Legal Protection of Trade Secrets in the People's Republic of China

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LEGAL PROTECTION OF TRADE SECRETS
IN THE PEOPLE’S REPUBLIC OF CHINA

Yuan Cheng

Abstract: The increasing need for an adequate legal framework for the protection of trade secrets in the People’s Republic of China led to the 1993 promulgation of the Law for Countering Unfair Competition (“LCUC”). The LCUC has removed some of the barriers to obtaining effective remedies. Under the LCUC, the injured party can rely on a legal definition of “trade secrets,” sue third parties, and expect that authorities will investigate violations. Nevertheless, barriers to adequate protection for trade secrets remain. In discussing the legal framework for trade secrets protection, this Article illustrates how the ambiguity of the LCUC’s relationship with other remedies—especially in the employer-employee context—tends to undermine the LCUC’s effectiveness in offering injured parties a sufficient choice of remedies.

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I. INTRODUCTION

The Law of the People’s Republic of China for Countering Unfair Competition (“LCUC”), promulgated on September 2, 1993 and put into force on December 1, 1993, has for the first time provided a firm legal basis for the protection of trade secrets in China. Although the Sino-U.S. Memorandum of Understanding on the Protection of Intellectual Property Rights had a direct influence on the enactment of the LCUC, the law also reflects the profound social and economic changes which have taken place in China over the past decade. With the deepening of market reform in China, Chinese enterprises have become increasingly aware of the importance of taking legal action to protect their trade secrets.

This Article discusses the LCUC’s role in the legal framework for the protection of trade secrets that has taken shape in China. In addition to the LCUC, the present framework consists of the Technology Contract Law, the General Principles of Civil Law, the Criminal Law, and other relevant central and local legislation. This Article also critiques the present framework’s inadequacies in terms of the ambiguity of existing laws and policies as well as the practical difficulties associated with the different avenues for

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1 Both Chinese and English texts of the Law for Countering Unfair Competition can be found in CHINA LAW & PRACTICE, Nov. 18, 1993, at 31. The Law for Countering Unfair Competition is sometimes alternatively translated as the Anti-Unfair Competition Law. The Law is hereinafter referred to as LCUC.
2 The drafting of this Law began in 1987. In some of the earlier drafts, other titles were used for the legislation, such as “Regulations on Anti-Monopoly and Countering Unfair Competition” and “Unfair Trade Law.” See Wang Xiaojing, An Introduction to China’s Law for Countering Unfair Competition, [1994] 1 CHINA PATENTS & TRADEMARKS 76, 76-77.
seeking protection.

Part II discusses the social and economic changes that have given rise to China's growing need for legislation aimed at protecting trade secrets, and also examines legal terms used in the laws that comprise China's present legal framework for protection. Part III presents a case study in order to examine the manner in which trade secrets are protected in practice. Part IV outlines China's existing legal framework for the protection of trade secrets and discusses the ways in which, even after the enactment of the LCUC, the existing legal framework fails to adequately define the scope of protection available under the various laws that comprise the framework. This Article then compares the different avenues for seeking protection in Part V, and concludes by summarizing the inadequacies of the present legal framework and suggesting ways to improve it.

II. SIGNIFICANCE OF LAWS PROTECTING "TRADE SECRETS"

A. Why Protect "Trade Secrets"?

Article 4 of the Sino-U.S. Memorandum of Understanding Concerning the Protection of Intellectual Property Rights (hereinafter referred to as the "MOU"), signed on January 17, 1992, specifically requires that:

[the] Chinese Government shall prevent trade secrets from being disclosed to, acquired by, or used by others without the consent of trade secret owner in a manner contrary to honest commercial practices including the acquisition, use or disclosure of trade secrets by third parties who knew, or had reasonable grounds to know, that such practices were involved in their acquisition of such information.3

The MOU further requires the Chinese Government to "submit the bill necessary to provide the levels of protection specified in this Article to its legislative body by July 1, 1993, and will exert its best efforts to enact and

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implement this bill before January 1, 1994."4

The MOU made the protection of U.S. trade secrets, and the enactment of the relevant law, a specific obligation of the Chinese Government and set a deadline for the introduction of such legislation. The Law of the PRC for Countering Unfair Competition came into force just one month before the deadline set in the MOU. It is obvious that the MOU has had a very direct impact on the legislation. However, to conclude that the LCUC was enacted solely because of U.S. pressure and see the Law as U.S.-imposed legislation would be to miss some important facts. There are in reality profound domestic social and economic reasons for the Chinese leadership's decision to promulgate this Law.

Under the old central-planned economic system in the People's Republic of China ("PRC"), trade secrets or know-how, like any other scientific and technological achievement, were treated as public property regardless of who developed them. They were not protected as private property as they are in a capitalist market economy. Technical secrets belonged to the state and were to be used by all the state enterprises free of any compensation.5 In 1978, on the eve of the economic reforms in the PRC, state-owned industrial enterprises accounted for seventy-eight percent of China's total industrial output, and the rest of China's national output was met by the collective enterprises which were managed in a similar fashion as the state enterprises.6

The economic reforms that have been pursued since the late 1970s have brought considerable change to the ownership structure in the Chinese economy. The state-owned sector declined to around fifty-five percent in 1990 and it has been estimated that by the year 2000 the state share will reach twenty-five percent. Collective enterprises have expanded rapidly and become autonomous economic entities. Private sector and foreign investment enterprises grew from nothing to around ten percent of China's total industrial output by 1990.7 Even state enterprises have moved towards a greater autonomy and begun to possess their own economic interests independent of other state enterprises and organizations.8

4 Id.
7 Id.
8 For further study of the reform of the state enterprises, see CHENG YUAN, EAST-WEST TRADE:
As a result of these developments, enterprises in China have become more concerned with the protection of their technical and commercial secrets, which are seen as crucial in maintaining their competitive edge. Trade secrets are increasingly being recognized as an important economic right and interest. Thus, the first reason for promulgation of the LCUC is that an environment of fair competition has come to be recognized as desirable for all those who wish to conduct legitimate trade in China.

Second, due to reforms in China's labor system, there is now greater mobility of labor in China, particularly among managerial and technical personnel. In fact, the state has adopted a policy of encouraging a reasonable movement of talented people (rencai de heli liudong) among the Chinese units as well as among the Chinese units and the foreign investment enterprises operating in China. As a result of this new freedom, some managerial and technical personnel are allowed to resign from their work units and join competitors, or even set up their own rival businesses. A typical situation involves a talented person in a state unit who, tempted by a private firm's pay package, decides to leave the former and join the latter.

Very often when these people move from one unit to another, they bring with them valuable technical and commercial secrets. This practice has two negative impacts. First, it infringes upon the economic interests of the unit which has spent time, money, and manpower in developing such technical and commercial secrets. Second, it disrupts orderly and fair competition between the enterprises. Instead of investing in research and development, some enterprises now divert their resources into spying on others' trade secrets and into bribery. Accordingly, China urgently needs to enact a law to deal with the infringement of trade secrets through personnel transfers.

Third, the promulgation of legislation to protect trade secrets

Finally, the LCUC is by no means China’s first attempt at legislating for the protection of trade secrets. Since the mid 1980s certain Chinese provincial and city authorities have adopted local legislation on countering unfair competition. Shanghai, Wuhan, and Jiangxi have all promulgated such local legislation.12 The LCUC was a natural product of this regional legislation. It has drawn on some useful experience gained from these regional regulations and brought the protection for trade secrets up to the level of a national law.

B. Legal Terms Defined and Distinguished

Until the enactment of the LCUC, Chinese language equivalents for interests in “know-how” and “trade secrets” reflected confusion as to which interests the terms should encompass. The following section describes and distinguishes legal terms used in the laws relevant to the protection of “trade secrets.”

1. “Know-how”

In the People’s Republic of China, one term which has been closely related to “trade secrets” and has attracted great attention, is “know-how.” At least six different Chinese terms are used for referring to “know-how.”13

13 Some Chinese literature simply uses the English word “know-how” without translating it into Chinese. Feng Chujian, supra note 5; YAN HUI & MI A’RONG, GUOJII JISHU MAO YI JIAOCHENG [TEXTBOOK
These terms are: *nuohao* (based on the English pronunciation for know-how), *zhuanmen jishu zhishi* ("special technical knowledge"), *jishu jueqiao* ("technical tricks"), *jishu mimi* ("technical secrets"), *zhuanyou jishu* ("proprietary technology"), and *fei zhuanli jishu* ("non-patented technology").

The term "know-how" came into China very early. In the 1960's Chinese foreign trade corporations were already using "know-how" in some technology import contracts of an East-West trade nature. Academic discussions of "know-how" can be found in the writings of the late 1970's.

In 1980, the Chinese State Council promulgated two sets of foreign-related tax regulations which, for the first time, used the term "proprietary technology" (*zhuanyou jishu*) in Chinese legislation. On May 24, 1985, the State Council promulgated the Regulations on Administration of Technology Import Contracts which used the term "proprietary technology." Subsequently, the Ministry of Foreign Economic Relations and Trade ("MOFERT") promulgated rules for implementation of the above Regulations. These rules define "proprietary technology" as "the knowledge of the manufacture of a certain kind of product or the application of a certain technique, as well as product design, technological process, formula, quality control and management that has not been made public and is not protected by industrial property law." As a result of these regulations and implementing rules, "know-how" brought into China by
foreigners through technology import contracts has become a subject of legal protection under Chinese law.

On June 23, 1987, the National People’s Congress (“NPC”) promulgated the Technology Contract Law of the PRC\(^1\) and on March 15, 1989, the State Science and Technology Commission adopted the Rules for the Implementation of the Technology Contract Law. These two pieces of legislation have replaced the term “proprietary technology,” sometimes used in earlier legislation, with the term “non-patented technology” (fei zhuanli jishu). The Rules for the Implementation of the Technology Contract Law provide that “non-patented technology” consists of (1) technological achievements for which a patent has not yet been applied, (2) technological achievements which have not been granted a patent, and (3) technological achievements which shall not be patentable under the Patent Law.\(^2\) Since the Technology Contract Law applies only to technology contracts between the Chinese domestic economic entities and citizens, it demonstrates that “know-how” traded in China’s domestic technology market is now firmly protected by Chinese law.

The Law of the PRC on Scientific and Technological Progress, promulgated by the Standing Committee of the NPC on July 2, 1993, provides that:

> anyone who plagiarizes, alters, passes off or infringes upon in other ways other person’s copyright, patent right, right of discovery, right of invention and the right to other scientific and technological achievements, or illegally steals other person’s *technical secrets*, shall be dealt with in accordance with the provisions of the relevant laws.”\(^3\)

It is interesting that this more recent legislation has dropped both “proprietary technology” and “non-patented technology” and instead adopted the term “technical secrets.” This is probably because the Chinese term “technical secrets” (*jishu mimi*) contains the word *mimi* (secrets). This

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\(^1\) The English text of the Technology Contract Law can be found in *CHINA LAW & PRACTICE*, Aug. 24, 1987, at 32-49 and in *China Laws for Foreign Business* (CCH Austl. Ltd.) ¶ 5-577. The Law is hereinafter referred to as the Technology Contract Law.


element of secrecy or non-publicity draws a main distinction between "know-how" and other types of intellectual property. This Chinese word, *mimi*, however, is missing from the other two Chinese terms.

In fact, there are no substantial differences between these Chinese terms, nor is any one term more satisfactory than the others. What is clear from these statutes is that the official Chinese view tends to give a narrow definition of what is "know-how." This is generally in line with the Chinese attitude towards the protection of intellectual property rights—to offer as little protection as possible. As noted earlier, it has taken a long time for China to recognize the right of the owner of know-how and offer legal protection of this right, which initially was given to foreigners only.

2. "Trade Secrets"

The term "trade secrets" was incorporated into Chinese commercial and legal thinking rather late. No significant studies can be found on the subject of the protection of trade secrets in the People's Republic of China before the mid 1980s. Generally speaking, the Chinese have been unwilling to offer the protection to this type of information and have been concerned that such protection may be easily abused by foreigners.

Like "know-how," the Chinese terms for "trade secrets" are equally confusing. Although *shangye mimi* (literally "commercial secrets" or "business secrets" and commonly translated as "trade secrets") has been the most widely adopted, *gongshang mimi* ("industrial and commercial secrets"), *hangye mimi* ("professional secrets"), and *jingji mimi* ("economic secrets") are also used in China to refer to the same thing. Some studies even consider "trade secrets" as equivalent to "know-how"

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23 See generally [PRACTICE ON INTERNATIONAL TECHNOLOGY TRADE], supra note 14, at 146 (discussing breadth of trade secret protection outside of the PRC).

24 CAO JIARUI ET AL., supra note 22, at 88.

25 See, e.g., ZHOU DAWEI, supra note 22; [COMPLETE BOOK ON LAW AND PRACTICE OF CHINESE INTELLECTUAL PROPERTY RIGHTS], supra note 22, at 149.

and use the two terms interchangeably.27

The term “trade secrets” (shangye mimi) was first used in PRC law when the Civil Procedure Law of the People’s Republic of China was revised on April 9, 1991. The Law provides that evidence involving “trade secrets” (shangye mimi) shall be kept confidential and not be presented in an open court session, and that cases involving “trade secrets” may be closed to the public when a party so requests.28 Later, the Opinions of the Supreme People’s Court on Several Issues Concerning the Application of the Civil Procedure Law of the PRC, issued on July 14, 1992, defined “trade secrets” as “technical secrets (jishu mimi) and commercial data and information (shangye qingbao ji xinxi), which are industrial and commercial secrets such as production processes, formulae, business contacts, marketing channels, etc., which the party concerned is unwilling to make public.”29

A much clearer definition of “trade secrets” was offered when the Law for Countering Unfair Competition was adopted on September 2, 1993. Article 10 of the Law defines “trade secrets” as “technical information and operational information which is non-public, can bring economic benefits to the party that has rights in such secrets and is practical, and for which the party that has rights in such secrets has adopted measures to maintain its confidentiality.”30 According to this definition, the term “trade secrets” consists of “technical information” (jishu xinxi) and “operational information”31 (jingying xinxi) that meet the following four conditions: (1) it is not already known to public; (2) the owner is able to derive economic gain from such information; (3) it is useful; and (4) the owner has adopted measures to protect the information.

According to one Chinese study,32 “technical information” refers broadly to all written and unwritten instructions, data, and procedures of various technology-related materials, parameters, formulae, and working

27 YAN HUI & MI A’RONG, supra note 13, at 59; Feng Chujian, supra note 5, at 54.
30 LCUC, art. 10.
31 Some English translations use the term “business information” for what the author translates as “operational information.”
methods. It consists of both patented and non-patented technology. The LCUC is only concerned with the protection of non-patented technology, which may be further divided into "know-how" and "show-how." \(^{33}\) "Technical information" concerning patented technology is protected by the Patent Law.

The same study defines "operational information" as:

all kinds of non-technical, secret information that is summed up and accumulated by operators in practice and is beneficial to the production and circulation of commodities and the development of other profit-making services, e.g., customer information, ... market analysis reports, information on competitors, and research reports on the feasibility of projects." \(^{34}\)

It is generally agreed in China that "technical information" is primarily concerned with industrial and manufacturing activities, whereas "operational information" is often related to the business activities of tertiary industries, as well as the marketing and distribution of products of an industrial enterprise. \(^{35}\)

III. CASE STUDY: BEIJING KEXING NEW MATERIALS RESEARCH INSTITUTE SUES BEIJING ZHITONG TECHNOLOGY-INDUSTRY-TRADE COMPANY\(^{36}\)

Although judicial decisions have never played a significant role in the development of the law in the PRC, they are nevertheless illustrative of the attitude of the court towards the new LCUC, the legal reasoning used by the court in adjudication, and the procedural practices applied to cases involving trade secrets. The case *Beijing Kexing New Materials Research Institute v. Beijing Zhitong Technology-Industry-Trade Company* involved

\(^{33}\) Id. at 84.

\(^{34}\) Id. at 85.


\(^{36}\) This case was reported in Liu Jianjun & Li Mingjun, *Shangye mimi de guansi: Beijing shi haidian qu fayuan shenli yiqi bu zhengdang jingzheng an jishi* [Trade Secrets Lawsuit: A Record of an Unfair Competition Case Tried by the Beijing Municipality Haidian District Court], *FAZHI RIBAO* [LEGAL DAILY], Feb. 11, 1995, at 7.
a dispute between two Chinese domestic economic organizations over an infringement of trade secrets. As one of the first cases heard by the Chinese courts immediately after the promulgation of LCUC, *Beijing Kexing* represents a significant start in interpreting the new law but leaves unanswered several important questions.

A. **Summary of Facts of Case**

In 1991, Kexing began research into a new filling material used in telecommunication. In June 1993, a new product named "communication cable filling agent" was invented. The new product had a vast potential market in China as China had until then relied upon imports to meet the demand. Throughout the research and development period, Kexing adopted measures to keep research work confidential so that only a few technical personnel could have access to the product formulae. Upon completion of the research work, Kexing began to purchase equipment and materials and to prepare for full-scale production.

In April 1994, Zhan Yi, a former research staff member of Kexing, who had participated throughout the entire process of developing the new product, resigned from Kexing and joined the Beijing Zhitong Technology-Industry-Trade Company ("Zhitong"). Subsequently, Kexing discovered many of its clients buying a new product similar to its own for a much lower price from Zhitong. Through investigation, Kexing found that the product made by Zhitong used the same formulae as Kexing’s. It concluded that Zhan had divulged Kexing’s technical secrets concerning the product to Zhitong. In June 1994, Kexing brought the suit to the Beijing Haidian District Court, claiming that both Zhan and Zhitong had infringed upon Kexing’s trade secrets, and that this had caused an economic loss of RMB 410,000 to Kexing.

Zhan, however, put forward two main defenses. He asserted that the formulae used in his product was different from that of Kexing’s product, and maintained that the product was a result of Zhan’s own research conducted between 1992 and 1994, in the spare time available to full-time employees at Kexing.

The court tried to mediate the case, but the parties failed to reach an agreement. On December 12, 1994, the court decided that the product of Zhitong contained trade secrets which were owned by Kexing, that the product formula used by Zhitong was substantially the same as the formula
developed by Kexing, and that Kexing’s internal regulations on maintaining confidentiality by its employees should have binding force. It concluded that both Zhan and Zhitong had violated article 10 of the LCUC by infringing upon Kexing’s trade secrets. The court ruled that co-defendants Zhan and Zhitong must cease their acts of infringement of Kexing’s trade secrets, and jointly compensate the economic loss suffered by Kexing, which was assessed by the court as RMB 416,690.

B. Analysis of the Beijing Kexing Decision

The court decision does shed some light on how the existence of trade secrets should be established. The court stated that for two years Kexing had conducted nine major tests for its new product and that all the technical data and materials involved in these tests should be regarded as “technical information” under the LCUC’s definition of the term. Also, Kexing’s client information, marketing channels, and other related business information all fell within the definition of the term “operational information” under the LCUC. The court found that by adopting internal measures, which required confidentiality from its research, development, and marketing personnel on all information concerning the new product, Kexing had satisfied the requirement to maintain confidentiality and that the measures should have binding force on Kexing employees.

The court, however, did not go far enough in its assessment of the legality of Kexing’s restrictive covenant. Under Kexing’s covenant, employees must not take any concurrent jobs with other competitors and must not engage in the research and development of the same technology for a period of three years after leaving Kexing. The court failed to address the conflict that a covenant of this nature may have with the state policy allowing the reasonable movement of talented persons and the holding of concurrent jobs by scientific and technical personnel.37

Beijing Kexing also illustrates how damages might be assessed in future cases. In Beijing Kexing, it seems that the court roughly accepted the amount of damages claimed by Kexing. This assessment of damages is in line with the method provided in article 20 of the LCUC; that is, the damages shall be equal to the loss suffered by the owner of trade secrets. The Chinese legislation and judicial interpretation, however, have not yet

37 See Decision of the Central Committee of the Chinese Communist Party Concerning the Reform of the Science and Technology System, supra note 9, at 140-42.
provided any method for assessing the value of trade secrets, nor any method for calculating the loss suffered by the owner of trade secrets. This remains a gray area in Chinese law.

*Beijing Kexing* represents a rather typical case in present-day China. Along with the reform to China’s labor system, the state has in recent years encouraged the free movement of talented persons, particularly of technical and managerial personnel, and has relaxed the restriction on people taking second jobs.\(^{38}\) This has created a new problem for China: when these technicians and managers move from one unit to another, they often bring valuable trade secrets with them. No matter what intention these persons may have in passing this secret information to their new employers, it inevitably leads to unfair competition between their former units and the units with which they are newly employed.

The court appears to find it difficult to draw a line between reasonable movement of talented persons and an infringement of trade secrets by stealing managerial and technical personnel of other units. Nor was the court able to answer the question of what technical information obtained from the former work unit can be safely used by a managerial or technical employee in his current employment without being charged with infringement. These questions must be answered by implementing legislation for the LCUC or by a judicial interpretation by the Supreme People’s Court.\(^{39}\)

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\(^{38}\) *Id.*

\(^{39}\) The State Council issued a number of documents in the 1980s concerning the scientific and technical personnel holding concurrent jobs and the reasonable movement of these personnel, such as the Provisional Measures Concerning Scientific and Technical Personnel Holding Concurrent Jobs, art. 2, *compiled in* 8 JINGJI SHENPAN SHOUCE [HANDBOOK ON JUDICIAL DECISION MAKING IN ECONOMIC CASES] 579, 579 (1991); Several Provisions Concerning the Reasonable Movement of Scientific and Technical Personnel, *compiled in* id. at 583; Notice Concerning the Encouragement of Reasonable Movement of Scientific and Technical Personnel, arts. 1, 2, 8, *compiled in* id. at 605; Opinions on Several Issues Concerning the Scientific and Technical Personnel Holding Concurrent Jobs, *compiled in* id. at 623.

These documents have laid down some useful guidelines and policy concerning these questions. For instance, the Opinions on Several Issues Concerning the Scientific and Technical Personnel Holding Concurrent Jobs, art. 1, §§ 1-3, *compiled in* id. at 623, 624, provide that the scientific and technical personnel who undertakes a major research work of his unit is not suitable for holding concurrent jobs, and that any scientific and technical personnel must keep confidential the unpublished technical data of his principal unit and, without the consent of his principal unit, must not pass any technical information or achievement on to the unit he holds a concurrent job. Unfortunately, these documents were not referred to by the court in its decision.
IV. LEGAL REMEDIES FOR INFRINGEMENT OF TRADE SECRETS IN CHINA

A. Legal Framework for the Protection of Trade Secrets in China

China's present framework for the protection of trade secrets fails to adequately define the scope of protection available under the different laws that relate to trade secrets. Any discussion of the LCUC’s effect on this framework is complicated by the ill-defined relationship between the scope of protection offered by the LCUC and the protection offered by other laws such as the Labor Law, the Technology Contract Law, and the Regulations on Administration of Technology Import Contract.

This section discusses each of the different laws that together comprise the framework for the protection of trade secrets; the next section discusses remedies that may be available. While the LCUC has contributed to the strengthening of trade secret protection, several critical issues remain unaddressed by the existing legal framework. These critical issues include the following: the nature of a trade secrets right; violation of trade secrets in the employer-employee context; criminal liability; and the method for assessment of damages. To the extent that the framework for the protection of trade secrets fails to address these issues even after the enactment of the LCUC, a special trade secrets law may be needed in China.

Legal protection of trade secrets can be achieved in a number of ways, including: (1) protection by contract; (2) protection through unfair competition legislation which treats an infringement of trade secrets as a form of unfair competition; (3) protection through tort law; (4) protection through criminal law; and (5) protection through additional trade secrets legislation, such as a special trade secrets law. Trade secrets also can be indirectly protected by other intellectual property legislation, such as patent law and trademark law.40

1. Protection by Contract

The term “contract” that is used here encompasses technology contracts and other contracts which contain provisions regarding the protection of trade secrets, such as employment contracts. A technology contract imposes obligations on the parties to maintain the confidentiality of

40 Feng Chujian, supra note 5, at 58-59; [COMPLETE BOOK ON LAW AND PRACTICE OF CHINESE INTELLECTUAL PROPERTY RIGHTS], supra note 22, at 149-50.
the technology concerned; a breach of such an obligation is equivalent to a breach of the contract. An employment contract may require an individual employee who has access to the employer’s technology and trade secrets to keep those secrets confidential; under such a contract, an unlawful disclosure amounts to a breach of the contract resulting in the employee’s liability for payment of damages to the employer.

The primary Chinese legislation governing technology contracts is the Technology Contract Law, promulgated on June 23, 1987. The Law deals with four types of technology related contracts. These are contracts for technology development, technology transfer, technology service, and technology consulting.\(^1\) The Law provides that a technology contract must contain a clause on the confidentiality of the technical information and materials.\(^2\) In the transfer of a “non-patented technology,” maintaining the confidentiality of the relevant technology is one of the main obligations of both the transferor and the transferee.\(^3\) Should a transferor or transferee breach his obligation regarding confidentiality, he shall pay a penalty or damages.\(^4\)

When the Technology Contract Law was promulgated in 1987, the concept of “trade secrets” was not yet officially recognized in China. As a result, the Law only uses the term “non-patented technology” (fei zhuanti jishu), which is a much narrower concept than “trade secrets.”\(^5\) “Non-patented technology” or “proprietary technology” as used in some earlier legislation does not comprise “operational information.” It is therefore doubtful whether a technology contract could be a suitable vehicle for the protection of non-technical secret information, such as information on customers and competitors, market analysis reports, and the like.

Also, the legal status of a clause on the protection of trade secrets, or

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\(^{1}\) Under this Law, “technology development contract” refers to a contract concluded between parties in respect of new technology, new products, new processes and new materials and their systematic research and development. “Technology transfer contract” refers to a contract concluded by parties in respect of the transfer of patent rights, the transfer of the right to apply for a patent, the licensing of a patent and the transfer of unpatented technology. “Technology consultancy contract” refers to a contract in which one party provides to another party feasibility studies, technical calculation, investigation into a particular technical subject or analytical appraisals. “Technology service contract” refers to a contract in which one party uses technical knowledge to resolve a particular problem of the other party, excluding surveying, designing, building and installing contracts in construction projects and processing contracts. Technology Contract Law, arts. 27, 34, 44, 47.

\(^{2}\) Technology Contract Law, art. 15.

\(^{3}\) Technology Contract Law, art. 39.

\(^{4}\) Technology Contract Law, arts. 40, 41.

\(^{5}\) See discussion of the term “trade secrets” supra Part II.B.
more narrowly a non-patented technology, in a contract other than a technology contract remains unclear. Some local legislation has touched upon this question indirectly. The Shenzhen Special Economic Zone adopted the Provisional Regulations for the Import of Technology in January 1984. This local legislation provides that work personnel who become involved with the secret part of imported technology shall have the duty to keep it confidential, and any person who divulges such secrets shall be investigated for his legal responsibility and ordered to pay compensation for the losses therefrom. This provision provides a legal basis for a contractual clause to protect non-patented technology in employment contracts in the Shenzhen Special Economic Zone. The legislation, however, has limited application. Its focus is the protection of technical information rather than of trade secrets generally; also the legislation applies only to technology import contracts in which one party is a foreigner or a “compatriot” of Hong Kong, Taiwan, or Macao.

Another example of local legislation dealing with the contractual protection of non-patented technology through contracts is the Regulations of the Gansu Province on the Administration of Technology Markets, promulgated on October 31, 1992. The Regulations provide that an individual or agency acting as a broker to make introductions for others to enter into a technology transfer contract has an obligation to maintain the confidentiality of the technology of his principal, and must not divulge the technical secrets (jishu mimi) he has thus obtained nor transfer them in his own name. This provision governs a brokerage relation in a technology transfer deal. A brokerage contract concerning the technology transfer is, however, not regarded as a technology contract by the Technology Contract

46 The Chinese and English texts of this legislation can be found in 3 CHINA'S FOREIGN ECONOMIC LEGISLATION 334-48 (1987).
49 According to Chinese jurisprudence, a “brokerage contract” (jujian hetong) refers to a contract whereby a broker, according to the instructions of the principal, finds opportunities for, and makes introductions between, the principal and a third person for them to enter into a contract, and the principal pays the agreed fee and other necessary expenses to the broker. BASIC PRINCIPLES OF CIVIL LAW IN CHINA 321-23 (William Jones ed., 1989); ZHONGGUO MINFA JIAOCHENG [TEXTBOOK OF CHINESE CIVIL LAW] 419-21 (Ma Yuan ed., 1989).
The Gansu Regulations, therefore, offer a legal basis for the inclusion of a contractual clause on the protection of non-patented technology, or "technical secrets" as referred to in the Regulations, in a brokerage contract.

In practice, however, many employment contracts have contained a covenant which imposes obligations on the employees to maintain the confidentiality of the trade secrets or the non-patented technology.

With the promulgation of the Law for Countering Unfair Competition in 1993, "trade secrets" are now firmly protected by the Chinese law with or without a contractual relationship. As a result, lack of a clear statement on trade secrets in the Technology Contract Law and other contract legislation should no longer be of concern as to the validity of contractual clauses on the protection of trade secrets.

The Labor Law of the People’s Republic of China, promulgated on July 5, 1994 and effective as of January 1, 1995, further clarifies the legal position of a trade secrets clause in an employment contract. Article 22 of the Labor Law states that "the parties may include in an employment contract the provisions concerning maintaining the confidentiality of the trade secrets (shangye mimi) belonging to the employing unit." Article 102 of the Law further provides that "the employee, who breaches his or her obligations to maintain confidentiality, thus causing economic losses to his employer, must pay damages to the latter."

Still, there are a number of other limitations for the protection of trade secrets through contract. First, the scope of protection extends only to the parties to the contract. It hardly touches upon a third party who illegally obtains, uses or discloses the trade secrets. Second, the duration of the protection does not generally exceed the term of the contract. Many of such contracts only restrict current employees and few impose the obligation beyond the term of employment. Third, it is not easy to produce evidence to prove that the other party has breached the provisions of the contract on confidentiality, particularly if the owner of the right is from abroad. Finally, the procedures for seeking remedies are relatively complex and

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50 For a discussion of the four types of technology contracts governed by the Technology Contract Law see supra note 41. 
52 Id. art. 102. 
expensive to operate.

2. Protection Under the LCUC

With the promulgation of the Law for Countering Unfair Competition, it is now possible to protect one's trade secrets without a contractual relation. The LCUC treats an infringement of trade secrets as one form of unfair competition. The LCUC strengthens the protection of trade secrets in China in a number of respects. First, it provides a clear definition of trade secrets. Article 10 defines "trade secrets" as "technical information and operational information which is non-public, can bring economic benefits to the party that has rights in such secrets and is practical, and for which the party that has rights in such secrets has adopted measures to maintain its confidentiality."

Second, it imposes a legal duty on the government department to monitor and investigate the acts of unfair competition, including an infringement of trade secrets. If an owner of the rights discovers that another person has infringed his trade secrets, he may request the relevant government department to investigate and deal with the matter. The competent department may also investigate infringing acts on its own initiative. And third, the Law authorizes the competent government department to order the infringer to cease his illegal act and to impose a fine.

The LCUC offers a more direct, effective and comprehensive protection to trade secrets (not just "non-patented technology") than the protection offered by contract. The LCUC is particularly effective against a third party infringer.

3. Protection Through Delicts Liability

In some common law countries, trade secrets can also be protected through tort law. In civil law jurisdictions, an equivalent protection may be offered through the liability for acts of infringement of rights (delicts). Many Chinese writers insist that it is possible in China to protect trade secrets through the delicts under the General Principles of Civil Law of the PRC. Article 106 of the General Principles of Civil Law imposes civil

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54 See LCUC, arts. 3, 10.
55 LCUC, art. 25.
56 [COMPLETE BOOK ON LAW AND PRACTICE OF CHINESE INTELLECTUAL PROPERTY RIGHTS], supra
liability on citizens and legal persons who, through their own fault, encroach upon state or collective property or another’s property or person.

The Chinese legal theory divides the liabilities for infringement of rights into four groups: (1) liability for infringement of property right; (2) liability for infringement of intellectual property right; (3) liability for causing injury to another person’s body; and (4) liability for infringement of personal rights. The majority of the Chinese writers hold the view that trade secrets fall within the category of intellectual property, but outside the protection of the Patent Law. Therefore, the liability for the infringement of trade secrets should be comparable to that for infringement of other intellectual property rights.

Some writers even argue that article 118 of the General Principles of Civil Law should directly apply to the trade secrets. Article 118 provides that:

if a copyright, patent right, right to exclusive use of trademark, right of discovery, right of invention, or right of other scientific and technological achievements of a citizen or legal person is infringed upon by such means as plagiarism, alternation or imitation, the owner of such right shall have the right to demand that infringement be stopped, its ill effects be eliminated and the damages be compensated for.

The term “other scientific and technological achievements” (qita keji chengguo) is interpreted in some studies as including “trade secrets.”

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57 See generally BASIC PRINCIPLES OF CIVIL LAW IN CHINA, supra note 49, at 174-78; WANG LIMING, GUO MINGRUI & FANG LIUFANG, MINFA XINLUN [NEW INTRODUCTION TO CIVIL LAW] 519-24 (1988). See also LIANG HUIXING, MINFA [ON CIVIL LAW] 401 (1989). The author, Liang Huixing, divides the liabilities for infringement of rights into three groups—property rights, non-property rights (which includes both injury to another person’s body and the infringement of personal rights), and other lawful rights and interests. In addition, he regards intellectual property rights as a special group containing both elements of property rights and non-property rights. Id.


59 See, e.g., Lai Daqing, supra note 35, at 35.


61 Id.
Such an interpretation is defective on two accounts. First, in the Law on Scientific and Technological Progress, promulgated on July 2, 1993, “technical secrets” (jishu mimi) is clearly excluded from the term “other scientific and technological achievements.” In other words, in more recent Chinese legislation, the term “other scientific and technological achievements” is used in a way that excludes “technical secrets.” Second, the “operational information,” as a part of “trade secrets,” cannot be interpreted as included in the term “scientific and technological achievements.”

Another possible protection available under the General Principles of Civil Law is the so-called “undue enrichment” (budang deli) under article 92, which provides that when a person improperly acquires a profit resulting in another person’s loss, that person will be bound to return the profit. According to this provision, if an owner finds that a third party has unlawfully used or disclosed his trade secrets, he may claim that the third party has been unduly enriched and ask the latter to return the profit gained through the unlawful act.

It should be remembered, however, that China is not a case law country, and Chinese courts are not willing to decide cases solely on the basis of the general principles of law. Therefore, even though in theory it is possible to protect one’s trade secrets through delict liability, it is extremely difficult in practice to persuade the court to do so.

4. Protection Under Criminal Law

The infringement of trade secrets is not a specific criminal offense under China’s Criminal Law. Although the wrongdoer in a case of infringement of trade secrets may be subject to both civil liability and administrative sanctions under the LCUC, the LCUC fails to address criminal liability. In fact, a draft law for countering unfair competition, submitted to the Standing Committee of the NPC in the spring of 1993, contained a provision stating that if the infringement of trade secrets constitutes a crime, the wrongdoer shall be subject to criminal liability. When the

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63 Yao Xinchao, supra note 15, at 46; see generally Li Yongming, Shangye mimijiqifali baohu [Trade Secrets and Its Legal Protection], 3 FAXUE YANJIU [LEGAL THEORY STUDY] 46-54 (1994).
64 Yao Xinchao, supra note 15, at 46; see generally Li Yongming, supra note 63, at 46-54.
65 LCUC, arts. 20, 25.
bill was discussed at the NPC meeting, most deputies agreed to introduce criminal sanctions against the serious infringement of trade secrets. Nevertheless, the meeting could not reach an agreement on a number of key issues, such as what conditions would constitute a criminal offense for the infringement of trade secrets and what penalties would be given for such offense. In the end, the deputies felt that more studies needed to be done before a provision on criminal liability could be introduced for the infringement of trade secrets.66

Failing to include a provision on criminal liability in the LCUC, however, does not mean that there is no criminal liability for an infringement of trade secrets. In Chinese judicial practice, criminal sanctions have been used in various cases involving the infringement of trade secrets before and after the promulgation of the LCUC.67

One Chinese study has tried to provide a legal theory for applying criminal sanctions against the infringement of trade secrets.68 According to this theory, the Chinese Criminal Law imposes criminal liability against property-related offenses. The law does not restrict the "property" to "tangible property" only. Therefore, "intangible property" should also be protected and an infringement of it should be treated as an offense of encroaching upon property. Trade secrets, particularly its main component—non-patented technology—has now been recognized as a form of intangible property in China. Therefore, a serious infringement of trade secrets should constitute an offense against property and the infringer should be punished by analogy to the most similar provisions in the Criminal Law.69

Another Chinese study argues that the Joint Explanation of the Supreme People's Court and Supreme People's Procuracy on Several Issues Concerning Application of Law in Handling Theft Cases, promulgated on December 11, 1992, should serve as a legal basis for imposing criminal

68 Chen Li, supra note 53, at 16-17.
69 Chen Li, supra note 53, at 15-17.
liability on the infringement of trade secrets. The Joint Explanation defines "stolen public and private property" as including "both tangible and intangible properties such as electricity, gas, natural gas, and major technical achievements and so on." According to this study, the term "major technological achievements" (zhongyao jishu chengguo) should include trade secrets. Therefore, stealing trade secrets should be considered a theft offense.\(^7\)

Although there is a lack of national legislation concerning the criminal liability for the infringement of trade secrets, some local legislation has indicated that criminal liability for the infringement of non-patented technology is possible. For example, the Gansu Provincial Regulations on the Administration of Technology Markets (promulgated on October 31, 1992) has imposed civil, administrative as well as criminal liability on illegal transactions concerning technology.\(^71\) "Technical secrets" (jishu mimi) are explicitly included in technology trade (jishu maoyi), which is the subject of regulation by this legislation. Therefore, an infringement of technical secrets (as the main component of trade secrets) can incur criminal liability under this local legislation. Similar provisions can also be found in the Regulations of Hebei Province on the Administration of Technology Markets, promulgated on August 20, 1991.\(^72\)

In judicial practice, the infringements of trade secrets are often handled as offenses of theft or embezzlement.\(^73\) Due to a lack of clear legislation or judicial interpretation, the courts find it difficult to determine whether an infringement of trade secrets has constituted a crime, which offense should apply, and what punishment should be imposed. As a result, the same infringement may be treated completely differently by different courts in China. Some regard an infringement of trade secrets as a crime whereas others do not. Some treat the infringement as a theft offense,

\(^70\) Song Hang et al., Lun shangye mimi de xingfa baohu [Protection of Trade Secrets by Criminal Law], 1 ZHONGYANG JIANCHAGUAN GUANLI XUEYUAN XUEBAO [CENTRAL PROCURATORS ADMINISTRATION COLLEGE GAZETTE] 15-17 (1994).

\(^71\) Gansu Provincial Regulations on the Administration of Technology Markets, arts. 28-31, compiled in 4 [COLLECTION OF NEW LAWS & REGULATIONS OF THE PRC], supra note 48, at 312.


\(^73\) Wang Zhengyong, supra note 67, at 27-28; Chen Li, supra note 53, at 17; Feng Chujian, supra note 5, at 59; Song Hang et al., supra note 70, at 15-17.
whereas others apply liability for embezzlement, divulging state secrets or even counterrevolutionary espionage.\textsuperscript{74}

5. \textit{Protection Through A Trade Secrets Law}

It has been suggested by some Chinese writers that China should promulgate a special trade secrets law.\textsuperscript{75} In fact, a delegation from the Chinese State Economic and Trade Commission went to the United States in September 1995 to research the U.S. Uniform Trade Secrets Act. The present Chinese protection framework—a combination of contract, unfair competition legislation, some vague principles in the civil law, and use of criminal law by analogy—is not a satisfactory solution.\textsuperscript{76}

The present protection framework has failed to address the following crucial issues concerning the protection of trade secrets: the definition of the relationship between the scope of protection offered by the LCUC and the protection offered by other legislation; the legal nature of a trade secrets right; violation of trade secrets in the employer-employee context; and availability of criminal liability. It would be difficult to successfully address these issues by means of a revised LCUC; nor would it be appropriate to address them through a set of implementing rules for the LCUC. Therefore the better approach is to enact a special trade secrets law.

B. \textit{Remedies for Infringement of Trade Secrets}

Generally speaking, an infringer of trade secrets may incur three kinds of liability: civil, administrative, or criminal. The threshold question for determining which civil remedy to pursue is whether the owner of the trade secrets has a contractual relationship with the infringer. If a contractual relationship exists, then the owner may have a cause of action under the Technology Contract Law, the Foreign Economic Contract Law, or the General Principles of Civil Law. If not, then the owner may look to the LCUC. If the owner is interested in an administrative remedy, the LCUC is the principal source of sanctions. By contrast, criminal liability for the infringement of trade secrets is not provided in the LCUC, nor expressly

\textsuperscript{74} Wang Zhengyong, \textit{supra} note 68, at 27-28; Wang Ruhai \& Li Guoqing, \textit{supra} note 26, at 44-48.

\textsuperscript{75} See, e.g., Du Huilin, \textit{supra} note 58, at 42 (discussing some of the problems in protecting trade secrets).

\textsuperscript{76} Li Yongming, \textit{supra} note 63, at 53-54; Zhang Fengrui, \textit{supra} note 5, at 34-35.
offered in any other national legislation. The criminal sanctions, however, have been and continue to be imposed in some cases by the Chinese courts on the basis of certain local legislation or analogical reasoning adopted by the courts.

1. Civil Liability Imposed Under Technology Contract Law

In the case of a technology contract, the party who breaches the obligation regarding confidentiality must pay damages or a penalty to the other party. If an obligation to maintain the confidentiality of trade secrets is contained in contracts other than a technology contract as defined in the Technology Contract Law, the relevant contract legislation and some provisions of the General Principles of Civil Law apply.

The Technology Contract Law contains potentially conflicting principles on the subject of measurement of damages. It provides that the liability to pay damages shall correspond to the loss suffered by the other party, but that it may not exceed the amount which the breaching party should have foreseen at the time of concluding the contract. On the other hand, it states that the parties may agree in the contract to a certain amount which the breaching party must pay as a penalty or "liquidated damages." The Law sets no limit on this penalty. Articles 40 and 41 of the Law suggest that an innocent party may make an election as to whether to sue for damages or to claim a penalty if the latter is stipulated in the contract.

2. Civil Liability Under the Foreign Economic Contract Law

This measurement of damages adopted in the Technology Contract Law contrasts with the method used in the Foreign Economic Contract Law of the PRC, promulgated in 1985. According to the latter, if one party breaches the contract, the other party is entitled to claim damages. Such damages may not exceed the loss which the breaching party ought to have foreseen at the time of the conclusion of the contract. The parties may also agree, in the contract, on liquidated damages. If, however, the

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77 Technology Contract Law, arts. 40(iii), 41(iii).
78 Technology Contract Law, art. 17, para. 2.
79 Technology Contract Law, art. 17, para. 3.
81 Id. art. 19.
liquidated damages are too high or too low in relation to the actual loss suffered by the innocent party, either party may request an arbitration body or a court to reduce or increase them appropriately.\(^8\) Therefore, under the Foreign Economic Contract Law, the liability of the breaching party is equal to the loss suffered by the innocent party.\(^3\)

The use of the potentially heavy penalty in a technology contract is probably due to the nature of such a contract; very often an ill intention is involved when one party breaches the obligation on confidentiality. It may also reflect the fact that sometimes it is difficult to make an accurate calculation of the loss suffered by the innocent party as a result of the divulgence or unlawful use of trade secrets. A third explanation is that the Technology Contract Law only applies to technology contracts between Chinese entities, whereas the Foreign Economic Contract Law applies to contracts where one party is a foreign individual or entity. A tough regime is imposed on the Chinese domestic economic entities, whereas, in international commercial transactions, China is willing to give due respect to international practice in the field.

3. **Civil Liability Under General Principles of Civil Law**

Article 111 of the General Principles of Civil Law provides that “if a party fails to fulfill its contractual obligations or breach the terms of a contract while fulfilling the obligation, the other party has the right to demand fulfillment or the taking of remedial measures and claim compensation for the losses.” Presumably the term “remedial measures” (\(\text{bujiu cuoshi}\)) could include an order issued by the court to prohibit the breaching party from continuing to use or disclose the trade secrets. Article 112 provides that the party who breaches a contract is liable for compensation equal to the losses suffered by the other party as a result of that breach. The parties may specify in the contract that if one party breaches the contract, it must pay the other party a certain sum in damages; they may also specify in the contract the method of assessing the compensation for any losses resulting from a breach.

Even where no contractual relationship exists, the owner of trade secrets may be able to seek remedies under article 134 of the General

\(^8\) *Id.* art. 20.
\(^3\) For a further study on the Foreign Economic Contract Law, see CHENG YUAN, *supra* note 8, at 273-75.
Principles of Civil Law. These remedies include (1) cessation of infringement, (2) removal of obstacles, (3) elimination of dangers, (4) return of property, (5) restoration of original condition, (6) repair, reworking or replacement, (7) compensation for losses, (8) payment of breach of contract damages, (9) elimination of ill effects and rehabilitation of reputation, and (10) extension of apology. Some of these remedies can be of use in cases involving the infringement of trade secrets. Many Chinese writers have proposed to amend the General Principles of Civil Law by including a clear definition of trade secrets and by stating both the legal nature and the methods for protection of trade secrets.\textsuperscript{84}

4. Civil Liability Under LCUC

If no contractual relationship exists, an owner may also resort to article 20 of the Law for Countering Unfair Competition to protect his trade secrets against a third party infringer. According to the LCUC, the infringing party must compensate the loss suffered by the owner of the trade secrets. If the loss suffered is difficult to calculate, the infringing party must return all the profit gained during the period of infringement through the infringing act. Lastly, the infringer must bear the owner’s cost of investigation of the infringing act.\textsuperscript{85} These requirements are generally in line with the principle of “undue enrichment” contained in the General Principles of Civil Law.\textsuperscript{86}

C. Administrative Sanction

In a legislative trade-off, a provision for criminal liability was dropped from the LCUC in exchange for the addition to the LCUC of an administrative sanction against the infringement of trade secrets in 1993.\textsuperscript{87} Article 25 of the LCUC provides that if a person is infringing the trade secrets of another, the relevant government department must order him to cease the infringing act and may, according to circumstance, impose a fine between RMB 10,000 yuan and RMB 200,000 yuan.

\textsuperscript{84} See, e.g., Li Yongming, supra note 62, at 54.
\textsuperscript{85} LCUC, art. 20.
\textsuperscript{87} Wang Shengming, supra note 65, at 76.
D. Criminal Liability

Currently, there is no specific criminal offense attached to the infringement of trade secrets, despite the fact that China has already introduced criminal liability for the infringement of all other types of intellectual property rights.88 In practice, a number of offenses are used by the Chinese courts to punish the infringers of trade secrets, depending upon the actual circumstances. These offenses include (1) theft,89 (2) embezzlement of public funds where the offender has used his public office90 to infringe, (3) acceptance of bribes in which the offender has sold trade secrets obtained by means of offender’s official position,91 (4) bribery in which the offender has given gifts to an official in a public organization in return for access to certain trade secrets92, (5) divulgence of state secrets93 in which the relevant trade secrets can be classified as “state secrets” under the relevant Chinese law,94 (6) sabotage of collective production in which the motive of the offender in divulging the trade secrets was revenge rather than some economic gain,95 and (7) counterrevolutionary espionage in which the offender has provided military defense or important economic secrets to an enemy state for a “counterrevolutionary purpose.”96 Of the above, theft and embezzlement are the two most frequently applied offenses for the infringement of trade secrets in China.97

These various offenses carry some wide differences in sentencing. The offense for sabotaging collective production is usually subject to an

89 Criminal Law of the PRC, arts. 151, 152.
90 Criminal Law of the PRC, art. 155.
91 Criminal Law of the PRC, art. 185.
92 Criminal Law of the PRC, art. 185.
95 Criminal Law of the PRC, art. 125.
96 Criminal Law of the PRC, art. 97.
97 Song Hang et al., supra note 69, at 16-17; Wang Ruhai & Li Guoqing, supra note 25, at 44-48; Wang Zhengyong, supra note 66, at 27-29; Feng Chujian, supra note 5, at 53-59.
imprisonment of less than five years. On the other hand, serious offenses of theft, embezzlement, acceptance of bribes, and divulgence of state secrets may lead to a death penalty under the current Chinese law.

The majority of these offenses offers a wide range of choices in measuring a punishment. For instance, theft can be punished with control by a work unit, detention of fifteen days to six months, fixed-term imprisonment from six months to fifteen years, life imprisonment, and the death penalty, depending upon the seriousness of the offense and other circumstances. This gives the court enormous discretionary power—as well as the headache of choosing the correct punishment.

The current situation in criminal punishment for the infringement of trade secrets is intolerable for several reasons. First, without a clear legal provision on or judicial interpretation of trade secrets-related crime, the Chinese court finds it extremely difficult to choose a correct offense for an apparent infringement. Second, the range of possible sentences is simply too broad and provides insufficient guidance for the court. Third, the offenses currently used by the Chinese court all entertain severe punishments which are totally inconsistent with both international practice in this area and the current Chinese law on the protection of other types of intellectual property rights. For example, according to the Decision of the NPC Standing Committee on Punishment for Crimes Against Copyright, promulgated on July 5, 1994, if an offender has committed a serious infringement of copyright he or she may be sentenced to detention or imprisonment of less than three years, and if the offense is very serious, the infringer is liable

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98 Criminal Law of the PRC, art. 125.
100 See Criminal Law of the PRC, arts. 151, 152; Decision of the NPC Standing Committee on Severely Punishing Criminals Who Gravely Undermine the Economy, *supra* note 98; Joint Explanation of the Supreme People's Court and the Supreme People's Procuracy on Several Issues Concerning the Application of Law in Handling Theft Cases, *supra* note 99.
to receive a fixed-term imprisonment ranging from three to seven years. Finally, under current Chinese law, criminal liability for the violation of other intellectual properties, such as patents and trademarks, is addressed in the Chapter on Offenses of Undermining the Socialist Economic Order in the Criminal Law of the PRC (article 127 of the Criminal Law) rather than in Chapter 5 of the Criminal Law as an Offense for Encroaching Upon Properties. This further illustrates the unsatisfactory application of the Criminal Law in the current judicial practice of adjudicating cases involving violation of trade secrets.

V. AVENUES FOR SEEKING PROTECTION

The owner of trade secrets may have a number of options in seeking protection of his trade secrets in China. These options include administrative intervention, conciliation, arbitration, and litigation. Each has its own merits and demerits. Complexity of the procedures, the time required, the cost, binding force of the settlement document, and enforcement all need to be taken into account in choosing the appropriate method of protection.

A. Administrative Intervention

According to the Law for Countering Unfair Competition, the competent Chinese government departments have a legal duty to investigate and handle the acts of infringing trade secrets. The competent government departments refer to the industrial and commercial administration department at and above the county level. If an owner finds his trade secrets being infringed upon by others, he may apply to the competent department to deal with the infringement whether or not there is a contractual relationship between himself and the infringer. The competent department may also take its own initiative to investigate an infringement. If the infringing acts complained of are found to constitute an offense, the competent department must order the infringer to cease the illegal acts and may impose a fine on the infringers.

101 Resolution of the Standing Committee of the NPC’s Congress on the Punishment of Crimes of Copyright Infringement, supra note 88.
102 LCUC, art. 3.
103 LCUC, art. 25.
The advantages for administrative intervention include its speed and the punitive measures available against infringers. To a foreign investor, administrative intervention can serve as an effective method for stopping an infringing act. The Chinese administration usually gives quick responses to foreign complaints for the sake of China's international reputation. The weaknesses include a lack of proper investigation and hearing, and frequently some undue pressure being exercised on the parties concerned. In addition, local favoritism and official corruption may prevent a fair intervention.

B. Conciliation

Conciliation is often used in China in settling commercial disputes. It can be carried out by a government department, a neutral institution, lawyers, or various specialized dispute settlement bodies. One permanent body for conciliation of commercial cases involving foreigners is the Beijing Conciliation Centre established in 1987. The Centre accepts instructions from the interested parties to conduct conciliation for foreign-related contracts. If the parties are reconciled, the Centre will issue a letter of conciliation.104 The demerits of this method is that the dispute in question has to be a contractual dispute and the parties have to agree to a conciliation. In addition, the letter of conciliation does not have the effect of compulsory enforcement.

C. Arbitration

Under the new Arbitration Law of the People's Republic of China, promulgated on August 31, 1994, and effective from September 1, 1995, two separate arbitration systems are continued—one for domestic economic disputes and one for foreign-related economic disputes. Depending upon whether there is a foreigner involved in the dispute or the nature of a contract, the arbitration can be held by different bodies in China.

Currently, if a dispute concerning a technology contract occurs between two Chinese entities, the arbitration is to be conducted by the

technology contract arbitration organs, which are under the jurisdiction of the Technology Contract Arbitration Committee of the State Science and Technology Commission. The substantive law to be used in this arbitration is the Technology Contract Law of the PRC.\textsuperscript{105} The arbitration procedures are laid down in the Arbitration Rules of Technology Contract Arbitration Organs (For Trial Use), promulgated on June 25, 1991, by the State Science and Technology Commission. The Technology Contract Arbitration Committee of the State Science and Technology Commission itself only monitors the work of various arbitration organs. It has power to overrule a valid award made by the arbitration organs if it finds error in the award. If an arbitration organ finds errors in an effective award made by itself, it can only submit the matter to the Technology Contract Arbitration Committee for examination and approval.\textsuperscript{106}

If a dispute between two Chinese entities over trade secrets arises from a non-technology contract, arbitration will be conducted by an economic contract arbitration organ under the State Industrial and Commercial Administration, the arbitration tribunal under the Ministry of Labor and Personnel, or some other kind of arbitration body.

With the promulgation of the Arbitration Law of the PRC, China's domestic economic arbitration system (including arbitration for technology contracts) is now undergoing a major reform. Under the new Arbitration Law, the arbitration organs under the Technology Contract Arbitration Committee and the State Industrial and Commercial Administration are to be abolished and replaced by some new arbitration commissions set up in all the provincial capitals and large cities in China. These new arbitration commissions are to be under the jurisdiction of a new national arbitration organ, the China Arbitration Association, which is a non-governmental organization. As the Arbitration Law has only been in effect since September 1995, it is still too early to assess the full impact of this Law and the institutional changes brought about by this Law.

If one party to a commercial contract is a foreign company or individual and the parties have agreed to submit their dispute to arbitration, the China International Economic and Trade Arbitration Commission ("CIETAC") may exercise its jurisdiction over the case. The parties may

\textsuperscript{105} Chi Shaojie, supra note 30, at 89-90.
also choose to hold arbitration in the defendant’s country or in a third
country.107

CIETAC is now the busiest commercial arbitration center in the
world. It had a caseload of over 800 in 1994.108 Its arbitration procedures
include many well recognized international practices. Many non-Chinese
experts are appointed as arbitrators at CIETAC, and the arbitration
conducted by CIETAC is generally regarded as fair.109 CIETAC arbitration
may be held in Beijing, Shanghai, and Shenzhen.

One feature of CIETAC arbitration is that the tribunal often combines
arbitration with mediation and arbitrators tend to encourage the parties to
reconcile their differences. If an agreement can be reached between the
parties, the tribunal will issue an arbitration award based on the agreement
of the parties. Such an award will have the same force as any arbitration
award made by the CIETAC. If one party fails to perform its obligations
under the award, the other party may apply to the competent Chinese court
for compulsory enforcement.110 Similar to conciliation, arbitration is also
based on the existence of a contractual relationship between the disputing
parties and requires the agreement of the parties to submit the dispute for
arbitration.

D. Litigation

According to the LCUC, if an owner of trade secrets has chosen adminis-
trative intervention and is not satisfied with the punishment imposed by the
competent government department, he may, within fifteen days, apply to the
next higher-level department for an administrative review. If he is still not
satisfied with the review, he may then bring suit in a competent Chinese
court.111 Under this circumstance, he institutes administrative litigation

107 See, e.g., Foreign Economic Contract Law of the PRC, art. 37.
108 According to Ren Jianxin, the President of the Supreme People’s Court, the CIETAC received
829 cases and settled 574 cases in 1994. Li Xiaolei, Zhongguo cheng mei guoji shangshi zhongcai
zhongyao zhongxin [China Emerges as Important Commercial Arbitration Center], RENMIN RIBAO
[PEOPLE’S DAILY], July 21, 1995, at 3.
Stanley Lubman, Settling Sino-Foreign Commercial Disputes—Accord Without Satisfaction?, Speech at
the Chinese Legal Practitioners’ Group meeting at the School of Oriental and African Studies (June 14,
1995); Peter Caldwell, Hong Kong as a Forum for China-Centered Disputes Settlement, Speech at the
110 Michael Moser, supra note 107, at 44.
111 LCUC, art. 29.
against the decision of the relevant government department. Only if the court establishes that there is a serious injustice in the administrative decision, may it order a full or part reversal of the original decision of that government department. Alternatively, the owner may choose to bring a suit directly in a Chinese court. In this event, he commences a civil action against the infringer of his trade secrets. He can then seek all remedies available under the LCUC.

In theory, litigation, particularly bringing an action against the infringers directly, represents the best legal protection to the owner of trade secrets, either against a party breaching his contractual obligations or against a third party infringer. It offers a good range of remedies to the owner of the rights and provides a number of sanctions against the infringer. Also, the court decision would have the most direct legal effect on all the parties concerned.

But in practice, litigation is not really advisable for a foreign owner of rights. Not only will a court case take much longer than some other methods of protection such as administrative intervention, but also the development of Chinese court system is well behind that of foreign-related commercial arbitration in China. Compared with the arbitrators who sit in CIETAC arbitration, Chinese judges are often poorly trained and educated, more likely to be corrupt, often subject to the pressure of local favoritism, and generally inexperienced in international commercial dispute settlement.

VI. CONCLUSION

The promulgation of the Law for Countering Unfair Competition, which for the first time addresses the issue of the protection of trade secrets, has closed the last major gap in the legal protection of intellectual property rights in the People's Republic of China. It took a long time for the Chinese to recognize the need to protect trade secrets. Although the concern was first voiced by foreign investors, protection of trade secrets has become increasingly important to Chinese enterprises as market reform deepens in China. Although the Sino-US Memorandum of Understanding on the Protection of Intellectual Property Rights had a direct influence on the enactment of the LCUC, the Law also reflects the profound social and

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112 LCUC, art. 29.
113 Stanley Lubman, supra note 103.
economic changes which have taken place in China over the past decade.

Clearly, a legal framework for the protection of trade secrets has taken shape in China. This framework consists of the Technology Contract Law, the Law for Countering Unfair Competition, the General Principles of Civil Law, the Criminal Law, and a number of other relevant central and local legislation. This legal framework, however, is far from satisfactory and needs further improvements. For instance, the General Principles of Civil Law needs to include a clear definition for trade secrets and to spell out its legal nature. A specific provision should be introduced in the Criminal Law or in the LCUC to address the criminal liability for violation of trade secrets. A set of rules for the implementation of the LCUC, or preferably, specific trade secrets legislation, needs to be adopted sooner rather than later.

Lack of a clear policy and provision on criminal liability for violating trade secrets is an area of major concern. China has introduced criminal liability for all other intellectual property-related offenses, and criminal liability has been adopted for other less serious activities of unfair competition. It is regrettable that the LCUC has failed to impose criminal liability for violation of trade secrets. The present judicial practice in applying criminal liability to the trade secrets-related offense is chaotic and unacceptable. Reform is urgently needed to address a whole range of issues relating to criminal liability including: (1) conditions that would

114 According to a report in the People's Daily, the State Industrial and Commercial Administration of the PRC has recently issued its measures concerning the violation of trade secrets pursuant to the LCUC; and the provinces of Hainan, Henan, Sichun, and Jiangsu, and the cities of Shanghai, Beijin, Shenzhen, and Chengdu, all have promulgated their local legislation on countering unfair competition. Luo Lan, Fan bzhengdang jingzheng fa buduan wanshan [Continuing Improvements to Anti-Unfair Competition Law], RENMIN RIBAO [PEOPLE'S DAILY], Jan. 27, 1996, at 2 (overseas ed.).

115 See, e.g., Patent Law of the PRC, art. 63; Criminal Law of the PRC, art. 127; Resolution of the Standing Committee of the NPC's Congress on the Punishment of Crimes of Copyright Infringement, supra note 88.

116 Song Hang et al., supra note 69, at 12-17; Zheng Chengsi, supra note 58, at 15.

117 Many Chinese writers have proposed for amending the current Criminal Law to include an offence for the violation of trade secrets. The name of such an offence can be as general as "offence for violation of trade secrets," see Zhang Fengrui, supra note 5, at 35, or as specific as a range of offences such as "offence for divulging trade secrets," "offence for unlawfully selling trade secrets," "offence for stealing trade secrets," and "offence for unlawfully possessing other's trade secrets." See Song Hang et al., supra note 69, at 16-17.

As regard to the punishment for the violation of trade secrets, the majority view is that the level of punishment should be comparable to that for the violation of other intellectual property rights. Therefore, the punishment should be at the level of two to five years of imprisonment plus a fine equivalent to one to five times of the illegal gains. For the most serious violation, the offender can be subject to an imprisonment of up to 10 years as a maximum. See Song Hang et al., supra note 69, at 16-17.
constitute a crime, (2) designation of different crimes relating to trade secrets violations, (3) punishments to be levied, (4) criminal procedures, and (5) definition of the relationship between criminal and other types of liabilities.

Further legislation also is needed to address questions that arise when trade secrets are violated in the employer-employee context. The LCUC is silent as to the violations that occur in employer-employee relationships. The Labor Law of 1995 has only briefly touched upon the issues. Still left unanswered are the following questions: (1) what information is a trade secret; (2) whether the legislature should expressly impose obligations on ex-employees or whether the matter should be left for the parties to address via the employment contract; (3) whether an ex-employee is obliged to keep confidential his ex-employer's trade secrets, and if so, for how long; (4) whether an ex-employer should be required to compensate an ex-employee for complying with the confidentiality obligation; and (5) whether the court should have the power to strike down restrictive covenants in employment contracts on the basis of excessive restriction on the employee's mobility.

In the acknowledgment of the recent legislation's faults, however, it must not be forgotten that the LCUC is only two years old. As can be observed from the case study in Part III, China needs more time to accumulate experience and to conduct research in the area of trade secrets protection.
VII. GLOSSARY

budang deli
补当得利
bujiu cuoshi
补救措施
fei zhuanli jishu
非专利技术
gongshang mimi
工商秘密
hangye mimi
行业秘密

jingji mimi
经济秘密
jingying xinxi
经济信息
jishu jueqiao
技术诀窍
jishu maoyi
技术贸易
jishu mimi
技术秘密
jishu xinxi
技术秘密
jüjian hetong
居间合同

nuohao
诺浩
qita keji chengguo
其它科技成果
rencai de heli liudong
人材的合理流动
shangye mimi
商业秘密
shangye qingbao ji xinxi
商业情报及信息

zhongyao jishu chengguo
重要技术成果
zhuanmen jishu zhishi
专门技术知识
zhuanyou jishu
专有技术