1. **Legal developments on trade secrets**

There has been a most significant development in law in China in the past ten years after the 20th century, which includes the generally-accepted protection theory of trade secret and the establishment thereof. The historical evolution of science of law on trade secrets as well as the legal development on China’s trade secret protection can be classified as three phases:

A. From folk secrets to state secrets (prior to 1978)

Folk trade secrets sprang from the wealth of traditional skills that have historically existed in China. Secret knowledge of formulas and techniques has been the pride of Chinese culture down through the ages. For example, the porcelain-making skills of Jingde Town, the ingredients in Guizhou Maotai, the techniques for the manufacture of Anhui rice paper, secrets of the cultivation of Fujian narcissus, as well as of traditional Chinese medicine and acupuncture can be considered business secrets having rather high economic value and affording competitive advantages in domestic and foreign markets. For centuries, however, folk secrets have depended on the discretion of the secret holders themselves rather than on legal protection. In 1889, Emperor Guangxu issued the Regulations on Rewarding Vitalization of Industry to promote the protection of inventions and creations including business secrets, yet these regulations were never actually implemented due to historical reasons.
Since the establishment of the People’s Republic of China in 1949, however, the central government has issued a series of rules and regulations to protect business secrets, the main subjects of which are technical secrets, scientific invention, and discovery. These regulations include:

- The Provisional Regulations for Maintaining State Secrets, promulgated by the Government Administrative Council (predecessor of the State Council) (1951);
- The Regulations on the Issue of Science and Technology Secrets; issued by the Central Committee of the CPC (1958);
- The Proposals for Science and Technology Exchange and Maintaining Confidentiality, jointly formulated by the China Security Committee, the State Scientific Committee, the Engineering Office of National Defence, the Scientific Committee of National Defence, and the State Economic Committee as well as other authorities (1965);
- The Regulations for Maintaining Confidentiality of Science and Technology, formulated by the Security Committee of the Central Committee of Communist Party of China (1978).

The type of information protected by these rules and regulations included mainly scientific invention and discovery as well as technical secrets and traditional skills related to technology, and the term ‘trade secret’ appears nowhere in the language of that legislation.

During this period in Chinese history, trade secrets were confined to being classified only as one important type of state secret and by that measure alone they acquired the status of state secrets and were protected by state administrative measures. The purpose of the state in protecting trade secrets was the same as that for protecting other state secrets: ‘To prevent spies, counter-revolutionaries, and saboteurs at home and abroad from scouting, stealing, or selling State secrets and to prevent various persons from disclosing or losing them’. The state was against the creation of technology-based monopolies and constraint of the use of technology, within and between enterprises, but rather encouraged ‘academic and technical exchanges so that the results of advanced experience and science and technology could be widely applied’. Consequently, there existed no obligation to confidentiality within enterprises or between them with the result that anyone could use trade secrets free of charge. This peculiar system of protection of trade secrets was in line with China’s political and economic system at that time. Not long after the establishment of the People’s Republic of China in 1949, the Chinese government set about creating a new economic system that was centralized and unified, based on state ownership of the means of production and on an economic and industrial structure dominated by socialist public ownership with a central planning system at its core. Through confiscation of bureaucratic capital the state established a leading position of ownership in the domestic economy. Through a process of land reform, landlord ownership was transformed into collective ownership. From 1949 to 1960, the state completed socialist reforms in agriculture, handicraft industries and ‘capitalist handicraft’ and instituted socialist public ownership whereby the state became the dominant owner of all means of production. In 1956 China began implementation of the first five-year plan of national economic development, (i.e., carrying out the planned purchase and planned
supply of grain, executing direct planning and deciding on the allocation of goods and materials to all industrial enterprises and determining the means of communication and transportation.) The state imposed a monopoly over income and spending and assumed decision making over storage, distribution and allocation of financial means as well as over credit loans and salaries. In this way, a centralized and unified economic system with central planning came into being. Under this economic system, the state and the administrative organs under its authority protected trade secrets through a unified system of administrative measures and they were its sole beneficiaries.

In 1958, the Chinese government made a series of major mistakes regarding economic policy. For example, with regard to ownership, it tried to create an entirely state-directed economy and distribution system that would be owned by the People in order to establish egalitarianism. The implementation of these policies nearly extinguished all individual economic activity, which was called at that time the 'remaining private ownership'. The state protected neither inventions nor the creations of employees. The rules were ‘All scientific and technological achievements belong to the State’ and ‘Any domestic enterprise may make full use of them so long as it is required for their work’.

After 1962, the central government promulgated a series of labour regulations, including the Proposals for Science and Technology Exchange and Maintaining Confidentiality, with a view to adjusting its strategy for national economic growth. However, the Cultural Revolution that followed thrust China into a catastrophe wherein the state turned from first ignoring the rule of law to totally discarding it. In the process, the nascent trade secret protection system was abandoned along with the entire legal system.

B. From state secrets to trade secrets: the rudiments of China’s trade secret law (1978 to 1993)

In December 1978, the CPC convened the Third Plenary Session of the Eleventh Central Committee. In formulating strategic policy for constructing socialist modernization, it took on the task of perfecting socialist democracy and strengthening the socialist legal system. In 1982, an amendment was added to the Constitution of the PRC stating that the Constitution would be the fundamental law of the state and would have supreme legal authority. All state organs, the armed forces, and all political parties and institutions were to adopt the Constitution as the basic standard of conduct. The Constitution was placed above all political parties including the CPC and all state organs were to be led by it. This was a revolutionary recognition of the legal system by the CPC and by all the people of China. The Constitution dictated that the legal system was to become a pillar in the creation of the ‘new’ China.

From 1978 to the end of 1990, the National People's Congress and its Standing Committee formulated and modified laws, making more than 200 decisions on relevant legal issues. During this period, over 300 administrative regulations were formulated by the State Council. Among them were approximately seventy laws and regulations concerning trade secret
protection. This was, however, only an initial stage in the establishment of an independent system of trade secret protection in China.

Features of the system of trade secret protection of the period 1978 to the end of 1990:

[i] Initial broad use of the legal term ‘trade secret’.

Since the 1980s, the understanding of what constitutes a trade secret in China has become broader. In addition to protecting confidential information, also protected by law are: inventions; discoveries, traditional technical secrets, technical data such as mapping results, prescriptions for protected types of traditional Chinese medicines, technological methods, various historical records in all written forms as well as in illustrations, audio and visual recordings and non-patented technology. On 9 April 1991 the Civil Procedure Law of the People’s Republic of China was promulgated. Article 66 of the Law provided that ‘Evidence that involves State secrets, trade secrets, and personal privacy shall be kept confidential. If it needs to be presented in court, such evidence shall not be presented in an open court session’. This was the first time that the legal term 'trade secrets' was used in Chinese law.

In 1992, the Supreme People’s Court of the PRC issued the Proposals on Several Problems of Enforcing the Civil Procedure Law of the People’s Republic of China that included a judicial interpretation of the meaning of the term ‘trade secrets’. Trade secrets, it said, mainly referred to: [t]echnological secrets and commercial intelligence and information. For example, industrial and trade secrets that interested parties are unwilling to make public such as production skills, formulas, business contacts or purchase and sales channels.

According to this interpretation, trade secrets included not only technical secrets but also business information that the parties concerned were reluctant to reveal.

Although the interpretation of the Proposals regarding trade secrets was a bit rough from today’s viewpoint, it was meaningful in the development of China’s trade secret protection system at the time. It was the most authoritative judicial interpretation of the concept of trade secrets in the historical context of that time and it was an important basis upon which China’s courts, at all levels, and was able to make decisions in trade secrets disputes. It also established a solid foundation for future legislation regarding trade secrets.

[ii] Trade secrets were gradually separated from state secrets.

As mentioned above, in China, trade secrets had for a long time assumed the nature of state secrets. However, the establishment of the market economy in China and the modification of the Constitution altered the common understanding of the nature of trade secrets. The 1982 Constitution laid the legal foundation for China’s reform and policy of opening up. Yet, as the Constitution was amended at the beginning of that period of reform, the state economic system and the structure established by it still contained major deficiencies and neither could not meet nor safeguard the real demand for
economic growth. For instance, the appearance of a greater number of Sino-
foreign joint ventures and wholly foreign-funded enterprises posed a problem
to the legal position of private enterprises in China. The emergence of varied
forms of economic operations, including individual enterprises, private
enterprises, Sino-foreign joint ventures, cooperative enterprises, and wholly
foreign-funded enterprises cast doubt on the allocation process and
administrative management under the planned economy system.
Consequently, in 1988, and again in 1993, the National People’s Congress
modified the 1982 Constitution by enacting the proposals of its delegates. The
modified Constitution replaced the ‘State with a planned economy on the
basis of public ownership’ described in the former Constitution with a ‘socialist
market economy’ and confirmed that China practiced a market economy
system endorsed by its Constitution. Meanwhile, it also provided that
individual economic activities operating within the limits prescribed by law
were a complement to the socialist public economy and that the state would
protect the lawful rights and interests of the private sector economy, thus
confirming the legal legitimacy of the private sector economy in China for the
first time.

A market economy is a competitive economic system that requires a
guaranteed rule of law to underpin it. The law must ensure equal legal
protection of private citizens in the conduct of economic activity and it must
ensure fair competition in the operation of markets. To that end, in 1982
China promulgated the first Trademark Law. In 1984 came the Patent Law
followed by the General Principles of Civil Law of the PRC in 1986, the Law of
the PRC on Technology Contracts in 1987, and the Copyright Law in 1990.
The promulgation of these laws formed a basic legal framework for the
protection of intellectual property rights in China. When protection of patents,
trademarks, and copyrights as three forms of intellectual property was
introduced, more attention began to be paid to the nature of trade secrets as
property and it was realized that the protection of trade secrets was different
from the protection of state secrets in purpose, in means, and in method. The
Law of the PRC on Technology Contracts (the Technology Contracts Law),
which became effective 1 November 1987, for the first time employed such
concepts as ‘unpatented technical achievements’ and ‘unpatented technology
transfers’ and contained provisions regarding relevant content. For example,
clause three of Article 32 provides that: The right to use unpatented
technological know-how achieved through a contract commissioning
development work or cooperative development, the right to transfer it, and the
methods of distributing benefits from it shall be stipulated by the parties to the
contract. In the absence of contractual stipulations, each party shall have the
right to use and transfer the technical know-how, except that the party
undertaking research and development under a commission development
contract may not transfer the results of said research and development to a
third party before delivering them to the commissioning party.

Although this law does not employ terms such as technical secrets and trade
secrets, unpatented technology here obviously refers mainly to what is
understood to be confidential technical information. The Technology
Contracts Law subsequently protected technical secrets in the form of
contract and was also the first substantive law to contain clauses protecting
technical secrets or trade secrets in China. The Implementation Rules of Technology Contract Law issued on 15 March 1989 defined unpatented technology as technical achievements that have not been the subject of an application or that have not been granted patent or that, under the Patent Law, cannot be granted patent. This definition basically extended the category of technical secrets to include unpatented technology. In September 1988, the Law on Protecting State Secrets of the People’s Republic of China was promulgated and adopted by the Seventh Standing Committee of the National People’s Congress. For the first time, the Law provided a clear definition of state secrets: ‘State secrets shall be matters that have a vital bearing on State security and the national interest and, as specified by legal procedure, are entrusted to a limited number of people for a given period of time’. These items included secrets of science and technology, but such secrets qualified as state secrets only when their disclosure might cause such consequences as reducing the economic, scientific, or technological power of the state. The Civil Procedure Law of the PRC, as modified in 1991, used the legal term ‘trade secrets’ twice. The Proposals on Several Problems of Enforcing the Civil Procedure Law of the PRC issued by the Supreme Court of the PRC, defined trade secrets as secrets of industry and commerce including technological secrets, business operations information (e.g., manufacturing skill or formulas), business contacts and channels for purchasing and selling. All of these secrets constitute information that the holder is unwilling to make public.

The Civil Procedure Law of the PRC provided the first definition of trade secrets. Taken together, all of the abovementioned legislation demonstrated the status of trade secrets as an independent legal subject in China.

[iii] Trade secrets mainly depended on the protection of ‘public law’.

Although the understanding of trade secrets deepened during the period discussed above, legal protection of trade secrets still depended on ‘public law’ such as the Law on Protecting State Secrets of the People’s Republic of China and the Criminal Law. The idea that the nature of trade secrets made them subject to private law required further development and the legal concept of trade secrets needed to be more clearly defined in legislation.

C. A new development phase: the establishment of an advanced secret protection system in China (1993 to 1998)

As described in the previous section, in the increasingly competitive environment in China, more enterprises depended on trade secrets to gain profit and competitive advantage. The technological and operational secrets of enterprises had become important elements of their very existence as well as development. Meanwhile, motivated by the drive for profits, the phenomena of illegal use and the outright stealing of trade secrets became increasingly common. In addition, the reform of the economic system was bringing about change in China’s labour and employment system. In 1983 the State Council promulgated the Provisions on Reasonable Mobility of Science and Technology Personnel, which allowed persons employed in those fields to ‘go to work in such units that can give full play to their professional skill’. In 1986 the State Council promulgated the Provisional Rules for Adopting the
Labour Contract System in State-run Enterprises, and the Provisions on Employing Workers inside State-run Enterprises. These laws required state-run enterprises to hire from the public labour market and to establish and enforce a labour contract system. The rules had the effect of shifting government management of labour to a free market system by means of uniform contractual arrangements through a centralized allotment of the labour force under the planned economy. The establishment of a labour market permitted and stimulated the mobility of personnel in China and ensured the freedom of individuals to choose their own careers.

However, the number of trade secret disputes consequently increased and became a hot topic affecting a greater number of people. Among the many trade secret disputes that arose, some concerned infringement on the trade secrets rights of enterprises and others concerned damage to the employment rights of employees or their freedom to choose their own careers. In order to regulate market competition and to restrict unfair competition in the form of trade secret infringement, and in order to promote the development of unpatented technology and technological know-how, a better protection system for trade secrets needed to evolve in China.

In 1987, the State Council proposed for the first time the formulation of a national law against unfair competition. In 1992 the Law against Unfair Competition prohibiting certain practices was listed in the legislative plan of the Standing Committee of the NPC. In the following year, through the efforts of experts and academics, the PRC Draft Law against Unfair Competition was completed (following three revisions) and was adopted at the Third Meeting of the Standing Committee of the Eighth NPC on 2 September 1993, making it the first specific law against unfair competition in Chinese history. The Law against Unfair Competition required that, in market transactions, a business operator must follow the principles of freedom of contract, equality, fairness, honesty, and credibility and must observe generally recognized business ethics.

The unfair competition mentioned in this law referred to the acts of business operators that violated provisions of the law and which infringed upon the lawful rights and interests of other business operators and disturbed the socioeconomic order. In addition to a general description of infringement, Chapter 2 of the Law against Unfair Competition also enumerated eleven acts of unfair competition, including acts considered to be infringement upon trade secrets. The Law against Unfair Competition also contains certain provisions concerning the legal responsibility for acts of infringement of trade secrets. Moreover, Article 10 defined what constitutes a trade secret: A trade secret is any technological information or information regarding business operations that is unknown to the public which may create business interest or profit for its legal owners, and which is maintained in secrecy by its legal owners.

Following the promulgation of the Law against Unfair Competition, on 25 November 1995 the State Industrial and Commercial Administrative Bureau issued the Several Rules on Forbidding the Infringement of Trade Secrets to concretely implement the regulations regarding trade secrets contained in that law. The Law against Unfair Competition was the most important and specific
law for the protection of trade secrets ever to be promulgated in China. It took the trade secret protection system a step further and, from its introduction, trade secrets were granted legal protection as a private right. The Law provides that only those legal persons and other economic organizations or individuals who deal with commercial businesses or profitable services (referred to as ‘managers’ in the Law against Unfair Competition) are subject to the rules concerning infringement of trade secrets.

In a certain sense, the law restricts its own scope of application. In practice, in addition to managers other very important parties are concerned with trade secrets. Employees of enterprises that have contractual rights and obligations in exploiting technology or who have an obligation of confidentiality might also commit acts of infringement of trade secrets. On 6 July 1994 the first labour law in China came into being. It promoted labour reform and contained provisions regarding trade secret protection clauses in labour contracts. On 15 March 1999 a new PRC Contract Law was adopted by the Ninth National People’s Congress (1999 Contract Law). The 1999 Contract Law, which became effective on 1 October 1999, prescribes trade secret protection during the creation and performance of contracts, as well as following their termination. In addition to the 1999 Contract Law, in certain other laws (e.g., the Company Law, the Audit Law, the Commercial Banking Law, and the Attorney’s Law which were formulated by the National People’s Congress and its standing Committee between 1994 and the present) there are corresponding provisions regarding non-competition as well as obligations regarding state secrets and the trade secrets of companies. Further, the Criminal Law of the PRC, as amended by the Fifth Session of the Eighth National People’s Congress on 14 March 1997, created the new criminal offence of trade secret infringement in order to punish acts of serious infringement. On 11 December 2001 China joined the WTO and began to meet the obligations contained in that agreement, including the obligation to protect undisclosed information as provided in the TRIPS Agreement. China initiated a legal program in 1998, when it was negotiating entry into the WTO, to amend certain laws and to abolish certain other laws, regulations, and rules in order to comply with the WTO rules. Prior to May 2002, China had already amended approximately fifty laws and administrative regulations, including the Patent Law (2000), the Trademark Law (2001), and the Copyright Law (2001), and had abolished nearly 532 statutes including certain laws, administrative regulations, and rules. The program was completed in 2003. The completion of this work illustrated that China was serious about establishing a legal system in accordance with the obligations of the treaty. In summary it can be said that, motivated by economic policy incentives and inspired by international treaties, China has established a legal framework for the protection of trade secrets based upon international treaties with the Law against Unfair Competition as its centrepiece in addition to the regulations contained in the PRC Constitution, the Contract Law, the Labour Law, and the Criminal Law.

2. Definition of trade secrets

Chinese legal academics have been puzzled by the question of how to precisely define trade secrets, which has caused contention among them
regarding which no consensus has currently been reached. Nevertheless, Chinese legal circles, over a long period of judicial practice, have reached a consensus on the elements of trade secrets and emphasize that legally protected business information must be confidential and have a certain commercial value, and that its holder must implement proper secrecy measures. In China, the elements of legally protected subject matter are generally defined in PRC legislation.

Current laws and judicial interpretations define trade secret as follows. Article 10 of the Anti-Unfair Competition Law enacted in 1993 provides that “the term ‘trade secret’ used in this article refers to technical and operational information which is unknown to the public, capable of bringing in economic benefits for the right holder, practically applicable and the secrecy of which is guarded by specific measures adopted by the right holder”. Article 219 of the 1997 Criminal Law provides that “the term ‘trade secret’ used in this article refers to technical and operational information which is unknown to the public, capable of bringing in economic benefits for the right holder, practically applicable and the secrecy of which is guarded by specific measures adopted by the right holder”.

Therefore, in Chinese legislative and judicial practice, trade secrets protected by law shares the characteristics, which are as follows:

A. Trade secret is unknown to the public.

Article 2 of Several Regulations on Prohibiting Activities Infringing Trade Secrets adopted by the State Administration for Industry and Commerce provides that “such information can not be obtained through public channels”. The Supreme Court’s view is that “such technical information, as a whole, or certain precise combination or component of it, is unknown or not easy to acquire in the relevant domain where such type of information normally circulated.”

B. Trade secret has economic value and practical applicability.

The Supreme Court has pointed out in its document that such technical information has commercial value due to its secrecy and is capable of conferring its holder economic benefits or competitive advantages. Article 2 of Several Regulations on Prohibiting Activities Infringing Trade Secrets adopted by the State Administration for Industry and Commerce provides that “such information has certain applicability, is capable of bringing in for the right holder real or potential economic benefits or competitive advantages.”

C. Measures have been taken by the right holder to guard its secrecy.

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1 More people in China think that a trade secret is constituted by three or four requirements. Scholars such as Zhang Yuri and Kong Xiangjun think that trade secrets are constituted by confidentiality, value, manageability, and novelty. Other academics think that trade secrets are constituted by confidentiality, value, and manageability.


3 Ibid.
The fact that the right holder has taken measures to guard the secrecy of the know-how is an important condition for such trade secret to be protected by law. These measures include the conclusion of the agreement on confidentiality, establishment of the enterprise internal regime on confidentiality and other reasonable measures.\(^4\) In order to ascertain whether reasonable measures have been taken by the parties to guard the secrecy, the court will, taking into consideration the circumstances of the case at hand, determine whether measures taken by the right holder of the trade secret is sufficient, in a normal situation, to maintain the confidentiality of such know-how.\(^5\)

3. **Control of trade secrets**

According to the regulation of Chinese State Administration for Industry and Commerce, the term “owner” refers to citizens, corporate bodies or other organizations who own trade secrets. In addition, current Chinese laws only define the ownership of know-how in contract law, patent law and Interpretation of the Supreme People’s Court concerning Some Issues on Application of Law for the Trial of Cases on Disputes over Technology Contracts.

A. **Ownership of a job-related technology**

According to Article 326 of the Contract Law, where the right to use and the right to transfer job-related technology belong to employers including legal persons or organizations of any other nature, such employers may enter into a technology contract in respect of such job-related technology. However employers shall reward or remunerate the employee(s) who developed the technology with a percentage of the benefits accrued from the use and transfer of the job-related technology. Where the employer is to enter into a technology contract for the transfer of the job-related technology, the employee who accomplished this technological achievement has the priority to be the transferee under the same conditions.

However, where there is an agreement between an employer and his employee on the rights and interests of the technological achievements accomplished by such employee during or after his/her employment, China’s court will make confirmation on the basis of such agreement.\(^6\)

A job-related technology as mentioned in China’s Contract Law is a technology developed in the course of executing work tasks assigned by an employer, or developed by primarily utilizing the material and technical resources thereof.\(^7\) “Executing work tasks assigned by an employer” includes within one year after employment, continuing engaging in the technology development related to his former post duties during the employment or related to the work tasks consigned by his/her former employer during the

\(^4\) See Article 2 of Several Regulations on Prohibiting Activities Infringing Trade Secrets adopted by the State Administration for Industry and Commerce.

\(^5\) Supra., n.3

\(^6\) Article 4 of Interpretation of the Supreme People’s Court concerning Some Issues on Application of Law for the Trial of Cases on Disputes over Technology Contracts, which has come into force since January 1, 2005.

\(^7\) Article 326 of Contract Law.
employment, unless otherwise prescribed in laws or administrative regulations.\footnote{Article 2 of Interpretation of the Supreme People’s Court concerning Some Issues on Application of Law for the Trial of Cases on Disputes over Technology Contracts, which has come into force since January 1, 2005.}

“Mainly utilizing the material and technical conditions of a employer” includes the employee’s utilizing the whole or major part of funds, equipment, apparatus, raw materials or other material conditions of his\her employer in the process of research and development of the technological achievement, and such material conditions have essential effects on the forming of the said technological achievement; it also includes the circumstances under which the essential contents of the technological achievement are completed on the basis of the technological achievement of either the whole process or a certain stage which has not been publicized by his\her employer, with the exceptions of the following circumstances: [i] with respect to the utilization of the material and technical conditions provided by his\her employer, it is stipulated that the funds should be refunded or the royalties should be paid; and [ii] after the technological achievement is accomplished, the technological plan is verified or tested with utilization of the material and technical conditions of his\her employer.\footnote{Article 4 of Interpretation of the Supreme People’s Court concerning Some Issues on Application of Law for the Trial of Cases on Disputes over Technology Contracts, which has come into force since January 1, 2005.}

“Material and technical conditions” includes funds, equipment, apparatus, raw materials and unpublicized technical information and data, etc.\footnote{Article 3 of Interpretation of the Supreme People’s Court concerning Some Issues on Application of Law for the Trial of Cases on Disputes over Technology Contracts, which has come into force since January 1, 2005.}

B. Ownership of a non-job-related technology

The right to use and the right to transfer non-job-related technology belong to the individual, who accomplish a technological achievement.\footnote{Article 327 of Contract Law.} Herein “individuals” includes the persons who independently or jointly make creative contributions to the technological achievement, that is, the inventors or designers of the technological achievement. The China’s court will, when ascertaining the creative contributions, decompose the composition of the essential technology involved in the technological achievement. The person who proposes the composition of the essential technology and therefore achieves the technological plan will be the person who makes creative contributions. However, the person, who only provides funds, equipment, materials, conditions for experiments, carries out organizational management, assists in making drawings, clearing up documents and translating literatures, will not be the individual who accomplishes the technological achievement.\footnote{Article 6 of Interpretation of the Supreme People’s Court concerning Some Issues on Application of Law for the Trial of Cases on Disputes over Technology Contracts, which has come into force since January 1, 2005.}

C. Ownership of the technical secret resulting from a commissioned or cooperative development

According to Article 341 of China’s Contract Law, the ownership of the technical secret resulting from a commissioned or cooperative development shall be agreed upon by the parties. Where the agreement is not clear or no
supplemental agreement can be made, nor can they be determined in accordance with contract provisions or transaction practices, the technology shall be joint owned by the parties. Where such matters are not agreed upon by the joint owners, each party is entitled to use the non-patented technology; the benefits accrued there from belong to the user. However, the developer in a commissioned development may not transfer the technology to a third party absent the permission from the other party (parties), and the benefits accrued there from shall be shared equally among the parties.

According to Article 363 of China’s Contract Law, in the course of performing a technical consulting contract or a technical service contract, any new technology developed by the consultant or service provider utilizing the technical materials and working conditions provided by the client belongs to the consultant or service provider. Any new technology developed by the client utilizing the work results provided by the consultant or service provider belongs to the client. However, if the parties agree otherwise in the contract, such agreement shall prevail.

D. Ownership of technical secret of subsequent improvement

According to Article 354 of China’s Contract Law, the parties may provide in the technology transfer contract for the method of sharing any subsequent improvement resulting from the exploitation of the patent or use of the technical secret. If such method is not agreed or the agreement is not clear, any subsequent improvement shall belong to the improver.

4. Source of law for trade secret protection

China's current legal framework of protection of trade secrets is based upon international treaties. It consists of the Anti-Unfair Competition Law as the central piece, as well as regulations contained in Contract Law, Labour Law and Criminal Law. According to the hierarchy of authority, this legal framework consists of: national laws promulgated by the National People’s Congress and its Standing Committee; administrative regulations promulgated by the State Council; local regulations adopted by the People’s Congress and its Standing Committee at provincial, large municipal and Special Economic Zone level; ministerial (departmental) regulations adopted by various ministries and commissions under the State Council, the Central Bank, the Auditor’s Office and other institutions directly affiliated to the State Council. During 1985-2005, more than 188 important laws and regulations related to the protection of trade secrets (including know-how) have been enacted and entered into force, including 29 national laws, 26 administrative regulations adopted by the State Council, 95 ministerial (departmental) regulations and 38 local regulations. These laws and regulations have jointly formed the legal sources for the protection of trade secrets.

Hierarchical Structure of the Chinese Legal System on Trade Secrets (Graph 1)

13 China has joined the WTO on 11 December 2001 and started to fulfill the obligations conferred by the treaty, including the obligation of protecting undisclosed information provided by TRIPS.
Hierarchical structure is drawn in accordance with the level of Chinese legislation.

A. State Laws

The first Chinese law regarding the protection of trade secrets was the Law of the People's Republic of China on Technology Contracts (effective November 1, 1987 and repealed October 1, 1999) which employed the concept of ‘unpatented technology’ and which applied only to contracts for technology development, technology transfer, technology consultation, and technological services concluded between Chinese corporations, between Chinese corporations and Chinese citizens, and between Chinese citizens. It mainly protected know-how not fundamentally related to confidential business information or other trade secrets and therefore played a fairly limited role in trade secret protection.

The Law on Protecting State Secrets of the People’s Republic of China (the ‘LPSS’) became effective on May 1, 1989 and methods for the concrete implementation of LPSS were published in Order No.1 issued by the State Secrets Bureau in May 1990 following approval by the State Council. Accordingly, the LGSS was applicable to all secret matters in the area of scientific technology related to national security and interests.

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14 See articles 34 to 40 of the Law of the People's Republic of China on Technology Contracts.
15 See article 2 of the Law of the People's Republic of China on Technology Contracts.
In China, the term ‘trade secrets’ was first used in legal parlance in the Civil Procedure Law of the People’s Republic of China (effective April 9, 1991) which also provided that evidence or testimony that involves State secrets, trade secrets, and personal privacy must be kept confidential and that if it is necessary to present such evidence or testimony in court, it may not be presented in an open court session.\(^\text{17}\) Civil cases involving trade secrets may not be heard in public if a party to the case so requests.\(^\text{18}\) This provision has become an important standard of procedure for the trial of cases involving trade secrets by Chinese courts.

Article 60 of the Law of the People's Republic of China on Science and Technological Progress (effective July 2, 1993) provides that ‘Anyone who encroaches upon another person's copyright, patent right, right of discovery, right of invention, or right of scientific and technological achievements by means of plagiarism, alteration, or imitation, or who illegally usurps technical secrets, shall be dealt with in accordance with relevant provisions of the law’.

Chapter 3 of the Labour Law of the People's Republic of China (effective January 1, 1995) titled ‘Labour Contracts and Collective Contracts’ provides that ‘The parties involved in a labour contract can reach agreements in their labour contracts on matters concerning the keeping of the trade secrets of the employer’.\(^\text{19}\)

In the Criminal Law of the People's Republic of China (‘CL1997’) effective October 1, 1997, the phrase ‘crimes of infringing trade secrets’ was added,\(^\text{20}\) which provides that ‘Whoever commits any of the following acts of infringing on business secrets and thus causes heavy losses to their owner shall be sentenced to a fixed-term of imprisonment of not more than three years, criminal detention, and/or imposition of a fine: (1) obtaining an owner’s business secrets by stealing, enticement, coercion or by any other illegitimate means; (2) disclosing, using, or allowing another to use business secrets obtained from the owner by any means mentioned in the preceding paragraph; or (3) in violation of the agreement to an owner’s demand for maintaining business secrets, disclosing, using, or allowing another person to use the business secrets he or she has knowledge of. If the losses to a holder are particularly serious, defendants may be sentenced to a fixed-term of imprisonment of not less than three years but not more than seven years and may also be fined.

The Contract Law of the People's Republic of China became effective on October 1, 1999 and, at the same time, the Economic Contract Law, the Foreign Economic Contract Law, and the Law of Technology Contracts were repealed. To better meet the needs of China’s developing market economy, the Contract Law contained new provisions regarding obligations of contract secrecy, emphasizing principles of equity, free will, fairness, good faith, and legality,\(^\text{21}\) and used foreign legislation as a model for Chinese practice. According to the provisions of the Contract Law, ‘A business secret the
parties learn in concluding a contract shall not be disclosed or unfairly used, no matter whether the contract is established or not. The party who causes another party to suffer losses due to disclosing or unfairly using said business secret shall be liable for damages.\textsuperscript{22} Parties must abide by the principle of good faith and perform the obligations of notice, assistance, maintaining confidentiality, and the like based on the character and purpose of the contract and in compliance with fair business practices.\textsuperscript{23} Chapter 18 of the Contract Law contains special provisions for technology contracts. Vis a vis trade secret protection, it incorporates the main content of the former Law of Technology Contracts allowing secrecy provisions to be included in technology contracts and obligates transferors and transferees in contracts concerning technology transfers to maintain confidentiality. In addition, the Contract Law contains rules regarding choice of applicable law. It provides that a party to a contract involving foreign elements may choose the law governing the settlement of contractual disputes with the exception of those prohibited by other existing law. If the party concerned declines to choose, then the laws of the country that is most closely related to the subject contract will be applied.\textsuperscript{24}

B. Administrative Law and Regulations of the State Council

The Detailed Rules and Regulations for the Implementation of the Regulation on Administration of Technology Import Contracts of the People's Republic of China (the 'DRR'), jointly promulgated by the State Council and the Ministry of Foreign Trade and Economic Cooperation and effective January 20, 1988, was repealed by the PRC Regulations on the Management of Technology Import and Export which became effective January 1, 2002.\textsuperscript{25} Article 13 of the DRR provides that 'A recipient shall undertake the obligation to keep confidential the technical secrets of certain know-how and relevant information provided or imparted by a supplier in accordance with the scope and term of confidentiality stipulated in the technology import contract. The term of confidentiality shall not exceed the period of validity of said contract. The recipient shall be relieved of any obligation to confidentiality if the technical secrets of the imported technical know-how or relevant information are made public during the term of confidentiality not owing to the recipient. If it is specified in the technology import contract that the supplier is required to provide products developed by or improved versions of the imported technology to the recipient during the contract validity period, the recipient may continue to bear the obligation to keep confidential the technical secrets of the developed products or improved versions of the technology after the validity of the said contract has lapsed. However, the additional term of confidentiality (that overlaps the original term) shall not be longer than the term of confidentiality previously approved in the technology import contract and the additional term of confidentiality shall become effective on the date the developed products or improved versions of the technology are provided to the recipient'.

\textsuperscript{22} See Article 43 of the Contract Law of the People's Republic of China (1999).
\textsuperscript{23} See Article 60 of the Contract Law of the People's Republic of China (1999).
\textsuperscript{24} See Article 126 of the Contract Law of the People's Republic of China (1999).
\textsuperscript{25} This new regulation only provides that a recipient shall undertake the obligation to keep confidential the un-disclosed part of technology provided by the supplier in accordance with the scope and duration of confidentiality stipulated in the contract. See article 3 of the Regulations of the People's Republic of China on the Management of Technology Import and Export.
Statistical Ratios of Different Legislation on the Protection of Trade Secrets in China (Graph 1) (1987-2005)

Article 4 of Chapter 1 titled ‘General Provisions’ of the Regulations of the People’s Republic of China on Customs Investigations and Inspections (promulgated by the State Council and effective January 3, 1997) provides that customs and customs personnel must, while executing customs inspections, be objective and fair, seek truth from facts, be honest in performing their official duties, must keep confidential trade secrets of persons they inspect, and must not violate the legitimate rights and interests of persons they inspect.

The Regulations on the Protection of Traditional Arts and Crafts was promulgated by the State Council in order to develop and protect Chinese traditional arts and crafts and became effective on May 20, 1997. These Regulations expressly provided that enterprises that produce traditional arts and crafts must establish and implement systems for the protection and secrecy of traditional arts and crafts and concretely strengthen the management of traditional arts and crafts, and that whoever engages in the production of traditional arts and crafts must abide by the provisions of
relevant State law and not divulge technological secrets or other trade secrets that they may know.\textsuperscript{26}

The Regulations on Export Control of Military Items of the People’s Republic of China (promulgated by the State Council and the Central Military Commission of the People’s Republic of China on October 22, 1997) provides that ‘Military trading companies, as required by the regulations of the national military export control authorities, shall faithfully submit documents and files related to their military export activities. The national military export control authorities shall maintain commercial confidentiality and safeguard the legitimate rights and interests of military trading companies’. \textsuperscript{27}

Annual Graph of Chinese Legislation on Protection of Trade Secrets (Graph 2)

(1987-2005)

The Regulations on Inspection of Accredited Representatives of the State Council (promulgated by the State Council and effective July 3, 1998) stipulate that no certified inspector nor any aid to certified inspectors may divulge trade secrets of inspected enterprises that they may come to know or possess during the process of inspection,\textsuperscript{28} that certified inspectors and their aids who divulge trade secrets of inspected enterprises will be issued administrative sanctions according to law, and that if a case is serious enough as to constitute a crime, criminal responsibility will be affixed according to law.\textsuperscript{29}

\textsuperscript{26} See Article 18 of the Regulations on the Protection of Traditional Arts and Crafts (1997).
\textsuperscript{27} See Article 11 of the Regulations on Export Control of Military Items of the People’s Republic of China (1997).
\textsuperscript{28} See Article 21 of the Regulations on Inspection of Accredited Representatives of the State Council (1998).
\textsuperscript{29} See Article 24 of the Regulations on Inspection of Accredited Representatives of the State Council (1998).
The Provisional Regulations on the Board of Supervisors of State-owned Enterprises and the Provisional Regulations on the Board of Priority State-owned Financial Institutions were promulgated by the State Council and became effective March 15, 2000. Both provisional regulations provide that every member of a board of supervisors must keep confidential the contents of inspection reports and may not divulge the trade secrets of enterprises\(^{30}\) and/or of State-owned financial institutions.\(^{31}\)

The Provisional Regulations on the Management of the Futures Business were promulgated by the State Council and became effective September 1, 1999. Article 43 of Chapter 4 of these Regulations titled ‘Basic Rules of the Futures Business’ provides that divulging trade secrets related to the futures business is not permitted in delivery warehouses, that disciplinary action will be taken against personnel of a futures exchange who divulge State secrets and trade secrets of members and clients of the exchange that they have access to during their service in the exchange or during their service in member units of the exchange within a year after leaving the exchange, and that criminal penalties will be imposed in cases so serious as to constitute a crime.\(^{32}\) In addition, where personnel of the CSRC divulge State secrets and/or trade secrets of members and clients and/or resort to deception for personal gain, commit dereliction of duty, abuse their power, or accept bribes and where such cases are serious enough as to constitute a crime, criminal penalties will be imposed. If a case is not serious enough to constitute a crime, administrative punishment will be meted out according to law.\(^{33}\)

C. Ministry Rules of the State Council

The Provisional Regulations on the Resignation of Personnel in Specific Technical Fields and Managerial Personnel of Institutions Owned by the Whole People (promulgated by the State Personnel Bureau and effective September 8, 1990) emphasize that personnel that have resigned are not allowed to remove without permission the results of scientific research, inside information, equipment, and so on of their original units.\(^{34}\) The Provisional Regulations also provide the procedure for resignation of persons in charge as well as for key members in the operation of priority scientific research projects of the State and in the provinces (as well as in municipalities and in autonomous regions) and for personnel engaged in work related to State secrets.\(^{35}\) The Rules on the Procedure of Hearing Administrative Punishment of Labour (approved by the PRC Ministry of Labour and effective October 1, 1996) provides that hearing chairmen are subject to an obligation to keep confidential State secrets, trade secrets, and private affairs related to cases.\(^{36}\) In addition, hearings wherein State secrets, trade secrets, or personal privacy are involved are not permitted to be held openly.\(^{37}\)

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\(^{30}\) See Article 22 of the Provisional Regulations on the Board of Supervisors of State-owned Enterprises (2000).

\(^{31}\) See Article 22 of the Provisional Regulations on the Boards of Priority State-owned Financial Institutions (2000).

\(^{32}\) See Article 66 of the Provisional Regulations on the Management of Futures Business (1999).

\(^{33}\) See Article 68 of the Provisional Regulations on the Management of Futures Business (1999).

\(^{34}\) See Article 14 of the Provisional Regulations on the Resignation of Personnel in Specific Technical Fields and Managerial Personnel of Institutions Owned by the Whole People (1990).

\(^{35}\) See Article 7 of the Provisional Regulations on the Resignation of Personnel in Specific Technical Fields and Managerial Personnel of Institutions Owned by the Whole People (1990).


The Notice on the Strengthening of the Protection of Trade Secrets of State-owned Enterprises (promulgated by the General Office of the State Economic and Trade Commission of the PRC and effective July 2, 1997) provides that State-owned enterprises must arrange for the protection of technological and business information on a case-by-case basis. State-owned enterprises must, after weighing the advantages and disadvantages of each, choose a proper form for the protection of intellectual property and for the protection of relevant information. They must, for information that is suitable for protection as trade secrets, correctly define the scope of those trade secrets and must regard them as important intellectual property in the course of the management of enterprise assets. They must also, when defining the scope of their trade secrets, determine the various levels of those trade secrets in accordance with their importance and adopt practical protective measures in a timely manner so as to prevent trade secrets from being stolen, divulged, or deciphered. They must establish or designate special agencies with full-time or part-time personnel that are particularly responsible for the management of trade secrets, (e.g., departments of legal affairs and corporate counsels of enterprises). They must notify their employees in writing that they are obligated to maintain confidentiality and must affirm the fact that their employees have been trained in the keeping of trade secrets. They may, according to their actual circumstances, establish the following systems for the management of trade secrets: methods for controlling the creation and determination of trade secrets; methods for controlling the use and destruction of trade secrets; methods for controlling the level and duration of the secrecy of trade secrets; methods for controlling the keeping of trade secrets by employees; methods for reward and punishment regarding the management of trade secrets; methods for maintaining secrecy during reception of visitors; methods for the maintenance of secrecy of work in vital areas; secrecy rules regarding conferences; and rules for the management of facsimile printers, computers, and communications apparatus. If it is found that the legitimate rights and interests of State-owned enterprises regarding their trade secrets have been infringed upon, relevant cases must be settled in a timely manner through an administrative or judicial process.\(^{38}\)

The Several Proposals for the Strengthening of the Management of Technological Secrets in the Flow of Scientific and Technological Personnel (promulgated by the State Science and Technology Commission of the PRC and effective July 2, 1997) expressly provides policy limits and measures for technical management in the movement of scientific and technological personnel. The Several Proposals define technological secrets owned by an enterprise as technological information which the enterprise possesses through development and/or other legal means, which have not been made publicly available, which can bring economic benefit and/or competitive advantage to the enterprise, which are practical, for which the enterprise has adopted secrecy measures, and which are inclusive of but not limited to design drawings (including drafts), experimental results and records, technological processes, ingredients and formulas, samples, data, and computer programs. Technological secrets can include technological plans that have specific and integrated technological content and that constitute a product, a process, a material (or improvements on said product, process, or

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material), as well as partially technological essential elements of a certain product, process, material. Departing scientific and technology personnel may not reveal to new employers, transfer to third persons, or use by themselves in unlawful ways technological secrets that they may have come to possess during their original employment and that are owned by their original employers (including technological achievements tied to a project which they themselves have conducted or in which they have participated). Enterprises and institutions must be attentive to the management of scientific and technological personnel that conduct State scientific and technological projects and/or important scientific research tasks of an enterprise. Certain scientific and technological personnel who have been enlisted for construction project tasks that have been certified as major State scientific or technological projects or who have been chosen to be members of relevant cooperative research project teams, who request transfers or who resign prior to the completion of said scientific or technological tasks and who might possibly divulge technological secrets related to those projects and/or scientific research tasks (thereby threatening the security and interests of the nation), are generally not permitted to transfer or to resign. Personnel who leave their positions without authorization and bring about economic loss to the State or to their original employer or who divulge technological secrets will incur civil liability, and the employer of said personnel will bear joint and several liability for payment of compensation according to law. Security measures that must be adopted by enterprises and institutions in order to avoid such liability include the conclusion of confidentiality agreements, establishment of security systems, adoption of security technologies, installation of reasonable security equipment, and adoption of other reasonable security methods. Relevant security measures must be clear, definite, and explicit and must concretely establish the scope, form, and duration of secrecy. Security measures for technological secrets owned by the enterprise should also include punishment for leaking of those secrets. Scientific and technological personnel may freely use technological information for which an enterprise has not implemented proper security measures, or the content of which has been made available to the public. Scientific and technological personnel may sign written agreements with their employers regarding the use and transfer of technological secrets and technological achievements and those agreements must stipulate the scope, mode, and conditions of the voluntary use of those technological secrets and technological achievements. Enterprises and institutions may, in accordance with provisions of relevant law, sign agreements regarding the confidentiality of technological secrets with their scientific and technological personnel, with administrative staff, with persons who may learn technological secrets in the course of business, and with other persons related to the business. A confidentiality agreement may be combined with a labour employment contract as well as with an intellectual property ownership agreement into one contract, each of which may be separately signed. Scientific and technological personnel in the performance of their obligation to maintain confidentiality are entitled to receive

41 See Article 5 of the Several Proposals on the Strengthening of the Management of Technological Secrets in the Flow of Science and Technology Personnel (1997).
remuneration and bonuses for being engaged in technological development activities and have the right to request alteration or termination of confidentiality agreements if their employers refuse to pay said remuneration and bonuses without reasonable grounds. An employer may, through consultations with administrative, scientific, and technological personnel who are essential to its technological and economic interests, include non-competition clauses in labour employment contracts, intellectual property right ownership agreements, and confidentiality agreements stipulating that relevant personnel may not, within a certain period of time after their leaving said employer, hold posts within other enterprises that produce goods of the same kind, engage in businesses that compete with those of the original employer or that share other interests with the original employer, or engage for themselves in the production of goods of the same kind or in the operation of businesses that compete with those of the original employer. If agreements of this kind are entered into, employers must pay a certain amount of compensation to relevant personnel and the non-competition period may not exceed three years. Employers and employees have the right to appeal to an arbitration panel or to bring an action before the people’s courts in disputes regarding non-competition. Where employers are fully aware that personnel are obligated to confidentiality or non-competition agreements with their previous employers and intentionally employ these personnel in order to acquire technological secrets, said employers shall bear civil liability. Scientific and technological personnel and other relevant personnel who, after leaving their original employer, achieve new technological results or technological innovations on the basis of technological secrets that they have come to know or have had access to during their previous employment and that are owned by said new employer have the right to apply and use those new technological results and technological innovations. However, if scientific and technological personnel exploit technological secrets that are owned by their previous employer and for which they are obligated to maintain confidentiality, they must receive the consent of said previous employer and pay royalties to that employer. If they have not received the consent of their previous employer or if they have no evidence proving that disputed technological content is the result of new technological results or of technological innovation that they themselves have developed, then they and their current employer may be subject to civil or criminal liability.

The Provisional Methods for the Management of Holders of Projects Concerning Confidential State Technologies (jointly promulgated by the State Science and Technology Commission of the PRC and the State Secrets Bureau and effective January 4, 1998) provides that supervisors at various levels responsible for science and technology and supervisors at various levels responsible for secret information are charged with guiding, supervising, and examining secret information of the holders of projects concerning confidential State-owned technologies. These holders must establish a

44 See Article 8 of the Several Proposals on the Strengthening of the Management of Technological Secrets in the Flow of Science and Technology Personnel (1997).
45 See Article 4 of the Provisional Methods for the Management of Holders of Projects Concerning Confidential State Technologies (1998).
management department for the protection of scientific and technological secrets for which their executives are responsible, and full-time and part-time managerial personnel must be provided to that department. These departments are responsible for establishing systems for the protection of scientific and technological secrets of their enterprises, for organizing secret works for scientific and technological projects of their enterprises, for conducting instruction regarding the protection of scientific and technological secrets, and for reporting at regular intervals to the supervisor responsible for security at the same level as well as to departments at higher levels responsible for the protection of scientific and technological secrets. These holders must precisely determine the main protected scope of projects, information involved, content of secrecy, and crucial places where relevant information is kept and relevant technologies are used. All confidential information must be marked with their level of secrecy and the term of confidentiality in accordance with the law and they must be strictly referenced in rules made by their holders. These holders must define the scope of confidential projects to which certain personnel have access and those personnel must be examined and approved by holders. In addition, the holders must sign confidentiality agreements with said personnel. Where changes occur to a holder as a result of reorganization, the original holder and the new holder must continue to maintain confidentiality in accordance with the original level of secrecy so as to secure State-owned confidential technologies from infringement.

D. Local Regulations

The Regulations of Shenzhen SEZ on the Protection of Technological Secrets of Enterprises (the ‘Shenzhen Regulations’) were promulgated by the Standing Committee of the People’s Congress of Shenzhen City and became effective November 3, 1995. The promulgation of these regulations preceded that of the Several Rules on the Prohibition of Infringement of Trade Secrets (the ‘Several Rules’) by the State Administration for Industry and Commerce by twenty days. It was the first to protect trade secrets in the form of local legislation, playing an important guiding role in the protection of trade secrets of enterprises. Many successive local laws and regulations have continued to use basic provisions established in the Several Rules. The Shenzhen Regulations expand on the general principles of the Law against Unfair Competition regarding the prohibition of acts which infringe on trade secrets and concretely and systematically define technological secrets, legal responsibility regarding infringement, and management of technological secrets of enterprises, non-competition agreements, as well as elaborate on other detailed rules for implementation, enabling Chinese legislation on the protection of trade secrets and relevant practice to take a step forward. The Shenzhen Regulations provide that technology and technological information include designs, processes, data, ingredients and formulas, know-how, and

49 See Article 8 of the Provisional Methods for the Management of Holders of Projects Concerning Confidential State Technologies (1998).
other media that may be physical, chemical, or biological in form. Where there are many developers that independently develop the same technological secret, each of them can freely use, transfer, and disclose that technological secret. Where an enterprise requests that its employees guard its technological secrets, it must sign confidentiality agreements with these employees whose obligation to maintain said confidentiality would end when their employment is terminated if there were no clear and definite confidentiality agreement or other relevant written agreement.

During the term of a confidentiality agreement, employees must strictly abide by the rules of secrecy of an enterprise, are not permitted to divulge technological secrets of the enterprise to other persons, and are not permitted to use the technological secrets in production or operational activities without the written consent of the enterprise that legally owns the technological secrets. An enterprise may sign non-competition agreements with its employees that know or could possibly know its technological secrets, stipulating that they are not permitted to hold posts in other enterprises that produce products of the same kind that compete with its own products. If agreements of this type are entered into, the employer must pay those employees a certain amount of compensation. The non-competition period may not exceed three years, and the compensation stipulated in the agreement can be no less than two thirds of the total remuneration that an employee earned for the year prior to leaving the enterprise. Whosoever infringes on the technological secrets of an enterprise and in doing so causes damage to the enterprise will be subject to payment of damages and will bear other civil liability, as well as reasonable costs incurred by the infringed enterprise for investigating the tort committed upon its legitimate rights and interests. According to the Shenzhen Regulations, the department of Shenzhen city in charge of science and technology has the right to order the immediate cessation and, on a case by case basis, impose a fine of 30,000 yuan to 150,000 yuan for the following torts: (a) a person that undertakes an obligation to maintain confidentiality for technological secrets discloses and uses said secrets without the written consent of the legitimate owner of those secrets; (b) a person that undertakes an obligation of non-competition with an enterprise holds a post in another enterprise that produces goods of the same kind that compete with those of the original enterprise, or a person engages in production and related business of the original enterprise that compete with that of the original enterprise without the prior written consent of the legitimate owner of the technological secrets; or (c) an enterprise employs a person who, said enterprise is fully aware, has undertaken an obligation of non-competition with another enterprise and who, according to that obligation, is not permitted to hold posts in that enterprise. The Shenzhen Regulations go on to state that where technological secrets are acquired through fraud, theft, persuasion through bribery, coercion, subornation, or by other improper means, the department of the city in charge of science and technology can

50 See Article 5 of the Regulations of Shenzhen SEZ on the Protection of Technological Secrets of Enterprises (1995).
52 See Article 9 of the Regulations of Shenzhen SEZ on the Protection of Technological Secrets of Enterprises (1995).
order the immediate cessation of such infringement, the restitution of
documents and equipment related to said acquisition, and can impose a fine
of 50,000 yuan to 500,000 yuan. Where technological secrets are acquired
through improper means and are disclosed, used, or transferred, the
department of the city of Shenzhen in charge of science and technology can
order the immediate cessation of infringement and restitution of documents
and equipment related to said acquisition, and can impose a fine of 100,000
yuan to 1,000,000 yuan. Where an enterprise is fully aware or should have
been aware that a technological secret is being disclosed as a result of a
breach of confidentiality agreement or is acquired through improper means,
and the enterprise accepts, uses, or discloses to others said secret, relevant
agreements of transfer shall be deemed invalid, the enterprise shall be
subject to payment of compensation, and the department of the city in charge
of science and technology shall seal equipment and documents related to the
secret and impose a fine of 300,000 yuan to 500,000 yuan.

The Regulations of Zhuhai City on the Protection of Technological Secrets of
Enterprises (the Zhuhai Regulations, adopted by the Standing Committee of
People’s Congress of Zhuhai City on July 10, 1997) provide that the
administrative department of science and technology of Zhuhai city is the
department in charge of the protection of technological secrets of enterprises
and is responsible for steering and supervising the protection of technological
secrets of enterprises, for investigating and prosecuting conduct violating the
Zhuhai Regulations, and for assisting arbitral agencies and judicial offices in
identifying technical matters in cases where technological secrets of
enterprises have been infringed. Technological secrets deemed legally
owned by an enterprise include those acquired through transfer of technology,
transmission of technological information, technological cooperation, or by
other legitimate means, including through independent development and
research, or commissioned development and research. An enterprise may,
according to how its economic interests, development, or survival are affected,
determine different levels of technological secrets: AAA, AA, and A. An enterprise must, in accordance with the level of secrecy involved,
determine various classifications of sites related to technological secrets, to
scientific research, handling of official business, production, or other purposes,
and must adopt security measures to ensure that technological secrets are
not leaked. The duration of the term of non-competition for various
personnel generally will be from two to five years according to, among other
things, the level of the technological secrets involved, the level of security
clearance of a specific position, and special training received. If the duration
of a term of non-competition exceeds five years, it must be approved by the
administrative department of science and technology of Zhuhai city. If there is
no relevant provision in a non-competition agreement, the term of non-
competition will be two years. An enterprise may, according to the life cycle,
maturity, and potential value of a technology, as well as the market demand

60 See Article 30 of the Regulations of Shenzhen SEZ on the Protection of Technological Secrets of Enterprises (1995).
61 See Article 7 of Regulations of Zhuhai City on the Protection of Technological Secrets of Enterprises (1997).
62 See Article 3 of Regulations of Zhuhai City on the Protection of Technological Secrets of Enterprises (1997).
63 See Article 9 of Regulations of Zhuhai City on the Protection of Technological Secrets of Enterprises (1997).
64 See Article 13 of Regulations of Zhuhai City on the Protection of Technological Secrets of Enterprises (1997).
65 See Article 20 of Regulations of Zhuhai City on the Protection of Technological Secrets of Enterprises (1997).
of a product manufactured based on that technology, independently
determine the term of secrecy for its technological secrets. Where a term of
secrecy has not been specifically determined, it is ten years.

The Regulations of Guangdong Province for the Protection of Technological
Secrets (the ‘Guangdong Regulations’ adopted by the 7th meeting of the 9th
Standing Committee of the People’s Congress of Guangdong Province and
effective 1998) provides that administrative departments of science and
technology of the people’s government at various levels together with
administrative departments of industry and commerce at similar levels are
responsible for the organization and the implementation of the Guangdong
Regulations. 66 Where a technological secret is formed through contract or
commissioned research and development, its ownership will be determined in
a manner agreed upon in writing by the parties concerned. If there is no
agreement regarding the manner of determining ownership, all parties
concerned will have the right to use or transfer said secret. However, for a
technological secret that is formed through commissioned research and
development, researchers and developers are not permitted to transfer the
secret to a third party before delivering it to the client. 67 An enterprise must
clearly identify its technological secrets by affixing corresponding labels on
technological documents. As for models, samples, data, ingredients and
formulas, technological processes, and other items to which labels cannot be
affixed, other identification methods must be used. 68 An enterprise may sign
non-competition agreements with persons that know its technological secrets,
and the duration of validity of said agreements may not exceed three years. 69
Where there is a dispute regarding an agreement on the protection of
technological secrets, the parties concerned may, in accordance with arbitral
clauses in the agreement or in accordance with a written arbitral agreement
reached thereafter, appeal for arbitration. If there is no arbitral agreement or
relevant clause in writing, the parties concerned may lodge a complaint with a
people’s court. 70

In Article 15 of Chapter two of the Regulations of the Shanghai Municipality
against Unfair Competition (the ‘Shanghai Regulations’ promulgated by the
Standing Committee of the People’s Congress of the Shanghai Municipality
and effective December 1, 1995) titled ‘Unfair Competitive Behaviour,’
additional remarks are included regarding the scope of technological or
business information that has been deemed a trade secret. The Shanghai
Regulations state that such information includes, but is not limited to,
ingredients and formulas, technological processes, know-how, designs,
management methods, marketing strategies, customer information, and
sources of supply.

The Regulations of the Shanghai Municipality on Labour Contracts (the
‘Shanghai Labour Regulations’ promulgated by the Standing Committee of
the People’s Congress of the Shanghai Municipality and effective May 1,
2002) is the newest local legislation in China for the regulation of labour
relations. The Shanghai Labour Regulations are applicable not only to labour

67 See Article 5 of the Regulations of Guangdong Province on the Protection of Technological Secrets (1999).
68 See Article 8 of the Regulations of Guangdong Province on the Protection of Technological Secrets (1999).
relationships between government agencies, government-sponsored institutions, and social organizations within the administrative divisions of the Shanghai Municipality and their employees, but are also applicable to labour relationships between enterprises and individual economic organizations within those divisions and their employees. Chapter two of the Shanghai Labour Regulations titled ‘Conclusion of Employment Contracts’ states that ‘Parties to a labour contract may agree upon clauses regarding confidentiality or may enter into separate confidentiality agreements. When a business secret becomes public knowledge, such confidentiality clauses and agreements will automatically become void. If an employee is to be obligated to maintain the confidentiality of the business secrets of their employer, the parties to a labour contract may agree upon an advance notice period in the labour contract or in a confidentiality agreement for employees requesting early termination of their employment contracts. Said advance notice period, however, may not exceed six months. During this period, the employer may take appropriate measures to declassify its business secrets. In addition, the Shanghai Labour Regulations state that ‘If an employee is obligated to maintain the confidentiality of the business secrets of his employer, the parties concerned may agree upon non-competition clauses in a labour contract or confidentiality agreement to provide that when the labour contract is terminated, the employee will receive compensation. Said scope of non-competition shall be limited in that an employee may not, within a certain period of time following his termination, engage in any business for him or on behalf of other business operators that compete with that of the original employer. The term of non-competition is subject to the terms of the employment contract between the parties, but shall not exceed three years with the exception, however, of provisions contained in the law or regulations of the PRC. If the parties enter into an agreement of non-competition in an employment contract, they may not include an agreement on an advance notice period for the employee in the event of early termination of the contract’.

The Regulations of the Beijing Municipality on the Talent Market (the ‘Beijing Regulations’ approved by the Standing Committee of the People’s Congress of the Beijing Municipality and effective January 1, 1998) provide that a job applicant, or one accepting an offer of employment, must, upon leaving their previous employment, deal in good faith regarding contract agreements they have signed with said previous employer.71 Where a job applicant or one accepting an offer of employment early terminates an employment contract with their previous employer and divulges trade secrets or technological secrets of that employer, or infringes upon intellectual property rights of that employer, and has caused damages to that employer, they will bear relevant civil liability in accordance with the Beijing Regulations and criminal charges shall be brought in cases wherein the damages caused are so serious as to constitute a crime.72

The Regulations of the Beijing Municipality on the Technology Market (approved by the Standing Committee of the People’s Congress of the Beijing Municipality and effective November 1, 2002) provide that a business broker

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must maintain the confidential technological information of his clients according to confidentiality agreements reached with his clients. Offices for registration of technology contracts and their staffs are obligated to maintain confidentiality of state-owned technology contracts as well as of trade secrets of parties concerned.

5. Available remedies

The main forms and means of trade secret infringement in Chinese enterprises include: [i] the leaking of trade secret occurs during the transfer of talents among enterprises; [ii] an individual employee discloses, without authorization, trade secret to others for his personal benefit; [iii] a certain employee undertakes, without authorization and during his period of employment, a part-time job in other enterprises and discloses trade secret; [iv] the trade secret is unintentionally disclosed during a tour for outside visitors; [v] retired employees are hired by competitors; [vi] the employees have not taken confidentiality seriously enough; [vii] academic papers published by employees disclosed the trade secret through the introduction of the product.

In order to prevent the leaking of the enterprise’s own trade secret, in respect of the scenario mentioned above, a lot of Chinese enterprises have, based upon foreign experiences, taken the following measures: [i] ensure the conclusion of a confidentiality agreement, including that between transferor and transferee during a technology transfer, that between the enterprise and its employees, and the non-competition promise applicable to both current and former employees in the employment contract; [ii] to take measures of displaying confidentiality, for example, using a stamp showing the confidential nature of the document and promulgating rules on confidentiality for the enterprise; [iii] clarify the ownership of intellectual property, for example, incorporating specific provisions on the ownership of trade secret subsequently acquired in technology transfer contracts, concluding intellectual property agreement with employees, defining the trade secrets of the employer and the skills of the employee in the employment contracts.

In case of the infringement of the trade secret of the enterprise, employers normally resort to legal remedies in order to cut the loss or seek compensation. The remedies available to them include the following.

A. To hold the infringer liable for the breach of contract on the ground of the confidence agreement in the contract in accordance with the Contract Law.

Article 107 of China’s 1999 Contract Law provides that the non-performing party or the party which has failed to fulfil its promised duties included in the contract terms shall be liable for the breach of the contract and shall continue the performance of the contract, take remedial measures, or pay damages. Article 43 provides that any trade secret learnt by parties in concluding a contract shall not be disclosed or unfairly used regardless of the status of the

73 See Article 16 of the Regulations of the Beijing Municipality on the Technology Market (2002)
74 See Article 30 of the Regulations of the Beijing Municipality on the Technology Market (2002)
contract. The party that has failed to observe such duty and caused the losses of the other party shall be obliged to pay damages. Article 60 provides that parties shall fully fulfil their contractual obligations according to the terms of the contract including the obligation of confidence. Even after the termination of the contract, the parties shall, abiding by the doctrine of good faith, fulfil the obligation of confidence according to transaction practices.

However, to a certain extent, the contract mentioned here mainly refers to technology transfer contracts in which a confidentiality agreement has been concluded. This is because according to current Chinese law, if contents regarding the confidentiality of trade secrets have been agreed upon by parties to an employment contract and the employee has failed to fulfil the obligation of confidence and infringed the trade secrets of the employer, such labour disputes shall be subject to arbitration by the Arbitration Committee for Labour Disputes. The Arbitration Committee shall accept the application for arbitration and make the ruling according to relevant regulations and the terms of the employment contract.75

B. To apply for labour dispute arbitration by the local Arbitration Committee for Labour Disputes on the ground of the employment contract.

Labour dispute arbitration refers to the scheme where labour disputes are heard and settled by the Arbitration Committee for Labour Disputes. The 1995 Labour Law of the People’s Republic of China provides in its third chapter regarding employment contracts and collective contracts, that the parties to an employment contract may in the contract agree upon a clause concerning the maintaining the confidentiality of trade secrets of the employer (Article 22). The obligation of confidence and the obligation of non-competition arising from the employment relationship is one aspect which gives rise to labour disputes involving trade secrets between employers and its current and former employees.

Article 77(1) of the Chinese Labour Law provides for the means to settle labour disputes: “[I]n cases of labour disputes between employers and employees, the parties may, in accordance with the law, apply for mediation, arbitration or initiate legal action, or settle the dispute through negotiation”. It should be pointed out that arbitration has been prioritized in settling labour disputes, i.e. while mediation is only optional and not a compulsory procedure for the parties to go through, arbitration is a compulsory procedure and a prerequisite for litigation. The court will reject any law suit brought by the parties to a labour dispute which has not been subject to arbitration.76

However, the parties may appeal in front of the court, the ruling of the Arbitration Committee for Labour Disputes regarding disputes arising from the performance of an employment contract or from the de facto employment

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76 See Article 6 of Regulation of the People’s Republic of China on the Settlement of Labour Disputes in Enterprises (State Council Order No. 117)
relationship in the absence of an employment contract and the court shall accept such a case.\textsuperscript{77}

\textsuperscript{77}See Article 1 of the \textit{Interpretation on Several Issues Concerning the Application of Law in the Trial of Labour Disputes}, Supreme Court Interpretation No. 14, 2001, adopted by the Judicial Committee of the Supreme Court on 22 March 2001.
C. To hold the infringer liable for infringement and to seek compensation in accordance with the Anti-Unfair Competition Law.

Article 10 of Chinese the 1993 Anti-Unfair Competition Law provides that “[B]usiness operators shall refrain from infringing others’ trade secrets using the following means: [i] obtaining a trade secret from the right holder through theft, enticement, coercion, or other illegitimate means; [ii] disclosing, using or allowing others to use such trade secret obtained through the illegitimate means identified above; [iii] disclosing, using or allowing others to use the trade secret in his possession in breach of a contractual obligation of confidence or a obligation of confidence imposed by the right holder of such trade secret; [iv] and for the third party, who knows or should know the illegal activities mentioned in the previous sections, obtaining, using or disclosing other’s trade secret by such third party.”

The Several Regulations on Prohibiting Activities Infringing Trade Secrets adopted by the State Administration for Industry and Commerce in 1995 in accordance with the Anti-Unfair Competition Law has extended the scope of the term ‘infringer’ to cover not only business operators but also individuals, i.e. infringement of trade secrets conducted by individuals may also be punishable by law (Article 5).

According to Anti-Unfair Competition Law, the business operators whose legitimate interests suffered from activities of unfair-competition may initiate a civil action in the people’s court and hold the infringer liable (Article 20).
D. Apply for measures against infringement to be taken by the administrative authority for industry and commerce in accordance with the Anti-Unfair Competition Law

Article 16 of the Chinese 1993 Anti-Unfair Competition Law provides that the administrative authority for industry and commerce at the county level, municipal level or above has the authority to inspect any activity of unfair competition within its jurisdiction. The Several Regulations on Prohibiting Activities Infringing Trade Secrets adopted by the State Administration for Industry and Commerce in 1995 provides that the administrative authority for industry and commerce has the authority to order the infringer engaging in the following activities infringing the trade secret to desist from infringing or to impose a fine of between 10,000 and 200,000 depending on the circumstances: [i] obtaining a trade secret from the right holder through theft, enticement, coercion, or other illegitimate means; [ii] disclosing, using or allowing others to use such trade secret obtained through the illegitimate means identified above; [iii] for the unit or individual who has business relationship with the right holder, disclosing, using or allowing others to use the trade secret in his possession in breach of a contractual obligation of confidence or a obligation of confidence imposed by the right holder of such trade secret; [iv] for the employee of the right holder, disclosing, using or allowing others to use the trade secret in his possession in breach of a contractual obligation of confidence or a obligation of confidence imposed by the right holder of such trade secret; [v] for the third party, who knows or should know the illegal activities mentioned in the previous sections, obtaining, using or disclosing other’s trade secret by such third party.78

However, according to the Anti-Unfair Competition Law, the State Administration for Industry and Commerce and its local branches can only take administrative measures provided by the law. The aggrieved party can only resort to civil legal action for compensation if its trade secrets have suffered losses due to the infringement. The purpose for the party to apply for administrative measures to be taken by administrative authorities for industry and commerce is normally to prevent in time the infringement from happening, or to prevent any imminent or further loss. At the same time, the facts found by the state administrative authorities for industry and commerce in its inspection process are often accepted by the court during the trial, which may,

78 Article 3, 6, 7.
to a certain extent, ease the burden of proof conferred upon the aggrieved party in the civil action.

In 2007, China’s Supreme People’s Court enacted the Interpretation on Some Issues Concerning the Application of Law in the Trial of Civil Cases Involving Unfair Competition provides principled rules for compensation of trade secret infringement, which can refer to the compensation method for patent infringement:

[i] The amount of compensation can be determined by the losses of the obligee. The method requires infringer to compensate for all the obligee’s countable property and earning losses. The losses of the obligee due to the infringement may be counted according to the product of multiplying the total amount of the decreased sales due to the infringement by the reasonable profit of each Know-how product;

[ii] The amount of compensation can be determined by the profits obtained by the infringer. The profits obtained by the infringer from the infringement may be counted according to the product of multiplying the total amount of that infringing product sold in the market by the reasonable profit of each infringing product. When the profit rate cannot be ascertained, intellectual property assessments or experts can be commissioned to evaluate.

[iii] Where the losses of the infringed or the profits of the infringer is difficult to determine, and there is the exploiting fee of Know-how license for reference, the people’s court may reasonably determine the amount of compensation by referring to one to three times of that exploiting fee of Know-how license, according to the type of the Know-how right, the nature and circumstances of the infringement of the infringer, the amount of the exploiting fee of Know-how license, the nature, scope, time of that Know-how license and other factors;

When determining the amount of compensation of Know-how infringement, the two above-mentioned calculation methods should be adopted. Where the losses of the obligee or the profits obtained by the infringer is difficult to determine, reasonable multiples of that exploiting fee of Know-how license can apply. The exploiting fee of Know-how license refers to exploiting fee of ordinary Know-how license. The Interpretation does not make specifications on the amount of multiples, which leaves the courts or related departments to determine under the principle that the obligee can be fully compensated and the infringer cannot gain any benefits due to the infringement act.

(iv) Liquidated damages

where there is no exploiting fee of patent license for reference or the exploiting fee of patent license is obviously unreasonable, the people’s court may determine the amount of compensation from 5,000 yuan to 300,000 yuan according to the type of the patent right, the nature and circumstances of the infringement of the infringer and other factors, and the amount of compensation shall not go beyond 500,000 yuan at the most.

Since the trade secret become known to the public due to the disclosure by infringement act, the amount of compensation shall be determined by the
commercial value thereof. The commercial value of a trade secret shall be determined in accordance with its development cost, benefits of the trade secret implementation, available profits, time for maintaining competitive edge and other factors.

E. Inform the police and the prosecutor’s office enabling the authority to file criminal charges against the infringer in accordance with the Criminal Law

The crime of infringing trade secrets is a new crime added in the 1997 amendment of the Chinese Criminal Law. It refers to the illegal activities infringing others’ trade secrets that have caused serious losses to the right holder. Article 219 of the Criminal Law provides that whoever has engaged in any of the activities listed below that infringe trade secrets and who has caused serious losses to the right holder of such trade secrets, shall, in cases where the loss suffered by the right holder is serious, be sentenced to fixed-term imprisonment of not more than three years or criminal detention in conjunction with, or independently of, a statutory fine. In cases where the loss suffered by the right holder is extremely serious, such a person shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years in conjunction with a statutory fine. The activities concerned are: [i] obtaining a trade secret from the right holder through theft, enticement, coercion, or other illegitimate means; [ii] disclosing, using or allowing others to use such trade secret obtained through the illegitimate means identified above; [iii] disclosing, using or allowing others to use the trade secret in his possession in breach of a contractual obligation of confidence or a obligation of confidence imposed by the right holder of such trade secret.
Under the Chinese law, the demarcation line between general infringing activities and the crime of trade secrets infringement is drawn upon the degree or amount of losses suffered by the right holder. Article 12(6) of the Interpretation on Several Issues Concerning the Application of Law in Trials of Theft Cases adopted by the Supreme Court in 1998 clearly provides that the theft of trade secrets such as technical achievements and so on shall be punished in accordance with Article 219 of the Criminal Law. Article 65 of the Regulation on the Threshold of Prosecuting Economic Crimes adopted by the Supreme People’s Procuratorate and the Ministry of Public Security on 18 April 2001 provides that the infringement of trade secrets shall be prosecuted if one of the following conditions is satisfied: [i] the economic loss suffered by the right holder is estimated at more than half a million Yuan; [ii] the right holder has been forced into bankruptcy or other serious consequences. However, since this regulation is neither a legislative nor a judicial interpretation, the guidance provided by it is not binding for the courts.

Therefore, in 2004, the Supreme People’s Court and the Supreme People’s Procuratorate jointly enacted the Interpretation on Several Issues Concerning the Application of Law in Handling Criminal Cases Involving Intellectual Property in order to provide guidance for the procuratorates and courts to prosecute and adjudicate crimes of trade secrets infringement in accordance with the Criminal Law. This interpretation has provided detailed explanations for related provisions of the Criminal Law. Its Article 7 explains circumstances under which infringement of trade secrets will cause the right holder “serious losses” and “extremely serious consequences” as provided for in the Criminal Law. If the infringement that is prohibited by the law has caused the right holder to suffer a loss exceeding the sum of 500,000 Yuan a “serious loss” of the right holder shall be established. If the infringement has caused the right holder to suffer a loss exceeding the sum of 2.5 million Yuan “extremely serious consequences” shall be identified. Obviously, the interpretation has adopted the threshold in the above-mentioned regulation and drawn a line between crimes and those infringements that have not yet constituted crimes. However, it remains unclear in the interpretation whether the 500,000 Yuan loss refers to the value of the trade secret and the media bearing such secret or the actual loss of interest suffered by the right holder. Therefore, the question of how to count the loss is still haunting the judicial practice.

6. **Protection of trade secrets before and during litigation**

China’s ‘preliminary execution’ scheme refers to the scheme under which the court may, after admitting a civil case but before giving final judgment, order the relevant party to preliminarily fulfill its obligation in order to meet the urgent need for the life or business operation of the right holder or the urgent need to stop or prevent a certain activity. Article 97 of the Civil Procedure Law of China provides that the people’s court may, at the request of the parties concerned, order preliminary execution in respect to the following cases: [i] those involving claims for alimony, support for children or elders, pension for the disabled or the family of a decedent, or expenses for medical care; [ii] those involving claims for remuneration for labour; and [iii] those involving urgent circumstances that require preliminary execution. The judicial
interpretation of the Supreme Court provides that such “urgent circumstances” shall include those where the infringement needs to be stopped or the obstruction to be removed immediately, and where certain activity need to be stopped immediately.79

However, in cases involving trade secrets and other intellectual properties, the applicability of the preliminary execution is weak and its application is very limited in such cases.80 This is mainly because the conditions for preliminary execution are hard to meet in law suits involving trade secrets. Article 98(1) of the Civil Procedure Law provides that cases in which preliminary execution is ordered by the people's court shall meet the condition that the relationship of rights and obligations between the parties is definite, and that denial of preliminary execution would seriously affect the life or business of the applicant. This requires the applicant and the judge to explain, in order to support the adoption of a preliminary execution order, why, in the absence of such order, the production or business operation of the applicant will be seriously affected. However, cases involving trade secrets are often complicated. The parties have substantial disagreements on whether the trade secret of the plaintiff exists, whether the defendant’s activity has been based on such trade secret or just on common knowledge, experience and skills of the defendant, etc. The rights and obligations between the plaintiff and the defendant are not clear. Furthermore, a lot of trade secrets cost little to form, contain little originality, are often not in use or belong to negative information, which, even if used by others, will not seriously affect the life or business of the right holder. Therefore, it is difficult for the plaintiff to apply for preliminary execution in these cases.

In order to be in conformity with the requirement on provisional measures contained in Part III Section 3 of TRIPS (Article 50), major Chinese intellectual property laws have been amended from 2000 to 2001.81 On the foundations of remedial measures provided by the Civil Procedure Law such as preservation of assets, preservation of evidence and preliminary execution, the newly amended Patent Law, Copyright Law and Trademark Law have added to the civil procedure pre-trial restricting order and pre-trial preservation of evidence.82 However, trade secrets have not received similar treatment. No new civil remedy measure has been added. The old regulation of the 1991 Civil Procedure Law was left unchanged.

In terms of the protection of trade secret on trial, according to article 120 of Chinese Civil Procedure Law, a case involving trade secrets may not be heard in public if a party so requests. The trial in private restricts to mass media, which still opens to all litigant participants, including judicial officers, court clerks, plaintiffs, defendants and their agents.

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81 The Standing Committee of the National Peoples Congress amended the Patent Law for the second time in August 2000, which entered into force on 1 July 2001; amended the Copyright Law and the Trademark Law for the second time in October 2001, which entered into force in October and December 2001 respectively.
82 Article 61 of the Patent Law, Article 57 of the Trademark Law and Article 49 of the Copyright Law.
In accordance with the Notice of the Supreme People’s Court on Printing and Issuing the Opinions on Strengthening the Work on Judicial Openness in the People’s Courts: The people’s courts shall strictly observe the extent of openness as prescribed by law, strictly keep national and trial secrets in their judicial work, and legally protect the privacies and trade secrets of the parties.

Judicial officers will notify the parties the rights to be heard in private before trial in case of disclosure of the trade secret, and the case shall not be heard in public if the parties so requires. People’s court has the duty to protect the disputed trade secret and adopt reasonable protective measures during the trial, which includes: if the trade secret-related evidence is not desired to be examined in public, after it has been produced by each party and confirmed by the court, or identified by authorized institution if necessary, the results excluding the contents can be declared between the parties by the court; People’s court shall decide that the personnel who knows the trade secret during the litigation including identification institution or personnel thereof are not entitled to disclose or use the trade secret without permission, and legal consequences for breaking the rule shall also be notified. In terms of trade secret infringement cases, the defendant shall be obligated to duly restrict the knowledge extent of the concerned trade secrets as well as to stop infringement; furthermore, infringing products and equipments or tools thereof shall also be duly disposed. The secrecy control of related files and other confidential measures should be carried out after concluding trials, such as: strictly filing trade secrets-related evidence; approval processes for retrieving or reviewing files; restrict the file-retrieval personnel scope; make specific regulations for keeping trade secrets and the liabilities thereof, etc.

7. Licensing trade secrets

There have been express provisions on issues such as management of technology importation and exportation, technology contract and resolution of the related disputes in Chinese laws. Importation and exportation of technology means technology transfer through trade, investment, or economic and technical cooperation from overseas to the territory of the People’s Republic of China or otherwise, including assignment of patent rights or claims of patent application, patent licensing, Know-how assignment, technical services or other technology transfer.83

A. Current legal framework of Chinese legislation on technology import and contractual aspects regarding technical information

Until January 1, 2002, there had been an approval system for contracts of technology import that entered into effect in accordance with the Regulation on the Administration of Contracts of Technology Import enacted by the State Council in 1985.84 The approving authority, i.e. the Ministry of Foreign Trade

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83 Article 2 of Regulations of the People’s Republic of China on Administration of Import and Export of Technologies, which has been implemented starting from January 1, 2002.

84 Article 4 of the Regulation on the Administration of Contracts of Technology Import provides that “The recipient and the supplier shall conclude in written form a technology import contract (hereinafter referred to as "the contract"). An application for approval of the contract shall be submitted by the recipient, within thirty days from the date of conclusion, to the Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China or any other agency authorized by the
and Economic Cooperation (hereinafter MOFTEC) and its affiliated agencies, had been conducting a thorough review of all aspects of the contracts of technology import submitted for approval in accordance with the Regulation on the Administration of Contracts of Technology Import and its implementing measures.

The 1985 Regulation on the Administration of Contracts of Technology Import has been revoked by the Regulation of the People's Republic of China on Administration of Import and Export of Technologies (hereinafter the Regulation on Technology Import and Export) which entered into force on January 1, 2002. The old approval system is replaced by a new system which divides technologies for import into three categories: technologies that are prohibited from importation, technologies that are restricted in terms of importation and that are subject to a licensing requirement, and technologies that can be imported freely but that are subject to a registration requirement.

At present, China’s legal environment regulating contracts of technology import mainly consists of:

(i) Laws

- the Foreign Trade Law, as amended on 6 April 2004;
- the Contract Law, which entered into force on 10 October 1999;
- the Patents Law, that was amended for a second time on 27 December 2008.

(ii) Administrative regulations and ministerial rules

These mainly include the Regulation on Technology Import and Export that was enacted by the State Council and that entered into force on January 1, 2002, and a series of ministerial rules adopted by the Ministry of Commerce (the former MOFTEC) regarding the implementation of the Regulation on Technology Import and Export, e.g. Measures for the Administration of Registration of Technology Import and Export Contracts of the People’s Republic of China (2008) and Catalogue of Technologies Prohibited from or Restricted to Import (2009).

(iii) Judicial Interpretation

This refers to the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Laws in the Trial of Cases of Civil Disputes Arising from Technology Contract which entered into force in January 2005.

B. Legal Issues Involving Technology Import Contracts

(i) China’s administration of technology import contracts
According to the Regulation on Technology Import and Export, the administration of import of technologies is based on the categorization of the technology in question into three categories: technologies that are prohibited from importation, technologies that are restricted in terms of importation and technologies that can be imported freely. It provides that technologies that are prohibited from being imported shall not be imported (Article 9) and technologies that are subject to restricted importation can be imported only with licenses (Article 10).

For technologies that are subject to restricted importation, the procedure is as follows (Articles 11 to 16).
- The importer shall submit an application for technology import to the foreign trade authority under the State Council (Ministry of Commerce and its agencies) together with supporting documents such as approval documents from the relevant authorities when necessary.
- If the application is approved, the importer will be issued a Preliminary License for the importation of the technology. Only upon which the importer may enter into contracts of technology importation only once he has received such a licence.
- Upon signing the contract, the importer shall submit a copy of the contract, together with other supportive documents, to foreign trade authority under the State Council (Ministry of Commerce and its agencies) in order to apply for a License of Import of Technologies.
- The foreign trade authority under the State Council (Ministry of Commerce and its agencies) shall, upon reviewing the authenticity of the contract, decide to grant or not to grant the License of Import of Technologies.
- If it decides to grant the License, the foreign trade authority under the State Council shall issue the License of Import of Technologies. The contract of import of technologies shall enter into force on the date on which the License is issued.
- The applicant shall present the License in order to go through the formalities at the authorities of foreign exchange, banking, taxation and customs.

Technologies that can be imported freely may be imported only by registering the importation contracts. The contracts of importation of technologies that can be imported freely shall become effective in accordance with the law and shall not be subject to the registration of the contracts (Article 17). The procedure is as follows (Articles 18-20).
- The importer shall submit to the foreign trade authority under the State Council, for the purpose of registration, an application letter, copies of the contracts of importation of technologies and documents proving the legal status of the parties to the contract.
- The foreign trade authority under the State Council shall register the contract and issue a registration certificate within 3 days of receiving the application documents.
- The applicant shall present the Certificate in order to go through the formalities at the authorities of foreign exchange, banking, taxation and customs.
It is clear from the procedure mentioned above that although the registration of the technology import contract (for those that can be imported freely) is not a prerequisite for the contract to become effective, the importer can only pay the contract price through the bank after the registration of the contract. Without registration, the exporter will not be paid in foreign currency.  

(ii) Applicable law and approval, registration and entry into force

Article 126(1) of the Contract Law provides that “[P]arties to the contract with foreign elements may choose the law applicable to any future contractual dispute except if otherwise provided in laws. If parties to the contract with foreign elements have not made a choice, the law of the nation which is most closely connected to the contract shall apply”. Since there is no specific provision regarding the applicable law in cases of technology import contracts, parties to technology import contracts may choose the law of another nation as the applicable law of the contract.

However, if a foreign law is chosen to be the applicable law of a technology import contract, it is questionable whether, during the review (in cases of restricted technology) or registration process, the authority shall conduct the review or registration in accordance with Chinese law or the foreign law chosen in the contract.

Obviously, in cases of restricted technologies, Chinese authorities can only review the contents of the contract and decide whether or not to grant the license according to Chinese law. For technologies that can be imported freely, although the Regulation on Technology Import and Export provides that the foreign trade authority shall register the technology import contracts, in practice, the Ministry of Commerce has refused to register those contracts that are in breach of any compulsory requirement of Chinese law. Therefore, even if the parties agree that a foreign law shall apply to the technology importation contract, the contract cannot contain any content that is contradictory to any compulsory requirement of Chinese law. Otherwise, the contract will not be approved or registered, and the contract will not be able to become effective (in cases of restricted technology) or even after the contract becomes effective, the contract price can not be paid to the exporter through the bank.

C. The guarantee of the licensor

Article 24 of the Regulation on Technology Import and Export provides that “[T]he licensor in a contract of technology import shall guarantee that it is the...
lawful proprietor of the said technology and therefore has the right to license the technology. If the licensee is charged for infringement by a third party because of its use of the technology pursuant to the contract terms, the licensee shall promptly notify the licensor who shall, once notified, assist the licensee in removing the obstruction. If other’s legitimate rights are infringed because of the licensee’s use of the technology pursuant to the contract terms, the licensor shall take the liability.”

In some technology importation contracts, foreign licensors require to be exempted from liabilities in infringement resulting from the use of the technology by the licensee. The Ministry of Commerce has rejected this contractual clause which is obviously against Chinese law. It states that “the obligation of guarantee by the licensor is compulsory and cannot be given up. If the contract does not contain a term of guarantee or the content of such term exempts the licensor’s from its obligation of guarantee, the authority may require that contract to be amended or reject the application for a license or for registration”.

Article 353 of the Contract Law provides that “unless otherwise agreed between the parties, the licensor shall accept liability in case another’s legitimate rights are infringed by the licensee while implementing the patent or using the technical know-how pursuant to the contract.” Read in conjunction with Article 24 of the Regulation on Technology Import and Export, the phrase “unless otherwise agreed between the parties” shall not be understood as meaning that the parties to the contract may agree to exempt the licensor from liability in case of infringement of a third party’s rights by the licensee because of the use of the technology. This phrase can only mean that under the precondition that the licensor is taking the liability, the licensor and the licensee may agree upon a limitation of such liability such as in terms of the amount of damages to be paid. This type of reasonable limit on the licensor’s liability will normally be accepted by the Chinese Ministry of Commerce.

D. The ownership of technical improvements

Article 354 of the Contract Law provides that “[T]he parties may stipulate in a technology transfer contract, the method of sharing technological achievements obtained from the follow-up improvements made in the exploitation of a patent or the use of know-how in the light of the principle of mutual benefit. Where there is no such agreement in the contract or such agreement is unclear and nor can it be determined according to the provisions of Article 61 of this Law, the other parties shall have no right to share the technological achievements made by one party in the follow-up improvement.” In principle, the know-how gained in the follow-up improvement shall be owned by the party which initiated such improvement, but the parties may agree upfront a way to share such achievements based on the principle of mutual benefit. The provision on “sharing” explicitly eliminates the possibility that the licensor would enjoy a monopoly over all fruits of follow-up improvements by any party.

Article 27 of the Regulation on Technology Import and Export, provides that “[D]uring the term of validity of a contract of import of technologies, the right
over any improvement of the technology shall be vested with the party which has made the improvement”.

Some foreign licensors want to incorporate in the contract a clause stating that any improvement made by the licensee in the process of using the technology shall belong to the licensor. This is clearly against Article 27 of the Regulation on Technology Import and Export. The Ministry of Commerce has made it clear that such arrangement can not be made through an agreement between the parties.

Now the common contract clause regarding the ownership of the improvement of the technology is that the improvement of the technology shall belong to the party which made the improvement, but that party commits itself to allowing the other party to the contract to use such improvement upon the payment of a reasonable fee. That clause has been accepted by the Ministry of Commerce.

E. Limitation on sales and parallel import

Article 29(7) of the Regulation on Technology Import and Export provides that the contract of technology import shall not “unreasonably restrict the export channel of the product produced by the licensee using the imported technology.”

The difference between economies leads to the fact that the same product is manufactured at different costs in different countries. It is possible that the product manufactured cheaper in one country may be exported to the country where the product is produced at a higher cost. There are still a lot of debates among Chinese legal scholars regarding such issues of parallel import.

Regarding the issue of parallel import, Article 46 of the Provisions of the Supreme People’s Court on Several Issues in the Trial of Cases of Disputes over Patents Infringement(draft version, dated November 2003) provides that “in the cases where the patented product domestically manufactured or obtained through patented process by the patentee or with its authorization is exported but subsequently imported back into the country, or the patented product manufactured or obtained through patented process abroad by the patentee or with its authorization is imported into the country, the people’s court shall deal with the issue according to Article 69(1) of the Patent Law, except where there have been explicit limits on the geographical scope of the sale of the patented product incorporated in the sales contract or the licensing contract. The sole proprietorship or exclusive exploitation rights regarding such patent which have been properly declared according to the law shall not be influenced.”

This provision is still under discussion as a draft and has not yet been adopted by the Supreme Court. However, it is clear from the above provision that in order to protect the interest of Chinese licensees, the licensee may, in

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87 Article 69(1) provides that the use, sale or offer to sell a patented product, after the sale of the product that was made or imported by the patentee or with the authorization of the patentee, or that was directly obtained by using the patented process, shall not be deemed as the infringement of the patent.
the licensing contract, limit the parallel import into China of the patented products manufactured abroad. In correspondence, it is only fair for foreign exporters of technology to be allowed to confer certain sales limit upon Chinese importers. These reasonable limits are not only accepted by Chinese laws and regulations, but they are also recognized by the judiciary.

F. Technology Contract infringing on fair competition

According to article 329 of the Contract Law, a technology contract which illegally monopolizes technology, impairs technological advancement or infringes on the technology of a third party is invalid. Article 10 of the Interpretation of the Supreme People’s Court concerning Some Issues on Application of Law for the Trial of Cases on Disputes over Technology Contracts provides following circumstances belonging to “illegally monopolizing technology and impairing technological progress” mentioned in Article 329 of the Contract Law:

[i] Restricting one party from making new research and development on the basis of the contractual subject technology, or restricting this party from using the improved technology, or the conditions for both parties to exchange the improved technologies with each other being not reciprocal, including such circumstances as requiring one party to gratuitously provide the other party with the improved technology, to transfer the improved technology to the other party non-reciprocally, to gratuitously and solely occupy, or jointly own the intellectual property of the improved technology;

[ii] Restricting one party from obtaining, from other origins, the technology similar to or competitive against that of the technology provider;

[iii] Impeding one party’s sufficient exploitation of the contractual subject technology in a reasonable way pursuant to the market demands, including unreasonably restricting the quantity, varieties, price, sales channel or export market of the contractual subject technology exploited by technology accepter in an obvious way to produce products or to provide services;

[iv] Requiring the technology accepter to accept attached conditions dispensable for exploiting the technology, including purchasing dispensable technologies, raw materials, products, equipment, services or accepting dispensable persons, etc.;

[v] Unreasonably restricting the channels or origins for the technology accepter to purchase raw materials, parts and components, products or equipment, etc.; and

[vi] Prohibiting the technology accepter from making objections to the effectiveness of the intellectual property of the contractual subject technology, or attaching conditions to the objections made.

If, after a technology contract is invalidated or revoked, the researcher and developer under the technology development contract, the transferor under the technology transfer contract, or the entrusted party under the technical
consulting contract or technical service contract has implemented or partially implemented the stipulated obligations, and the fault of causing invalidity or revocation of the contract lies in the other party, the people’s court may ascertain the research and development fees ought to be charged for the implemented obligations, the technology royalties, or the remuneration from provision of consulting services as the losses caused by the other party from invalidity or revocation of the contract.

If, after a technology contract is invalidated or revoked, the parties are unable to re-determine through agreement the new technological achievement accomplished due to implementation of the contract, or the belongingness of rights and sharing of benefits of the technological achievement based upon the follow-up improvements of the technological achievements accomplished by others, the people’s court may rule that the technological achievement shall be owned by the accomplishing party.\(^8\)

8. Effectiveness of non-disclosure and non-use agreements

Confidentiality agreement and non-competition agreement are two important measures to protect trade secrets of Chinese corporations, which are expressly stipulated in Chinese law.

Article 22 of the Labour Law provides that the parties involved in a labour contract can reach agreements in their labour contracts on matters concerning the keeping of the trade secrets of the employer.

Article 17 of the Labour Contract Law provides that apart from the essential clauses as prescribed in the preceding paragraph, the employer and the employee may, in the labour contract, stipulate the probation time period, training, confidentiality, supplementary insurances, welfares and benefits, and other items.

According to Article 23 of the Labour Contract Law, An employer may enter an agreement with his employees in the labour contract to require his\'her employees to keep the business secrets and intellectual property of the employer confidential.

For an employee who has the obligation of keeping confidential, the employer and the employee may stipulate non-competition clauses in the labour contract or in the confidentiality agreement and come to an agreement that, when the labour contract is dissolved or terminated, the employee shall be given economic compensations within the non-competition period. If the employee violates the stipulation of non-competition, he\'she must pay the employer a penalty for breaching the contract.

According to Article 24 of the Labour Contract Law, The persons who should be subject to non-competition shall be limited to the senior mangers, senior technicians, and the other employees, who have the obligation to keep

\(^{8}\) Article 12 of Interpretation of the Supreme People’s Court concerning Some Issues on Application of Law for the Trial of Cases on Disputes over Technology Contracts.
secrets, of employers. The scope, geographical range and time limit for non-competition shall be stipulated by the employer and the employee. The stipulation on non-competition shall not be contrary to any laws or regulations.

After the dissolution or termination of a labour contract, the non-competition period for any of the persons as mentioned in the preceding paragraph to work in any other employer producing or engaging in products of the same category or engaging in business of the same category as this employer shall not exceed two years.

Harmonization

9. Common and practical definition of trade secret

Although people in China have good understanding of the definition of the term ‘undisclosed information’ in TRIPS, in practice its literal meaning can easily be confused with other terms of secrecy, such as trade secret and personal secret information, or other confidential corporate information, etc. Therefore, making use of the term trade secret is highly recommended.

The focus of current trade secret disputes in recent China’s judicial practices is the value of trade secrets and how to determine the competitive advantages of related information. Furthermore, shall business information be included in the contents of trade secrets? Shall customer lists be protected by law and how to implement? Reasonable regulation or minimum standard on the above issues will help to promote optimality of trade secret protective mechanism.

10. What is desired in your jurisdiction?

In China, promulgation of trade secret legislation and research on the legal science of trade secrets began in the 1990s. The progress of establishment and development of a trade secret protection system in China has maintained a momentum similar to that being enjoyed in its economic growth and social reform. With unexpected speed and scale, China has gone through a process of ‘marketization,’ urbanization, diversification of economic ownership, and globalization, achieving results that have attracted the attention of the world. It is rare in the world that based on international conventions, centred on anti-unfair competition and supported by contract law and labour law, the legal system of trade secret protection has been established within 20 years.

It has been realized by Chinese government and some scholars that improvement of capacity for independent innovation, construction of independently innovative environment and establishment corporations as subjects of technology innovation has substantial connection with proper utilization with trade secret protection systems. National Economic and Trade Commission (currently mentioned as Department of Commerce) established a drafting group composed of related departments and legal experts for codification of the Trade Secret Law of the PRC. The drafting group, resting on substantial investigation and current situation of trade secret protection and referring to related foreign legislation, has drawn up the Draft of the Trade Secret Law of the PRC (draft for comment).
Afterwards the draft was distributed to local corporations for comment, being discussed and modified by many experts, and finally came to the current Draft of the Trade Secret Law of the PRC (draft for examination), which is by now still under review. Furthermore, the revised Law of the PRC on Guarding State Secrets was first submitted to Standing Committee of the National People's Congress for examination on June, 2009, which has made some modifications regarding the new circumstances in secrecy work. The Special Committee of National People's Congress and the Work Council of Standing Committee of the National People's Congress distributed the revised draft to local and central departments, universities and legal research institutes for comment, and symposium was held for comments from central departments, enterprises and public institutions and scholars. The revised draft was also published in full text for public comments in the official website of the National People's Congress. The revised draft was second examined by Standing Committee of the National People's Congress on 24th Feb. 2010, which made amendments on some hot issues, such as the scope of state secrets, hierarchy and competence for secrecy determination, duty of confidentiality, time of validity, etc. The revision of the Law of the PRC on Guarding State Secrets will advance the progress of trade secret protection in China.

The legislation and system construction of protection of trade secrets in China get started later than other countries, in particular the application and management of trade secrets is still in the exploration phase, and the challenge thereof comes from the following problems:

[i] The component of crime of trade secret infringement and its difference with general tort;

[ii] The application of Interlocutory injunctions on trade secret litigations and conditions thereof;

[iii] Confidentiality obligations of employees in employment and nature and standard of non-competition obligations;

[iv] Definition of the amount of compensation in trade secrets

[v] Proof of evidence in trade secret litigations

11. **What is required for an improved global standard for trade secret protection?**

With many overseas investments in China, lots of foreign people come to China for job opportunities. For example, the number of foreign people employed in Shanghai grows on a year to year basis: the number in 2002 is 51.1% more than that in 2001, year of 2003 is 28.66% more in number over the same period of the previous year. Until the end of September in 2005, the number of foreign people applying for Work Permit in Shanghai reached 11,277, exceeding the total in 2004. Above 80% of them work in foreign-invested enterprises or agencies for foreign enterprises, who engaged in management and technical tasks, more than 3600 of them take the post as general manager. The recent survey made by Shanghai Bureau of Labour
and Social Security indicates that the foreign permanent population residing in Shanghai reaches up to 152,104 by the end of 2008.

Foreign-related trade secret disputes increase with the ascending population of foreign employees in China, such as contract disputes including non-competition or confidential agreements and IP disputes including trade secret infringement.

The obstacles to resolve transnational trade secret disputes which influence the effective protection of trade secrets exist as follows: determination of applicable law of trade secret disputes; international judicial cooperation to coordinate mandatory rules stipulated in domestic laws for protection of trade secrets; public policy, etc. AIPPI, as one of the international organizations, may agree on the following issues in order to advance the development of international legal system of trade secret protection:

[i] Determination of applicable law in transnational license agreement of trade secrets

[ii] The principle and standard in determination of applicable law for disputes arising from foreign-related confidential and non-competition agreement compared with general foreign-related contract disputes;

[iii] The principles in public policies and mandatory rules in domestic law for handling foreign-related disputes arising from trade secret infringement or contracts thereof.

[iv] Precaution against malicious actions in trade secret litigations

12. Other comments?

Influenced by the international financial crisis, there has been sharp decrease in exports and demands of domestic and foreign markets, causing many enterprises and factories’ financial problems or bankruptcy in China as well as in other countries. In order to control expenses to cope with the crisis, some enterprises are forced to reduce salaries, or even make layoffs on large scale. These measures not only cause large flow among the employees, but also the loss of enterprises’ trade secrets. Many principals of the enterprises indicate that they are now confronted with the problem of protecting the trade secrets: on one hand, they need to reduce the employees’ salaries or layoff to control the expenses under such harsh economic environment, which definitely lead to employees’ frequent mobility; on the other hand, some enterprises just take the opportunity to hire employees from other enterprises at high salary in bad faith, or use improper means to acquire their competitors’ trade secrets, so as to enhance the competitive power of their own and preempt the competitors’ market. It remains a big challenge of the current trade secret protection mechanism world wide on how to improve the protective capability of each enterprise, to decrease the loss cause by secret-related employees’ leaving and to keep an open, fair and competitive market circumstances under the severe international financial crisis.
For the purposes of safeguarding the rewards to the developer for the successful innovation in order to advance scientific development in the whole society and maintaining the competitive order of the market economy, the acts on the protection of trade secret are formulated in domestic law in various countries. However, protection of trade secrets will unavoidably conflict with other legal systems, such as restricting information flow and public access to it, raising the threshold for informationization and its application, impeding the application of information technology and its distribution, etc. Furthermore, the non-competition agreement will be bound to hinder employee’s mobility and their post-employment life. Therefore, the construction and perfection of trade secret protection system shall be strictly complied with reasonable legislative principle to deter abuse of rights through improper competitive means. A balancing mechanism is pursued to realize the balance between protections of trade secrets, public interest of free information flow and public rights to access information; and between protections of owner’s property rights and employee’s basic rights.

The modern legal system for trade secret protection should be based on reasonable principles and should achieve harmonization of certain public policies including:
- Balancing of the protection of trade secrets and the basic rights of employees;
- Realization of fair competition through the protection of trade secrets;
- Harmonization of substantive fairness of contracts and trade secret protection.

[i] Balancing the protection of trade secrets and the basic rights of employees

In order to cope with the reality that in the Information Age the economic strength of a country is determined by scientific and technical advancement, many countries have proposed and implemented a strategy of “building a country with knowledge” which regards intellectual property as the backbone of market competition. Using this strategy, all countries hope to advance their competitive capacity within an environment of increasingly globalized world trade by protecting creativity and encouraging enterprises to increase investment in scientific and technical research and development.

Nowadays, it has become a preferred choice of many enterprises and technical personnel not to apply for patents but to ensure a longer period of exclusive possession by maintaining the secrecy of the know-how they have obtained. In addition, as with other intellectual property, the trade secrets of an enterprise consist not only of oral and written knowledge but also the experience and skill of its employees that might become common knowledge or valuable information of an enterprise through ongoing training and communication within an enterprise. However, once employees possessing such knowledge or information leave an enterprise, the development of that knowledge is cut short and accumulation of common knowledge is hampered, resulting in the derogation and loss of enterprise assets. Further, turnover of highly skilled workers causes diffusion, duplication, and imitation of the store of knowledge of an enterprise, which will reduce the market value of the enterprise’s intellectual property. If competitors can easily obtain intellectual
property from the ex-employees of other enterprises they will obtain without effort a springboard that will allow them to easily catch up with the market share enjoyed by those enterprises. Ultimately, those enterprises will lose their competitive advantage in the marketplace.

For these reasons, many countries not only prescribe confidentiality obligation for employees, but also allow employers to restrain post-employment competition through agreements with their employees as an effective means to protect the trade secrets of enterprises.

However, the acquisition of work experience and skill relies on a certain corporate culture as well as on personal experience. Employees, as the medium for the transmission of information in the workplace, are both beneficiaries and creators of the common knowledge of enterprises. As such, they create valuable information for their enterprises and contribute substantially to the corporate culture based on their unique personal skills and intelligence, which are a means of production belonging exclusively to them. It is reasonable that employees should share the fruits of their labor within an enterprise. Based on a policy of protecting the interests of both employers and employees, as in other intellectual property law, trade secret legislation must draw a distinct line between the trade secret rights of employers and employees during the course of employment.

Because agreements concerning non-competition following employment do, in fact, deprive employees of the opportunity to advance to a better paying position, they will to some degree restrain the competitive ability of skilled workers in the labor marketplace. Particularly, in a society with deep divisions of labor and close professional cooperation, the latitude of employees to change jobs will be narrow. Performance of non-competition agreements directly infringes on the basic rights of employees including their right to a livelihood and their right to work - rights that are guaranteed by the constitutions of some countries. From this point of view, as an effective measure to protect trade secrets, post-employment restraint comes at the cost of the coerced waiver of the basic rights of employees as well as hindrance of the mobility of the labor force. The freedom to work and to conduct lawful competition is a principal manifestation of a worker’s right to a livelihood in a market economy. The infringement of those rights undoubtedly runs counter to social policy. For these reasons, any trade secret legislation must confine non-competition agreements following employment to a reasonable scope.

[ii] Realizing fair competition in protecting trade secrets;

Competition is not only the subsistence rule for human beings and other living beings but also the originative power for the developing market economy. Free access to the market is, in essence, the freedom of competition. In view of these factors, in earlier British and American precedents some courts have invalidated non-competition agreements on the underlying assumption that said agreements violated the doctrine of free competition in the market. Until today, some legislatures still uphold this reasoning and maintain a negative
attitude towards enforcement of non-competition agreements following employment.

However, in order to achieve an advantage in the technological market some enterprises entice the skilled employees of their competitors to work for them or to obtain the technical information they possess. They try to gain and make use of the trade secrets through the departing employees of their competitors. This happens in the course of business all the time in the Information Age, but obviously goes against the commercial moral of fair competition and will turn the market into a disorderly situation if there are no effective preventive measures. In order to protect the public interest in maintaining fair and free competition and technical innovation, laws in many countries permit enterprises to conclude non-competition agreements with their employees for the purpose of protecting trade secrets.

Now that the concept of non-competition has gradually been applied to employment relationships, post-employment restraint can also be thought to hinder competition in the labor market.

Nevertheless, by preventing an ex-employee from working within the same industry or using information obtained during employment, an employer may remove a potential competitor from the marketplace or deprive an existing competitor of a valuable resource. Furthermore, an employer that enjoys market dominance could cause the cost of information capital to rise by controlling access to the use of information. This, in turn, may result in hindering the dissemination of knowledge and might easily create monopolies within certain industries.

As a result, the excessive protection of trade secrets, especially the market monopoly created by the abuse of post-employment constraints, will inevitably destroy the environment of free and fair competition for enterprises.

For these reasons, to regulate such agreements so as to achieve fair competition is a considerable problem facing legislators.

[iii] Empowering the substantive fairness of contracts in trade secret protection

The doctrine of the freedom to contract has always been the theoretical pillar of confidentiality agreements and non-competition agreements and is cited in the statutes and precedent in some countries. It is consistently used to determine the validity of said agreements, especially of non-competition agreements.

According to the doctrine of freedom to contract, whether a confidentiality agreement or a non-competition agreement is to be formed and what the content of such agreements shall be is decided by the mutual consent of the parties to such contracts. Hence, as long as an agreement expresses the true will of the parties, the agreement will be legally enforceable.
As discussed in my thesis, in civil and commercial law, “contract is law.” Freedom to contract is one of the basic principles of contemporary civil and economic relationships, which embodies the autonomy of contracting parties in civil and economic activities. Freedom to contract is considered the backbone of maintaining the public interest in many countries so that public policy can be created based on this doctrine and the legitimate expectations of contracting parties can be satisfied. It is better for society that individuals have the intent to keep their promises so that other individuals can then feel that they can rely on those promises. The benefit gained in doing so is increased efficiency and reduced costs of trade.

The fulfillment of those expectations at the conclusion of a contract will help the contracting parties to obtain their anticipated benefit. If contracts were routinely not enforced, individuals would stop entering into them. If an employer did not feel that it could rely on the promise of its employees not to compete, the benefits of such agreements would be lost. What are the expectations of employers and employees when they enter into a covenant not to compete following employment? Normally, employers anticipate that such agreements will protect the confidentiality of their business information and prevent any unfair competition against them as a result of misappropriation of their trade secrets. Employees normally enter into non-competition agreements in order to obtain more opportunities for technical training and to obtain the trade secrets of their employer so as to leverage their technical skills. Therefore, it seems reasonable for the court to uphold the enforcement of such agreements.

Nevertheless, the doctrine of freedom to contract is based on equity between parties in the form of the contractual relationship. When individual employees feel intimidated by employers (e.g., companies or enterprises that have great financial power), especially when those employers offer limited compensation as consideration for the signing by employees of non-competition agreements, it is difficult for them to depend solely on the principle of freedom to contract to realize the substantive equity and fairness of such agreements. Therefore, underlining the importance of the doctrine of freedom to contract, it is generally a dilemma for legislatures and courts worldwide to ensure the substantive justice of agreements not to compete following the expiration of employment contracts. Therefore, the legal system of trade secret protection must ensure the substantive fairness of confidentiality agreements as well as non-competition agreements.