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Implications of Recent Agreements for United States-China Trade

Introduction

The Chinese contend that they do not like lawyers and therefore wish American firms would exclude them from their negotiating teams. Some knowledgeable China scholars believe this attitude is rapidly changing and that the People's Republic of China (PRC) is moving as quickly as it can to reestablish a competent group of Chinese lawyers. Regardless of these views, the United States legal community will play a significant role in advising United States firms on China trade.

On her trip to China in May 1979, then Secretary of Commerce Kreps initialed a trade agreement *ad referendum*,¹ signed a claims settlement agreement on blocked assets,² and signed a trade exhibitions agreement.³ The trade agreement was subsequently signed by Ambassador Woodcock and Minister of Foreign Trade Li Qiang on July 7, 1979.⁴ These three agreements established a broader basis for growth in United States-China trade.

I. The Trade Agreement

The initial effort by the executive branch in recent decades to deal with the issue of trade agreements with communist countries occurred in the mid-1960s. On May 11, 1966, at the direction of the President, the Secretary of State sent to the Congress proposed legislation to provide the President with the authority necessary to negotiate trade agreements with the Soviet Union

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¹Classified document.

²Agreement on Settlement of Claims, May 11, 1979, United States-People's Republic of China, Pub. L. No. 89-497, 80 Stat. 271 (1979). T.I.A.S. No. 9306.

³Trade Agreement, July 7, 1979, United States-People's Republic of China, 18 I.L.M. 1041 (1979).

⁴*Treaties: Current Actions*, 79 DEP'T STATE BULL. No. 2030, at 69 (1979).

and other communist nations of Eastern Europe.⁵ The purpose of these agreements was to be the widening of trade in peaceful goods when such agreements would serve the interests of the United States. On May 17 the East-West Trade Relations Act of 1966 was introduced in the Senate by Senator Magnuson on behalf of Senator Mansfield and himself.⁶ On May 24 a bill was introduced in the House of Representatives by Congressman Keogh.⁷

These pieces of legislation contained five principal provisions:⁸

1. The first provision stated the purpose of the Act, particularly to use peaceful trade and related contacts with communist countries to advance the long-range interests of the United States.⁹

2. The second provision authorized the President to enter into a commercial agreement with a communist country if he determined it would promote the purposes of the Act, if he felt the national interest would be promoted, and if benefits to the United States would be equivalent to those accruing to the other party.¹⁰

3. The third provision stated some of the benefits the United States hoped to gain in such agreements.¹¹

4. The fourth provision limited each agreement to an initial period of three years, renewable for three-year periods. It required that each agreement provide for regular review of operations and of relevant aspects of the relations between the United States and the other party.¹² It also required that each agreement be subject to suspension or termination at any time on reasonable notice.¹³

5. The fifth and most central provision of the Act, however, recommended by the responsible groups studying this matter, authorized the President to proclaim most-favored-nation (MFN) treatment for the goods of communist nations with which a commercial agreement was made under the Act. Such MFN treatment continued only so long as the agreement was in effect.¹⁴

The President would have had the authority to suspend or terminate any proclamation made pursuant to this Act whenever he determined that the other party to the agreement was no longer fulfilling its obligations under the agreement, or that suspension or termination was in the national interest.¹⁵

The authority of the Act would not have extended to the People's Republic of China, North Korea, North Vietnam, Cuba or the German Democratic Republic.¹⁶ The bill expressly provided that it did not modify or amend the

⁵Exec. Com. No. 2397, 89th Cong., 2d Sess., 112 CONG. REC. 10337 (1966).

⁶S. 3363, 89th Cong., 2d Sess., 112 CONG. REC. 10729 (1966).

⁷H.R. 15212, 89th Cong., 2d Sess., 112 CONG. REC. 11346 (1966).

⁸S. 3363, *supra* note 6, and H.R. 15212, *supra* note 7, contain the same provisions.

⁹H.R. 15212, *supra* note 7, at § 2(c).

¹⁰*Id.* § 3.

¹¹*Id.* § 4.

¹²*Id.* § 5.

¹³*Id.*

¹⁴*Id.* § 6.

¹⁵*Id.*

¹⁶*Id.* § 9.

Battle Act¹⁷ or the Export Control Act,¹⁸ which together controlled the export of military articles, strategic goods and technology which would adversely affect the national security and welfare of the United States.¹⁹ The Act would not have changed in any way existing laws and regulations which prohibit aid and limit credit to communist countries.

The Act also would have provided that before the President enters into any agreement under the Act, he should seek information with respect to it from all of the United States government agencies concerned, interested private persons, and other appropriate sources.²⁰ The procedures for adjustment assistance and escape-clause relief set forth in the Trade Expansion Act²¹ would have been applicable in the case of articles imported in increased quantities as a result of MFN tariff treatment extended to a country in accordance with an agreement pursuant to the Act. Antidumping laws and all other laws for the protection of United States industry, agriculture, and labor would have remained in full effect. In addition, problems of interest to American business were to be dealt with under the consultation procedures or in periodic negotiations to be provided for by an agreement under the Act.

Congress, however, took no definitive action on these bills. Subsequently, on October 18, 1972, the basic elements of a commercial agreement such as that proposed in the 1966 bills were incorporated in a trade agreement between the USSR and the United States that was signed in Moscow.²² Although many of its provisions were and are still being implemented, the agreement never entered into force because of the Soviet rejection of the restrictions contained in the Trade Act of 1974.²³

That Act contained proposals similar to most of those in the proposed East-West Trade Relations Act of 1966,²⁴ as well as some radically different elements. The Act required that any bilateral commercial agreement negotiated within the Act should:

(1) be limited to an initial period specified in the agreement which shall be no more than 3 years from the date the agreement enters into force; except that it may be renewable for additional periods, each not to exceed 3 years; if—

(A) a satisfactory balance of concessions in trade and services has been maintained during the life of such agreement, and

(B) the President determines that actual or foreseeable reductions in United States tariffs and nontariff barriers to trade resulting from multilateral negotiations are satisfactorily reciprocated by the other party to the bilateral agreement;

¹⁷Mutual Defense Assistance Control Act of 1951 (Battle Act), 22 U.S.C. § 1611 (1976).

¹⁸Export Control Act of 1949, ch. 11, 63 Stat. 7 (1949) (expired 1969) (current version at 50 U.S.C. § 2401 (1976)).

¹⁹H.R. 15212, *supra* note 7, at § 10.

²⁰*Id.* § 7.

²¹Trade Expansion Act of 1962, 19 U.S.C. § 1861 (repealed 1975).

²²*U.S. and U.S.S.R. Sign Agreements on Trade and Lend-Lease*, 67 DEP'T STATE BULL. No. 1743, at 581 (1972).

²³19 U.S.C. § 2101 (Supp. 1979).

²⁴See notes 6-7 *supra*.

- (2) provide that it is subject to suspension or termination at any time for national security reasons, or that the other provisions of such agreement shall not limit the rights of any party to take any action for the protection of its security interests;
- (3) include safeguard arrangements
 - (A) providing for prompt consultations whenever either actual or prospective imports cause or threaten to cause, or significantly contribute to, market disruption and
 - (B) authorizing the imposition of such import restrictions as may be appropriate to prevent such market disruption;
- (4) if the other party to the bilateral agreement is not a party to the Paris Convention for the Protection of Industrial Property, provide rights for United States nationals with respect to patents and trademarks in such country not less than the rights specified in such convention;
- (5) if the other party to the bilateral agreement is not a party to the Universal Copyright Convention, provide rights for United States nationals with respect to copyrights in such country not less than the rights specified in such convention;
- (6) in the case of an agreement entered into or renewed after Jan. 3, 1975, provide arrangements for the protection of industrial rights and processes;
- (7) provide arrangements for the settlement of commercial differences and disputes;
- (8) in the case of an agreement entered into or renewed after January 3, 1975, provide arrangements for the promotion of trade, which may include those for the establishment or expansion of trade and tourist promotion offices, for facilitation of activities of governmental commercial officers, for the participation in trade fairs and exhibits, and for the sending of trade missions, and for facilitation of entry, establishment, and travel of commercial representatives;
- (9) provide for consultations for the purpose of reviewing the operation of the agreement and relevant aspects of relations between the United States and the other party; and
- (10) provide such other arrangements of a commercial nature as will promote the purposes of this Act.²⁵

The same section provided for approval by Congress before such an agreement could enter into effect.²⁶

The Act did not stop there, however. Sections 402 (Freedom of Emigration in East-West Trade—the Jackson-Vanik Amendment)²⁷ and 409 (Freedom to Emigrate to Join a Very Close Relative in the United States)²⁸ of the Act injected the “freedom of emigration” issue into East-West trade and imposed a number of requirements on the President regarding the attitudes and practices of a communist country towards various aspects of emigration by its citizens. Requirements for presidential waivers of these new elements were spelled out in detail.²⁹ The extension of MFN treatment, access to United States governmental credits, and conclusion of any commercial agreement with a communist country were also conditioned on meeting the requirements of these sections.³⁰

²⁵Trade Act of 1974, *supra* note 23, § 2435(6).

²⁶*Id.* § 2435(c).

²⁷*Id.* § 2432.

²⁸*Id.* § 2439.

²⁹*Id.* §§ 2432(c), 2439(d).

³⁰*Id.* §§ 2432(a), 2439(a).

Section 403³¹ (United States Personnel Missing in Action in South East Asia) introduced the “missing in action” personnel issue and set similar conditions for extension of MFN treatment, access to United States governmental financial facilities and entering into a commercial agreement.

II. United States–China Trade Agreement

The United States–China trade agreement was initiated *ad referendum* on May 14, 1979, in Beijing and Canton and signed July 7, 1979 in Beijing.³² It was negotiated to provide a framework for future United States–China trade relations in accordance with section 405 of the Trade Act of 1974. The agreement contains the elements required under section 405 for bilateral agreements between the United States and nonmarket economy countries, and includes other provisions for the promotion of bilateral trade.

A. Promotion of Trade

The agreement contains general commitments by the parties to promote the development of their bilateral trade. It provides that such trade shall be effected on the basis of commercial contracts and considerations.

B. Nondiscriminatory Treatment

The agreement provides for reciprocal nondiscriminatory treatment of the parties’ imports and exports, including nondiscriminatory (MFN) tariff treatment. This means that the products of both countries will be subject to the generally lower MFN rates of duties in their respective tariff schedules.

The agreement, at the behest of the Chinese negotiators, takes note of China’s situation as “a developing country.” It provides for equitable treatment in the event that quantitative restrictions are imposed. It commits each party to reciprocate satisfactorily for concessions made by the other in the area of trade and services.

C. Business Facilitation

The agreement addresses issues related to the facilitation of business activities, including the establishment of business offices, the stationing of business representatives, and improvement in the conditions under which these offices operate. It provides for nondiscriminatory treatment in business facilitation matters. The agreement also includes provisions regarding visits by economic, trade and industrial groups.

D. Government Trade Offices

The agreement takes note of the importance of government trade offices, and contains undertakings to facilitate their operations.

³¹*Id.* § 2433.

³²*See* note 4 *supra*.

E. Financial Provisions

The agreement contains provisions regarding international payments and facilities for international financial, currency, and banking transactions. It looks toward the participation of financial institutions of each country in appropriate banking services, of the other country, particularly in international trade and finance. In addition, the two parties agree to facilitate the availability of official export credits in accordance with applicable laws and procedures.

F. Patents, Trademarks and Copyrights

The agreement provides for reciprocal and equivalent protection of patents, trademarks, and copyrights. It also includes provisions for the protection of other industrial rights and processes.

G. Resolution of Bilateral Trade Problems

Bilateral trade problems, including market disruption due to rapidly rising imports, will be the subject of prompt consultations. Should such consultations not result in a satisfactory resolution within a reasonable period of time, either party may take whatever action it believes appropriate. In an emergency, action may be taken before consultations are held.

H. Resolution of Commercial Disputes

The agreement endorses nonjudicial procedures, including third-country arbitration, for the prompt settlement of commercial disputes.

I. National Security

The agreement leaves the parties free to take whatever actions they deem necessary to protect their security interests, as required under the Trade Act of 1974.

J. Entry Into Force and Termination

The agreement will be for a three-year, renewable term. It can be suspended if either party loses its domestic authority to carry out its obligations.

The signing of the United States-China agreement marks a significant step toward improvement in trade and economic relations. The agreement provides a framework for increasing trade and commercial contacts between the two countries. Its provisions include general principles as well as specific privileges and protections for United States firms trading with China.

The agreement reflects the requirements of section 405 of the Trade Act of 1974. It satisfies the specific requirements of that section for a commercial agreement with a nonmarket economy country, including safeguards against potential market disruption, protection of patents, copyrights and trademarks, and improved conditions to facilitate the activities of business representatives.

III. Claims and Assets Agreement

The major obstacle to normalizing relations with the People's Republic of China (PRC) was the absence of a signed agreement on claims and assets. The absence of such an agreement seriously and adversely affected private American business involvement with the PRC in, for example, the fields of banking, shipping, aviation, trade exhibitions, and certain aspects of trade transactions.

A claims settlement agreement on blocked assets was negotiated with the PRC early in 1979, and was initialed on March 2 by then United States Treasury Secretary Blumenthal and PRC Finance Minister Zhang Jingfu.³³ On May 11, 1979, this agreement was signed in Beijing by Secretary Kreps and Minister Zhang.³⁴

The agreement provides for PRC payment of \$80.5 million to the United States. Of that amount, \$30 million will be paid on October 1, 1979, and the remainder in five annual installments of \$10.1 million commencing October 1, 1980.³⁵ Distribution of the PRC's payment to claimants will be made by the United States government, beginning soon after October 1, 1979.³⁶

The United States on January 31, 1980 unblocked all PRC-related assets which remained blocked as of March 2, 1979, the date of the initialing of the agreement.³⁷ The agreement does not take any position as to the ownership of those assets.

The United States claims settled under the agreement are those held by United States nationals against the PRC arising from any nationalization, expropriation, intervention, or other taking of property, or from any special measures directed against property of United States nationals between October 1, 1949, the date the PRC was established, and July 7, 1979, the date on which the agreement was signed.³⁸ Claims arising before November, 1966, have been adjudicated by the Foreign Claims Settlement Commission pursuant to the International Claims Settlement Act of 1949, as amended,³⁹ and were certified to the Secretary of State in 1972.

The Commission certified a total of 384 claims having a value of \$196.9 million. Of this amount, claims of individuals totaled \$14.5 million; claims of religious and other nonprofit organizations, \$58.3 million; and claims of corporate and other business entities, \$124.1 million.⁴⁰

The Chinese claims settled are those of the PRC, PRC nationals and others subject to PRC jurisdiction or control, arising from the United States block-

³³*Chronology: March 1979*, 79 DEP'T STATE BULL. No. 2026, at 69 (1979).

³⁴Agreement on Settlement of Claims, *supra* note 2.

³⁵*Id.* art. III.

³⁶*Id.* art. IV.

³⁷*Id.* art. II(b).

³⁸*Id.* art. I(a).

³⁹22 U.S.C. § 1621 (1950), as amended by Law of Aug. 9, 1955, ch. 645, § 1, 69 Stat. 562.

⁴⁰FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES, ANNUAL REPORT TO THE CONGRESS 507 (1972).

ing of Chinese assets, between December 17, 1950, and the date of signature of the agreement.⁴¹ These assets now total approximately \$80.5 million. The agreement does not cover claims of the United States government against the PRC.

IV. Eximbank Credits, Credit Guarantees and Credit Insurance

As noted earlier, sections 402 and 409 placed requirements on the President to make certain determinations on the emigration policies and practices of a communist country before he would be free to extend MFN treatment, to provide access to United States governmental financing facilities (except CCC credits for the PRC), or to enter into a commercial agreement. Assuming that the United States-PRC trade agreement were submitted to the Congress with the required determinations and approved by the Congress, where would Eximbank stand regarding the PRC?

First, the President would have to make a national interest determination that it is desirable to extend finance to the PRC, as required by section 2(b)(2)(B) of the Export-Import Bank Act of 1945, as amended.⁴²

Second, Eximbank has outstanding claims of about \$26 million plus accrued interest against the PRC (which have yet to be negotiated).

Third, Eximbank does not now have any funds budgeted for financing to the PRC and new executive branch and congressional authorization would be required to permit the bank to extend any significant financing to the PRC.

The signing of the trade agreement and the claims and assets agreement were helpful and encouraging steps, but much remains to be accomplished before Eximbank financial facilities become available to the PRC. During his recent visit to the PRC, Vice-President Mondale told the Chinese that the United States is prepared to establish Eximbank credit arrangements for the PRC on a case-by-case basis up to a total of \$2 billion over a five-year period. He also said additional credit arrangements could be considered if developments warrant them. In the meantime, other countries such as the United Kingdom, Japan, France, and Canada are making substantial sums available to the PRC, mostly but not entirely in direct support of actual or intended exports from their countries to the PRC. United States firms must continue to trade without the important support of the Eximbank until the remaining hurdles are overcome. It will not be easy going, but the progress already made may help ease the way to increased United States-PRC trade.

V. Trade Exhibitions Agreement

On May 10, 1979, a separate agreement on trade exhibitions was signed in Beijing by Secretary of Commerce Kreps and PRC Minister of Foreign Trade Li Qiang. It became effective immediately.

⁴¹Agreement on Settlement of Claims, *supra* note 2, art. 1(b).

⁴²12 U.S.C. § 635(a)(2)(b)(2)(B) (1945).

The agreement recognizes the importance of trade exhibitions to the development of bilateral commercial ties and the promotion and increase of exports by both the United States and the PRC. It also provides for appropriate assistance and facilitation by each party to assist the other in arranging and holding trade exhibits and to assist in such matters as customs applicability, participation by firms and organizations, interpreters, and security of goods and personnel. Most important were the following elements:

1. Agreement that the PRC may hold "an economic and trade exhibition from May to October, 1980, in the cities of New York, Chicago and San Francisco, and exhibitions in these and other cities of the United States in subsequent years."
2. Agreement that the United States "may hold an exhibition in Beijing in 1980 and exhibitions in Beijing and other cities in China in subsequent years."
3. Recognition that the United States Department of Commerce and the China Council for the Promotion of International Trade are the key organizations for assisting and facilitating these efforts.

The signing of this agreement and of the claims and assets agreement have opened the way for trade exhibition efforts in 1980 and thereafter by both parties. Efforts are now underway in the Commerce Department's Industry and Trade Administration to prepare for a United States national exhibition in Beijing in the fall of 1980.

Having set forth the basic facts and the trade implications of the recent agreements signed or initialed between the United States and China, one might ask what does it all mean? Basically, the two countries have taken several critical steps forward in improving bilateral commercial relations, and in opening the way to increased bilateral trade and, possibly, investment—in other words, the achievement of trade normalization. If this impetus can be continued, United States firms should find it easier to become more competitive in the China market and to realize a \$5 billion level of United States-PRC trade by 1985.

