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Enviro Compliance Abroad: The China Conundrum

Law360, New York (December 6, 2010) -- In this era of economic globalization, American companies are increasingly looking to overseas markets for manufacturing and export opportunities. One of the largest of these markets is China.

While China provides rich expansion opportunities for American companies, the regulatory landscape — particularly in the environmental arena — creates pitfalls for the unwary. China's myriad environmental regulations coupled with enforcement uncertainty present further challenges. Take, for example, an American car manufacturer (ACM) of solar-powered cars seeking to open a new plant in China. ACM must comply with Chinese environmental laws on renewable energy, energy conservation and clean production. Depending on where the plant is located within China, the degree to which these laws are enforced, and the level of risk associated with noncompliance, will vary.

Once built, suppose ACM's Chinese plant accidentally releases hazardous substances into a nearby river. If the river and drinking water are contaminated, and residents suffer personal injuries as a result of the contamination, the manufacturer could face liability in both China and the U.S. This article will highlight select areas of environmental regulation through which an American manufacturer, such as the fictional ACM, must navigate in order to do business in China.

Complying With Chinese Environmental Regulations

In the early 1970s, China, like the U.S., experienced a surge in environmental regulation. The country's environmental law framework now includes regulations on renewable energy, oil and gas pipelines, water pollution, energy conservation, clean production, water and soil conservation, marine protection, and noise pollution, among other areas.

Although promulgated at the central government level, many of these regulations are enforced by local governments. This oftentimes results in unpredictable and disparate enforcement. Local governments in industry-friendly districts may be less inclined to strictly regulate environmental compliance than local governments in other districts, which may impose harsh and severe penalties for noncompliance.

Consider ACM's hypothetical manufacturing plant in China. As a manufacturer of solar-powered cars, ACM would be regulated by China's Renewable Energy Law, which regulates the exploitation of renewable energy. This law also requires uniform technical standards throughout China for "technology and products related to renewable energy." Therefore, ACM would need to ensure that its products and manufacturing processes are compliant with relevant technical standardization requirements.[1]

ACM would also need to consider Chinese energy conservation laws which could impact its manufacturing operations. China has banned the manufacture, sale and import of certain energy-consuming products and equipment that do not comply with statutory standards for

energy efficiency. The country also requires that energy-consuming entities such as ACM establish an accountability system for energy conservation targets.

Additionally, companies engaged in the manufacture, import or sale of noncompliant energy-using products or equipment risk orders to cease production, confiscation of illegal energy-using products, fines of up to 500 percent of illegal proceeds and, in serious situations, business license revocation.[2]

On the other hand, China incentivizes manufacturers to utilize energy saving production technologies. Rewards include tax preferences, increased credit support and preferential loans from financial institutions.[3]

Along similar lines, China has established a system of rewards and commendation for cleaner production for companies and individuals who have made "conspicuous" achievements in cleaner production. Incentives include reduction or exemption from value-added tax regarding products produced from wastes and materials reclaimed from wastes.

Companies are required to monitor resource consumption and water generation during the course of production and provision of services. They are also required to conduct cleaner production audits regarding production and service procedures. If ACM were to use or discharge toxic and hazardous materials in production it would be required to report these audit results to "relevant administrative departments for environmental protection and the relevant departments for economic (sic) and trade under the local people's government at or above county level." [4]

ACM would also be subject to China's anti-pollution laws. If, for example, the hypothetical plant were to discharge a hazardous substance into a local river, causing contamination, ACM could face liability for water contamination pursuant to Chinese water pollution laws.

Under China's laws against water pollution, companies must adhere to national and local pollutant discharge standards. Companies must report and register the following to the local Environmental Protection Division: 1) existing facilities for discharging and treating pollutants; 2) the categories, quantities and concentrations of pollutants discharged under normal operating conditions; and 3) technical information concerning prevention and control of water pollution.

A discharge fee is assessed against companies discharging pollutants into a water body. While an excess discharge fee is assessed if companies' discharge exceeds national or local standards, in such instances companies must also submit plans for conformance to discharge standards. And companies failing to eliminate water pollution within a time limit set by local authorities risk doubled fines for excess discharge, additional fines, suspension of operations and even orders to shut down operations.[5]

ACM could also face tort liability to individuals for its unpermitted discharges. Under Chinese tort law, ACM may also owe individual compensation to victims of harms caused by its pollution. Tort law in China mandates that polluter companies compensate victims of environmental pollution.[6]

The law allows for joint or several liability but places the burden on offending companies to shift and/or mitigate liability.[7] Moreover, under anti-water-pollution laws, in pollution accidents which lead to "heavy loss to public or private property or serious injury or death of persons" companies also face potential criminal liability.[8]

Impact of International Treaties and American Laws

International treaties and bilateral agreements are unlikely to create any compliance

concerns for American companies operating in China. While China is a signatory to a number of international environmental treaties, such treaties have very little enforcement teeth, if any.

In addition, enforcement action — to the extent it exists — generally takes the form of pressure on China to comply with its treaty obligations, not action against private companies. Even the Kyoto Protocol, which has an enforcement mechanism, applies its enforcement measures against the signatory country by requiring a compliance action plan to be implemented or mandating reduction of the country's emissions targets.

Similarly, China and the U.S. have signed several memorandums of understanding, which establish cooperative programs between the two countries but do not create any enforceable rights. Such bilateral agreements and international environmental treaties can drive policymaking at the national and local level, and therefore merit attention, but they are unlikely to play a direct role in environmental compliance in China.

American companies can, however, find themselves subject to liability in the U.S. for acts committed abroad. The Alien Tort Claims Act, 28 U.S.C. § 1350, confers subject matter jurisdiction on federal district courts when "(1) an alien sues, (2) for a tort, (3) that was committed in violation of the 'law of nations' or a treaty of the United States." [9]

Environmental torts are among the claims alien plaintiffs have brought under the ATCA. [10] While these claims are frequently dismissed for failure to demonstrate violation of the law of nations or on the grounds of forum non conveniens, [11] American companies should nonetheless be aware of the potential for suit.

Thus, while the hypothetical ACM would be unlikely to face any liability for water contamination or personal injury under international treaties, the affected Chinese residents could seek redress in American courts under the ATCA. A successful claim would require the Chinese plaintiffs to prove that the manufacturer's acts violated "well-established, universally recognized norms of international law." [12]

To defeat these claims, ACM would want to argue that international law lacks any concrete standards regarding environmental torts, such that its conduct cannot represent a violation of the law of nations. In addition, the manufacturer could bring a motion for dismissal based on forum non conveniens, since the relevant acts took place in China and the evidence and witnesses are also located there.

Solving the Conundrum

As seen through the above discussion, environmental compliance in China is governed by an intricate network of laws compounded by variance in enforcement action at the local government level. International agreements to which China has subscribed and Chinese environmental laws such as those discussed in this article, offer a mere peephole view into the comprehensive regulatory environment facing companies operating in China.

Nonetheless, American companies can take some affirmative steps to ensure compliance and reduce the risk of enforcement action or litigation. Consultation with local attorneys — particularly attorneys in the relevant province or city — to determine environmental compliance obligations is an essential first step. Understanding which industries have come under fire for environmental violations will inform risk management decisions and indicate the level of compliance that local officials may demand. Finally, continued monitoring of the legal and regulatory environment for changes in policy is key to maintaining compliance.

--By Beverlee Silva (pictured), Trudy Caraballo and Sarah Babcock, Alston & Bird LLP

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The opinions expressed are those of the authors and do not necessarily reflect the views of the firm, its clients, or Portfolio Media, publisher of Law360.

[1] See Decision of the Standing Committee of the National People's Congress on Amending the Law of the People's Republic of China on Renewable Energy Resources (adopted by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective April 1, 2010), available at www.gov.cn/flfg/2009-12/26/content_1497462.htm (Chinese version) and www1.lawinfochina.com/Law/Display.asp?Id=7880 (unofficial English translation); The Law of the People's Republic of China on Renewable Energy (adopted by the Standing Comm. Nat'l People's Cong., Feb. 28, 2005, effective Jan. 1, 2006), St. Council Gaz., Issue 11, Serial No. 1154, available at www.gov.cn/gongbao/content/2005/content_63180.htm (Chinese version) and www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384096.htm (unofficial English translation).

[2] Renewable Energy Law of the People's Republic of China, (Adopted at the 14th meeting of the Standing Committee of the Tenth National People's Congress on Feb. 28, 2005) available at www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384096.htm (unofficial English translation).

[3] Id.

[4] Law of the People's Republic of China on the Promotion of Clean Production (Adopted June 29, 2002. Effective Jan. 1, 2003) available at www.chinaenvironmentallaw.com/wp-content/uploads/2008/03/clean-production-law.doc (unofficial English translation).

[5] Law of the People's Republic of China on Prevention and Control of Water Pollution, (Adopted at the fifth meeting of the Standing Committee of the Sixth National People's Congress on May 11, 1984, amended pursuant to the Decision on Amending the Law of the People's Republic of China on Prevention and Control of Water Pollution adopted at the 19th meeting of the Standing Committee of the Eighth National People's Congress on May 15, 1996, and amended at the 32nd meeting of the Standing Committee of the Tenth National People's Congress on Feb. 28, 2008) available at www.greenlaw.org.cn/files/laws/water-pollution-prevention-and-control-law.pdf (unofficial English translation).

[6] See id.; The Law of the People's Republic of China on Tort Liabilities adopted by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective March 1, 2010), available at www.gov.cn/flfg/2009-12/26/content_1497435.htm (Chinese version) and http://www.procedurallaw.cn/english/law/201001/t20100110_300173.html (unofficial English translation).

[7] Id.

[8] *Supra* at note 9.

[9] *Beanal v. Freeport-McMoran Inc.*, 197 F.3d 161, 164-65 (5th Cir. 1999).

[10] See *id.* at 166-67; *Aguinda v. Texaco Inc.*, 303 F.3d 470, 473 (2d Cir. 2002).

[11] See *Beanal*, 197 F.3d at 166-67; *Aguinda*, 303 F.3d at 476-80.

[12] *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir.1980).

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