I. INTRODUCTION

In the heated competition between companies doing business in China, protection of trade secrets is a daunting challenge. Economic espionage causes U.S. companies enormous losses in their global operations. China is well known for aggressively targeting U.S. technology and has one of the highest rates of infringement of intellectual property rights in the world. This reality was underscored when General Motors Corporation (GM) discovered that the Chinese automaker Chery Automobile Co. Ltd. was marketing the QQ, a nearly identical copy of GM's Chevrolet Spark. The only substantial difference between the cars was QQ's sticker price, which at $3,600 was a third less than Spark's. GM brought a lawsuit against Chery in a Shanghai court; soon thereafter the parties entered into a settlement. Just a little over two years later, Chery announced its plans to raise its annual output to one million vehicles by 2010. Most recently, Chery entered into a low-cost production venture with Chrysler Group, which includes the goal of exporting cars from China to the United States. Although it is unclear how much of an advantage Chery initially gained through misappropriation of trade secrets, this example is particularly troubling because Chery is partially owned by the local Chinese government. When the government participates in the theft of trade secrets, it undermines confidence in the integrity of the law.

How then can U.S. companies doing business in China avoid this kind of loss of trade or business secrets? China's "strong imitative capacity" makes protection of employee disclosures of trade secrets especially important. One significant way to stop former employees from divulging trade secrets is to require employees with access to confidential information to agree to be bound by specific "restrictive covenants" outlined in detailed employment agreements. Both covenants not to compete (or "noncompete agreements") and confidentiality provisions lay the groundwork for protection.

This essay builds on the article, "The Google Challenge": Enforcement of Noncompete and Trade Secret Agreements for Employees Working in China, and discusses new developments in Chinese laws for the protection of trade secrets, which are designed to address concerns of corporations doing business in
China. Part II details the requirements of the recently passed Labor Contract Law, which contains provisions aimed at restricting employees from working for competitors and divulging trade secrets. This section also discusses the ways in which a 2006 interpretation by the Supreme People's Court clarifies practical aspects of trade secret protection as well as recent developments on the calculation of damages. Despite all of the legal changes on the books to protect intellectual property rights, however, China is still lagging in enforcement of this legal regime. Although some enforcement difficulties may be due to differing perceptions about intellectual property rights and the lack of an effective judicial system, enforcement shortcomings are a very practical and immediate concern to companies doing business in China. Because it may be desirable for U.S. companies to avoid seeking remedies in the court system or administrative systems in China, Part III discusses the use of arbitration under the China International Economic and Trade Arbitration Commission (CIETAC) as an alternative. Features of CIETAC arbitrations, such as neutrality, flexibility, finality, confidentiality, and enforceability of judgments, make this an attractive alternative to litigation in China. Lastly, Part IV makes practical recommendations for protecting trade secrets and for drafting employment contracts with noncompete clauses and confidentiality provisions that protect companies from disclosures of trade secrets by former employees working in China. Companies that implement practices and policies consistent with current trends in Chinese law are more likely to be successful in protecting their trade secrets.

II. NEW DEVELOPMENTS IN CHINESE LAW GOVERNING NONCOMPETE AGREEMENTS AND THE PROTECTION OF TRADE SECRETS

Misappropriation of trade secrets by employees is, unfortunately, not an uncommon scenario in China. The most recent legal development that can aid in the protection of trade secrets against employee disclosure is the Labor Contract Law. For over a year, the Standing Committee of the National People's Congress (SCNPC) reviewed various drafts of the Chinese Labor Contract Law, including provisions that protect against employee disclosures of trade secrets. On June 29, 2007, the SCNPC passed the Labor Contract Law, which became effective January 1, 2008. The new Labor Contract Law supplements and updates China's 1995 Labor Law. Existing labor contracts executed under the Labor Law are grandfathered by the new law. Thus, employers will not need to require existing employees to sign new contracts.

All employees who commence employment on or after January 1, 2008 have the benefit of the new Labor Contract Law, which is designed to protect their legal rights and to promote harmonious and stable employment relationships. The Labor Contract Law requires the employment relationship to be based on a written employment contract. Employment contracts are divided into three types: fixed-term employment contracts, open-ended contracts, and contracts for the completion of a certain project. As a disincentive to employers who might be tempted to avoid written contracts, the law provides clear penalties. If an employer fails to secure a written labor contract with the employee for between one month and one year following the employee's first day of employment, the employer is required to pay double the employee's monthly salary for each month of employment without a written contract in place. Moreover, if an employer fails to secure an employment contract within the first year of employment, the employee is automatically deemed to have an open-ended employment contract. Similar to the 1995 Labor Law, the Labor Contract Law requires that employment contracts shall specify (1) the name, domicile, and legal representative or main person in charge of the employer; (2) the name, domicile, and number of the resident identification card or other valid identity document of the worker; (3) the term of the employment contract; (4) the job description and the place of work; (5) working hours, rest, and leave; (6) labor compensation; (7) social insurance; (8) labor protection, working conditions, and protection against hazards; and (9) other matters which laws and statutes require to be included in employment contracts.
Importantly, similar to the Labor Law, [FN30] the Labor Contract Law provides that the employer and worker may stipulate other matters, such as confidentiality of trade secrets and intellectual property. [FN31] If a worker has a confidentiality obligation, the worker and employer may agree on restrictive covenants in the contract. Such provisions obligate the employer to pay financial compensation to the worker on a monthly basis for the duration of the restrictive covenant following termination or ending of the employment contract. [FN32] If the worker violates the covenants, he is required to pay liquidated damages to the employer, as stipulated under the contract. [FN33] The Labor Contract Law specifically states that only senior management, senior technicians, and those bound to keep information confidential may be held to noncompetition agreements. [FN34] The terms of the noncompetes, geographic limits, and caps on liquidated damages are all subject to mutual agreement between the employer and employee. Importantly, however, the Labor Contract Law specifies that the maximum term of a noncompete clause is two years. [FN35] Overall, the Labor Contract Law is clear that an employee can be contractually prohibited from working for a competing employer that produces the same type of products or is engaged in the same type of business as the current employer as well as prohibited from establishing his own business to produce the same type of products and engaging in the same type of business as the current employer. [FN36]

Both the Labor Contract Law and the 1995 Labor Law are designed to help employers protect their trade secrets in China. This invariably prompts questions regarding the type of information that is considered to be a trade secret in China and the extent of protection for such information. The first formal legal protection for trade secrets took place when the State Council issued the Provisional Regulations on Technology Transfer in 1985. [FN37] The most significant development for the protection of trade secrets in China was the promulgation of the Law of the People’s Republic of China against Unfair Competition, which became effective in 1993. [FN38] Central to the law is the definition of “trade secret” as “technical information and operational information which is not known to the public, which is capable of bringing economic benefits to the owner of rights, which has practical applicability and which the owner of rights has taken measures to keep secret.” [FN39] The plain language of the law, however, was open to interpretation, which created uncertainty about enforcement.

Because the Unfair Competition Law allowed courts to exercise a high degree of subjectivity, the Supreme People’s Court issued the “Interpretation of Several Issues Relating to Trial of Civil Cases of Unfair Competition” in late 2006. [FN40] The Interpretation lists specific factors that courts should use in determining if the owner of a trade secret has undertaken confidentiality measures. These include (1) restricting disclosure to relevant people, (2) “locking” or encrypting confidential information, (3) marking the information “confidential,” (4) using passwords or codes on the confidential information, (5) entering into confidentiality agreements, (6) restricting access/visits to machines or sites with confidential information, and (7) other reasonable measures. [FN41] This checklist of considerations adds a great deal more specificity to the law and the kinds of measures courts will consider to determine if the employer has taken adequate measures to keep trade secrets confidential.

Importantly, the Interpretation also addresses what is or is not a trade secret under the Unfair Competition Law. It clearly states that trade secret information obtained through one’s own research and development or reverse engineering does not constitute infringing action under the Unfair Competition Law. [FN42] Under the Interpretation, customer lists are recognized as trade secrets, if they refer to special customer information that is not publicly available, such as names, addresses, deal details, and contact methods. [FN43] If, however, a customer conducts business with a company based on the trust of a certain individual employee and the customer voluntarily continues to do business with the former employee at his new employer, it would not constitute a violation of the Unfair Competition Law. [FN44] Moreover, the Interpretation also clarifies the burden of proof for a plaintiff claiming a violation of the Unfair Competition Law. To prove a violation, the plaintiff must show (1) that it complied with the statutory requirements (e.g., detailed
content and commercial value of the trade secret as well as specific confidentiality measures taken), (2) that the information used by the opposing party is identical or materially identical to its trade secret, and (3) that the opposing party obtained the information by improper means. [FN45]

Pursuant to the Unfair Competition Law, successful plaintiffs are entitled to money damages. [FN46] Effective February 1, 2007, however, the method for determining damages for unfair competition will be based on the method for calculating damages for infringing patent rights or trademark infringement, depending on the type of unfair competition. [FN47] Additionally, where any infringing act causes trade secrets to be known to the public, the damages shall be determined in accordance with the commercial value of the secrets, including such factors as research and development costs, benefits from implementing trade secrets, prospective interests, and the time during which competitive advantages can be maintained. [FN48] Overall, the Interpretation helps to clarify and create more detailed guidelines for the protection of trade secrets in China.

Despite these recent developments in Chinese law toward greater protection of trade secrets, China is viewed as having a poor intellectual property enforcement record. [FN49] In fact, in a 2006 Special Report, the U.S. Trade Representative (USTR) stated that, because China “does not *408 provide American copy-right materials, inventions, brands, and trade secrets the intellectual property protection and enforcement to which they are entitled,” China will remain on the Priority Watch List, subject to monitoring. [FN50] One major reason for poor enforcement cited by the USTR is China’s “chronic underutilization of deterrent criminal remedies.” [FN51] According to the USTR, instead of tough criminal penalties, China’s enforcement authorities rely on “toothless administrative enforcement, which primarily results in small fines, administrative injunctions and other minor inconveniences for infringers.” [FN52]

Attempting to address this criticism, China issued an action plan on intellectual property rights protection. In that plan, China undertakes to increase protection, including the revision of laws and regulations on the Unfair Competition Law and the formulation and issuance of the interpretation by the Supreme People's Court on Issues Concerning Application of Law in Dealing with Civil Cases of Unfair Competition. [FN53] Because self-innovation and trained talent, along with reforms in science and education, are prominent aspects of China's most recent Five-Year Guidelines, [FN54] it would behoove China to continue to increase the protection of trade secrets to protect its own industries as well as to allay concerns of U.S. investors.

III. ARBITRATION AS AN ALTERNATIVE: CIETAC

There are many considerations in deciding the best way to enforce an employment contract or other agreement related to the protection of trade secrets. In any jurisdiction, a key consideration is enforceability of the resulting judgment. In China, both foreign civil judgments and judgments *409 by domestic courts may be difficult to enforce. [FN55] An alternative is to agree to arbitrate any disputes using the CIETAC, the main international arbitration body in China. [FN56] There are many reasons U.S. companies may favor CIETAC arbitration over litigation in China. Some of those reasons include neutrality, flexibility, finality, confidentiality, and enforceability of judgments.

In 2005, CIETAC amended its rules, making it an even more attractive alternative for dispute resolution. [FN57] The jurisdiction of CIETAC extends to cases involving international or foreign-related disputes; disputes related to Hong Kong, Taiwan, or Macao; and domestic disputes. [FN58] An important feature of CIETAC arbitration is the ability of the parties to agree to the number of arbitrators—typically one or three—and to select the arbitrator(s) from a “Panel of Arbitrators” provided by CIETAC. [FN59] Arbitrators are charged with the duty of independence from the parties and are required to disclose in writing any facts or circumstances likely to give rise to justifiable doubts as to their impartiality or independence. [FN60] The
parties may also select the place of the arbitration, including locations outside of China, [FN61] and the lan-
guage of the arbitration. [FN62] Another key feature is confidentiality of the proceedings, which are held in camera, unless the parties request an open hearing. [FN63] If the parties are amenable to an open hearing, then the tribunal can grant this request. However, most matters are in camera. [FN64]

*410 At the arbitration, the parties, their representatives, witnesses, interpreters, arbitrators, experts, appraisers, and CIETAC staff members will appear and will be bound not to disclose to outsiders any substantive or procedural matters of the case. [FN65] In the hearing, the parties have the burden of proving the facts relied upon to support their claims, defenses, and counterclaims. [FN66] One somewhat unusual feature, however, is that the arbitral tribunal may, on its own initiative, undertake investigations and collect evidence it considers necessary. [FN67] If it does so, the arbitral tribunal is required to notify promptly the parties and allow them to be present if the parties so desire. [FN68]

The arbitral tribunal is required to render its award within six months from the date the tribunal is formed, with the possibility of extensions if truly justified. [FN69] The awards are to include a statement of the claims, the facts of the dispute, the reasons on which the award is based, the result of the award, the allocation of arbitration costs, and the date and place at which the award is made. [FN70] The arbitral award is final and binding on the parties; neither party may bring an action before a court of law or make a request to any organization for revising the award. [FN71] This lack of judicial or other review of the awards removes the element of uncertainty from the process. Moreover, the parties must fully comply with the terms of the award within the time specified in the award. If one party fails to comply, the other party may apply to a Chinese court (the Intermediate People's Court) for enforcement pursuant to China's Civil Procedure Law or may apply to a competent court for enforcement pursuant to the 1958 United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards or other international treaties that China has concluded or acceded to, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. [FN72] Because of the confidentiality *411 of many of the proceedings and lack of a public system to track arbitral decisions, it is difficult to evaluate the content of the awards. [FN73]

IV. BEST PRACTICES

Especially within China, where it may be difficult to bring an action for breach of contract and unfair competition, it is important for companies to implement prevention measures that are specific to Chinese operations so as to safeguard against disclosure. This is also important because violations may be perpetrated by elusive defendants who may be undercapitalized and can easily close a small business, move, and reopen elsewhere.

The following best-practices recommendations are designed to be consistent with Chinese statutory and case law to help corporations manage trade secret disclosure risk as well as to prepare for the potential of trade secret litigation in China. [FN74] The recommendations are divided into two general categories: drafting elements in employment contracts and actively protecting trade secrets in the workplace.

A. Drafting Key Elements in Noncompetition and Secrecy Agreements

As they would in any jurisdiction, companies must carefully draft non-competition and secrecy agreements for consistency with local and national law. First, the duration of the noncompetition agreement should be limited. Pursuant to the new Labor Contract Law, agreements entered into on or after January 1, 2008 may contain noncompete provisions with a maximum term of two years. [FN75] If possible, the duration should be shorter, limited to an amount of time that is just long enough to protect the employer against unfair competition. This is because the employer will want to proffer evidence that the duration is not an un-
due restraint on the employee's right to work. Second, the Labor Contract Law allows only senior management, senior technicians, and those bound to keep information confidential to be held to noncompetition agreements. [FN76] Third, an employer should limit the scope of the information covered by the noncompetition agreement to those activities central to the employer's business. [FN77] The noncompetition clause should allow the employee to work elsewhere as long as the employee is not in direct competition with the employer and does not divulge any legitimate business secrets. Corporations should carefully identify employees who may have access to confidential information; if the employee has no access, then Chinese courts are not likely to uphold a noncompete agreement. Companies should also consult local law in the province, as it may be more restrictive than the Labor Contract Law. [FN78] Additionally, the confidentiality agreement signed by the employee should address the employer's position on business secrets or knowhow developed by the employee. Employers are well advised to explicitly state that trade secrets developed in the course of an employee's employment belong to the employer, thereby avoiding costly confusion on this issue. Fourth, the general rule is that the geographic scope of the noncompete agreement should be no broader than is necessary to protect legitimate business interests. Fifth, employers should compensate employees in exchange for the noncompete agreement. [FN79] Although it is unclear how much compensation the employer owes the employee as a general matter, the agreement should specify the amount and method appropriate for the industry. Lastly, the contract may contain, and employers will want to include, liquidated damages provisions that will be triggered if trade secrets are divulged. [FN80]

B. Actively Protecting Trade Secrets in the Workplace

In addition to careful drafting, companies should take reasonable steps to protect their business secrets. The law may not be enforced if a company does not endeavor to protect itself. The first and most fundamental duty of a company is to limit access to the trade secret information. [FN81] Once access is so limited, companies should require only those employees with actual access to trade secret information to sign agreements with confidentiality provisions. The employee signing the agreement should also understand exactly what is considered to be a business secret. Companies should conduct regular reviews of employees with access to business secrets and should remind these employees of their obligations to keep the information strictly confidential. Physical access to documents and equipment (such as computers) containing trade secret information should also be restricted. [FN82] Files and other places containing trade secrets should be labeled (e.g., “Classified” or “Restricted”) to prevent inadvertent disclosures. [FN83] Moreover, companies should instruct employees to restrict communication of proprietary information over e-mail. To the extent that employees need to transmit confidential information electronically, they should take security measures, such as password protection and user identification information. Of course, only information that is truly a legitimate business secret should be restricted.

Second, to be protected in China, the company must ensure that the information claimed to be a trade secret has economic value and practical applicability. [FN84] If a company claims unfair competition through infringement on business secrets, it must prove that the information at issue has economic value. Also, in accordance with Chinese law, the information claimed to be a business secret must have practical usefulness. [FN85] The bottom line is that the business secret must not be just a theoretical idea.

Third, pursuant to Chinese law, companies must take steps to protect the business secret. [FN86] At the most basic level, companies should adopt and consistently enforce written policies on confidential information. They should require each employee to sign a copy of the policy and a statement acknowledging that the employee understands the policy and will comply. [FN87] The policy should clearly define what information constitutes a business secret and how such information should be handled by employees. By training all employees and making sure that they have access to and understand the policies, there is a better chance that a court will uphold the policies as valid. Additionally, companies should keep records of employees in attend-
ance at all meetings in which business secrets are discussed or confidential information is distributed in electronic or hard-copy form. Such records could later be used at trial as proof of access to information that is allegedly deemed to be misappropriated.

Fourth, once an employee resigns or gives notice, that employee's access to business secrets should be limited or removed altogether. The employer should collect from the employee all company-owned equipment, especially computers and other electronic equipment that might contain confidential information. The employer should also conduct exit interviews of all employees bound to noncompete agreements, reminding such employees of their ongoing obligation to keep the information secret.

Fifth, after a key employee leaves, the employer may want to follow up on where he or she goes, to protect against breaches of the noncompete agreement as well as the development of any competitive practices that infringe on business secrets to which the former employee was privy. The former employer then can notify the new employer of ongoing contractual obligations of the former employee. Any such notification should have confirmation of delivery/receipt to put the new employer on notice that the employee had access to trade secrets and the liability that can result from disclosure. This is an important measure because, under Chinese law, a third party who obtains or uses another's business secret, when it is aware (or ought to be aware) that the use infringes on the other's methods, can be held liable. [FN87]

Lastly, the importance of undertaking a thorough investigation before raising allegations of misappropriation of trade secrets should not be underestimated. Unlike litigation in the United States, the legal system in China does not provide for a traditional discovery process, so it can be very difficult, if not impossible, to obtain evidence once a lawsuit is filed. [FN88]

Although there is no ironclad way to prevent the misappropriation of trade secrets in China, all of these best practice recommendations can help stem the unlawful flow of proprietary information. Ultimately, the more preemptive measures that are taken, the more likely it will be that a court or other tribunal will find in favor of the plaintiff/employer.

This article is written from the perspective of recommending best practices for U.S. companies doing business in China. Nevertheless, it is important to note that Chinese firms similarly have a vested interest in the protection of their trade secrets. As Chinese companies invest more and more in research and development, and in strategies to attract and retain top talent, they will be well served by a network of effective laws to prevent unfair competition.

V. CONCLUSION

Economic espionage, including theft of trade secrets, is indeed a kind of warfare. Because offensive action and active deterrence are much more desirable than litigation, this article encourages employers to take action early to protect their knowhow before there is an infringement issue. It is important to ensure that contractual provisions for employees in China are consistent with the law and that effective prevention measures are in place. If so, Chinese courts and arbitrators are more likely to protect what a company claims are its trade secrets.

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McKenzie, Hong Kong.


[FN11]. It is interesting to note, however, that GM has been criticized for not seeking patent protection in China for the Spark car, instead relying on the loss of its trade secrets as a remedy. Secrets of Success in China, MANAGING INTELL. PROP., Oct. 2004, at 40.

[FN12]. The terms “trade secrets,” “business secrets,” and “knowhow” are used interchangeably herein.


China is no exception to the difficult problem of enforcing noncompete agreements in a global context. For example, the issues raised by the enforceability of noncompete agreements in the United States pertaining to a former employee competing in China are illustrated by the litigation between Microsoft Corporation, its former employee Dr. Kai-Fu Lee, and Google, Inc. in 2005. For discussion and analysis of this litigation, see Pagnattaro, supra note 15, at 606-14.


[FN19] DANIEL C.K. CHOW, A PRIMER ON FOREIGN INVESTMENT ENTERPRISES AND PROTECTION OF INTELLECTUAL PROPERTY IN CHINA 188-89 (2002) (describing a typical scenario when an employee leaves one company to work for a competitor and brings along information acquired at the former place of employment).


[FN24] Labor Contract Law, supra note 20, art. 1.

[FN25] Id. art. 10.

[FN26] Id. art. 12.

[FN27] Id. art. 82.
[FN28]. Id. art. 14.

[FN29]. Id. art. 17.

[FN30]. Labor Law, supra note 22, art. 22.

[FN31]. Labor Contract Law, supra note 20, art. 23.

[FN32]. Id.

[FN33]. Id. arts. 23, 25 & 90.

[FN34]. Id. art. 24.

[FN35]. Id.

[FN36]. Id.


[FN39]. Id. art. 10. This definition also is in the rules promulgated in accordance with the Unfair Competition Law. See Several Regulations Concerning Prohibition of Acts of Infringement of Business Secrets (promulgated by the St. Admin. of Indus. & Commerce, Nov. 23, 1995, effective Nov. 23, 1995), art. 2, in TRADE SECRETS THROUGHOUT THE WORLD app. 8B (Melvin F. Jager ed., vol. 1 2005) (P.R.C.) [hereinafter Regulations Concerning Infringement].


[FN41]. Id. art. 11.

[FN42]. Id. art. 12. “Reverse engineering” refers to relevant technical information on any product acquired by dismantling, surveying, mapping, and analyzing products obtained through open channels. Id.

[FN43]. Id. art. 13.

[FN44]. Id.

[FN45]. Id. art. 14.

[FN46]. Regulations Concerning Infringement, supra note 39, at art. 20.

[FN47]. Interpretation, supra note 40, art. 17.

[FN49]. U.S. TRADE REP., 2006 REPORT TO CONGRESS ON CHINA’S WTO COMPLIANCE 70
[hereinafter USTR 2006 COMPLIANCE REPORT].

[FN50]. U.S. TRADE REP., 2006 “SPECIAL 301” REPORT: EXECUTIVE SUMMARY 16-20,

[FN51]. USTR 2006 COMPLIANCE REPORT, supra note 49, at 70.

[FN52]. Id.


[FN58]. Id. art. 3.

[FN59]. Id. arts. 20 & 21.

[FN60]. Id. arts. 19 & 25.

[FN61]. Id. art. 31.

[FN62]. Id. art. 67. Absent an agreement on the arbitration language, the Chinese language is the official language of the proceedings. Id.

[FN63]. Id. art. 33.

[FN64]. Attorneys practicing in China before CIETAC confirmed that open hearings are rare. Interview with Peter Thorp and Mile Zhao, Attorneys, Allen & Overy, in Beijing, PRC (Mar. 13, 2007).

[FN65]. Arbitration Rules, supra note 57, art. 33.

[FN66]. Id. art. 36.

[FN67]. Id. art. 37.

[FN68]. Id.

[FN69]. Id. art. 42.

[FN70]. Id. art. 43(2).

[FN71]. Id. art. 43(8).

[FN72]. Id. art. 43.


[FN74]. These recommendations are a revised and updated version of those in Pagnattaro, supra note 15, at 632-37, reiterating the importance of the recommendations in that article and updating them with the recent developments in Chinese law.

[FN75]. Labor Contract Law, supra note 20, art. 24.

[FN76]. Id.

[FN77]. Id.


[FN79]. Labor Contract Law, supra note 20, art. 24.

[FN80]. Id. arts. 23, 25 & 90.

[FN81]. Id. art. 10.

[FN82]. Interpretation, supra note 40, art. 11.

[FN83]. Id.

[FN84]. Unfair Competition Law, supra note 38, art. 10.

[FN85]. Id.

[FN86]. Id.

[FN87]. Regulations Concerning Infringement, supra note 39, art. 3(4).

[FN88]. Secrets of Success in China, supra note 11, at 40.

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