

中美经贸第一阶段协议（三）：举证责任倒置意义深远：整个协议我们通篇来看

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听课笔记



课程导读

- ▶ “举证责任倒置”是什么意思？为什么它对中国的知识产权司法审判会有重大影响？
- ▶ 对商业秘密侵害的刑事执法和惩罚措施该如何加强？这些新措施折射的是现实中的哪些漏洞？
- ▶ 从第一章到第八章，这份贸易协议有何亮点？到底 2000 亿亏不亏？我们应该如何从长远来看待？

ECONOMIC AND TRADE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE PEOPLE'S REPUBLIC OF CHINA

讲解正文

Article 1.5: Burden-Shifting in a Civil Proceeding

1. The Parties shall provide that the burden of **production** of evidence or **burden of proof**, as appropriate, shifts to the accused party in a civil **judicial** proceeding for trade secret misappropriation where the holder of a trade secret has produced **prima facie** evidence, including **circumstantial** evidence, of a reasonable indication of trade secret misappropriation by the accused party.

2. China shall provide that:

(a) the burden of proof or burden of production of evidence, as appropriate, shifts to the accused party to show that it did not misappropriate a trade secret once a holder of a trade secret produces:

(i) evidence that the accused party had access or opportunity to obtain a trade secret and the information used by the accused party is **materially** the same as that trade secret;

(ii) evidence that a trade secret has been or risks being disclosed or used by the accused party; or

(iii) other evidence that its trade secret(s) were misappropriated by the accused party; and

(b) under the circumstance that the right holder provides preliminary evidence that measures were taken to keep the claimed trade secret confidential, the burden of proof or burden of production of evidence, as appropriate, shifts to the accused party to show that a trade secret identified by a holder is generally known among persons within the circles that normally deal with the kind of information in question or is readily accessible, and therefore is not a trade secret.

3. The United States affirms that existing U.S. measures afford treatment equivalent to that provided for in this Article.

Article 1.6: **Provisional** Measures to Prevent the Use of Trade Secrets

1. The Parties shall provide for prompt and effective provisional measures to prevent the use of misappropriated trade secrets.

2. China shall identify the use or attempted use of claimed trade secret information as an "urgent situation" that provides its judicial authorities the authority to order the grant of a preliminary **injunction** based on the specific facts and circumstances of a case.

3. The United States affirms that existing U.S. measures afford treatment equivalent to that provided for in this Article.

Article 1.7: **Threshold** for Initiating Criminal Enforcement

1. The Parties shall eliminate any requirement that the holder of a trade secret establish actual losses as a **prerequisite** to initiation of a criminal investigation for misappropriation of a trade secret.

2. China shall:

(a) as an **interim** step, clarify that "great loss" as a threshold for criminal enforcement under the trade secret provision in the relevant law can be fully shown by **remedial** costs, such as those **incurred** to **mitigate** damage to business operations or planning or to re-secure computer or other systems, and substantially **lower** all the thresholds for initiating criminal enforcement; and

(b) as a subsequent step, eliminate in all applicable measures any requirement that the holder of a trade secret **establish** actual losses as a prerequisite to initiation of a criminal investigation for misappropriation of a trade secret.

Article 1.8: Criminal Procedures and Penalties

1. The Parties shall provide for the application of criminal procedures and penalties to address **willful** trade secret misappropriation.

2. China's criminal procedures and penalties shall at least **encompass** cases of trade secret misappropriation through theft, fraud, physical or electronic intrusion for an unlawful purpose, and the unauthorized or improper use of a computer system in the scope of prohibited acts.

3. The United States affirms that existing U.S. measures afford treatment equivalent to that provided for in this Article.

Article 1.9: Protecting Trade Secrets and Confidential Business Information from Unauthorized Disclosure by Government Authorities

1. To further strengthen the protection of trade secrets, as well as better encourage various enterprises to innovate, China shall prohibit the unauthorized disclosure of undisclosed information, trade secrets, or confidential business information by government personnel or third party experts or advisors in any criminal, civil, administrative, or **regulatory** proceedings conducted at either the central or sub-central levels of government in which such information is submitted.

2. China shall require administrative agencies and other authorities at all levels to:

(a) limit requests for information to no more than necessary for the legitimate **exercise** of investigative or regulatory authority;

(b) limit access to submitted information to only government personnel necessary for the exercise of legitimate investigative or regulatory functions;

(c) ensure the security and protection of submitted information;

(d) ensure that no third party experts or advisors who compete with the submitter of the information or have any actual or likely financial interest in the result of the investigative or regulatory process have access to such information;

(e) establish a process for persons seeking an exemption from disclosure and a mechanism for challenging disclosures to third parties; and

(f) provide criminal, civil, and administrative penalties, including monetary fines, the suspension or **termination** of employment, and, as part of the final measures **amending** the relevant laws, **imprisonment**, for the unauthorized disclosure of a trade secret or confidential business information that shall *deter* such unauthorized disclosure.

3. The United States affirms that existing U.S. measures afford treatment equivalent to that provided for in this Article.

词汇

proceeding /prə'si:diŋ/ n. 诉讼

- when someone uses a court of law to deal with a legal case
- e.g. John is taking legal proceedings against his ex-partner. 约翰在对他的前合伙人提起法律诉讼。

production /prə'dʌkʃən/ n. 出示某物

- (formal) when you show something
- e.g. Entrance is only permitted on production of a ticket. 凭票入场。

burden of proof 举证责任

- the duty to prove that something is true

judicial /dʒu:'diʃəl/ adj. 法律的; 法官的; 裁决的; 司法的

- relating to the law, judges, or their decisions
- e.g. the judicial system 司法系统

prima facie /,praɪmə/ adj. 初步的, 表面的

- based on what seems to be true when you first consider a situation, even though it may later be proved to be untrue
- e.g. prima facie evidence 表面证据

circumstantial /,sɜ:kəm'stænʃəl/ adj. 按情况推测的, 间接的

- based on something that appears to be true but is not proven
- e.g. The case against McCarthy is based largely on circumstantial evidence. 对麦卡锡的起诉案主要是以间接证据为依据的。

materially /mə'tɪəriəli/ adv. 极大地; 强有力地; 实质性地

- (formal) in a big enough or strong enough way to change a situation
- e.g. This would materially affect US security. 这将会严重影响美国的安全。

provisional /prə'vɪʒənəl/ adj. 临时的, 暂时的, 暂定的

- likely or able to be changed in the future
- e.g. We accept provisional bookings by phone. 我们接受电话临时预约。

injunction /ɪn'dʒʌŋkʃən/ n. (由法院发出的) 禁(止)令

- an order given by a court, which tells someone not to do something
- e.g. The judge refused to grant an injunction. 法官拒绝发出禁令。

threshold /'θreʃhəʊld/ n. (某事开始发生或产生效果的) 起始点

- the level at which something starts to happen or have an effect
- e.g. My earnings are just above the tax threshold. 我的收入刚刚超过征税起点。

prerequisite /pri:'rekwəzət/ n. 先决条件, 前提, 必备条件

- (formal) something that is necessary before something else can happen or be done
- e.g. A reasonable proficiency in English is a prerequisite

for the course. 不错的英语水平是上这门课程的前提。

interim /'ɪntərɪm/ adj. 过渡期间的; 临时的

- intended to be used or accepted for a short time only, until something or someone final can be made or found
- e.g. An interim government was established. 一个临时政府成立了。

remedial /rɪ'mi:diəl/ adj. 补救的; 纠正的

- intended to improve something that is wrong
- e.g. Some remedial work needs to be done on the foundations. 地基需要修补一下。

incur /ɪn'kɜ:/ v. 招致; 遭受; 引起

- something unpleasant happens to you because of something you have done
- e.g. She wondered what she'd done to incur his displeasure this time. 她奇怪她这次做了什么引起他的不悦。

mitigate /'mɪtɪgeɪt/ v. 减轻, 缓解, 缓和

- to make a situation or the effects of something less unpleasant, harmful, or serious
- e.g. Measures need to be taken to mitigate the environmental effects of burning more coal. 需要采取措施来减轻燃煤增加对环境造成的影响。

lower /'ləʊə/ v. 减少, 降低

- to reduce something in amount, degree, strength etc, or to become less
- e.g. Do you think we should lower the price? 你觉得我们应该降价吗?

establish /ɪ'stæblɪʃ/ v. 证实, 确定

- to find out facts that will prove that something is true
- e.g. The police must establish the facts of the case before proceeding. 警方必须在起诉前确定案件事实。

willful /'wɪlfəl/ adj. 故意的; 有意的; 成心的

- (=wilful) done deliberately, although the person doing it knows that it is wrong
- e.g. willful damage 蓄意破坏

encompass /ɪn'kʌmpəs/ v. 包含, 包括

- to include a wide range of ideas, subjects, etc
- e.g. The study encompasses the social, political, and economic aspects of the situation. 这项研究涵盖了这一局势的社会、政治和经济三方面。

regulatory /,regjə'leɪtəri/ adj. (机构) 具有监管权的, 监管的, 管理的

- (formal) a regulatory authority has the official power to control an activity and to make sure that it is done in a satisfactory way
- e.g. New drugs have been approved by the regulatory authority. 新药已经得到监管机构的批准。

exercise /'eksəsaɪz/ n. 权力(权利)的行使

- (formal) the use of a power or right
- e.g. the exercise of political leadership 政治领导权的行使

termination /ˌtɜːməˈneɪʃən/ n. 结束, 终止, 停止

- (formal) the act of ending something, or the end of something
- e.g. You may face a reduction or termination of benefits. 你的津贴可能会减少或取消。

amend /əˈmend/ v. 修改, 修订

- (formal) to correct or make small changes to something that is written or spoken
- e.g. The law was amended to include women. 该法律经修改把女性也包括在内。

imprisonment /ɪmˈprɪzənmənt/ n. 囚禁; 服刑; 刑期

- the state of being in prison, or the time someone spends there
- e.g. They were sentenced to 6 years' imprisonment. 他们被判处六年监禁。

deter /dɪˈtɜː/ v. (通过让对方意识到做某事会有困难或坏结果而) 制止, 吓住 (某人)

- to stop someone from doing something, by making them realize it will be difficult or have bad results
- e.g. The company's financial difficulties have deterred potential investors. 该公司的财务困境令潜在的投资望而却步。

1. 根据英文释义写出文中出现的对应单词

_____ : relating to the law, judges, or their decisions

_____ : something unpleasant happens to you because of something you have done

2. 一词多义

Which of the following underlined word is closest in meaning to the one in the sentence "The holder of a trade secret establish actual losses as a prerequisite to initiation of a criminal investigation for misappropriation of a trade secret."? _____

- A. I was never able to establish whether she was telling the truth.
- B. Our goal is to establish a new research centre in the North.
- C. Hungary established diplomatic relations with Chile in 1990.
- D. He'd already begun to establish quite a reputation as a journalist.

3. 翻译：根据给定中文回译英文

中国应禁止政府工作人员或第三方专家或顾问，未经授权披露在中央或地方政府层面刑事、民事、行政或监管程序中提交的未披露信息、商业秘密或保密商务信息。

1. **judicial; incur**

2. **A**

3. **China shall prohibit the unauthorized disclosure of undisclosed information, trade secrets, or confidential business information by government personnel or third party experts or advisors in any criminal, civil, administrative, or regulatory proceedings conducted at either the central or sub-central levels of government in which such information is submitted.**

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