

III. Community Commercial Policy and External Relations

A. ANTIDUMPING AND SUBSIDIES LEGISLATION

The Communities have enacted new antidumping and subsidies legislation, updating the previous legislation and incorporating into it the so-called "screw-driver" rules of regulation 1761/87³⁴ aimed at "final assembly" dumping. The new statutes are regulation 2423/88/EEC³⁵ on Protection Against Dumped or Subsidized Imports, replacing regulation 2176/84/EEC,³⁶ and the similar regulation 2424/88/ECSC,³⁷ replacing regulation 2177/84/ECSC.³⁸

B. EEC-EFTA FREE TRADE AGREEMENTS

The recent interpretation by the ECJ of the competition provisions in these FTAs is discussed above at Section II.A.

C. JURISDICTION AND ENFORCEMENT OF JUDGMENTS OF EFTA AND EEC COURTS

The recent Lugano Convention is discussed above at Section I.B.

Pacific Basin*

I. Australia

A. THE MAY ECONOMIC STATEMENT: SIGNIFICANT TAX CHANGES

On May 25, 1988, the Federal Treasurer announced a number of significant business tax reforms. The significant tax changes include (effective from July 1, 1988):

- The company tax rate will be cut from 49 percent to 39 percent.
- Introduction of a foreign source income accruals taxation system along the following lines:

34. 30 O.J. EUR. COMM. (No. L 167); 9 (1987); *see also* 22 INT'L LAW. 569 (1988).

35. 31 O.J. EUR. COMM. (No. L 209) 1 (1988).

36. 27 O.J. EUR. COMM. (No. L 201) 1 (1984).

37. 31 O.J. EUR. COMM. (No. L 209) 18 (1988).

38. 27 O.J. EUR. COMM. (No. L 201) 17 (1984).

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- all income (active or passive) of nonresident entities in which Australian residents have interests, where the income has been derived in a low tax country, will be taxed on an accruals basis to the Australian resident;
- income of nonresident entities in which Australian residents have an interest, where the income is derived in a country having a tax system comparable to that in Australia, will not be subject to accruals taxation but will be subject to tax under the Foreign Tax Credit System (FTCS) when received;
- dividends received by companies from direct investments (10 percent or more of voting interests) in nonresident companies and dividends subject to accruals taxation will be outside the FTCS.

Foreign income subject to the accruals taxation system will be attributed to all classes of Australian taxpayers with interests in foreign entities. The government has released a "tentative" list of sixty designated low-tax countries (including most of the known "tax havens") as well as a list of countries offering "designated tax concessions."

B. SALES TAX ON COMPUTER SOFTWARE

The Australian Treasurer has recently announced that, with effect from December 23, 1988, sales tax for certain software and the electronic transfer of software will be withdrawn. Computer hardware, including storage media, will remain taxable. Firmware, which includes basic instructions embodied in hardware, such as microchips, will also continue to be taxable. As a result of the exemption of software from sales tax, those goods such as computer hardware, disks, tapes, and other taxable materials that are now exempt from sales tax when used by software creators (as being an aid to manufacturing) will no longer qualify for exemption.

The removal of the sales tax on software is as a result of intensive lobbying by industry groups. Until the Government introduces the necessary legislation to effect these amendments, software distributors will not be obliged to register for the purpose of payment of sales tax or to pay any sales tax upon the sales or license of software.

II. Hong Kong

A. PERFORMANCE GUARANTEES AND BONDS

The recent decision of the Court of Appeal of Hong Kong in *Guangdong Transport Ltd. v. Ancora Transport N.V.*, [1987] HKLR 923, provides a useful interpretation of the law relating to on-demand performance bonds and guarantees.

The defendant, Ancora, contracted with Guangdong Transport Limited (GTL) to ship a dismantled steel mill from the United States to Hong Kong. GTL, at

Ancora's request, provided an irrevocable bank guarantee as security for the full freight cost. The guarantee was payable upon first demand, the bank not requiring any evidence of actual default. As a result of certain claims under the contract, Ancora made a demand on the bank under guarantee. GTL sought and obtained an interim injunction restraining Ancora from demanding payment under the guarantee and the bank from making payment.

In discharging the injunction, the Court stated that the unique value of on-demand letters, bonds, and guarantees is that the beneficiary can be completely satisfied that whatever disputes may arise between the beneficiary and the bank's customer, the bank is personally undertaking to pay the beneficiary provided that all specified conditions are met. The guarantee was seen virtually as a promissory note payable on first demand. Fraud (which was not present in this case) was acknowledged as an exception that could negate the bank's obligation to pay.

III. Indonesia

A. AGREEMENT WITH EEC ON COPYRIGHT PROTECTION FOR SOUND RECORDINGS

On April 27, 1988, the Government of Indonesia agreed with the EEC to extend to nationals of certain EEC Member States the same legal protection regarding sound recordings as extended to Indonesian nationals in those countries. Protection has been extended to nationals of Belgium, Denmark, France, Ireland, the Netherlands, and the United Kingdom.

A protected copyright holder of a sound recording may take advantage of remedies available under the Indonesian Copyright Act. The possible civil remedies include:

- cancellation of an unauthorized copyright registration;
- seizure and/or destruction of goods violating copyright;
- a court order requiring that the copyright infringer stop manufacturing, selling, etc., goods that give rise to copyright violations.

B. BANKING DEREGULATION PACKAGE ANNOUNCED

The Indonesian Government has recently announced a package of deregulation measures in the finance, banking, and taxation areas. These measures are designed to promote exports, improve competition in the banking and financial services sector, and stimulate Indonesia's capital markets.

The key measures announced are as follows:

- The removal of fiscal discrimination against investors in Indonesia's growing share market. The Government has introduced a withholding tax at the rate of 15 percent on the interest income derived from time deposits. Thus the taxation rate for income from deposits and dividends is now the same.

- The eleven foreign banks currently operating in Indonesia have been authorized to open branches outside Jakarta. One of the conditions to be satisfied for new offices is that the offices must be involved in financing exports from Indonesia.
- National banks are authorized to set up joint ventures with foreign banks that already have representative offices in Jakarta, subject to the condition that paid-up capital for the joint venture is at least rupiah 50 billion, of which 15 percent must be held by a national bank (or banks).
- State-owned enterprises may now deposit up to 50 percent of their funds in private banks, whether foreign or domestic, with a maximum level of 20 percent of their funds in any single bank.
- The term of Central bank currency swap facilities has been extended from six months to three years. The premium will now be calculated on the difference between the average domestic deposit rates and LIBOR. Previously the premium was calculated on a subjective basis by the Central Bank.

IV. People's Republic of China

A. COOPERATIVE JOINT VENTURE LAW FINALLY PASSED

On April 13, 1988, the First Session of the Seventh National People's Congress adopted the long-awaited Law on Co-Operative Joint Ventures using Chinese and Foreign Investment (the Law). This Law will apply to all cooperative joint ventures established after the date of its promulgation. The key features of the Law are:

- The Examination and Approval Authority must give its approval or disapproval of a proposed joint venture enterprise within forty-five days after the receipt of the relevant application documents.
- Recognition of the existence of two different types of cooperative joint ventures: a "pure" cooperative joint venture in which no separate company is formed, and a "hybrid" cooperative joint venture through which the parties establish a separate Chinese company.
- The operation and management of a cooperative joint venture must be conducted in accordance with the approved joint venture contract and the Articles of Association of the joint venture company, if any. The Law guarantees that cooperative joint ventures may be autonomously operated and managed without any interference.
- Matters relating to the employees of a cooperative enterprise shall be provided for in a separate contract.
- If a cooperative enterprise fails to maintain accounting books and records in China, it may be fined, ordered to cease business, or have its business license revoked.

- If the joint venture contract specifies that all fixed assets shall belong to the Chinese party upon expiration of the joint venture term, the foreign party may repatriate its investment before the expiration of the joint venture term.
- If the cooperative enterprise contract provides that the foreign party shall repatriate its investment prior to payment of enterprise income tax, approval must be obtained from the relevant financial department and tax authorities.

B. TECHNOLOGY IMPORT CONTRACTS: NEW IMPLEMENTING RULES

China has recently approved detailed rules implementing the Regulations Concerning the Control of Technology Import Contracts. These Rules became effective on January 20, 1988.

Most forms of license relating to intellectual property, technology and know-how, which are entered into between a foreign supplier on the one hand, and a Chinese enterprise, Chinese-foreign entity, or a cooperative joint venture or wholly foreign-owned enterprise on the other hand, must now be examined and approved by the relevant authority pursuant to the Regulations and Rules.

The Rules specify that certain basic terms must be included in a technology import contract.

Without special approval, a contract may not contain terms that:

- restrict the export of products produced by the recipient utilizing the technology except for exports to countries for which the supplier has already entered into an exclusive licensing or agency contract; or
- prohibit the recipient from continuing to use the technology after the expiration of the contract term. A technology import contract will not be approved, if:
 - State sovereignty or public interest is harmed;
 - the contract does not contain reasonable provisions for the technical level to be attained and the economic benefits to be generated by the assigned or licensed technology;
 - the price of the imported technology or the method of payment thereof is unreasonable;
 - the provisions for the rights, responsibilities, and obligations of each party to the contract are not sufficiently explicit, reciprocal, or reasonable.

C. TRADEMARK LAW: NEW IMPLEMENTING RULES

New Implementing Rules for the Trade Mark Law of the People's Republic of China have recently been announced. The Rules took effect on January 13, 1988, and completely replace the old rules. Some important features of the new Rules include the following:

- The Rules now permit organizations appointed by the State Administration of Industry and Commerce (SAIC), as well as the China Council for

Promotion of International Trades, to handle trademark matters on behalf of foreigners.

- The foreign applicant's name must be consistent with the Chinese name registered in China.
- The goods bearing the trademark must relate to the foreign applicant's registered area of business.
- Certain products (e.g., pharmaceutical and tobacco products) must bear registered trademarks and the SAIC may expand the list.
- Nonuse of a registered trademark for three consecutive years can lead to its cancellation and anyone may file a request for cancellation.
- Any agreement to license a registered trademark must be submitted to the SAIC for recording.
- The Rules deal with the question of registration of another company's trademarks and apply the relatively strict first-to-file system as a means of forcing the true owner to purchase the exclusive right to use the trademarks in China.
- Anyone may apply to cancel an improperly registered trademark or lodge a complaint against a suspected infringer or counterfeiter.

V. Taiwan

A. STANDING TO ENFORCE COPYRIGHT

Many foreign copyright owners authorize local publishers to publish their works in Taiwan. A question that arises is whether the Taiwan publisher (or a Taiwan distributor or general agent) can sue an infringer for copyright infringement. There are presently two opposing views on this issue in Taiwan.

One view states that only the copyright owner can sue. The opposing view is that a publisher can sue for infringement even if such publisher is not the copyright owner.

The current Copyright Law, which was promulgated on July 10, 1985, is silent regarding a publisher's right to sue for copyright infringement. The second paragraph of article 4 of the Law, however, indicates that copyright includes the exclusive rights of reproduction, public broadcast, public show, public performance, public display, etc. These activities may be deemed to be publication activities. In addition, article 3(5) of the Law provides that a publisher is a holder of a right related to the work. The National Police Administration of the Ministry of Interior and the Ministry of Justice have agreed in principle with this latter view.

In early 1988, however, the Taipei District Court held that a publisher is not qualified to sue for copyright infringement because he is not the copyright owner. The publisher has appealed the initial decision to the Taiwan High Court, which as of July 1988 had not rendered a decision. Thus, the right of a publisher to sue