

# New Developments in the Chinese Legal Regime on Competitive Intelligence

To meet the emerging needs for protecting its economic interests and security, China has commenced adjusting its legal regime on competitive intelligence and reinforcing judicial protection for state secrets relating to economic interests and trade secrets. The most eye-catching changes have been the amendment of the State Secrets Protection Law and the promulgation of the Interim Measures on the Protection of Trade Secrets of Central Enterprises. Equally prominent were the cases involving Stern Hu, a former employee of the Rio Tinto Group, and Xue Feng, an American Chinese geologist.

## Amendment of the State Secrets Protection Law

The amended State Secrets Protection Law, which was adopted by the Standing Committee of the National People's Congress on 29 April 2010, became effective on 1 October 2010.

The major amendments to the State Secrets Protection Law are as follows:

First, the amended law has narrowed down the county-level government's authority to determine the confidentiality of a state secret. Authorities at this level no longer have the power to determine the confidentiality unless otherwise authorized by the upper-level authorities (Article 13). Also, within a competent authority, only the person in charge and those appointed by him/her can determine confidentiality (Article 12).

Second, the amended law has improved rules relating to the confidentiality period and declassification, thereby solving the longstanding problem of "perpetual confidentiality". Article 19 provides for two methods of declassification. One is automatic declassification upon the expiration of the confidentiality period. The other method is for the competent authority to make a special order of declassification *before* the confidentiality period expires. In the latter case, the decision should be based on the grounds that (i) the scope of confidential information has been adjusted so that the subject matter is no longer treated as a state secret, and/or (ii) the disclosure will not impair state security or interests.

Third, the amended law contains more detailed provisions on what acts breach the law, especially acts in relation to the use of a computer or the Internet. Article 48 sets out 12 types of breaches, six of which are directly related to the use of computers or the Internet. In addition, Articles 28 and 50 require internet operators and service providers as well as operators of other public information networks to cooperate with government authorities in state secret protection actions.

## Key Issues

**Amendment of the State Secrets Protection Law**

**Promulgation of the Interim Measures on the Protection of Trade Secrets of Central Enterprises**

## Important Cases

## Other New Developments

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## Promulgation of the Interim Measures on the Protection of Trade Secrets of Central Enterprises

The Interim Measures on the Protection of Trade Secrets of Central Enterprises (**Interim Measures**) were promulgated by the PRC State-Owned Assets Supervision and Administration Commission on 25 March 2010. The Interim Measures are based on the State Secrets Protection Law and the Unfair Competition Law, but go further and require central enterprises to strengthen their protection of trade secrets. Although foreign enterprises and foreign-invested enterprises are not directly subject to the Interim Measures, some of the provisions may still have substantial impact on their commercial activities in China.

### 1. Scope of Trade Secrets

Although Article 2 of the Interim Measures contains the same definition of "trade secrets" as in the Unfair Competition Law, Article 10 of the Interim Measures has actually widened the scope of trade secrets.

In the earlier Several Rules on Prohibiting Infringements upon Trade Secrets promulgated by the State Administration for Industry and Commerce, technical information and business information that fall within trade secrets include "information on designs, processes, product formulations, production techniques, production methods, management know-how, client lists, product sources, production and marketing strategies, the floor price and tender terms in a tender, etc."

In contrast, in Article 10 of the Interim Measures, business information and technical information that is defined as protected trade secrets includes, respectively, "information on strategic planning, management methods, business modes, restructuring and listing, mergers and acquisitions, transfer of ownership, financial matters, investment and financing decisions, production and purchase/sale strategies and reserves of resources, customer information and tender information" and "information on designs, processes, product formulations, production techniques, production methods and technical know-how". While the coverage of technical information remains substantially the same as that specified in the earlier rules, the coverage of business information has been widened substantially with many other types of financial and strategic information included.

### 2. Protection for Trade Secrets

Articles 19 to 29 of the Interim Measures contain detailed requirements on measures that central enterprises should take to protect their trade secrets. The following provisions are particularly relevant to the commercial activities of central enterprises and their trade counterparties:

- Article 19: The employment contracts between a central enterprise and its employees shall contain a confidentiality clause. The central enterprise shall also enter into non-competition agreements with its core personnel who have access (sometimes extensive) to trade secrets.
- Article 21: A central enterprise shall enter into confidentiality agreements with its counterparties in relation to activities that involve trade secrets such as consultations, negotiations, technical reviews, achievement accreditation, cooperative development, technology transfer, joint venture and equity participation, external auditing, due diligence investigation, inventory check and asset verification.
- Article 22: A central enterprise shall establish and improve its trade secret confidentiality review procedures in the course of disclosure of information regarding its overseas and domestic issuance of securities, listing and the relevant listed company.

Additionally, the requirement under Article 28 that a central enterprise shall actively take legal action against infringement of its trade secrets is likely to make its trade counterparties and competitors subject to a higher risk of being sued for alleged infringement of trade secrets.

### Important Cases

#### 1. Alleged Infringement of Trade Secrets by Stern Hu and Others

On 29 March 2010, the No. 1 Intermediate People's Court of Shanghai convicted Stern Hu, Ge Mingqiang, Liu Caikui and Wang Yong, who were then employees of the Rio Tinto Group, of infringement of trade secrets and other corruption offences, sentencing them to imprisonment for seven to 14 years. On appeal, the Higher People's Court of Shanghai upheld the first instance judgment. In a related case, Tan Yixin, then the Assistant General Manager of China Shougang International Trade & Engineering Corporation, and Wang Hongjiu, then the Manager of International

Ocean Shipping Department of Shandong Laiwu Steel International Corporation, were sentenced to imprisonment for disclosure of trade secrets to the Rio Tinto Group.

One of the most important issues in dispute was whether the relevant information concerned constituted trade secrets. It included information regarding meetings of the China Steel Industry Association on the import of iron ore, reduction in production of Shougang Group and a circular of the China Steel Industry Association on the opening of Letters of Credit relating to the import of iron ore. The No. 1 Intermediate People's Court of Shanghai believed that " the information owner had taken confidentiality measures to protect the information before the defendants had access to it, the persons who disclosed the information were well aware of their confidentiality obligations and the information had not been declassified before the defendants had access to the same, hence the information concerned was not in public domain; additionally, it was apparent that all of the information concerned was related to the trading of iron ore and the negotiations thereon and was directly relevant to the economic interests of its owner as it could be used for practical purposes and could bring actual competitive advantages to its owner". For this reason, the court determined that the information concerned were trade secrets.

## 2. Alleged Stealing of State Secrets by Xue Feng

According to media reports, Xue Feng, an American Chinese geologist, was sentenced to imprisonment for eight years for having committed the offence of stealing China's state secrets in his purchase and sale of a commercial database of China's oil industry.

As the judgment is yet to be made public, the specific facts and reasoning remain unclear.

## Other New Developments

A number of industries and authorities have promulgated their specific rules on coverage and protection of state/trade secrets. The industries concerned include electricity and electronics, aviation and aerospace, chemicals, oil and petrochemicals, energy and metals and others where foreign and foreign-invested enterprises carry out their business in China.

Following the amendment of the State Secrets Protection Law and the promulgation of the Interim Measures, it is very likely that those industries will revise their specific rules on coverage and protection of state/trade secrets. For example, it has been reported that the three top oil companies in China – China National Petroleum Corporation, SINOPEC Corporation and China National Offshore Oil Corporation – are revising the Rules on State Secrets and the Specific Scope of Each Level of Secrets in Petroleum and Petrochemical Industries. We will closely watch any developments in this and other industries.

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