

ASIAN DEVELOPMENT BANK

TAR:PRC 38094

TECHNICAL ASSISTANCE

TO THE

PEOPLE'S REPUBLIC OF CHINA

FOR

COMPETITION POLICY AND LAWS

December 2004

CURRENCY EQUIVALENTS

(as of November 2004)

Currency Unit	–	yuan (CNY)
Y1.00	=	\$0.121
\$1.00	=	CNY8.277

ABBREVIATIONS

ADB	–	Asian Development Bank
EA	–	executing agency
LAC	–	Legislative Affairs Commission
M&A	–	merger and acquisition
MOFCOM	–	Ministry of Commerce
NPC	–	National People's Congress
OECD	–	Organisation for Economic Co-operation and Development
PRC	–	People's Republic of China
SAIC	–	State Administration of Industry and Commerce
SETC	–	State Economics and Trade Commission
SOE	–	state-owned enterprise
TA	–	technical assistance

TECHNICAL ASSISTANCE CLASSIFICATION

Targeting Classification	–	General intervention
Sector	–	Law, economic management, and public policy
Subsector	–	Economic management
Theme	–	Competition
Subtheme	–	Competition laws

NOTE

In this report, "\$" refers to US dollars.

This report was prepared by Xiaohua Peng.

I. INTRODUCTION

1. The Government of the People's Republic of China (PRC) requested that the technical assistance (TA) for Development of Economic Laws II focus on the making of competition laws, including amending the Law against Unfair Competition (adopted in September 1993) and preparing the Anti-Monopoly Law.¹ Fact-Finding Missions (the Mission)² of the Asian Development Bank (ADB) visited Beijing and held meetings with officials of the Ministry of Finance, Legislative Affairs Commission (LAC) of the National People's Congress (NPC), Ministry of Commerce (MOFCOM), and State Administration of Industry and Commerce (SAIC). Understanding was reached on the TA objective, scope, cost estimates and financing plan, terms of reference for the consultants, and implementation arrangements.

II. ISSUES

2. More than two decades of economic reform and opening policy released unprecedented dynamics in PRC's economy. Developing and maintaining an effective and fair competition environment are critical to the success of further reforming PRC's economy and meeting challenges arising from the opening up of PRC's market to foreign investors after the PRC joins the World Trade Organization.

3. Unfair competition is recognized by the Government, market players, and consumers as a major impediment in improving efficiency, safeguarding consumers' interest, and promoting entrepreneurship in the country. Unfair competition practices include, among others, practices infringing on intellectual property rights, corrupt activities such as offering bribes and kickbacks in sale promotion, misleading and deceptive advertisement, illegal possession of commercial secrets, defamation of competitors, market collusion, tied sales, monopoly at predatory prices, and other monopoly practices. Because of the greater complexity in the policy-making and implementation process, monopoly practices stand out as a more difficult impediment to the maintenance of a fair and competitive market.

4. Currently in the PRC monopoly practices are found in three forms: (i) the sectors in which State-owned enterprises (SOEs) have been traditionally dominant and where monopolies are achieved and maintained due to the link to administrative authorities before the completion of SOE reform; (ii) protection of regional markets by the local governments; (iii) commercial monopolies through various unfair competition activities in the market, in particular foreign investment through mergers and acquisitions. These monopoly practices are mingled, respectively, with SOE reform and privatization, regional development, industry and sector development, and foreign investment policies. The natural monopoly in certain sectors such as power supply and transmission, railway, and telecommunications raises the issue of how to keep the economy of scale on one hand and, on the other, introduce and maintain competition in these sectors.

5. The current legal and regulatory regime is not adequate to address the cited three types of monopolies. The approach in existing laws only defining certain monopoly practices by relatively more static tests fails to offer a theoretical underpinning for analyzing and balancing the complicated anti-monopoly and other policy objectives and to designate an authority or

¹ The TA is included in the Country Strategy and Program (2004-2006) and first appeared in *ADB Business Opportunities* (Internet Edition) in June 2004 under the name Development of Economic Laws II – Competition Policy and Anti-Monopoly Law.

² The Mission comprised a fact-finding mission on 8–15 June consisting of Xiaohua Peng, mission leader/principal counsel; and Kamal Ahmad, counsel; and a fact-finding follow-on mission on 17–25 September 2004 comprising Xiaohua Peng, mission leader/principal counsel.

authorities in charge of formulating and implementing anti-monopoly policies. Therefore, the regulatory regime based on existing laws cannot provide effective enforcement procedures for anti-monopoly investigation, public hearing and debate, determination of monopoly; and impose administrative or judicial measures to curb, break, and penalize illegal monopolies.

6. Since no single law applies specifically to anti-monopoly activities, the rules on anti-monopoly are currently scattered in different laws and regulations, such as the Law against Unfair Competition, Price Law (adopted in 1997), Telecommunication Regulation (adopted in September 2000), and Provisional Method for Regulating Mergers and Acquisitions of Chinese Enterprises by Foreign Investors (adopted in 2001).³ The scattered rules cloud the policy imperatives because of lack of clear policy objectives and parameters for determining illegal monopoly, and leave room for contradictory legal provisions.

7. The responsibilities to safeguard competition were shared mainly by the former State Economics and Trade Commission (SETC),⁴ SAIC, and the then State Development Commission (renamed as the National Development Reform Commission). After the Government restructuring, the newly established MOFCOM (based on the former Ministry of Foreign Trade and Economic Cooperation) was also involved in the formulation of competition policy and regulations regarding monopoly activities, particularly in connection with foreign investment. In the absence of a clearly designated competition policy authority, the regulators in certain sectors are left with the powers to form industry policies and competition policy in the concerned sectors the result is policy conflicts and entrenched monopoly in the sectors dominated by SOEs.

8. To maintain a competitive market in general and streamline the formulation of the competition policy and enforcement of the anti-monopoly law in particular, the Government has decided to address the above issues through the preparation and adoption of an Anti-Monopoly Law and revision of the Law against Unfair Competition within the 5-year term of the 10th NPC (2002-2007). The new competition laws will cover separately the monopoly activities and other unfair competition activities, clarify regulatory responsibilities, and set up a regulatory framework for effective implementation of the Anti-Monopoly Law and the amended Law against Unfair Competition. In addition, the legislation process will help address the following important conceptual, institutional, and procedural issues.

9. **Core Objective and Possible Conflict with Other Objectives.** Competition policy is generally directed at enhancing economic efficiency through the promotion of effective competition. To this end, competition policy aims to eliminate or curb producers' abuse of dominant market position and price fixing while reducing barriers to entry. The result will be greater than consumer welfare and economic efficiency. Consumers will be able to access a wider choice of products at lower costs. Producers get incentives to expand production up to the optimal level. However, even such a benign policy could at times be at odds with other important public policy objectives and goals, such as those of trade policy, industrial policy, regional development policy, intellectual property policy, science and technology policy, and foreign investment policy. As in any other public policies, the gains and losses from competition policy have to be weighed in each particular case.

³ The Provisional Method on Regulating Mergers and Acquisitions of Chinese Enterprises by Foreign Investors was drafted with assistance of ADB-funded TA 3672-PRC: *WTO Membership and Foreign Trade Law Reform*. (ADB, Manila.

⁴ SETC was dissolved during Government restructuring in March 2003 and the responsibility to ensure market competition was transferred to the Ministry of Commerce.

10. **Competition Policy and Law Authority(ies).** Effective discharge of competition policy and laws requires an administrative mechanism to implement such policies and laws. In a constantly evolving market place, the authority(ies) or agency(ies) entrusted with execution of competition policy and laws must be able to anticipate changes and set rules that address new demands of the marketplace. It must have powers to secure essential data and other information on noncompetitive business practices and enforce penalties. It must be able to coordinate action with other relevant Government agencies.

11. **Relationship between Anti-Monopoly Law Authority and Sector Regulators.** As a general matter, competition laws apply to all sectors and actors in the economy unless specific exemptions are granted. Consequently, an anti-monopoly law impinges on a wide variety of public policies such as trade and industrial policy, privatization and reform of SOEs policy, research and development policy, regional development policy, and so on. To make competition laws most effective, they must be harmonized with all other policies and regulations that relate to them. Where state priorities determine the need for certain exemptions, the priorities have to be identified and the purpose and nature and period of exemptions have to be delineated. Such a policy-making process involves interaction between the competition policy authority(ies) and sector or industry regulators.

12. **Legal Procedure and Role of the Judicial System.** Once competition laws are adopted and implementation agencies are designated, competition policy formulation and implementation will no longer be exclusively kept in the domain of administrative authorities. Nongovernment parties will be able to initiate anti-monopoly investigation and seek redress. Competition laws will make policy formulation and implementation more transparent and predictable, and will, by virtue of the administrative litigation procedures in the PRC, subject the decisions of the competition policy and law authorities to contest and challenge in court. The drafters of competition laws need to take into account the legal procedure and role of the judicial system in the area of competition policy and law, and provide appropriate administrative and judicial procedures as well.

III. THE TECHNICAL ASSISTANCE

A. Purpose and Output

13. The TA will assist the Government in establishing the legal and regulatory framework for formulating and implementing competition policy by preparing the Anti-Monopoly Law and amending the Law against Unfair Competition. The major outputs of the TA will be the Anti-Monopoly Law and the amendment to the Law against Unfair Competition. The TA framework is in Appendix 1.

B. Methodology and Key Activities

14. The general methodology of the TA emphasizes assistance to the Government agencies in their strategically important task by exposing these agencies to the best international experience in formulating legislation for competition laws.

15. The TA will facilitate the legislative process for competition laws through the following inputs:

- (i) experts' review of and comments on the draft Anti-Monopoly Law and draft amendment to the Law against Unfair Competition, and providing advice on legal and economic theories that underpin anti-monopoly analysis and international

experience of implementation authorities and regulatory regimes for competition policy and laws;

- (ii) training for Government staff involved in preparing and enforcing the Anti-Monopoly Law and amendment to the Law against Unfair Competition;
- (iii) exchange of views and sharing of experiences with competition law authorities of the other countries in the world; and
- (iv) comparative study of international practices in implementing an anti-monopoly law.

C. Cost and Financing

16. The total cost of the TA is estimated to be \$795,000 equivalent, of which \$413,000 is in foreign currency cost and \$382,000 equivalent in local currency. ADB will provide \$600,000 equivalent on a grant basis, financed from ADB's TA funding program, to finance the total foreign currency cost and \$187,000 equivalent of the local currency cost. The TA funds will finance (i) international and domestic consulting services; (ii) cost for resource persons and speakers; (iii) costs of workshops, seminars, and international symposiums; (iv) support for domestic investigation workshops; (v) external training; (vi) purchase of equipment; (vii) comparative study including collection, translation, and summary of foreign laws, treatises, and papers; and (viii) other administrative costs such as production of reports and workshop proceedings. The Government will provide \$195,000 equivalent as counterpart contribution in the form of counterpart staff, conference venue, office, local communications and local transport, interpretation, and general administration. The detailed breakdown costs and financing plan for the TA is shown in Appendix 2.

17. The Organisation for Economic Co-operation and Development (OECD) has expressed strong interest in cooperating with ADB in providing support to the Government in the area of competition policy and laws. It had provided support in preparing the Anti-Monopoly Law. Because of its wide-ranging experience, OECD will be able to make valuable contribution in kind to the TA, i.e., inputs of expertise of its staff; training facilities based in Seoul, Republic of Korea; and networking with the competition policy and law authorities of major economies in the world. A memorandum of understanding will be discussed and entered into by ADB and OECD at the initial TA implementation stage to set a framework for cooperation on a parallel basis to accomplish the purposes of the TA.

D. Implementation Arrangements

18. Services of international consultants (6 person-months) and domestic consultants (8 person-months) will be provided. The international consultants will be experts in competition policy and laws, with various emphases such as international experiences and practices, anti-monopoly law authority, coordination of policy objectives, relationship between the authority(ies) to enforce competition laws and sector regulators, and implementation of anti-monopoly law in M&A transactions. International and domestic resource persons will be invited to provide expert inputs in workshops and symposiums. The outline terms of reference for the consultants and resource persons are attached as Appendix 3. Individual international and domestic consultants will be engaged in accordance with ADB's *Guidelines on the Use of Consultants* and other arrangements satisfactory to ADB for selecting and engaging domestic consultants. The equipment, to be provided under the TA to facilitate the three executing agencies' (EAs) implementation involving a number of workshops and symposiums, will be procured by the EAs

in accordance with ADB's *Guidelines for Procurement*. An advance facility will be provided for the equipment, external training, workshops and seminars, and international symposium.

19. MOFCOM and LAC will be the EAs for preparing the Anti-Monopoly Law; and SAIC and LAC will be the EAs for the draft amendment to the Law against Unfair Competition. Based on the legislation drafting procedure in the PRC, TA implementation will be carried out in two phases (Appendix 3). In phase 1, as designated Government agencies for preparing the initial draft of the competition laws, MOFCOM will be responsible for the initial version of the Anti-Monopoly Law, and SAIC for the initial draft of revisions to the Law against Unfair Competition. MOFCOM and SAIC will focus on the objectives, general structure, basic principles, legal procedures, implementation authorities, and relationship between the competition law authorities and the sector regulators implementation. In phase 2, LAC will be responsible for finalizing the draft Anti-Monopoly Law and the draft amendment to the Law against Unfair Competition. LAC will be able to more effectively address the general issues in competition laws such as coordination between the two laws, adjustment of other laws due to the introduction of the Anti-Monopoly Law and the amendment to the Law against Unfair Competition, division of roles between the national law and administrative and ministerial regulations, and the role and procedures regarding the judicial system in enforcing competition laws.

20. A senior official at the vice minister level of each of LAC, MOFCOM, and SAIC will provide overall leadership and guidance in the implementing each relevant TA component. A working group to be formed in each of LAC, MOFCOM, and SAIC and to be led by a senior official will be responsible for detailed implementation of the TA. A coordination group of LAC and MOFCOM and a coordination group of LAC and SAIC will be set up to coordinate the respective drafting work for the Anti-Monopoly Law and amendment to the Law against Unfair Competition. MOFCOM, SAIC and LAC will provide the initial and final draft of the Anti-Monopoly Law and the amendment to the Law against Unfair Competition to the international and domestic consultants and resource persons for their review and comment. MOFCOM, SAIC, and LAC will provide the international consultants with a list of the specific issues for which international expertise is needed, and, where necessary, background information regarding these issues. TA implementation is expected to begin in January 2005 and be completed at the end of December 2006.

IV. THE PRESIDENT'S DECISION

21. The President, acting under the authority delegated by the Board, has approved the provision of technical assistance not exceeding the equivalent of \$600,000 on a grant basis to the Government of the People's Republic of China for Competition Policy and Laws, and hereby reports this action to the Board.

TECHNICAL ASSISTANCE FRAMEWORK

Design Summary	Performance Indicators/Targets	Monitoring Mechanisms	Assumptions and Risks
Goal Development and maintenance of a fair and competitive market in the People's Republic of China	Adoption of Anti-Monopoly Law and amended Law against Unfair Competition	TA completion report	
Purpose Development of legal and regulatory framework for implementation of anti-monopoly policy and law against unfair competition	Completion of the final draft of Adoption of Anti-Monopoly Law and amended Law against Unfair Competition	TA review missions	Risks: Delay in preparing the legislation and its adoption due to the fact that legislation is a political process
Outputs (i) Draft Anti-Monopoly Law (ii) Draft amended Law against Unfair Competition	Initial and final draft of Anti-Monopoly Law Initial and final draft of amended Law against Unfair Competition	TA completion report Proceedings of workshops and seminars Consultants' and resource persons' review and comment on the draft legislation Draft legislation	Risks: Change of the Government legislative agenda affecting the plan for a new Anti-Monopoly Law and amended Law against Unfair Competition
Activities Comparative study External training Domestic workshops and international seminars	Compilation and translation of foreign competition laws Summary of training topics and benefits Workshop and seminar proceedings or resource persons' reports	TA review missions Supervision over implementation Supervision and coorganization of workshops and seminars	Risks: Effectiveness of the executing agencies in absorbing international experiences through comparative study and external study Effectiveness of domestic workshops and the international symposium in introducing best international practices
Inputs Experts' comments	Consultants' and	Obtaining, review and	Risks: Failure of consultants'

Continued on next page

Design Summary	Performance Indicators/Targets	Monitoring Mechanisms	Assumptions and Risks
<p>Legal materials</p> <p>Training</p> <p>Workshop and seminar support</p> <p>Office equipment</p>	<p>resource persons' reports</p> <p>Compilation, translation, and study of legal materials</p> <p>Attendance in training activities</p> <p>Conduct of workshops and seminars</p> <p>Procurement of equipment</p>	<p>comment on the reports</p> <p>Supervision over comparative study</p> <p>Supervision of training activities</p> <p>Supervision over domestic workshops and supervision and organization of international seminars</p> <p>Supervision of procurement</p>	<p>performance to meet the requirements</p>

COST ESTIMATES AND FINANCING PLAN
(\$'000)

Item	Foreign Exchange	Local Currency	Total Cost
A. Asian Development Bank (ADB) Financing^a			
1. Consultants			
a. Remuneration and Per Diem			
i. International Consultants	108.0	0.0	108.0
ii. Domestic Consultants	0.0	34.0	34.0
iii. Honorarium and Per Diem for International and Domestic Resources Persons	40.0	31.0	71.0
b. International and Local Travel	116.0	8.0	124.0
2. Equipment ^b	30.0	0.0	30.0
3. Workshops and Symposiums ^c	0.0	56.0	56.0
4. External Training	60.0	0.0	60.0
5. Comparative Study	0.0	30.0	30.0
6. Contingency	59.0	28.0	87.0
Subtotal (A)	413.0	187.0	600.0
B. Government Financing			
1. Counterpart Staff	0.0	90.0	90.0
2. Office Accommodation	0.0	12.0	12.0
3. Local Transportation	0.0	3.0	3.0
4. Local Communication	0.0	6.0	6.0
5. Interpretation and Translation	0.0	3.0	3.0
6. Investigation Activities	0.0	21.0	21.0
7. Seminar and Symposium			
a. Venue	0.0	30.0	30.0
b. Organization and Administration	0.0	18.0	18.0
8. Administration	0.0	12.0	12.0
Subtotal (B)	0.0	195.0	195.0
Total	413.0	382.0	795.0

^a Financed by ADB's technical assistance funding program.

^b Including desktop and notebook computers and software, scanners, multi-media projector and copy machine.

^c Including logistic and materials costs and conference equipment rental and interpretation.

Source: ADB estimates.

IMPLEMENTATION ARRANGEMENTS AND OUTLINE TERMS OF REFERENCE

A. Implementation Arrangements

1. Implementation of the technical assistance (TA) will be divided into two phases.

1. Phase 1

2. Phase 1, which will be carried out mainly by Ministry of Commerce (MOFCOM) and State Administration of Industry and Commerce (SAIC), will focus on preparing and improving the initial draft Anti-Monopoly Law and initial draft amendment to the Law against Unfair Competition. The emphasis of the assistance will be on the following aspects:

- (i) Study and identify the broader implication of the adoption of competition laws for other economic policies, industry and sector development policies, and regional development policies.
- (ii) Articulate basic principles, rules, and procedures for applying and enforcing the anti-monopoly law, especially to the unique situation in the People's Republic of China (PRC).
- (iii) Articulate the role, power, and responsibilities of the anti-monopoly authority and anti-unfair competition authorities in other countries and finalize the proposal for the same in the PRC.
- (iv) Share experiences in other countries on the mechanism for coordinating a competition policy, other policies, and the competition policy authority with other regulators.

2. Phase 2

3. Phase 2, to be carried out mainly by the Legislative Affairs Commission (LAC), will concentrate on finalizing the Anti-Monopoly Law and the amendment to the Law against Unfair Competition, with emphasis on the following aspects:

- (i) Take into account the stakeholders other than the administrative authorities.
- (ii) Adjust to the other laws consequent upon the introduction of the Anti-Monopoly Law and the amended Law against Unfair Competition.
- (iii) Study and determine the role of the judicial system in enforcing a competition law, in particular, the Anti-Monopoly Law.

3. Inputs

4. The following activities will be undertaken to help achieve the above objectives:

- (i) Building capacity through external and domestic training to help the staff responsible for drafting the competition laws familiarize themselves with the basic concepts, jurisprudence, objectives, principles, and procedures of competition laws, in particular, the anti-monopoly law and the economic theories on competition.

- (ii) Collect, translate and summarize foreign countries' competition and anti-monopoly laws and regulations/
- (iii) Hold small-scale domestic workshops to investigate and review and comment on the initial draft of the Anti-Monopoly Law and the amendment to the Law against Unfair Competition.
- (iv) Make a comparative study of foreign countries' laws and the administrative practice of their competition and anti-monopoly authorities.
- (v) Hold an international symposium on competition policy and anti-monopoly law and on law and practice against unfair competition.
- (vi) Obtain domestic and international experts' inputs in the areas of competition policy, anti-monopoly law, and law and practice on anti-unfair competition.

B. Outline Terms of Reference

1. International Consultants and Resource Persons

5. Two individual international consultants (6 person-months) will be engaged. One will be an expert in legal and regulatory frameworks and the other in applying the anti-monopoly and competition law in merger and acquisition (M&A) transactions.

6. **Legal and Regulatory Framework Expert** (3 person months). The expert will

- (i) advise on anti-monopoly laws and competition policy, competition policy and other economic policies and sector development policies, and coordination of implementation of these policies;
- (ii) prepare an introduction to the regulatory framework in major countries, and competition and anti-monopoly authorities and other authorities; and
- (iii) play a lead role in the symposium on the regulatory framework to be held under the TA by assisting in organizing the symposium, making a keynote presentation at the symposium, and assisting in compiling the proceedings.

7. **Anti-Monopoly and M&A Expert** (3 person months). The expert will

- (i) review and analyze the existing laws and regulations governing M&A transactions, such as the Company Law, Securities Law, regulations on acquisition of publicly listed companies, and regulations on transnational M&As.
- (ii) Prepare an introduction to the legal regime regulating M&A transactions in major countries; and
- (iii) advise on how to address anti-monopoly issues in M&A transactions in the Anti-Monopoly Law.

8. The international resource persons will be internationally reputed experts in the areas of competition policy and laws. They are expected to play the following roles:

- (i) review and comment on the draft Anti-Monopoly Law and amended Law against Unfair Competition, and analyze and advise on the issues encountered by MOFCOM, SAIC, and LAC based on the list of issues these agencies provided.
- (ii) advise on the legal and regulatory framework of competition policy, competition authorities, relationship between competition authorities and other sector or industry authorities, anti-monopoly issues in M&As, and administrative and judicial procedure regarding anti-monopoly cases; and
- (iii) deliver a paper at the workshop or symposium on the designated topics in the areas of competition policy, anti-monopoly law, and law against other unfair competition practices.

2. Domestic Consultants and Resource Persons

9. The 3–5 domestic consultants (8 person-months) including the domestic resource persons will be experts in the areas of (i) anti-monopoly law and unfair competition law, and (ii) M&As, and (iii) unfair competition and monopoly practices in the PRC and its laws and regulations regulating such activities.

10. The domestic consultants including the domestic resource persons who are specialists in areas (i) and (ii) in para. 9 will

- (i) participate in the work to draft an Anti-Monopoly Law and amend the Law against Unfair Competition, and help prepare the draft law, review and comment on the draft law; and
- (ii) advise on the competition policy, anti-monopoly law, and law against other unfair competition based on the comparative study of other countries' experiences.

11. The domestic consultants who are specialists in area (iii) in para. 9 will

- (i) assist MOFCOM, SAIC, and LAC examine the current situation in the market.
- (ii) assist MOFCOM, SAIC, and LAC in conducting domestic workshops by training the drafting staff.
- (iii) assist MOFCOM and LAC in summarizing and analyzing the consultants' reports and preparing conference proceedings for the domestic workshops.
- (iv) Assist MOFCOM and LAC in undertaking the comparative study.