

COMMERCIAL RULE OF LAW

Introduction

When China acceded to the World Trade Organization (WTO) on December 11, 2001,¹ the Chinese government made numerous commitments to strengthen transparency,² run state-owned enterprises (SOEs) on a commercial basis,³ open Chinese markets,⁴ protect intellectual property rights,⁵ and reform China's legal system.⁶ The Chinese government made additional transparency, trade, and intellectual property commitments through the U.S.-China Joint Commission on Commerce and Trade (JCCT) and the U.S.-China Strategic and Economic Dialogue (S&ED).⁷ From 2001 to 2013, U.S. imports from China increased by US\$338 billion, while exports to China increased by US\$103 billion—less than one-third as much.⁸ In 2012, the Ministry of Commerce reported that Chinese foreign direct investment into the United States exceeded investment by U.S. companies into China for the first time,⁹ and the Rhodium Group reported that in 2013, Chinese investments in the United States doubled from 2012 levels.¹⁰ The Chinese government has not kept its international trade commitments in many respects. China continued to discriminate against foreign companies and products, had not met its transparency commitments, provided large subsidies to SOEs, had poor protection for intellectual property, and lacked the rule of law.¹¹ During the Commission's 2014 reporting year, Chinese leaders committed to allowing the market to play a decisive role in allocating resources but also reaffirmed that SOEs would continue to play a primary role in China's economy.¹² Authorities also established a pilot Shanghai Free Trade Zone,¹³ and an amended PRC Trademark Law took effect.¹⁴

State-Owned Enterprises and Indigenous Innovation

During this reporting year, the Chinese government continued to provide subsidies to state-owned and state-controlled enterprises (collectively, "SOEs") and to promote indigenous innovation.¹⁵ The state capitalism practiced by China also continued to be a key issue in U.S.-China economic dialogues and ongoing treaty negotiations.¹⁶ When China acceded to the WTO, it made commitments to running SOEs on a market basis, including not interfering in procurement and sales decisions, except as provided for by WTO rules.¹⁷ The November 2013 Chinese Communist Party Central Committee Third Plenum Decision on Certain Major Issues Regarding Comprehensively Deepening Reforms emphasized a decisive role for the market in the allocation of resources, but acknowledged that SOEs would continue to play a primary role in China's economy.¹⁸ Foreign companies also perceived SOEs as receiving preferential treatment in litigation.¹⁹ In 2014, an American Chamber of Commerce in China survey of U.S. companies found that the surveyed companies considered Chinese policies favoring SOEs to be the most negative type of industrial policy in China.²⁰ As of July 2014, there were reportedly 113 central SOEs directly controlled by the national State-owned Assets Supervision and Administration Commission (SASAC).²¹ A total of 144,700 SOEs, including those controlled by provincial and local governments, were reported at

the end of 2011.²² According to the China State Owned Assets Report, 92 of the 100 Chinese companies on the 2014 Global Fortune 500 List were SOEs.²³ SOEs, however, are less profitable than private enterprises.²⁴ High-level personnel changes at SOEs are often driven by political considerations.²⁵ Through direct and indirect supervision, the Chinese Communist Party oversees the decision-making of SOEs,²⁶ including using policies and subsidies to make non-market-based purchasing and sales decisions to support Chinese companies and technology.²⁷ The Chinese government reportedly encouraged greater private investment in SOEs through a mixed-ownership model in which private companies take minority stakes in SOEs, but it is unclear whether the move was intended to make SOEs more subject to market-based decisionmaking or simply to provide SOEs with additional capital.²⁸

The Chinese government promoted SOEs and domestic companies through indigenous innovation policies, including subsidies, incentives, and preferential procurement policies.²⁹ Some U.S. companies considered implementation of indigenous innovation policies to be an even larger problem than intellectual property theft.³⁰ China's High and New Technology Enterprise tax incentives, first implemented in 2008, continued during the reporting year, and maintained unfavorable licensing requirements and the requisite that beneficiaries conduct a majority of their research and development in China.³¹ Despite China's commitments when it joined the WTO, technology transfer requirements are still often required of foreign companies, although at times described as "encouraged," in order to operate in China.³² Fiscal and tax benefits were often given to Chinese companies, including in strategic industries,³³ while many foreign companies in China believed they had been held to higher regulatory standards than Chinese companies.³⁴

Transparency and Access to Corporate Information

This past year, China remained noncompliant with its WTO commitments for disclosing subsidies and providing regulatory transparency on draft laws and regulations,³⁵ and access to government and corporate information in China remained challenging.³⁶ In 2013, the percentage of Chinese government administrative regulations and departmental rules published for public comment on the Web site of the State Council Legislative Affairs Office (SCLAO) was less than 10 percent.³⁷ At the June 2008 Strategic Economic Dialogue, according to the Joint U.S.-China Fact Sheet, China committed to publish on the SCLAO Web site "in advance for public comment, subject to specified exceptions, all trade and economic-related administrative regulations and departmental rules that are proposed for adoption and provide a public comment period of not less than 30 days."³⁸ An industry association of multinational corporations with investment in China reportedly had some success in strengthening the new PRC Trademark Law³⁹ through submission of comments on draft amendments.⁴⁰ In an October 2013 analysis of corporate reporting on anticorruption programs, organizational transparency, and financial information in major emerging markets by Transparency International, Chinese companies ranked last among companies from Brazil, Russia, India and South Africa.⁴¹ According to an October 2013 Bloomberg report, the lack of cor-

porate reporting requirements made conditions “ripe for” corruption.⁴² The Chinese government blocked access to the New York Times and Bloomberg News’ Web sites in the wake of their reporting on the wealth and business connections of government officials.⁴³ In November 2013, a report on the hidden financial ties between China’s wealthiest man, Wang Jianlin, and family members of China’s top leaders reportedly was not published by a foreign media company, due to concern it would harm the company’s access in China.⁴⁴ As of June 2014, the New York Times and Bloomberg News remained blocked in China, and in late 2013 many reporters had difficulty obtaining visas.⁴⁵

American regulators, private companies, and investors have also faced difficulty obtaining corporate information in China. In January 2014, the U.S. Securities and Exchange Commission (SEC) suspended the activities of the Chinese affiliates of the Big Four accounting firms for not providing audit documents of China-based companies “whose securities are registered with the SEC” and that were targets of “fraud investigation” by the SEC.⁴⁶ The accounting firms did not provide the audit documents due to concerns they would be in violation of Chinese law, including the China Securities Regulatory Commission’s (CSRC) announcement 29 of 2009, which requires the approval of regulatory authorities before work papers can leave China.⁴⁷ The Hong Kong Securities and Futures Commission also had difficulties in obtaining documents due to concerns over potential conflicts with the PRC State Secrets Law and related regulations.⁴⁸ According to a 2014 survey conducted by the American Chamber of Commerce in China, 56 percent of businesses surveyed indicated that Internet censorship negatively affected their businesses.⁴⁹ A lack of corporate transparency created obstacles for companies wishing to engage in merger and acquisition transactions in China⁵⁰ and investors in Chinese companies.⁵¹ China’s vague personal privacy laws also created obstacles for due diligence work.⁵² Chinese officials, for example, detained and later arrested U.S. citizen Yu Yingzeng and her husband Peter Humphrey for purchasing personal information to assist them in doing due diligence on behalf of corporate clients.⁵³ An article in the Atlantic Monthly described the arrests as revealing “a Chinese government that fears public exposure of corruption.”⁵⁴ In August 2014, the Shanghai No. 1 Intermediate People’s Court sentenced Yu to two years in prison and Humphrey to two years and six months in prison.⁵⁵

Commercial Developments and Cyber Theft

American companies cited the continuing deterioration in the business environment in China and continuing bias against foreign companies, despite Chinese government claims that “China has fully honored its extensive commitments of the WTO accession.”⁵⁶ Chinese subsidies and the lack of transparency reportedly had a negative impact on U.S. businesses.⁵⁷ In 2014, an American Chamber of Commerce in China survey found that 41 percent of member companies surveyed believe that China is “less welcom[ing] than before.”⁵⁸ A European Union Chamber of Commerce in China (EUCCC) survey found that 51 percent of member companies believe “that business in China has become more difficult over the

last couple of years,”⁵⁹ including 68 percent of large companies with over 1,000 employees.⁶⁰ According to 71 percent of member companies surveyed by the EUCCC, improved rule of law and more transparent policymaking are the most important factors for economic progress in China.⁶¹ Many U.S. technology and media companies remained blocked in China, including Facebook, Twitter, YouTube, Dropbox, the New York Times, and Bloomberg News.⁶² In May 2014, the Central Government Procurement Center banned the installation of Microsoft’s Windows 8 on government computers,⁶³ and the Financial Times reported that SOEs were ordered to stop using U.S. consulting firms.⁶⁴

The United States and China continued to negotiate a bilateral investment treaty and China continued to promote its Shanghai Free Trade Zone. In July 2014, during the Strategic and Economic Dialogue, the United States and China reportedly agreed to “intensify” negotiations over a bilateral investment treaty culminating in an agreement on “core issues” and “major articles” of the treaty by year’s end, and to begin negotiations on a “negative list” in early 2015.⁶⁵ In January 2014, China submitted a fourth revised bid to join the WTO Government Procurement Agreement, which could open China’s government procurement market, valued at US\$230 billion in 2012, to foreign companies.⁶⁶ In September 2013, a pilot Shanghai Free Trade Zone was opened to reduce restrictions on investment and the services market.⁶⁷ According to the Chinese government, the Shanghai Free Trade Zone is intended as a test area for “trade and investment liberalization” policies that may be implemented nationwide in the future.⁶⁸ As of June 2014, Chinese and foreign media noted that modest liberalization of trade and investment policies had occurred to date in the Shanghai Free Trade Zone,⁶⁹ although over 20 local governments have applied for similar free trade zone status.⁷⁰

There continued to be reports of significant theft of U.S. intellectual property originating from China, which caused significant losses for American companies.⁷¹ In May 2014, the U.S. Department of Justice (DOJ) charged five Chinese military hackers for cyber espionage against Westinghouse Electric Co., U.S. subsidiaries of SolarWorld AG, United States Steel Corp., Allegheny Technologies Inc., United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), and Alcoa Inc.⁷² The indictment marks the first time the DOJ has filed criminal charges against foreign government officials for computer hacking,⁷³ although the DOJ has brought criminal charges against employees of Chinese companies.⁷⁴ At the announcement of the indictment against the alleged military hackers, U.S. Federal Bureau of Investigation Director James B. Comey said, “[f]or too long, the Chinese government has blatantly sought to use cyber espionage to obtain economic advantage for its state-owned industries.”⁷⁵ The Ministry of Foreign Affairs reportedly responded that the DOJ indictment included “intentionally-fabricated facts” and suspended the ongoing China-U.S. Cyber Working Group.⁷⁶ In June 2014, U.S. Ambassador to China Max Baucus described cyber theft by state actors as a “major threat” to U.S. economic and national security.⁷⁷ During the reporting year, the DOJ began criminal prosecutions in two

significant cases involving the theft of agricultural trade secrets.⁷⁸ In December 2013, a Chinese national was arrested for allegedly conspiring to steal corn-related trade secrets of several U.S.-based seed manufacturing companies, including Monsanto and DuPont Pioneer, from fields in Iowa and Illinois.⁷⁹ In July 2014, a second Chinese national who was allegedly part of the conspiracy to steal corn-related trade secrets was arrested.⁸⁰ According to prosecutors, the value of the trade secrets was likely over US\$500 million.⁸¹ In December 2013, two agricultural scientists from China reportedly were indicted in a different case for allegedly stealing seeds from a biopharmaceutical company's research center in Kansas and providing them to a visiting Chinese delegation.⁸²

Intellectual Property Rights

During this reporting year, the State Council implemented amendments to the PRC Trademark Law,⁸³ and the Chinese government and courts worked to strengthen the prosecution and enforcement of intellectual property rights (IPR) in China.⁸⁴ U.S. companies in China, however, continued to have difficulty enforcing IPR through Chinese courts and administrative agencies.⁸⁵ Sales of IPR-intensive goods, including copyrighted software, music, and movies, remained low for U.S. companies in China.⁸⁶ One report estimated that in 2013, 74 percent of computer software in China was unlicensed.⁸⁷ In 2014, Microsoft assisted state attorneys general in litigation against Chinese companies in U.S. state courts due to difficulties in collecting payments in China.⁸⁸ Trade secret protection is also difficult in China.⁸⁹ In August 2013, the U.S. pharmaceutical company Eli Lilly and its Chinese subsidiary were able to obtain the first preliminary injunction in a trade secret dispute.⁹⁰ Prior to implementation of the revised PRC Civil Procedure Law on January 1, 2013, preliminary injunctions were not available in trade secret cases.⁹¹ In 2014, Massachusetts-based AMSC had four ongoing lawsuits against Sinovel Wind Group (Sinovel) totaling an estimated US\$1.2 billion in damages, including a trade secrets case, two copyright infringement cases, and a commercial arbitration for violations of sales contracts.⁹² In June 2013, the DOJ, in a related case, also brought a criminal indictment against Sinovel, several Sinovel employees, and a former employee of AMSC's Chinese subsidiary.⁹³ In another significant lawsuit, Huawei Technologies (Huawei) filed civil complaints in its hometown of Shenzhen municipality, Guangdong province, against the Delaware company InterDigital, Inc., for failing to negotiate on fair, reasonable, and non-discriminatory terms for licensing its standard essential patents and abuse of its dominant market position.⁹⁴ According to analysis by an international law firm, Huawei's victory in the litigation "sends a clear message that China wants to encourage indigenous innovation and lower technology barriers against the development of domestic technology companies."⁹⁵

In May 2014, the amended PRC Trademark Law and implementing regulations took effect, which increased statutory damages for trademark infringement from 500,000 yuan (US\$80,000) to 3 million yuan (US\$480,000).⁹⁶ In most intellectual property cases, however, the recovered compensation is well below the statutory damages, and in one database of 5,169 intellectual property judg-

ments for 2012, average compensation awarded was 44,871 yuan (US\$7,200).⁹⁷ During this reporting year, the State Administration for Industry and Commerce began to draft proposed revisions to the 1993 PRC Anti-Unfair Competition Law, China's key law for civil protection of trade secrets.⁹⁸

Antimonopoly Law and Company Law

Chinese authorities are conducting an increasing number of antimonopoly reviews, including merger reviews and investigations of abuse of dominant market positions.⁹⁹ Article 7 of the PRC Antimonopoly Law provides preferential treatment for SOEs that are important to the national economy or security.¹⁰⁰ Between 2008 and 2013, the Ministry of Commerce (MOFCOM) received 866 declarations for "concentration of business operations," and among the 740 settled cases, MOFCOM unconditionally approved 717 "concentration of business operations," conditionally approved 22, and prohibited only 1.¹⁰¹ In June 2014, however, MOFCOM blocked a cooperative vessel-sharing agreement between A.P. Moller-Maersk, CMA CGM, and MSC Mediterranean Shipping Company ("P3 network").¹⁰² The P3 network had been approved by the U.S. Federal Marine Commission¹⁰³ and the European Commission.¹⁰⁴ Analysts believe that the Chinese P3 network decision may have been influenced by a motivation to protect domestic industry; the PRC Antimonopoly Law provides for an assessment of the impact on "national economic development."¹⁰⁵ Chinese SOEs in the shipping industry had suffered significant losses in recent years and reportedly pressured Chinese government officials not to approve the P3 network.¹⁰⁶ The previous deal blocked by MOFCOM was the Coca-Cola Company's failed acquisition of Chinese beverage company Huiyuan Juice Group in 2009.¹⁰⁷ In 2013, 80 price-related investigations were conducted by the National Development and Reform Commission (NDRC) under the PRC Antimonopoly Law, a number four times greater than the total of 20 investigations conducted in the previous five years.¹⁰⁸ Investigations against U.S. and foreign firms reportedly have also increased.¹⁰⁹ In July 2014, NDRC reportedly determined that Qualcomm Inc., the American semiconductor company, was a monopoly, a decision which may result in up to US\$1 billion in fines.¹¹⁰ Also in July 2014, the Chinese government began investigating Microsoft for possible violations of the PRC Antimonopoly Law.¹¹¹ According to an August 2014 Wall Street Journal editorial, "[t]he investigations are clustered in industries in which foreign firms have a competitive advantage and Chinese firms are struggling," and these "attacks on foreign firms" may serve to "distract from the huge cost to consumers" of China's monopolist SOEs.¹¹² In September 2014, the US-China Business Council reported that 86 percent of firms that responded to its survey had some level of concern about competition enforcement activities in China.¹¹³ Foreign companies' concerns with China's enforcement activities included selective and subjective enforcement, lack of regulatory transparency, and the use of administrative intimidation tactics.¹¹⁴ According to a September 2014 U.S. Chamber of Commerce report, China's enforcement activities, which "often appear designed to advance industrial policy and boost national champions," may be a violation of its WTO commitments.¹¹⁵

In December 2013, the National People's Congress passed significant amendments to the PRC Company Law that simplified the registration process and review procedure for companies.¹¹⁶ Registered capital will no longer be required for registration of most companies, along with other reforms.¹¹⁷ In the first three months after the amended PRC Company Law took effect, the number of new companies increased by over 66 percent compared to the same three-month period in 2013.¹¹⁸ The amended PRC Company Law will increase the need for due diligence.¹¹⁹

World Trade Organization Disputes

During this reporting year, the U.S. Government continued to use the World Trade Organization (WTO) dispute settlement mechanism to address China's noncompliant trade policies, including export restrictions and subsidies, that could not be resolved through dialogue.¹²⁰ A lack of transparency in China and weak rule of law made WTO disputes challenging, a situation exacerbated by the fear of retaliation for companies that are involved in trade disputes.¹²¹ Four U.S. entities—United States Steel Corp., Allegheny Technologies Inc., U.S. subsidiaries of SolarWorld AG, and the United Steelworkers union—were allegedly victims of cyber theft after they challenged discriminatory Chinese trade policies.¹²² China also continued to challenge U.S. trade policies in WTO disputes.¹²³ As of July 2014, China had been involved in 12 WTO disputes as a complainant, 31 cases as a respondent, and 110 cases as a third party.¹²⁴ China has been a complainant in 9 cases against the United States and the United States has been a complainant in 15 cases against China.¹²⁵ In December 2013, China filed a WTO dispute challenging duties the United States had imposed on a number of Chinese products, including coated paper, steel products, and shrimp.¹²⁶

In the first half of 2014, significant WTO panel decisions were issued in a rare earths dispute involving Chinese export quotas and an automobile subsidies dispute involving Chinese duties on U.S. automobile imports.¹²⁷ In March 2014, a WTO panel found that “under the circumstances, China’s imposition of the export duties [on rare earths] in question was found to be inconsistent with China’s WTO obligations,” and “that China’s export quotas were designed to achieve industrial policy goals rather than conservation.”¹²⁸ In August 2014, the WTO Appellate Body upheld the panel’s findings that China’s rare earths export quotas were not measures relating to conservation.¹²⁹ In May 2014, a WTO panel in an automobile duties case reportedly found a number of errors in China’s determination of automobile duties, including calculating rates without a factual basis and not providing facts used to determine the duties.¹³⁰ The U.S. Trade Representative’s Office (USTR) estimated over US\$5 billion of U.S. auto exports were affected by these illegal duties in 2013.¹³¹ USTR reported that the Chinese government imposed the duties in retaliation against U.S. President Barack Obama’s decision in September 2009 to impose tariffs on Chinese tire imports.¹³² During the reporting year, the United States also initiated a WTO compliance proceeding against China’s failure to implement an October 2012 WTO appellant report that upheld a finding that Chinese duties on imports of grain-oriented

flat-rolled electrical steel from the United States violated WTO rules.¹³³

Outbound Investments and Foreign Exchange Controls

In 2013, Chinese investments in the United States doubled from 2012 levels, reaching US\$14 billion, and China has now invested more in the United States over the past decade than any other country.¹³⁴ According to the Rhodium Group, the largest of approximately 80 significant investments in 2013 were in the food industry, energy, and real estate sectors.¹³⁵ China's Shuanghui International Holdings' US\$7.1 billion acquisition of the pork processor Smithfield Foods was the largest deal of 2013.¹³⁶ In the first quarter of 2014, Chinese companies announced new deals totaling over US\$8 billion.¹³⁷ During 2014, the Committee on Foreign Investment in the U.S. (CFIUS) reviewed national security concerns relating to the announced acquisitions by the Chinese company Lenovo Group of an International Business Machines Corporation (IBM) server unit and of Motorola Mobility from Google.¹³⁸ In January 2014, Lenovo agreed to purchase IBM's x86 server business for US\$2.3 billion and Motorola Mobility for US\$2.9 billion.¹³⁹ The x86 servers are used by the Department of Defense, Department of Homeland Security, and Federal Bureau of Investigation.¹⁴⁰ As of July 2014, the deals were reportedly still under review by CFIUS.¹⁴¹ The purchase of residential properties in the United States by Chinese buyers also increased significantly, with US\$22 billion in purchases in the year ending March 2014, up from US\$13 billion in the previous year, raising questions about compliance with Chinese law.¹⁴² Chinese regulations prevent Chinese citizens from exchanging over US\$50,000 in currency per year, but CCTV reported in July 2014 that the Bank of China provided "illegal" foreign exchange services above that amount and expressly targeted Chinese looking to emigrate and purchase property overseas.¹⁴³

This past year, intervention by the Chinese government continued to contribute to significant undervaluation of the Chinese yuan.¹⁴⁴ The yuan reportedly reversed a trend of appreciation in 2014, depreciating by 1.5 percent in February 2014, for the largest two-week depreciation since 2005,¹⁴⁵ and depreciating 2.68 percent for the year ending in April 2014.¹⁴⁶ China's currency policy reportedly results in increases in the cost of U.S. imports for Chinese consumers and lowers the price of Chinese exports, increasing the U.S. trade deficit with China.¹⁴⁷ In 2013, China's inbound foreign direct investment (FDI) and current account surplus amounted to more than US\$446 billion,¹⁴⁸ and China's foreign currency reserves reached approximately US\$4 trillion in June 2014.¹⁴⁹ According to February 2014 analysis by the Economic Policy Institute, eliminating currency manipulation globally, with China as the "linchpin," could reduce the U.S. trade deficit in three years by as much as US\$500 billion and create up to 5.8 million U.S. jobs.¹⁵⁰

Food Safety and Labeling

During the Commission's 2014 reporting year, food safety concerns and labeling issues affected consumers in China and overseas. Chinese media highlighted official plans¹⁵¹ to address food

safety concerns, including the use of banned pesticides,¹⁵² unsafe veterinary drugs,¹⁵³ illegal food additives,¹⁵⁴ use of expired food,¹⁵⁵ sale of waste oil,¹⁵⁶ and mislabeled food.¹⁵⁷ A Pew Research survey published in September 2013 found 38 percent of Chinese consider food safety to be a “very big problem,” an increase from the 12 percent reported in 2008.¹⁵⁸ In June 2014, an investigation by a reporter for Chinese state media¹⁵⁹ found widespread use of bribes by Chinese companies to obtain certifications for farm produce and other products, including pesticide.¹⁶⁰ During the reporting year, food safety concerns affected a number of foreign companies; for example, Wal-Mart announced that it would strengthen its food safety inspection system in China¹⁶¹ after donkey meat sold in its stores there was found to contain fox meat.¹⁶² In July 2014, the Chinese subsidiary of the U.S. meat supplier OSI Group was also reportedly discovered selling expired meat in China and Japan, negatively impacting its customers McDonald’s, KFC, Pizza Hut, Burger King, and Papa John’s.¹⁶³ In June 2014, draft amendments to the PRC Food Safety Law, including improvements to the supervision and management system and higher penalties for violations, were published for public comment.¹⁶⁴

China’s food safety concerns also affect U.S. consumers who may not be aware that a product is sourced from or processed in China.¹⁶⁵ In May 2014, the U.S. Food and Drug Administration (FDA) announced that since 2007 more than 1,000 canine deaths may be associated with eating jerky pet treats that primarily come from China.¹⁶⁶ Following the FDA announcement, U.S. pet food retailers Petco and PetSmart announced they would stop selling pet treats from China.¹⁶⁷ As of July 15, 2014, the FDA had 79 active import alerts for China, which is more than for any other country.¹⁶⁸ In August 2013, China became eligible to export processed poultry to the United States, provided it is slaughtered in the United States or other approved countries.¹⁶⁹ According to the U.S. Department of Agriculture, imported processed chicken will not be labeled as a product of China if it is repackaged in the United States.¹⁷⁰ Although the U.S. Government plans to increase the number of food safety inspectors in China, there reportedly were difficulties in obtaining visas for them, despite U.S. Vice President Joe Biden addressing the issue during a December 2013 visit to China.¹⁷¹

Notes to Section III—Commercial Rule of Law

¹ See World Trade Organization, “Protocols of Accession for New Members Since 1995, Including Commitments in Good and Services,” last visited 28 July 14. China became a member of the World Trade Organization (WTO) on December 11, 2001. A list of members and their dates of membership is available on the WTO Web site.

² Information on China’s participation in the World Trade Organization (WTO), including principal accession documents, schedules, trade policy reviews, and dispute case documents, can be found on the WTO Web site. China’s commitments are outlined in these documents, as well as in WTO agreements applicable to all members, including the General Agreement on Tariffs and Trade (GATT 1947) and the Trade-Related Aspects of Intellectual Property Rights. See World Trade Organization, “WTO Legal Texts,” last visited 28 July 14; World Trade Organization, WTO Agreement, Marrakesh Agreement, Establishing the World Trade Organization, Annex 1A, General Agreement on Tariffs and Trade 1994, 15 April 1994, art. X. Transparency requirements include those under Article X of GATT: “Laws, regulations, judicial decisions and administrative rulings of general application, . . . , shall be published promptly in such a manner as to enable governments and traders to become acquainted with them.” See, e.g., Sijie Chen, “China’s Compliance With WTO Transparency Requirements: Institution-Related Impediments,” *Amsterdam Law Forum*, Vol. 4, No. 4 (Fall 2012), 25.

³ World Trade Organization, Report on the Working Party on the Accession of China, WT/ACC/CHN/49, 1 October 01, 34. See also Claustre Bajona and Tianshu Chu, “China’s WTO

Accession and Its Effect on State-Owned Enterprises,” East-West Center, No. 70, April 2004, 16.

⁴See World Trade Organization, “Protocols of Accession for New Members Since 1995, Including Commitments in Goods and Services,” last visited 28 July 14. See also U.S. Chamber of Commerce, “China’s Approval Process for Inbound Foreign Direct Investment: Impact on Market Access, National Treatment and Transparency,” 11 November 12, 4, 19, 29–30, 39, 41; Trade Lawyers Advisory Group, “China’s Compliance With WTO Commitments and Obligations: 2005–2007 Update,” reprinted in U.S.-China Economic and Security Review Commission, September 2007, 6–8.

⁵See World Trade Organization, WTO Agreement, Marrakesh Agreement, Establishing the World Trade Organization, Annex 1C, Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 94.

⁶See Donald C. Clarke, “China’s Legal System and the WTO: Prospects for Compliance,” Washington University Global Studies Law Review, Vol. 2, No. 1 (2003), 113–15.

⁷U.S. Government Accountability Office, “U.S.-China Trade: United States Has Secured Commitments in Key Bilateral Dialogues, but U.S. Agency Reporting on Status Should Be Improved,” February 2014, 6.

⁸U.S. International Trade Commission, Interactive Tariff and Trade DataWeb, last visited 1 July 14; China’s Compliance with the World Trade Organization and International Trade Rules, Hearing of the Congressional-Executive Commission on China, 15 January 14, Written Statement Submitted by Elizabeth J. Drake, Partner, Stewart and Stewart, 1.

⁹Daniel H. Rosen and Thilo Hanemann, Rhodium Group and U.S. Chamber of Commerce, “New Realities in the US-China Investment Relationship,” April 2014, 5. See also Bureau of Economic and Business Affairs, U.S. Department of State, “2014 Investment Climate Statement China,” June 2014, 26–27.

¹⁰Thilo Hanemann and Cassie Gao, Rhodium Group, “Chinese FDI in the US: 2013 Recap and 2014 Outlook,” 7 January 14.

¹¹Office of the U.S. Trade Representative, “2013 Report to Congress on China’s WTO Compliance,” December 2013; Chris Wilson, Office of the United States Trade Representative, “United States Statement at the World Trade Organization Trade Policy Review of the People’s Republic of China,” 1 July 14.

¹²Chinese Communist Party Central Committee, Decision on Certain Major Issues Regarding Comprehensively Deepening Reforms [Zhonggong zhongyang guanyu quanmian shenhua gaige ruogan zhongda wenti de jue ding], reprinted in Xinhua, 15 November 13, secs. 1(2), 2(intro); Chris Wilson, Office of the U.S. Trade Representative, “United States Statement at the World Trade Organization Trade Policy Review of the People’s Republic of China,” 1 July 14; Knowledge@Wharton, Wharton School, University of Pennsylvania, “Road to the Chinese Dream? Xi Jinping’s Third Plenum Reform Plan,” 10 December 13.

¹³Shanghai Municipal People’s Government, Measures for the Administration of China (Shanghai) Pilot Free Trade Zone (Municipal Decree No. 7) [Zhongguo (shanghai) ziyou maoyi shiyan qu guanli banfa (shi zhengfu ling di 7 hao)], issued 29 September 13, effective 1 October 13.

¹⁴PRC Trademark Law [Zhonghua renmin gongheguo shangbiao fa], passed 23 August 82, amended 22 February 93, 27 October 01, 30 August 13, effective 1 May 14.

¹⁵Ministry of Finance, “2014 January to June State-Owned Enterprise and State-Controlled Enterprise Economic Situation” [2014 nian 1–6 yue guoyou ji guoyou kongqu qiye jingjing yunxing qingkuang], 17 July 14. The term SOE is often used, including by the Chinese government, to refer to both state-owned and state-controlled enterprises.

¹⁶Charlene Barshefsky and Long Yongtu, “A Win-Win Possibility for China-U.S. Trade Bilateral Investment Strategy Talk on July 9–10 Could Pay Big Dividends,” Wall Street Journal, 30 June 14; Andrew Batson, “The SOE Irritant in U.S.-China Relations,” Wall Street Journal, 7 July 13.

¹⁷World Trade Organization, Report on the Working Party on the Accession of China, WT/ACC/CHN/49, 1 October 01, 34.

¹⁸Chinese Communist Party Central Committee, Decision on Certain Major Issues Regarding Comprehensively Deepening Reforms [Zhonggong zhongyang guanyu quanmian shenhua gaige ruogan zhongda wenti de jue ding], reprinted in Xinhua, 15 November 13, secs. 1(2), 2(intro).

¹⁹See, e.g., Joseph Sternberg, “The Day the Chinese SOE Went to Court,” Wall Street Journal, 26 March 14.

²⁰American Chamber of Commerce in the People’s Republic of China, “2014 China Business Climate Survey Report,” 2014, 10.

²¹“List of Central State-Owned Enterprises” [Yangqi minglu], State-Owned Assets Supervision and Administration Commission of the State Council, last visited 1 July 14.

²²Note that SOEs includes state-owned enterprises together with state-controlled enterprises. See “China Focus: China Pledges Further Reform for State-Dominated Sectors,” Xinhua, 24 October 12; “All-Round Reform,” China Daily, 13 November 13; Dong Zhang and Owen Freestone, Australian Government, The Treasury, “China’s Unfinished State-Owned Enterprise Reforms,” Economic Roundup, Issue 2, 2013.

²³Zhao Lingling and Yang Kai, “92 State-Owned Enterprises Shine on Fortune 500 List” [92 jia guoyou qiye shanyao shijie 500 qiang bangdan], China State-Owned Assets Report, 15 July 14.

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¹⁵⁹Mao Weihao et al., “Certification or Recognize Money?—A Xinhua Reporter’s Undercover Investigation of the Certification Market” [Renzheng, haishi renqian?—xinhua she jizhe diaocha anfang renzhen shichang], Xinhua, 15 June 14.

¹⁶⁰Mandy Zuo, “Mainland Industries Bribing Their Way to Quality-Control Certification: Xinhua,” South China Morning Post, 16 June 14.

¹⁶¹Gail Sullivan, “Wal-Mart To Triple Food Safety Spending in China After Donkey Meat Disaster,” Washington Post, Morning Mix (blog), 17 June 14.

¹⁶²Laurie Burkitt, “Wal-Mart Recalls Donkey Meat in China,” Wall Street Journal, 2 January 14.

¹⁶³Sophia Yan, “China Scare Snares Burger King, Papa John’s,” CNN Money, 22 July 14.

¹⁶⁴National People’s Congress, Food Safety Law (Draft Revisions) Full Text [Shipin anquan fa (xiuding caoan) quanwen], 30 June 14; “Local Watchdogs Empowered in Food Safety Shake-Up,” Xinhua, 26 January 14; “Chinese Law Makers Review Food Safety Law,” CCTV, 26 June 14.

¹⁶⁵For example, during a June 2014 hearing, Dr. Daniel Engeljohn, Assistant Administrator for the Food Safety Inspection Service, U.S. Department of Agriculture, explained that poultry processed in China will not be labeled as being from China if it is repackaged in the United States. See Pet Treats and Processed Chicken from China: Concerns for American Consumers and Pets, Hearing of the Congressional-Executive Commission on China, 17 June 14, Written Statement of Dr. Daniel Engeljohn, Assistant Administrator, Office of Field Operations, Food Safety and Inspection Service, U.S. Department of Agriculture, 4.

¹⁶⁶U.S. Food and Drug Administration, “Questions and Answers Regarding Jerky Pet Treats,” last visited 16 May 14.

¹⁶⁷Jolie Lee, “PetSmart, Petco To Stop Selling Dog and Cat Treats Made in China,” USA Today, 21 May 14.

¹⁶⁸U.S. Food and Drug Administration, Number of Import Alerts by Country/Area, last visited 1 July 14.

¹⁶⁹U.S. Department of Agriculture, Food Safety and Inspection Service, “Final Report of an Audit Conducted in the People’s Republic of China, March 4–19, 2013,” 30 August 13.

¹⁷⁰Pet Treats and Processed Chicken from China: Concerns for American Consumers and Pets, Hearing of the Congressional-Executive Commission on China, 17 June 14, Written Statement of Dr. Daniel Engeljohn, Assistant Administrator, Office of Field Operations, Food Safety and Inspection Service, U.S. Department of Agriculture, 4.

¹⁷¹Adam Minter, “Is China Blocking FDA Inspectors?” Bloomberg, 28 February 14.