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forms of import relief available to United States companies injured by imported goods, especially where the imports are being "dumped" on United States markets or are being subsidized by the exporting country. She then gives specific instances where imports of goods from the PRC have been subject to import relief. In his article, Mr. Xiao describes China's Foreign Economic Contract Law ("FECL"). The FECL is one of the few comprehensive pieces of legislation in China dealing with international trade.

Both speakers recognize the importance of increased United States-PRC trade from both economic and political perspectives and see few barriers which would inhibit growth in United States-PRC trade. Of course, no one could have foreseen the events of June 1989 and the impact they would have on United States-PRC trade. Whether the current Chinese leaders continue China's commitment to increased economic and political freedom for the people of China will undoubtedly affect the future of United States-PRC trade.

Export to China—Legal and Extra-Legal Aspects

YOUNGANG XIAO*

Great progress has been made in the last ten years in Sino-United States trade relations. News reports have painted a fairly exciting picture: the United States is the third largest trading partner of China, second only to Hong Kong and Japan; United States firms exported \$4.84 billion worth of goods to China in 1987; and many leading United States companies have committed themselves to the Chinese market. China engaged in a massive effort to build up its legal system, which was recognized by United States legal scholars as being absent ten years ago. The prospect of one billion Chinese continuing to advance their ambitious modernization program permits the American

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business community to anticipate a glorious future for Sino-United States trade relations.

However, the road to China has always been littered with unfulfilled expectations. Neither the dreams of the nineteenth-century British textile merchants who sought to add one inch to every Chinese gown, nor the dreams of the early 1980s United States businessmen who expected to sell a dollar worth of goods to each of one billion Chinese have come true. Furthermore, the setbacks of the Chinese economy and the widely known saying that "no American company makes a profit in China," may suggest that doing business with China is a useless endeavor.

The combination of the positive reports and unfulfilled expectations tend to create either optimism or pessimism, which can possibly undermine the practical operation of exporting to China. Realistically, however, the outlook for beneficial long-range exportation will indeed be prosperous. This outlook requires a pragmatic review of legal and extra-legal aspects of exporting to China.

I. LEGAL ASPECTS OF EXPORTING TO CHINA

The legal structure with respect to export and import operations in China can be categorized into two building blocks: Chinese law and international rules.

A. Chinese Law

Promulgated on March 21, 1985, the Foreign Economic Contract Law ("FECL") of the People's Republic of China is one of the few comprehensive pieces of foreign economic legislation in China. It applies to all economic contracts between Chinese enterprises and foreign businesses or individuals, except for contracts concerning international transportation. The highlights of the FECL are as follows:

1. Formation of Contract

Unlike the common law principle which requires that only certain contracts be in writing, Article 7 of the FECL requires that an effective foreign economic contract under the FECL be in writing regardless of the subject matter involved.

2. Invalid Contract

Articles 9-10 of the FECL outline three types of contracts which will be considered invalid: (1) contracts violating the laws of the PRC,

(2) contracts contrary to public and social interests, and (3) contracts induced by duress or fraud. Article 9 also provides that the invalidity of some provisions of a contract will not affect the validity of other parts of the same contract.

3. Performance of Contract

While the FECL emphasizes the binding effect of a valid contract, it also permits parties to suspend performance when there is a strong likelihood that either party cannot perform its obligation, provided the suspending party has adequate evidence and informs the other party in time (Article 17). When one party provides adequate assurance, the other party must resume its performance.

4. Breach and Damage

The FECL defines "breach" as non-performance or performance not in conformity with the terms of a contract (Article 18). The non-breaching party is required to take appropriate steps to cover or prevent aggravation of its loss. There can be no recovery of damages for losses that result from the aggrieved party's failure to mitigate.

5. Choice of Law

Generally, the FECL permits the parties to choose which law will govern the settlement of party disputes. If the parties fail to choose, the FECL requires that the law which has the closest, most immediate relationship to the contract be applied. The FECL also mandates that Chinese law be applied for joint venture contracts, contracts concerning cooperative enterprises with foreign parties, and contracts involving development of natural resources in cooperation with a foreign party. If Chinese law does not provide specific provisions for a particular dispute, the FECL allows international rules to be applied, provided foreign laws and international practices do not violate the public or social interests of the PRC (Article 5).

6. Dispute Settlement

The dispute settlement procedures in the FECL include consultation, mediation, arbitration and judicial proceedings, with an emphasis on consultation and mediation. The FECL also permits parties to resort directly to arbitration. Arbitration can be held either in China or abroad, depending upon the provisions of the arbitration clause in the contract or a subsequent special agreement between the parties

(Article VII-2, Agreement on Trade Relations of United States-People's Republic of China).

7. Excuse of Performance

Three situations are permitted by the FECL as excuses for performance: (1) frustration of the expectation of economic benefit as a result of the other party's breach, (2) impossibility of performance due to "force majeure," and (3) occurrence of conditions excusing performance provided for in the contract. "Force majeure" is defined by the FECL as an event that the parties cannot foresee at the time of conclusion of the contract, and whose occurrence and consequences cannot be avoided or overcome. FECL also allows contract parties to specify events constituting force majeure or other conditions excusing performance. In addition to Chinese law, international practice and customs are also recognized by China to ensure the transaction process.

B. International Rules

Effective January 1, 1988, for sales of goods between China and the United States, the International Sale of Goods Convention ("CISG") began to harmonize the laws of United States and China. The rules set forth in the CISG provide that the parties are supreme—the terms of the contract are to be enforced as to all matters the parties have specifically agreed upon. Where the parties have not provided their own special terms, the CISG supplies a fair set of contract terms which will fill in. For instance, the CISG provides the price (prevailing market price), the date of delivery (a reasonable time after the signing of the contract), the place of delivery, the place of passage of risk of loss, the warranty of quality, the payment terms (cash upon delivery), and rules for late delivery and breach of the contract. Since the CISG is essentially a choice of law clause for international sale of goods contracts, it is important to be aware that electing in or opting out of the CISG does not affect the forum for adjudicating a contract. Therefore, the choice of forum should be set out in the agreement.

In addition to the CISG, there are two other standard sets of rules that are normally included by reference. Both are publications of the International Chamber of Commerce in Paris. First, "Incoterms," fills in the "terms of sale," the location of transfer of risk of loss, the responsibilities of the parties for arranging shipping and insurance and the responsibilities of the parties for import and export

licenses. Second, the "Uniform Customs and Practice for Documentary Credits" fills in the missing terms on how some payment documents, especially the letter of credit, operate.

II. EXTRA-LEGAL ASPECTS

Despite the fact that substantial progress has been seen in Sino-United States trade areas, exporting to China still remains less than desired. As stated above, the legal framework is not the obstacle it was ten years ago. Past experience suggests that there are restrictions and limitations set forth by economics, policies and practices which served and will serve to moderate the increase in the exporting operation.

A. Limitations from the Chinese Side

1. Import Restrictions

One of the major restrictions on the growth of United States exports to China is that the Chinese government has set out import restrictions. This is not attributed to protectionism, but to China's limited ability to import. China insists that its financial ability to import depends on its earnings from its export of goods and services. While debt and equity capital clearly play an important role in China's long-term economic strategy, news reports indicate that China's hard currency debt last year reached approximately \$30 billion and that there are signs of serious debate in China over the strategy of depending on foreign loans to accomplish a modernization program. As a result, it is possible that China will slow its reliance on foreign loans and place more emphasis on having its exports pay for its imports.

In 1987, China's exports amounted to slightly less than \$40 billion. However, rapid increases in its exports are unlikely to occur as the policy of inflation control will check the goods available for export. Also, a recent setback of China's economy has undermined China's ability to export. Thus, it is logical to conclude that China's financial ability to purchase from the United States is limited and China's import restrictions will be carefully monitored.

2. Foreign Trade Systems

There was a brief moment when Chinese foreign trade systems were decentralized and Chinese companies and enterprises, which engage in foreign trade, were given more authority to implement trade

operations. However, as a result of the recent economic slowdown, re-centralization has again become dominant in China's foreign trade system. Under this system, the Ministry of Foreign Economic Relation and Trade, not the individual trade firm, makes the decisions on how much of the scarce hard currency will be allocated for imports.

Negotiation processes under the centralized system tend to be frustrating and require great patience. United States exporters will be expected to provide detailed explanations about the proposed transaction. In the end, United States traders will probably be presented with standard Chinese contracts.

B. Limitations From the United States Side

China is not wholly responsible for obstacles to Sino-United States trade. Restrictions from the United States side also exist. One of the basic problems China endlessly complains about is export control. Because United States law has a tendency to limit the exportation of United States products, particularly high technology items to China, United States exporters must pay close attention to the United States export control system. This has made it difficult for United States companies to compete against other countries in China. The controls also cause difficulties for Chinese companies to purchase from the United States. On some occasions, the Chinese are unable to buy United States goods in which they are particularly interested.

Export control also creates significant challenges for United States attorneys. Under the regulations, the definition of technical data released for export is extremely broad. The definition includes: (1) visual inspection by foreign nationals of United States equipment and facilities, (2) oral exchange of information in the United States or abroad, and (3) the application of personal knowledge or United States technical expertise to situations abroad. Because of the broad definition, considerable care should be taken to ensure that technical data is not inadvertently transferred to Chinese companies without appropriate licensing. Penalties for violations are severe. The 1988 Trade Act specifically increases possible sanctions against any company which, in the future, violates United States export control regulations related to high-technology products.

III. CONCLUSION

There is indeed an exciting prospect that American exportation to China may enter into a new era. It is also important to keep in

mind that both American and Chinese companies must refrain from becoming caught up in the euphoria or disappointment of a moment. Reality calls for great patience and creativity. Great prospects for the twenty-first century spur both sides of the Pacific to go further, despite the hardship and uncertainty in the near future.

Import Relief on Imports from the People's Republic of China

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I. INTRODUCTION

In recent years, trade between the United States and the People's Republic of China ("China") has grown.¹ Coincident with the rise in imports from China has been an increase in trade cases filed against imports from China. Both of these trends are likely to continue. As trade between the United States and China increases, import-competing domestic producers are likely to file more petitions against China, and the United States trade laws will play an even larger role in regulating trade between the two countries.² Consequently, anyone who either imports merchandise from China or manufactures merchandise in China for export to the United States should be familiar with U.S. trade laws.

The United States International Trade Commission ("Commission") administers four important trade statutes of concern to importers of Chinese merchandise. They are: the GATT Escape Clause,

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1. Trade between China and the United States totalled \$13.4 billion in 1988, up from \$9.7 billion in 1987. This paper was written before the events in Tiananmen Square last June. What those events mean for United States-China trade remains to be seen.

2. China is one of the few communist countries that the United States gives most-favored-nation ("MFN") treatment. Under U.S. law, communist countries that impose restrictions on their citizens' ability to emigrate cannot receive MFN treatment. However, under Section 402 of the Trade Act of 1974, (19 U.S.C. § 2432(4) (1988)), the President has the authority to waive this provision of U.S. law. This waiver has been extended to several countries, including China. Imports from countries that receive MFN treatment are subject to reduced tariff rates. MFN treatment makes it easier for China to expand its exports to the United States. Such an expansion of trade is likely to lead to more litigation.