.¹⁰⁰

90. *See id.*

91. *See id.* Although there are numerous industries that are Restricted and Prohibited, many industries are still listed as Encouraged. *Id.*

92. *Id.* at Catalogue of Restricted Foreign Investment Industries art. VIII, § 2 [hereinafter Restricted Category].

93. *Id.* art. VIII, § 1

94. *Id.* art. VIII, § 3

95. *Id.* at Catalogue of Prohibited Foreign Investment Industries, art. X, § 9 [hereinafter Prohibited Category].

96. For example, toys, furniture, shoes, clothes, high energy, steel, aluminum, paper and cement.

97. 2007 Catalogue, *supra* note 80, at Restricted Category, art. VI. For example, in the food, cotton, medicine, tobacco and automobile businesses, the Chinese party must have a controlling interest for certain retail operations. Although auto manufacturing is also listed as *Restricted*, various aspects of car manufacturing not yet mastered in China are now favored to aid the industry in becoming fully integrated.

98. *Id.* at Catalogue of Industries Encouraged for Foreign Investment, arts. VI –VII [hereinafter Encouraged Category].

99. *Id.* at Restricted Category, *supra* note 92, art. IX.

100. *Id.* at Encouraged Category, *supra* note 98, art. VII.

5. *Entertainment and Leisure*

Operating sports and fitness centers and venues for sports competition, training, and agency services are expressly identified as Encouraged.¹⁰¹ Although operating a performance place is listed as Encouraged, the Chinese party must have the controlling interest.¹⁰² Operating venues for recreational purposes, performing arts agencies, and constructing and operating large theme parks and movie theatres are identified as Restricted, with certain businesses being restricted to a contractual or equity joint venture relationship.¹⁰³

6. *Media, Publications, and Internet.*

Limitations have been imposed on media, publication, and Internet enterprises. The operation of news websites, movie making, online audio-visual programs, Internet online-service centers, and Internet cultural operations are now listed as Prohibited.¹⁰⁴

7. *Environmental Protection*

The 2007 Catalogue clearly shows China's commitment to cleaning the environment. Recycling, clean production, renewable energy, reproducible energy, ecological protection, and efficient usage of resources are now part of the Encouraged category.¹⁰⁵ Manufacturing equipment that relates to environmental protection is now favored.¹⁰⁶

In addition to the distinct revisions previously mentioned, many industry sectors have been delineated as desirable or banned.

- Favored industries: The Encouraged category has grown by 37 percent, with industries that will support the current economic development goals.¹⁰⁷ These industries include the following: (1) financial services, (2) shipping and infrastructure, (3) energy (power generation, grid construction, and clean energy), (4) bio-techs, (5) electricity, (6) aerospace (airports and satellites), (7) chemical (especially supporting aerospace, IT, environmental or shipping industry), and (8) pharmaceutical and healthcare (early diagnosis).¹⁰⁸
- Limited industries: The Restricted and Prohibited categories have had a less dramatic change than the Encouraged category, although both categories have been expanded.¹⁰⁹ Several industries that previously were in the Encouraged category have been reclassified as Restricted¹¹⁰ or even Prohibited.¹¹¹ But, the central gov-

101. *Id.* art. XII §,2.

102. *Id.* art. XII, § 1.

103. *Id.* at Restricted Category, *supra* note 92, art. XIV.

104. *Id.* at Prohibited Category, *supra* note 95, art. X.

105. *Id.* at Encouraged Category, *supra* note 98, arts. III, VIII.

106. Examples of manufacturing for environmental protection are: (1) manufacturing solar cells, (2) preventing pollution, (3) handling garbage in cities, (4) disposing of garbage in villages through organic means, and (5) recycling and re-using scrap tires.

107. 2007 Catalogue, *supra* note 80, at Encouraged Category, art. III. A significant number of the increased categories are specific references to manufacturing.

108. *Id.* arts. III - V.

109. Restricted—11.5 percent and Prohibited—14 percent. *See id.* and para. I.A, above.

110. For example, (1) development and manufacturing of certain coal mine systems and metals and minerals (*See id.* at Restricted Category, art. II), and (2) medical establishments (i.e.: hospitals) (*see id.* art. XIII) are identified as Restricted.

ernment's attitude remained unchanged with respect to certain industries, such as gambling, pornography, and ammunition manufacturing, which continue to be identified as Prohibited.¹¹²

C. EFFECT OF CHANGES TO THE CATALOGUE

For over a decade, the Catalogue has guided investors in making critical decisions when entering and expanding in the China market. The new guidelines make Beijing's intentions evident by plainly stating what types of investments are welcome or banned.¹¹³ With the 2007 Catalogue, the investment climate may never be the same in China again.

V. China's Evolving Environmental Regulation of New Technologies

China is a leader among developing nations in setting up regulatory approaches to waste electronics and agricultural biotechnology, due in part, to its own embrace of the economic benefits of electronics recycling and planting crops and trees using modern biotechnology.

A. CHINA'S REGULATORY FRAMEWORK ADVANCES AGRICULTURAL BIOTECH

Production of biotechnologically modified crops, trees, and products made from them (biotech products) increased substantially worldwide, with China leading the way among developing countries in acreage planted (mainly non-food biotech cotton and poplar trees).¹¹⁴ Studies tracking the use of insect-resistant B.t. cotton in India and China found increased yields nearing 50 percent and 10 percent, respectively, with 50 percent reductions in insecticide use in both countries.¹¹⁵ In July 2008, China dedicated US\$3 billion in state-funded agricultural biotechnology research through 2023, confirming its position that biotech food crops could improve food security (i.e., prevent hunger) provided the

111. For example, (1) the beverage manufacturing industry (specifically, carbonated) and (2) exploration and mining for non-recyclable goods and rare earth minerals are now under the Prohibited category. *See id.* at Prohibited Category, *supra* note 95, arts. II, IV.

112. *See id.* art. III(IV), § 1 and art. X, §§ 10-11.

113. In certain industries and regions, the government is offering foreign enterprise income tax credits, deductions, rebates, import custom duty, value added tax (VAT) exemptions, a VAT refund of 17 percent, and tax holidays, such as 15 percent for hi-tech and a 150 percent super deduction for research and development centers. Industry-specific incentives are also offered for environmental and infrastructure related projects and for companies doing business in the Central or Western Region. Although incentives were offered to all manufacturing companies importing their own equipment in the past, now a tax benefit is offered when importing equipment only for manufacturing companies in the Encouraged category and for companies importing equipment for self use and purchasing domestically manufactured equipment. These incentives may differ considerably from the prior Catalogue or be unavailable even if committed to by government entities due to the reclassification.

114. Press Release, International Service for the Acquisition of Agri-Biotech Applications, Biotech Crops Experience Remarkable Dozen Years of Double-Digit Growth (Feb. 13, 2008), *available at* <http://www.isaaa.org/RESOURCES/PUBLICATIONS/BRIEFS/37/pressrelease/pdf/Brief%2037%20-%20Press%20Release%20-%20English.pdf>.

115. *Id.* The B.t. gene is taken from a soil bacterium and expressed in the leaves of the plant to kill larvae without endangering human health. The use of B.t. poplar trees in China and other faster growing biotech trees could make a substantial contribution via quick re-forestation to mitigate global warming. *Id.*

technology is used safely. China is expected to approve commercial production of domestically developed phytase corn for animal feeding operations (which will reduce phosphorous in feedlot effluent), but allowing growers to plant biotech rice may still be years away.¹¹⁶ If major food crops are allowed out of China's lengthy regulatory process and planted commercially, a long pipeline of pending applications for biotech rice, corn, and soybeans could enter into Chinese production.¹¹⁷

In contrast to planting approval, China has approved imports of biotech agricultural products, primarily through supply chains from South and North American sources that are using only China-approved varieties of biotech crops (for animal feed) and non-biotech sources for foods like soy sauce. China recognizes that many biotech crops are being grown widely, but its regulatory approval process for imported food and feed is stricter than that in the United States. (Certificates for genetically modified (GM) commodities can only be granted for a maximum of five years, and are usually granted for three years or less.) China's 270-day approval process does not commence until initial planting approval has been given in the exporting nation,¹¹⁸ making it hard to ensure approval by harvest time in the exporting nation.¹¹⁹ Because approvals are granted at different rates in different countries, agricultural product shipments may be denied entry due to the presence of an unapproved biotech crop at the port of entry in China.¹²⁰ Such trade disruption also affects China's exports of food and feed. China's rice products exports have been delayed when unintentionally shipped B.t. rice, never approved in China or any other country, disrupted entry of Chinese rice-containing food exports to the European Union (EU) and Japan.¹²¹ It is this sort of disruption that has made China wary of

116. Niu Shuping, *China Approves Big Budget for GMO Amid Food Worries*, REUTERS, July 10, 2008, <http://www.reuters.com/article/environmentNews/idUSPEK11727520080710?pageNumber=2&virtualBrandChannel=0> (approval for commercial production of domestically developed phytase corn).

117. See *id.* See also Mark Petry & Wu Bugang, *U.S. Embassy-Beijing, China Biotechnology Update*, RESOURCE INVESTOR, Sept. 11, 2008, <http://www.resourceinvestor.com/pebble.asp?releid=45975>.

118. Specific rules on imports of biotech products include: (1) Each product imported into China must submit test results or data obtained from in-country field experiments within the exporting country (or a third country) to prove products are safe for human consumption and do not impose biosafety risks to other plants, animals, or the environment, (2) each shipment of biotech products imported into China needs a single or separate safety certificate accompanying each shipment, (3) the Chinese Ministry of Agriculture's approval process can take up to 270 days to grant safety certificates required for imported biotech products, (4) there is a "zero" threshold level for biotech content in foods, and (5) decision-making should be based on demonstrated risks (biohazards) from scientific data, whereby the expert panel should play an important role in the decision-making process. Baohui Song & Mary A. Marchant, *China's Biotech Policies and Their Impacts on U.S. Agricultural Exports to China*, Paper Presented at the International Association of Agricultural Economists, at 8 (Aug. 12-18, 2006), available at <http://ageconsearch.umn.edu/bitstream/25661/1/pp060329.pdf>.

119. See Press Release, Biotechnology Industry Organization, *Biotechnology Industry Approves Product Launch Stewardship Policy* (May 21, 2007), available at http://bio.org/news/pressreleases/newstitem.asp?id=2007_0521_01. (BIO is encouraging its members in its Food and Agriculture Section to seek the appropriate regulatory authorizations from major countries—including the United States, Canada, and Japan—prior to commercializing a new biotech-derived crop.).

120. Paul B. Green, *The Role and Challenges of Biotechnology in Global Grain Markets*, Presentation to Australian Grain Industry Conference (Aug. 8, 2008), available at http://www.ausgrainsconf.com/_data/page/416/P_Green_S2.pdf.

121. Reuters News Service, *Japan Finds Unauthorised GM Rice in China Products*, Aug. 1, 2008, http://www.agbios.com/static/news/NEWSID_9852.php#. In 2007, Japan stepped up testing for the Bt-63 variety of

approving biotech crops for field trials and commercial planting before these crops are approved for use in the EU, Japan, and other major markets.¹²²

China is actively participating in the international meetings seeking a resolution of the problem of trade disruption caused by biotech crops. China is one of the 168 member nations participating in the Codex Alimentarius Commission, a food safety reference body for the World Trade Organization that is considering the problem of trade disruption.¹²³ China is also one of the 149 nations that has ratified the Cartagena Protocol on Biosafety (CPB), which held its fourth meeting of the parties (MOP4) in Bonn in May 2008 to commence work on the development of liability standards for biotech plants—termed living modified organisms (LMOs) under the CPB—moving in international trade. China is a member of the “Friends of Co-Chairs” Contact Group on liability (FOCC), which will meet at least once before the next meeting of the parties.¹²⁴ The next FOCC meeting is set for late February 2009 in Mexico City, Mexico.

B. CHINA’S ELECTRONIC-ELECTRICAL REGULATION ADVANCES TO PHASE II

China’s laws regulating waste electrical and electronic equipment (WEEE) and parallel laws on Reduction of Hazardous Substances (RoHS) are unique in their approach to this problem. RoHS law in China requires labeling of products, while the EU and other nations list six hazardous substances that such equipment should not contain beyond a specified tolerance for incidental content. Moreover, China does not exclude from the scope of its law large stationary industrial tools, which the EU exempts. Because companies prefer to design products to the highest common denominator national standard (ensuring a one-size-fits-all-nations product), companies involved in selling various forms of electrical and electronic equipment must comply with China’s RoHS law (including large stationary industrial tools using these products as components).

China’s first phase of RoHS compliance, involving labeling of products, commenced on March 1, 2007.¹²⁵ For the second phase of the China RoHS regulation, companies will have to eliminate certain hazardous substances and obtain certification, with the list of products and procedures for certification (RoHS Catalogue) still to be determined. On

GM rice in Chinese food imports after the EU detected it in rice imported from China; Japan found three incidents of processed rice product imports from China.

122. See Friends of the Earth Europe, *The Rise in Animal Feed Prices and Potential Impacts in the EU Causes and Links to GMO Policy*, Dec. 2007, at 3, http://www.foeeurope.org/GMOs/animal_feed/GMO_Livestock_briefing.pdf. Monsanto’s roundup ready soybean is approved for import, but not commercial production in China, due to valuable premiums paid for non-GM soy in EU and Japanese market.

123. Nicholas Kalaitzandonakes & Peter W.B. Phillips, *GM Food Labeling and the Role of the Codex*, J.AGROBIOTECHNOLOGY MGMT. & ECON. 3(4), 188-191, Aug. 25, 2000, <http://www.agbioforum.org/v3n4/v3n4a01-editor.htm>.

124. Conference of the Parties to the Convention on Biological Diversity Serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety, May 12-16, 2008, *Report of the Fourth Meeting*, UNEP/CBD/BS/COP-MOP/4/18 (June 25, 2008), available at <http://www.cbd.int/doc/meetings/bs/mop-04/official/mop-04-18-fr.pdf>. 84) <http://www.cbd.int/doc/?meeting=MOP-04>.

125. See Ministry of Information Industry Order No. 39: Management Methods on the Control of Pollution Caused by Electronic Information Products (promulgated by the Ministry of Information Industry et al., Feb. 28, 2006, effective Mar. 1, 2007) *unofficially translated by* Am. Elecs. Assoc. available at http://www.aeanet.org/governmentaffairs/gabl_ChinaRoHS_final_March2006.asp. (last visited Nov. 15, 2008) (P.R.C.) [hereinafter AEA China RoHS].

October 9, 2008, the Chinese Ministry of Industry and Information Technology (MIIT) issued its "RoHS Catalogue Formulation Procedures Document" that explains the process for placing electronic information products (EIP) in the RoHS Catalogue, with high volume items (such as personal computers) first and larger equipment with fewer sales added last. China's National Certification and Accreditation Administration (CNCA) will administer the pre-market certification process under Article 19 of China RoHS.¹²⁶ The American Electronics Association has formed a "China RoHS Steering Committee" that follows China RoHS closely and reports on China's progress regularly.¹²⁷

VI. Auto Parts Panel at the WTO

On July 18, 2008, the WTO Panel convened to decide the complaints by the European Communities (EC), the United States, and Canada against certain Chinese measures on imported auto parts released its final report, ruling against China.¹²⁸ The order lays out a development strategy for China's auto industry and measures to promote the industry's development. Particularly relevant to this dispute are articles contained in its Chapter 11, titled Import Administration. Chapter 11 states that the Chinese government will support the auto industry to develop domestic production capacity and calls for strictly enforcing the applicable tariff rates for auto parts and complete motor vehicles to prevent the loss of tariff revenue.¹²⁹ The Panel is of the view that Policy Order 8 provides legal authority for the other two measures at issue, because both of the other two measures state that they are promulgated in accordance with Policy Order 8.¹³⁰

126. The Chinese Administration for Quality Supervision, Inspection, and Quarantine (AQSIQ) is also responsible for China's regulation of food and feed imports, "CCC mark" certifications, and other certification management issues. *Id.*; see also Song & Marchant, *supra* note 118.

127. See Press Release, Am. Elects. Assoc., AEA China RoHS Steering Committee Assesses Chinese Procedures for the RoHS Catalogue, available at http://www.aeanet.org/PressRoom/gatb_intupdate110408.asp#CertificationProcess.

128. Panel Report, *China-Auto Parts*, WT/DS339/R (July 18, 2008), available at http://www.wto.org/english/tratop_e/dispu_e/339_340_342r_conc_e.pdf [hereinafter Panel Report]; Qi Che Gong Ye Fa Zhan Zheng Ce [the Policy on Development of Automotive Industry] (promulgated by the National Development and Reform Commission, May 21, 2004, effective Mar. 21, 2004), LAWINFOCHINA (last visited Feb. 18, 2009) (P.R.C.) [hereinafter Policy Order Eight].

129. Relevant to the dispute at hand, Chapter 11 also calls for "auto makers who use imported auto parts with essential characters of a complete vehicle to truthfully report to the Ministry of Commerce (MOFCOM), the General Administration of Customs (GAC) and NDRC to facilitate effective administration" (Policy Order Eight, *supra* note 128, art. 53), and "[the government agencies] to strictly apply the tariff rates for auto parts and complete motor vehicles to prevent loss of tariff revenue." (Policy Order Eight, *supra* note 128, art. 54) The order also specifies the criteria for determining when auto parts shall be deemed to have essential character of a complete vehicle. (Policy Order Eight, *supra* note 128, art. 57).

130. Panel Report, *supra* note 128, ¶¶ 7.17, 7.312. China disputed the Panel's finding by claiming that "there is no legal hierarchy between these measures, at least not in the sense that one prevails over the others in case of conflict between them." *Id.* ¶ 7.17. In other occasions, however, China's position on this issue is less clear. For example, in its answer to Panel Question 49, China explained that only chapter 11 of Policy Order Eight "gave rise to the customs enforcement procedures embodied in Decree 125 and Announcement No. 4" (emphasis added) Panel Report, *China-Auto Parts* (add.), WT/DS339/R/Add.1 ¶ 214 (July 18, 2008). The disposition of this issue painted the background color against which the measures at hand had been judged, hence deserves a close scrutiny here. The Panel noted in paragraph 7.13 of the Panel Report that Decree 125 is promulgated jointly by GAC, NDRC, MOF and MOFCOM, a fact that indicates GAC and NDRC are of equal legal standing. This raises whether NDRC has the legal capacity to issue orders to

The second measure, titled the Administrative Rules on Importation of Automobile Parts with the Essential Character of a Complete Vehicle (Decree 125) was promulgated jointly by the General Administration of Customs (GAC), NDRC, the Ministry of Finance (MOF), and the Ministry of Commerce (MOFCOM) on February 28, 2005.¹³¹ Decree 125 sets forth the specific rules for the relevant administrative procedures and the criteria for determining whether imported auto parts shall be deemed to have the essential character of a complete vehicle, and thereby, be classified as motor vehicle for tariff collection purpose. The third measure, referred to in the Panel Report as Announcement 4, stipulates the rules on verification, a process used by the GAC to verify whether imported auto parts have the essential character of a complete vehicle. Imported motor vehicles are subject to a tariff rate of 25 percent on average, while China's WTO bound tariff rate for auto parts is 10 percent.

The complainants claimed that, by applying a tariff rate that exceeds the scheduled bound rate for the individual imported auto parts, China acted inconsistently with its obligations under Article II of the GATT; in the alternative, the complainants argued that China's measures at issue impose an internal charge and burdensome administrative procedures, discriminating against imported auto parts in violation of Article III of the GATT.¹³² Specifically, the complainants argued that the measures at issue violated China's commitment under Articles II & III of the GATT, the TRIMs, and the SCM Agreements, and commitments made under China's Working Party Report.

China maintained that it could apply the scheduled tariff rates for motor vehicles to imported auto parts that have the essential character of a complete vehicle. According to China, the WTO Agreements do not prohibit it from counting together auto parts that are imported in multiple shipments and by different importers but are intended to be assembled into a specific model of vehicles. Where imported auto parts have the essential character of a complete motor vehicle, China asserted it could classify the collected parts as a motor vehicle for tariff collection purpose.¹³³

The Panel rejected China's arguments and found that the measures at issue are inconsistent with China's obligations under Articles II & III of the GATT, and China's Working Party Report.¹³⁴ It decided to exercise judicial economy on the other two claims.

serve as "legal basis/authority" for GAC's subsequent rule making. Indeed, under the PRC Law on Legislation, legal authority for GAC can only come from two types of legal authorities: statutes (Fa Lü, 法律) or State Council Regulations, Decisions or Orders (Xing zheng fa gui, jue ding, ming ling, 行政法规, 决定, 命令). Li fa fa [Law on Legislation] (promulgated by the Standing Comm. Nat'l People's Cong., Mar 15, 2000, effective July 1, 2000). Orders promulgated by NRDC, such as Policy Order Eight, are agency rules (bu meng gui zhang, 部门规章) in the Chinese administrative law system; and, as such, are of lower legal status than statutes and State Council Regulations/Decisions/Orders. Hence, Policy Order Eight is not qualified, at least in law, as a legal authority for Decree 125. A similar analysis applies with regard to Announcement 4.

131. Gou cheng zheng che te zheng de qi che ling bu jian jin kou guan li ban fa [Administrative Rules on Importation of Automobile Parts with Essential Character of a Complete Vehicle] (promulgated by GAC, NDRC, MOF, and MOFCOM, Feb. 28, 2005) [hereinafter Decree 125].

132. Panel Report, *supra* note 128, ¶¶ 4.14-38.

133. *Id.* ¶¶ 4.137-47, 7.377.

134. Noticeable are panel's decision not to exercise judicial economy after it had found the measures at issue in their entirety are inconsistent with Article III, and continued its analysis of claims raised under Article II. The panel noted that "the criteria for the essential character determination, if applied to imported auto parts

A. CONSISTENCY WITH ARTICLE III OF THE GATT

The Panel first addressed the claims under Article III of the GATT, and found that the measures at issue are inconsistent with Article III:2 first and second sentences, and Article III:4, and is not justified under the exemption contained in Article XX(d). Two issues are critical for the Panel's findings under Article III. The first is whether the charge imposed by the measures is an internal charge and not an ordinary tariff, subject to the national treatment standard of Article III.¹³⁵ If the Panel found the charge was an internal charge, inconsistency with Article III's national treatment principle is reflexive because the charge applies only to imported auto parts. The second critical issue is whether the charge is justified under the exceptions found in the GATT.

To decide whether the charge is an internal charge and not an ordinary tariff, the Panel had to determine under which law or regulation the charge arose. China took the position that the charge arose not from the measures at issue, but from China's tariff schedule itself. To China, the measures "merely define the circumstances under which China will classify imported merchandise as falling under different tariff provision."¹³⁶ The Panel did not agree. It considered in passing that, although "other domestic laws or regulations in China may also prove relevant how the imposition of the charge is operated; the 'legal obligation' to pay the charge originates in the measures themselves."¹³⁷

The Panel next concluded that because the charge arises from the measures at issue and not from China's tariff schedule, the charge is an internal charge. After a careful analysis pursuant to the treaty interpretation rules set forth in the Vienna Convention, particularly by comparing the languages used in the French and the Spanish versions of the GATT, the Panel concluded that a charge is internal when the "obligation to pay such charge accrues because of an internal factor . . . occur[ing] after the importation of the product. . . ."¹³⁸ The Panel observed that "ordinary customs duties" should "necessarily be related to the status of the product at [the] single moment" the product enters the territory of another member.¹³⁹ The Panel clarified that final assessment, calculation, and collection of customs duties after the goods have physically crossed the border are common practice and do not contradict the Panel's finding here.¹⁴⁰

in a single shipment, can be considered as an element that would make the charge under the measures fall within the scope of the Article II: 1(b) of the GATT". *Id.* ¶ 7.372.

135. The complainants also claimed that the administrative procedures imposed by the measures at issue are unduly burdensome and discriminated against imported auto part, thereby are inconsistent with China's various obligations. *Id.* ¶ 7.22. Because, to the extent that the administrative procedures are necessary, the legal analyses for them shall be and is actually similar with the analyses for the charge; therefore, the legal analyses are not repeated in the article.

136. *Id.* ¶ 7.18.

137. *Id.* ¶ 7.19. The panel may have noticed its cursory handling of this issue and stated in paragraph 7.19 that this issue is explained in more detail in paragraphs 7.20-7.69. *Id.* Paragraphs 7.20-7.69, however, are panel's factual examination of the measures at issue and recounts of the parties' positions. Although related to the issue at hand, they contain no legal analysis; and, more importantly, these discussion as expressly clarified by the panel are without prejudice to the parties' legal claims. The panel's analysis of this issue remains unclear.

138. *Id.* ¶ 7.132.

139. *Id.* ¶ 7.184.

140. *Id.* ¶ 7.191.

Applying this interpretation to China's measures at issue, the Panel concluded that China's measures are internal measures because "the obligation to pay the charge accrues internally after auto parts enter into the customs territory of China and are assembled/produced into the motor vehicle" under Article 5 of Decree 125.¹⁴¹ On this basis, the Panel easily found that China's measures at issue violated Article III's national treatment principle because they apply to and disadvantage the imported auto parts only.¹⁴²

The Panel completed its analysis by considering China's claims that the measures are anti-circumvention/evasion measures,¹⁴³ justified under Article XX(d) on the grounds that the measures are "necessary to secure compliance with a valid interpretation of China's tariff provision for motor vehicles."¹⁴⁴ The Panel concluded that China's defense is ineffective because China's interpretation of its tariff provisions is itself inconsistent with the GATT.¹⁴⁵ In the alternative, the Panel rejected China's defense on the ground that Policy Order Eight "cast doubt on China's claim that the measures are designed to secure compliance with the tariff schedule"¹⁴⁶ and that China had not established that the type of circumvention the measures are designed to prevent is indeed inconsistent with China's tariff schedule.¹⁴⁷ The Panel also found that the measures are over-inclusive, unduly burdensome, and not necessary because the evasions can be dealt with by investigating individual cases.¹⁴⁸

B. CONSISTENCY WITH ARTICLE II OF THE GATT

Complainants claimed that China applied the higher motor vehicle tariff rate (25 percent on average) to auto parts, which have a bound tariff rate of 10 percent, thereby violating Article II of the GATT by exceeding its bound rate. China maintained that it is allowed to apply the General Interpretation Rule (GIR)(2)(a) to auto parts imported in

141. *Id.* ¶ 7.205. The translation of Article 5, as cited in the panel report, reads: "the reference to automobile parts characterized as complete vehicles in these rules shall mean that the imported automobile parts should be characterized as complete vehicles *at the stage when complete vehicles are assembled.*" (emphasis original). *Id.* Although generally correct, this translation probably should have placed more emphasis on the two phrases "already" (Yi Jing, 已经) and "at the time" (在...时), which appear in the original Chinese text addressing directly the timing issue. This generalized translation may have contributed to the panel's critical but potentially disputable finding that "the obligation to pay the charge accrues internally *after auto parts ... are assembled/produced into motor vehicles,*" *Id.* (emphasis added). The key part of the original Chinese language probably should be translated more literally as "the imported auto parts should be assessed as having the [essential] character of a complete vehicle if they are *already* so at the time of being assembled." The emphasis is that the assessment should be made at the final stage immediately before the action of assembling is complete; in other words, in the state ready to be assembled (在装车状态时).

142. The panel decided to exercise judicial economy on claims under Article III 5. Panel Report, *supra* note 128, ¶ 7.276.

143. *Id.* ¶ 7.316.

144. Panel Report, China-Auto Parts (add.) *supra* note 130, ¶ 764.

145. Panel Report, *supra* note 128, ¶ 7.294.

146. *Id.* ¶ 7.312.

147. The panel and the complainants acknowledged that it would be illegal in many countries for an importer to break a complete vehicle into parts before importation to avoid higher tariff rates applicable to complete vehicles. They would characterize this type of conduct as false declaration, not circumvention. The panel found that this type of conduct, which China claims the measures at issue were designed to prevent, has already been defined and dealt with by China's general customs law, so that there is no need for the measures. *Id.* ¶¶ 7.338-45.

148. *Id.* ¶¶ 7.360-64.

split consignments and multiple shipments¹⁴⁹ in light of a Harmonized Schedule (HS) Committee Decision in 1995, and to classify imported auto parts with essential character of a complete vehicle as motor vehicles for tariff collection purpose pursuant to GIR(2)(a).¹⁵⁰

The Panel did not agree that GIR(2)(a) could be applied to imports in separate shipments.¹⁵¹ Even assuming the HS Committee Decision could be read to have given China the discretion to apply GIR(2)(a) in multiple shipment situations, this does not provide China with an absolute defense against violation of its WTO obligations, because “[s]uch discretion must be exercised in a manner compatible with Members’ obligations under the WTO.”¹⁵²

In all, the Panel did not find the context of the term motor vehicles supports China’s position that the term motor vehicle as used in the tariff schedule covers auto parts and components imported in multiple shipments and assembled into a motor vehicle in the importing country;¹⁵³ the Panel was of the view that such a reading could undermine the objective and purpose of the WTO Agreements, which is “to maintain the security and predictability of reciprocal market access arrangements manifested in tariff concessions.”¹⁵⁴

China argued that numerous other WTO members, including all the three complainants, maintain similar customs practices. In such situations, the concept of subsequent practice would permit China also to maintain such a practice.¹⁵⁵ The Panel found however that the practices identified by China are factually distinguishable from the measures at issue and therefore do not constitute evidence of subsequent practice.¹⁵⁶

After invalidating China’s measures at issue based on the finding that the term motor vehicle does not include auto parts imported in multiple shipments, the Panel continued to address the issue whether the measures are invalid when applied to auto parts imported

149. GIR (2)(a) provides that “Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or failing to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.” *Id.* ¶ 7.679.

150. The HS Committee Decision stated that “questions of split consignments and the classification of goods assembled from elements originating in or arriving from different countries are matters to be settled by each country in accordance with its own national regulations.” *Id.* ¶ 7.425.

151. *Id.* ¶ 7.446. The panel stated that the parties agreed on the meaning of scope of the term “split consignment,” which is limited to a “unique situation where imported parts and components were intended to be part of a single consignment, but were then split into multiple consignments for reasons mainly relating to transportation.” *Id.* ¶ 7.436.

152. *Id.* ¶ 7.446.

153. *Id.* ¶ 7.451.

154. *Id.* ¶¶ 7.460-62.

155. *Id.* ¶ 7.467.

156. China identified that the Canadian Border Services Agency (CBSA) had determined when the importer/retailer purchased complete furniture abroad, and disassembled it into parts for importation separately into Canada over a period of time, the CBSA would consider “the commercial reality of the transaction between the importer and exporter.” The Panel noted that this practice concerns applying GIR 2(a) to multiple shipments arriving over a period of time, it nonetheless concluded that the Canadian measure is dissimilar in the sense that it is much narrower, and applies to situations where furniture is completely manufactured abroad, disassembled for importation and then subject to re-assembly in Canada and the Canadian’s classification decision does not hinge upon the intention of the importer. *See id.* ¶¶ 7.475-81.

in a single shipment by looking at whether any of the criteria set forth in Decree 125 are invalid by themselves, regardless of how it is administered.

The Panel noted that the HS Convention contains no clear criteria for the contracting parties to follow on assessing whether imported parts have the essential character of complete assemblies.¹⁵⁷ But, based on the special structure of China's tariff schedule in the section for motor vehicles, the Panel was able to establish that one of the criteria in Article 21(2) necessarily led to a result that is inconsistent with China's tariff schedule. The Panel also found that using value as a criterion will create undue difficulties for the importers; hence, it is inconsistent with the principles of GIR2(a).¹⁵⁸

C. CKD AND SKD UNDER CHINA'S WORKING PARTY REPORT

Finally, the Panel addressed China's tariff treatment for Complete Knocked-Down (CKD) kits and Semi-Knock-Down (SKD) kits. Although CKD and SKD kits are generally classified as complete vehicles by most of the WTO members, the Panel noted that, in paragraph ninety-three of China's Working Party Report, the representative of China promised that if China created a tariff line for CKD and SKD kits, the tariff rate for CKD and SKD kits would be no more than 10 percent.¹⁵⁹ Canada presented a copy of Customs Import and Export Tariff of the PRC 2005, published by China's Economic Science Publishing House containing a tariff line under the heading for motor vehicles with description code indicating, "complete sets of assemblies." China did not question the legal status of this publication.¹⁶⁰

The Panel found China had created a tariff line for CKD and SKD kits. The Panel also concluded that China's measures at issue had de facto created a tariff line for CKD and SKD kits, because they mandated that CKD and SKD kits be classified under the tariff line for motor vehicles. Because China was found to have created a tariff line for CKD and SKD kits, the Panel concluded that China is bound by its promise made in the Working Party Report and cannot apply a tariff rate higher than 10 percent to imported CKD and SKD kits.

VII. China's Fiscal Stimulus Package

On November 5, 2008, the Chinese government issued an investment package that will extend through December 31, 2010 (Stimulus Package).¹⁶¹ The Stimulus Package responds to the global financial crisis and, on its face, represents a capital injection into the Chinese economy of approximately 4 trillion RMB (US\$586 billion) over the next two

157. *Id.* ¶ 7.540.

158. *Id.* ¶ 7.589. In Article 21(3) of Decree 125, imported auto parts will be deemed to meet the essential character test if "the total price of imported parts accounts for at least 60% of the total price of a complete vehicle of the vehicle model." *Id.*

159. Report of the Working Party on the Accession of China, ¶ 93, WT/ACC/CHN/49 (Oct. 1, 2001); Panel Report, *supra* note 128, ¶ 7.742.

160. China did argue however that it has not amended its tariff schedule officially under the procedure as required under China's domestic law. *Id.* ¶ 7.747.

161. A State Council Standing Committee Conference arranged policies to spur domestic demand and boost the slowing economy, issued on Nov. 9, 2008, available at www.gov.cn/jdhq/2008-11/09/content_1143689.htm (chinese version).

years.¹⁶² The government's plan seeks to spark domestic demand, reverse China's slowing domestic growth, and offset factory shutdowns and massive job losses caused by reductions in the export sector.¹⁶³ The bailout is directed at Chinese infrastructure projects, Chinese technology companies, and China's life-style as well as at holding the global financial crisis at bay.¹⁶⁴ As the Stimulus Package is in its early stage, this summary will identify the main sectors the government is targeting and a recent Value-added Tax (VAT) Regulation that was passed, which is the government's first step at implementing the Stimulus Package.

A. THE TEN POLICIES

The Stimulus Package list ten areas in which the government intends to boost the economy.¹⁶⁵

1. **Housing:** Create a housing development construction program to build more low-rent and affordable housing and speed up slum demolition. Develop pilot programs to rebuild rural homes and encourage nomads to move into permanent housing.

2. **Rural infrastructure:** Rural infrastructure development would be stepped up by improving the roads and power grids in the countryside and drinking water throughout the country. One of the water related projects would be a huge project to divert water from the South to the North of China. There will also be some poverty relief initiatives that will be strengthened.

3. **Transport:** Improvement of the railroads, highways, and airports will be accelerated. Specifically, the government seeks to build more rail links, routes for transporting coal, and new airports in Western China.

4. **Health and Education:** Development of the medical industry by building more hospitals in the smaller towns and cities. Development of the education system by building more schools in Western and Central China and more schools for special needs children.

5. **Environment:** Construct sewage and trash treatment facilities to prevent pollution. Accelerate green belt and natural forest planting programs, energy conservation initiatives, and pollution control projects.

6. **Industry:** Create and modify subsidies for high-tech and service industries.

7. **Earthquake:** Dedicate more money for reconstruction in the Sichuan earthquake region.

8. **Wealth creation:** Increase the minimum price of grain purchases and farm subsidies to raise rural incomes, boost pension funds for a wide range of workers, and provide more allowances for low-income city dwellers.

9. **Tax:** Boost the economy through a new regulation to overhaul the VAT system.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

10. **Finance:** Remove loan quotas and ceilings for all lenders to increase bank credit for priority projects across the board, such as in rural areas and for small businesses, technology companies, iron, and cement companies.¹⁶⁶

B. THE NEW VAT REGULATION-THE FIRST STEP TOWARDS IMPLEMENTATION

As part of the overall reformation of the VAT system, the *Provisional Regulation of the People's Republic of China on Value-added Tax* (VAT Regulation) was issued on November 10, 2008, effective January 1, 2009,¹⁶⁷ to use fiscal policy to boost the economy.¹⁶⁸ The VAT Regulation modified the former VAT laws that had been in effect since January 1, 1994.¹⁶⁹ Under the VAT Regulation, VAT is paid by all entities and individuals (1) engaged in the sale of goods, and (2) that provide processing, repairing and replacement services, and (3) that import goods.¹⁷⁰ The new regulation provides for a host of benefits to taxpayers. Two significant changes that will make taxes less burdensome are that, after January 1, 2009, input tax on fixed asset purchases could be credited against the output tax,¹⁷¹ and the VAT rate on the small-scale taxpayer may be reduced, depending on the situation, to 3 percent, from the current rate of 4 or 6 percent.¹⁷²

C. HOW BIG AND HOW EFFECTIVE?

To date, there is little detail of how the money in the Stimulus Package will be spent.¹⁷³ The amount of money committed by the Chinese government is huge, but there are open questions as to whether the amounts reflect new spending over and above what was already planned, or whether the government is merely shifting money from one sector to another. It is also unclear as to whether all of the measures that appear in the Stimulus Package are really new, or whether some of them may have been previously introduced in other forms.

166. *Id.*

167. Provisional Regulation on Value-added Tax (promulgated Nov. 10, 2008, effective Jan. 1, 2009) LAWINFOCHINA (last visited Dec. 8, 2008) (P.R.C.)

168. A State Council Standing Committee Conference Resolved to Reform VAT in the National Scope, ¶ 2 (issued on Nov 10, 2008), available at http://www.gov.cn/jdhd/2008-11/10/content_1144890.htm.

169. Provisional Regulation on Value-added Tax (promulgated Dec. 13, 1993, effective Jan. 1, 1994) LAWINFOCHINA (last visited Dec. 8, 2008) (P.R.C.) [hereinafter 1994 VAT Reg.].

170. *Id.* art. 1.1.

171. *Id.* art. 10, sec. 1. (Forbids crediting input tax on fixed asset purchases against the output tax, but VAT Reg. has removed this provision).

172. *Id.* art. 12.

173. Duncan Hewitt, *China's Stimulus Package: Questions the Morning After*, NEWSWEEK, Nov. 11, 2008 (QUOTING Stephen Green, Head of China Research at Standard Chartered in Shanghai), available at <http://blog.newsweek.com/blogs/chinacalling/archive/2008/11/11/china-s-stimulus-package-questions-the-morning-after.aspx>.