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This article highlights selected 2003 legal developments in the People's Republic of China (PRC or China). In 2003, legal developments in China continued at a brisk pace as the PRC central government worked to implement the commitments it made as part of its accession to the World Trade Organization (WTO) and its own plans to further develop

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certain industrial sectors, increase protection for innovation, and monitor and regulate commercial activity. To achieve these goals, *inter alia*, the PRC central government reorganized and restructured several major government agencies; notably, it created a new Ministry of Commerce (MOFCOM) to oversee foreign investment in China and to coordinate international trade and economic cooperation.[1] In addition, China concluded significant free trade agreements, referred to as Closer Economic Partnership Agreements, with the two Special Administrative Regions of Hong Kong and Macau.[2] Several new foreign investment regulations were issued, including clarifications of the regulations governing mergers and acquisitions of domestic Chinese enterprises by foreign investors and the formation of joint venture foreign trade companies.[3] Certain international trade issues, such as the United States' use of a WTO-compliant safeguard against Chinese textiles, emerged in 2003.[4] China's intellectual property regulation and enforcement processes continued to strengthen, and China continued to build its legal infrastructure in the foreign exchange and financial services sector. China also promulgated several important regulations concerning its telecommunications sector.[5]

I. Government Reform

Among other changes, the Tenth National People's Congress approved the State Council's reform plan on March 10, 2003, to fold the State Economic and Trade Commission (SETC) and Ministry of Foreign Trade and Economic Cooperation (MOFTEC) into the newly established MOFCOM. MOFCOM assumed responsibilities as China's primary regulator of foreign investment as well as coordinator of China's domestic and foreign trade and international economic cooperation.[6] Moreover, MOFCOM is to develop relevant laws and regulations to implement China's WTO commitments.[7]

The State Council's reform plan also: (1) established a State Asset Management Commission and a Banking Supervision and Administration Commission; (2) renamed and restructured the State Development and Planning Commission (SDPC) to be the State Development and Reform Commission (SDRC), the State Family Planning Commission to be the State Population and Family Planning Commission, and the State Drug Administration to be the State Food and Drug Administration; and (3) placed the State Administration of Work Safety directly under the supervision of the State Council.[8]

1. United States Trade Representative, 2003 Report to Congress on China's WTO Compliance (Dec. 11, 2003) [hereinafter 2003 Report to Congress], *available at* http://www.ustr.gov/regions/china-hk-mongolia-taiwan/2003-12-18-china.pdf.

2. *CEPA to Promote Macao's Economy in 3 Ways*, China International Electronic Commerce Network (Nov. 10, 2003), *at* http://www.ec.cn/gov03_hmt_038.shtml; *CEPA Enhances HK-Mainland Legal Cooperation*, China International Electronic Commerce Network (Nov. 10, 2003), *at* http://www.ec.cn/gov03_hmt_037.shtml.

3. Zhang Yong, *Foreign Investment Widened*, China Daily, Sept. 3, 2003, *available at* 2003 WL 57779634.

4. *Textile Decree to Cloud Ties in Trade*, China Development Gateway, *available at* http://www1.chinadaily.com.cn/chinagage/doc/2003-11/20/content_283303.htm (Nov. 20, 2003) [hereinafter *Textile Decree to Cloud Ties in Trade*].

5. Chen Zhiming, *Regulators to Optimize Telecom Market*, China Daily, Aug. 28, 2003, *available at* 2003 WL 57559358.

6. *Id.*

7. *Id.*

8. Zhang Zhouyuan, *Institutional Reform Enhances Role of Gov't.*, China Daily, Apr. 7, 2003, *available at* 2003 WL 3053753.

II. Closer Economic Partnership Agreements

On June 29, 2003, representatives from the Hong Kong Special Administrative Region and China signed the Mainland/Hong Kong Closer Economic Partnership Arrangement (CEPA), consisting of twenty-three articles and six attachments, including: (1) Arrangements for Implementation of Zero Tariff on Trade in Goods; (2) Rules of Origin for Trade in Goods; (3) Procedures for Issuance and Verification of Certificates of Origin; (4) Specific Commitments on Liberalization of Trade in Services; (5) Definition of Service Provider and Relevant Regulations; and (6) Trade and Investment Facilitation.[9] The CEPA was effective as of June 29, 2003, and its six attachments were effective September 29, 2003, their date of signature.[10] On October 17, 2003, the governments of China and the Macau Special Administrative Region signed the Mainland/Macau Closer Economic Partnership Arrangement (Mainland/Macau CEPA), effective as of that date.[11] Since the Mainland/Macau CEPA is substantially similar to the CEPA, this section of the article will review the CEPA.

The CEPA reduces or eliminates tariffs and non-tariff barriers on almost all trade in goods and services and addresses trade facilitation between China and Hong Kong.[12] As of January 1, 2004, zero tariff rates will apply for 273 categories of goods from Hong Kong.[13] Duty free treatment will be phased in on additional Hong Kong products through the end of 2005.[14] In addition, pursuant to the CEPA, China has committed not to apply quotas to goods of Hong Kong origin. Further, the CEPA mandates that no anti-dumping and countervailing measures may be applied to goods imported from and originating in the territory of either party.

Because Hong Kong is a significant trans-shipment point for goods and the site of many foreign service firms, the major issue in the negotiation of the CEPA was the applicable rule of origin for goods and the definition of a Hong Kong service supplier. In the case of goods, the general rule of origin applied is substantial transformation or originating in the territory. A Hong Kong service supplier generally refers to a permanent resident of Hong Kong or a juristic person formed in Hong Kong, but its definition is slightly different for each of the eighteen categories of service supplier.[15]

The CEPA liberalizes cross-border supply in eighteen service sectors. While Hong Kong's services liberalization commitments are the subject of continuing negotiations, China also made services liberalization commitments in several sectors, including financial services, five value-added telecommunications services sectors (such as internet data center services, store and forwarding services, call center services, internet access services, and

9. Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA), Hong Kong SAR of the People's Republic of China, Trade and Ind. Dept. [hereinafter CEPA], *at* http://www.tid.gov.hk/english/cepa/fulltext.html (last visited Sept. 7, 2004).

10. *Id.*

11. Mainland and Macao Closer Economic Partnership Arrangement (CEPA), Macao Economic Services, *at* http://www.economia.gov.mo/english/engcepa.htm (last visited Sept. 7, 2004).

12. CEPA, *supra* note 9.

13. *Id.*

14. *Id.*

15. Press Release, Hong Kong SAR of the Peoples Republic of China, Gov't to Extend Hong Kong Service Supplier Certification to all Service Sectors under CEPA (Nov. 14, 2003), *at* http://www.info.gov.hk/gia/general/200311/14/1114104.htm. *See also*, Annex 5 of the CEPA: Definition of "Service Supplier" and Related Requirements; Annex 4 of the CEPA: Specific Commitments on Liberalization of Trade in Services, *supra* note 9.

content services), and specified professional services (such as architectural services, engineering services, integrated engineering services, urban planning services, real estate services, advertising services, management consulting services, convention and exhibition services, transportation services, tourism, and travel related services).[16] The CEPA provides for the strengthening of cooperation in seven fields: (1) promotion of trade and investment; (2) facilitation of customs clearance; (3) quarantine and inspection of commodities; (4) food safety and quality assurance; (5) electronic commerce; (6) transparency in laws and regulations; and (7) cooperation between small and medium-sized enterprises in the Chinese medicine and pharmaceutical industries.[17] The parties may add other areas to this list, as agreed from time to time.

III. Foreign Investment Regulation

A. Venture Capital Enterprises

On January 30, 2003, the old MOFTEC, the Ministry of Science and Technology (MOST), the State Administration for Industry and Commerce (SAIC), the State Administration of Taxation (SAT), and the State Administration of Foreign Exchange (SAFE) jointly issued the Regulation on the Administration of Foreign-Invested Venture Capital Enterprises.[18] In eight chapters and fifty-one articles, the regulation covers the creation, operation, and dissolution of foreign-invested venture capital enterprises (FIVCEs).[19] Article 3 of the regulation defines venture capital (VC) investment activities as the making of equity investments in nonlisted high-technology companies, the provision of VC management services, and the attainment of capital gains over time. FIVCEs are to have between two and fifty investors, including at least one principal investor, who is intended to serve as the FIVCE's manager.[20] Each regular FIVCE investor must make a minimum capital contribution of one million U.S. dollars.[21] Aggregate capitalization from regular investors in a partnership FIVCE must exceed ten million U.S. dollars, and aggregate capitalization from regular investors in a corporate FIVCE must exceed five million U.S. dollars.[22] In addition to quantitative requirements, FIVCEs must have appropriate formation documents and must employ more than three professional staff people with experience in venture capital investment. The principal investor must be an experienced venture capitalist who has overseen 100 million U.S. dollars in investment (of which fifty million must be focused on venture capital) during three years prior to the FIVCE creation.[23] A Chinese principal investor must have overseen RMB100 million (12.08 million U.S. dollars), half of which was venture capital-focused during the three years prior to the FIVCE formation.[24] A FIVCE's term is to be stipulated in its organizational documents and normally may not exceed twelve years.

16. *Id.*
17. CEPA, *supra* note 9.
18. *Administration of Foreign-funded Business-starting Investment Enterprises*, Order No. 2 (Jan. 30, 2003) (PRCLEG 2654).
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*

A FIVCE is restricted to investing its own funds in unlisted equities, providing venture capital investment consulting, providing management consulting to investee enterprises, or engaging in other operations as approved.[25] Investments by a FIVCE must comply with the *Catalogue Guiding Foreign Investment in Industry* and the Regulation on Guiding Foreign Investment Direction.[26] A FIVCE may not: (1) invest in projects that the catalogue lists as prohibited; (2) directly or indirectly invest in listed securities (except where the FIVCE holds the securities following the investee's initial public offering); (3) directly or indirectly invest in fixed assets that are not for its own use; or (4) invest in other projects as prohibited by laws, regulations, or the FIVCE's formation documents.[27] FIVCEs may not invest through loans or any funds other than the FIVCE's own funds, or provide credit or guarantees (excluding investment in bonds issued by an investee company or convertible bonds with a term of at least one year). FIVCE investments, and increases and transfers thereof, are subject to an approval and registration process. Investments in an encouraged or permitted category entity require the FIVCE to notify the local-level MOFCOM where the investee is located. The local-level MOFCOM must conclude its review and, if it approves, issue a foreign-invested enterprise (FIE) Approval Certificate within fifteen days of its receipt of completed application materials. Investments into a restricted category entity require the same notification to the local-level MOFCOM, although the local MOFCOM has forty-five days to review the investment application.[28]

B. Equity Joint Foreign Trade Corporations

On January 31, 2003, the old MOFTEC issued the Interim Measures Governing the Establishment of Chinese-Foreign Equity Joint Foreign Trade Corporations.[29] Investors seeking to form a Chinese-Foreign Equity Joint Foreign Trade Corporation (CEJFTC) must have an average annual foreign trade value with China exceeding thirty million U.S. dollars in the three years before application; investors forming a CEJFTC to be registered in China's western provinces must have an average annual foreign trade value with China exceeding twenty million U.S. dollars in the three years before application.[30] A CEJFTC's registered capital must exceed RMB50 million (RMB30 million if the CEFTJC is located in China's western provinces), and a foreign investor is to provide at least 25 percent of the venture's registered capital.[31] The parties' capital contributions may be made in cash, tangible property, and intangible assets (such as industrial properties, special technologies, and a right to use a site). A CEJFTC may import and export cargo, technology, services, and commodities as an agent or for its own account. A CEJFTC is to have its own name and an operational infrastructure suitable for the foreign trade business.[32]

25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Interim Measures Governing the Establishment of Sino-Foreign Equity Joint Foreign Trade Corporations*, (Jan. 1, 2003) (PRCLEG 2609).
30. *Id.*
31. *Id.*
32. *Id.*

C. Sino-Foreign Cooperative Education

On March 1, 2003, the State Council issued the Regulations of the People's Republic of China on Sino-Foreign Cooperative Education (Education Regulations) to strengthen the development of foreign educational exchange and cooperation programs.[33] The Education Regulations encourage Sino-foreign efforts in higher education and occupational education. The Education Regulations prohibit the establishment of educational institutions to engage in compulsory education, military education, police and politics education, and religious education.[34] The value of investors' intellectual property investment may not exceed one-third of the educational institutions' registered capital, except for foreign educational institutions that are invited by the Chinese government to run a school in China.[35] The Education Regulations mandate a licensing procedure for investors to follow and prohibit the arbitrary collection of fees. Fees and related items are to be determined and publicized, as provided for in relevant regulations, and such fees, which must be paid in *renminbi*, may not be increased without advance government approval.[36]

D. Mergers and Acquisitions of Domestic Enterprises by Foreign Investors

On March 7, 2003, the old MOFTEC, the SAT, the SAIC, and the SAFE jointly issued the Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (M&A Provisions).[37] The M&A Provisions allow foreign investors to acquire stock and assets of domestic Chinese enterprises. Such acquisitions may be accomplished through the purchase of the outstanding equity of shareholders in a domestic Chinese enterprise or through a subscription of newly issued shares of such a company. In either case, the domestic company will be converted into an FIE upon purchase. Alternatively, a foreign investor may purchase a domestic enterprise's assets and then either operate those assets through an existing FIE or contribute those assets to a newly formed FIE. In equity acquisitions, the resulting FIE will assume the obligations to creditors of the prior domestic enterprise. In an asset acquisition, the selling domestic company will retain its creditor obligations. The foreign investor, the domestic enterprise, and other parties may enter into agreements regarding the disposition of rights and obligations of the domestic company, provided such arrangements do not harm the interests of third parties or the public. Both equity and asset acquisitions must be approved by MOFCOM or its provincial-level branches and must be registered with the local SAIC bureau. The M&A Provisions require that the purchase price be based on an appraisal of the equity interest or the assets to be sold; a sale at a price below an appraised value is expressly prohibited.

The M&A Provisions require the reporting and review of transactions that may result in excessive market concentration. The foreign investor must obtain MOFCOM and SAIC approval if an intended transaction would involve: (1) a party to the intended transaction

33. *Regulations of the PRC on Sino-Foreign Cooperative Education*, Order No. 372 (Mar. 1, 2003), *available at* http://www.fdi.gov.cn/ltlaw/lawinfodisp.jsp?appId = 1&language = en&id = CENSOFT0000000008790 (last visited Sept. 9, 2004).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Interim Provisions for Foreign Investors to Merge Domestic Enterprises*, Order No. 3 (Mar. 7, 2003) (PRCLEG 2630).

with a business turnover in the China market that exceeds RMB1.5 billion; (2) an industry with over ten mergers and acquisitions of domestic enterprises during the past year; (3) a party who holds a share of the relevant Chinese market that equals or exceeds 20 percent; or (4) a party whose share of the relevant market in China would reach 25 percent.[38] Even if the proposed transaction does not meet any of the foregoing circumstances, MOFCOM or SAIC may still require the foreign investor to submit a report if requested by any competing domestic company, relevant authority, or industrial association or upon MOFCOM's or SAIC's own initiative. If reporting is required, MOFCOM and SAIC must convene a hearing with relevant state departments, bodies, and interested parties before approving or rejecting the proposed merger or acquisition. Reporting requirements also apply to certain offshore transactions, including those in which: (1) a party to the offshore transaction owns assets in China with a value in excess of RMB3 billion; (2) a party to the offshore transaction has a business turnover in excess of RMB1.5 billion in the Chinese market in the then-present year; (3) a party to the offshore transaction and its affiliates collectively hold at least 20 percent of the relevant market share in China; (4) as a result of the transaction, a party to the transaction and its affiliates have acquired a Chinese market share of at least 25 percent; or (5) as a result of the transaction, a party thereto will, directly or indirectly, hold equity in more than fifteen FIE's in the relevant industrial sector in China.[39] A party to the transaction may apply to MOFCOM or SAIC for an exemption from such investigation in specified circumstances.[40] It remains unclear how and whether the reporting requirements and antitrust provisions will be enforced.

E. Establishment of Holding Companies

On June 10, 2003, MOFCOM issued the *Decision Concerning Revision of the Interim Provisions on Foreign Invested Investment Companies and Their Supplementary Regulations* (*IC Provisions*).[41] As provided in the *IC Provisions*, a holding company may invest in all sectors that China has opened to foreign investment, such as "encouraged," "permitted," and "restricted" projects.[42] A holding company may: (1) assist or represent its subsidiary enterprises by purchasing machinery, equipment, office equipment, and raw materials, components, and parts needed in production for its own; (2) sell products manufactured by its subsidiary enterprises in China and abroad and provide after-sale service; (3) balance foreign exchange, under SAFE supervision, among its subsidiary enterprises; (4) provide its subsidiary enterprises with services such as technical support, sales, and market development, employee training, and intra-enterprise personnel management; and (5) assist its subsidiary enterprises in seeking loans and providing them with guaranty.[43]

There are three requirements to establish a holding company. The foreign investor must have: (1) total assets exceeding four hundred million U.S. dollars in the year before application; (2) a foreign-invested enterprise inside China, with registered capital exceeding ten million U.S. dollars; and (3) more than three approved investment projects.[44] Alternatively,

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38. *Id.*
39. *Id.*
40. *Id.*
41. *Establishment of Investment Companies by Foreign Investors*, Order No. 1 (June 6, 2003) (PRCLEG 2870).
42. *Id.*
43. *Id.*
44. *Id.*

a foreign investor may satisfy the above requirements by having ten or more foreign-invested enterprises inside the territory of China engaged in the production of infrastructure, with the registered capital exceeding thirty million U.S. dollars.[45] The Chinese investor must have total assets exceeding RMB100 million in the year before the application, and the venture's registered capital must exceed thirty million U.S. dollars.[46]

Holding companies that engage in systems integration are allowed to import a certain amount of finished products for resale as part of the system. Separately, a holding company is permitted to import finished products for market testing purposes. In both cases, the annual cap on imports has been raised from 20 percent to 35 percent of the holding company's registered capital that has been contributed in cash.[47] Holding companies with paid-in capital exceeding thirty million U.S. dollars are permitted to borrow up to four times their registered capital. The *IC Provisions* allow a holding company with registered capital exceeding 100 million U.S. dollars to borrow up to six times its registered capital.[48] As a practical matter, establishing holding companies in economic sectors "restricted" to foreign investment remains difficult.

IV. International Trade Regulation

December 11, 2003, the second anniversary of China's accession to the World Trade Organization (WTO), was marked by little ceremony. This date was the implementation deadline for a variety of specific commitments and an additional round of tariff cuts. Some of the developments for the year in the area of trade related directly to the implementation of commitments to change laws increasing liberalization in specified service sectors and to increases in tariff rate quotas for agricultural commodities. For the most part, however, legal activity in 2003 related to WTO accession was notably lower than in previous years. Trade relations between Washington and Beijing were punctuated by several unfair trade actions taken by industries in the United States against goods imported from China—culminating in the decision by the U.S. government to utilize the textile safeguard provision of paragraph 242 of the *Working Party Report on China's WTO Accession.*[49] The reduction in activity related to trade laws seems unsurprising given the flurry of activity in 2001 (when China prepared to accede to the WTO) and in 2002 (during its first year of WTO membership). China's slowdown in activity disturbed observers who recognized 2003 as an opportunity for the Chinese government to make changes not only in individual laws but also in rulemaking and legislative procedures. There is some concern as to whether some of the regulations and notices released by the PRC government substantially contribute to its capacity to meet or implement its WTO commitments. The transparency commitment to publish trade-related measures for comment before they went into effect went largely unobserved, judicial review of administrative decisions remained generally unavailable and provincial and other local governments often failed to comply with the accession obligations.[50]

Chinese and U.S. industries, on the other hand, pursued causes of action in a variety of venues. Aside from dumping cases in both countries, several U.S. industries took advantage

45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Textile Decree to Cloud Ties in Trade*, *supra* note 4.
50. 2003 REPORT TO CONGRESS, *supra* note 1.

of the two China-specific safeguards in U.S. law.[51] Although several cases were initiated with the U.S. International Trade Commission (ITC) under section 421 of the Permanent Normal Trade Status legislation, the President decided not to impose a safeguard in both cases in which market disruption was found.[52] The ITC concluded the third case with a finding of no market disruption. The U.S. textile industry also filed petitions under the textile-specific safeguard as soon as the regulations implementing the safeguard were published. With regard to three textile product categories, the Committee for the Implementation of Textile Agreements (CITA) did find surges and requested consultations with the Chinese government, requiring China to limit its exports of those products to the United States.[53]

A. Trading Rights Expanded

China-based FIEs have for some time been able to import raw materials and other goods for their own use and benefit without governmental approval. China is now easing restrictions on foreign trading rights for FIEs over a three-year period in accordance with the phase-in schedule detailed in China's WTO accession package.[54] Foreign trading rights were previously extended to FIEs with minority foreign ownership although implementation of these new rights remains uneven. New regulations that became effective September 1, 2003, provide full foreign trading rights to Chinese companies funded domestically more than one year prior to the scheduled granting of such rights to FIEs.[55] The new regulations result in a clear discrepancy between the relatively low thresholds for domestically invested foreign trade enterprises and the significantly higher thresholds applicable to FIEs.

B. Cartagena Protocol

The Cartagena Protocol on Biosafety (Protocol), a treaty regulating biotech crops and other "living modified organisms" (LMO) produced using modern gene-splicing methods, entered into force on September 11, 2003.[56] As of December 10, 2003, a total of seventy-eight nations had ratified the Protocol.[57] China has signed—but not yet ratified—the biosafety protocol.[58] China instituted a new "biosafety" law and also passed GM (genetically modified) food labeling, which the United States has shunned as "anti-biotech" in its intent and misleading to consumers.[59] U.S. grain exporters are concerned that China may invoke legal restrictions on imports of biotech crops to selectively ban shipments of grain from

51. *China-US Trade Spat Further Frayed*, China Development Gate, *at* http://210.72.21.244/pls/ora/Show_Text?info_id=4748&p_qry=president%20and%20bush (last visited Sept. 7, 2004).

52. *Id.*

53. *Announcement of Request for Bilateral Textile Consultations with the Gov't of the PRC and the Establishment of an Import Limit for Knit Fabric, Cat. 222, Produced or Mfg. in the PRC*, 60 Fed. Reg. 248 (Dec. 23, 2003).

54. *China's WTO Accession Package*, China Development Gateway, *at* http://www.mac.doc.gov/China/WTOAccessionPackage.htm (Nov. 10, 2001).

55. *Adjusting the Standards and Approval Procedures for the Qualifications to Engage in the Import and Export Business*, Notice No. 254, Sept. 1, 2003 (PRCLEG 3057).

56. *The Cartagena Protocol on Biosafety*, Convention on Biodiversity, *available at* http://www.biodiv.org/biosafety/default.aspx (Sept. 11, 2003).

57. *Id.*

58. *Id.*

59. *Id.*

the United States if the shipments *may contain* any trace of a particular biotech crop. Details of Protocol implementation were discussed at the first meeting of the parties to the Protocol in Kuala Lumpur, Malaysia, scheduled February 23-27, 2004. The Protocol is expected to require that commodities shipments that *may contain* LMOs state that fact, along with the list of LMOs, on their invoice or other import-export shipping label. Such requirements could pose an enormous challenge to U.S. agricultural interests. Given its unique position as innovator and over-regulator of biotech, China should be considered a nation worth monitoring by anyone interested in agricultural biotechnology.

C. Foreign Trade Law Redraft

In December 2003, MOFCOM released for comment a draft of the yet-to-be-implemented Foreign Trade Law.[60] This new version of the law will implement China's commitment to eliminate the restriction on trading rights and provides MOFCOM with new powers of investigation in trade remedy cases. The most significant change concerns trade remedies for intellectual property rights holders who bring an action against makers of allegedly infringing imported goods. Such action appears to be copied from one available under section 337 of the United States Tariff Act of 1930. The draft law does not make clear how such investigation will be conducted or what remedies will be available through it. Note that the proposed changes in the circulated draft are not guaranteed to be in the final version of the revised law, although the draft remains a useful barometer of the trend of thought by relevant responsible PRC authorities

V. Customs Regulation

A. Customs: Free Trade Zones

In early 2003, MOFCOM and the General Administration of Customs (GAC) jointly issued a circular (*Circular 22*) allowing four free trade zones—Shanghai, Shenzhen, Tianjin, and Xiamen—to grant import and export rights to enterprises within those zones.[61] According to *Circular 22*, the procedures and standards for approval should be the same as those for enterprises outside the zones.[62] The Waigaoqiao Free Trade Zone in Shanghai was the first trade zone to publish implementing rules in accordance with *Circular 22*.[63] As a result, manufacturing enterprises within the zone may apply for import-export licenses so they can legally conduct business directly with domestic enterprises without employing state owned trade agents, which may help significantly reduce the sales costs. Although the promulgation of *Circular 22* and other relevant rules did not introduce significant advantages to trading companies, they are considered positive developments for foreign investors with production facilities in the free trade zones.

60. Press Release, Ministry of Commerce of the PRC, Trade Law Goes Under Change (Dec. 12, 2003), *at* http://mofcom.gov.cn.

61. *Circular 22*, Ministry of Commerce of the People's Republic of China, *available at* http://english.mofcom.gov.cn (last visited Sept. 7, 2004).

62. *Id.*

63. *Id.*

B. Customs: License Fees

On May 30, 2003, the GAC issued the Measures of the General Administration of Customs of the People's Republic of China for the Valuation of License Fees Related to Imported Goods, effective July 1, 2003.[64] The measures implement several of the requirements found in article VII of the General Agreement on Tariffs and Trade 1994 by defining the circumstances under which license fees should be considered "related to imported goods" with respect to patents, proprietary technology, trademarks, and copyright and also by providing guidelines for determining when the payment of license fees is a "condition of sale" of the goods.[65] The measures also require license fees for the "distribution or resale rights" of goods to be included in their declared value.[66]

C. Customs: Clearance Procedures

On September 18, 2003, the GAC issued the Provisions of the General Administration of Customs for the Administration of Declarations for Imported and Exported Goods, effective November 1, 2003, outlining the procedures to obtain customs clearance for imported and exported goods.[67] Trading enterprises are to register with the GAC upon establishment and conduct customs clearance procedures in their own name or through a professional agent.[68] Customs declarations must now be made through an electronic data declaration form that carries the same legal validity as the previous paper declaration form.[69]

D. Customs: Multifunctional Equipment

In October 2003 the GAC issued *Announcement 58, The Declaration of Import and Export Goods.*[70] *Announcement 58* provides that, in the case of incomplete multi-functional machinery and electrical products, the tariff classification will be based on the products' planned function so long as the declared goods demonstrate the basic features of the complete goods. With respect to goods whose main planned functions *can* be determined, classification should follow rule 3, paragraph 2 of the General Rules of Classification (these are essentially what are referred to in other countries as the General Rules of Interpretation) and be classified according to the products' main planned functions.[71] In the case of goods whose main planned functions *cannot* be ascertained, the classification should be according to rule 3, paragraph 3 of the General Rules of Classification, which requires using the last item number in the sequence of all possibilities.[72] *Announcement 58* may have significant implications for companies exporting to China high-technology, multi-functional electronic

64. *Measures of the Customs of the PRC for Evaluation of the Royalties of Imported Goods*, Order No. 102 (May 5, 2003) (PRCLEG 2776).

65. *Id.*

66. *Id.*

67. *Provisions of the PRC on the Customs Admin. Of Declaration for the Import and Export of Goods*, Decree No. 103 (Sept. 18, 2003) (PRCLEG 3205).

68. *Id.*

69. *Id.*

70. *The Declaration of Import and Export Goods*, Order No. 103 (Sept. 18, 2003) (P.R.C.).

71. *Id.*

72. *Id.*

products, which reflect the rapid convergence between data processing, data display, and video display functions.

VI. Intellectual Property

A. Patents: Patent Agency Measures

According to State Intellectual Property Office (SIPO) statistics, 308,487 patent applications were filed in 2003—a 22 percent increase over the number filed in 2002. 2003 was the first time in the past eight years that domestic applications exceeded foreign applications. It was also the first time service invention applications exceeded non-service invention applications. Given this burgeoning activity, on June 6, 2003, the SIPO issued the Measures for Management of Patent Agencies (Patent Measures).[73] The Patent Measures require a patent agency to have: (1) an appropriate agency name; (2) a partnership agreement or articles of association; (3) partners or shareholders as stipulated therein; (4) registered capital exceeding RMB50,000 for a partnership patent agency or RMB100,000 for a limited liability company patent agency; and (5) fixed offices and necessary working facilities.[74] A patent agency's partners and shareholders should: (1) have a patent agent qualification; (2) have more than two years of patent agent experience; (3) engage in full-time patent agency services; (4) be under sixty-five years of age when applying to establish a patent agency; and (5) not have violated relevant law.[75] The patent agency itself should have: (1) been established for more than two years; (2) more than ten patent agents; (3) completed the previous years' annual examinations; (4) more than two full-time patent agents assigned or engaged by the patent agency; (5) fixed offices and necessary funds; and (6) a name composed of the agency's full name and the name of the city where the agency is located.[76]

B. Patents: Expected Future Developments

Revisions to the Patent Law were considered in 2003 and may be concluded in 2004. The revisions will address patent protection for high-tech inventions because the SIPO has accelerated its research on the patentability of genes, trans-gene technology, e-business, and computer software. The SIPO is analyzing the drafting of patent applications in these fields and how to conduct substantive examinations. Under the current Patent Law, there is a lack of patentability for "animal and plant varieties," and no patent right is granted to trans-gene animals and plants.[77] Possible revisions to the Patent Law may indirectly provide protection for trans-gene animals and plants through an effective extension of process patent. The examination standard for invention patents on computer software currently applies the business method, meaning that a computer program relies on the rules and processes of intellectual activities and may not be granted a patent right.[78] If, however, the software

73. *Measures for Management of Patent Agencies*, Order No. 30 (June 6, 2003) *available at* http://www.fdi.gov.cn/resupload/epdf/e03210.pdf.

74. *Id.*

75. *Id.*

76. *Id.*

77. Patent Law of the People's Republic of China, State Intellectual Property Office of the People's Republic of China (2002), *available at* http://www.sipo.gov.cn/sipo_English/flfg_e/zlflfg_e/t20020327_4704.htm (last visited Sept. 7, 2004).

78. *Id.*

patent application's content is "to solve technological problems and to achieve technological effect through technological means," then it is under the Patent Law's protection.[79]

The State Council's 2003 legislative plan listed the formulation of regulations on service technology achievements as a second level project, and the SIPO accelerated its related research, investigation, and drafting work accordingly. On December 28, 2002, the State Council issued *Order No. 368, Decision of the State Council on the Revision of Implementation Regulations of Chinese Patent Law*, effective February 1, 2003.[80] *Order No. 368* extends the time limit for international applications entering the national phase under PCT chapter I from twenty months to thirty months from the priority date.[81] This revision will benefit applicants with international applications and provide them with a longer time to consider whether to proceed with the national phase.[82]

C. Trademarks: Protection of Well-Known Marks

On April 17, 2003, the SAIC issued the Recognition and Protection of Well-known Trademarks Provisions (Trademark Provisions), effective June 1, 2003.[83] The Trademark Provisions replace tentative provisions issued in 1996 in part because of conflicts between the tentative provisions and 2001's revisions to the Trademark Law. Specifically, the definition and standards provided in the 1996 provisions to judge well-known trademarks conflict with 2001's changes to the Trademark Law. In addition, the 2001 revisions changed the process for recognizing well-known trademarks from one dominated by the SAIC's Trademark Office (TMO) to a process involving the TMO, the Trademark Review and Adjudication Board (TRAB), and administrative authorities for industry and commerce (AIC). Courts also have power to recognize well-known trademarks.

The Trademark Provisions provide three situations in which it may be necessary to determine the status of well-known marks: (1) trademark opposition; (2) trademark cancellation; and (3) trademark infringement.[84] In these circumstances, parties may request that the respective authorities recognize their marks as well known in order to stop the registration and use of certain marks. Pursuant to the Trademark Provisions, an applicant must submit the following documentation to determine whether a mark is well known: (1) degree of knowledge about the trademark in the relevant public sector; (2) evidence of a consistent period of trademark use; (3) the period, extent, and territory of trademark promotion; (4) records of trademark protection as a well-known trademark; and (5) other materials, including annual production volume of items using the mark.[85] The Trademark Provisions delete the criteria that required registration and usage in China to determine a well-known mark.

The first step of evaluation under the Trademark Provisions requires an AIC (where trademark infringement has occurred) to examine submitted materials for compliance with

79. *Id.*

80. *Decision of the State Council on the Revision of Implementation Regulations of Chinese Patent Law*, Order No. 368 (Dec. 28, 2002).

81. *Id.*

82. *Id.*

83. Trademark Law of The People's Republic of China, China Today, (Apr. 17, 2003), *available at* http://www.chinatoday.com/law/a02.htm.

84. *Id.*

85. *Id.*

the requirements of article 13 of the Trademark Law.[86] If the AIC decides that the submitted materials meet the requirements of article 13, it will issue a formal notice accepting the case and will forward the materials to the provincial-level AIC.[87] The provincial-level AIC has fifteen days from the date of receipt to evaluate the submitted materials and forward them to the TMO if the provincial-level AIC believes the materials meet the requirements of article 13 of the Trademark Law.[88] Such AICs may rely on previous determinations on well-known trademarks if the scope of protection of the current case is similar to previous cases and the other party does not challenge the determination or cannot provide contrary evidence as to the previous determination. If the scope of protection is different from the previous determination or the other party challenges the determination and provides relevant evidence, the TRAB or the TMO may review the materials to decide whether the trademark is well known on a case-by-case basis.[89]

Note that the provincial-level AIC where trademark infringement has occurred may directly accept the case at the request of the parties and that such an AIC may directly submit relevant materials to the TMO at the direct request of the parties. In turn, the TMO should make a decision on the status of well-known trademarks within six months of receiving the relevant materials and should send a notice of the decision to the provincial-level AIC where the trademark infringement occurred.[90] The Trademark Provisions state that decisions on well-known trademarks will face review by judges according to the principles of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIP), as acceded to by China in connection with its WTO accession.[91]

D. Trademarks: Implementation of Madrid System Obligations

On April 17, 2003, the SAIC issued the revised Madrid International Registration of Marks Implementing Procedures (Madrid Procedures), effective June 1, 2003, and designed to facilitate China's implementation of the Madrid Agreement Concerning the International Registration of Marks and the Protocol Relating to the Madrid Agreement Concerning International Registration of Marks (collectively the Madrid System).[92] The Madrid Procedures supersede regulations of the same name from 1996 and make China's trademark system more consistent with the Madrid System.

Under the Madrid System, the International Bureau of Intellectual Property (International Bureau) may only accept registration applications for international marks submitted by a nation's chief administrative authority overseeing trademark issues. The relevant Chinese authority is the Trademark Bureau, which, as one of its main duties, is to receive and forward such applications for international registration. Under the Madrid Procedures, the process for the territorial extension and deregistration of marks under the Madrid System is to be handled through the Trademark Bureau. The renewal, transfer, and change of international registration of trademarks, as well as territorial extension, deregistration, re-

86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Policy for the Implementation of International Registration of Marks under Madrid Agreement*, China Patent Agent (H.K.) Ltd., *available at* http://www.cpahkltd.com/Archives (Apr. 17, 2003).

newal, transfer, and change of international registration of trademarks under the Madrid System may be handled either through the Trademark Bureau or directly through the International Bureau.[93]

As the Madrid System allows international registration of marks only to the nationals of a contracting member, the Madrid Procedures provide that China must be the country of origin for applicants seeking international registration of marks through the Trademark Bureau. The *Madrid Procedures* require such an applicant to (1) have a real and effective industrial or commercial establishment in China; (2) have a domicile in China; or (3) be a Chinese national.[94]

The Madrid Procedures specify that an applicant is to complete an application form that includes (1) its name, address, and telephone number; (2) the pinyin of the mark subject to registration; (3) the goods or services for which the mark is to be registered as well as the corresponding class or classes according to the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks; and (4) the registration number of the mark or the application number of the mark.[95] In addition, the Madrid Procedures require an applicant to submit: (1) a copy of the Trademark Registration Certificate issued by the Trademark Bureau or a copy of the Acceptance Notice of Application for Trademark Registration issued by the Trademark Bureau, as appropriate; (2) evidence as to the importance of international registration; (3) a copy of an identity certificate, such as a copy of the business license, an identity card, or a residence permit; and (4) two drawings, between 20mm x 20mm and 80mm x 80mm, of the mark to be registered.[96] In addition, if color is to be claimed as a distinctive feature of the mark, the applicant is to make such claim explicit, file a notice specifying the color or the combination of color, and append color copies of said mark to its application.

In normal cases, the Trademark Bureau will forward an application to the International Bureau within one month of receipt unless the application materials are incomplete or incorrect, or the application fee has not been paid within fifteen days of the applicant's receipt of the Notice of the Payment of Application Fee.[97] If there are only minor mistakes or omissions in the application materials, the Trademark Bureau may allow the applicant to correct or complete the application materials within fifteen days of such notice. If the applicant does so, its original date of application will be retained. The International Bureau will register the marks following receipt of the application; the registration's date of application to the International Bureau will be the date of application to the Trademark Bureau so long as the International Bureau has received the application within two months of such date.[98]

E. Trademarks: Related Developments

In 2003, the China Trademark Office received more than 452,000 applications, breaking the record of 375, 000 established by the United States in 2002.[99] By the end of 2003, China

93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *China's Trademark Applications Hit a New Record in 2002*, China Trademark Office: State Administration for Industry and Commerce: People's Republic of China, *at* http://sbj.saic.gov.cn/english/show.asp?id=55&bm=sbyw (Jan. 1, 2003).

had approved a total of 1,973,000 trademark registrations.[100] In February 2003, the State Council abolished the administrative examination and approval process for trademark agency, trademark agent, trademark printing administrative staff, and trademark printing entity qualifications.[101] As a result, the number of trademark agencies throughout China increased to more than 840 by the end of 2003.[102]

In November 2003, two Chinese government trademark websites (http://www.ctmo.gov.cn and http://sbj.saic.gov.cn) went active, containing information on trademark-related law and regulations, trademark registration procedures, guidelines for trademark applications, trademark news, statistics, and trademark consultancy. As of December 26, 2003, the twelve most recent volumes of the *Trademark Gazette* (covering all preliminarily approved marks published for opposition, as well as information related to the registration, renewal, change, assignment, cancellation, revocation, opposition, appraisal, record of license, and service announcement of marks) could be viewed free of charge on these websites.

F. Copyright

On July 16, 2002, the National Copyright Administration (NCA) issued Measures for the Enforcement of Copyright Administrative Penalty (Copyright Measures), stating that it was the appropriate authority for copyright administration.[103] The Copyright Measures allow the NCA to impose administrative penalties, such as: (1) an order for an infringer to cease its tortious activity; (2) confiscation of illegally-obtained income; (3) confiscation of infringing duplicates; (4) fines; (5) confiscation of materials, tools, and devices used to make infringing items; and (6) other penalties as specified in relevant laws, regulations, and stipulations.[104] Under the Copyright Measures, the NCA may confiscate materials, tools, and devices used to make infringing items only in "serious circumstances," defined as: (1) illegally-obtained income exceeding RMB5,000 for an individual or RMB30,000 for an enterprise; (2) the value of illegal operations exceeding RMB30,000 for an individual or RMB100,000 for an enterprise; (3) infringing duplicates reaching 2,000 copies for an individual or 5,000 copies for an enterprise; (4) repeated copyright infringement by the subject of a criminal copyright infringement prosecution; or (5) other serious consequences or results as defined in relevant laws or regulations.[105] The Copyright Measures provide enforcement personnel with certain emergency powers, including: (1) preventing or correcting infringement; (2) advance copyright registration to protect against infringing duplicates and the materials, tools, and equipment used for such infringement; and (3) collecting relevant evidence.[106]

G. Intellectual Property: Shanghai IP Opinion

On May 20, 2003, the Shanghai Municipal Government issued the *Strengthening Protection of Intellectual Property Rights in Foreign Trade and Economic Cooperation Opinion* (*IP Opin-*

100. *Intellectual Property Under Spotlight*, China Daily, (Dec. 11, 2003), *available at* http://www1.chinadaily.com.cn/en/doc/2003-12/11/content_289508.htm.
101. *Id.*
102. *Id.*
103. *Measures for the Enforcement of Copyright Administrative Penalty* (2003) (July 16, 2003), *available at* http://www.cpahkltd.com/Archives/index.html.
104. *Id.*
105. *Id.*
106. *Id.*

ion), focusing on intellectual property issues in the conduct of foreign business.[107] The Shanghai Copyright Bureau, Shanghai AIC, Shanghai Intellectual Property Office, Shanghai Customs and Shanghai Foreign Economic Relation & Trade Commission all endorsed the *IP Opinion.*[108] The *IP Opinion* apparently will be distributed to all levels of city, district, and county governments for dissemination to local companies to further educate them on the importance of intellectual property protection.

The *IP Opinion* addresses several intellectual property issues. Article 6 provides that original equipment manufacturers (OEM) must hold a license to produce items with another's trademark, and the products must contain an indication that the OEM manufacturer was authorized to manufacture the product.[109] If such action is not taken, the foreign trademark holder will be deemed liable for any loss. Article 7 addresses anti-improvement clauses that traditionally have been included in international technology transfer contracts, and it is consistent with article 29 of the Administration of Registration of Technology Import and Export Contracts Procedures, which disallows contractual provisions, such as tying, anti-improvement clauses, or terms that prevent the transferor from acquiring similar or competing technology.[110] Article 13 of the *IP Opinion* requires a Shanghai foreign trading enterprise that has registered a trademark in the country to which it exports products and a Shanghai manufacturer that has registered the same trademark in China to settle any conflicts amicably.[111] Article 18 protects Chinese brands from being stricken from the national trademark register due to non-use or dilution when they have been sidelined by an associated stronger brand used by a joint venture to which such Chinese trademark holders are a party.[112]

H. Intellectual Property: Plant Variety Rights

The Ministry of Agriculture's (MOA) Provisions on Handling Cases of Infringement of Rights to New Varieties of Agricultural Plants (PVR Provisions) came into effect on February 1, 2003.[113] The PVR Provisions make transparent the MOA's procedures for handling infringement claims by holders, or in some cases licensees, of agricultural plant variety rights (PVR) that have been granted by the MOA in accordance with 1997's Protection of New Varieties of Plants Regulations and 1999's Protection of New Varieties of Plants Regulations Implementing Rules (Agriculture).[114] The latter two regulations provide that any plant variety subject to PVR is to have characteristics of novelty, distinctness, uniformity, stability, and an adequate denomination.[115] As provided in the latter two regulations, applicants should file the following information in connection with their PVR application: (1) for purposes of determining novelty, information related to whether the seeds, seedlings,

107. *Strengthening Protection of Intellectual Property Rights in Foreign Trade and Economic Cooperation Opinion*, China Patent Agent (H.K.) Ltd., *available at* http://www.cpahkltd.com/Archives/index.html (May 20, 2003).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Provisions on Handling Cases of Infringement of Rights to New Varieties of Agricultural Plants*, China Patent Agent (H.K.) Ltd., *available at* http://www.cpahkltd.com/Archives/index.html (Apr. 27, 1999).

114. *Id.*

115. *Id.*

or asexual reproduction materials of the applied variety have been sold prior to the application filing date (if such items have been sold, information as to the date and place of the first sale and as to whether such sale was agreed to by the variety rights holder is to be included); (2) a power of attorney executed by the applicants or their representatives; (3) the name(s) of breeders and applicants, including addresses, contact information, contact person, breeding places, and duration of applied variety; (4) a detailed specification of applied variety, which includes proposed denomination, scientific and Chinese names, description of background materials, breeding process and methods, declaration of selling, declaration of distinctness, uniformity, and stability (DUS), declaration of adaptability to growing or environmental conditions, and main points of culture techniques; and (5) three color photographs sized 8.5cm x 12.5cm or 10.0cm x15.0cm, including an explanation to distinguish the candidate variety with a similar variety.[116]

The PVR Provisions discuss for the first time how provincial-level and above agricultural departments should handle PVR infringement claims and are largely consistent with China's obligations under TRIPs. The PVR Provisions allow only infringement cases to be accepted by the relevant MOA branch, which include cases involving (1) the commercial, unauthorized production or sale of a PVR's propagating material; or (2) the repeated use of such material in the development of other propagating varieties.[117] The rights holder (in whose name the PVR has been registered) and certain licensees (such as licensees under a sole license) may file a claim under the PVR Provisions.[118] Licensees under an exclusive license may file a claim only where the rights holder has not filed a claim, and general licensees must either seek the consent of the rights holder or rely on contractual provisions in their license in order to file a claim. An eligible claimant must submit a letter of request conforming to article 6 of the PVR Provisions, specifying the claim's nature, reasons, and relevant facts. The request letter must be signed or stamped with the claimant's seal and must include the original PVR certificate issued to the rights holder. If a case is not accepted, the relevant department must inform the claimant within seven days of the claimant's filing of the request letter and include its reasons for rejecting the case. The PVR Provisions state that administrative action on an infringement claim will not be entertained if either party has filed an action with a People's Court.[119]

If accepted, the administrative department of agriculture at the provincial level or above will appoint a three-or-more person odd-numbered panel to review the claim. The PVR Provisions state that the relevant agricultural department must serve a copy of the claim on the respondent within seven days of receipt, and the respondent must file a defense within fifteen days of receipt of the complaint. The respondent's answer is to be provided to the claimant within seven days of receipt. The reviewing panel has no timeframe within which it must render a written decision.[120]

The panel will assess the claim's merits based on the parties' written submissions. The PVR Provisions state that a hearing may be held if deemed necessary and that the parties will be given seven days notice of such hearing.[121] Because the PVR Provisions are silent

116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*

on the substantive issues the panel must consider, the panel has significant discretion as to how it handles these issues and in deciding what importance it will attach to certain arguments or evidence.[122]

The panel's decisions must be in writing, detailing the panel's reasoning and legal basis behind its decision. The panel may impose penalties, such as an order to cease infringement activities or an order to destroy any propagating material in the possession of the infringer. A panel decision may include punitive measures, such as the confiscation of illegal income derived by the infringer or the imposition of a fine, but a panel may not award compensation (although PVR Provisions article 14 specifies the basis upon which compensation, payable to a successful claimant, should be calculated).[123] Enforcement of binding decisions requires an application to a People's Court.[124]

VII. Foreign Exchange

On April 1, 2003, SAFE issued the *Issues Relating to Improving the Administration on Forex in relation to FDI* (*FDI Forex Notice*), providing foreign investors with more routes to contribute capital to FIEs.[125] Subject to approval by the local SAFE branch, the *FDI Forex Notice* allows certain foreign investors to open onshore "special forex accounts" in one of four classifications: (1) an investment account, opened when a foreign investor contracts for a project; (2) an acquisition account, opened when a foreign investor wishes to establish an FIE, to be used for acquiring land use rights, equipment, or other assets during the FIE's pre-establishment period; (3) an expenses account, opened when a foreign investor intends to establish an FIE, to be used for market research and establishment preparations during the FIE's pre-establishment period; and (4) a security account, opened when a foreign investor needs to provide a funding security to a domestic institution.[126] SAFE retains discretion to determine the limits on the amounts such special *forex* accounts can hold, as well as the account's duration and its scope of receipt and payment of funds. Upon establishment, funds settled and transferred from such special *forex* accounts may be treated as a capital contribution made by the foreign investor to the FIE. Any remaining balance may then be transferred to the capital account of the FIE as a part of the capital contribution. Each foreign investor is permitted to open one special *forex* account, unless SAFE approves additional accounts.[127]

The FDI Forex Notice allows foreign investors to contribute funds directly to an FIE's capital account: (1) from an offshore account in a designated offshore forex bank; or (2) by using the *forex* in an onshore non-resident individual cash remittance account.[128] Foreign investors also may, pursuant to *The FDI Forex Notice* and subject to their ratio of capital contribution made to the FIE, convert specific items into FIE's registered capital including: (1) a proportional amount of the FIE's development funds and reserve funds; (2) the FIE's undistributed dividends and accrued interest; (3) principal and accrued interest of the FIE's

122. *Id.*
123. *Id.*
124. *Id.*
125. *Notice on Issues Relating to Improving the Administration on Forex in Relation to FDI* (Apr. 1, 2003).
126. *Id.*
127. *Id.*
128. *Id.*

registered foreign debt held by the foreign investors; and (4) investors' early-recouped investments or assets derived from liquidation, equity transfer, or reduction of registered capital from FIEs in which they have invested.[129]

The FDI Forex Notice states that SAFE will not approve onshore transfer of *forex* funds between: (1) FIEs (foreign-invested holding companies excluded) and their domestic investee enterprises; or (2) the domestic investee enterprises invested in by the same FIE (foreign-invested holding companies excluded).[130] If a foreign investor contributes capital in kind, and the value of the in-kind contribution is in doubt, SAFE will use the valuation of the relevant Chinese authority. *The FDI Forex Notice* provides that a guarantee letter is not required to remit *forex* from a Sino-foreign cooperative joint venture if the venture itself is debt free.[131]

VIII. Financial Services

A. Banking: Anti-Money Laundering Rules

In early 2003, the People's Bank of China (PBOC) promulgated the Provisions on Anti-Money Laundering for Financial Institutions and two other measures concerning requirements for financial institutions to report "large and suspicious" *renminbi* transactions and foreign exchange transactions, both effective March 1, 2003.[132] Financial institutions in China, including foreign-invested financial institutions, are required to establish a strict internal system to control money laundering, including implementing a record retention policy and a system to report large or suspicious transactions to the PBOC or SAFE. Securities and fund management companies and insurance companies are excluded from the scope of these rules because they are not under PBOC jurisdiction.

These rules reinforce existing guidelines regarding confirming the identity of account holders, verifying the source of cash deposits and purpose of remittances, and record keeping. Financial institutions are to report "large" transactions to PBOC, including: (1) single transfers between legal persons, organizations, and privately- owned businesses of RMB1 million or above; (2) single cash deposits or withdrawals of RMB200,000 or above; and (3) transfers between settlement accounts of individuals, and transfers between settlement accounts of RMB200,000 or above.[133] Similar reporting to the SAFE is required for (1) cash deposits, withdrawals, purchase, or conversion of foreign currency of 10,000 U.S. dollars equivalent or more per day; and (2) non-cash foreign exchange transactions of 100,000 U.S. dollars equivalent or more per day for individuals, or 500,000 U.S. dollars per day for business entities.[134] In addition, "suspicious" transactions must be reported, as determined by the amount, frequency, direction and purpose of the transactions.[135]

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129. *Id.*

130. *Id.*

131. *Id.*

132. *Provisions on Anti-Money Laundering for Financial Institutions*, TDC.com, *available at* http://www.tdctrade.com/report/reg/reg_030202.htm (Feb. 17, 2003).

133. *Id.*

134. *Id.*

135. *Id.*

B. Banking: China Banking Regulatory Commission

On April 26, 2003, the National People's Congress approved the creation of the China Banking Regulatory Commission (CBRC), now responsible for carrying out the examination and approval functions of the PBOC, as well as its functions related to the supervision and administration of banks, financial assets management companies, trust and investment companies, and other savings and financial organizations.[136] On April 28, 2003, the CBRC announced it will be organized into fifteen departments.[137] The CBRC First Division will be responsible for the supervision and administration of state-owned commercial banks and asset management companies. The CBRC Second Division will be responsible for the supervision and administration of shareholding commercial banks and municipal commercial banks, and the CBRC Third Division will be responsible for the supervision and administration of policy banks, postal savings agencies, and foreign-invested banks.[138]

C. Banking: Auto Finance Company Measures

On October 3, 2003, the CBRC issued the Measures for the Administration of Car Finance Companies, permitting automobile companies and non-banking financial institutions to establish automobile finance companies with the right to lend money and extend loan guarantees to car buyers and dealers.[139] These measures were eagerly awaited, and although issued past the original WTO-committed deadline, they lay out the first clear requirements for foreign investment in this area. The chief investor must be a manufacturer or seller of automobiles or a non-banking financial institution with total assets of at least RMB4 billion and annual revenue of at least RMB2 billion.[140] Minimum registered capital is RMB500 million.[141] Automobile finance companies are not permitted to establish branches, and an investor is not allowed to establish more than one automobile finance company in China.[142]

D. Banking: Renminbi Business Expanded

On October 24, 2003, the CBRC promulgated the Announcement Regarding Further Opening Renminbi Business to Foreign Invested Financial Institutions, effective December 1, 2003, allowing foreign-invested financial institutions to conduct *renminbi* business in four additional cities: Jinan, Fuzhou, Chengdu, and Chongqing.[143] Upon examination, approval, and registration, a foreign-invested financial institution may provide *renminbi* services to domestic Chinese enterprises. Successful applicants should be profitable for the two years prior to application, and they must submit specific information to the CBRC.[144]

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136. China's Banking Regulatory Body Officially Launched, People's Daily (Apr. 29, 2003), *available at* http://english/peopledaily.com.cn/200304/28/eng20030428_115942.shtml.

137. *Id.*

138. *Id.*

139. *Measures for the Administration of Car Finance Companies*, China Banking Regulatory Commission (Oct. 3, 2003), *available at* http://www.cbrc.gov.cn/english/falvfagui/detail.asp?id = 1&keyword.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Announcement Regarding Further Opening Renminbi Business to Foreign Invested Financial Institutions*, Tdctrade.com, *available at* http://www.tdctrade.com/alert/cba-e0308p3.htm (Oct. 24, 2003).

144. *Id.*

E. Banking: Investments in Domestic Financial Institutions

On December 8, 2003, the CBRC issued the Measures for the Administration of Investments and Share Purchases of Domestic Financial Institutions by Foreign Financial Institutions, effective December 31, 2003, allowing specified investments by foreign financial institutions into domestic Chinese financial institutions.[145] Only a foreign investor meeting certain requirements may acquire more than 20 percent of a domestic Chinese financial institution: the investor must have (1) assets exceeding ten billion U.S. dollars to invest in or purchase shares of a domestic commercial bank; (2) one billion U.S. dollars or more to invest in or purchase shares of any other type of domestic financial institution may so invest; and (3) more than one investor.[146] Within sixty days after receipt of approval from the CBRC, the transaction must be closed, with consideration paid in cash.[147]

F. Banking: Bank Regulatory Reform

On December 27, 2003, the National People's Congress enacted several laws and amendments affecting China's banking sector, effective February 1, 2004. The Amendment to the Law on the People's Bank of China removes from PBOC much of its authority to supervise and regulate China's commercial banks, credit cooperatives, policy banks, financial asset management companies, trust and investment companies, financial companies, financial lease companies, and other banking institutions.[148] Such supervisory power will be transferred to the CBRC. The PBOC remains as China's central bank, with authority to formulate and implement monetary policy and monitor and safeguard financial markets, including a new power to trade bonds on the open market. In certain circumstances the PBOC may request the CBRC to investigate a regulated financial institution.[149]

The Law on Supervision and Administration of the Banking Industry of the People's Republic of China codifies the CBRC's mandate as regulator of China's banking sector.[150] CBRC's responsibilities include the supervision and administration of all financial institutions in the banking sector and the authority to approve the establishment and dissolution of a regulated financial institution. This new law embodies the basic rules and principles of the *Basel Core Principles for Effective Banking Supervision* by, among other provisions, giving the CBRC the power to enforce prudential requirements.[151] This law also creates an information sharing mechanism among the CBRC, the PBOC, and other financial sector regulators.

The Amendment to the Commercial Banking Law of the People's Republic of China attempts to strengthen the supervision and regulation of commercial banks by requiring

145. *Measures for the Administration of Investments and Share Purchases of Domestic Financial Institutions by Foreign Financial Institutions*, Tdctrade.com, *available at* http://www.tdctrade.com/econforum/tdc/tdc020301.htm (Dec. 8, 2003).

146. *Id.*

147. *Id.*

148. *Amendment to the Law on the People's Bank of China*, China Daily (Dec. 27, 2003), *at* http://www1.chinadaily.com.cn/en/doc/%202003-12/29/content_294131.htm.

149. *Id.*

150. *Law on Supervision and Administration of the Banking Industry of the People's Republic of China*, Tdctrade.com, available *at* http://www.tdctrade.com/report/reg/reg_020802.htm (Dec. 27, 2003).

151. *Id.*

commercial banks to formulate risk management and internal control policies.[152] Also, this amendment expands the permissible business scope of commercial banks to include acceptance and discounting of negotiable instruments, sale and purchase of bonds, provision of banking card services, and sale and purchase of foreign exchange.[153] Significantly, this amendment eliminates the requirement that wholly state-owned commercial banks provide loans to special projects approved by the State Council and requires the State Council to adopt measures for compensating banks that incur losses from such loans.

G. Securities: Investment Management Businesses

On May 15, 2003, the China Securities Regulatory Commission (CSRC) issued the *Notice on Relevant Issues Concerning Securities Companies Performing Mutual Investment Management Services.*[154] The notice states that the CSRC is currently drafting administrative measures to standardize the performance by securities companies of mutual investment management services. Pending the implementation of new measures, the notice prohibits securities companies from offering mutual investment management services and requires them to cease the implementation of all existing mutual investment plans. Securities companies already providing mutual investment management services were to submit relevant contracts, product descriptions, and marketing materials to the CSRC by May 20, 2003.

H. Securities: Listed Shares of Acquired Companies

On May 20, 2003, the CSRC issued the *Notice on Relevant Issues Concerning the Conditions for Public Trading of Shares of Acquired Companies Involving Tender Offers.*[155] The notice sets forth the conditions under which an acquired company's listed shares may continue to be publicly traded, may become subject to a delisting notice, or may be delisted. The notice provides that the purchaser is subject to certain disclosure obligations and, if a foreign investor, must comply with the special provisions for the acquisition of listed companies by foreign investors.

I. Securities: Bonds Issued by Securities Firms

On August 29, 2003, CSRC issued the *Interim Measures on the Administration of Bonds of Securities Companies*, effective October 8, 2003.[156] The measures allow Chinese securities companies to issue bonds upon approval by the CSRC. The company must have been profitable in the most recent fiscal year, must have assets of at least RMB500 million for private issues and RMB1 billion for public issues, and must have no securities violations for two years.[157] The value of the newly issued bonds may not exceed 40 percent of the

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152. *Amendment to the Commercial Banking Law of the People's Republic of China*, Tdctrade.com *available at* http://www.tdctrade.com/report/req/req_020802.htm (Dec. 27, 2003).

153. *Id.*

154.

155. *Notice on Relevant Issues Concerning the Conditions for Public Trading of Shares of Acquired Companies Involving Tender Offers* (May 20, 2003), *available at* http://www.csrc.gov.cn.

156. *Interim Measures on the Administration of Bonds of Securities Companies* (Aug. 29, 2003), *available at* http://www.csrc.gov.cn.

157. *Id.*

company's net assets, and bond interest is limited to an amount equal to the average annual profit distributed by the company for the most recent three years.[158]

J. Securities: Tougher Initial Public Offering Rules

On September 19, 2003, the CSRC promulgated the *Notice on the Further Standardization of Work Related to Initial Public Offerings* (effective October 1, 2003), tightening the rules under which a company limited by shares may conduct an initial public offering (IPO).[159] As of January 1, 2004, before it can apply for an initial public offering, a company must be established for at least three years and not have undergone significant restructuring (in either its business or management team) for at least three years.[160] The IPO's total value is limited to twice the un-audited net asset value of the company in the year prior to the offering. Controlling shareholders may purchase no more than 30 percent of the total value of the new offering.[161]

K. Securities: Securities Investment Fund Law

On October 28, 2003, the National People's Congress passed the Securities Investment Fund Law of the People's Republic of China (Investment Fund Law), effective June 1, 2004.[162] The Investment Fund Law regulates closed-end funds and open-end funds that are publicly offered and sold. Only CSRC-approved fund management companies may establish and manage investment funds. Such fund management companies must have: (1) registered capital exceeding RMB100 million; (2) principal shareholder(s) who are in the securities management, securities investment consulting, trust asset management, or other financial asset management business; and (3) principal shareholder(s) with registered capital exceeding RMB300 million.[163]

To establish a fund, a fund management company must apply to CSRC for approval. If approved, the fund management company may start selling fund units to the public. To achieve a valid public offering for a closed-end fund, the fund management company must sell more than 80 percent of the total amount of the units approved by CSRC. For an open-end fund, the fund management company must sell more than the minimum amount of units (as approved by CSRC) to a minimum number of buyers (as stipulated by CSRC). Funds may be invested only in listed stocks, bonds, and other securities products designated by CSRC. The Investment Fund Law prohibits the use of fund assets for: (1) underwriting securities, extending loans, or buying other funds; (2) making equity investments in the fund management company or custodian; and (3) buying securities issued or underwritten by the fund manager's or fund custodian's controlling shareholder.[164]

158. *Id.*

159. *Notice on the Further Standardization of Work Related to Initial Public Offerings* (Sept. 19, 2003), *available at* http://www.csrc.gov.cn.

160. *Id.*

161. *Id.*

162. *Securities Investment Fund Law of the People's Republic of China*, Lawtran.com, *available at* http://www.lawtran.com/Default.aspx (Oct. 28, 2003).

163. *Id.*

164. *Id.*

L. Securities: Supreme Court Interpretation of Company Law

On November 4, 2003, the Supreme People's Court published the *Provisions Regarding Several Issues on the Adjudication of Cases Involving Company Disputes*, introducing several new concepts to Chinese law, including the "nominal shareholder" (similar to a trustee shareholder), stock buy-backs, bonus stocks, and the use of securities as part of a capital contribution.[165] The provisions provide detailed rules on the protection of minority shareholders, the fiduciary duties of directors and senior management personnel, and the circumstances under which a court may pierce the corporate veil.[166]

M. Securities: Management of Client Assets by Securities Companies

On December 18, 2003, the CSRC issued the *Trial Measures on the Management of Client Assets by Securities Companies* (effective February 1, 2004), requiring securities companies that want to manage client assets to establish a separate department, hire qualified personnel, and implement risk control procedures.[167] Such securities companies may engage in asset management accounts for individual clients, restricted portfolio asset management plans and unrestricted portfolio asset management plans for multiple clients, and special purpose asset management accounts for clients with special projects.[168]

N. Securities: Equity Incentive Plan for High-Tech SOEs

Throughout 2003, the Ministry of Finance (MOF) and MOST issued guidelines and a follow-up notice on the launch of an equity incentive pilot project for state-owned, unlisted high-technology enterprises. The goal is to promote innovation in such enterprises by rewarding technical personnel who make significant contributions to the development of an enterprise with an interest in an equity incentive plan. Enterprises meeting certain criteria, including a requirement that annual research and development spending accounted for 5 percent of annual sales during the past three years, may apply to the relevant government departments to participate in the pilot project on equity incentive plans.

O. Insurance: Non-life Insurance Commitments

On December 1, 2003, the China Insurance Regulatory Commission issued the *Announcement on the Fulfillment of Related WTO Commitments* (effective immediately), enabling foreign-invested property insurance companies to conduct all non-life insurance business, with the exception of statutory insurance.[169] Further, five additional cities—Fuzhou, Xiamen, Ningbo, Shenyang, and Wuhan—were opened to foreign investment in the insurance sector.[170]

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165. *Provisions Regarding Several Issues on the Adjudication of Cases Involving Company Disputes*, Lawtran.com, *available at* http://www.lawtran.com/Default.aspx (Nov. 4, 2003).

166. *Id.*

167. *Trial Measures on the Management of Client Assets by Securities Companies*, Lawtran.com, *available at* http://www.lawtran.com/Default.aspx (Dec. 18, 2003).

168. *Id.*

169. *Announcement on the Fulfillment of Related WTO Commitments*, China Internet Information Center, *available at* http://www.china.org.cn/English/MATERIAL/75517.htm (Dec. 1, 2003).

170. *Id.*

IX. Telecommunications and Technology

A. Telecom Catalogue Issued

On February 21, 2003, the Ministry of Information Industries (MII) issued a revised *Catalogue of Telecommunications Services (Telecom Catalogue)*, effective April 1, 2003.[171] The Telecom Catalogue retains MII's dichotomy between Basic Telecom Services and Value Added Telecom Services but leaves unclear certain distinctions between such services.[172]

B. Service Standards

On May 27, 2003, MII's Telecommunications Administration Bureau issued the *Announcement on Soliciting Opinions for the Telecommunications Service Standard.*[173] This new service standard amends the 2000 *Telecommunications Service Standard (for Trial Implementation)* and is intended to improve the provision and quality of telecommunications services by specifying the basic principles, criteria, and indices of telecommunications service standards.[174] Internet Protocol telephony business and Internet data transmission business are subject to this new service standard.

C. Network Access for Mobile Phones

On April 4, 2003, the MII issued the *Notice on Further Strengthening the Administration of Network Access for Mobile Phones.*[175] The notice simplifies the process under which new mobile telecommunications products are tested for network access approval. Applicant manufacturers are required to submit a standardized application form to the MII's Telecommunications Equipment Authentication Center detailing the design and production parameters and the sales prospects of any new mobile phone units.[176] Successful applicants must guarantee the normal use, design, and functioning of the product. Post-certification inspections are conducted at irregular intervals on samples from both the factory and the marketplace.

D. Supreme Court Interpretation of Technology Contract Disputes

On November 10, 2003, the Supreme People's Court circulated the *Interpretation Regarding Several Issues on the Laws Applicable to the Adjudication of Disputes Involving Technology Contracts* (effective December 10, 2003).[177] The interpretation discusses various provisions of China's Contract Law, such as those related to technology development contracts, tech-

171. *Catalogue of Telecommunications Services*, Qiugao and Associates, *available at* http://www.mychineselawyer.com/law027.htm (Feb. 21, 2003).

172. *Id.*

173. *Announcement on Soliciting Opinions for the Telecommunications Service Standard*, Tdctrade.com, *available at* http://www.tdctrade.com/alert/cba-e0003a.htm (May 27, 2003).

174. *Id.*

175. *Notice on Further Strengthening the Administration of Network Access for Mobile Phones*, China Development Gateway, *available at* http://www.chinagate.com.cn/english/457.htm (Apr. 4, 2003).

176. *Id.*

177. *Interpretation Regarding Several Issues on the Laws Applicable to the Adjudication of Disputes Involving Technology Contracts*, Ministry of Science and Technology of the People's Republic of China, *available at* http://www.most.gov.cn/English/Polocys/techcontract_law (Nov. 10, 2003).

nology transfer agreements, and technology consulting and service contracts. The interpretation also discusses procedural issues involved in the adjudication of technology contract disputes.

E. Encryption Policy for Wireless LANs

On November 26, 2003, the General Administration of Quality Supervision, Inspection & Quarantine and the Standardization Administration of China jointly issued the *Announcement Regarding Implementation of Mandatory National Standards for Wireless LAN*, effective December 1, 2003.[178] Pursuant to this announcement, Chinese and overseas computer manufacturers are required to use Chinese encryption standards in terminal equipment for Chinese wireless local area networks.[179] Implementation of the announcement prohibits the importation, manufacture, and sale in China of any equipment used in wireless LANs unless it complies with Chinese standards. The announcement does not apply to: (1) noncompliant products that have been manufactured and imported into China before December 1, 2003; (2) noncompliant products that are the subject matter of purchase contracts executed before December 1, 2003; or (3) LAN equipment re-processed or manufactured in China for overseas markets.[180] The standard will enhance security and augment government access, control, and regulation of the sector, and will provide a domestic market advantage to Chinese equipment manufacturers.

X. Other Developments of Note

A. Price Discrimination

On June 18, 2003, the SDRC issued an anti-price discrimination regulation, effective November 1, 2003.[181] This regulation restricts certain activities undertaken by a business operator to manipulate an item's market price. Under the new regulation, business operators may not engage in price fixing or restricting production quantities through agreements, resolutions, or coordination.[182] Also, business operators may not: (1) restrict resale prices by taking advantage of their dominant market position over distributors; (2) make predatory profits; (3) dump goods with the purpose of harming competitors, or sell goods below cost in the form of kickback, subsidy, or donation; or (4) conduct price discrimination.[183]

B. Freight Forwarding Developments

On January 11, 2003, the former MOFTEC issued the Measures for the Administration of Foreign-Invested International Freight Agencies, raising the foreign ownership cap in an international freight forwarding agency to 75 percent.[184] These measures also contain

178. *Announcement Regarding Implementation of Mandatory National Standards for Wireless LAN*, Squire Sanders, *available at* http://www.ssd.com/resources/events.aspx (Nov. 26, 2003).

179. *Id.*

180. *Id.*

181. *Interim Provisions on Preventing Acts of Price Monopoly* (June 18, 2003), *available at* www.ssd.com/library/pdf/china_update-10-2003.pdf.

182. *Id.*

183. *Id.*

184. *Measures for the Administration of Foreign-Invested International Freight Agencies* (Jan. 11, 2003), *available at* www.ustr.gov/reports/nte/2003/china.pdf.

provisions detailing the acquisition of existing international freight agencies. Related thereto, MOFCOM issued the Supplementary Provisions to the Measures for the Administration of Foreign Invested International Freight Agencies on December 7, 2003, and the Detailed Rules on the Provisions for the Administration of International Freight Agencies on January 1, 2004.[185] Both regulations became effective January 1, 2004. The supplemental provisions require an international freight agency to be established as a limited liability company or a company limited by shares, with a controlling shareholder that meets certain criteria with regard to experience and resources. The new rules also provide that international freight agencies may only establish affiliates or branch companies one year after the parent commences actual business operations and must specify the procedures for the examination and approval, registration, annual review, and regulation of international freight agencies.[186]

C. Online Audio-Video Programs

Effective February 10, 2003, the Measures for Administration of the Transmission of Audio-Video Programs Over the Internet and Other Information Networks issued by the State Administration of Radio, Film and Television (SARFT) assert SARFT jurisdiction over the transmission of audio-video programs over all types of networks.[187] These measures categorize audio-video programs into four basic groups: (1) news; (2) film and television programs; (3) entertainment; and (4) professional.[188] Those transmitting audio-video programs in all four categories must be licensed by SARFT. Chinese website operations are prohibited from providing connection services to unlicensed website operators inside or outside China.[189]

D. Foreign-Invested Construction Enterprises

On April 8, 2003, the Ministry of Construction issued the Implementing Measures Concerning the Administration of Qualifications Contemplated in the Regulations for the Administration of Foreign-Invested Construction Enterprises, providing guidance to foreign construction companies seeking to set up construction subsidiaries in China.[190] These measures detail China's system of qualification grading for foreign-invested construction companies and its rules governing the qualifications of expatriate managers of foreign-invested construction companies.

E. Periodicals Distribution

On March 17, 2003, the General Administration of Press and Publications (GAPP) and the former MOFTEC jointly issued the Measures on the Administration of Foreign In-

185. *Id.*

186. *Id.*

187. *Measures for Administration of the Transmission of Audio-Video Programs Over the Internet and Other Information Networks* (Feb. 10, 2003), *available at* http://www.cecc.gov/pages/selectLaws/PRCLaws.pdf.

188. *Id.*

189. *Id.*

190. *Implementing Measures Concerning the Administration of Qualifications Contemplated in the Regulations for the Administration of Foreign-Invested Construction Enterprises* (Apr. 8, 2003), *available at* http://www.jus.uio.no/lm/china.establishment.of.foreign.funded.construction.enterprises.provisions.1995/doc.

vested Books, Newspapers and Periodicals Distribution Enterprises, effective May 1, 2003.[191] These measures cover foreign-invested wholesale and retail enterprises that distribute books, newspapers, and periodicals through traditional channels and online, providing that a foreign-invested books, newspapers, and periodicals distribution enterprise may be established through a traditional joint venture or an acquisition of an existing domestic distribution enterprise. The venture's registered capital must exceed RMB30 million for wholesale enterprises and RMB5 million for retail enterprises.[192] MOFCOM and the GAPP shall jointly conduct examination and approval of such foreign-invested wholesale or retail enterprises.[193]

F. Travel Agencies

On June 12, 2003, MOFCOM and the National Tourism Administration (NTA) jointly issued the Interim Provisions on the Establishment of Foreign Invested and Wholly Foreign-Owned Travel Agencies, effective July 14, 2003.[194] These provisions allow creation of travel agencies as wholly foreign-owned enterprises (WFOE) if the foreign investor's annual revenue exceeds 500 million U.S. dollars.[195] A foreign party to a tourism joint venture must have annual revenue in excess of 40 million U.S. dollars, be a member of their home country's tourism association, and have tourism as their primary business.[196] Registered capital of foreign-invested travel agencies must be at least RMB4 million.[197]

G. China Compulsory Certification (CCC) Marks

On May 1, 2003, China reorganized its compulsory products certification system by centralizing certification authority of the new Certification and Accreditation Administration (CNCA) under the General Administration of Quality, Inspection, and Quarantine (AQSAQ).[198] CNCA's mandate is to establish an internationally recognized certification system and bring about unified technical standards, a unified catalogue, unified marks, and unified certification fees.[199] As of August 1, 2003, Chinese customs will no longer allow goods to enter China unless they are stamped with the new CCC (China Compulsory Certification) mark or accompanied by an exemption letter issued by the Beijing office of the CNCA or a designated local branch. Similarly, goods not bearing the new CCC mark may not be distributed in China unless they bear one of the old marks and were imported before August 1, 2003. CCC marks may be issued at one of ninety-nine designated testing laboratories or nine designated certification centers throughout China. The certification

191. *Measures on the Administration of Foreign Invested Books, Newspapers and Periodicals Distribution Enterprises* (Mar. 17, 2003), *available at* http://www.tdctrade.com/report/reg/reg_030703.htm.

192. *Id.*

193. *Id.*

194. *Interim Provisions on the Establishment of Foreign Invested and Wholly Foreign-Owned Travel Agencies* (June 12, 2003), *available at* http://www.tdctrade.com/alert/cba-e0308d.htm.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Announcement No. 8 of the Certification and Accreditation Administration of the People's Republic of China* (May 1, 2003), *available at* http://www.mac.doc.gov/China/Docs/BusinessGuides/CCCAnnouncement8.pdf.

199. *Id.*

process is supposed to take approximately ninety days, beginning with an inspection of the relevant overseas manufacturing facility.[200]

Exemption certificates are available for imported items, such as those imported for a research purpose, products imported as parts for assembly and re-export, products imported where the end products are exclusively for export, products imported to develop new product lines, products imported for equipment maintenance, and obsolete products. The validity period for most exemption certificates is thirty days, but the certificates may be valid for up to one year.[201] Most exemption certificates are valid for a single use, but in certain cases they may be issued for multiple imports.[202]

H. Pharmaceuticals Imports

On August 18, 2003, the State Food and Drug Administration (SFDA) issued the Measures for the Administration of the Importation of Pharmaceutical Products, effective January 1, 2004, requiring pharmaceuticals importers to obtain a registration certificate from the SFDA at the port of entry prior to actual import.[203] The measures also penalize distributors of imported pharmaceuticals that fail to obtain an SFDA registration certificate.[204]

I. MOFCOM Transparency

On November 25, 2003, MOFCOM issued the Interim Measures for Public Government Affairs, effective immediately, implementing some of China's WTO commitments on administrative transparency.[205] Under these measures, before completing a new regulation, policy, administrative measure, or administrative procedure, MOFCOM may choose to consider the regulation internally or consult with outside experts. If a draft regulation is vital to the interests of citizens, legal persons, or other organizations, MOFCOM may solicit comments from the general public before completing the regulation. Assuming a new regulation is deemed confidential, it will be published through three channels: (1) the MOFCOM website (*http://www.mofcom.gov.cn/*); (2) *The MOFCOM Gazette*; and (3) *The International Business Daily*.[206]

J. Acquiring State-Owned Enterprises in Shanghai

On August 4, 2003, three authorities in Shanghai—the State-owned Asset Supervision and Administration Commission, Foreign Investment Work Commission, and Administration for Industry and Commerce (AIC)—jointly promulgated the Implementing Rules on Foreign Investment in Acquiring State-Owned Enterprises Several Opinions (SOE Implementing Rules).[207] The SOE Implementing Rules specify the steps for foreign investors to

200. *Id.*

201. *Id.*

202. *Id.*

203. *Measures for the Administration of the Importation of Pharmaceutical Products* (Aug. 18, 2003), *available at* http://www.tdctrade.com/alert/chwto0011aj.htm.

204. *Id.*

205. *Interim Measures for Public Government Affairs* (Nov. 25, 2003), *available at* http://www.tdctrade.com/alert/cba-e0201a.htm.

206. *Id.*

207. *Implementing Rules on Foreign Investment in Acquiring State-Owned Enterprises Several Opinions* (Aug. 4, 2003), *available at* http://www.cbbc.org/china-guide/sus/winding.html.

acquire state-owned properties in Shanghai: (1) the submission of an application to the Comprehensive Service Window for Foreign Investment in Merger and Acquisition; (2) an asset evaluation; (3) the execution of a property transfer contract by the entrusted agents of the parties; (4) the transfer of property and registration of the transfer; (5) the approval by the Foreign Investment Commission of the property transfer; and (6) the registration of changes with the AIC with respect to both the state-owned enterprise and the new foreign-invested enterprise.[208]

XI. Conclusion

In 2003, China enacted revised regulations on mergers and acquisitions between domestic and foreign enterprises, as well as new regulations on Sino-foreign education ventures. China continued to strengthen its intellectual property regime, and its banking, securities, and insurance sectors were further opened to foreign investment. The development of telecommunications regulation in China continued and foreign investors now have greater access to China's freight forwarding and construction sectors. Legal development should be expected to continue at a fast pace in 2004.

208. *Id.*