IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

U.S. SECURITIES AND EXCHANGE COMMISSION,	)	
Petitioner,	)	Miscellaneous Action No. 11-0512 GK/DAR
-v.-	)	
DELOITTE TOUCHE TOHMATSU CPA LTD.,	)	
Respondent.	)	

DECLARATION OF JAMES V. FEINERMAN

JAMES M. MORITA PROFESSOR OF ASIAN LEGAL STUDIES

GEORGETOWN UNIVERSITY LAW CENTER

I, James V. Feinerman, declare as follows:

1. I am the James M. Morita Professor of Asian Legal Studies at Georgetown University Law Center and have been admitted as an attorney to practice before the courts of New York. I have been retained by counsel for Deloitte Touche Tohmatsu Certified Public Accountants, Ltd. ("DTTC") in the above-captioned action. I submit this affidavit in support of Respondent DTTC's Statement of Points and Authorities Opposing The Securities and Exchange Commission's ("SEC") Application for Order to Show Cause and Order Requiring Compliance with a Subpoena.

Qualifications

2. I briefly summarize below my education, training and relevant experience. Following my receiving a B.A. in Chinese Studies at Yale College, I spent two years teaching and studying in Hong Kong at the Chinese University of Hong Kong, 1971-73. In the ensuing years, I earned a Ph.D. in East Asian Languages and Literature at Yale University and a J.D. from the Harvard Law School, where I specialized in East Asian Legal Studies. During 1979-80, I was a participant in the national student exchange program sponsored by the Committee on Scholarly Communication with the People's Republic of China ("CSCPRC", renamed "Committee on Scholarly Communication with China" – "CSCC"). For one year, I studied

at Peking University and received a post-graduate certificate; in the fall of 1980, I spent an additional four months as a Visiting Scholar at the Institute of Law of the Chinese Academy of Social Sciences. I speak Mandarin and Cantonese dialects of Chinese and can also read Chinese.

3. I have taught at Georgetown, and also as a visiting professor at Harvard and Yale Law Schools, for over twenty-five years. Among other courses, I teach a course in Chinese Law at Georgetown, along with a seminar in Asian Law and Policy Studies. At Harvard, I have taught courses in Chinese Law and Pacific Community Legal Relations; at Yale, I taught both Chinese Law and Asian Legal Studies courses.

4. In addition to my work as a professor of law, I served as Editor-in-Chief of the China Law Reporter, a publication of the American Bar Association's Section of International Law and Practice, from 1986-1998; as Chair of the Committee on Legal Education Exchange with China, from 1993-1997; as Chair of the Asia Law Forum of the Association for Asian Studies, from 1991-1996; and have been a Trustee of the Yale-China Association and the Lingnan Foundation.

5. From 1993-1995, I served as Director of the Committee on Scholarly Communication with China, Washington, D.C., the national organization sponsoring official academic exchange between the United States and China, sponsored by the National Academy of Sciences, the American Council of Learned Societies, and the Social Science Research Council. In 1982-83, I taught as a Fulbright Lecturer on Law at the Peking University Law Department, Peking, People' s Republic of China. From 1983-1985, I served as Administrative Director and Fellow of the East Asian Legal Studies Program at Harvard Law School, Cambridge, Massachusetts. In 2006, I taught as Fulbright Distinguished Senior Lecturer on Law at the Law School of Tsinghua University, Beijing, People's Republic of China. I have attached my curriculum vitae as Exhibit A to this affidavit.

Summary of Opinions

6. I summarize my opinions as follows:

- Although the modern legal system of the People's Republic of China ("PRC") has only been evolving for the past three decades, and has yet to achieve the same level of development of the legal orders of other advanced economies, it does follow a general civil law model and is not an outlier among civil law jurisdictions.

- The PRC has made enormous strides in the following areas: With respect to the enhancement of the legislative process, the implementation of legislation via the

interpretive practices of courts and administrative agencies, as well as through the enforcement of civil judgments, the personnel staffing the system in the role of legal advisers, criminal law and human rights, the key area of foreign trade and investment law, and finally China's place and role in the international legal order. This can clearly be counted as a major success story in the annals of legal modernization. Similar advances took decades longer in Japan, Korea, and Thailand.

- The United States and other market democracies have been encouraging and assisting the PRC for decades to develop and to improve the rule of law in China.

- The gathering of evidence created and located within a sovereign territory by a foreign government would be viewed by any sovereign as intrusive. But this is even more the case in a civil law country like China. Under a civil law approach, the collection of evidence is viewed as an act requiring significant government involvement, which cannot be undertaken solely by individual litigants. The China Securities Regulatory Commission's ("CSRC") requirement that information requests by foreign regulators be directed to the China government, rather than to individual citizens or companies, is consistent with this civil law tradition.

- China's securities regulatory regime is also relatively new, but has begun to employ a rule-of-law modality to the tasks of establishing a transparent, well-regulated financial market in China and building the capacity of necessary gatekeepers to meet high global standards for performance. The World Bank and the International Monetary Fund ("IMF") have applauded the PRC for its impressive progress in putting in place an institutional framework for accounting, auditing, and corporate financial reporting, with a high level commitment on the part of China's Ministry of Finance.

- The financial regulators in China, as well as other senior economic officials and top Party and government leaders are committed to the creation of an effective enforcement regime and are actively working to improve the existing regime to that end. The CSRC has overseen regulatory reforms to support a more market-based financial system and to facilitate Chinese companies' ability to attract foreign investment and to obtain access to foreign capital markets. These efforts have included improving ongoing regulatory systems and cross-border regulatory cooperation mechanisms, and Chinese regulatory authorities have adopted a wide range of statutes and regulations that comport with international best practices in most areas related to oversight of corporate entities, banks, and similar financial institutions.

- China recognizes protection of economic and commercial information as an element of its national security. Although there is some trend toward privitization, many large China companies are state-owned enterprises.

- Chinese criminal and civil laws, including laws protecting "State secrets" and "archives," impose legal requirements on China accounting firms to maintain the confidentiality of information obtained during audits, including economic and commercial information. These Chinese laws have serious binding force, and serious penalties may be imposed on firms which violate Chinese laws and regulations.

- The October 11, 2011 letter from the CSRC replying to DTTC's letter of October 8, 2011 requesting directions about how to respond to requests of a United States regulatory agency confirms that direct production of audit workpapers to foreign governments without approval of the China government would be a violation of China laws imposing a duty of confidentiality on China accounting firms.

  I have examined the statutes, regulations, and cases Professor Tang cites in his declaration and have reviewed the opinions he has presented about them with respect to their content and their interpretation as a matter of Chinese law. Based on that review and my own prior knowledge of the Chinese legal system, I agree with the conclusions he has drawn and believe both his analysis and conclusions are accurate.

  China provides, through its accession to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents ("Hague Service Convention"), the exclusive method under Chinese domestic law for foreign litigants to serve litigation documents on entities located in China. As the record demonstrates, China has a well-documented system for considering requests for service through the Hague Service Convention and regularly processes these requests.

- In my opinion, the Chinese Central Authority would honor a properly tailored request for service through the Hague Service Convention.

7. I have reviewed relevant portions of the following documents, in addition to the other documents referenced in this declaration: the PRC Law on Guarding State Secrets, the PRC Law on Guarding State Secrets Implementation Rules, the PRC Criminal Law, the PRC Archives Law, the PRC Archives Law Implementation Rules, the PRC Securities Law, the Regulations on Strengthening the Protection of Secrets and Archive Management Related to the Issuance and Listing of Securities Overseas, the PRC Certified Public Accountants Law,

the Accounting Firm Quality Control Principles, the Chinese Certified Public Accountants Ethics Regulation Guiding Opinion, the Measures for the Spot Inspection of Listed Companies, and the Practising Quality Inspection Rules for Accounting Firms.

8. My opinions are based on my experience with and study of Chinese law and the PRC government, my examination of relevant statutes, and cases and interactions with Chinese and foreign experts in Chinese law. These include the Constitution of the People's Republic of China, national laws issued by the National People's Congress, and administrative regulations issued by the State Council.

Recent Development of a Modern Legal System in the People's Republic of China

9. The development of a modern legal system in China began in earnest in 1978, following the Third Plenum of the 11th Communist Party Central Committee. Over the past three decades, despite occasional setbacks and difficulties, the construction of a complex legal system and the training of human resources to staff it have proceeded apace. Among the notable developments and specific successes of China's legal modernization are the volume of formal legislation: many new commercial laws governing corporate behavior, bankruptcy, behavior of banks, and other financial institutions have been enacted by the National People's Congress. Furthermore, the Chinese judicial system for law enforcement has been modernized and improved. The practice of litigation is now more widespread and the number of lawyers has dramatically increased. The number of legal personnel increased several hundred thousand between 1979 and 2012; in addition to support staff, legal clerks, and other related personnel in the courts and legislative bodies at various levels, this included over 100,000 judges and 175,000 lawyers. By way of comparison, there was no functioning judiciary in 1978 and only 300-400 lawyers, most of them trained before 1949.

10. Moreover, in its legal development, the PRC has carefully studied the models provided by countries with longer histories and more effective realization of the rule of law in creating its own new system. China has employed many of the legal regimes originating in the United States and other common law countries in areas such as competition law, banking and securities regulation, and administrative law in key aspects of its legal modernization. Like many other nations adapting traditional legal systems to modern circumstances, China has determined through trial and experimentation to adopt the civil law model. China, in an effort to modernize its legal system, borrowed heavily from the Japanese system, which in turn borrowed heavily from the German system. It also modernized its civil code during that era by examining the Swiss Civil Code. In the middle of the last century, after the creation of the People's Republic under the Communist Party of China, China borrowed from the former socialist countries in Eastern Europe, all of which followed a modified form of the civil law. The civil law model adopted by China was previously adopted by other Asian nations, such

as Japan, Korea, and Thailand, in the modernization of their legal systems—a modernization that took far longer than China's.

The "Rule of Law" in China

11. Ever since the PRC embraced the modernizing of its legal system in the late 1970s, foreign governments and non-governmental organizations have been involved in efforts to promote the "rule of law" in China. National governments, foundations, university law faculties, private law firms, and individuals have endeavored for more than three decades to assist in the PRC's program of legal development while at the same time encouraging the adoption of statutes, regulations, institutions, and standards that are in line with those of other global legal systems. They also seek to integrate the PRC into international rule-based organizations and to align the domestic law and practice of Chinese actors with their foreign counterparts.

12. In the United States, as part of the approval by Congress of PRC accession to the WTO, the Congressional-Executive Commission on China was created by Congress in October 2000 with the legislative mandate to monitor human rights and the development of the rule of law in China, and to submit an annual report to the President and the Congress detailing PRC progress in those areas. The Commission consists of nine Senators, nine Members of the House of Representatives, and five senior Administration officials appointed by the President.

13. Other nations have also committed resources to these endeavors. For example, the German government established a Sino-German Institute for Legal Studies at Nanjing University. Speaking at a ceremony there in August 2007, German Chancellor Angela Merkel praised the institute for promoting cooperation in the area of law studies between Germany and China, as well as dialogues between the two countries. She pointed out that a country needs "a good legal system, the observance of the law by most of its people, and a good administrative system that ensures the effective implementation of the law." [1]

14. Over the past three decades, the United States, the European Union, and various countries, as well as the Ford Foundation, other civil society organizations, and – most importantly – the Chinese government and its judicial, other governmental and educational institutions have devoted considerable human and financial resources to building a modern rule of law system in the PRC. Internally, this was viewed as an essential feature of economic reform and

[1] German Chancellor Visits NJU [Nanjing University], http://www.nju.edu.cn/cps/site/njueweb/fg/index.php?id=31.

opening to the outside world as part of China's development; externally, other nations desired to integrate China into a peaceful global community bound by a shared system of uniform rules governing their international relations.[2]

Sensitivity to Collecting Evidence in Civil Law Country

15. While all nations have an interest in protecting their nationals from the imposition of unreasonable burdens by a foreign sovereign, this interest is especially strong in civil law jurisdictions. Understanding this sensitivity is instructive in understanding China's response to administrative subpoenas, such as in this case. The U.S. approach to the extraterritorial collection of evidence differs from that of many foreign nations. In many civil law jurisdictions, such as China, the collection of evidence is regarded as a "judicial" or "public" act that may not be performed by anyone but a properly authorized governmental authority in an officially sanctioned proceeding.

16. The gathering of evidence created and located within a sovereign territory by a foreign government would be viewed by any sovereign as intrusive. But this is even more the case in a civil law country like China. Civil law takes a very different view of foreign discovery orders because the investigation of legal claims and defenses is a public, not private, function in the civil-law system. In these countries, only local governmental officials as part of their authorized public functions are allowed to undertake quasi-judicial actions such as serving process, acquiring evidence, recording testimony, or other matters whether or not in the presence of a judge or in a formal courtroom setting. There is an additional desire in many civil law countries to protect, as a matter of both national and judicial sovereignty, the privacy of citizens.[3] This leads to cautious consideration of discovery orders from foreign

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[2] Jamie P. Horsley, The Rule of Law in China: Incremental Progress (March 2006). http://csis.org/files/media/csis/pubs/0604_cbs_papers.pdf.

[3] For example, the European Union established an Article 29 Data Protection Working Party under the Directive 95/46/EC of the European Parliament and of the Council of October 24, 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The Working Party, established as an independent advisory board, has observed that"[t]here is tension between the disclosure obligations under US litigation or regulatory rules and the application of the data protection requirements of the EU." Art. 29 Data Protection Working Party, *Working Doc. 1/2009 on Pre-trial Discovery for Cross Border Civil Litigation* 4-5, Doc. No. 00339/09/EN WP 158 (Feb. 11, 2009). *See, e.g.*, Alan Charles Raul et al., *Reconciling European Data Privacy Concerns with US Discovery Rules: Conflict and Comity*, 2009 Global Competition L. Rev. V. 119-20 ("Whereas EU law identifies privacy as a fundamental human right, US law conceives of privacy as one interest among others.").

jurisdictions, especially those, like the U.S., that are perceived to have fewer privacy protections.

17. Many foreign nations, particularly civil law states, object to orders from foreign authorities to take evidence within national territory from local nationals, except where local officials are involved in the taking of such evidence. Attempting to acquire evidence without following the requirements of the foreign country may result in arrest, detention, deportation, or imprisonment of participants, including American counsel.[4]

18. Dozens of countries, from Albania and Argentina to Venezuela, including Germany, Italy, Poland, Portugal, and Switzerland, take this position in the civil litigation context, a far less intrusive discovery scheme than that, as here, of foreign governmental administrative action.[5] China's position that documents cannot be produced without authorization from Chinese regulators is thus neither unique nor even unusual. These objections arise from legitimate and important concerns regarding a territorial conception of national sovereignty.

19. In addition, some civil law nations base their objections on the view that extraterritorial extension of judicial power could lead in particular cases to violations of national public policy in other areas. In all these respects, PRC practice is well within that of most civil law countries. In civil law countries the court conducts evidence gathering, rather than the parties. The purpose of judicial control is to safeguard individuals from undue coercion and ensure that privileges are respected. In civil law systems, the parties can typically only obtain material that is admissible at trial.

20. Taken together, these features of Chinese procedural rules, in common with those of other civil law jurisdictions, have created a highly regulated regime for data and documents located within or created within its sovereign territory. In keeping with its sovereign concerns in respect of these matters, the Chinese government has enacted laws that give the government

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[4] *See* http://travel.state.gov/law/info/judicial/judicial_688.html, as cited in http://www.hep.uiuc.edu/home/g-gollin/pigeons/exhibit_24.pdf." (The same language is found in travel.state.gov/law/judicial/judicial_684.html and travel.state.gov/law/judicial/judicial_661.html).

[5] Article 23 of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters permits states signatory to take an exception stating that they will not execute Letter of Request issued for the purpose of obtaining "what is known as pretrial discovery in Common Law countries" (every signatory with the exception of Czechoslovakia, the United States, and Israel has registered some exception). *See* 1 Bruno A. Ristau and Michael Abbell, International Judicial Assistance (Civil and Commercial) A-95A-161 (1984).

the sole authority to decide whether data and documents may be transmitted both within China and without or subject to discovery abroad, and the China government enforces those laws vigorously. These include, among others, Law of the People's Republic of China on Guarding State Secrets ("State Secrets Law"), the Implementing Measures of the Law of the People's Republic of China on Guarding State Secrets ("Implementing Measures of the State Secrets Law"), Archives Law of the People's Republic of China ("Archives Law"), the Criminal Law of the People's Republic of China ("Criminal Law"), and the Supreme People's Court's Interpretation on Certain Issues Regarding Application of Law in Deciding Cases Involving Stealing, Spying into, Buying or Unlawfully Providing State Secrets or Intelligence Overseas ("Criminal Law Interpretation"). *See* Tang Decl. at ¶¶16 -22.

21. In addition, China has detailed procedures for Chinese companies, such as accounting firms, to provide audit workpapers and other documents to foreign regulators, such as the SEC. This is set forth in the Provisions on Strengthening Confidentiality and Archives Administration of Overseas Issuance and Listing of Securities ("Regulation 29"). *See* Tang Decl. at ¶20.

China's Evolving Securities Regulatory Regime

22. The quick rise and robust growth of China's securities market leads many foreign observers to forget the developing nature of the Chinese market and the regulatory regime that governs it. As the recent Financial Sector Assessment of the World Bank and IMF has noted:

> China's progress in reforming and developing its financial system has been considerable… This development has been supported by key banking sector reforms, creation of capital markets, introduction of a prudential regulatory regime, bank recapitalizations, and a broad-based opening of the financial system following accession to the WTO and reforms since 2003.[6]

23. To understand this development, it is important to look at the history of China securities industry. Although there were a few wildcat exchanges set up in the 1980s in several Chinese cities, the Shanghai and Shenzhen stock exchanges were launched as the first officially approved exchanges in 1990 and 1991 respectively. At this stage, no national supervisory body existed.

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[6] World Bank and IMF, China: Financial Sector Assessment, SecM2011-0492 (November 2011), p. 3.

24. In 1992, the CSRC was created to address perceived failings in supervision. In 1998 the supervision was fully centralized in the CSRC as part of securities reform that led to the promulgation of China's first Securities Law in 1999.

25. In two decades, the CSRC has overseen the passage of basic statutes (a Company Law in 1994 and a Securities Law five years later), as well as dozens of regulations. It today has 21 departments, four affiliated institutions, and four special committees. The senior management includes a Chairman, five Vice Chairmen, and three Assistant Chairmen. Many of the departments are headed or staffed by personnel with overseas educations in law and business faculties of the United States, United Kingdom, and other developed countries. The CSRC has 36 regional offices located around the country and two securities supervision offices located at the Shanghai and Shenzhen Stock Exchanges.[7] What this short outline of the history of China's securities market should demonstrate is substantial development has occurred since 1992, and undoubtedly will continue. China has, through the CSRC, implemented the requisite laws and regulations in order to modernize its securities market.

CSRC Commitment to Enforcement of Securities Regulations

26. The CSRC oversees China's nationwide centralized securities supervisory system, with the power to regulate and supervise securities issuers, as well as to investigate, and impose penalties for illegal activities related to securities and futures. The CSRC is empowered to issue Opinions or Guideline Opinions, non-binding guidance for publicly traded corporations. Regulations enacted and issued under the authorization of the State Council are "hard law"; other enactments of the CSRC are "soft law."[8] The CSRC's soft law is nevertheless also enforceable in practice, since the CSRC may take actions against companies – such as preventing them from listing – if they fail to follow soft law directives.

27. The desire to improve Chinese companies' access to foreign capital markets has driven the CSRC to improve regulation of the securities markets and to develop cross-border regulatory cooperation mechanisms. As the CSRC stated in its 2010 Annual Report, "Overseas listing provides an important channel for China to attract foreign investment. The CSRC will continue to encourage qualified domestic companies to go public abroad through the implementation of *Several Opinions of the State Council on Further Utilizing Foreign Capital*. The CSRC urges the revision of laws and regulations relevant to overseas listing to

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[7] China Securities Regulatory Commission Annual Report (2010), at 3.

[8] Li Xiaoning, A Comparative Study of Shareholders' Derivative Actions: England, the United States, Germany and China 251 (2007).

improve the ongoing regulatory systems and cross-border regulatory cooperation mechanisms for domestic companies listed overseas, and encourages those companies to build platforms for going global and conduct cross-border investment, mergers and acquisitions so as to optimize resource allocation for better international competitiveness." CSRC 2010 Annual Report at 53-54.

28. In 2002 the CSRC announced a program to allow foreign institutional investors to deal in all categories of PRC shares; the CSRC announced a further revision of these rules with the aim being to encourage "foreign institutions to make medium- and long-term investments in China's capital markets." In 2005, China made significant reforms to its Company Law and Securities Law. The 2005 amendments made substantial changes to China's securities law. Subsequent developments, have also contributed to an improved securities environment, although some problems continue to persist.

29. In attempting to enhance its capacity to perform its enforcement role, the CSRC has sought international linkages for more than a decade in order to learn from more experienced regulators and to share information about developments in global efforts to increase the reach of new regimes for financial controls. As early as January 2002, the CSRC signed a Memorandum of Cooperation with the United States Commodity Futures Trading Commission ("CFTC"), which among other things provided for the CSRC to get technical assistance from the CFTC about enforcement.[9] Subsequently, there have been exchanges of delegations, training missions, additional agreements, and discussions about regulatory coordination.[10]

30. Similarly, the SEC signed a cooperation agreement with the CSRC in 1994. Over the almost two decades since then, there have been regular exchanges, additional agreements, and further regulatory cooperation. These include:

    - Memorandum of Understanding Regarding Cooperation, Consultation and the Provision of Technical Assistance, April 28,1994 (Beijing);

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[9] Memorandum of Understanding between the United States Commodity Futures Trading Commission and the China Securities Regulatory Commission regarding Futures Regulatory Cooperation, http://www.cftc.gov/ucm/groups/public/@internationalaffairs/documents/file/ccsrc02.pdf.

[10] As of March 15, 2012, the CSRC website lists 51 cooperative agreements with foreign regulatory authorities: http://www.csrc.gov.cn/pub/csrc_en/affairs/Cooperation/201203/t20120315_207208.htm.

- Terms of Reference for Cooperation and Collaboration. May 2, 2006 (Washington, D.C.);
- Sino-U.S. Symposium on Audit Oversight, Beijing, July 11-12, 2011 (In attendance were officials from the SEC; Public Company Accounting Oversight Board ("PCAOB"); CSRC, and Chinese Ministry of Finance ("MOF")).

31. As then SEC Chairman Christopher Cox noted in May 2006, upon the signing of the Terms of Reference, "We are also mindful that regulatory progress must be coupled with strong, consistent enforcement and channels for international cooperation. I am pleased that today we are memorializing the strengthening of cooperation and collaboration between the SEC and the CSRC through the formalization of a dialogue between our Commissions."[11]

32. The new dialogue, which continues to this day, has three primary objectives:
    a. to identify and discuss securities markets regulatory developments of common interest, particularly those relevant to reporting requirements for public companies listed in one another's markets;
    b. *to improve cooperation and the exchange of information in cross-border securities enforcement matters;* and
    c. to continue and expand upon the existing program of training and technical assistance provided by the SEC to the CSRC. (emphasis supplied)[12]

33. The CSRC has continued to enhance communication and cooperation with its overseas counterparts and other international organizations such as the International Organization of Securities Commissions ("IOSCO"). By mid-2011, the CSRC had signed 51 bilateral Memoranda of Understanding ("MOUs") with securities and futures regulatory authorities in various countries and regions.[13] These MOUs contribute to the sharing of supervisory information, provide assistance on cross border investigations, and facilitate staff exchanges and cooperation on research. In June 2006, Mr. Shang Fulin, Chairman of the CSRC, was elected as the vice-chairman of the Executive Committee of IOSCO) an association of organizations that regulate the world's securities and futures markets. Its members are typically the Securities Commission or the main financial regulator from each country. Mr.

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[11] http://www.sec.gov/news/press/2006/2006-63.htm.

[12] *Id*.

[13] *See* List of Bilateral MOUs signed between CSRC and its overseas Counterparts (As of the end of February 2012) March, 15, 2012, *supra* note 8.

Shang was re-elected in 2011 – a recognition of the high regard in which he was held – and served until being transferred later that year to head China's Banking Regulatory Commission.

34. And more generally, China has been committed to efforts to expand regulatory cooperation, especially with the U.S. For example, the Joint U.S.-China Fact Sheet from the Fourth U.S.-China Strategic Economic Dialogue, held at the U.S. Naval Academy in Annapolis, Maryland on June 17 and 18, 2008, included the following agenda items:

    - The United States has proposed new regulations that are consistent with the International Organization of Securities Commissions revised Code of Conduct for Credit Rating Agencies, to strengthen their procedures to protect the integrity of the ratings process, help ensure that investors and issuers are treated fairly, and safeguard confidential material information provided;
    - China will allow existing credit rating agency ("CRA") joint ventures to apply to qualify for a securities-related credit rating business without a reduction in their existing percentage foreign equity stake, following entry into force of new U.S. CRA regulations, at which time registered CRAs must comply fully. CSRC will consider these applications in accordance with its prudential regulations.[14]

35. When a newly-created U.S.-China Strategic and Economic Dialogue was established by President Obama and Chinese President Hu in 2009, it emphasized high-level sovereign-to-sovereign contacts and exchanges in the development of relations between the two countries. Both nations announced they would "welcome continued dialogue between the bilateral competent authorities on the oversight of accounting firms providing audit services for public companies in the two countries based on mutual respect for sovereignty and laws."[15]

36. In 2011, U.S. Treasury Department and Chinese regulators "welcome[d] continued dialogue between the bilateral competent authorities on the oversight of accounting firms providing audit services for public companies in the two countries."[16]

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[14] http://www.treasury.gov/initiatives/Documents/sedjointfactsheet.pdf.

[15] U.S. Dep't of Treasury, Joint Strategic and Economic Dialogue Fact Sheet (Jul. 28, 2009), http://www.treasury.gov/press-center/press-releases/pages/tg240.aspx.

[16] Joint Press Release, Third Meeting of the U.S.-China Strategic & Economic Dialogue (May 10, 2011), http://www.treasury.gov/press-center/press-releases/Pages/tg1170.aspx.

PRC Sensitivity about Release of Information

37. The PRC has had a longstanding interest in protecting sensitive information. The Provisional Regulation on Protecting State Secrets was one of the first pieces of legislation issued in the PRC after its formation. In the PRC, there is a huge body of what are classified as "state secrets." Under Chinese law, these are rather loosely defined as matters concerning "national economic and social development." Article 9 of the State Secrets Law; *see also* Tang Decl. at ¶¶16 & 33. These matters relating to "national economic and social development" are apart from and in addition to the usual inclusion of political, military and diplomatic matters and decisions.

38. According to both the letter and spirit of this legislation, matters relating to the PRC economy, including such matters as filings with regulatory agencies, commercial records, and even normal social and economic statistics are routinely labeled as "state secrets." *See* Tang Decl. at ¶16 & 33. China's treatment of economic and commercial information as an element of its national security is, in part, a reflection of the fact that many large China companies are state-owned enterprises. With such a high level of State involvement in industry, it is only reasonable that far more information is deemed to be sensitive to the State.

39. Moreover, in the PRC, the determination of what constitutes a state secret is a governmental function. The State Secrets Bureau is empowered to determine what constitutes a state secret and may make broad determinations. *See* State Secrets Law at Art. 11. This determination is not the purview of citizens or companies.

PRC Concerns about Sovereignty

40. The "Hundred Years of Humiliation" ushered in by the Opium Wars and Western exploitation of Chinese military weakness in the 19th century, as well as civil war, Japanese occupation and atrocities, and the subsequent revolutions during the 20th century, have engendered an extreme sensitivity toward any foreign intrusion in modern China. Such events as the acquisition of Hong Kong by Western powers and the loss of three eastern provinces of Manchuria (known as "Manchukuo") to Japan deepened this sensitivity. Defending China by controlling foreign access to Chinese territory is a remnant of China's perceptions of its own comparative weakness and inability to rebuff foreign incursions not only before 1949, but throughout the Cold War and various confrontations before China's more recent rise. For this reason, along with the historical reasons set forth above, unilateral demands by foreign governments are viewed as an affront to China sovereignty.

41. The PRC prefers settlement of international issues with foreign governments through negotiation, mediation, and conciliation because it maintains respect for the PRC as a

sovereign nation. Respect for the PRC as a sovereign government, particularly by other sovereign powers, is an important value of the China government because of the historical challenges to China's sovereignty. Due to the size of the Chinese government, the various governmental offices that may be involved, and the importance China attaches to issues of sovereignty, negotiations can be time-intensive endeavors.

42. China aspires to increase its standing in the international community and continues to seek opportunities to work cooperatively with other countries, to create effective cross-border enforcement, and to take part in and strengthen the global marketplace.

The CSRC's Position on Providing Information to Foreign Regulators

43. In light of China's history and prior experience with international and foreign law, and maintaining the strong commitment to governmental control of official information, the CSRC has developed a regulatory regime which reflects those important national priorities. For example, in the context of PCAOB inspections, the CSRC has conditioned inspection of firms in China on general principles of successful cross-border cooperation, including, but not limited to:
    a. Equality and reciprocity;
    b. Observing laws in both jurisdictions, and being to the common interests [sic];
    c. Facilitating cross-border financial activities rather than creating obstacles;
    d. respecting the consensus already reached between regulators instead of resorting to a unilateral departure from existing cooperative framework.[17]

44. As a result, the CSRC's rules and practices are designed to require the transmission of any information between PRC companies or individuals involved in them and foreign regulators solely through governmental channels. Going outside of those channels not only violates a panoply of Chinese legal and regulatory enactments, *see, e.g.*, Regulation 29, the State Secret Law, the Criminal Law, the Securities Law, the CPA Law, the Archives Law, and the China Certified Public Accountants Audit Rules No. 5101 on Service Quality Control; *see also* Tang Declaration at ¶¶19-50, but it also breaches longstanding political and cultural norms which may operate even more powerfully to constrain the behavior of Chinese persons.

45. In connection with this case, the CSRC sent a letter to DTTC, "Concerning Providing Audit Archives Overseas of Certain CPA Firms," dated October 11, 2011. The text of this letter reiterated the long-held position of the CSRC with respect to these issues:

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[17] *See* Letter of CSRC to PCAOB, dated January 22, 2009, RE: PCAOB Rulemaking Docket Matter No. 027.

> In reply to a letter dated October 8, 2011 regarding Longtop Group, the CSRC – after deliberating and discussing with the Ministry of Finance – ordered:
>
> In providing audit working paper and other archive materials overseas, CPA firms shall comply with the Securities Law of the PRC, the Law of the PRC on Certified Public Accountants, the Law of the PRC on Guarding State Secrets, the Archives Law of the PRC and other relevant laws, regulations and related provisions, and shall follow the applicable legal procedures; otherwise they shall assume legal liabilities according to law.
>
> Overseas securities regulatory agency [sic] who seeks the relevant audit archives and other documents in fulfilling its legal responsibilities shall work together and consult [with the Chinese regulatory agency] to find a solution through the co-operative regulation mechanism with the Chinese regulatory agency.
>
> CPA firms must comply with the relevant Chinese laws regulations and related provisions and properly deal with the relevant issues; those who provide audit archives and other documents overseas without authorization and in violation of the law shall be subject to legal liabilities.

From the foregoing, it should be abundantly clear that the Chinese government and securities regulatory authorities have taken the position that direct production of audit workpapers to foreign governments without approval of the China government would be a violation of Chinese laws.

46. While the PRC government has begun to increase the transparency of its regulatory system, partly in response to requirements of China's accession to the WTO, the vast majority of administrative guidance provided by Chinese regulators to regulated entities is still largely unwritten or "internal" (in Chinese "neibu"), unlike in the U.S. The use of "neibu" guidance in no way undermines the authoritative nature of the guidance, and Chinese citizens and companies must follow "neibu" guidance just as with written law. This practice is employed for several reasons – it preserves the flexibility of administrative action, it avoids possible embarrassment should higher-level officials disapprove of the guidance or should the official line change, and it allows disparate treatment of similarly situated entities. The decision to commit this guidance not only to a written document but also to a letter which must have been expected to be transmitted overseas bespeaks the policy importance the CSRC attaches

to this issue. Moreover, having taken such a step, the CSRC clearly intends to make it very clear to the regulated entity that it intends this policy to be legally binding.[18]

The Declaration of Professor Tang Xin

47. I am personally well acquainted with Professor Tang Xin. We were colleagues in the Law Faculty at Tsinghua University during the Spring Term, 2006, while I taught there as Fulbright Distinguished Senior Lecturer on Law. We subsequently joined a panel at Oxford University on "Recent Developments in Chinese Law" in 2007, where I presented a paper on corporate governance in China and Professor Tang commented on my paper. The panel presentations were later edited for a special issue of the *China Quarterly* and also published as a book. We share interests in corporate law, securities regulation, corporate finance, and corporate governance – subjects which both of us regularly teach and research. I believe that Professor Tang, as a member of a leading Chinese university law faculty and a respected scholar and author, is an expert with respect to the matter upon which he has rendered his opinions in this case.

48. I have examined the statutes, regulations and cases Professor Tang cites in his declaration and have reviewed the opinions he has presented about them with respect to their content and their interpretation as a matter of Chinese law. Based on that review and my own prior knowledge of the Chinese legal system, I agree with the conclusions he has drawn and the opinions he has rendered.

China and The Hague Service Convention

49. As discussed above, China has made great strides in building a modern legal system over the past three decades. Among those accomplishments is the creation of a system of civil process to accommodate China's increasing global influence, including the collection of evidence in China relating to foreign proceedings.

50. Both the People's Republic of China and the United States have signed the Hague Service Convention, and the Hague Service Convention entered into force between the U.S. and

[18] *See* 1 James M. Zimmerman, China Law Deskbook: A Legal Guide for Foreign-invested Enterprises, 67 (3d ed. 2010).

China in 1991.[19] Therefore, service on a Chinese company must fully comply with this Convention. Service under the Hague Service Convention is effected through the designated Chinese Central Authority in Beijing, which is the Bureau of International Judicial Assistance, Ministry of Justice of the People's Republic of China.

51. In 1992, to help promote effective implementation of the Convention by the judiciary, and by Chinese diplomatic and consular missions abroad, the Supreme People's Court, Ministry of Foreign Affairs and Ministry of Justice jointly issued two documents: (i) the Circular on the Relevant Procedures to Implement the Convention on Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters;[20] and (ii) the Measures on the Implementation of the Hague Service Convention.[21] The Circular specified the competent authorities and the procedures for the service of documents through diplomatic channels and judicial channels, respectively. The Measures contained specifications, in particular, on the time limitation for service, as well as rules for translations and communication of documents. Since Chinese national laws do not contain any special procedural rules for international judicial assistance, the above-mentioned notices issued by the Supreme People's Court help the courts to obtain proper information on the status of treaties that China has concluded with foreign countries. The notices also give binding legal guidance for the uniform implementation of the Hague Service Convention by domestic courts.[22]

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[19] *See* Status Table: Convention of November 15, 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Hague Conference on Private International Law (Hague Service Convention), available at http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=41 (last visited Feb. 12, 2012).

On March 2, 1991, at the Seventh National People's Congress Standing Committee meeting, the People's Republic of China decided to approve China's accession to the Hague Service Convention. 20 U.S.T. 361, T.I.A.S. 6638; 28 U.S.C.A. (Appendix following Rule 4 Fed. R. Civ. P.); 16 I.L.M. 1339 (1977).

[20] Ministry of Justice, Supreme People's Court, Ministry of Foreign Affairs, Circular on the Relevant Procedures to Implement the Convention on Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters, promulgated March 4, 1992. (Exhibit B).

[21] Ministry of Justice, Supreme People's Court, Ministry of Foreign Affairs, Measures on the Implementation of the Convention on Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters, promulgated September 19, 1992. (Exhibit C).

[22] H. Xue and Q. Jin, *International Treaties in the Chinese Domestic Legal System*, Chinese J. Int'l L, Vol. 8 (2): 299-322 (2009).

52. The People's Republic of China in Articles 260 and 261 of its Civil Procedure Law has detailed the sole means for foreign litigants to obtain international judicial assistance in China.[23] Article 261 states that any request for judicial assistance "shall be conducted through channels stipulated in the international treaties concluded or acceded to by the People's Republic of China" or through diplomatic channels. The Hague Service Convention is precisely the international treaty contemplated by Article 261 to which China has acceded with the intention of channeling all requests for judicial assistance through the mechanism provided by the treaty and China's implementing legislation in compliance with the Hague Service Convention.

53. In acceding to the Hague Service Convention, China took a limited reservation with regard to service of process by mail, further indicating its determination to control the intrusion of foreign legal process on Chinese judicial sovereignty. Indeed, according to the U.S. State Department's website, "service of process by mail should NOT be used in China." *See* ¶56 *infra*. Service beyond simple notice by mail is an essential component to China's willingness to countenance foreign access to its domestic civil process which would otherwise be regarded as an affront to Chinese sovereignty. As noted above, China is not alone among civil law jurisdictions in imposing such requirements.

54. The U.S. approach to the extraterritorial service of process in civil litigation differs from that of many foreign nations. In many civil law jurisdictions, such as China, the service of process is regarded as a "judicial" or "public" act that may not be performed by private persons.[24] To that end, civil law jurisdictions generally regard service of process in litigation as a sovereign act that may be performed in their territory only by the state's own officials and in accordance with its own laws. In many civil law countries, service of process must be effected by an official of the local court, or by a specially designated official subject to the court's control.[25]

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[23] PRC Civil Procedure Law, arts. 260 & 261 (Exhibit D).

[24] For example, in Switzerland, Swiss government officials must serve judicial documents on persons residing in Switzerland. The Swiss Criminal Code, § 271, forbids the service of process within Switzerland by anyone other than Swiss government officials. G. Born, International Civil Litigation in United States Courts: Commentary & Materials, 775-776 (3d ed. 1996).

[25] *See* Tatyana Gidirimski, "Service of United States Process in Russia Under Rule 4(f) of the Federal Rules of Civil Procedure," 10 Pac. Rim L. & Pol'y J. 691, 695 (2001):

55. Many foreign nations, particularly civil law states, object to orders from foreign courts to serve process within national territory upon local nationals, except where local officials have been involved.[26] These objections arise from several concerns. Originally, it stems from the territorial conception of national sovereignty; other sovereigns and their judicial institutions have no right to intrude on the territory of another sovereign. In addition, some civil law nations base their objections on the view that extraterritorial extension of judicial power could lead in particular cases to violations of national public policy in other areas.[27]

56. Service by mail, thus, is an unacceptable method by which to serve process on a defendant in the People's Republic of China, whose accession to the Hague Convention contains an express objection to mailed service. *See* U.S. Dep't of State, Country Specific U.S. State Department Circulars, Judicial Assistance - China, in International Business Litigation & Arbitration 2005, Litigation and Administrative Practice Course Handbook Series, PLI Order No. 5929, 721 PLI/Lit 1311, 1311, 1313 (Practising Law Institute ed., March 2005) ("DOS Circular") ("Service by registered mail should not be used in China, which notified the Hague Conference on Private International Law and the Government of the Netherlands (the depository) on accession, ratification or subsequently that it objects to service in accordance with Article 10, sub-paragraph (a) of the Convention, via postal channels.").[28]

> Compliance with foreign law, however, is often easier said than done. Difficulties arise because U.S. litigants are generally unaccustomed to the view held by civil law countries that service of process is a sovereign act that must be carried out by state officials according to state law.

[26] Switzerland, which criminalizes unauthorized service of foreign process, is an example of "an extreme view on the nature of sovereignty, whereby any act touching Switzerland, including mailing of service *into* Switzerland from the United States, is viewed by Switzerland as a judicial act of the United States *within* Switzerland, thereby invading Swiss sovereignty." Gary N. Horlick, "A Practical Guide to Service of United States Process Abroad," 14 Int'l Law. 637, at 641 (1980).

[27] *See e.g.*, Minehan, "The Public Policy Exception to the Enforcement of Foreign Judgments: Necessary or Nemesis?" 18 *Loy. L.A. Int'l & Comp. L.J.* 795 (1996).

[28] Service on a Chinese company by mail is not effective, as U.S. courts have held that formal objections to service by mail under Article 10(a) of the Convention are valid. *See DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir. 1981) (recognizing in a case involving a Japanese defendant that "[b]y virtue of the supremacy clause, the [Hague Service Convention] overrides state methods of serving process abroad that are objectionable to the nation in which the process is served"), *cert. denied*, 454 U.S. 1085 (1981); *Dr. Ing H.C. F. Porsche A.G. v.*

57. With its reservation, China has indicated the circumstances under which it will permit access by foreign litigants to its judicial system to serve process in China. It should not be construed as a prohibition of service of process upon litigants located in China; rather, it indicates that any requests should be properly tailored.

58. According to the Hague Service Convention and the relevant PRC laws and regulations, service of litigation documents upon Chinese entities should follow the procedures below:
    a. The documents should be transmitted to the Department of Judicial Assistance and Foreign Affairs of the PRC Ministry of Justice ("MOJ"); the MOJ will forward them to the PRC Supreme People's Court ("Supreme Court").
    b. The Supreme Court will forward the documents to the competent Higher People's court, which will then forward the documents to the competent Intermediate People's Court.
    c. The intermediate court finishes the service of process upon receipt of the documents. It then delivers proof of service to the Higher Court, which will forward the proof of service to the Supreme Court, and then the Supreme Court will forward it to the MOJ. The MOJ completes a certificate based on the proof of service and sends it to the applicant for the service according to the Hague Service Convention, stating that the documents have been served and specifying the method, place, and date of service and the person to whom the Documents were delivered.

    China regularly cooperates in accommodating foreign judicial assistance requests that are forwarded through the process it has established for implementing and complying with the Hague Service Convention domestically. Indeed, in its 2008 response to the Hague Service Convention's questionnaire to contracting states which are parties to the Hague Service Convention, China noted that in 2007 it had received 2,209 incoming requests for judicial assistance from 31 countries and had effected 74 percent of them within six months.[29]

59. China takes its treaty commitments seriously, and I believe China, especially now given its economic and legal progress in the last few years, would honor a properly tailored request for service of process through the Hague Service Convention, especially if the parties in the

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Superior Court, 123 Cal. App. 3d 755, 761 (1981) (rejecting attempt to serve a German defendant by mail where Germany had objected to Article 10(a) of the Convention).

[29] Hague Service Convention Questionnaire, Questions for Contracting States (2008), http://www.hcch.net/upload/wop/2008china14.pdf

relevant litigation worked together to ensure that the request moves through the pertinent process.

60. The progress which China has made in implementing the Hague Service Convention is an example of China's embrace of the Rule of Law.

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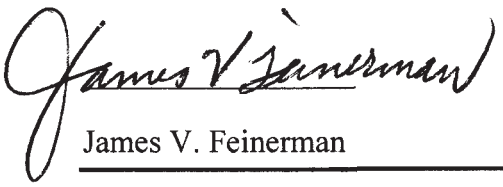
I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 11, 2012 in Washington, D.C.



James V. Feinerman

EXHIBITS

Exhibits to Declaration of James V. Feinerman

Exhibit A: Curriculum Vitae of James V. Feinerman.

Exhibit B: Ministry of Justice, Supreme People's Court, Ministry of Foreign Affairs, Circular on the Relevant Procedures to Implement the Convention on Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters, promulgated March 4, 1992.

Exhibit C: Ministry of Justice, Supreme People's Court, Ministry of Foreign Affairs, Measures on the Implementation of the Convention on Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters, promulgated September 19, 1992.

Exhibit D: People's Republic of China Civil Procedure Law, arts. 260 and 261.