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What Shanghai's Free Trade Zone Bodes For China

上海自贸区 你了解多少

China's Anti-Monopoly Law: Retrospect and Prospect on the Fifth Anniversary

中国反垄断立法五周年

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Celebrating the New Milestone of King & Wood Mallesons
庆祝金杜迎来新的里程碑

2013年11月1日是总部位于伦敦的国际律师事务所SJ Berwin正式加入金杜联盟的日子，联盟的目的是要建立一家根植于亚欧，深具国际影响并获得全球广泛专业认同，居于行业先导地位法律服务机构。

On 1st November, 2013, the firm officially launched the new combination with the European leading firm, SJ Berwin. The combination aims to establish a law firm with roots in Asia and Europe, have significant international influence, have professional recognition globally, and take a leading position in the industry.

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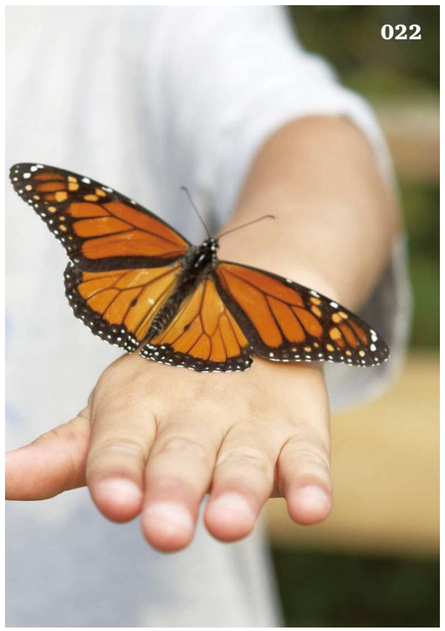

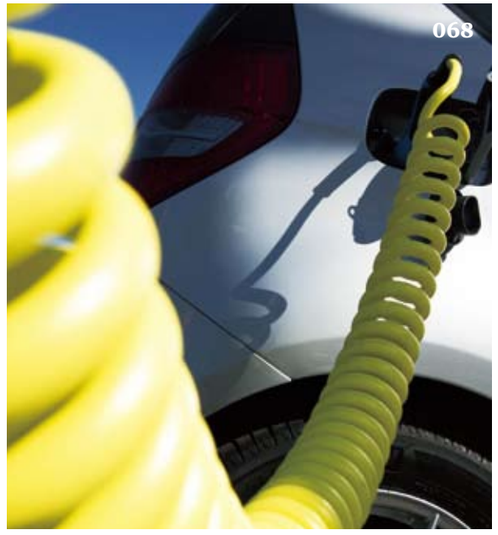

What Shanghai's Free Trade Zone Bodes For China

封面故事：上海自贸区 你了解多少

Streamlining Foreign Investment in the Shanghai Free Trade Zone

中国（上海）自由贸易试验区外商投资管理体制改革解析

By Xue Han, Dong Yuting and Li Moqian
作者：薛 瀚　董宇霆　李默谦

国务院于2013年9月27日批准并印发《中国（上海）自由贸易试验区总体方案》（以下称“《总体方案》”），其中确定了在上海自由贸易试验区（以下称“自贸区”）探索与国际接轨的外商投资管理制度，并提出了改革方向，包括加快政府职能转变由注重事先审批转为注重事中与事后监管、建立集中统一的市场监管综合执法体系以及探索并建立负面清单管理模式。

随后，全国人大与各级政府部门出台了相关规定，以提供政策保障，包括《全国人民代表大会常务委员会关于授权国务院在中国(上海)自由贸易试验区暂时调整有关法律规定的行政审批的决定》（相关暂停调整事项详见附件）、《关于支持中国（上海）自由贸易试验区建设的若干意见》、《中国（上海）自由贸易试验区管理办法》、《中国（上海）自由贸易试验区外商投资准入特别管理措施（负面清单）》、《中国（上海）自由贸易试验区外商投资项目备案管理办法》、《中国（上海）自由贸易试验区外商投资企业备案管理办法》等。

上述政策与方案的发布，对于推进与完善自贸区内乃至全国的外商投资管理体制有着巨大且积极的作用，比如（i）简化行政审批（备案）程序，实现一口受理、综合审批和高效运作的服务模式，从而提高了外商投资项目与设立企业的便利性与灵活性；以及（ii）突破部分现行的外商投资管理模式，将原来的审批制管理改革为实施负面清单管理，对负面清单之外的领域，按照内外资一致的原则，将外商投资项目由核准制改为备案制（国务院规定对国内投资项目保留核准的除外），拓展了外商投资领域的范畴。

同时，由于自贸区的创新监管模式尚处于探索起步阶段，相关政策主要为宏观性政策缺乏配套的实施细则（比如相关外汇管理的操作规程以及区内企业的人民币和外汇账户的管理规定）予以支撑。并且，中央目前出台的改革政策处于一个层次，上海市为加快推动改革而出台的政策属于另一个层次。相关政策之间的衔接与配套细则的出台，能否切实在外商投资管理体制上实现突破性的进展，并通过在区内设立项目公司的方式“辐射全国”，尚待进一步观察。

监管规则与流程的重要突破

在外商投资监管方面，自贸区部分突破了以往监管模式，实施了一些新的举措。下表整理了负面清单之外的自贸区外商投资企业设立及变更相关事项监管规则的重要突破：

Encouraging foreign investment is a key objective of the Shanghai Free Trade Zone. While the new rules apply initially only in the Free Trade Zone ("FTZ"), they provide an important glimpse into the possible future direction of PRC-wide investment rules.

On 27 September 2013, the State Council published the “General Scheme for the China (Shanghai) Pilot Free Trade Zone” (the “General Scheme”). The General Scheme aims to explore the feasibility of establishing an internationally compatible foreign investment management regime in the China (Shanghai) Pilot FTZ and guide the direction of future reform. Potential reform areas include shifting the government’s focus from pre-approval to in-process and post-supervision, establishing united, concentrated and comprehensive market supervision and law enforcement systems, and exploring and establishing the negative list management system.

The NPC and each level of government have promulgated relevant regulations to provide policy support.

These polices are designed to improve the foreign investment management system of the FTZ (and of China broadly). In particular, the policies aim to (i) streamline the administrative approval (filing) procedures and establish a “one stop shop” approval system, thus improve convenience and flexibility for foreign-invested projects and enterprises; and (ii) extend the field of foreign investment; reform the existing foreign investment approval management regime to a “negative list” regime (granting national treatment to the foreign investments not falling under the negative list); and shift the existing approval system to a filing system for foreign invested projects (with the exception of domestic investment projects specified by the State Council that remain subject to pre-approval).

Because the reforms are still in their early stages, the relevant policies are still largely macro policies without detailed implementation rules. In addition, the reform policies have been promulgated at two distinct levels – the central government level and the Shanghai government level. It remains to be seen whether detailed implementation rules will be promulgated; how the relevant policies will interlink with each other; and whether the scheme will allow project companies established in the FTZ to act as investment vehicles throughout China broadly.

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事 项	注册资本登记制度	企业设立与变更事项管理	“先照后证”登记制
自贸区外	实行注册资本实缴登记制。 工商部门登记公司注册资本及实收资本。相关法律法规针对最低注册资本、首次出资额及比例、货币出资比例、出资期限等有细化规定。	外商投资企业设立与变更事项需要取得商务、工商、税务、质检等多个部门的批准/许可；各机构办事流程不统一、办事地点分散，流程通常较繁琐（请见下文整理的流程对比表）。	一般要求企业先行取得前置审批/许可后，再行申领营业执照。 实践中，取得营业执照与取得前置审批有时可能面临孰先孰后的问题。例如当外国投资者拟设立一家主营业务为需经前置许可的经营活动的企业时，鉴于该境内企业尚未取得前置许可，工商机关不予办理营业执照；而未能取得营业执照，则该拟设立的公司尚不是法人实体，难以说服前置许可机关办理前置许可手续。
自贸区内	除法律、行政法规对公司注册资本实缴另有规定的外，其它公司试行注册资本认缴登记制。对于试行注册资本认缴登记制的公司，在新的营业执照中，“实缴资本”已不再作为一项登记事项 除法律、行政法规、国务院对特定行业注册资本最低限额另有规定的外，取消最低注册资本（有限责任公司最低注册资本3万元；一人有限责任公司最低注册资本10万元；股份有限公司最低注册资本500万元）要求；不再限制公司设立时全体股东（发起人）的首次出资额及比例；不再限制公司全体股东（发起人）的货币出资金额占注册资本的比例；不再规定公司股东（发起人）缴足出资的期限。	建立“一口受理”机制。自贸区工商部门会同税务、质监等部门和管委会建立外商投资项目核准（备案）以及企业设立（变更）“一表申报、一口受理”工作机制。 所谓“一表申报、一口受理”，是指：工商部门统一接收工商、试验区管委会、质量技监和税务部门的申请材料，通过部门间后台流转完成审批或备案流程，再由“一口受理”窗口统一向申请人发放各类审批结果文书或证照。	除法律、行政法规、国务院决定规定的企业登记前置许可事项外，在自贸区内试行“先照后证”登记制度。 自贸区内企业向工商部门申请登记、取得营业执照后即可从事一般生产经营活动；经营项目涉及企业登记前置许可事项的，在取得许可证或者批准文件后，向工商部门申领营业执照；申请从事其他许可经营项目的，应当在领取营业执照及许可证或者批准文件后，方可从事经营活动。
金杜评注	根据《中国（上海）自由贸易试验区管理办法》及自贸区目前出台的相关办事指南，原有的注册资本实缴到位、最低注册资本、首次出资额及比例、货币出资比例、出资期限等相关要求在自贸区内暂停执行，使得设立“一元钱”注册资本的公司成为可能，这无疑对降低企业投资门槛及提高投资灵活性有着巨大的意义。 值得注意的是，注册资本制的改革存在两项例外：（i）对法律、行政法规对公司注册资本实缴有明确规定的（如银行、保险公司等）的公司，仍实行注册资本实缴登记制；（ii）法律、行政法规、国务院决定对特定行业注册资本有最低限额规定的，公司注册登记时也会有最低注册资本的要求 但就目前看，取消实缴资本制度是否意味着可以以任何形式的资产对注册资本进行出资（如股权、实物及知识产权等），尚待具体的解释及办事规程出台以明确。 “一口受理”机制极大地简化了企业的设立与变更流程，省去了企业在各办事部门间辗转的过程，帮助投资者有效地管理其商业行为从构思到实施阶段的行政审批（备案）时间。 但目前各部门间职权如何衔接及材料的准备标准尚不明确，尤其是相关外汇操作规程尚未出台，易导致行政机关内部产生分歧而唯一对外的工商窗口可能难以代表其他部门处理问题。行政审批（备案）流程存在一定的不确定性，尚待具体办事细则的出台以进行明确。	“一口受理”机制极大地简化了企业的设立与变更流程，省去了企业在各办事部门间辗转的过程，帮助投资者有效地管理其商业行为从构思到实施阶段的行政审批（备案）时间。 但目前各部门间职权如何衔接及材料的准备标准尚不明确，尤其是相关外汇操作规程尚未出台，易导致行政机关内部产生分歧而唯一对外的工商窗口可能难以代表其他部门处理问题。行政审批（备案）流程存在一定的不确定性，尚待具体办事细则的出台以进行明确。	“先照后证”登记制的试行将帮助企业先获得主体资格，再凭营业执照申请营业资格，有效解决长期以来困扰企业的“先有鸡还是先有蛋”的问题。 值得注意的是，根据自贸区目前出台的办事指南与相关答疑，自贸区内的企业必须登记经营范围，即投资者的具体经营行为仅限于营业执照规定的生产经营活动范围。拟从事经营范围之外的经营活动的，仍需办理相关备案（审批）程序，涉及前置证照的须先取得该等证照。

Key changes to regulatory rules and procedures

On foreign investment regulation, the FTZ will implement some significant departures from the existing regulatory mode. The table below provides a summary of the key regulatory rules with respect to foreign-invested enterprises in FTZ (other than those under the negative list):

Issue	"One stop shop"for enterprise establishment and change	Simplified business licensing process
Outside FTZ	The establishment of, and changes to, foreign-invested companies requires the approval of the relevant authorities in charge of commerce, industry and commerce, taxation, quality supervision etc. The authorities are often physically scattered, and each has different, and often tedious, procedures to follow (see the table below for a comparison of procedures).	Generally speaking, enterprises are required to obtain pre-approval/permit, and then apply for a business license. In practice, enterprises may face practical issues regarding which of these authorizations they need to obtain first. For example, when a foreign investor intends to establish an enterprise (of the sort requiring pre-approval), since such domestic enterprise has not obtained pre-approval, the AIC will not issue a business license to the entity. On hand, since the investment entity has not obtained a business license, an entity cannot yet be regarded as a legal person, thus making it practically impossible to go through the procedures for pre-approval with the relevant authorities.
Inside FTZ	The AIC (of the FTZ) (together with the taxation, quality inspection, management commission and other relevant authorities) will establish a single application and “one stop shop” system of approval (filing) of foreign-invested projects and establishment and changes of enterprises. Under the “one stop shop” system, the AIC will accept all application materials addressed to the AIC, the management commission of the FTZ, and the authorities of quality, technology supervision and taxation. The approval and filing procedures will be completed through inter-department circulation, and then the AIC will issue to the applicant the various approval documents or certificates all together.	Unless otherwise specified, the registration system of “license first, permit second” will apply in FTZ. In the FTZ, an enterprise will be allowed to carry out its general production and operation activities after it has completed its company registration with the AIC and obtained a business license. Where the business of an enterprise is subject to pre-approval for enterprise registration, the enterprise must first obtain the permit or approval document and then apply for a business license with the AIC. An enterprise that applies to engage in other permitted businesses must first obtain the business license and permit/approval document before carrying out such operation activities.
KWM Comments	The "one stop shop"system greatly simplifies the procedure for establishment of, and change to, enterprises. The system avoids the need for applicants to run around between different authorities, and helps investors to effectively manage the timing of administrative approvals from conception to implementation. However, it is still unclear how the functions of different authorities will be inter-linked and what standards will apply to the preparation of materials (especially since the relevant operation guide on foreign exchange has not been promulgated). This is likely to result in internal disagreement between the administrative authorities and, as a result, it may be difficult for the AIC to deal with the issues on behalf of other authorities. There is uncertainty in the administrative approval (filing) procedure, which will need to be clarified by detailed published rules.	The trial of the“license first, permit second”registration system will allow enterprises to first obtain the legal entity status, and then apply for a business license. This will effectively solve the “chicken and egg” problem that has persistently bothered prospective enterprises. It is worth noting that, according to the operation guide and other official published materials, enterprises in the FTZ must register their business scope. The business scope is limited to the business activities set forth in the business license. If an enterprise proposes to engage in activities beyond its business scope, it must go through the relevant filing (approval) procedures, and if such activities are subject to pre-approval, it must obtain such pre-approval.

自贸区内外 外商投资企业设立一般审批（备案）流程对比

自贸区外	自贸区内
工商窗口：企业名称预核准； 发改委：根据需要出具开展前期工作意见的函； 规划窗口：建设用地选址预审意见； 国土部门：建设用地审查意见； 环保窗口：建设项目环评审批意见； 投资者：编制项目申请报告； 发改委：项目核准或初审转报； 商务局窗口：企业合同章程审批、领取批准证书； 行业主管部门：经营事项前置审批（如需）； 工商窗口：企业设立登记、领取营业执照； 后续相关证照（外汇、质监、税务、海关等）。	至自贸区管委会综合服务大厅或市工商局取得企业名称预先核准； 登陆中国上海门户网站 或 在自贸区综合服务大厅一口受理窗口提交申请； 工商部门统一接收，管委会在经商务、规划、土地、建设、环保等多个部门的授权后对申请材料予以统一备案（核准）； 至统一发证窗口领取营业执照、机构代码证、税务登记证等相关证照。

实行外商投资领域负面清单的监管模式

负面清单的监管原则

目前，《中国（上海）自由贸易试验区外商投资准入特别管理措施（负面清单）（2013年）》、《中国（上海）自由贸易试验区外商投资项目备案管理办法》、《中国（上海）自由贸易试验区外商投资企业备案管理办法》均已经公布，自贸区的外商投资负面清单制度已经初步建立，其监管的框架与原则见下表：

事 项	规 定
公布单位	自贸试验区外商投资准入特别管理措施（负面清单），由上海市政府公布。
清单构成	负面清单按照《国民经济行业分类及代码》（2011年版）分类编制，包括18个行业门类。S公共管理、社会保障和社会组织、T国际组织2个行业门类不适用负面清单。
监管原则	对负面清单之外的领域，将外商投资项目由核准制改为备案制（国务院规定对国内投资项目保留核准的除外）；将外商投资企业合同章程审批改为备案管理。
附加限制	除列明的外商投资准入特别管理措施，禁止（限制）外商投资国家以及中国缔结或者参加的国际条约规定禁止（限制）的产业，禁止外商投资危害国家安全和社会安全的项目，禁止从事损害社会公共利益的经营活动。
港澳台湾	香港特别行政区、澳门特别行政区、台湾地区投资者在自贸试验区内投资参照负面清单执行。内地与香港特别行政区、澳门特别行政区《关于建立更紧密经贸关系的安排》及其补充协议、《海峡两岸经济合作框架协议》及其后续《海峡两岸服务贸易协议》、我国签署的自贸协定中适用于自贸试验区并对符合条件的投资者有更优惠的开放措施的，按照相关协议或协定的规定执行。
调整情况	根据外商投资法律法规和自贸试验区发展需要，负面清单将适时进行调整。

自贸区项目备案的范围

另外，根据《中国（上海）自由贸易试验区外商投资项目备案管理办法》以及相关办事指南的规定，我们注意到，自贸区项目备案管理范围包括：自贸区外商投资准入特别管理措施（负面清单）之外的中外合资、中外合作、外商独资、外商投资合伙、外国投资者并购境内企业、外商投资企业增资等各类外商投资项目（国务院规定对国内投资项目保留核准的除外）。法律、法规另有规定的，从其规定。

Approval and filing procedures for establishing foreign-invested enterprises – comparison inside and outside FTZ

Outside FTZ	Inside FTZ
AIC: Pre-approval of enterprise name; Development and reform commission (the "DRC"): Opinions of preliminary work as needed; Planning authority: Opinions of pre-approval of construction land site; Land resources authority: Opinion of review of construction land; Environmental protection authority: Opinion of environmental impact assessment of construction project; Investor: Preparation of project application report; DRC: Approval or preliminary review and further submission of project; Commerce authority: Approval of contract and articles of association of enterprise, and issuance of approval certificate; Competent authority(ies) in charge of specific industry(ies): Pre-approval of restricted business (if any); AIC: Enterprise establishment registration, and issuance of business license; Subsequent relevant permits and certificates in respect of Foreign exchange, quality supervision, tax, customs etc.	Obtain pre-approval of enterprise name at the general service hall of the FTZ management committee or the Shanghai Municipal AIC; Submit the application through the official website of the Shanghai Municipal Government or at the service counter in the general service hall of FTZ; The application materials will be received by the service counter of AIC, and filed (approved) by the FTZ management commission in a coordinated manner to obtain the authorization of other relevant authorities (commerce, planning, land, construction, environmental protection etc); Business licenses, organization code certificates, tax registration certificates and other relevant authorizations will be issued all together at the service counter

Implementation of the negative list system

Negative list regulatory principles

Regulatory publications have now been issued and the foreign investment negative list system for the FTZ has been set up. The framework and principles of the negative list management system are as follows:

Item	Provisions
Issuing authority	The *Special Administrative Measures on the Entry of Foreign Investment in China (Shanghai) Pilot Free Trade Zone (Negative List)* is issued by the Shanghai Municipal Government.
Composition of list	The negative list is prepared in categories according to the *National Economic Industrial Classification and Codes (2011)*, containing 18 industrial sectors. Two industrial sectors; S (public administration, social security and social organizations) and T (international organizations), are not subject to the negative list.
Supervision principles	For matters not falling under the negative list, foreign investment projects shall be subject to the filing system instead of the approval system (except domestic investment projects specified by the State Council, which remain subject to pre-approval). Contracts and articles of association of foreign-invested enterprises shall be filed for record instead of being applied for examination and approval.
Additional restrictions	In addition to the special administrative limitations on foreign investment, certain investments are prohibited or restricted under the international treaties to which China is a party, or on the basis that the proposed investment is contrary to national security, social stability or the public interest.
Hong Kong, Macao and Taiwan	Investors from the Hong Kong Special Administrative Region, Macao Special Administrative Region and Taiwan may only invest in the FTZ by reference to the negative list. If measures are more favorable to qualified investors exist in the *Closer Economic Partnership Arrangements between Mainland and Hong Kong/Macao* (and its supplementary agreements), the provisions of such agreements shall apply.
Adjustment	The negative list will be adjusted in due time according to the laws and regulations on foreign investment and the development requirements of the FTZ.

FTZ project filing requirements

The following projects will be subject to the filing management of the FTZ: Sino-foreign equity joint ventures, Sino-foreign contractual joint ventures, wholly foreign-owned enterprises, foreign-invested partnerships, domestic M&A enterprises by foreign investors, capital increases of foreign-invested enterprises and all other foreign investment projects (other than those set out in the Special Administrative Measures on the Entry of Foreign Investment in the FTZ (negative list)). Unless otherwise stipulated, such requirements shall apply.

附录

事 项	受调整企业	调整前情况	调整后情况
1 企业设立	外资企业	《中华人民共和国外资企业法》及其《实施细则》要求，设立外资企业应当报审查机关批准。	暂时停止实施该项行政审批，改为备案管理。
	中外合资经营企业	《中华人民共和国中外合资经营企业法》及其《实施条例》要求，设立中外合资经营企业应当报审查机关批准。	
	中外合作经营企业	《中华人民共和国中外合作经营企业法》及其《实施细则》要求，设立中外合作经营企业应当报审查机关批准。	
2 企业经营期限	中外合资经营企业	《中华人民共和国中外合资经营企业法》及其《实施条例》要求，中外合资经营企业的合营期限应当报审查机关批准。	暂时停止实施该项行政审批，改为备案管理。
	中外合作经营企业	《中华人民共和国中外合作经营企业法》及其《实施细则》中要求，中外合作经营企业的合作期限应当报审查机关批准。	
	外资企业	《中华人民共和国外资企业法》及其《实施细则》中要求，外资企业重要事项的变更（如增加/减少注册资本，股权转让等）须报审查机关批准。	
3 企业变更	外资企业	《中华人民共和国外资企业法》及其《实施细则》中要求，外资企业重要事项的变更（如增加/减少注册资本，股权转让等）须报审查机关批准。	暂时停止实施该项行政审批，改为备案管理。
	中外合资经营企业	《中华人民共和国中外合资经营企业法》及其《实施条例》中要求，中外合资经营企业重要事项的变更（如增加/减少注册资本，股权转让等）须报审查机关批准。	根据自贸区目前公布的办事指南，企业的重大事项变更如注册资本变更（增资、减资）、股权或合作权益转让等均实行备案管理。
	中外合作经营企业	《中华人民共和国中外合作经营企业法》及其《实施细则》中要求，中外合作经营企业重要事项的变更（如增加/减少注册资本，股权转让等）须报审查机关批准。	暂时停止实施该项行政审批，改为备案管理。
4 企业解散	外资企业	现行《中华人民共和国外资企业法》及其《实施细则》要求，外资企业的解散（提前终止）需报审查机关批准。	根据自贸区目前公布的办事指南，企业提前终止事项实行备案管理。
	中外合资经营企业	《中华人民共和国中外合资经营企业法》及其《实施条例》要求，中外合作经营企业的解散（提前终止）需报审查机关批准。	暂时停止实施该项行政审批，改为备案管理。
	中外合作经营企业	现行《中华人民共和国中外合作经营企业法》及其《实施细则》要求，中外合作经营企业的解散（提前终止）需报审查机关批准。	根据自贸区目前公布的办事指南，企业提前终止事项实行备案管理。
5 转让合作企业合同权利、义务	中外合作经营企业	《中华人民共和国中外合作经营企业法》及其《实施细则》要求，中外合作者的一方转让其在合作企业合同中的全部或者部分权利、义务的，必须经他方同意，并报审查批准机关批准。	暂时停止实施该项行政审批，改为备案管理。
6 委托他人经营管理	中外合作经营企业	《中华人民共和国中外合作经营企业法》及其《实施细则》要求，合作企业成立后改为委托中外合作者以外的他人经营管理的，必须经董事会或者联合管理机构一致同意，报审查批准机关批准。	暂时停止实施该项行政审批，改为备案管理。

Appendix

Activity	Enterprise	Standard rule	FTZ rule
1 Establishment of enterprise	Wholly foreign-owned enterprise	In accordance with the *Law of the People's Republic of China on Wholly Foreign-Owned Enterprise* and its *Implementation Rules*, establishing a wholly foreign-owned enterprise requires Government approval.	No approval is required. Instead, only a filing obligation applies.
	Sino-foreign equity joint venture	In accordance with the *Law of the People's Republic of China on Sino-Foreign Equity Joint Ventures* and its *Implementation Regulations*, establishing a Sino-foreign equity joint venture requires Government approval.	
	Sino-foreign contractual joint venture	In accordance with the *Law of the People's Republic of China on Sino-Foreign Contractual Joint Ventures* and its *Implementation Rules*, establishing a Sino-foreign contractual joint venture requires Government approval.	
2 Operation period of enterprise	Wholly foreign-owned enterprise	In accordance with the *Law of the People's Republic of China on Wholly Foreign-Owned Enterprise* and its *Implementation Rules*, the operation period of a wholly foreign-owned enterprise requires Government approval.	No approval is required. Instead, only a filing obligation applies.
	Sino-foreign equity joint venture	In accordance with the *Law of the People's Republic of China on Sino-Foreign Equity Joint Ventures and its Implementation Regulations*, the equity joint venture period of a Sino-foreign equity joint venture requires Government approval.	
	Sino-foreign contractual joint venture	In accordance with the Law of the *People's Republic of China on Sino-Foreign Contractual Joint Ventures* and its *Implementation Rules*, the contractual joint venture period of a Sino-foreign contractual joint venture requires Government approval.	
3 Change of enterprise	Wholly foreign-owned enterprise	In accordance with the *Law of the People's Republic of China on Wholly Foreign-Owned Enterprise* and its *Implementation Rules*, significant changes (such as increase/decrease of registered capital and share transfer), require Government approval.	No approval is required. Instead, only a filing obligation applies.
	Sino-foreign equity joint ventures	In accordance with the *Law of the People's Republic of China on Sino-Foreign Equity Joint Ventures* and its *Implementation Regulations*, significant changes (such as increase/decrease of registered capital and share transfer), require Government approval.	No approval is required. Instead, only a filing obligation applies.
	Sino-foreign contractual joint venture	In accordance with the *Law of the People's Republic of China on Sino-Foreign Contractual Joint Ventures* and its *Implementation Rules*, significant changes (such as increase/decrease of registered capital and share transfer), require Government approval.	No approval is required. Instead, only a filing obligation applies.
4 Dissolution	Wholly foreign-owned enterprise	In accordance with the *Law of the People's Republic of China on Wholly Foreign-Owned Enterprise* and its *Implementation Rules*, dissolution (early termination) of wholly foreign-owned enterprises requires Government approval.	No approval is required. Instead, only a filing obligation applies.
	Sino-foreign equity joint ventures	In accordance with the *Law of the People's Republic of China on Sino-Foreign Equity Joint Ventures* and its *Implementation Regulations*, dissolution (early termination) of Sino-foreign equity joint ventures requires Government approval.	No approval is required. Instead, only a filing obligation applies.
	Sino-foreign contractual joint venture	In accordance with the *Law of the People's Republic of China on Sino-Foreign Contractual Joint Ventures* and its *Implementation Rules*, dissolution (early termination) of Sino-foreign contractual joint venture requires Government approval.	No approval is required. Instead, only a filing obligation applies.

(This article was originally written in Chinese, the English version is a translation.)

China's Anti-Monopoly Law: Retrospect and Prospect on the Fifth Anniversary

中国反垄断立法五周年

Review of Merger Control and Merger Remedies Regime in China: From 2008-2013

中国经营者集中审查及附条件执法五年综述

By Susan Ning, Hazel Yin, Zheng Ziqing and Ji Kailun
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中国反垄断法自生效以来已经整整5周年了。在反垄断法生效之前，中国政府及社会已经有十余年的时间在讨论如何起草和执行反垄断法，但毋庸置疑的是，最近的5年——即反垄断法正式生效5年来，中国的反垄断立法和执法发生了巨大的变化，并取得了令中国乃至国际社会瞩目的成绩。

反垄断法对于中国市场经济的建设至关重要，且随着中国法制和市场经济的完善，这种重要性将进一步凸现。作为中国最早参与反垄断法立法咨询和提供反垄断相关法律服务的律师事务所之一，金杜有幸见证了中国反垄断法迅猛发展的重要历程，并伴随其发展实现了自身反垄断业务的发展壮大。5年来，金杜已经拥有了规模庞大的专业队伍，在经营者集中审查、反垄断合规咨询和应对调查以及反垄断诉讼等各业务领域均堪称业内翘楚。在反垄断法5岁生日之际，我们以一系列文章的形式分享我们多年积累的宝贵经验及对未来发展的展望，以此向反垄断法生效5周年献礼。

Five years have passed since the enactment of China's Anti-monopoly Law on August 1, 2008. Before the Anti-monopoly Law went into effect, the Chinese governments and the public had spent more than ten years discussing the drafting and implementation of the Anti-monopoly Law. It goes without saying that during the past five years, significant changes have taken place in the legislation and enforcement of the Anti-monopoly Law, which has achieved both domestic and international recognition.

The Anti-monopoly Law is vital to the Chinese market economy. Its importance will only rise as perfects its legal system and market economy. As one of the pilot firms participating in the legislation of Chinese Anti-monopoly law and providing Anti-monopoly related services, we are fortunate to witness the rapid development of this legal regime and to expand our practice with it. During the past five years, we have built a sizable professional team providing the full-range of Anti-monopoly legal services, covering merger review, Anti-monopoly investigation and litigation, and Anti-monopoly compliance counseling. As a tribute to the fifth anniversary of the Anti-monopoly Law, we present a series of articles, to share with you years of invaluable experiences.

《中华人民共和国反垄断法》（以下简称《反垄断法》）自2008年8月1日起实施生效，至今已满5周年。5年来，商务部作为经营者集中审查的主管机关，共审结了逾640起交易，除19起获得附条件批准的交易和1起受到禁止的交易外[1]，其他交易均获得了无条件批准。5年时间，反垄断的概念在各界的争议和探讨中逐渐深入人心，而商务部的执法能力亦随着实践不断提高，经营者集中附加限制性条件制度也日趋成熟。本文从实务工作者的角度简要回顾和总结经营者集中审查制度及附条件执法的实施情况，以期为企业带来一二启示。

经营者集中审查及附条件执法概况

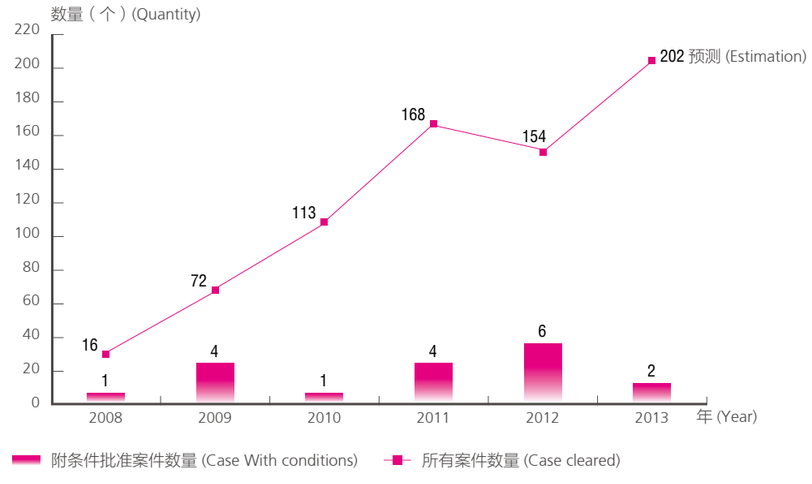
截至2013年6月30日，商务部共收到经营者集中申报754件，立案690件，审结643件。在审结的案件中，无条件批准624件，附条件批准18件，禁止1件（可口可乐收购汇源）。下表为商务部审结经营者集中案件数量（包括附条件案件）及附条件案件数量对比统计表。[2]（见下图）

August 1st, 2008 marks the fifth anniversary of China's Anti-Monopoly Law ("AML"). Along with debates and controversies, the AML is gradually taking root and has contributed to shaping the economic landscape and competition status in China.

During the past 5 years, the Ministry of Commerce ("MOFCOM"), the authority in charge of merger control, has cleared more than 640 cases, including 19 cases that were cleared with conditions and 1 case that was denied.[1] MOFCOM has been making continuous progress in improving its enforcement capabilities, which are highlighted by the increasingly mature merger remedy regime. This article presents an overview of the merger control regime, in particular the merger remedies regime in China from the perspective of practitioners.

Overview of Merger Control Regime and Cases Cleared with Conditions

As of June 30, 2013, MOFCOM received 754 cases in total, officially accepted 690 cases and cleared 643 of them, including 18 conditionally approved cases and 1 forbidden case (Coca Cola's acquisition of Huiyuan). The following chart indicates the yearly statistics of all cases cleared (with or without conditions) and cases conditionally approved by MOFCOM.[2]



[1]2013年8月13日，商务部附条件批准了美国百特国际有限公司收购瑞典金宝公司的交易。由于本文中所用的多数数据截至2013年第二季度，因此下文中并未将该案纳入讨论范围。

[2]其中2013年附条件批准的数据截至该年度第二季度，2013年审结案件总数根据该年度上半年案件审查数量预测得出。

[1]On August 13, 2013, MOFCOM issued conditional clearance of Baxter's acquisition of Gambro. Since most data used in this article dates as of Q2 of 2013, this case was not included in the below discussions.

[2]The number of conditionally approved cases in year 2013 is updated as of Q2 of this year, while the total case number is an estimate based on cases cleared as of Q2 of 2013.

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附条件案件行业分布及集中性质

从附条件批准的18起案件所涉及的行业看，依据中华人民共和国国家统计局的国民经济行业分类标准（GB/T 4754-2011），18起案件涉及其中的5类行业，即“制造业”、“电力、热力、燃气及水生产和供应业”、“信息传播、软件和信息技术服务业”、“批发和零售业”和“采矿业”。**其中涉及制造业的最多，共12起。**（见下表）

就附条件案件的集中性质而言，通常认为横向集中更容易降低竞争约束。与其他司法辖区执法机关相似，商务部最关注的也是横向集中。**18起附条件的案件中11起涉及横向重合，1起既涉及横向重合也涉及纵向关系，另有4起案件涉及纵向关系，2起涉及相邻关系。**（见下表）

行 业	子行业	案 例	集中性质
制造业	酒、饮料和精制茶制造业	英博收购AB公司案（2008）	横向重合
	化学原料和化学品制造业	乌拉尔吸收合并谢尔维尼特案（2011）	横向重合
		三菱丽阳收购璐彩特案（2009）	横向重合+纵向关系
		汉高香港与天德化工组建合营企业案（2012）	纵向关系
	医药制造业	诺华收购爱尔康案（2010）	横向重合
		辉瑞收购惠氏案（2009）	横向重合
	专用设备制造业	佩内洛普收购萨维奥案（2011）	横向重合
	汽车制造业	通用汽车收购德尔福案（2009）	纵向关系
	电器机械和器材制造业	松下收购三洋案（2009）	横向重合
	计算机、通信和其他电子设备制造业	希捷收购三星硬盘驱动器业务案（2011）	横向重合
		西部数据收购日立存储案（2012）	横向重合
	铁路、船舶、航空航天和其他运输设备制造业	联合技术收购古德里奇案（2012）	横向重合
电力、热力、燃气及水生产和供应业	燃气生产和供应业	通用电气与神华公司设立合营企业案（2011）	相邻关系
信息传播、软件和信息技术服务业	电信、广播电视和卫星传输服务业	谷歌收购摩托罗拉移动业务案（2012）	纵向关系
	软件和信息技术服务业	安谋、捷德和金雅拓组建合营企业案（2012）	纵向关系
批发、零售业	零售业	沃尔玛收购纽海控股案（2012）	相邻关系
	批发业	丸红收购高鸿公司100%股权案（2013）	横向重合
		嘉能可收购斯特拉塔公司案（2013）	横向重合
采矿业	有色金属矿	嘉能可收购斯特拉塔公司案（2013）	横向重合

注：被禁止的可口可乐/汇源案涉及行业为制造业中的“酒、饮料和精制茶制造业”，集中性质为涉及相邻关系的集中。

Industries Involved in Cases with Conditions and Types of Concentration

According to the *Industrial Classification for National Economic Activities* (GB/T 4754-2011) of the National Bureau of Statistics, 5 industry categories are involved in the 18 cases with conditions, including “manufacturing”, “production and supply of electricity, heating, gas and water”, “information transmission, software and information service industry”, “wholesale and retail”, and “mining industry”. ***In particular, a total of 12 cases relate to the manufacturing industry.*** (See Table 1 below)

Horizontal mergers usually are considered more likely to cause competition concerns. Similar as law enforcement authorities in other jurisdictions, MOFCOM pays closest attention to horizontal mergers. ***Among the 18 conditionally approved cases, 11 cases relate to horizontal mergers, and 1 case relates to both horizontal and vertical relationship.*** Only 4 cases relate to vertical relationship and the other 2 cases concern conglomerate relationship. (See Table 1 below)

Table 1: Industries Involved in Cases with Conditions and Types of Concentration

Industry	Sub-Industry	Case	Types of Concentration
Manufacturing Industry	Alcohol, drinks and refined tea manufacturing industry	Acquisition of Inbev N.V./S.A. by Anheuser-Busch Companies Inc. (2008)	Horizontal
	Chemical raw materials and chemical manufacturing industry	Acquisition of Silvinit by Uralkali (2011)	Horizontal
		Acquisition of Lucite by Mitsubishi Rayon (2009)	Horizontal + Vertical
		Establishment of Joint Venture between Henkel Hong Kong and Tiande Chemical (2012)	Vertical
	Pharmaceutical manufacturing industry	Acquisition of Alcon by Novartis (2010)	Horizontal
		Acquisition of Wyeth by Pfizer (2009)	Horizontal
	Specialized device manufacturing industry	Acquisition of Savio by Penelope (2011)	Horizontal
	Automobile manufacturing industry	Acquisition of Delphi by General Motor (2009)	Vertical
	Electric machinery and equipment manufacturing industry	Acquisition of Sanyo by Panasonic (2009)	Horizontal
	Computer, communications and other electric device manufacturing industry	Acquisition of Samsung Hard Disk Drive by Seagate (2011)	Horizontal
		Acquisition of Hitachi Global Storage Technologies by Western Digital (2012)	Horizontal
	Manufacturing of railway, shipping, aircraft and other transportation equipment	Acquisition of Goodrich by United Technologies (2012)	Horizontal
Production and Supply of Electricity, heating power, gas and water	Production and supply of gas	Establishment of Joint Venture between General Electric and Shenhua (2011)	Conglomerate
Wholesale and Retail	Retail	Acquisition of New Haven Holding by Walmart (2012)	Conglomerate
	Wholesale	Acquisition of Gavilon by Marubeni (2013)	Horizontal
		Acquisition of Xstrata by Glencore (2013)	Horizontal
Mining Industry	Non-Ferrous Metal	Acquisition of Xstrata by Glencore (2013)	Horizontal

Note: The rejected acquisition of Huiyuan by Coca Cola (2009) is a conglomerate concentration related to “alcohol, drinks and refined tea production industry”.

附条件案件审查决定期限

从18个附条件案件决定作出的审查阶段来看，除了早期的两起案件在第一阶段作出决定外，其余均在第二阶段及延长期作出决定，反映了商务部在作出附条件批准决定时态度更为审慎。（见下表）

表2：商务部附条件通过案件审查决定期限

年 份	附条件批准案件数量		
	第一阶段审结	第二阶段审结	第二阶段延长期
2008	1	---	---
2009	1	2	1
2010	---	1	---
2011	---	2	2
2012	---	1*	5
2013**	---	1*	1*

* 其中西数案（2012）、丸红案（2013）以及嘉能可案（2013）均在第一次申报的第二阶段延长期临近截止日期时，撤回申报后再次提交。上表中所列审结阶段均为重新申报后的审结阶段。

** 截止到2013年第二季度。

我们还注意到，2008年第一起附条件案英博案的审查决定内容相对较少，而今年批准的嘉能可案不仅审查决定篇幅较长，分别从市场份额、产量、市场力量、市场进入及对消费者的影响等角度展开竞争分析，内容十分翔实，且首次公布了经营者提交的救济承诺方案。这一变化体现了商务部执法水平的进步，也体现出商务部在增加执法透明度方面做出的努力。

限制性条件类型

自《反垄断法》生效以来，商务部在附加限制性条件方面不断创新，所采用的救济类型日趋丰富。尽管《反垄断法》深受欧盟竞争法的影响，商务部在实践中仍然形成了有别于其他司法辖区的执法模式，初步具备了自身审查风格。例如，**商务部是一些跨国交易中唯一对交易附加限制性条件的反垄断执法部门，如通用汽车案（2009），希捷案（2011），谷歌案（2012）以及丸红案（2013）。**在另一些交易中，如西数案（2012）以及嘉能可案（2013）中，商务部则附加了不同于其他司法辖区的限制性条件。我们将在下文中从结构性条件和行为性条件两个方面分别梳理。

结构性条件

也许是因为商务部希望尽量保留交易的原始结构，其对结构性条件的使用相对谨慎。**在18起附条件案件中，商务部附加结构性条件的案件共7起，均涉及横向集中。**这些案件既包括剥离参与集中的企业既存独立业务单位的典型结构性条件，如松下案（2009）和辉瑞案（2009），也包括剥离非独立业务单位的资产、产能、关联企业股份、股东权益等非典型的结构性条件。（见下表）

表3：涉及结构性条件的案件

结构性条件类型		案 例
典型结构性条件	剥离既存独立业务单位	辉瑞收购惠氏案 松下收购三洋案
非典型结构性条件	剥离非独立业务单位的资产、产能、关联企业股份、股东权益	三菱丽阳收购璐彩特案 佩内洛普收购萨维奥案 松下收购三洋案 西部数据收购日立存储案 联合技术收购古德里奇案 嘉能可收购斯特拉塔公司案

行为性条件

商务部对行为性限制性条件态度相对开放。**目前附条件批准的18起案件中，半数以上的案件都以行为性条件为主。**这些案件所涉及的行为性条件类型多样，不仅包括一些国外执法部门经常使用的典型行为性条件，如开放承诺、非歧视条款、终止排他性协议、过渡性协助义务、防火墙条款以及禁止滥用市场势力的承诺等条件，还包括一些颇具创新性的条

Review Timeline for Conditionally Approved Cases

All conditionally approved cases, but for the earliest two, were closed at Phase II or extended Phase II, showing that MOFCOM has become increasingly cautious when imposing conditions. (See Table 2 below)

Table 2: Timeline for Cases Conditionally Approved by MOFCOM

Year	Number of Cases		
	Phase I	Phase II	Extended Phase II
2008	1	---	---
2009	1	2	1
2010	---	1	---
2011	---	2	2
2012	---	1*	5
2013**	---	1*	1*

* In WD/Hitachi (2012), Marubeni/Gavilon (2013) and Glencore/Xstrata (2013), the filings were withdrawn from MOFCOM by the parties before the deadline of the Extended Phase II and then resubmitted. The stage shown in the above table therefore refers to the stage in the second round of review process.

** Statistics updated as of Q2 of 2013.

In November 2008, when the first conditional case (AB/Inbev) was issued, information disclosed in the final decision was very limited. Five years later in the Glencore/Xstrata (2013) case, not only did MOFCOM provide a detailed competition analysis of market share, market power, market entry and influence upon consumers, but also disclose, for the first time, the full text of the parties' final commitment proposals. This shows that MOFCOM has made great progress in merger remedy practice, and has been making efforts to increase transparency of its law enforcement.

Types of Remedies

Although the AML is largely influenced by EU experiences, MOFCOM has gradually developed its own methodology and distinguished itself from its foreign counterparts. For example, ***MOFCOM was the only antitrust authority imposing conditions upon such global transactions as General Motor/Delphi (2009), Seagate/Samsung (2011), Google/Motorola (2012) and Marubeni/Gavilon (2013).*** In other transactions, such as WD/Hitachi (2012) and Glencore/Xstrata (2013), MOFCOM imposed conditions different from other jurisdictions. We hereby analyze the structural and behavioral conditions as follows:

Structural Remedies

MOFCOM has been relatively cautious in the application of structural conditions, which usually mandate the divestiture of the parties' assets or businesses. Such reluctance may be prompted by MOFCOM's intention to preserve the original structure of a transaction to the extent possible. ***Of the 18 conditionally cleared cases, 7 cases involve structural conditions and all of them are horizontal mergers.***

Structural conditions in these cases include not only typical ones, i.e. divesture of existing independent business unit, but also relatively less common ones, such as divesture of assets, production capability, shares in affiliates and shareholders' interests that do not constitute independent business unit. (See Table 3 below)

Table 3: Cases Involving Structural Remedies

Types of Structural Conditions		Cases
Typical Structural Conditions	Divesture of existing independent business unit	Acquisition of Wyeth by Pfizer Acquisition of Sanyo by Panasonic
Atypical Structural Conditions	Divesture of assets, production capability, shares in the affiliates and shareholders' interests that do not constitute independent business unit	Acquisition of Lucite by Mitsubishi Rayon Acquisition of Savio by Penelope Acquisition of Sanyo by Panasonic Acquisition of Sanyo by Panasonic Acquisition of Hitachi Global Storage Technologies by Western Digital Acquisition of Goodrich by United Technologies Acquisition of Xstrata by Glencore

Behavioral Remedies

In contrast to the experiences in some other major jurisdictions, MOFCOM employs a more receptive approach to conduct remedies. ***The majority of the 18 conditionally cases involve***

款，如供应与服务水平承诺、禁止市场扩张、保持两个业务主体之间的独立性以及禁止特定市场行为等条件。（见下表）

表4：涉及行为性条件的案件

行为性条件类型		案 例
典型行为性条件	开放承诺	松下收购三洋案
		谷歌收购摩托罗拉移动业务案
		安谋、捷德和金雅拓组建合营企业案
	非歧视条款	通用汽车收购德尔福案
		汉高香港与天德化工组建合营企业案
		谷歌收购摩托罗拉移动业务案
		丸红收购高鸿案
		安谋、捷德和金雅拓组建合营企业案
	防火墙条款	通用汽车收购德尔福案
		希捷收购三星硬盘驱动器业务案
		西部数据收购日立存储案
		丸红收购高鸿案
	终止排他性协议	诺华收购爱尔康案
	过渡性协助义务	辉瑞收购惠氏案
		联合技术收购古德里奇案
	禁止滥用市场势力的承诺	通用电气与神华设立合营企业案
		希捷收购三星硬盘驱动器业务案
		西部数据收购日立存储案
		安谋、捷德和金雅拓组建合营企业案
		乌拉尔吸收合并谢尔维尼特案
非典型行为性条件	供应与服务水平承诺	希捷收购三星硬盘驱动器业务案
		西部数据收购日立存储案
		嘉能可收购斯特拉塔案
	禁止市场扩张	英博收购AB案
		三菱丽阳收购璐彩特案
		诺华收购爱尔康案
	保持两个业务主体之间的独立性	希捷收购三星硬盘驱动器业务案
		西部数据收购日立存储案
		丸红收购高鸿案
	禁止特定市场行为	沃尔玛收购纽海控股案

behavioral conditions. Some of the behavioral conditions are also frequently used by foreign authorities, such as the opening up commitment, non-discrimination terms, termination of exclusive contracts, and transitional assistance obligations. Some, on the other hand, are less common, such as the commitment of supply and service standard, prohibition of market expansion, hold-separate and prohibition of certain market behaviors. (See Table 4 below)

Table 4: Cases Involving Conduct Remedies

Types of Conduct Remedies		Cases
Typical Conduct Remedies	Opening up commitment	Acquisition of Sanyo by Panasonic
		Acquisition of Motorola by Google
		Establishment of JV between ARM Holdings, Giesecke & Devrient and Gemalto
	Non-discrimination	Acquisition of Delphi by GM
		Establishment of JV between Henkel and Tiande
		Acquisition of Motorola by Google
		Acquisition of Gavilon by Marubeni
		Establishment of JV between ARM Holdings, Giesecke & Devrient and Gemalto
	Firewall	Acquisition of Delphi by GM
		Acquisition of Samsung Hard Disk Drive Business by Seagate
		Acquisition of Hitachi Global Storage Technologies by Western Digital
		Acquisition of Gavilon by Marubeni
	Termination of exclusive contracts	Acquisition of Alcon by Novartis
	Transitional assistance obligation	Acquisition of Wyeth by Pfizer
		Acquisition of Goodrich by UTC
	Commitment to refrain from abuse of dominance	Establishment of JV between General Electronics and Shenhua
		Acquisition of Samsung Hard Disk Drive Business by Seagate
		Acquisition of Hitachi Global Storage Technologies by Western Digital
		Establishment of JV between ARM Holdings, Giesecke & Devrient and Gemalto
		Acquisition of Silvinit by Uralkali
Atypical Conduct Remedies	Commitment of supply and service standard	Acquisition of Samsung Hard Disk Drive Business by Seagate
		Acquisition of Hitachi Global Storage Technologies by Western Digital
		Acquisition of Xstrata by Glencore
	Prohibition of market expansion	Acquisition of Anheuser-Busch by Inbev
		Acquisition of Lucite by Mitsubishi
		Acquisition of Alcan by Novartis
	Hold-separate	Acquisition of Samsung Hard Disk Drive Business by Seagate
		Acquisition of Hitachi Global Storage Technologies by Western Digital
		Acquisition of Gavilon by Marubeni
	Prohibition of certain market behavior	Acquisition of New Haven Holding by Walmart

在希捷案（2011）、西数案（2012）和丸红案（2013）中，商务部均附加了要求交易方“保持两个业务主体之间独立性”的限制性条件。**尽管这一条件形式上可归于行为性条件，但商务部曾在公开场合表示，其希望通过这一条件来达到结构性救济的效果。**

虽然商务部所附加的部分行为性条件具有创新性，但对这些行为性条件进行实际监督的成本很高，这也成为救济执行中一个很大的挑战。在诺华案（2010）、乌钾案（2011）、希捷案（2011）、汉高案（2012）、西数案（2012）、谷歌案（2012）、嘉能可案（2013）和丸红案（2013）中，商务部均要求交易方委托独立的监督受托人监督交易方对义务的履行。沃尔玛案（2012）和安谋案（2012）中，则明确商务部有权自行或通过监督受托人监督检查交易方履行义务的情况。而在英博案（2008）、通用汽车案（2009）和神华案（2011）中，商务部没有明确要求设置监督受托人。

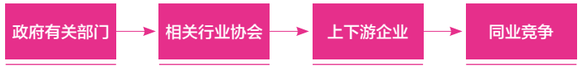
即使存在监督受托人，某些限制性条件的执行监督仍十分困难。如西数案（2012）中，商务部要求交易方维持Viviti公司（日立运营相关业务的子公司）作为独立的竞争者存在，并制定保障措施避免交换竞争性信息。这一条件对交易人而言负担较重，尤其是考虑到合并后公司通常需要遵守公司法和证券法的相关规定。为了保证对限制性条件执行的监督不会影响限制性条件的功能发挥，但同时又不至于对承担义务的企业造成过重的负担，或对商务部造成过重的执法成本，在两者之间寻求一种平衡非常必要。

经营者集中审查过程中的市场调查手段

商务部在评估限制性条件时的市场调查手段十分丰富，包括以书面征求意见、论证会、座谈会、听证会、实地调查、委托调查、约谈当事人、电话采访、调查问卷等形式，向政府有关部门、相关行业协会、同业竞争者、上下游企业以及行业专家展开沟通并征求意见，了解案件中所涉及的重要问题。

通常，商务部对意见的采信程度根据不同的意见来源存在差异。（见下图）

图2：



注：→ 对商务部决定的影响从大到小

一般而言，政府有关部门的意见对商务部审查决定的影响最大。**商务部在征询意见时，通常会征询国家发展和改革委员会（“发改委”）的意见，也会针对不同的产业征询相关产业主管机关。如涉及工业行业，包括传统行业和高新技术行业的案件，商务部通常会征询工业和信息化部的意见；涉及农产品的案件，则会征询农业部的意见。**此外，如涉及外资，商务部则会征询相关外资审批机关，如商务部外资司和/或地方外资审批机构的意见。

相关政府部门的意见可能影响案件的审查进程。如在丸红案（2013）中，商务部要求交易方“维持丸红大豆子公司与高鸿大豆子之间的分离和独立”。可以想见，商务部应该征询了国内大豆行业协会以及农业部的意见。而商务部与农业部行政级别相同，商务部会倾向于听取农业部的意见。

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结语及展望

回望过去5年，商务部取得的成就十分瞩目。展望未来执法趋势，我们预计：

- **行为性条件与结构性条件的适用将继续并重；**
- **限制性条件类型上的创新将继续受到鼓励；**
- **简易程序的出台可能加快审查进度；**
- **商务部将进一步增强审查程序的透明度。**

除欧盟和美国外，中国已逐渐成为又一个主要反垄断司法辖区。因此，境内外公司在中国实施重大交易之前，均应考虑商务部反垄断审查的影响，并提前评估其交易可能产生的竞争问题。

In Seagate/Samsung (2011), WD/Hitachi (2012) and Marubeni/Gavilon (2013), MOFCOM imposed “hold separate” conditions requiring the merged parties to maintain operations independently. ***While the “hold separate” condition may be categorized as behavioral, MOFCOM has publicly expressed that such condition was intended to achieve similar effects as structural conditions.***

Although some of the behavioral conditions imposed by MOFCOM are creative, proper supervision of these conditions has become a challenge. In Novartis/Alcon (2010), Uralkali/Silvinit (2011), Seagate/Samsung (2011), Henkel/Tiande (2012), WD/Hitachi (2012), Google/Motorola (2012), Glencore/Xstrata (2013) and Marubeni/Gavilon (2013), MOFCOM requested the parties to engage an independent supervision trustee. In the Walmart (2012) and ARM (2012) cases, the decisions provide that MOFCOM is entitled to supervise either by itself or through the supervision trustee. In AB/Inbev (2008), General Motor/Delphi (2009) and GE/Shenhua (2011), however, the decisions did not specifically mention the requirement for a supervision trustee.

Even in cases with supervision trustees, such difficulty still exists. For instance, in the WD/Hitachi (2012) case, MOFCOM requested the parties to maintain Viviti (Hitachi’s subsidiary operating the relevant business) as an independent competitor and to adopt safeguard measures to avoid exchange of competitive information. This condition places enormous burdens on the parties, in particular in light of integrations that are usually required of merging parties under applicable corporate and securities laws. Therefore, a balance has to be made to ensure that such supervision does not strip the conditions of their substance nor introduce unintended burdens on the obligors’ businesses.

Market Survey Instruments Adopted by MOFCOM

MOFCOM has adopted numerous market survey instruments in the merger review process, including written consultation, meetings, hearings, site investigation, entrusted investigation, face-to-face interview with relevant parties, telephone interview and questionnaire. In such market surveys, government authorities, relevant industry associations, competitors, upstream and downstream entities as well industry experts will be consulted on important issues in the cases.

The weight MOFCOM gives to these opinions differs as shown in Chart 2 below.

Chart 2:

Note: → shows the impact of opinions on MOFCOM’s decision is decreasing.

Generally, opinions from government authorities are most influential on MOFCOM’s decision. ***MOFCOM usually seeks the opinion from the National Development and Reform Commission (“NDRC”), sometimes also from competent authorities in charge of different industries, for instance, from the Ministry of Industry and Information Technology (“MIIT”) for filings related to traditional and high-tech industries, and from the Ministry of Agriculture (“MOA”) for filings involving agricultural products.*** In addition, for filings involving foreign investment, MOFCOM usually consults with the relevant approval authorities for foreign investment, such as the Department of Foreign Investment Administration of MOFCOM and/or local foreign investment approval authorities.

The review timeline and the MOFCOM decision may be affected by the opinions of other government authorities. For example, in the Marubeni/Gavilon (2013) case, the parties are required to “hold Marubeni Soybean Sub and Gavilon Soybean Sub separate from each other”. One could imagine that MOFCOM should have consulted the domestic soybean industry association and the MOA. Considering both MOFCOM and MOA are at the same administrative ranking, MOFCOM would be prone to give substance to MOA’s opinions.

Conclusion and Forecast

Looking back upon the past 5 years, MOFCOM’s achievements are widely recognized by domestic and international communities. Going forward, we expect that:

- ***behavioral remedies will continue to be put equal weight as structural remedies;***
- ***innovation on the types of remedies will continue to be encouraged;***
- ***MOFCOM’s review process may be accelerated by introducing the “fast track” mechanism; and***
- ***Transparency of MOFCOM’s review process will be further enhanced.***

With China becoming one of the “major” antitrust jurisdictions alongside the U.S. and Europe, both domestic and international companies should consider the implications of a MOFOM review and identify in advance the competition issues that their transaction may raise, before embarking on major transactions in China.

(This article was originally written in Chinese, the English version is a translation.)

Appeal of Infringement Dispute of Patent for Invention on One of the 2012 Top 50 Typical Cases of Intellectual Property Protection in Chinese Courts — *Harbin Industrial University Xinghe Industrial Co., Ltd v. Jiang Su Runde Pipe Industry Co., Ltd*

2012年中国法院知识产权司法保护50件典型案例评述

——哈尔滨工业大学星河实业有限公司与江苏润德管业有限公司侵害发明专利权纠纷上诉案

By Li Zhongsheng and Song Xinyue
作者：李中圣　宋新月

2013年4月，中华人民共和国最高人民法院办公厅印发了“2012年中国法院知识产权司法保护50件典型案例”（法办[2013]44号），供各级人民法院在知识产权审判工作中参考借鉴。在这50大典型案例中，金杜律师事务所代理的侵害发明专利权纠纷上诉案（案件号：[2012]苏知民终字第0021号）榜上有名。

In April 2013, the Supreme People's Court of the People's Republic of China (the "**Supreme People's Court**") released *the 2012 Top 50 Typical Cases of Intellectual Property Protection in Chinese Courts* (Fa Ban [2013] No. 44) as a referential document for fair and efficient adjudications for the People's Courts. The document included an appeal case regarding a patent for invention infringement dispute (Case Number: [2012] Su Zhi Min Zhong Zi No. 0021), which was represented by the IP Litigation Group of King & Wood Mallesons.

一、案情概要

原告哈尔滨工业大学星河实业有限公司（“星河公司”）于2005年7月7日向国家知识产权局申请了“一种钢带增强塑料管道及其制造方法和装置”发明专利，2007年4月4日获得授权，专利号为ZL200510082911.4，该专利处于有效状态。该专利包括三项独立权利要求，要求保护的主题分别为管道产品、制造管道的方法以及制造管道的装置。

被告江苏润德管业有限公司（“润德公司”）成立于2009年9月，经营范围包括金属骨架塑料复合管及其配件生产、销售等业务。

2010年10月，星河公司以侵犯其发明专利权为由，将润德公司诉至南京市中级人民法院（“南京中院”），声称润德公司使用其专利方法及装置生产、销售塑料钢带缠绕排水管，导致星河公司损失巨大，请求判令润德公司停止侵权、赔偿经济损失50万元。一审中，南京中院认为润德公司制造的管道产品未落入涉案专利独立权利要求1的保护范围，而润德公司制造管道的方法和装置分别落入独立权利要求2和6的保护范围，故认定润德公司构成侵权，并判决润德公司立即停止侵权、赔偿经济损失50万元。

润德公司不服一审判决，遂向江苏省高级人民法院（“江苏高院”）提起上诉。江苏高院在二审中认定，润德公司制造管道的方法及装置未落入星河公司涉案专利的保护范围，不构成专利侵权。因此，江苏高院判决撤销一审判决，驳回星河公司的诉讼请求。

1. Case Brief

The Plaintiff, Harbin Industrial University Xinghe Industrial Co., Ltd ("**Xinghe Co. Ltd**") filed its invention patent application entitled "Production and apparatus of a steel strip- reinforced plastic pipeline" with the State Intellectual Property Office (**SIPO**) of the People's Republic of China, which granted the patent on April 4, 2007 (Patent No. ZL200510082911.4). The patent has three independent claims, covering the following subject matters respectively: 1) pipe product; 2) manufacturing method of the pipe; and 3) manufacturing apparatus of the pipe.

The Defendant, Jiang Su Runde Pipe Industry Co., Ltd ("**Runde Co. Ltd**") was established in September 2009, producing and selling steel stripe reinforced plastic pipelines and its installments.

In October 2010, Xinghe Co. Ltd filed an action against Runde Co. Ltd with the Nanjing Intermediate People's Court (the "**Nanjing Court**") for infringement of its patent for invention. Xinghe Co. Ltd alleged that Runde Co. Ltd had been using its patented method and sales of steel strip reinforced plastic pipes, resulting in tremendous amount of damages and therefore, requested the Nanjing Court to stop the infringement immediately and to pay damages up to RMB 0.5 million. The Nanjing Court reckoned that Runde Co. Ltd.'s production of Pipe Products did not fall into the scope of claim 1 of the patent but did infringe claim 2 and 3. As a result, it ruled that Runde Co. Ltd had infringed patent rights in the First Instance Judgment and ordered it to cease such acts of infringement and pay damages of RMB 0.5 million.

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二、争议焦点

本案两审过程中，控辩双方围绕“主题名称对于权利要求保护范围是否具有限定作用”这一核心问题展开了激烈交锋。具体而言，涉案专利独立权利要求1、2分别记载了如下的技术方案：

“1、一种钢带增强塑料复合排水管道，包括一个塑料管体和与管体成一体的加强肋，加强肋内复合有增强钢带，其特征在于，钢带上有若干矩形或圆形的通孔或钢带两侧轧制有纹路，两个加强肋之间的塑料形状具有中间凸起，管体的端部具有一个连接用的承插接头，承插接头的连接部具有密封胶或橡胶圈。

2、一种制造权利要求1所述的钢带增强塑料排水管道的方法，其特征在于包括如下步骤：1. 将挤出机与复合机头成直角布置，钢带从机头一端引入复合机头，并在机头内与塑料复合，经冷却、定型、牵引后成型为钢带增强塑料复合异型带材钢带；2. 将异型带材运送到安装现场；3. 缠绕并熔焊异型带材形成钢带增强塑料排水管；4. 在排水管的端口设置塑料承插接头，并将其熔焊连接形成连续的排水管道。”

对于权利要求1，润德公司的排水管道缺少“钢带开孔或轧制纹路”、“加强肋间具有中间凸起”这两个技术特征，故不侵犯权利要求1，双方对此已无异议。争议焦点在于权利要求2的保护范围，即假设润德公司的制造方法具有权利要求2记载的1-4四个步骤特征，侵权是否成立？如果权利要求2的主题名称仅为“一种制造钢带增强塑料排水管的方法”，答案是肯定的。然而，独立权利要求2引用了独立权利要求1，这时主题名称是否属于技术特征从而具有限定作用？在不侵犯产品权利要求1的前提下，针对方法权利要求2是否构成侵权？

一审过程中，南京中院认为润德公司侵犯了权利要求2。主要理由是，其一，以“一种制造权利要求1所述的钢带增强塑料排水管道的方法”这一主题名称作为技术特征没有法律依据；其二，权利要求1与权利要求2之间不是从属权利要求的关系，被告以权利要求1的技术特征来限定权利要求2的保护范围，明显违背法律规定。

作为润德公司的代理律师，我们认为南京中院的判决值得商榷，因此通过上诉从多个角度对其进行反驳。首先，从专利法及其实施细则的相关规定可知，主题名称是组成技术方案的基础要件，属于技术特征，在确定专利权保护范围时应当予以考虑。譬如，《专利法》第五十九条规定“发明或者实用新型专利权的保护范围以其权利要求的内容为准，说明书及附图可以用于解释权利要求的内容”，而主题名称毫无疑义地属于权利要求的内容；《专利法实施细则》第二十一条“独立权利要求包括前序部分和特征部分，其中前序部分写明主题名称和与最接近的现有技术共有的必要技术特征，前序部分与特征部分一起共同限定权利要求的保护范围”，明文规定主题名称属于前序部分，是权利要求不可或缺的组成部分，与特征部分共同限定保护范围。

其次，按照专利审查实践，“权利要求1所述的钢带增强塑料排水管”对方法权利要求2也应当具有限定作用。《专利审查指南2010》第二部分第二章3.1.2节规定，对于这种引用另一权利要求的独立权利要求，在确定其保护范围时，被引用的权利要求的特征均应予以考虑，而其实际的限定作用应当体现在对该独立权利要求的保护主题产生了何种影响。本案中，应当考虑权利要求1的技术特征，实际的限定作用应当体现在产品特征对该方法产生的具体影响。权利要求1的产品对权利要求2的方法的具体影响主要体现在两个层面。其一，在方法所需原料及中间产品层面，权利要求1和2中的技术术语“钢带”应作相同解释，即所述钢带上有若干矩形或圆形的通孔或钢带两侧轧制有纹路，同时经复合形成的异型带材的两个加强肋之间的塑料形状应当具有中间凸起；其二，在方法步骤层面，该方法必须包括对钢带进行加工使其具有通孔或纹路的步骤，以及设置复合成型模具从而形成塑料中间凸起的步骤。缺少以上限定，权利要求2的方法根本无法制造出权利要求1的管道产品，也就不可能称之为“一种制造权利要求1所述的钢带增强塑料排水管道的方法”。

再者，本案专利审查时，专利权人对权利要求2 的主题名称进行了修改。专利申请公开文本的表述是“一种制造钢带增强塑料排水管的方法”，授权文本则为“一种制造权利要求1所述的钢带增强塑料排水管的方法”。专利权人实际上是通过该修改，明确限定权利要求2的方法，仅限于制造权利要求1所述的钢带增强塑料排水管。根

Unsatisfied with the First Instance Judgment, Runde Co. Ltd appealed to the High People’s Court (the “**Jiangsu Court**”). The Jiangsu Court deemed at the Second Instance that the manufacturing method and apparatus used by Runde Co. Ltd did not fall into the protection scope of Xinghe Co. Ltd.’s patent. As a result, the Jiangsu Court overruled the First Instance Judgment.

2. Case Highlight

At First and Second Instance, both parties had been debating on “whether the title of the subject matter in a claim should limit the protection scope of a patent”. In particular, Claim 1 and Claim 2 of the patent at issue read as follows:

A plastic drainage pipe reinforced by steel strips, comprising a plastic pipe body and into which the steel strips are incorporated, and the reinforcing ribs are integrated with the plastic pipe body as a whole, wherein rectangular or circular holes are perforated on the steel strips or the surfaces of both lateral sides of the steel strip are pressed to form lines pattern; the plastic part between two ribs has convex shape; the pipe body has a spigot joint at one end of the pipe for jointing the pipes to each other, and the spigot joint has a jointing part where a sealing rubber ring is to be fixed or a sealant is to be used.

A method for making steel strip-reinforced plastic pipelines as described in Claim 1, characterized in that it includes the following steps: a) steel strips go through a composite mold where they are enwrapped by the plastic melt from a extruder, and profiled bands are formed after cooling, hardening and pulling, wherein the extruder and the composite mold are disposed in a right-angled arrangement; b) the profiled bands are transported to an installation site; c) the profiled bands are spirally wound and then welded to form plastic drainage pipes reinforced by steel strips; and d) a continuous pipeline is form by welding the pipes through a spigot joint provided at one end of each pipe.

With regard to Claim 1, the drainage pipes made by Runde Co. Ltd. lack the features of “the steel strips are perforated and pressed” and “the plastic part between two ribs has convex shape”, and thus it is undisputed that Runde Co. Ltd. does not infringe Claim 1. The main dispute centers around whether Runde Co. Ltd infringes Claim 2, provided that its method includes the four steps as recited in Claim 2. If the title of the subject matter of Claim 2 merely reads “a process of producing steel strip-reinforced plastic pipelines”, then the answer would most certainly be positive. Yet, the problem is that Claim 2 had in fact cited Claim 1. So a more complicated question arises: whether the title of the claimed subject matter should be regarded as a technical feature and hence limits the scope of Claim 2? Then, given that Claim 1 is not infringed, whether or not 2 is infringed or not?

At First Instance, the Nanjing Court thought that Runde Co. Ltd. had infringed Claim 2. The main reason for such judgment is that, firstly, there is no legal basis to deem the title of the claimed subject matter, “a method for making steel strip-reinforced plastic pipelines as described in Claim 1”, as a technical feature. Secondly, Claim 2 is not an independent claim rather than a dependent claim, so it is obviously against legal regulations when the defendant uses 1 to restrict the scope of Claim 2.

Having represented Runde Co. Ltd., we believe that the judgment of the Nanjing Court is debatable. Hence, we rebutted from different perspectives through appeals. Firstly, with regards to the related regulations of the Patent Law of the People’s Republic of China (the “Patent Law”) and the Implementing Regulations of the Patent Law (the “Implementing Regulations”), the title of the claimed subject matter, which is the basic component that composes the technical solution, is classified as a technical feature and should be taken into consideration when defining the patent’s scope of protection. Article 59 of the Patent Law states that “the scope of protection in the patent right for an invention or a utility model shall be determined by the contents of the patent claim. The specification and appended drawings may be used to interpret the patent claim.” Rule 21 of the Implementing Regulations of the Patent Law state that “An independent claim of an invention or utility model shall contain a preamble portion and a characterizing portion”, while the preamble portion indicates “the title of the claimed subject matter of the technical solution of the invention or utility model, and those technical features which are necessary for the definition of the claimed subject matter but which, in combination, are part of the most related prior art. The preamble portion and the characterizing portion together define the scope of protection of the invention or utility model”. The laws explicitly prescribe that the title of the claimed subject matter belongs to the preamble portion, which is an indispensable and inseparable part of the claim and defines the scope of protection together with the characterizing portion.

Moreover, according to patent examination practices, “steel strip-reinforced plastic pipelines as described in Claim 1” indeed restricts the definition of Claim 2. In the “Guidelines for Patent Examination 2010”, Part II Chapter 2 section 3.1.2, “in determination of scope of patent protection for such an independent claim containing reference to another claim, all the features

据禁止反悔原则，专利权人不能在诉讼阶段重新扩张权利要求2的保护范围。

此外，南京中院的认定在逻辑上不能自圆其说。一审判决结论是，润德公司对涉案专利产品权利要求1不构成侵权，但侵犯了方法权利要求2。根据《专利法》第十一条的规定，对专利方法的保护可延及由该方法直接获得的产品。具体到本案，如果侵犯方法权利要求2，则由该方法直接获得的管道产品也构成侵权，而权利要求2的方法是“制造权利要求1的排水管道的方法”，其直接获得的产品即为权利要求1的排水管道。因此，从方法权利要求2被侵犯的前提出发，可推导出产品权利要求1也被侵犯，这显然与一审法院的认定的结论相互矛盾。

最后，从专利撰写实务角度，也能看出一审判决的荒谬之处。例如，以下这种撰写方式是常见的，权利要求1：一种XX产品的制造方法，包括步骤XXX；权利要求2：根据权利要求1的方法制得的产品。可见，权利要求2只有主题名称，而按照南京中院的观点，主题名称不属于技术特征，故该权利要求不包含任何技术特征，其保护范围也无法确定，这明显有悖于专利法的规定。

通过上述理由，上诉法院江苏高院最终被说服，认定一审判决对专利主题名称的性质及作用的理解有误，权利要求中所记载的主题名称应属于解决技术问题的必要技术特征，在确定专利权的保护范围时应当予以考虑，润德公司不构成侵权，撤销原判并驳回原告诉讼请求。

三、典型意义

自2008年起，最高人民法院会根据各高级人民法院的推荐向社会公布中国法院知识产权司法保护10大案件和50件典型案例，旨在加大知识产权司法保护宣传力度，展示人民法院知识产权司法保护的成果，营造知识产权司法保护事业健康发展的良好氛围。

本案作为2012年中国法院知识产权司法保护50件典型案例之一，涉及专利权保护范围的确定，这是专利侵权判定的前提与基础。实践中这种通过引用另一独立权利要求来撰写独立权利要求的情形十分常见，确定这类权利要求的保护范围时需要考虑被引用独立权利要求的技术特征的限定作用，本案所确立的这一原则对此类案件具有较高的借鉴意义和参考价值。

of the claim referred to shall be taken into account, and their actual limiting effect shall depend on what final impact they may impose on the claimed subject matter of the independent claim”. In this case, we should consider the technical features of Claim 1, and the actual limiting effect should be reflected in the manner where the product’s special features influence the patented process. There are two aspects on which the product in Claim 1 influences the process in Claim 2. The first aspect is relating to the raw materials and intermediate products. The construction and meaning of the technical terminology, in this case “steel strip”, in both Claim 1 and 2 should be construed as having the same meaning. In particular, the steel strip recited in Claims 1 and 2 should both have perforated rectangular or circular holes formed on the steel strips or the surfaces of both lateral sides of the steel strip are pressed to form lines pattern, and the plastic part between two ribs has a convex shape. The second aspect is involving method steps, where the method should involve the corresponding steps of making rectangular or circular holes and molding the convex shape between two ribs. Without these steps, 2 could never produce the pipeline product mentioned in Claim 1, and therefore could not be named “a method for making steel strip-reinforced plastic pipelines as described in Claim 1”.

Furthermore, during the substantive examination, the patentee made amendment to Claim 2 by modifying the title of subject matter. The original version says, “method for making steel strip-reinforced plastic pipelines”, while the amended version specifically refers to Claim 1: “method for making steel strip-reinforced plastic pipelines as described in Claim 1”. In doing so, the patentee manifestly limits the scope of Claim 2 to those methods through which the product described in Claim 1 is made. According to the doctrine of prosecution history estoppel, the patentee should not inappropriately broaden the scope of Claim 2 during litigation.

In addition, the rationale adopted by the Nanjing Court seems to be illogical. The First Instance Judgment says that Runde Co. Ltd.’s infringement did not fall into the scope of Claim 1 but did fall into that of Claim 2. According to Article 11 of the Patent Law, the scope of protection of the patent can be extended to products directly obtained by the patented method. When we look into the case, if Claim 2 is said to be infringed, then all pipeline products produced by the method described in Claim 2 should also infringe. Now that Claim 2 reads, “method for making steel strip-reinforced plastic pipelines as described in Claim 1”, obviously this method produces a product described in Claim 1. As a result, we can see that if we start from the premise that Claim 2 is infringed, then the product directly obtained by Claim 2, i.e. Claim 1, should is also infringed. This reveals a huge contradiction in the judgment given by the Nanjing Court.

Finally, it is not difficult to spot out the absurdity of the First Instance Judgment from a patent drafting point of view. In practice, the following is common for claim drafting: Claim 1: A method for producing XX, which comprises steps XXX; Claim 2: The product obtained from the method of Claim 1. It is thus clear that Claim 2 only contains a title of the claimed subject matter, and according to the viewpoint of the Nanjing Court, a title of the claimed subject matter is not a technical feature. Hence Claim 2 does not include any technical features, whereas its scope of protection remains uncertain. This is obviously against the Patent Law.

The Jiangsu Court was eventually convinced by the above arguments and stated that the First Instance court erred in its ruling. The title of the claimed subject matter should be deemed as an essential technical feature and should be given full consideration when defining its protection scope. Consequently, it ruled that Runde Co. Ltd. did not infringe the patent at issue, and reversed the judgment of lower court .

3. Typical Significance

From 2008 onwards, the Supreme People’s Court, with reference to the recommendations from various High People’s Court, has announced the 10 major cases and 50 typical cases of judicial protection of intellectual property, aiming at promoting juridical protection towards intellectual property rights, displaying its successful outcomes and creating a favorable atmosphere for such development.

The *Xinghe Co. Ltd. v. Runde Co. Ltd.* case, as one of the 50 typical cases, relates to the issue of determination of patent scope, which is the premise and basis for patent infringement analysis. It is very common in practice to draft an independent claim by citing another independent claim. When ascertaining the protection scope of such a claim, the technical features of the cited claim should have limiting effects. The principle established by this case has brought high referential value to future cases of the same kind.

(This article was originally written in Chinese, the English version is a translation.)

First Certification Mark Case –“ZHOUSHANDAIYU and device”

“舟山带鱼”证明商标案——首例证明商标案例

By Trademark Group
作者： 商标组

舟山市水产流通与加工行业协会（简称舟山水产协会）系第5020381号证明商标“舟山带鱼ZHOUSHANDAIYU及图”的专用权人。舟山水产协会以申马人公司生产的“舟山精选带鱼段”，其外包装上突出使用了“舟山带鱼”字样，容易造成公众混淆，从而侵犯其商标专用权为由提起民事诉讼，请求对方立即停止生产销售侵权产品并赔偿经济损失。

申马人公司辩称其生产加工的产品系来自舟山地区的带鱼，对“舟山带鱼”文字的使用是合理使用，没有侵犯舟山水产协会的权利。其销售的产品上有自己的商标“小蛟龙”，不会造成公众的混淆。北京市第一中级人民法院认为：

是否侵犯证明商标权利，不能以被控侵权行为是否容易导致相关公众对商品来源产生混淆作为判断标准，而应当以被控侵权行为是否容易导致相关公众对商品的原产地等特定品质产生误认作为判断标准。舟山水产协会主张申马人公司在商品外包装上突出使用“舟山带鱼”字样，容易造成公众混淆，因此构成侵权，是对法律的错误理解，实质上将证明商标与商品商标混同。是否突出使用，是否造成商品来源混淆，与是否侵犯证明商标权利无关。本案中，涉案商

Zhoushan City Aquatic Product Alliance initiated a civil action against Beijing Shenmaren Food Sales Co. (“**Shenmaren**”), on the grounds that “ Zhoushan Jingxuan Daiyu” produced by Shenmaren with the indication of “ZHOUSHANDAIYU” prominently printed on the package would likely mislead the public and infringe upon the exclusive right of Zhoushan City Aquatic Product Alliance to use the mark. Zhoushan City Aquatic Product Alliance requested Shenmaren to cease the infringement and compensate for their losses.

Shenmaren defended that their products were made from Daiyu (“hairtail” in Chinese pinyin) in Zhoushan district, thus they were legitimate to use “ZHOUSHANDAIYU” and such use did not constitute infringement to the trademark right of Zhoushan Aquatic Product Alliance. Moreover, Shenmaren claimed that they also used their own mark “Xiaojiaolong” on the products, and thus their use of “ZHOUSHANDAIYU” would not cause confusion to the public. Upon hearing, Beijing First Municipal Intermediate People’s Court held that:

Whether Shenmaren infringes upon the exclusive right of the said certification mark should not depend on the likelihood of misleading the public on the origin of products but the likelihood of causing misrepresentation of a given quality of the products from that origin. Zhoushan Aquatic Product Alliance’s claim that Shenmaren’s prominent printing of “ZHOUSHANDAIYU” on the package would be likely to cause confusion to the public and infringe the exclusive right of using the certification trademark, was made based on a misunderstanding of law, and Zhoushan Aquatic Product Alliance virtually mixed up the certification marks and common trademarks. Whether the mark is prominently used or causes confusion as to the origin are irrelevant to the finds of infringement of Certification Mark. In this case, the mark “ZHOUSHANDAIYU and the device” is a geographical identification of the certification mark, certifying that the products bearing such mark come from Zhoushan territorial waters. Therefore, labeling Daiyu (“hairtail” in Chinese pinyin) originated from Zhoushan territorial waters as “Zhoushan Jingxuan Daiyuduan” is a legitimate way to use a geographical identification and does not infringe upon the exclusive right of Zhoushan Auqatic Product Alliance to use the certification mark.

The Court therefore rejected all claims of Zhoushan Aquatic Product Alliance. Zhoushan Auqatic Product Alliance disagreed with this judgment and appealed

标“舟山带鱼ZHOUSHANDAIYU及图”系作为证明商标注册的地理标志，即证明商品原产地为舟山海域的标志。因此，在原产于舟山海域的带鱼上标注“舟山精选带鱼段”属于对地理标志的正当使用，并不侵犯舟山水产协会的商标权利。

判决驳回舟山水产协会的全部诉讼请求。舟山水产协会不服，向北京高级人民法院提起上诉。北京高级人民法院依据《商标法》第十六条第二款和《商标法实施条例》第六条有关地理标志的规定，《商标法实施条例》第四十九条和《集体商标、证明商标注册和管理办法》第十八条第二款有关正当使用地理标志中的地名的规定，认为舟山水产协会作为该商标的注册人，对于商品符合特定品质的自然人、法人或者其他组织要求使用该证明商标的，应当允许。而且，其不能剥夺虽没有向其提出使用该证明商标的要求，但商品确产于浙江舟山海域的自然人、法人或者其他组织正当使用该证明商标中地名的权利。但同时，对于其商品并非产于浙江舟山海域的自然人、法人或者其他组织在商品上标注该商标的，舟山水产协会则有权禁止，并依法追究其侵犯证明商标权利的责任。申马人公司提交的证据不足以证明涉案商品原产地为浙江舟山海域。在申马人公司不能证明其生产、销售的涉案商品原产地为浙江舟山海域的情况下，其在涉案商品上标注“舟山精选带鱼段”的行为，不属于正当使用，构成侵犯涉案商标专用权的行为，应当就此承担停止侵权、赔偿损失的法律责任，支持了舟山水产协会要求申马人公司停止侵权、赔偿损失的主张。作为国内首例证明商标侵权案例，该判决对于如何认定侵犯证明商标权利及其与商品商标的不同判断标准具有指导作用。

to the Beijing High People's Court. According to Article 16 section 2 of the PRC Trademark Law, Article 6 and Article 49 of the Implementing Regulations of the Trademark Law on geographical indication, and Article 18 section 2 of the Administrative Measures Concerning the Registration of Collective Marks and Certification Marks on "legitimate use of geographical indication", the Beijing High People's Court held that Zhoushan Aquatic Product Alliance, as the registrant of the said certification mark, should permit natural person, legal person or other organizations to use the certification mark on goods that has met the requirement for use of said geographic indication. Moreover, any natural person, legal person or other organization who does not request authorization to use the certification mark may also duly use the geographic indication on the products it sells if such products met the condition, and Zhoushan Aquatic Product Alliance does not have the right to prohibit such use. However, Zhoushan Aquatic Product Alliance has the right to request the cease of the production and to bring a claim for infringement of certification mark when the goods bearing a geographical indication do not originate in the region indicated. The evidence presented by Shenmaren was insufficient to prove that the goods they sold originated from Zhejiang Zhoushan territorial waters. Under such circumstances, marking "Zhoushan Jingxuan Daiyuduan" on the products was regarded as an illegal use of the certification mark and such use constituted infringement to the exclusive right to use the said certification trademark. Shenmaren should bear the legal responsibilities to cease the infringing activities and to compensate the losses of Zhoushan Aquatic Product Alliance. The Beijing High People's Court therefore supported the claims of Zhoushan Aquatic Product Alliance. This is the first certification mark infringement case, and the judgment has indicative effect on clarifying the criteria in finding infringement of certification mark which differ from those of other trademarks.

(This article was originally written in Chinese, the English version is a translation.)

Eight Key Points about the Third Amendment to the PRC Trademark Law
《商标法》第三次修订的八大要点

By Cecilia Lou, Ding Xianjie and Yao Di
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全国人大常委会于2013年8月30日通过了对中华人民共和国《商标法》的第三次修订（以下简称“商标法修正案”）。商标法修正案将于2014年5月1日起施行。

本次修订在总体上回应了社会所关注的商标申请程序过长、恶意抢注猖獗、商标保护困难等问题，其中一些修订内容将对商标权人和商标从业者产生重要影响，现归纳要点如下：

The Standing Committee of the National People's Congress passed the Third Amendment to the PRC Trademark Law ("Revised Trademark Law") on August 30, 2013. The new Trademark Law will be implemented on May 1, 2014. Besides its share of critics, this revised PRC Trademark Law, in general, responds to the public concern on complex trademark prosecution procedures, rampant bad faith trademark squatters and difficult trademark protection. A detailed explanation of some key changes affecting brand owners and trademark practitioners is provided below:

扩大了可注册的商标类型

本次商标法修正案接受了声音成为可注册商标。

这一新增的商标类型会给以声音作为区别特征的企业和商家带来福音，对于那些在已经接受声音作为商标进行注册和保护的国家的申请人，可能会很快将其在国外注册的声音商标在中国进行注册保护，对于那些对声音商标还不甚熟悉的国内企业和商家，则需要尽快熟悉起来了。

商标申请程序上更加便利：法定审查时间限制、电子申请、一标多类申请、审查意见和商标续展审查时间规定

此次修订在中国商标法历史上第一次对商标局和商标评审委员会设定了商标审查的法定时限。具体如下：

程 序	时限（月）	经批准后可延长（月）
商标申请	9	无
驳回复审	9	3
异议	12	6
异议复审	12	6
基于绝对理由的无效	9	3
基于绝对理由的无效复审	9	3
基于相对理由的无效	12	6
撤销注册商标	9	3
撤销复审	9	3

审理时限的确定，将大大提高商标事务的处理效率，增加当事人对案件处理时间的可预期性。

电子申请

商标局已在几年前开始了电子申请的试点，此次正式将此写入商标法修正案，顺应了商标申请的国际化趋势。

一标多类申请

新法将允许申请人通过一份申请就多个类别的商品申请注册同一商标，这一修订简化了注册申请手续，有利于降低申请人的申请和管理成本；目前的做法是一份申请书仅针对一个商标在一个类别的商品或服务上的申请。

审查意见

新的修订内容加入了审查意见制度，对于商标局在审查商标申请时发现的问题，商标局可以向申请人发出通知、要求申请人进行改正或说明。这一修订给予了申请人参与审查、对审查员的意见阐述自己看法的重要机会，既可降低商标申请的驳回率，也降低了申请人克服驳回的成本。

商标续展

本次修订将商标续展的申请时间延长，可在期满前12个月内办理，同时保留了期满后的6个月的宽展期。这一操作可以使商标注册人尽早进行商标续展工作，有利于配合续展之后的其它诸如海关知识产权备案等工作的开展。

所有这些变化均将给商标申请人带来更多的便利和实惠。但是，需要指出的是，一些变化可能会影响到商标权人以及商标从业者的商标策略的制订和选择。

异议程序的实质性修改

值得特别关注的是商标局异议程序在此次修订中发生了实质性变化。

首先，它限制了提出异议的异议人的主体资格和异议理由。现行法规定，任何人都能以任何理由对已公告的商标申请提出异议，但根据修改后的商标法，仅有在先权利人和利害关系人才能基于相对理由在商标公告后提出异议。这一变化可能会减少异议的数量，并缓解恶意异议给正常的商标注册申请带来的问题。

其次，如果一件异议申请被商标局决定异议不成立，被异议商标将立即获得注册，注册程序将不会被拖延到后续的复审和诉讼程序完成之后。但对于异议成立的，被异议人则可向商标评审委员会提出复审请求，与现行法律的规定一致。

因此，如果异议经商标局审查决定不能成立，异议人将不能就此决定向商标评审委员会提出复审。这样，异议人就只能利用后续的无效程序对已注册的商标提出无效请求。这一变化将会产生怎样的影响尚不能预料，因为如果异议失败、申请人取得商标注册之后，就可以基于该注册行使其商标权。这对于在恶意注册未能通过异议加以遏制的情况下，真正的商标所有人即便立即提起无效申请，也面临被恶意注册人指控侵权的风险。该问题是否能被解决，以及怎样被解决，将有待日后实施条例或法院的实践加以阐明。

由于异议程序的这一重大改变，异议人将需要提高对异议的重视程度，尽量争取在异议阶段就将恶意注册情况加以遏制。

遏制商标抢注

商标法修正案明确禁止代理人、代表人、业务关系人在未经他人授权的情况下，在同一种或类似商品上注册与他人在先使用的未注册商标相同或近似的商标。业务关系包括合同、业务往来关系或因其他关系而明知他人商标存在的情况。

Expansion of Non-traditional Trademark Registration

The Revised Trademark Law proposes to accept non-traditional trademark registrations to cover sound.

This enlargement of trademark family may attract lot of new filings from those countries where sound mark has already been registrable. The examination criteria in the Chinese Trademark Office will be the next point of public attention.

Unfortunately, the revised Trademark Law fails to cover single color trademark registration which was under heated discussion during this revision process.

Procedure Facilitation: *Statutory time-limit for examination, electronic filing, multi-class application, Office Action and trademark renewal*

Time-Limit

This revision will be the first time in the PRC trademark history that sets a statutory time-limit for trademark examinations by both the Chinese Trademark Office ("CTMO") and the Trademark Review and Adjudication Board ("TRAB").

Procedure	Time-limit (months)	Extension (if granted)
Trademark application	9	N/A
Review on rejection	9	3
Oppo sition	12	6
Review on opposition filed by trademark applicant	12	6
Invalidation on absolute ground	9	3
Review on invalidation decision made by CTMO on absolute ground	9	3
Invalidation on relative ground	12	6
Cancellation in CTMO	9	3
Review on Canecellation inTRAB	9	3

The CTMO has already allowed electronic filings for several years through a trial pilot program; however, this practice is now officially and explicitly written into the revised Trademark Law.

Multi-Class Application

Furthermore, the Revised Trademark Law also simplifies the registration procedure by allowing an applicant to submit one application for a trademark in multiple classes. The current practice only allows the filing of one trademark in one class and additional trademark applications are required for additional classes.

Office Action

Moreover, the proposed change to expend the use of office action which will offer trademark applicants an opportunity to present additional arguments or amendments to their application if required by the CTMO.

Renewal

Lastly, a renewal application can be filed 12 months prior to expiration, compared to 6 months under the old law. The 6 month grace period will still exist.

All these changes will provide more conveniences and benefits to trademark applicants. However, it should be noted that some changes may affect the trademark strategy of trademark practitioners and owners, especially due to the new time limits of examination of various types of cases.

Unfortunately, the revised Trademark Law fails to extend the responding time to the rejection from CTMO which was previously proposed during this revision process. This together with failure in extending some other responding times by the brand owners may be disappointing to many brand owners and practitioners.

Material Change in the Opposition Procedure

It is worth to mention that the CTMO's opposition procedure is materially changed in the revised PRC Trademark Law. Firstly, it strictly limits the party that can file an opposition and the grounds for their opposition. In the past, any party could oppose any trademark on any grounds (i.e., absolute grounds or relative grounds), but the revised Trademark Law only allows the owner of a prior right or an interested party to lodge an opposition on relative grounds before the trademark is registered. This change may reduce the number of opposition cases and help alleviate the bad faith opposition filing problem.

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此外，商标法修正案首次引入了商标代理机构的义务。除了保密义务和其它义务之外，商标法修正案还规定商标代理机构除对其代理服务申请商标注册外，不得申请注册其他商标。因为曾有商标代理机构代其客户恶意注册他人商标的情况，这一修订也将对商标抢注产生一定的遏制效果。

特别值得注意的是，此次修正案中单独就“诚实信用原则”增加了一个条款。商标法修正案第七条规定，“申请注册和使用商标，应当遵循诚实信用原则”。作为对民事行为的普遍性要求，在商标法中专门列出这一条款，彰显国家对正常商标秩序的维护。同时，该条款也为遏制不能为其它条款所制止的不诚信行为提供了一个兜底的法律依据。

加强对商标权人的保护

商标侵权中的混淆原则

商标法修正案首次在立法历史上引入了“混淆”这一判断原则。第五十七条第二款禁止“未经商标注册人的许可，在同一种商品上使用与其注册商标近似的商标的，或者在类似商品上使用与其注册商标相同或者近似的商标，容易导致混淆的”行为。在商标侵权判断中加入混淆原则，回归了商标区别商品来源的本来意义。

虽然“混淆”这一概念已在实践中被长期使用，但这是第一次被写入法律条文。在商标近似或商品类似的情况下，这将会帮助工商管理机关或法院公平地裁决商标侵权案件。

赔偿数额的计算

赔偿数额将首先会按照商标权利人因被侵权所受到的实际损失确定；实际损失难以确定的，可以按照侵权人因侵权所获得的利益确定。权利人的损失或者侵权人获得的利益均难以确定的情况下，则参照该商标许可使用费的倍数合理确定。而根据现行法，商标权利人可在实际损失和侵权人获利二者之间选择一种。

此外，侵权人将被要求提供相关账簿和资料来确定其获利数额，因为根据现行法商标权人很难在商标侵权案件中对此加以举证，所以法院往往无法得到合理的赔偿计算依据。根据新的修正案，如果侵权人不提供或者提供虚假账簿和资料的，法院可以参考权利人的主张和提供的证据来判定赔偿数额。

惩罚性赔偿

商标法修正案提出了惩罚性赔偿，这也是惩罚性赔偿首次被引入中国知识产权法律领域。新的修正案规定，对情节严重的恶意性商标侵权行为，可按正常方法确定数额的一倍以上三倍以下的范围判定赔偿数额。

另外，对五年内实施两次以上商标侵权行为的，工商管理机关也将从重处罚。

Moreover, if an opposition claim is denied by the CTMO, the CTMO will allow immediate registration and the application will no longer be pending until it is resolved in the subsequent appellate procedure. An opposing party’s only recourse afterwards is through a new procedure – “invalidation”. As many oversea brand owners are generally the party who files these oppositions, this change will greatly affect the trademark strategy of oversea brand owners in China. If a brand owner loses their opposition filing, they can only attempt to invalidate the trademark and will face the disadvantageous situation where the bad faith applicant obtains the full registered trademark right during the whole invalidation process. Whether and how this problem can be tackled will remain to be further clarified in future implementing regulations and/or judicial interpretations and it is highly recommended for brand owners to put more focus on opposition first.

Efforts on Restraining Trademark Squatting

The revised Trademark Law clearly prohibits the dealers, distributors, agents, and those who have business contacts with the brand owners to register the same or similar trademark on same or similar goods.

The new law also introduces in first time the responsibilities of trademark agencies. Besides the confidential duties and other obligations, the new version also prohibits the registration of trademark in the name of trademark agency beyond its business scope. It is a positive improvement to owners of famous brands because some trademark agencies in the past years registered many famous trademarks on behalf of their anonymous clients with bad faith.

Most eye-catchingly, the revised Trademark Law introduces the principle on good faith (so called “honest and trustworthy principle”) for trademark use and registration. The outstanding Article 7 which says that “The principle of honest and trustworthy should be followed when a trademark is used and filed for registration” seems to show forth the resolution to restrain trademark squatting on bad faith, because this article may be used as a safeguard to those bad faith registrations which cannot be stopped by other specific grounds set in the revised law.

A More Trademark Owner Friendly Protection System: *Public Confusion; Increased Damages; Burden of Proof*

Confusion in Trademark Infringement

The revised Trademark Law introduces a confusion claim, for the first time in its history of legislation. Article 57.2 prohibits any party “without the consent of the owner of the registered trademark, to use a trademark that is similar to a registered trademark in relation to identical goods, or uses a trademark that is identical with or similar to a registered trademark in relation to similar goods, which can easily cause confusion.”

Although the principle of confusion has been used in the practice for a long time, it is the first time to be written in the law. It will help the AIC or the court to fairly decide trademark infringement cases when the marks are similar and/or the goods are similar.

法定赔偿

商标法修正案将最高法定赔偿数额从50万增加到300万人民币。这一显著变化亦可有效地遏制商标侵权。

未使用商标无法获得赔偿

同样值得一提的是，商标法修正案规定，如果注册商标专用权人不能证明此前三年内实际使用过该注册商标，也不能证明因侵权行为受到其他损失的，被控侵权人可不承担赔偿责任。这可以大大降低仅以诉讼索赔为目的的商标申请数量。同时，对于商标权人而言，也提高了其在日常工作中收集保存相关使用证据的要求。

明确了商标的合法使用方式：在先未注册商标可继续使用；他人对注册商标有正当使用权

本次商标法修正案中加入了对未注册但在先使用的商标的保护。商标注册人申请商标注册前，他人已经在同一种商品或者类似商品上先于商标注册人使用与注册商标相同或者近似并有一定影响的商标的，注册商标专用权人无权禁止该使用人继续使用该商标。但是，该继续使用将被限制在原使用范围内，并且注册商标专用权人可以要求其附加适当区别标识。

但是，修正案未就“原使用范围”和“一定影响”作出定义或解释，这也将有待于日后实施条例或司法解释的进一步阐述。

修正案特别提到注册商标中若含有本商品的通用名称、图形、型号，或者直接表示商品的质量、主要原料、功能、用途、重量、数量及其他特点，或者含有的地名，注册商标专用权人无权禁止他人正当使用这些要素。立体商标中的商品自身性质产生的形状、为获得技术效果而需有的商品形状、或使商品具有实质性价值的形状也属此列。

禁止驰名商标用于广告宣传

长期以来，驰名商标认定成为许多公司竞相追求的目标，以求在广告和宣传中可使用“驰名商标”来加强产品的推广，也因此使驰名商标认定制度饱受诟病，并引起了诸多争议。为了制止该种日渐偏离法律本意的行为，最高法院、商标局和商标评审委员会近年来也已对驰名商标认定加以严格管理。

此次修正案从本质上将驰名商标认定回归到法律本意上来。对于将驰名商标用于商品、商品包装或者容器上，或者用于广告宣传、展览或者其他商业活动中的，也将被处以罚款。在禁止驰名商标用于商业目的后，驰名商标将会回归它在法律和实践中的真实和恰当的法律功能。

商标和企业名称的冲突解决

本次修正案也明确规定，将他人注册商标、未注册的驰名商标作为企业名称中的字号使用，误导公众，构成不正当竞争行为的，依照《中华人民共和国反不正当竞争法》处理。这样，公司名称中使用他人商标的情况有了法律依据，或可得到有效抑制。

（本文原文为英文，中文为译文。）

Damage Calculation

The damage is the actual loss suffered by the trademark registrant, or the profit earned by the trademark infringer if the actual loss is hard to be determined. Where the actual loss and infringer's profit are all hard to be determined, the damage can be determined according to the reasonable times of license fee. Under the current law, the trademark registrant can elect its actual loss or infringer's profit.

Additionally, the disputed infringer will be required to provide its financial books as evidence to show the profits earned, which was difficult for trademark owners to obtain, failing to obtain these records meant that the only evidence the court would be able to use to calculate damages was based solely on the evidence that could be provided by the trademark owner.

Punitive Damage

The revised Trademark Law proposes punitive damages, which is the first time for punitive damages to be introduced in the Chinese IP laws. This intends to punish severe trademark infringement on bad faith, and the damages will be 1 to 3 times of above normal damages.

Furthermore, the heavier penalties from AIC will be posted on those who implement trademark infringement activities more than twice within five years.

Statutory Damage

Furthermore, the revised Trademark Law proposes to increase the cap of statutory damage from RMB 0.5 million to RMB 3 million. It is a significant increase which may effectively restrain trademark infringement.

No Compensation on non-use Mark

It is also worth mentioning that the revised Trademark Law provides the possibility of no compensation to the trademark owner if the trademark owner cannot demonstrate its use of the mark in the past three years and cannot prove any other loss suffered. For brand owners, they must pay attention to the collection and reservation of use evidences in their routine work.

Right of Prior Use and Fair Use

The right of prior use is introduced in the revised Trademark Law. A person/entity may continue to use its trademark even after an identical or similar trademark is registered in identical or similar goods/services, if it has used the trademark before the application date of the trademark and obtained certain influence. However, the continued use is limited to the original scope, and the trademark registrant may ask the prior user to attach alterations to its trademark to differentiate the goods/services provided by the two.

However, no definition to “original scope” and “influence” is mentioned in the new law, and it may need to be further clarified in the forthcoming implementing regulations or judicial interpretations.

The revised Trademark Law stipulates that the trademark registrant cannot prevent others from using the generic name, picture, model type of the goods, or descriptive features of the goods, or geographic name which are comprised in the registered trademark. Under the new law, using these elements is deemed as a fair use and does not constitute infringement to trademark right.

The term “Well-known Trademark” should not be used in advertising and other business activities

There has been controversy in the past years regarding the use of well-known trademarks in large advertising campaigns and publications in China, which encouraged Chinese companies to compete for recognition of well-known trademarks. In order to stop this departure from legal nature, the Supreme People's Court, CTMO and TRAB have enacted strict rules and practices for granting well-known status in recent years.

It is a significant move for the legislator to rule that the term “well-known mark” should not be used on goods, packages or containers of goods, or in advertising, exhibition or any other business activities, and the violation of the stipulation of the non-publicity clause is subject to monetary penalties. With the severe limitation on the commercial utilization of the title, the public can be now more optimistic about the real and proper legal functionality of “well-known trademark” in the Chinese laws and practices.

Conflict between Trademark and Trade Name

The revised Trademark Law makes it clear that the Anti-Unfair Competition law will be applied if any company uses a registered trademark, or a well-known unregistered trademark as its trade name and causes public confusion. In that, using other's trademark in company name may be restrained.

Insights on Drafting Pharmaceutical Patents from the "Supreme People's Court's Annual Report of Intellectual Property Cases"

《最高院知识产权案件 2012 年年度报告》给医药领域专利撰写带来的启示

By Cecilia Lou, Yao Di and Shirley Sun
作者：楼仙英　姚 迪　孙雨晨

2013年4月，最高人民法院（最高院）从2012年审结的知识产权和竞争案件中精选了34件典型案件，归纳出37个具有普遍指导意义的法律适用问题，发布了《最高人民法院知识产权案件年度报告》。我们就该报告中涉及药物的专利案件做出如下简要归纳和总结，供医药企业撰写专利申请时参考。

案例一：封闭式权利要求的解释以及封闭式权利要求侵权判定中等同原则的适用

最高院认为，*"对于封闭式权利要求，一般应当解释为不含有该权利要求所述以外的结构组成部分或者方法步骤；对于组合物封闭式权利要求，一般应当解释为组合物中仅包含所指出的成分而排除所有其他组分，但是可以包含通常含量的杂质，辅料并不属于杂质。专利权人选择封闭式权利要求表明其明确将其他未被限定的组成部分排除在专利权保护范围之外，在侵权判定中将不再适用技术特征之间的等同原则。"*

基本案情：名称为"注射用三磷酸腺苷二钠氯化镁冻干粉针剂及其生产方法"的第200410024515.1 号专利的权利要求2 采用封闭式撰写，请求保护一种冻干粉针剂，其特征是：由三磷酸腺苷二钠与氯化镁组成，二

In April 2013, the Supreme People's Court ("SPC") issued the Annual Report of Intellectual Property Cases ("Annual Report"), which included 34 typical intellectual property and competition cases from 2012 and summed up 37 legal issues with universal significance. To assist pharmaceutical enterprises in drafting patent applications we have summarized the pharmaceutical patent cases in the Annual Report.

Case A: The Interpretation of Close-ended Claims and the Application of the Doctrine of Equivalents for Close-ended Claims

The Supreme Court held that:
"[c]lose-ended claims should be generally construed as compromising indicated compositions only and exclude other ingredients, though impurities are allowed within normal amounts. However, excipients are not impurities. If the patentee chose a close-ended claim, he clearly considered that any unmentioned component is out of the protection scope of the patent right. Moreover, in this situation the doctrine of equivalents of judging different technical features should no longer be applied."

Case Brief:
The patent was named "Adenosine triphosphate disodium and magnesium chloride frozen powder

者的重量比为100 毫克比32 毫克。有两家公司销售了含有三磷酸腺苷二钠、氯化镁和其他辅料的药物，其中三磷酸腺苷二钠与氯化镁的重量比与权利要求2 描述的相同。专利权人因此提起民事诉讼，一审法院认为被告以存在辅料为由提出的不侵权抗辩不能成立；二审法院依据专利复审委员会作出的第13268号无效宣告请求撤销一审判决。再审法院判决撤销二审判决，维持一审判决。最高院撤销再审判决，驳回专利权人的诉讼请求。最高院认为，因申请时撰写权利要求的表达方式不当而导致错失原本可能获得的更宽的保护范围，此种不利后果由专利权人承担。

案例二：创造性判断中采纳申请日后补交的实验数据的条件

最高院指出，“*创造性判断中，当专利申请人在申请日后补充对比实验数据以证明专利技术方案产生了意料不到的技术效果时，接受该实验数据的前提是其用以证明的技术效果在原申请文件中有明确记载。*”

基本案情：甲公司的发明专利“用于治疗糖尿病的药物组合物”因创造性问题在专利无效程序中被宣告部分权利要求无效。在此程序中，甲公司向专利复审委员会提交了实验数据，用以证明其专利的技术方案达到了预想不到的技术效果，专利复审委员会未予采纳。甲公司遂提起行政诉讼。一、二审法院均判决维持专利复审委作出的无效决定。最高院驳回了甲公司的再审申请。

说明书应当满足充分公开发明或者实用新型的要求。化学领域属于实验性科学的领域，影响发明结果的因素是多方面、互相交叉且错综复杂的。根据现有技术，本领域技术人员无法预测请求保护的技术方案能够实现所述用途、技术效果时，说明书应当清楚、完整地记载相应的实验数据，以使所属技术领域的技术人员能够实现该技术方案，解决其技术问题，并产生预期的技术效果。没有在专利说明书中公开的技术方案、技术效果等，一般不得作为评价专利权是否符合法定授权标准的依据。当专利权人欲通过提交对比实验数据证明其要求保护的技术方案相对于现有技术具备创造性时，接受该数据的前提必须是针对在原申请文件中明确记载的技术效果。

案例三：新晶型化合物的创造性判断

最高法院认为，“*评价创造性时所需考虑的技术效果只能是记载于原始申请文件中或可从原始申请文件直接确定的技术效果。*”同时，最高院指出“*《专利审查指南》所称“结构接近的化合物”仅特指化合物具有相同的核心部分或者基本的环，而不涉及化合物的微观晶体本身的比较。*”

基本案情：乙公司的01817143.5 号专利要求保护一种化合物晶体，专利复审委员会因现有技术已公开该化合物以其他晶体形式存在，而该专利保护的晶体所实现的技术效果未能从原始申请文件中直接确定，从而导致该专利不具备创造性为由宣布该专利全部无效。二审法院先后维持该无效决定。最高院驳回了专利权人的再审申请。

晶体型化合物的微观晶型结构变化多样，某一化合物在固体状态下可能基于两种或者两种以上不同的分子排列而产生不同的固体结晶形态，并非所有的微观晶型结构变化均必然导致突出的实质性特点和显著的进步，故不能单单依据微观晶型结构的不接近而认定其化合物结构上不接近，从而免除对其相对于现有技术具有创造性(意想不到的技术效果)进行评价的要求。

最高院认为，《专利审查指南》所称“结构接近的化合物”仅特指化合物具有相同的核心部分或者基本的环，而不涉及化合物微观晶体本身的比较。虽然晶体化合物基于不同的分子排列可能在物理化学参数上存在差异，但其仍属化合物范畴，故《专利审查指南》关于化合物的规定可以适用于新晶型化合物的创造性判断。晶体所实现的技术效果是决定其是否具有创造性的最重要因素。评价创造性时所考虑的而技术效果只能是记载于原始申请文件中或可从原始申请文件直接确定的技术效果。

金杜提示：

化学领域，尤其是医药领域的发明专利为了获得更宽的保护范围，从而有力的行使专利权，应尽可能采取开放式权利要求，并在说明书中充分公开其技术效果。

当专利申请人在申请日后补充对比实验数据时，应核实其所证明的技术效果是否已在原申请文件中有明确记载。

对于本领域技术人员根据现有技术难以预测的技术效果，建议在专利申请的说明书中清楚、完整地记载相应的实验数据。

就新晶型化合物的创造性判断，最高院明确指出“《专利审查指南》所称‘结构接近的化合物’仅特指化合物具有相同的核心部分或者基本的环，而不涉及化合物的微观晶体本身的比较。”

（本文原文为英文，中文为译文。）

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injection and its manufacturing method" with an application No. 200410024515.1. There was a close-ended Claim 2, which sought protection of a freeze-dried powder injection, comprising adenosine triphosphate disodium and magnesium chloride, with a weight ratio of 100 mg to 32 mg. Two companies sold drugs containing adenosine triphosphate disodium, magnesium chloride and other excipients, among which the weight ratio of adenosine triphosphate disodium and magnesium chloride is the same as Claim 2 of the patent. The patentee therefore filed a civil lawsuit, and the first instance court did not support the non-infringement defence of these two companies, arguing the existence of excipients. The second instance court revoked the judgment made by the first instance court, based on the No. 13268 Invalidation Decision issued by the Patent Reexamination Board. The Retrial Board revoked the judgment made by the second instance court and sustained the judgment of the first instance court. The SPC revoked the judgment of the first instance court and the pleadings of the patentee. According to the SPC, adverse consequences resulting from claims drafted in an inappropriate way causing the loss of a wider scope of protection that could have been possible should be borne by the patentee.

Case B: The Requirements for Acceptance of Additional Experimental Data Submitted after the Application Date Regarding the Examination of Creativeness of a Patent

The SPC pointed out that:

"[i]n the examination of inventiveness, if, after the application, the applicant submits experimental data to prove unexpected technical effects realized by the technical solution of the patent, such data can only be accepted if the technical effects to be proved are clearly disclosed in the original application documents of the patent."

Case Brief:

The invention patent of Company A, "a pharmaceutical compound for treating diabetes" was declared invalid because of a creativeness problem in the patent validation procedure. Company A then presented experimental data to the Patent Reexamination Board to prove that the technical scheme of the patent had unexpected effects. But the Patent Reexamination Board did not adopt this experimental data, so Company A litigated. Both the first and second instance courts upheld the decision of the Patent Reexamination Board.

Furthermore, the Supreme People's Court rejected Company A's application for retrial.

The application specification must sufficiently disclose either invention or utility models. Chemistry is a science of experiment, and the factors influencing invention results could be various, integrating and complicated. According to prior art, if persons skilled in the art cannot predict the functions or technical effects of the claimed technical solution, the description must record the corresponding experimental data clearly and completely, so that persons skilled in the art may utilize the technical solution, solve the technical problems and reach the expected technical effect. Technical solutions and technical effects undisclosed in the specification cannot usually be legal grounds for judging patentability. When the applicant submits experimental data after the application data to prove the inventiveness of the patent in comparison with prior art, such data can only be accepted if the technical effects to be proved are clearly disclosed in the original patent application documents.

Case C: Examination of Creativeness of Compounds with New Crystal Structures

The SPC held that

"[o]nly the technical effects from the records in the original application documents, or which can be directly concluded from the original application documents may be taken into consideration when determining the inventiveness of a patent." Also, the SPC pointed out that "compounds of similar structures" referred to in the "The Guidelines for Patent Examination" ("Guidelines") only mean compounds with identical basic core structures or basic rings and do not involve the comparison of the compound's microscopic crystal structure itself."

Case Brief:

Company B's patent claim No. 1817143.5 aims to protect a crystalline compound. The Patent Reexamination Board declared the patent was wholly invalid on the grounds that the patent did not have the requisite inventiveness because the existing technology disclosed that this compound presently exists in another crystal structure, and the original application document failed to prove the technical effect of this compound. Both the first and second instance courts supported the invalidation decision, and the SPC revoked the retrial appeal of the patentee.

Microscopic crystal structures of crystalline compounds vary from case to case. A compound in a solid state may have different solid crystalline forms based on two or more different molecular arrangements. However, not all changes in a microscopic crystal structure will inevitably lead to prominent substantive features and obvious progress. Therefore, it cannot be concluded that a compound is not similar in structure based only on its difference in microscopic crystal structure, and therefore exempt from describing the creativeness of the patent from prior art (has unexpected technical effects).

The SPC held that "compounds of similar structure" referred to in the Guidelines only specifically means compounds with identical basic core structures or basic rings and does not involve the comparison of the microscopic crystal structure itself. Though crystalline compounds may show different physical or chemical characteristics due to their different molecular arrangements, they are still within the field of compounds. Therefore, the regulations regarding compounds provided in the Guidelines can be applied to determine the inventiveness of compounds with new crystal structures. The technical effects achieved by the crystals are the key factors contributing to their inventiveness. Only the technical effects from the records in the original application documents, or which can be directly concluded from the original application documents may be taken into consideration when determining the inventiveness of a patent.

KWM Comments:

1.If possible, the invention patents of chemical fields, especially those of pharmaceutical fields, should adopt open-ended claims. They should disclose the technical effects sufficiently in the description so as to broaden the scope of the protection and to enhance efficient enforcement of the patent right.

2.When the applicant submits experimental data after the application data, it should confirm whether the corresponding technical effects to be proved are clearly disclosed in the original application documents of the patent.

3.If the technical effect of a patent is difficult to predict for persons skilled in the art, we recommend recording the corresponding experimental data clearly and completely in the specification.

4.For examination of creativeness of compounds with a new crystal structure, the SPC pointed out that "compounds of similar structures" referred in the "The Guidelines" only specifically means, compounds with identical basic core structures or basic rings and does not involve the comparison of the compound's microscopic crystal structure itself.

COMPLIANCE — THE NEW WATCHWORD FOR COMPANIES IN CHINA

在华医疗企业和其他高风险企业关注的问题

By Compliance Practice Group
作者：合规业务组

过去一段时间，中国政府部门对一家著名的英国跨国药企采取的一系列行动不断登上了国内和国际媒体的头版头条。中国公安部于7月11日正式宣布，该公司的部分高级管理人员涉嫌为增加产品销量，而通过旅行社向政府官员、医院、医生和医疗行业协会等大肆行贿，目前已对相关人员展开刑事侦查。另外，该声明还指出该公司的一些高管及员工同时涉嫌收受供应商的商业贿赂。

根据新闻报道，此次由公安部统一部署和领导的大规模调查源起于今年6月下旬各地方公安机关对该公司在上海，长沙和郑州的办事处进行的搜查。根据相关报道，此次行动中，公安机关查封了公司的一些文件并且带走了一些员工。

In the past few months, allegations of a massive bribery scheme on the part of the Chinese unit of a famous British multinational pharmaceutical company have grabbed headlines in China and abroad. China's Ministry of Public Security officially announced on July 11 that senior executives of this company are under criminal investigation on suspicion of using travel agencies to bribe government officials, hospitals, doctors, and medical industry associations in a

除了媒体报道的此次大规模调查事件外，其他多家医疗领域内的公司近期也受到了政府有关部门在不同层面的调查。另外，国家发展和改革委员会在7月初宣布，将对在中国运营的60家医药公司展开药品成本价的调查。

这一系列针对医疗企业的调查和行动在一定程度上反应了中国政府进一步推动医疗改革的决心，这将对医疗企业产生整体的直接影响。

鉴于此，医疗企业和其他在合规方面存在高风险的企业，比如大量聘请第三方中介机构、频繁接触政府官员或国有企业的公司等，应当高度关注与该事件相关的最新动态，并采取适当的应对措施。

在目前的监管环境下，相关企业应高度关注其内部合规制度并确保相关制度得以有效和全面的实施。建议企业着重从以下几个方面审查和完善其合规制度：

- 审查和更新内部规章制度和流程，包括但不限于关于商务宴请和招待的行为指引、关于应对政府“突袭”检查的指引、员工手册、以及处理内部举报的相关流程等；
- 向员工提供如何配合政府调查的相关培训；
- 开展合规及法律风险评估；
- 对包括财务、会计业务在内的内部控制流程进行审查以及“压力测试”；
- 主动对涉嫌违规行为进行内部审计和内部调查；
- 对第三方中介机构，如中介、销售代表等，进行全面的尽职调查；
- 对被证实的违规行为或举报立即进行处理。
- 如相关政府部门已经对企业启动了相关调查，那么企业在启动内部评估和审计方案时还应当格外谨慎开展合规及法律风险评估；
- 对包括财务、会计业务在内的内部控制流程进行审查以及“压力测试”；
- 主动对涉嫌违规行为进行内部审计和内部调查；
- 对第三方中介机构，如中介、销售代表等，进行全面的尽职调查；
- 对被证实的违规行为或举报立即进行处理。

如相关政府部门已经对企业启动了相关调查，那么企业在启动内部评估和审计方案时还应当格外谨慎。

联系我们（CONTACT US）：
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scheme to increase sales. Some of the company's senior executives and employees are also suspected of taking bribes from third party vendors.

According to the news reports, the national Ministry of Public Security began the investigation in late June, when local public security bureaus visited the company's Shanghai, Changsha and Zhengzhou offices. Reportedly, company documents have been seized and some employees detained.

While this investigation is high-profile, it is by no means alone. In early July, the National Development and Reform Commission announced an investigation into the costs and prices charged by 60 domestic and international pharmaceutical companies operating in China.

These investigations of drug makers signal China's intention to push forward with reforms in the healthcare sector, which will impact all companies operating in that space.

It is not just healthcare companies that need to take note of these investigations. Companies in other sectors can have high compliance risks if they, for example, frequently use third party intermediaries or have a high degree of interaction with government officials or State-owned enterprises. Companies that fit this profile are advised to pay attention to enforcement trends and take proper responsive measures.

In the current regulatory climate, companies are advised to stay focused on their compliance programs to ensure that they are robust and fully implemented. Recommended steps include the following:

- Review and revise internal policies and procedures on, among other things, hospitalities, "dawn raid" guidelines in the event of government inspections, employee handbooks and manuals; and the process for handling "whistleblowers;"
- Prepare a training course for employees on how to handle investigations;
- Conduct compliance and legal risk assessment;
- Review and "stress-test" internal control procedures on, among other things, financial and accounting practices;
- Conduct proactive internal audits and investigations of suspected violations;
- Conduct detailed due diligence on third party intermediaries such as agents and sales representatives;
- Take prompt action if faced with evidence or allegations of wrongdoings.

Companies should exercise caution when an investigation has been initiated before embarking on any internal assessment and audit process.

China's Investigation into Drug Pricing: What You Need to Know

面对中国政府的药品价格调查应当了解的事情

By Compliance Practice Group
作者：合规业务组

在医药价格监管体系下，企业应当对于适用市场调节价的药品进行定价；对适用政府指导价的药品，应当在政府指导价规定的幅度内制定药品价格；另外，企业还需制定属于政府指导价、政府定价产品范围内的新产品的试销价格，特别产品除外。对于侵犯企业依法自主定价权利的行为，企业有权进行检举、控告。如企业对政府的处理决定不满，企业有权申请行政复议，对行政复议决定不服的，还可以依法向人民法院提起诉讼。

在医药价格监管体系下，企业的义务可以概括为根据政府的要求制定价格以及配合政府进行价格调查。企业同时有义务及时了解并遵守相关法律法规，包括执行依法制定的政府指导价、政府定价和法定的价格干预措施、紧急措施等。面对政府的价格及成本调查，有关企业应当如实反映情况、向价格部门提供与调查相关的必要文件以及其他资料。企业应当制定和标明药品零售价格，禁止暴利和损害用药者利益的价格欺诈行为。

根据上述的权利和义务，企业需要在价格调查过程中应全面配合相关的价格调查部门。但是如果价格主管部门违反了相应的法律、法规，企业有权申请行政复议，如果行政复议的结果依然不令人满意，企业还可以向人民法院提起行政诉讼。

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Under the drug pricing regime, drug manufacturers are required to fix drug prices that are subject to market regulation and to establish prices for new products which are subject to government-set or guided prices, except for special products for trial sales. Manufacturers also have the right to report or claim against actions that have infringed upon their rights of independent pricing. If a manufacturer is not satisfied with a punishment decision made by the authorities, the manufacturer has the right to apply for administrative review of the decision. If the manufacturer is not satisfied after administrative review, it may file suit in a people's court.

Manufacturer's obligations under the drug pricing regime include setting prices according to the government's requirements and cooperating with the government during investigations. Manufacturers also have the obligation to keep abreast of all relevant laws and regulations, including government guided-prices, government-set prices, legal price intervention measures, and any emergency measures adopted by the government; to provide any documents or other materials necessary to an investigation; to provide the pricing authority with information related to raw material costs and drug pricing; to fix and mark the retail prices of pharmaceuticals; and to avoid sudden excessive profits and any deceptive pricing harmful to the interests of patients.

Within the context of these rights and obligations, drug manufacturers need to cooperate fully with authorities during a pricing investigation. However, if investigators overstep their authority, manufacturers have recourse to administrative review of investigators' actions. If unsatisfied with the result, manufacturers may file suit and air their grievances in court.

Who Can Initiate Class-action Lawsuits under the Draft Environmental Protection Law?

从环境保护法草案看集体诉讼

By Harry Du and Tom McGinn
作者：杜慧力　Tom McGinn

2013年6月底，人大常委会对《中国环境保护法修正案（草案）》二次审议稿进行了审议。鉴于目前广泛的讨论，很多人臆测这项法律初稿还要经第四轮的修改，才能最终生效[1]。这些修改是中国环保法1989年生效以来对其的首次修正。

原全国人大环资委研究室办公室副主任骆建华解释说，目前为止做出的修改重点厘定为七个领域：1) 法律的大致角色；2) 当地政府的职责；3) 公开环境统计数据；4) 防止农村地区与农业相关的污染；5) 公众参与；6) 信息透明度；以及7) 惩治措施。[2]核心论题目前围绕对环境污染提起的集体诉讼展开。现行法律下，代表公众对环境污染提起集体诉讼的权利人为数甚少，最为人所知的可能就属半官方性质的中华环保联合会了。

为有效解决上述（5）至（7）的问题，在第二稿草案征向社会公开征求意见期间，很多人认为权利人主体应扩充范围。按照立法者的说法，这样做或许有助制定出“长着尖牙具有威慑力的法律”。[3]

[1]http://www.kankanews.com/BCmoney/news/2013-09-22/3539575.shtml（最后访问于2013年11月7日）

[2]http://www.eeo.com.cn/ens/2013/0712/246452.shtml (最后访问于2013年11月7日)

[3]http://www.npc.gov.cn/englishnpc/news/Legislation/2013-06/28/content_1799075.htm (最后访问于2013年11月7日)

At the end of October 2013, the Standing Committee of China's National People's Congress (NPC) finalized the third draft of amendments to China's Environmental Protection Law (《环境保护法修正案（草案）》).

In light of the extensive debate so far, many speculate that the Law will undergo a fourth draft before the New Environmental Protection Law enters into force[1]. Such changes would constitute the first amendment to the Law since it came into force in 1989.

Luo Jianhua (骆建华), the former deputy head of the NPC's Environment Protection and Resources Conservation Committee, explained that the amendments made so far emphasize seven key areas: i) the overall role of the law, ii) the responsibilities of local governments, iii) the sharing of environmental data, iv) preventing pollution related to farming in rural areas, v) public participation, vi) information transparency and vii) punishment[2].

The issue that has taken center stage in the debate so far surrounds class-action law suits against environmental polluters. Under the current Law, the list of claimants that can initiate class-action law suits against polluters on behalf of the public is limited, with perhaps the best known being the quasi-governmental All-China Environment Federation (中华环保联合会).

In order to effectively address areas v), vi) and vii), many argued, during the public comment phase on the second draft that, that the list should be extended to cover more claimants. Doing so might help to create, in the words of lawmaker, “a law with teeth that can bite”[3].

The third draft seems to reflect that the legislature is convinced by these arguments. It stipulates that “relevant organizations” must, in order to initiate an environmental class-action lawsuit, satisfy four conditions:

1.Be a national organization,

2.Be registered with the Civil Ministry,

3.Have been continuously active for at least 5 years, and

4.Have a “good standing”.

Currently 13 organizations satisfy the requirements (1) – (3). However, as the “good standing” condition gives the court a wide discretion to reject applications, it is difficult to determine who will be able to claim if the amendment is passed.

Class-action law suits generally are a contentious topic in many countries.

[1]http://www.kankanews.com/BCmoney/news/2013-09-22/3539575.shtml (last visit on November 7,2013)

[2]http://www.eeo.com.cn/ens/2013/0712/246452.shtml (Last visit on November 7, 2013)

[3]http://www.npc.gov.cn/englishnpc/news/Legislation/2013-06/28/content_1799075.htm (last visit on November 7, 2013)

草案第三稿显示立法者采纳了上述意见，规定能够提起集体诉讼的“相关组织”必须满足以下条件：

1.全国性社会组织；

2.依法在国务院民政部门登记；

3.专门从事环境公益活动连续五年以上；并且

4.“信誉良好”。

目前有13家组织符合前三项要求，但“信誉良好”则赋予法官驳回环境集体诉讼以较大自由裁量权。这种情况下很难确定什么组织可以提请集体诉讼。

一般来说，在很多国家集体诉讼都是一个颇有争议的话题。

美国善于引进新概念，以此弱化权利者个人与被告（通常为大型规模的公司组织）之间的不平等，也有不少权力者个人对环境污染主体提起集体诉讼这样的事例。众所周知的是位于加州辛克利的居民胜诉太平洋天然气和电器公司的事件，该公司被起诉非法排放含有大量致癌物质的污水，导致该地区地下水污染且使居民罹患恶性疾病，后来这也成为好莱坞电影《永不妥协》的素材。

加拿大也有集体诉讼的先例，但提起公诉的理由却相对窄得多。在美国可以精神痛苦或情感痛苦为由提出索赔要求[4]，但在加拿大这些理由很难成立。举例说，要在安大略省提起集体诉讼，提起人需证明集体是否认可“共同议题”[5]。鉴于污染会对人体健康造成不同程度的损害，上述所谓的“共同议题”只限于与财产权侵害有关的案件[6]。

在英国集体诉讼并不常见，比较类似的机制则为“集团诉讼制度”。该制度下，当事人要向法庭证明其案件“导致了带有普遍性或有关联性议题的发生”，并因此具备集体操作的可行性[7]。法官具有充分裁量权批准这类请求。最近有个涉及环境污染的案例，上诉法院拒绝了500位权利申诉人的集体索赔请求，理由是当事人的情况无论从法律上看还是从事实上看，都彼此不具备充分的相似性[8]。该案例常被引用，以此表明界定相似性的难度。

德国法对多方当事人诉讼也设限很多。但也有些例外情况——如果对非政府污染源污染环境要求索赔不在此列——德国法将不确认集体诉讼请求成立，但当事人各个主体仍可向法院申请共同审理这些案件[9]。

2013年6月11日，欧盟执行机构欧洲委员会发布了一项决议[10]，声明欧盟成员国在未来两年内将采用“集体救济”机制，使得权利要求人能以集体的名义寻求赔偿或禁令解除。该决议还特别指出，该补偿机制的推出对环境保护意义深远[11]。因此，尽管该决议不具有法律上的约束力，但会催生环境污染集体诉讼案件在欧洲大陆“全面开花”。

在修正案三审稿下依然难以确定可以提起环境集体诉讼的主体。但是，四审稿将会扩大相关主体的范围。即使维持目前现状，可能更多的非政府组织（NGO）将允许提起环境侵权集体诉讼。不管怎样，是否应增加环境污染集体诉讼当事人数量的公众讨论令人欣喜。同时，这样也能向更多人敞开正义的大门，构建起美国那样广受诟病的“诉讼文化”。特别是在环境保护这块政治比较敏感的领域，或许会弊大于利。加拿大、英国、德国对是否将集体诉讼制度加入其既有法律体系一直犹豫再三，正充分显示了其中所含的风险。

（本文原文为英文，中文为译文。）

[4]http://www.michbar.org/journal/article.cfm?articleID=484&volumeID=36 (最后访问于2013年11月7日)

[5]Class Proceedings Act S.O 1992, s. 5.1(c)

[6]参见Pearson v. Inco Ltd. (2005), 205 O.A.C.

[7]Civil Procedure Rule 19.10

[8]Austin & Others -v- Miller Argent (South Wales) Ltd [2011] EWCA Civ 928

[9]Through an application for a “Prozessverbindung” under § 147 ZPO

[10]http://ec.europa.eu/justice/civil/files/c_2013_3539_en.pdf(最后访问于2013年11月7日)

[11]Under clause (7)

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The United States is often accredited with introducing the concept as way to level the playing field between individual claimants and larger, often corporate, defendants. As such, there are several examples of an individual bringing a class-action lawsuit against an environmental polluter. Perhaps the best known involves residents of the town of Hinkley in California defeating The Pacific Gas & Electric Company in what became the basis of the Hollywood film Erin Brockovich.

In Canada, there is also precedence for class-action law suits. However the grounds on which to initiate such claims are far narrower. While it is possible in the U.S. to bring a claim for mental anguish or emotional distress[4], such claims are unlikely to succeed in Canada. For example, in order for a member to raise a class action in Ontario, he must demonstrate that the class has “common issues”[5]. In light of pollution often having divergent effects on peoples’ health, such “common issues” have only been established in cases involving damage to property[6].

In the United Kingdom class-action lawsuits are not possible. The most similar mechanism is the Group Litigation Order. This involves parties demonstrating to the court that their cases “give rise to common and related issues” and should therefore be managed collectively[7]. It is at the complete discretion of the Judge to award such an Order. In the most recent case involving an environmental pollutant, the Court of Appeal declined to group 500 individuals claiming damages on the ground that the parties’ cases were not sufficiently similar in law and in fact[8]. This case is often cited to demonstrate the difficulty in establishing such similarity.

German law is similarly restrictive in allowing multi-party litigation. With very few exceptions – environmental claims against non-governmental polluters not being one of them – German law does not recognize class-action law suits. The parties can however apply to have their cases managed collectively[9].

On June 11 2013 the European Commission, the executive body of the European Union, issued a Recommendation[10] indicating that within two years Member States should adopt a mechanism for “collective redress” so as to allow claimants to seek damages or injunctive relieve on a collective basis. It specifically states that the availability of such redress would be of value for environmental protection[11]. Therefore, despite the Recommendation being non-binding, it may result in class-action lawsuits against pollutants becoming available across Europe.

It is not yet possible to determine which organizations would be able to initiate class-action litigation under the third draft of the Environmental Protection Law. However moving away from a definitive list of claimants to a 4-stage test would make the law more flexible. While the status quo may be retained, it is also possible that more NGOs may be allowed to initiate proceedings. In any case, the public debate about extending the number of parties that can initiate class-action lawsuits against polluters is a welcome one. While this may foster access to justice, it may also create the “litigation culture” that the U.S. is often criticized for. Especially in the politically sensitive area of environmental protection, this may do more harm than good. The hesitation of the Canadian, UK and German legal systems in adopting class-action law suits demonstrates this risk.

[4]http://www.michbar.org/journal/article.cfm?articleID=484&volumeID=36 (last visit on November 7,2013)

[5]Class Proceedings Act S.O 1992, s. 5.1(c)

[6]Such as Pearson v. Inco Ltd. (2005), 205 O.A.C.

[7]Civil Procedure Rule 19.10

[8]Austin & Others -v- Miller Argent (South Wales) Ltd [2011] EWCA Civ 928

[9]Through an application for a “Prozessverbindung” under § 147 ZPO

[10]http://ec.europa.eu/justice/civil/files/c_2013_3539_en.pdf (lastvisit on November 7, 2013)

[11]Under clause (7)

Push For Soil Quality Regulations Will Have Consequence

对投资者产生深远影响的土壤环境治理规则

By Compliance Practice Group
作者：合规业务组

随着环境污染问题逐步占据中国媒体的头版头条，中央政府也开始寻求解决环境问题的方案，土壤污染问题就是其中的一个突破口。国务院最近发布了题为《近期土壤环境保护和综合治理工作安排》的通知，这将预示着政府将在土壤环境保护方面进行大量的立法工作。投资者应当注意：该通知一定会对您不论是现阶段还是将来的在华投资产生深远的影响。尤其体现在制造业、重工业领域，以及一些环境保护的敏感地区。

国务院的通知对法规的进一步起草以及今后立法方向的确定起到重要的指导作用。通知中的一些规则将推动现有的土壤环境监管体系的变革。我们期待国务院的各部委和各地方政府在以下几点做出更加具体的规定。

1）土壤的定期监测以及污染的限期治理。通知规定对排放重金属、有机污染物的工矿企业以及污水、垃圾、危险废物等处理设施周边土壤进行定期监测。任何监测出来的污染需要在限定的时间内予以治理。

2）强化土壤环境保护的优先区域。通知规定耕地和集中式饮用水水源是土壤环境保护的优先区域。在这些区域禁止新建有色金属、皮革制品、石油煤矿、化工医药、铅蓄电池制造等项目。

3）加强受污染土地的控制。通知规定有关部门禁止向土壤环境标准不能满足建设用地要求的土地颁发施工许可

With environmental pollution front and center in the Chinese press, the government in Beijing has moved to address at least one aspect of the problem – soil pollution. In a sign that new regulations on soil quality are on their way, the State Council recently issued a directive titled “Working Arrangement of the Recent Environmental Protection and Comprehensive Treatment of Soil.” Investors take note: the policies proposed by the Council will almost certainly impact existing and future investments in sectors such as manufacturing and heavy industry, as well as investments in geographic areas deemed to be ecologically sensitive.

A Council directive is intended to guide the drafting of legislation and is an important clue to the scope of future regulation. A number of the Council’s recommendations could significantly alter the current regulatory landscape. We expect regulation to be forthcoming on national, provincial and local levels in the following areas:

1) Regular monitoring of soil quality with deadlines for pollution clean-up. The Council recommends that soil quality be monitored around industrial and mining establishments that emit heavy metals and organic contaminants, as well as around facilities that process sewage, garbage, and hazardous waste. Any pollution would need to be controlled within prescribed deadlines.

2) Enhanced soil protection areas. The Council recommends that cultivated land and watersheds around reservoirs be granted priority protection. Within these areas, there would be a prohibition

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证。并且经评估认定对人体健康有严重影响的污染地块，不得作为住宅开发和农产品生产用地。

4）开发土壤污染治理和修复的试点区域。通知规定在长江三角洲、珠江三角洲、辽中南等重点污染区域实施土壤污染综合治理，有关地方应在2013年年底前完成综合治理方案的编制工作。根据该规定，所涉及地区的投资者在年底前会迎来新的环境保护规则。

5）健全土壤环境的投入机制。通知规定政府要加大土壤环境保护的投入力度。并且规定企业将对因自身原因产生的污染提供相应的治理费用。

6）严格企业问责制度。通知规定地方政府将同当地主要企业签订土壤环境保护目标责任书。未能达到所签订目标的企业需要承担相应的责任。

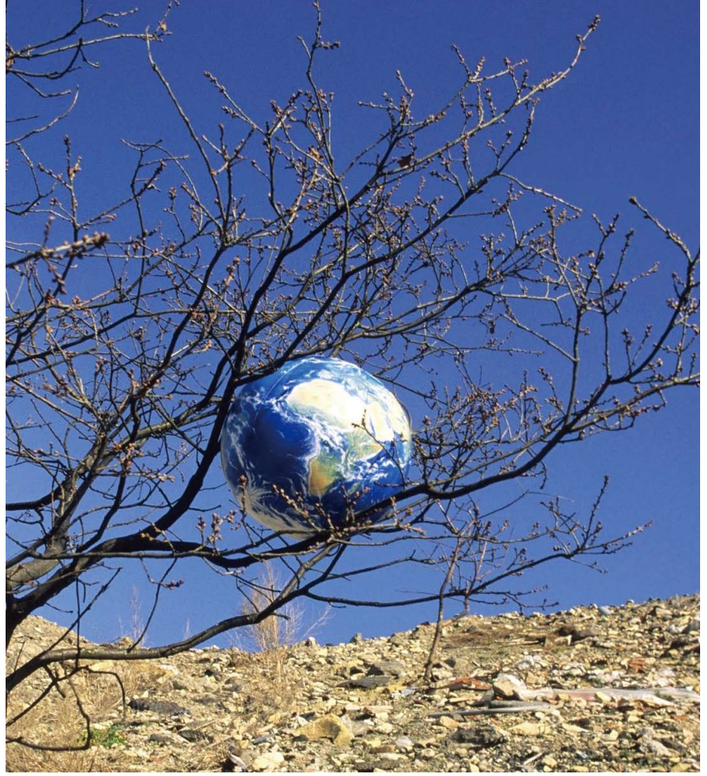
近期，中央的一系列举措也印证了对环境保护问题的关心。 首先，在中国共产党十八次全国代表大会上，新一代中国领导人第一次将生态建设与经济建设、政治建设、文化建设、社会建设一并纳入了党章。习近平主席在今年的中央政治局会议上提出了改善生态环境就是发展生产力的理念。

其次，5五月初，环境保护部连同其他部委完成了“土壤环境保护法”的起草工作。由于草案的具体内容仍处于保密状态，在该草案正式公开后，我们将在后续的合规简讯中及时分享相关信息。

另外，最高人民法院和最高人民检察院在本月联合发布了《关于办理环境污染刑事案件适用法律若干问题的司法解释》(“《解释》”)，并于2013年6月19日起生效实施。《解释》列出了14种“严重污染环境”的情形，其中包括“非法排放、倾倒、处置危险废物3吨以上；非法排放超过国家污染物排放标准或地方污染排放标准3倍以上的污染物；致使农田或特种用途林地5亩以上，其他土地20亩以上基本功能丧失或者遭受永久性破坏的等情形”。根据我国《刑法》第338条，以上情形的出现将使违法者面临三年以下有期徒刑或者拘役，并处或者单处罚金的刑罚。

此外，《解释》还列出了11种构成《刑法》第338条规定的“后果特别严重”情形。这些情形中包括“致使农田或特种用途林地十五亩以上，其他土地六十亩以上基本功能丧失或者遭受永久性破坏的；致使公司财产损失一百万元以上的；致使一人以上死亡或者重度残疾等情形”。根据《刑法》第338条的规定，以上情形的出现将使违法者面临三年以上七年以下有期徒刑，并处罚金。

这些发展表明中国环境监管体系正在面临变革。国务院在土壤环境保护方面的通知和最新实施的《解释》都是强有力信号，预示着投资者不论是现在还是将来都将面临更繁杂的土壤质量监管制度和刑事责任。谨慎的投资者应该为此作出相应的规划。



on new projects involving non-ferrous metals, leather products, lead-acid batteries, oil and coal, and chemicals and pharmaceuticals.

3) Measures to forbid various uses of polluted land. The Council recommends that construction permits, including those for new industrial projects, should not be issued for land that cannot meet certain soil quality tests. It further recommends that such land be barred from residential development and agricultural use.

4) Model Areas for Soil Control and Recovery. The Council recommends that heavily-polluted areas such as the Yangtze River Delta, the Pearl River Delta, and central and southern Liaoning be made into models for the control and treatment of soil pollution. Comprehensive treatment plans for these areas would be required by the end of 2013. Under this recommendation, investors with projects in these areas could potentially face new environmental regulations by the end of this year.

5) Increased Funding for Treatment of Soil Pollution. The Council recommends that governments increase funding for soil environmental protection. It further recommends that enterprises be held liable for the treatment costs of pollution they cause.

6) Enhanced Accountability. The Council recommends that local governments sign agreements with key enterprises to commit them to certain environmental targets. Failure to meet these targets would expose the enterprises to liability.

Recently, several additional developments have confirmed Beijing's increased concern with environmental protection. First, China's leaders at the 18th Communist Party Conference affirmed that environmental protection was as important an area of policy as the Party's traditional concerns with economic, political, cultural, and social issues. In a meeting of the Central Committee's Political Bureau this year, President Xi Jinping equated environmental protection with the protection of economic productivity.

Second, in early May, the Ministry of Environmental Protection, among others, promulgated a draft "Soil Environment Protection Law." However, this draft is still confidential. Its provisions will be explored in our later newsletters when it is issued.

Additionally, in June, the Supreme People's Court together with the Supreme People's Procuratorates issued the Interpretations on Certain Issues Concerning the Application of Law in Handling Criminal Cases of Environmental Pollution (the "**Interpretations**"), which became effective on June 19, 2013. The Interpretations list 14 actions constituting "severe environmental pollution", breach of which can carry the criminal penalties of imprisonment of no more than 3 years, criminal detention, and/ or penalty in accordance with Article 338 of the PRC Criminal Law. Some actions amounting to "severe environmental pollution" include illegal releasing, dumping, or disposing of dangerous waste of more than 3 tons, illegal releasing of pollutants 3 times above the national emission standard or local emission standard and causing loss or permanent damage to cultivated land, specially used forests of more than 0.8 acres or other land of more than 3.2 acres.

Moreover, the Interpretations also list actions constituting "exceptionally serious consequences". These can carry fixed-term imprisonments of more than 3 years and less than 7 years and a fine in accordance with Article 338 of the PRC Criminal Law. The "exceptionally serious consequences" include causing loss or permanent damage to cultivated land, specially used forests of more than 2.5 acres or other land of more than 10 acres and causing property damage exceeding 1 million RMB or causing more than 1 death or severe disability.

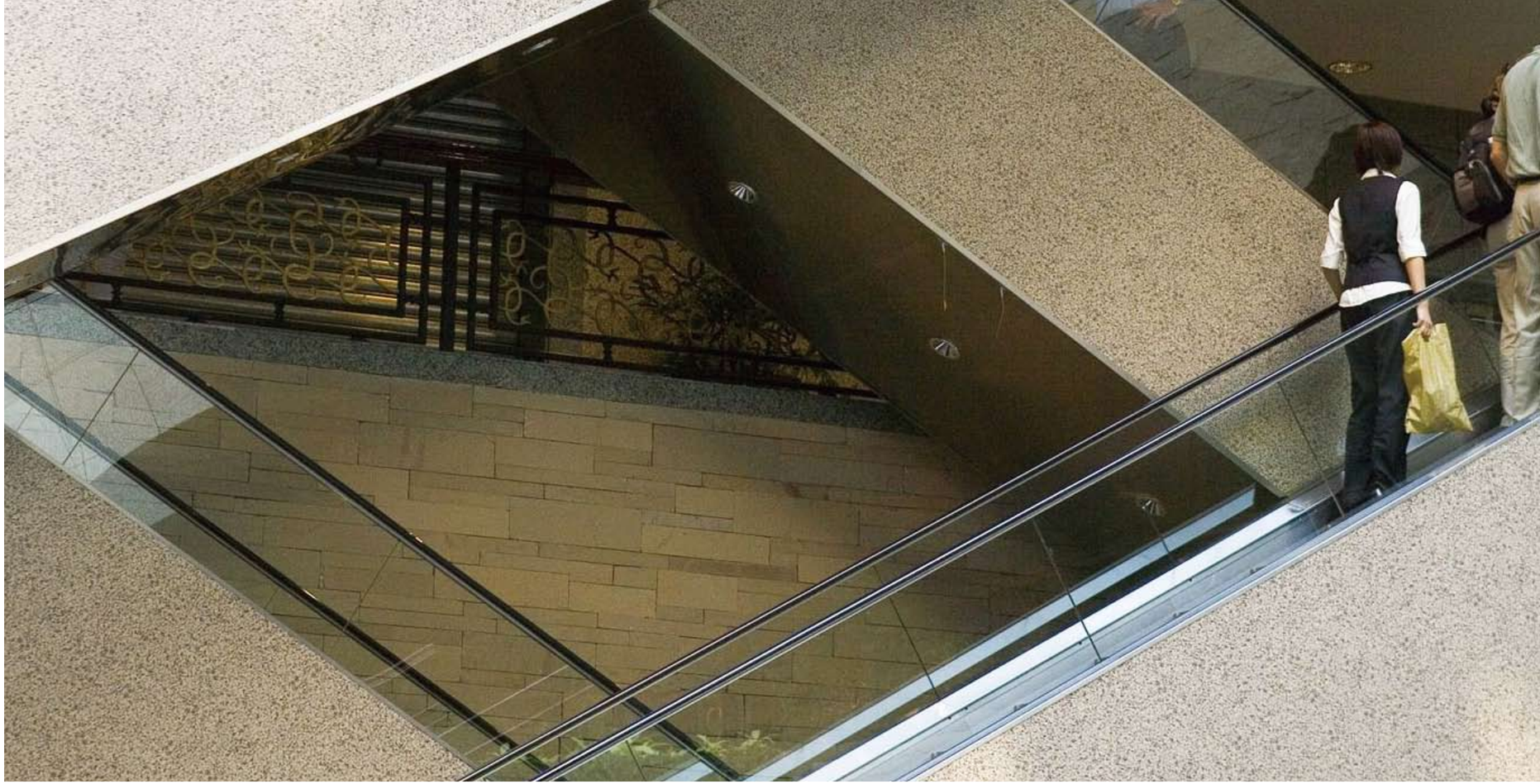
These developments signal that changes are coming to China's environmental regulatory regime. The Council's directive on soil pollution and the newly implemented Interpretations are strong indications that, at the very least, existing and future projects will face enhanced regulatory scrutiny and criminal liabilities related to environmental pollution. Prudent investors should plan accordingly.

(This article was originally written in Chinese, the English version is a translation.)

The Use of the VAM in an Equity Investment Scheme

对赌模式与股权投资类信托计划的“跨界”结合

By You Yang, Lin Kaiyi and Zhao Zhihan
作者：尤 杨　蔺楷毅　赵之涵



“海富投资”案曾在PE业内引起热切关注，各方对本案的讨论直至最高人民法院于2012年末做出再审判决后方告一段落。最高人民法院最终摒弃了原二审法院机械地将PE投资认定为“名为联营，实为借贷”的观点，在肯定PE这一投资模式的基础上，综合考量项目公司、项目公司债权人、项目公司其他股东等各方权益，就对赌协议的效力做出综合判定，区别对待与项目公司对赌和与其股东对赌的效力，有条件的肯定了项目公司股东间对赌协议的合法性 。[1]

笔者认为，该判决的影响不仅局限于PE领域，同样也会对信托行业，特别是股权投资类信托计划的设计提供参考和借鉴意义。

一、现有股权投资信托计划资金退出途径分析

如何实现信托资金安全、妥善地自项目公司退出是股权投资类信托计划中非常关键的一个环节。在实务中，信托公司通常习惯与项目公司的股东签署回购协议，要求后者在信托计划到期时，溢价回购项目公司股权。笔者认为，这一类资金退出方案的优势在于信托公司对此模式非常熟悉、易于操作，但同时这一模式的不足之处也相当明显，具体而言：

1、“定期溢价回购股权”始终与“假投资真借贷”有瓜田李下之嫌。根

[1]具体案件介绍及评析详见金杜博客《海富投资案：解读最高法院再审判决及对PE投资者的启示》。

The Haifu Case[1] caused the Private Equity industry consternation until a clarifying judgment from the Supreme People's Court of China (the "Supreme Court") in December 2012. The Supreme Court overruled the second instance court's opinion that PE investments are "joint risk sharing" and investors are not entitled to a guaranteed profit without regard to the performance of the business. The Supreme Court (i) recognized the legitimacy of the PE investment model, (ii) fully considered all the various interests of the project company, the creditors of the project company and the shareholders of the project company, (iii) distinguished VAM (Valuation Adjustment Mechanism) agreements between the project company and the shareholders from VAM agreements between the company shareholders, and affirmed the validity of the latter with certain prerequisites.

The Haifu Case has significant implications not only for PE firms, but also for the investment industry which may find guidance from it when designing equity investment structures.

I. How to withdraw capital from an equity investment?

How to withdraw capital from a project company in a safe and appropriate manner is a key process in an equity investment scheme. In practice, the investment company will sign repurchase agreements with the shareholders of the project company whereby the shareholders are required to purchase for a premium the equity of the financier at the closing date of the project. This process is advantageous because it is common and companies are familiar with it. As for the shortcomings:

a. It is difficult to distinguish between a "regular equity repurchase for a premium" and a "loan arrangement

[1]Please find more information in the Haifu Case Review –Interpreting the Supreme People's Court's Retrial Judgment and It's Implications for PE Investors on the blog of King & Wood Mallesons (www.chinalawinsight.com).

据《信托公司私人股权投资信托业务操作指引》[2]，信托公司可以通过融资企业回购等方式退出信托计划，但是如果投资对象为房地产企业，此类约定就有可能被认定为“名为投资，实为借贷”，信托公司也有可能被认为试图规避银监部门关于房地产信托项目“四三二”的规定。

2、这一模式如进入司法审判阶段，其结果具有不确定性。根据笔者与包括最高人民法院在内的各级法院商事审判庭的法官沟通，大多数法官对于信托法律概念并不熟悉，信托计划一旦发生纠纷，法官们往往更倾向于采用传统民法理论进行裁判。这就导致对“信托公司名为投资，但不参与项目公司经营，到期要求回购股权，收取固定收益（溢价款）”的投资模式有不同理解和认识。很有可能因此质疑信托计划本身的效力。

3、信托公司如选用这一资金退出模式，往往会要求融资方提前签署《股权回购协议》等文件。而一旦发生纠纷，融资方很有可能通过主张该等协议意思表示不真实，否认相关协议的效力，导致股权回购程序无法进行。

除回购外，股权投资信托计划还存在其他退出途径，例如，信托公司可对外转让股权、设置随售权等。但除转让公开流通的上市公司股票外，信托公司是否能够顺利处置股权，回收信托资金都存在较大的不确定性。

二、对赌作为股权投资型信托计划资金退出途径的可行性分析

将对赌运用于股权投资型信托计划指：信托公司可以与项目公司股东设定关于业绩、现金流、盈利目标等对赌条件，在预设情况实现时，信托公司可以要求项目公司股东予以现金补偿或回购股权。对赌协议的条款尚缺乏明确的成文法规范，但是笔者基于对海富投资案终审判决的理解认为，如对赌协议不损害项目公司、项目公司债权人的权益，此类协议应可获得人民法院的支持。

[2]银监发[2008]45号

under the name of an investment”. According to the *Guidelines for Trust Companies to Operate a Private Equity Investment Trust Business*[2], a trust investor company can withdraw from an equity investment by the presale of its capital investment”. However, in the case of a real estate investment, this “withdraw capital” model may be deemed a “loan arrangement under the name of investment” and the investor company may be considered to be attempting to intentionally avoid the regulations of the ”four three two” provision (a qualified real estate developer must have four kinds of permission from the relevant government agencies, i.e., *State-owned Land Use Permit, Land Use Permit, Building Permit and Building Construction Permit,* and must possess a 30% equity fund and a second grade development qualification) implemented by banking regulation authorities.

b. The “withdraw capital” model leads to great uncertainty in the outcome of the judicial process. Based on years of experience engaging with judges of commercial courts at all levels, including the Supreme Court, in cases involving trust plan disputes, most judges are not very familiar with trust laws and prefer instead to adopt traditional civil law theory in their judgments. This leads to a different interpretation, i.e. – that the trust company invests capital but in fact, does not involve itself in the management of the business and also demands the repurchasing of its equity when it becomes due, and charges fixed returns (premium). All this brings the validity of the equity investment structure into question.

c. If a trust company adopts a “withdraw capital” model, documents such as the Equity Repurchase Agreement will be signed in advance with a financing party. However, if disputes arise, the financing party may deny the validity of related agreements by insisting that these agreements are not based on true intentions, thereby rendering the equity repurchase impracticable.

Apart from repurchase, there are other options available for withdrawing capital from equity investments, For instance a company can transfer its equity to third parties or by agreeing upon tag along rights. However, except by transferring the outstanding shares issued by listing companies, there is no certainty that an investing company can dispose of its equity or recover the trust fund successfully. In short, a VAM gives the equity investor certainty over the return of its investment. Without the VAM, the investor can only get a return of its investment by transfer of its shares to a third party by way of a tag along right, or an IPO or a negotiated sale—all of which are uncertain exits.

II. The feasibility of VAM as a method to withdraw capital from an equity investment.

Applying VAM to equity investments: the investing company may set VAM terms depending on performance, cash flow and profit objectives with the project company. When such conditions are satisfied, the investing company demands cash compensation or the repurchase of equity by the shareholders of the project company. There is no clear and definite legislation regarding the terms of VAM agreements, but following the judgment in the Haifu Case, the courts should support similar agreements as long as they do not adversely affect the interests of project companies or their creditors.

In theory, a VAM agreement is a valuation adjustment mechanism of a project company. It aims at (i) reducing the risk of the investors' miscalculation of the equity value, and (ii) incentivising and binding the finance party to the investors. If the project company cannot achieve the profit objectives under the VAM agreement, the shareholders of the project company must compensate the investors. This will not cause any damage to the interests of the company, other shareholders or creditors or violate any mandatory provision of any laws, regulations, rules or policies. In addition, because of the uncertainty of realization of the assumed and pre-stated conditions, the VAM agreement differs greatly from the “regular repurchase” clause and to a certain extent helps the investing company reduce the risk of it being held that it is a “loan arrangement under the name of investment”.

In fact, situations where VAM was applied to investment structures occurred long before the Haifu Case. In the Trust Plan of Energy Investment Collection of CITIC Rongjin[3], CITIC Trust made an arrangement with China Oceanwide Corporation (“**China Oceanwide**”) whereby: if the project company cannot obtain a mining permit and sell 8 million tons of ore a year, China Oceanwide will repurchase all the equity of the project company held by CITIC Trust as trust assets. Although this arrangement mainly aimed to recover the trust fund when the

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[2]Yinjianfa No.45 [2008]

[3]All the sources are open information of this trust plan.

从理论上看，对赌协议即是对项目公司的估值调整机制。其目的一是降低投资方错误判断公司股权价值的投资风险；二是投资方以此对融资方进行激励和约束。在双方已达成对赌协议，而项目公司不能实现预设的盈利目标等条件时，由项目公司股东将额外获取的权益补偿给投资人，这一过程并不损害公司及其他股东、债权人的利益，也不违反法律、行政法规的强制性规定。同时，由于预设条件能否实现具有不确定性，对赌协议明显有别于“定期回购”条款，也可以帮助信托公司在一定程度上摆脱被认定为“假投资真贷款”的烦恼。

从实践上看，在海富投资案之前，已普遍存在将对赌运用于信托计划的实例。例如，在中信融金·能源投资集合信托计划[3]中，中信信托与泛海公司约定：如果项目公司未能拿到采矿许可证并且达到800万吨的年销量，泛海公司应回购中信信托以信托资产所持有的全部项目公司股权。笔者认为，尽管该约定主要针对的是信托目的无法实现时如何回收信托资金，但是推而广之，这类约定同样也可以适用于信托目的已经实现，信托资金“正常”退出的情况。

需要强调的是，尽管有最高人民法院判例在先，但是我国不是判例法国家，不同地方法院仍然有可能对对赌协议的效力以及信托计划退出模式存在不同的理解，最高院本身也有可能对新发生的案件作出更新的判决，因此，海富投资案的判决只有参考意义，信托公司需要对此予以注意。

三、 将对赌运用于股权投资型信托计划退出的注意事项

笔者建议，信托公司在签署对赌协议时需要注意以下几点：

1、对赌条款不得违反我国法律、法规的强制性规定，不得损害他人合法权益

海富投资案中，最高人民法院认定投资者与公司对赌协议无效的理由为其违反了《中外合资经营企业法》[4]第八条有关企业利润分配的规定，构成《公司法》第二十条规定的滥用股东权利，损害了公司其他股东和债权人的利益。这一点是信托公司在签订对赌协议时应当特别予以注意的，由于我国缺乏有关对赌协议的法律法规，因此需要信托公司全面考量可能涉及的既有规定，避免对赌协议被认定无效的法律风险。

2、避免与项目公司对赌

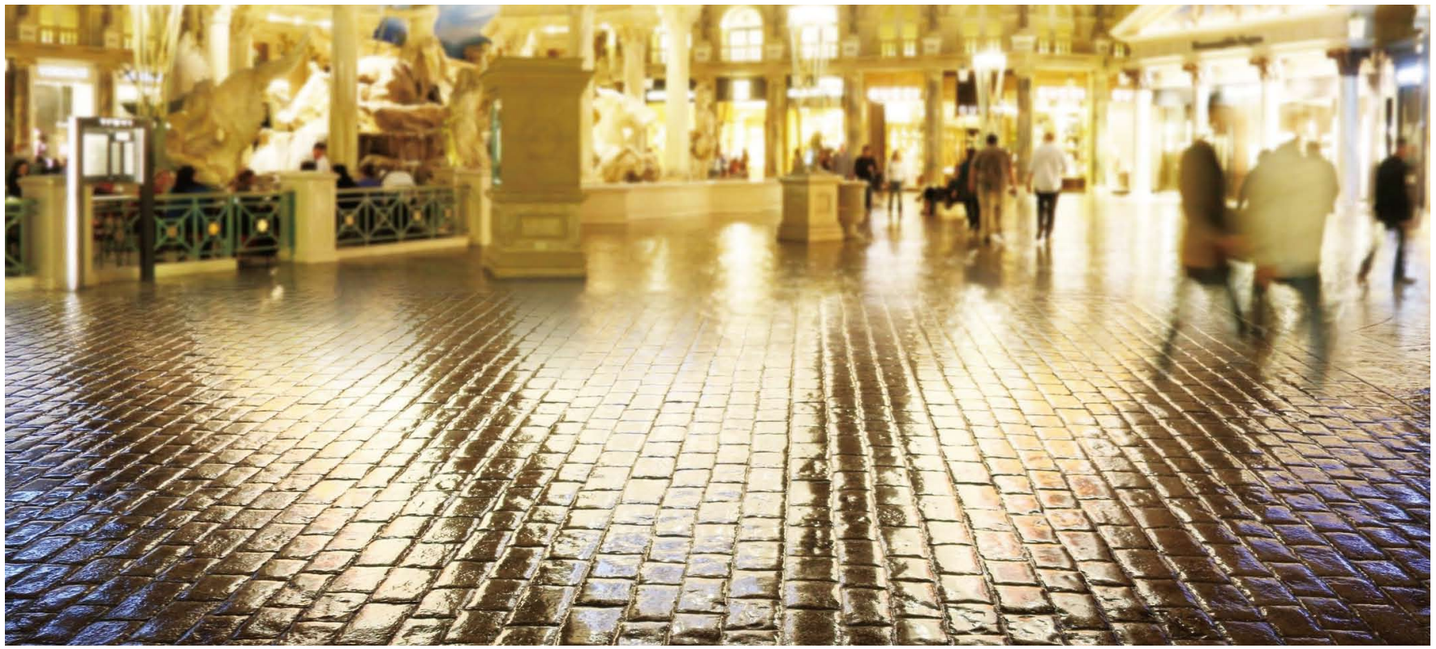
建议信托公司应尽量避免与项目公司对赌，否则很可能将承担对赌协议无效的不利后果。信托公司可以考虑与项目公司的实际控制人、管理层或其他股东对赌，尽量避免对赌协议因此被认定无效的法律风险。

3、对赌条款应当尽量公平、合理

笔者认为，一旦发生纠纷，法院会重点考察对赌协议的公平、合理性。因此，笔者建议信托公司在对赌协议中尽量明确交易对手的经营状况、行业前景、对业绩的承诺等，设定较为合理、公平的对赌条件，并明确列明补偿款或回购款的计算方式，避免法院以显失公平等原因认定对赌协议无效或部分无效。

4、可以考虑将对赌与股权回购协议、随售权等综合运用

笔者认为，对赌方式具有很强的灵活性，信托公司在设计股权投资信托计划的资金退出途径时，可以考虑将对赌协议与股权回购协议、随售权等多种退出方式相结合。例如，信托公司可以在对赌协议中约定股权回购协议的生效条件，当对赌条件被触发，预先签订的股权回购协议即生效，信托公司即可依该股权回购协议回收信托资金。



[3]有关信息来源于该信托计划的公开信息。

[4]1979年7月1日第五届全国人民代表大会第二次会议通过；1990年4月4日第七届全国人民代表大会第三次会议修订；2001年3月15日根据第九届全国人民代表大会第四次会议《关于修改〈中华人民共和国中外合资经营企业法〉的决定》再修订。

purpose of trust could not be realized, it could also be used when the project succeeded for the “normal” withdrawal of trust funds.

A fact worth emphasizing is that Chinese courts do not need to follow the precedents set by earlier cases or higher courts and different local people’s courts may hold different opinions and interpret VAM agreements differently. Considering the possibility that the Supreme Court may give a different judgment in a future case, the Haifu Case can therefore only be considered as a reference for investor companies.

III. Facts worth noting when VAM is used in withdrawing from an equity investment scheme.

A few points investor companies should note when signing a VAM agreement:

a. The terms of a VAM must not violate any mandatory provision of any laws, regulations, rules and policies or damage the legitimate rights of any other person.

In the Haifu Case, the Supreme Court ruled that the VAM agreement between the investors and the target company was invalid because it violates Article 8 of the *PRC Sino-Foreign Equity Joint Venture Law*[4] on profit distribution, which in turn abused shareholders’ rights prohibited by Article 20 of the Company Law and jeopardized the interest of other shareholders and creditors of the company. Since China lacks specific laws regulating VAM agreements, investor companies must bear in mind the impact of potentially relevant provisions of the general law, as well as judicial decisions involving VAM agreements so as to mitigate the risk of a VAM agreement being invalidated.

b. Avoid gambling with the project company

It is recommended that the investor company should try to avoid entering into VAM agreements with the project company; otherwise, the investor company may expose itself to the court finding that the VAM agreement is invalid. In order to avoid this risk, the investor should instead consider entering into VAM agreements with the actual controller, the management board or other shareholders of the project company.

c. The VAM agreement must be fair and reasonable

The court will focus on the fairness and reasonableness of the VAM agreement whenever disputes arise. Therefore, it is advisable that the investor company explicitly identifies the basis for the investment pricing by reference to the target company’s operational status, industry key performance indicators, etc. The parties should also set fair and reasonable VAM terms and list clearly the method for calculating compensation or repurchase so as to avoid putting the VAM in danger of being recognized by courts as invalid or partially invalid due to its obvious unfair terms.

d. Consider a combination of an equity repurchase agreement, a tag along right and a VAM.

When designing the method of withdrawing capital from an equity investment, an investing company can combine a VAM agreement and an equity repurchase agreement with a tag along right. For instance, the trust company may set conditions in the VAM agreement to trigger the equity repurchase. Once the conditions are satisfied, the equity repurchase agreement signed in advance will become effective and the financing company can then recover its investment.

(This article was originally written in Chinese, the English version is a translation.)

[4]Adopted at the 2nd Session of the 5th National People's Congress on July 1, 1979; amended at the 3rd Session of the 7th National People's Congress on April 4, 1990; further amended pursuant to the Decision to Amend the Law of the People's Republic of China on Sino-Foreign Equity Joint Ventures made at the 4th Session of the 9th National People's Congress on March 15, 2001.

New Regulations on Alien's Residence, Work, and Study in PRC

外国人入境居留、工作和学习的新规制

By Jiang Junlu and Jin Shan
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拥有双博士学位的美国籍电子工程师本杰明，有多年高新科技电子工程的从业经验。最近，本杰明受聘于国内一家大型知名企业，便琢磨着带他的妻子露丝到中国长期生活和工作。另外，他还希望他的19岁的儿子法兰克到中国来读大学研究东方文化，并利用寒暑假时间打工，增加社会经验。一家人就签证问题向我所进行咨询。

今年7月1日，《中华人民共和国出境入境管理法》（“《出境入境管理法》”）开始实施。与《出境入境管理法》相配套的《中华人民共和国外国人入境出境管理条例》（“《管理条例》”）将于2013年9月1日起施行。

一、《出境入境管理法》的主要内容

《出境入境管理法》增加了“人才引进”的签证类别，作为普通签证的R字签证，发给国家需要的外国高层次人才和急需紧缺专门人才。因此，除了考虑申请职业签证Z签证以外，若本杰明根据政府有关主管部门确定的外国高层次人才引进条件和要求提交相应的证明材料，还可以选择申请此种新增的R字签证入境工作。

与旧法[1]不同，《出境入境管理法》明确了不予签发签证的几种情形，包括：（一）被处驱逐出境或者被决定遣送出境，未满不准入境规定年限的；（二）患有严重精神障碍、传染性肺结核病或者有可能对公共卫生造成重大危害的其他传染病的；（三）可能危害中国国家安全和利益、破坏社会公共秩序或者从事其他违法犯罪活动的；（四）在申请签证过程中弄虚作假或者不能保障在中国境内期间所需费用的；（五）不能提交签证机关要求提交的相关材料的；（六）其他。同时，该法也规定了不予签发外国人居留证件的几种情形。

《出境入境管理法》强调了外国人在中国境内非法就业的几种情形：（1）未按照规定取得工作许可和工作类居留证件在中国境内工作的；（2）超出工作许可限定范围在中国境内工作的；（3）外国留学生违反勤工助学管理规定，超出规定的岗位范围或者时限在中国境内工作的。本杰明作为外国人，在中国就业必须获得相应的工作证和居留证，以避免因非法就业受到中国法律的惩罚。

《出境入境管理法》还对居留证有效期作出了调整，即外国人非工作类居留证件和工作类居留证件的最短有效期分别为180天和90天；最长有效期为5年。

二、《管理条例》的主要内容

《管理条例》将普通签证由原先的8类调整为12类：取签证种类首字的汉语拼音，在旧法[1]规定的八类普通签证，即D字（定居）、Z字（职业）、X字（学习）、F字（访问）、L字（旅游）、G字（过境）、C字（乘务）、J字（记者）签证的基础上，新增了M字（贸易）、Q字（亲属）、R字（人才）、S字（私事）四类签证，并对原有F、X、Z字签证的发放范围进行了调整。

因此，本杰明的妻子露丝将不再申请Z签证，而是申请S字签证进入中国境内。对于本杰明的儿子法兰克来说，若其只是来探亲，也可以申请S字签证；若其即将进入中国境内的大学学习，根据学习期限的长短，分别申请X1（长期学习）或X2（短期学习）的签证。

《管理条例》的一大亮点是留学生勤工助学合法化。《管理条例》规定，持学习类居留证件的外国人需要在校外勤工助学或者实习的，应当经所在学校同意后，向公安机关出入境管理机构申请在居留证件上加注勤工助学或者实习地点、期限等信息。未加注的，不得在校外勤工助学或者实习。因此，法兰克若想在寒暑假时间到校外实习，必须满足上述要求；否则，可能会被认定为非法就业而受到惩罚。

新出台的上述两个法律法规相比之前的法律法规，增加了许多新内容，同时细化了原先未涉及的规定，使外国人在入境居留、工作和学习的过程中有更清楚的指引。在此，我们预祝本杰明一家未来在中国的生活、工作和学习一切顺利！

[1]《中华人民共和国外国人入境出境管理法》和《中华人民共和国公民出境入境管理法》于2013年7月1日废止。《中华人民共和国外国人入境出境管理法实施细则》于2013年9月1日废止。

Benjamin is an American electric engineer. He holds two PhDs and has wide-ranging experience in the high-tech industry. He recently accepted a job offer from a large well-known Chinese business, and is considering moving to China with his wife Rose and 19-year-old son Frank. While Rose would also like to work in China, Frank hopes to study oriental culture at a top Chinese university and work part-time during the summer and winter breaks in order to enrich his social experience. Now, the Benjamin family seek our advice about acquiring a visa to live, work and study in China.

On July 1st, 2013, the *PRC Exit-Entry Administrative Law* (the “**Exit-Entry Administrative Law**”) came into force. Its supporting regulation, the *PRC Administrative Regulation of Entry and Exit of Aliens* (the “**Administrative Regulation**”) will take effect on September 1, 2013.

1. Key Points of the Exit-Entry Administrative Law

In line with the “talents introduction” national policy, the Exit-Entry Administrative Law creates the “R type visa” as a new ordinary visa. The R visa will be issued to high-level foreign talents and specialized talents sought by China in urgent matters. Therefore, in addition to a work visa (Z visa), Benjamin may qualify for the new R visa to enter and work in China. To obtain an R visa, Benjamin will have to submit the supporting documents required by the government’s high-level foreign talents’ attraction policy.

Unlike the old regulations , the Exit-Entry Administrative Law clarifies that a Chinese visa will not be issued to the following six applicants: (1) those who have been deported due to a criminal sentence or repatriation and the prohibition period of re-entry has not expired; (2) those with a serious mental disorder, infectious pulmonary tuberculosis or any other infectious disease that may seriously damage public health; (3) those who may imperil the national security and interests of China, disrupt public order, or commit other violations of law or criminal offences; (4) those who commit fraud when applying for a visa or who cannot show they have sufficient funds to cover all the necessary expenses for their stay in China; (5) those who fail to present relevant documents required by the visa issuer; or (6) those that match other criteria set out in the Exit-Entry Administrative Law. The Exit-Entry Administrative Law also provides circumstances under which a residence permit will not be issued.

The Exit-Entry Administrative Law specifies that the following will be regarded as illegal workers in China: (1) those who work in China without obtaining a work permit and a work-related residence permit as required; (2) those who work in China beyond the authorized scope prescribed on the work permit; (3) those foreign students who violate administrative regulations of off-campus work by working in China beyond the authorized scope of their job position or duration. Hence, Benjamin, as a foreign worker, must obtain the relevant work permit and residence permit to work in China and avoid punitive measures as a result of unlawful employment under PRC laws.

The Exit-Entry Administrative Law further adjusts the validity period of residence permits. For example, a non-work-related residence permit and work-related residence permit will be valid for at least 180 days and 90 days respectively; and at most 5 years for both.

2. Key Points of the Administrative Regulation

The Administrative Regulation expands the category of ordinary visas from 8 types to 12 types. Each visa name comes from the initial letter of the Chinese Pinyin of the Mandarin characters for the subject matter of each type of visa. The original 8 types of ordinary visa first prescribed under the old regulation are: D (settlement), Z (employment), X (study), F (visiting), L (traveling), G (border crossing), C (crew members), and J (journalist). The Administrative Regulation adds another 4 types: M (commerce), Q (relatives), R (talents), and S (personal affairs). The Administrative Regulation also narrows the scope of the original F, X, and Z visas.

Thus, Benjamin’s wife Rose will no longer apply for a Z visa. Instead, she needs to apply for the new S visa to enter China. As for Frank, if he comes to China only to visit parents, he can also apply for an S visa. Alternatively, if Frank studies at a Chinese university, he can apply for an X1 visa for long-term study or an X2 visa for short-term study.

The new Administrative Regulation legalizes international students’ off-campus work or internships in China. When a foreign student who holds a residence permit for study works or interns off-campus, upon obtaining consent from his/her school, he/she must apply to the entry-exit administration of a competent public security authority. The entry-exit administration must endorse the place and period of the work or internship on the student’s residence permit. A foreign student who fails to obtain this endorsement may not take a part-time job or internship outside of campus. Thus, if Frank would like to find an off-campus internship during his winter and summer breaks, he should complete the above procedures. Otherwise, his internship will be deemed illegal employment and he will be punished.

Compared with the old regulations, the two new laws provide new content and state new issues the old regulations never addressed. The new laws provide clearer directions to foreigners about their residence, work and study in China. We wish the Benjamin family a wonderful life, work and study in China!

(This article is originally written in Chinese, the English version is a translation.)

[1]见脚注1。

China Tax: Unveiling the International Secondment Arrangement

中国税收：掀开国际人员派遣安排的面纱

By Tony Dong, Daisy Duan and Jiang Junlu
作者：董刚 段桃 姜俊禄

Over the years, it has been common practice for a multinational company ("**Home Entity**") to dispatch expatriate employees ("**Secondees**") to its affiliated enterprise in China ("**Host Entity**") to hold senior management or other technical positions. Usually, the Home Entity and the Secondee retain the employment relationship. The Home Entity will pay the salary and social security contribution for the Secondee in the home country, and will be reimbursed by the Host Entity. A Chinese tax clearance certificate is usually required when the Host Entity makes the reimbursement payment, so the Chinese tax authority needs to determine whether the Home Entity constitutes an establishment/place of business ("**taxable presence**") or a permanent establishment ("**PE**") under the relevant tax treaty and thus be liable to Enterprise Income Tax ("**EIT**") consequence in China. The tax authorities and the Host Entity may have different views due to the ambiguity of tax regulations in the assessment of taxable presence or PE for cross-border secondment arrangements. As a result, the Host Entity often has difficulty in obtaining the tax clearance certificate and cannot remit the payment to its overseas Home Entity. The situation is likely to change from June 1, 2013.

On April 19, 2013, the State Administration of Taxation (**SAT**) issued the Announcement on Issues Concerning Enterprise Income Tax on Services Provided by Non-resident Enterprises through Seconding Personnel to China ("**Announcement 19**"), which provides clearer guidance over the criteria for determining whether the Home Entity under a secondment arrangement will constitute a taxable presence or a PE in China. Announcement 19 is based on tax circular Guoshuifa [2010] No.75 (**Circular 75**) and is a further development in respect of the PE assessment for international secondment in China. Where the Home Entity constitutes a taxable presence or a PE in China, (apart from Individual Income Tax (**IIT**) which usually apply to the Secondees) EIT will be imposed on the Home Entity. This new policy will significantly

多年以来，跨国企业（“派遣企业”）向境内企业（“接收企业”）派遣人员（“被派遣人员”）担任境内企业高管或其他技术职务的劳务安排非常普遍，通常做法是派遣企业与被派遣人员仍然保持雇佣关系并继续在境外支付工资、薪金及缴纳境外社会保险，然后由境内企业向境外派遣企业支付代垫费用的方式进行偿付。由于境内企业在申请境外支付时需要税务机关出具税务证明，税局通常会判定相关劳务派遣安排是否构成非居民企业在中国的机构、场所或依据税收协定形成常设机构而在中国产生企业所得税的纳税义务，由于过去法规多是原则性的规定，缺乏具体指引，导致税企之间多发争议，阻碍正常的对外支付行为，增加企业的税务合规风险。这一切将在今年6月1日发生重大变化。

2013年4月19日，国家税务总局发布了《关于非居民企业派遣人员在中国境内提供劳务征收企业所得税有关问题的公告》（“19号公告”），对派遣安排下的外国企业是否会在中国构成机构场所或常设机构的问题提供更为清晰的指引。19号公告是在国税发〔2010〕75号文的基础上对国际劳务派遣安排是否形成机构场所或常设机构的细化。如果境外企业在中国构成机构场所或常设机构，除被派遣人员正常情况下需要缴纳个人所得税外，将会导致在中国产生企业所得税纳税义务，必将对企业的税务成本和劳务派遣安排产生深远影响，需要谨慎应对。

我们在此结合75号文及最新的19号公告的要点，对境外劳务派遣安排下机构场所和常设机构认定问题进行简要梳理，以供参考。

判定是否构成机构场所或常设机构的因素

根据75号文，如果应境内子公司要求，境外母公司派人员为子公司工作，子公司正式雇佣该派遣人员，对其工作有指挥权，其工作责任与风险与母公司无关而由子公司承担，则该派遣人员的活动不导致母公司在中国构成机构场所或常设机构。此种情况下，子公司向外籍人员支付的费用，不论是直接支付还是通过母公司转支付，都视为对子公司雇员的工资、薪金性质的费用支付。

19号公告明确指出，非居民企业派遣人员在中国境内提供劳务，如果派遣企业对被派遣人员工作结果承担部分或全部责任和风险，通常考核评估被派遣人员在中国的工作业绩，则应视为派遣企业在中国境内设立机构、场所提供劳务；如

果派遣企业属于税收协定缔约对方企业，该机构、场所可能会构成在中国境内设立的常设机构。

在进行上述判断时，应结合下列因素予以确定：

境内接收企业向派遣企业支付管理费、服务费性质的款项；

境内接收企业向派遣企业支付的款项金额超出派遣企业代垫、代付被派遣人员的工资、薪金、社会保险费及其他费用；

派遣企业并未将接收企业支付的相关费用全部发放给被派遣人员，而是保留了一定数额的款项；

派遣企业负担的被派遣人员的工资、薪金未全额在中国缴纳个人所得税；

派遣企业确定被派遣人员的数量、任职资格、薪酬标准及其在中国境内的工作地点。

一般而言，只要符合其中之一，加上前面的定性条件（即派遣人员所从事的工作性质与派遣企业还是境内企业有实质联系），就可以判定构成机构、场所或常设机构。

此外，19号公告明确派遣企业如果构成机构、场所或常设机构，则该派遣企业和接收企业应当按照相关规定办理税务登记、备案，并对所得据实申报缴纳企业所得税。不能如实申报的，税务机关有权按照相关规定实行核定纳税。

金杜观察

1．19号公告出台后，税务机关必将加强对国际人员派遣行为的税务征管，建议企业对目前的劳务派遣安排进行自查并评估税务风险；同时该文件减少了派遣安排下税务处理的不确定性，有助于境内接收企业对外付款时顺利取得税务凭证。

2．如果被派遣人员工资、薪金已经全额在中国缴纳个人所得税，即使派遣企业负担其中的全部或部分费用，由于不存在派遣企业负担工资、薪金或通过派遣行为取得所得的情况，这种情形将不作为判断构成机构场所的因素。

3．该公告明确了派遣企业为行使股东权利、保障其合法股东权益而派遣人员来华提供劳务不属于派遣企业在中国境内设立机构场所和常设机构的情形。

4．企业应在基于事实的前提下尽量强化被派遣人员所从事工作与境内企业的实质性联系，关于工作结果承担责任和风险、工作考核评估等方面的文档准备至关重要，包括：（1）相关的合同协议或约定；（2）派遣企业或接收企业对被派遣人员的管理规定，包括被派遣人员的工作职责、工作内容、工作考核、风险承担等方面的具体规定；（3）接收企业向派遣企业支付款项及相关账务处理情况，被派遣人员个人所得税申报缴纳资料；（4）接收企业是否存在通过抵消交易、放弃债权、关联交易或其他形式隐蔽性支付与派遣行为相关费用的情形。

19号公告自2013年6月1日起施行，在此之前发生但未作税务处理的，包括有相关款项未对外支付，或未申报纳税等情形的，应根据19号公告的规定重新进行判定并进行相应的税务处理。因此，我们建议相关企业应谨慎评估19号公告对目前国际劳务派遣安排的影响，如有需要，可考虑调整国际劳务派遣安排并强化相关的文件准备，以降低相关的中国税务风险。

impact the tax cost of Home Entities and the pattern of structuring international assignments.

Based on the salient points of Circular 75 and the latest Announcement 19, we summarize below the issues concerning the assessment of taxable presence or PE under secondment arrangements.

Criteria determining the constitution of taxable presence or PE in China

According to Circular 75, if at the request of its PRC subsidiary, the overseas parent company dispatches personnel to work for the subsidiary, and such personnel enter into formal employment with the PRC subsidiary which has command over their work, and the work responsibilities and risks are entirely assumed by the subsidiary, instead of the parent company, then the activities of such personnel shall not trigger a taxable presence or a PE of the parent company in China. In this case, the fees paid, directly by the PRC subsidiary or indirectly through the parent company to such personnel, shall be deemed payroll expenses paid to the PRC subsidiary's employees.

Moreover, Announcement 19 clearly states that, where the Home Entity dispatches personnel to render service in China, if the Home Entity bears all or part of the responsibilities and risks in relation to the work of the Secondees, and normally reviews and evaluates the job performance of the Secondees, the Home Entity shall be deemed as having a taxable presence in China. If the Home Entity is a tax resident of a country/region that has entered into tax treaty with China, such establishment and place of business may create a PE in China if the criteria of PE have been met under the applicable treaty provisions, for instance, the Secondees' stay in China has exceeded 183 days or 6 months in any consecutive 12 month period.

When doing the above assessment, the following factors shall be taken into consideration:

The Host Entity makes payments to the Home Entity in the nature of management fees or service fees;

Payments from the Host Entity to the Home Entity exceed the Secondee's salaries, bonus, social security contributions, and other expenses as advanced by the Home Entity;

Not all related expenses reimbursed by the Host Entity are paid to the Secondees, instead, the Home Entity retains a portion of such payments;

IIT has not been reported and paid based on the full amount of the Secondee's salaries ; and

The Home Entity is the decision maker in terms of the number, the qualification, the remuneration and the working locations of the Secondees in China.

Generally speaking, if one of the above factors is met and the work of Secondees has substantial connection with the Home Entity, the Home Entity is likely to be assessed as having a taxable presence or a PE in China.

In addition, Announcement 19 stipulates that, if the Home Entity constitutes a taxable presence or a PE in China, the Host Entity and the Home Entity shall perform tax registration or record-filing with the tax authorities, and file EIT based on the actual income generated in China, if it is not feasible to accurately calculate the taxable income, the tax authority is empowered to deem the taxable income in accordance with relevant regulations.

KWM Observations

1. With the release of Announcement 19, it is expected that the tax authorities will strengthen their oversight of secondments between multinationals and their subsidiaries in China. It is suggested that enterprises review their existing secondment arrangements and assess the underlying tax risks. The bright side of Announcement 19 is that it provides greater certainty about the tax treatment of secondments, and will facilitate smoother tax clearance when Host Entities make reimbursement payments overseas.

2. Where PRC IIT is paid on the full amount of the Secondee's salaries, then even if the Home Entity bears part or all of the expenses, it is not likely to create a taxable presence or a PE for the Home Entity because it does not bear the Secondee's salary and does not derive a profit through the secondment arrangement.

3. This Announcement clarifies that where the Home Entity assigns its expatriate employees to China solely to exercise its shareholders' rights and safeguard the shareholders' interest, the Home Entity will not be deemed to have a taxable presence or a PE in China.

4. Enterprises should establish the factual background to substantiate the connection between the work of Secondees and the Host Entity. It is of vital importance to put in place proper documentation about the work reporting requirements and evaluation mechanism of job performance, The documentation should include: (1) relevant contracts of employment and/or secondment; (2) Secondee's job description for the Home Entity or the Host Entity, including responsibilities, role, performance indicators and assumption of risk of the Secondees; (3) the terms governing payments to be made by the Host Entity to the Home Entity and accounting treatment, and the IIT filing and payment records of the Secondees in China; and (4) information about whether the Host Entity treats a Secondees' expenses by way of offsetting inter-company accounts, waiver of creditor's rights, related party transactions or other means, in lieu of reimbursement,

Announcement 19 becomes effective from June 1, 2013, and also applies to existing secondments where the tax treatment has not been confirmed or the reimbursement has not been made. It is suggested that enterprises shall assess the tax implications of Announcement 19 on their current secondments and, where needed consider restructuring the international assignment arrangement and put in place proper documentation to safeguard the parent company's tax position and mitigate PRC tax risks.

(This article was originally written in Chinese, the English version is a translation.)

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2013 Chinese Outbound Investment Trends Overview -- Energy and Resources M&As

2013：中国对外投资趋势概述——能源与资源并购交易

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中国商务部的统计数据显示，在即将结束的2013年中，中国海外投资继续保持高速增长的势头。其中，能源资源类投资继续占据较大比例。2012年，中国对外直接投资878亿美元，首次成为世界三大对外投资国之一。其中采矿业对外直接投资135.4亿美元，与能源资源相关的“电力、热力、燃气及水的生产和供应业”超过10亿美元。[1]

岁末年终，本文将从地域（和代表性国家）的角度，对中国企业对海外能源和资源行业的投资趋势进行总结，分析相关趋势的成因，并对中国企业境外投资的主要问题和风险进行提示。

According to statistics released by China's Ministry of Commerce, Chinese outbound investment will continue its robust upward trend during the latter half of 2013, with energy and resources-related deals dominating the scene. In 2012, China's outbound direct investment reached a record high of $87.8 billion, making it for the first time one of the top three outward investors during the period. Of that amount, $13.54 billion flowed to the mining industry, and more than $1 billion to the energy and resources-related industries, in particular the production and supply of electricity, steam, gas and water[1].

Before closing what is likely to be yet another record breaking year, this article attempts to summarize some of the latest trends and developments affecting Chinese outbound investment into the energy and resources sector generally from a geographical perspective, as well as the forces shaping such trends, and discuss some of the major challenges and risks facing Chinese investors who are riding or wish to hop on the wave of globalization.

第一部分 中国在传统能源和资源行业的对外投资国

非洲/中东：该地区拥有大量未开发的能源和自然资源，因此，中国企业长期对该地区保有浓厚的兴趣。并且，该地区也逐渐成为具有价格优势的中国工业产品的巨大市场。尽管如此，由于高风险的环境，科技的落后，以及较低的个人平均收入水平，外国投资者在这一地区从事商业活动较为困难。例如，在经济学人智库最近发表的，计算了67个国家的机会与风险的中国“走出去”投资指数中[2]，虽然南非排名第49，但安哥拉，尼日利亚和肯尼亚排在最后的三位。

根据国务院新闻办发布的《中非经贸合作白皮书》中的数据，2009 – 2012年期间，中国在非洲的直接投资已由14.4亿美元增长至25.2亿美元，年均增长率20.5%[3]。为提高投资的竞争力，中国政府已经开始为准

[1]http://www.china.com，文章:http://chinairn.com/news/20130913/16155852.html

[2]www.eiu.com article: http://china.ucsd.edu/_files/odi-2013/09232013_Paper_Liu_ChinaGoingGlobal.pdf, 17-10-2013 最后访问

[3]www.xinhuanet.com,文章: http://news.xinhuanet.com/english/china/2013-08/29/c_132673248.htm, 2013年9月16日最后访问

Part I　Chinese Outbound Investment Trends in Traditional Energy and Resources Industries

AFRICA/MIDDLE EAST: China has continued to maintain its great interests in Africa, thanks largely to the abundant energy and natural resources untapped in this continent and increasingly, the potentially huge market for competitively-priced Chinese industrial products. Nonetheless, despite the existence of individual opportunities in this part of the world, risky environments, a lack of technology and low per capita income levels make doing business difficult for foreign investors. By way of illustration, Angola, Nigeria and Kenya are ranked in the bottom three, while South Africa ranked 49, of the China Going Global Investment Index[2], which balances opportunities against risks for 67 countries, recently published by Economist Intelligence Unit.

[1]www.chinairn.com article: http://www.chinairn.com/news/20130913/16155852.html, viewed 31-10-2013

[2]www.eiu.com article: http://china.ucsd.edu/_files/odi-2013/09232013_Paper_Liu_ChinaGoingGlobal.pdf, viewed 17-10-2013

备与中国公司共同在非洲投资的中小型非洲公司提供特别贷款。

近期该地区最为引人关注的并购交易包括：1.中石油收购埃尼集团东非公司莫桑比克28.57%股权；2.中石化以25亿美元的对价收购道达尔公司尼日利亚PLC分公司某海上油田项目20%股权；3.由河北钢铁集团、天津物产集团、中非发展基金及其它投资者组成的联合体以4.46亿美元的对价向矿业巨头力拓公司和英美资源集团购买南非Palabora铜矿公司74.5%股权；(iv).为降低最近在埃及发生的政治动乱所带来的负面影响，美国油气生产商Apache公司正在向中国国有石油巨头中石油出售其埃及油气业务33%的权益，交易额达31亿美元[4]。通过交易，中石油还与Apache建立了全球战略伙伴关系，共同开发油气上游项目。该交易是中石油继2012年11月以51.9亿美元收购葡萄牙Galp Energia石油公司巴西子公司股权以来所进行的最大的一宗海外并购交易。

北美：在2012年，中国对加拿大的直接投资达到了历史上的最高值。投资主要用于收购自然资源类公司和项目。其中倍受争议的中海油以151亿美元收购尼克森能源的交易占据了总投资金额的六成。

最近一笔体现中国对加拿大能源需求的交易发生在2013年9月，中国的延长石油国际公司以2.32亿加元（2.26亿美元）的对价收购了加拿大初级油气公司Novus能源公司(NVS. V)。

但是，由于加拿大政府在不断加强对外资获得加拿大战略性资源的限制，中国企业对于加拿大的投资是否会因此而减少或受阻，仍然有待进一步观察。

在美国，切萨皮克能源公司正在尝试引入中国资本，以弥补其在全球金融危机中遭受的损失。该公司已在今年夏天同意将一块横跨俄克拉何马州和堪萨斯州边界的石油天然气田股权以10亿美元的价格出售给中石油[5]。

拉丁美洲：同样的，对于能源资源和大宗商品的渴望也促使中国对拉丁美洲的投资大幅增长。中国的投资目标国已从巴西、智利等拉美地区较成熟的，市场扩展到其它新兴热点地区，比如秘鲁，哥伦比亚和厄瓜多尔。

巴西国家石油公司在最近以15.4亿美元的对价向中石化出售了其在桑托斯盆地石油勘探项目中35%的股权。同时还将其对一家化工厂的全部股权，其对一家墨西哥湾集团的股权和其对巴西一家热能公司的股权也一并出售给中石化。

2012年12月，厄瓜多尔与中国国家开发银行签订了20亿美元的贷款协议。与此同时，该国的国有公司—厄瓜多尔石油公司与中国公司签订了为期8年的原油及燃油售油协议。中国的银行在频繁的与拉美国家的石油公司签订类似上述的贷款协议[6]。

上述厄瓜多尔公司同时还拥有一项炼油项目的51%股权。中石化正在就该项目与委内瑞拉的国有公司Petroleos de Venezuela, PdVSA展开谈判。后者拥有该项目其余的49%的股权，中石化希望向购买其中的30%。

中亚：除此之外，中国已经和邻国俄罗斯和哈萨克斯坦建立了紧密的联系。俄罗斯和中国已经建立了一个共同基金，旨在激活这一地区的投资。其中，70%将用于投资俄罗斯项目，30%将用于投资中国项目[7]。这一基金旨在加强与矿物及其它资源有关的交通运输基础设施建设。

就在不久前，中国国家主席习近平访问哈萨克斯坦时见证了总额达300亿美元合同的签署，其中包括中石油以50亿美元购买哈萨克斯坦巨型油田卡沙甘近海油田8.33%股权的交易[8]。这一交易进一步扩大了中国在前苏联中亚地区的影响力。

[4]www.apachecorp.com 文章 http://investor.apachecorp.com/releasedetail.cfm?ReleaseID=787946, viewed 2013年9月17日最后访问

[5]www.wsj.com 文章 http://online.wsj.com/article/SB10001424127887324338604578325901158645038.html, 2013年9月17日最后访问

[6]www.wsj.com 文章 http://online.wsj.com/article /BT-CO-20130131-715950.html, 2013年9月16日最后访问

[7]www.xinhuanet.com 文章 http://news.xinhuanet.com/english/business/2012-09/07/c_131834312.htm, 2013年9月17日最后访问

[8]www.reuters.com 文章 http://www.reuters.com/article/2013/09/07/us-oil-kashagan-china-idUSBRE98606620130907, 2013年9月24日最后访问

- According to a white paper on Sino-Africa economic and trade cooperation published by the Information Office of the State Council, Chinese direct investment in Africa increased from $1.44 billion to $2.52 billion, with an annual growth of 20.5% from 2009 to 2012. To enhance the competitiveness of its investment, the Chinese government is providing special loans for small and medium-sized African companies wanting to co-invest with Chinese companies in Africa.
- Recent blockbuster deals in this region include the acquisitions (i) by China National Petroleum Corporation of a 28.57% stake in Mozambique's Eni East Africa for $4.2 billion; (ii) by China Petrochemical Corporation of a 20% stake in Nigeria's Total Nigeria PLC, an offshore oil project, for $2.5 billion; and (iii) by a consortium (which includes, among others, Chinese investors Hebei Iron and Steel Group, Tewoo Group and Cadfund) of a 74.5% stake in South African copper producer Palabora Mining from mining giants Rio Tinto and Anglo American for $446 million.
- US-based oil and gas producer Apache Corporation is selling a 33% stake in its Egyptian oil-and-gas business for $3.1 billion to state-owned Chinese oil giant Sinopec Group, to reduce its exposure to the recent political unrest in Egypt. The two have also formed a global strategic partnership to jointly pursue upstream oil and gas projects. The Apache deal is Sinopec's biggest overseas acquisition since it bought a stake in the Brazilian unit of Portuguese oil company Galp Energia SA for $5.19 billion in November of 2012.

NORTH AMERICA: Chinese foreign direct investment into Canada hit an all-time high in 2012, with most of tha going to the purchases of natural resource companies and projects. The much-debated $15.1 billion acquisition of Nexen Energy by Chinese state-owned CNOOC accounted for close to 60% of the total investment value that flowed into the region.

The latest sign of continued interest in Canada's oil patch by energy-hungry China can be seen in the acquisition of Novus Energy Inc. (NVS.V), a Canadian junior oil and gas company, by China's Yanchang Petroleum International Ltd. for around CAD232 million ($226 million) in September 2013.

It remains, however, to be seen if Chinese foreign investment into Canada will decline as a result of the current Canadian administration's plan to tighten restrictions on foreign ownership of Canadian resources.

In the United States, Chesapeake Energy Corp. agreed to sell a stake in an oil and natural-gas field straddling the Oklahoma and Kansas border to China's Sinopec for $1 billion this summer, as the American company tries to recover from the global financial crisis with a Chinese cash injection[3].

LATIN AMERICA: China's hunger for energy resources and commodities has also led to a surge in Chinese outbound investment into Latin America. China's list of targets is expanding beyond the more mature markets in Latin America such as Brazil and Chile to other up and coming hotspots such as Peru, Colombia and Ecuador.

Brazilian company Petrobras has recently sold a 35% stake in a Santos Basin oil exploration project to China's Sinochem Group Co., Ltd. for $1.54 billion, all of the shares it owned in a petrochemical company, as well as shares in a Gulf of Mexico bloc and a thermal energy company in Brazil.

[3]www.wsj.com article:http://online.wsj.com/article/SB10001424127887324338604578325901158645038.html, viewed 17-09-2013

东南亚：东南亚国家拥有丰富的自然资源。因此，我们预计中国在印度尼西亚和马来西亚等东南亚国家的投资，将会在未来数年加速增长。在这一地区，矿业和能源的交易数量在2011年至2012年间增长了15.7%。在近年的1至4月份，中国在东盟国家的矿业投资项目达到了76个，并在最近举行的中国-东盟矿业合作论坛和展会上，签订了7个矿业合作协议，总价值达到163亿元人民币（25.9亿美元）[9]。

澳大利亚：一个引人注目的相反趋势发生在澳大利亚。作为长期以来受到中国投资者高度青睐的能源和矿产资源投资目标国，澳大利亚在2011和2012年间获得的中国投资大幅降低。根据中国矿业协会的数据[10]，2013上半年中，中国企业对澳洲矿产资源领域的投资总额仅为约4800万澳元，是2009年以来的最低水平。造成这一现象的原因应当是多方面的。从宏观经济来看，中国经济的减速和正在进行的产业结构调整和再平衡导致中国市场对大宗资源类商品需求调整。从中国投资者来看，他们中大部分的国际化程度并不高，通常缺乏实施复杂跨境交易的能力。从澳洲的投资环境来看，中国投资者普遍认为澳大利亚的外国投资审核政策（尤其是针对国有企业以及像农地等特定敏感资产的投资审核）经常变动且令人困惑、备受争议的碳排放税及矿产资源税对特定的矿业项目带来负面的财务影响并动摇长期以来投资者认为澳洲没有“主权风险”的信念。此外，基础设施建设不足和劳动力短缺等问题也是普遍认为影响中国矿业投资者进行大型投资的重要障碍。加之近年来不少中国企业在澳洲投资矿业项目失败后损失惨重，导致中国投资者一定程度上对投资澳洲丧失信心。这些原因都导致中国投资者对澳洲能源资源投资的兴趣下降。而另一方面，中国投资者找到了其他替代的能源和资源供应国，加拿大、非洲、东南亚、拉丁美洲和中亚等地区无疑正在吸引越来越多的中国能源和资源投资者。

第二部分 中国在清洁能源和可再生能源行业的对外投资

在政府的政策性支持下，中国在可再生能源方面的跨境投资在近年来有了前所未见的增长。在过去的十年中，中国在世界上33个国家投资了至少124个太阳能和风能项目[11]，并且中国将继续在世界范围内的可再生能源投资中居于领导地位。

澳大利亚，北美和欧洲：这些国家和地区注重对可再生能源的投资。许多国家已经在这一领域制定了吸引内资和外资的政策，例如：德国计划在2035年前将可再生能源的比例提升至35%。为保证完成这一目标，德国已经建立了多种支持机制，包括上网电价补贴政策和电网优先接入政策。其它国家，例如美国，通过税收优惠和贷款担保的方式，提高可再生能源市场的盈利性。在上述地区进行可再生能源投资的另一原因在于，有可能获得先进的技术和know-how。

风能：中国最大的风机制造商天顺风能股份有限公司,在2012宣布了对丹麦风机制造商维斯塔斯旗下风机厂的并购。天顺风能曾长期作为维斯塔斯的供货商，通过此次并购他们成为了该公司丹麦制造基地的拥有者。对于天顺风能来说，欧洲有最具前景的海上风能市场，而海上风能在中国尚未被充分开发。

[9]www.chinadaily.com.cn 文章 http://europe.chinadaily.com.cn/china/2013-05/13/content_16493304.htm, 2013年9月17日最后访问

[10]援引中国矿业联合会常务副会长王家华先生在2013年中国～澳大利亚资源投资论坛（北京）上的讲演。

[11]www.wri.org 文章 http://insights.wri.org/news/2013/06/china-invests-billions-international-renewable-energy-projects, 2013年9月17日最后访问

In December 2012, Ecuador signed a $2 billion loan agreement with the China Development Bank and simultaneously, state-run company Petroecuador signed an eight-year contract to sell crude oil and fuel oil to Chinese companies. Chinese banks are frequently making these loan agreements with oil companies in Latin America[4].

The same Ecuadorian company holds a 51% stake in a refinery project, in which China National Petroleum Corp, CNPC, are negotiating to acquire a 30% stake. These shares will be acquired from Venezuela's state-run oil firm Petroleos de Venezuela, PdVSA, who holds the remaining 49%.

CENTRAL ASIA: In addition, China has been making close ties with neighboring countries Russia and Kazakhstan. A Russia-China Investment Fund was established to jumpstart the investments in this region, where 70% of the investments will be in Russia and 30% in China[5]. The purpose of the fund is to improve infrastructure for transportation of minerals among others.

More recently, Chinese President Xi Jinping's visit to Kazakhstan witnessed the signing of a series of deals worth a total of around $30 billion, including a $5 billion oil and gas deal under which China National Petroleum Corp will acquire a 8.33% stake in Kazakhstan's giant Kashagan offshore oil project[6], further increasing China's influence in post-Soviet Central Asia.

SOUTH EAST ASIA: We also expect Chinese investment in South East Asian countries like Indonesia and Malaysia to grow at an accelerated pace over the next few years due to their abundant natural resources. Mining and energy transactions in this region went up 15.7% from 2011 to 2012. China invested in 76 mining projects in ASEAN countries from January to April of this year and has signed seven mining cooperation agreements valued at about 16.3 billion yuan ($2.59 billion) with ASEAN countries during the China-ASEAN Mining Cooperation Forum and Exhibition recently[7].

AUSTRALIA: A noteworthy trend reversal is taking place Down Under. Despite being China's long-time favourite investment destination for resources, Australia has seen Chinese investment slip considerably in 2011 and 2012 in general. Statistics published by the Chinese Mining Industry Association[8] show that, in the first half of 2013, Chinese outbound direct investment in Australia's mining and resources sector totalled a mere AUD48 million, hitting lowest level since 2009. Multiple factors have led to such reversal. First, from a macroeconomic perspective, China's slowing economy and the on-going structural change and economic rebalancing have led to the decline in Chinese demand for commodities. Secondly, from Chinese investors' perspective, hindered by lack of execution capability for complicated cross-border transactions, only a handful of them have globalisation plans. Thirdly, from an Australian investment climate's perspective, the country's confusing and unpredictable foreign investment approval policy (especially policy towards foreign government-owned entities or investments in highly sensitive sectors such as agricultural), as well as the negative economic impact of the controversial carbon tax and mining resources tax on specific mining projects, have greatly deterred Chinese investment, shattering long-held beliefs that Australia is a sovereign-risk-free investment destination. In addition, constrained infrastructure capacity and labour shortage issues have thwarted Chinese mining investors' ambitions to engage in large-scale investment. All these factors, coupled with the considerable losses suffered by them as a consequence of failed mining investments in this continent, have, to a certain extent, caused Chinese investors to lose confidence in Australia. At the same time, Chinese investors have found new supply alternatives for their natural resource demands. Regions like Canada, South Africa, South East Asia, Latin America and Central Asia are undoubtedly turning an increasing number of Chinese energy and resource investors away from Australia.

Part II Chinese Outbound Investment Trends in Clean and Renewable Energy Industries

Powered by policy support from the government, China's cross-border investments in renewable energy have witnessed an unprecedented rate of growth in

[4]www.wsj.com article:http://online.wsj.com/article/BT-CO-20130131-715950.html, viewed 16-09-2013

[5]www.xinhuanet.com article:http://news.xinhuanet.com/english/business/2012-09/07/c_131834312.htm, view 17-09-2013

[6]www.reuters.com article:http://www.reuters.com/article/2013/09/07/us-oil-kashagan-china-idUSBRE98606620130907, viewed 24-09-2013

[7]www.chinadaily.com.cn article:http://europe.chinadaily.com.cn/china/2013-05/13/content_16493304.htm, viewed 17-09-2013

[8]An excerpt from Mr. Wang Jia Hua's (Executive Vice President of China Mining Association) speech at the China-Australia Resources Investment Forum 2013.

在今年初，金杜律师事务所代表神华集团的全资子公司——国华能源投资从澳大利亚塔斯马尼亚的州属企业——塔州水电的手中收购了正在塔州建造的168兆瓦风力发电场Musselroe项目75%的股份。在此之前，金杜团队在2012年初已经代表国华向塔州水电收购了其在塔州拥有的Woolnorth风电场（包括65兆瓦的Bluff Point风力发电场和75兆瓦的Studland Bay风力发电场）的75%的股份。相关交易完成后，国华在澳大利亚拥有的风力发电装机总量超过了300兆瓦

太阳能：中国可再生能源海外投资的另一重点领域是太阳能。中国是世界上最大的太阳能组件生产商之一 世界前十大太阳能电池板生产商中，有四家是中国公司。

在最近的一次投标中，中国公司天合光能赢得了为位于美国内华达州某光伏电站提供110万块太阳能电池板的合同。

除了在美国寻求出口机会之外，中国投资者对投资美国太阳能电池板公司抱有浓厚的兴趣。中国太阳能控股公司在最近收购了Thin Silicon公司的全部股权，以及Terra Solar Global公司51%的股权[12]。

中国公司对欧洲的太阳能公司同样兴趣浓厚。在2012年，中国的多晶硅和硅片生产商赛维LDK收购了德国Sunways公司38%的股权，在该年早些时候，赛维已经收购了该公司33%的股权。这次交易为中国的第二大多晶硅制造商提供了新的技术，并使其获得了在世界最大的光伏市场的销售网络。

非洲：近期一个值得关注的趋势是，中国在非洲的可再生能源投资正在蓬勃发展。这主要归因于非洲政府向私人投资开放经济的努力，以及该地区的上网电价补贴政策。中国公司英利和尚德已经在此地区投资太阳能电站，金风科技和国电龙源则在南非投资风力发电场[13]。中国最大的发电机制造商东方电气正在中国进出口银行的融资支持下，准备在埃塞俄比亚西部的Aysha建设120兆瓦的风力发电场[14]。除此之外，中国电工设备总公司与中国水利水电建设联盟已和尼日利亚政府签订了13亿美元的协议，计划在尼日尔州建设Zungeru水电站。该水电站预计将为尼日利亚增加700兆瓦的发电能力。该项目得到了中国进出口银行的融资支持。[15]

第三部分 中国投资者面临的主要问题和风险

虽然有中国政府在融资、设备出口等许多方面的优惠政策支持，中国投资者在投资海外时仍面临诸多挑战。

投资所在国的外国投资审批机制是公认影响中国能源和资源投资者的一个非常重大的因素。近期中国投资受到阻碍的例子包括：中国三一集团控股的罗尔斯公司在美国收购位于俄勒冈州某海军基地附近的风力发电场的项目遭到否决。国家安全考虑是导致美国政府作出这一决定的核心原因。类似的例子还包括，五矿有色收购澳洲OZ Minerals公司过程中，首次资产收购方案由于包括了接近军事禁区的资产，同样基于国家安全考虑，被澳大利亚财长否决。因此，外国投资审批机制应当也正在成为中国投资者进行海外投资计划时一项重要的考量因素。

其次，税负和劳动力问题也是影响中国投资者的投资意向的重大因素。如前所述，澳大利亚是中国投资正在减少的国家之一。高额的碳排放税和劳工问题都是阻碍中澳在能源和资源领域深化合作的主要障碍。由于这些问题，与其它矿业市场，例如非洲、挪威、哈萨克斯坦和俄罗斯等相比，澳大利亚对中国投资的吸引力正在逐步降低。为扭转这一局面，澳大利亚联邦和州政府将共同推动变化。2013年9月上台的新的联合政府已经承诺将取消碳排放税和矿业资源税（具体的实施时间表和替代政策尚未公布。而且，随着保守派和自由派之间的

[12]www.wri.org 文章 http://pdf.wri.org/chinas_overseas_investments_in_wind_and_solar_trends_and_drivers.pdf, 第8页, 2013年9月17日最后访问

[13]www.wri.org 文章 http://pdf.wri.org/chinas_overseas_investments_in_wind_and_solar_trends_and_drivers.pdf, 第17页, 2013年9月17日最后访问

[14]www.windpowermonthly.com 文章 http://www.windpowermonthly.com/article/1208796/china-builds-power-influence-ethiopia, 2013年9月23日最后访问

[15]http://cn.reuters.com/article/CNTopGenNews/idCNCNE98T00D20130930

recent years. Over the past decade, China has made at least 124 investments in solar and wind industries in 33 nations around the world[9], and will continue to lead the world in renewable energy investment.

AUSTRALIA, NORTH AMERICA AND EUROPE: Countries in these regions have a focus on renewable energy for investment. Some of them have implemented policies to attract domestic and foreign investments in this sector. For instance, to ensure its goal of achieving 35% renewable energy by 2035, Germany has implemented support mechanisms such as feed-in tariffs and priority connection to power grids. Other countries, like the United States, have tax credits and loan guarantees to make their markets for sustainable energy more lucrative. Cutting edge technologies and know-how offered by these regions are also an important factor in attracting foreign investment.

WIND POWER: China's largest wind turbine manufacturer Titan Wind Energy Co. Ltd. announced in 2012 the acquisition of Vestas' turbine manufacturing plant in Denmark. Titan Wind Energy had for long been Vestas' supplier but because of this transaction, they have now become the owner of Vestas' manufacturing facility in Denmark. To Titan Wind Energy, Europe offers the most promising outlook for offshore wind energy, which is still relatively underdeveloped in China.

Early this year, King & Wood Mallesons advised Guohua Energy Investment Corp, a wholly owned subsidiary of Shenhua Group, on its acquisition of a 75 % stake in Hydro Tasmania's (a company owned by the State of Tasmania) 168-megawatt Musselroe wind farm project. The firm previously advised Guohua on its acquisition of a 75% stake in Hydro Tasmania's Bluff Point 65-megawatt and Studland Bay 75-megawatt wind farms in Woolnorth, Tasmania in early 2012. Upon completion, the total installed wind power capacity of Guohua in Australia will exceed 300-megawatts.

[9]www.wri.org article:http://insights.wri.org/news/2013/06/china-invests-billions-international-renewable-energy-projects, viewed 17-09-2013

矛盾开始逐渐显现，新的联合政府正面临大选胜利以来最严峻的考验。这一动态将对新联合政府的政策产生怎样的影响，还有待进一步的观察）。

另外一个普遍存在的问题是，中国投资者在进入外国市场时，对当地法律和文化上的差异缺乏必要的了解。业内人士分析称，中国企业进行海外投资时，往往仅考虑投资什么的问题，而缺乏通盘的考虑。[16]比如，中信泰富在西澳的20亿吨磁铁矿项目，就是由于对当地移民政策、环保法律要求以及当地磁铁矿本身特质充分了解，导致实际成本超出预计数倍，即使投产亦无法收回成本的境地。同时，中国投资者通常也缺乏整合被并购资产的能力和缺乏执行复杂跨境交易的能力。

需要指出，上述现象正在逐步改善。越来越多的中国企业在进行境外投资时主动聘请财务、法律、技术、公共关系等方面的专业机构，重视尽职调查和专业机构的意见。又如，中国企业“抱团出海”，逐渐习惯采用联合体收购的方式，让产业投资人、EPC承包商和财务投资人以优势互补的方式来收购和投资项目。此外，中国主权基金和私募基金等专业投资者的介入也让中国境外投资能以更加专业化的方式来进行。

根据普华永道的一项调查分析，1986年至2006年间，中国企业海外投资的失败率接近67%。另一方面，根据商务部2012年底的官方统计显示，中国企业海外投资的失败是少数，特别是，中央企业设立的2700多家境外企业中，赢利和持平的企业占80%，亏损的占20%。但据该报道，商务部官员也承认海外投资存在着巨大风险，中国企业“吃亏”的实例不在少数。[17]显然，在不断提高境外收购成功率的道路上，中国投资者还有漫长的道路要走。

[16]http://www.invest.com.cn文章http://www.invest.com.cn/NewsDetail.aspx?class=oi&id=8693, 2013年10月15日最后访问

[17]http://finance.21cn.com 文章http://finance.21cn.com/newsdoc/zx/a/2013/0911/06/23940488.shtml, 2013年10月15日最后访问

SOLAR ENERGY: Another renewable energy magnet for Chinese outbound investments is solar energy. China is one of the world's biggest solar panel manufacturers, four out of the ten biggest global solar panel companies are Chinese.

In a recent bid, Chinese company Trina Solar won the deal of supplying 1.1 million solar panels for a power plant in the desert of Nevada, United States.

As well as exporting to the United States, Chinese investors have also shown a great deal of interest in American solar panel companies. China Solar Power Holdings Ltd. has recently acquired 100 % of the shares of ThinSilicon Inc., and a 51% stake in Terra Solar Global Inc.

European solar energy companies are under the radar of Chinese companies as well. Chinese solar polysilicon and wafer manufacturer LDK Solar acquired a 38% stake in Germany's Sunways AG in 2012, adding to the 33% stake it purchased earlier in the year and providing China's second-largest solar-polysilicon maker access to new technology and a distribution network in the world's biggest photovoltaics market.

AFRICA: A recent trend worth mentioning is that Chinese investments in renewable energy in Africa are blooming. This appears to be largely due to the African governments' efforts to open up their economies for private investments and the possibility of feed-in tariffs. Chinese companies Yingli Solar and Suntech Power have invested in solar plants, whereas Goldwind and Guodian Longyuan have invested in wind farm projects in South Africa, for that reason[10]. Moreover, Dongfang Electric, one of China's largest manufacturers of power generators, is poised to build a 120-megawatt wind power facility at Aysha, in western Ethiopia, with financial support from the China Exim Bank[11]. Separately, just last month, Nigeria signed a $1.3 billion deal with two Chinese state companies, China National Electrical Equipment Corporation and Sinohydro Consortium, to build the Zungeru power plant in Niger state, also with financial backing from China Exim Bank. The hydroelectric plant is expected to add 700 megawatts electricity to Nigeria's current 4600 megawatts[12].

Part III Challenges Faced by Chinese Investors

Despite a slew of preferential incentives offered by the Chinese government, covering areas such as financing and equipment export, Chinese investors still face various challenges when investing abroad.

The foreign investment approval regime of a target country is commonly considered to be one of the major obstacles facing China's overseas mining and resources investment projects. In one recent example, Chinese-owned Ralls Corporation in the US was denied access to buy a wind farm located near a navy area in Oregon, USA. National safety was cited as the reason for rejection. Another example is the Australian finance minister's rejection of China Minmetals's proposed acquisition of the assets of the Australian company OZ Minerals. Again, national security reasons were cited because part of the target assets is near a navy area. Consequently, but unsurprisingly, the foreign investment approval regime of a country has increasingly become one of the key factors to consider for Chinese investors when they invest overseas.

High taxes and labor issues can be a major stumbling block as well. As discussed earlier, Australia is one of the countries seeing a decrease in Chinese investments. When asked why, the Chinese Mining Association quoted high carbon tax as the main reason[13]. Because of high taxes, Australia is not able to compete with other mining markets like Africa, Norway, Kazakhstan or Russia. The new coalition government, which came into power in September 2013, has vowed to scrap the carbon tax and mining resource rent tax[14]. But the timetable for implementation and replacement policy have yet to be announced, not to mention that the new coalition government is facing its sternest test since election victory as the tensions between its conservative and liberal wings are beginning to surface. It remains to be seen how this leadership tussle would impact the government's policy-making process.

Another general concern when entering a foreign market is the lack of knowledge of local laws and cultural differences. According to the analysis of an industrial insider, when investing abroad, Chinese companies tend to only focus on what they are going to invest and fail to consider every aspect of the investment as a whole.[15]

For example, CITIC Pacific was hit with a multi-fold budget blowout on its 2 billion ton magnetite iron ore project in Western Australia and is at the risk of being unable to recover the costs after the commencement of production. The underlying reason for this is its lack of knowledge of the migration policies and environment protection laws, as well as the characters of the magnetite in Western Australia. This is often compounded by Chinese investors' lack of capability to efficiently restructure acquired assets and to execute complex cross-jurisdictional transactions.

Nonetheless, it needs to be pointed out that despite the above setbacks, we have seen positive signs of steady improvement. For example, more and more Chinese investors have taken the initiative to seek and rely on professional advice from financial, legal, technical and PR experts before embarking on their outbound investment journey. Also, Chinese companies are increasingly using consortiums as a form of acquisition vehicle, allowing industrial investors, EPC contractors and financial investors to combine their strengths and jointly execute an acquisition or investment. In addition, the participation of professional investors such as sovereign wealth funds and private funds has enabled Chinese outbound investments to be made in a more professional way.

According to a survey undertaken by PwC, during 1986 to 2006, as much as 67% of China's outbound investments ended in failure. However, according to one news report, the official statistics published by the Ministry of Commerce at the end of 2012 showed that only a small fraction of China's outbound investments ended in failure. In particular, of all the more than 2700 overseas companies owned by the central government, 80% broke even or made a profit, with only 20% reported losses. Despite this, Ministry of Commerce officials did admit in the same news report that Chinese outbound investments were exposed to high risks and there were quite a number of failed cases.[16] Apparently, Chinese investors still have a long way to go before it begins to significantly bump up the success rate of overseas acquisitions.

(This article was originally written in Chinese, the English version is a translation.)

[10]www.wri.org article:http://pdf.wri.org/chinas_overseas_investments_in_wind_and_solar_trends_and_drivers.pdf, page 17, viewed 17-09-2013

[11]www.windpowermonthly.com article:http://www.windpowermonthly.com/article/1208796/china-builds-power-influence-ethiopia, viewed 23-09-2013

[12]www.ventures-africa.com article:http://www.ventures-africa.com/2013/09/china-build-1-3-billion-zungeru-power-plant-nigeria/, viewed 17-10-2013

[13]www.theaustralian.com.au article:http://www.theaustralian.com.au/business/mining-energy/china-mining-association-urges-steelmakers-to-buy-into-australian-mines/story-e6frg9df-1226693569110, viewed 16-09-2013

[14]www.theaustralian.com.au article:http://www.theaustralian.com.au/national-affairs/election-2013/nation-losing-out-to-offshore-locations/story-fn9qr68y-1226719612484, viewed 16-10-2013

[15]http://www.invest.com.cn article:http://www.invest.com.cn/NewsDetail.aspx?class=oi&id=8693, viewed 15 October 2013

[16]http://finance.21cn.com, article:http://finance.21cn.com/newsdoc/zx/a/2013/0911/06/23940488.shtml, viewed 15 October 2013

Investing in Myanmar – Risks and Strategies for Chinese Entities

中国企业投资缅甸的风险和策略

By Monique Carroll, Ariel Ye and Max Bonnell, Jonathan Kelp
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缅甸现任总统吴登盛于2011年3月就职，自此，新政府逐步结束军政府统治而成为准民事政府。同时，新政府也进行了经济和政治改革，希望西方国家停止对缅甸的经济制裁并吸引外国投资。[1]

目前，根据缅甸投资和公司管理董事会的数据，中国已经向缅甸提供了约200亿美元的直接投资，成为缅甸最大的投资者。多年来，中国政府和中国投资者已经同缅甸政府建立了良好的关系，在投资缅甸方面已经比许多其他外国投资者占尽先机，而其他外国投资者不久前还被禁止向缅甸投资。但是随着缅甸政治、社会和监管环境的改变，中国投资者必须考虑新的策略以确保他们投资的长期成功。

[1]例如，2013年6月新政府宣布将接受外国公司对在仰光北部建立超大城市项目的投标。

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Myanmar's incumbent president U Thein Sein took office on March, 2011 and since then the new government has become quasi-civilian, bringing an end to military rule. The new government has also undertaken economic and political reforms to encourage Western countries to suspend economic sanctions and to attract foreign investment.[1]

Currently, China is the largest investor in Myanmar, providing $20 billion in foreign direct investment according to the Directorate of Investment and Company Administration of Myanmar. Over many years, China and Chinese investors have established good relationships with Myanmar's government and obtained a 'head-start' in this regard over many other foreign investors who until recently, were prohibited from investing in Myanmar. However, with the changing political, social and regulatory environment in Myanmar, Chinese investors must consider new strategies to ensure the long-term success of their investments.

I. Demand for "corporate social responsibility"

The New York Times recently reported[2] that projects in Myanmar are "challenged more than ever by activists energized by Myanmar's democratic opening" providing the following examples:

- the Shwe Gas Movement is pressing for higher compensation for land taken for gas pipelines and for better paying jobs along the pipelines' route;
- monks have joined with ancestral landholders to stop a Chinese-led conglomerate from 'leveling' a fabled mountain embedded with copper;
- violent protests were held against a mining project involving a Chinese company which promoted a government-established inquiry into the project.

Community challenges to foreign investment can have serious, even devastating effects on the investment. One Chinese hydropower company operating in Myanmar was asked to close operations because of concerns over practices that lead to fighting between the national army and Kachin rebels. The company was asked to leave Myanmar even though it initially invested with the approval of the Government.

These examples illustrate the increasing importance of "Western-style" corporate social responsibility practices (**CSR**) for Chinese outbound investors. This is because adopting CSR is an important step in strengthening the relationship between Chinese investors on the one hand, and foreign governments and local communities on the other. In this way, CSR can satisfy local communities and governments as well prevent a situation where an investor is effectively forced to abandon their investment. This is sometimes referred to as maintaining a 'social licence' to operate.

II. Corporate social responsibility

CSR often requires companies to go beyond complying with local laws. For example, outbound investors need to consider the impact of extra-territorial regulation from their home jurisdiction, as well as the adoption of voluntary CSR codes and principles. In addition, investors should be sensitive to local expectations regarding labor relations and corporate activity, even if those expectations are not strictly enshrined in local law.

A. Extra-territorial regulation

Chinese companies are now subject to greater extra-territorial regulation from their home jurisdiction when investing abroad. This year, the Ministry of Commerce (**MOFCOM**) has published three new sets of rules to govern the extra-territorial conduct of Chinese companies:

a.Guidelines on the Environmental Protection in Outbound Investment and Cooperation (《对外投资合作环境保护指南》). Pursuant to these Guidelines, which were issued on 18 February 2013, Chinese companies are encouraged to fulfill their responsibilities to support sustainable development and protect the environment in host countries. The Guidelines state that Chinese companies should comply with local environmental laws, and adopt practices that protect the environment in host countries. Companies are also encouraged to adopt a broader range of social values including respecting local cultural traditions and workers' rights.

[1]For example, in June 2013 the new government announced that it would accept tenders from foreign companies for its "mega city" project in northern Yangon.

[2]18 May 2013.

一、公司社会责任的要求

近期，纽约时报曾报道[2]，由于缅甸民主开放政策的鼓励，一些在缅甸的投资项目遭遇了从事社会活动的积极分子们前所未有的抵制。

- “瑞区天然气运动”被要求支付更高额赔偿以征收土地修建输油管道，以及向管道沿线的居民提供更好薪酬的工作机会。
- 僧侣们加入祖传土地所有者的队伍，阻止一家中国领导的企业集团夷平一座传说中的富含铜矿的山。
- 发生暴力游行反对一家中国公司参与的煤矿项目，促使缅甸政府介入对该项目的调查。

当地社区对外国投资的挑战将对这些外国投资项目产生严重的、甚至毁灭性的影响。因为担忧运营会引发政府军与克钦邦叛乱分子之间的战争，一家在缅甸运营的中国水电公司被要求停止运营。即便该公司在投资时获得了政府的批准，但该公司仍被要求离开缅甸。

这些事例向中国海外投资者表明了“西方式”的公司社会责任与日俱增的重要性。因为承担公司社会责任是加强中国投资者与外国政府和当地社区联系的重要步骤。通过这种方法，公司社会责任不仅能够满足当地社区和政府的要求，也能避免投资者被强迫放弃投资。这有时也被称为公司获得从事经营的“社会执照”。

二、公司社会责任

公司社会责任通常要求公司承担比遵守当地法律更多的义务。例如，对外投资者需要考虑他们母国制定的具有域外效力的超领域规定以及公司社会责任的自律守则和原则。此外，投资者还必须关注当地对劳工关系和公司活动的通常预期，即便这些预期没有被当地法律严格规定。

2.1超领域规定

现在中国公司对外投资时面临着来自中国的更多超领域规定。今年商务部公布了三个新的规定以规范中国公司在中国领域外的行为。

(1)2013年2月18日发布的《对外投资合作环境保护指南》。该指南鼓励中国公司支持东道国的可持续发展和保护当地环境。指南称中国公司应遵守当地的环境保护法规，并采取措施保护东道国环境。指南也鼓励中国公司采纳更广泛的社会价值观，包括尊重当地文化传统和工人权利等。

(2)2013年2月27日发布的《2013年商务部规范企业境外经营行为，防治境外商业贿赂工作要点》。该要点借鉴西方法律制度的经验，扩大商务部对中国企业境外商业贿赂的监管。要点增加了中国企业雇佣外国工人的相关规定。商务部的目标是提升从事国际业务的中国公司内部文化，宣传和推广公司良好行为的积极例子。

(3)《规范对外投资合作领域竞争行为的规定》。该规定于2013年4月17日生效，目的是鼓励公平竞争和支持中国海外投资的有序进行。

中国颁布超领域规定反应了与澳大利亚、英国和美国相似的发展趋势，也符合中国刑法2011年禁止中国公民和公司贿赂外国政府官员的扩大规定。

2.2自律守则和实践

“西方式”的公司社会责任也包含了一系列公司能采取的自律措施和守则。例如，澳大利亚、英国和美国的公司通常要求他们的海外经营符合下列标准：

(1)《联合国商业和人权指导原则：实行保护、尊重和救济的框架》。由联合国人权委员会批准的保护、尊重和救济的框架是指公司应对由其引起的直接社会影响、与其经营活动相关的间接社会影响以及通过商业联系提供的产品和服务负责。指导原则建议公司公布其对公司社会责任的承诺，对其经营活动产生的社会影响承担谨慎注意的义务，并建立对负面影响的补救制度。

(2)安全和人权的自律原则。公司、政府和非政府组织一起发展了自律原则以协助采矿业处理安全运营的问题。这些原则不仅具有法律约束力，而且参与的公司还要求能够负责任地处理与警察或私营保安力量之间的事宜，并公开地向当地社区咨询相关意见。

(3)赤道准则。赤道准则被世界上许多大型出口信用代理机构和金融机构采用，如兴业银行，用来评估它们资助项目的环境和社会风险。借款人在与这些机构签订的金融文件承诺他们将遵守项目所在国的相关要求以及有关环境和社会的法律。

通过确定恰当的自律措施和规范公司的海外经营活动，中国海外投资者能够达到他们投资所在的东道国政府和工商业界的期望并获得从事经营的社会执照。

三、投资协议保护

3.1 介绍

本文第一部分提及的事件不仅引发有关公司社会责任的问题，也可以被描述为政治风险事件。所谓的“政治风险”在对外投资领域是指东道国的政治或监管决定对投资产生不利影响，或者东道国未能提供稳定的法律或监管环境从而严重损害投资。

[2]2013年5月18日。

b.Key Working Points on Regulating the Conduct of Enterprises Engaged in Overseas Business and Preventing Overseas Commercial Bribery (《2013年商务部规范企业境外经营行为，防治境外商业贿赂工作要点》). The Key Working Points, which were issued on 27 February 2013, extend MOFCOM's oversight of commercial bribery by Chinese companies operating abroad, including the adoption of best practice features of Western legal systems. The Key Working Points will increase regulation of Chinese companies' employment of foreign workers. MOFCOM aims to promote the development of corporate culture within Chinese companies that engage in international business, and will look to publicise positive examples of business behavior.

c.Provisions on Regulating Competitive Conduct in Outbound Investment and Cooperation (《规范对外投资合作领域竞争行为的规定》). These Provisions came into force on 17 April 2013 and are aimed at encouraging fair competition and upholding the orderly process of Chinese foreign investment.

China's enactment of extra-territorial rules governing outbound investors reflects similar developments in Australia, the UK and the US, and follows the extension in 2011 of the PRC Criminal Law to prohibit Chinese citizens and companies from bribing foreign officials.

B.Voluntary codes and practices

"Western-style" CSR also involves a series of voluntary initiatives and codes that companies can adopt. For example, companies from Australia, the UK and the US often align their overseas operations with the following standards:

a.UN Guiding Principles on Business and Human Rights: Implementing the "Protect, Respect, Remedy" Framework. The "Protect, Respect, Remedy" Framework, endorsed by the UN Human Rights Council, states that companies are responsible for the direct social impacts caused by their activities, as well as indirect social impacts linked to their operations, products or services through business relationships. The Guiding Principles recommend that companies publish a policy commitment to CSR, undertake due diligence on the social impacts of their operations, and develop remediation mechanisms for addressing adverse impacts.

b.Voluntary Principles on Security and Human Rights. The Voluntary Principles were developed by companies, governments and non-government organizations to assist the extractive sector with security operations. These Principles are not legally binding, but participating companies are expected to deal responsibly with public and private security forces and to consult openly with local communities.

c.Equator Principles. The Equator Principles are used by many of the world's largest export credit agencies and financial institutions, including for example Industrial Bank Co., Ltd, to assess environmental and social risk in projects that they finance. Borrowers from these institutions are required to covenant in the financing documents that they will comply with the relevant requirements, as well as environmental and social laws in the project's host country.

By identifying which voluntary initiatives are appropriate, and aligning their overseas operations as appropriate, Chinese outbound investors in Myanmar can help to meet the expectations of Government and the business community in the counties in which they are investing, and maintain their 'social licence' to operate.

III. Investment treaty protection

A. Introduction

As well as contributing to the expectation that companies will demonstrate their commitment to various CSR standards, the events described above, can also be described as 'political risk' events. "Political risk" in foreign investment is the risk that an investment will be adversely affected by a host country's political or regulatory decisions, or, the risk that the host country fails to provide a stable legal and regulatory environment and therefore significantly harms your investment.

投资协议通过给予投资者向东道国政府就其投资遭受的损失要求赔偿的权利来保护投资者抵御政治风险事件。

没有投资协议的保护，你在外国的投资无法获得除东道国国内法律体系提供的保护以外的其他保护。这是在那些没有稳定政治环境和成熟法律制度的国家进行投资时让投资者忧虑的问题。相应的，如果你正在缅甸投资（或其他国家），我们建议你寻求投资协议的保护。

3.2 中国与缅甸的投资协议

中国和缅甸已经订立了《中华人民共和国政府和缅甸联邦政府关于鼓励促进和保护投资协定》（“**中缅双边投资协定**”）。该协定为在缅甸的中国投资者提供了广泛的保护，包括：

(1) 全面的保护和安全。这要求缅甸政府尽职尽责地向来自中国的投资提供基本水平的保护。例如，缅甸政府未能采取充分措施防止游行示威者损害投资财物，缅甸政府就可能违反了该要求。

(2) 公平和公正待遇。该保护非常广泛，通常保护投资者免受来自法院、仲裁庭、行政机关违反正当程序或存在偏见、欺诈、不诚实、不公正的裁决和决定，也保护投资者免受任意武断的对待和因东道国重大的法律和商业环境改变而造成的不利影响。如果缅甸政府撤销了投资者的经营执照或者损害了投资者认为投资将被缅甸政府支持的预期，则中国投资者可以寻求该条款的保护。

(3) 防止遭受不合理或歧视性措施。不合理或歧视性措施会损害管理、维护、使用、享有和处置投资。如果缅甸政府制定严重限制外商投资的管理和运营规定，则缅甸政府可能违反了此条款。

(4) 对投资进行征收或国有化而未给予充分补偿的赔偿。该条款可以保护投资者免遭实施国有化或毁坏投资价值的法案或政府措施的侵害。

(5) 赔偿损失。当投资由于战争、国家紧急状态、暴乱、动荡或类似情况而收到损失时，该协定也向中国投资者提供与缅甸本国投资者或其他第三国投资者相同的要求赔偿的权利。

(6) 资本和收益的汇回。协定保证中国投资者向中国转移投资收益的权利，包括利润、红利、利息和其他法定的收益、出售或清算全部或部分投资获得的收益以及有关知识产权的特许权使用费等。

中国与东盟的投资协定也提供了类似的保护。

3.3如何获得保护

每个投资协定都规定了受到保护的投资者和投资的概念、提供给投资者的保护以及协定被违反时，投资者寻求救济的权利。中缅双边投资协定保护中国公民（包括公司和其他经济组织）根据缅甸法律和程序在缅甸投资的各类财产。尽管保护范围广泛，但中国投资者需要确定他们的投资符合法律规定的“投资”定义，并且向缅甸投资的公司和经济实体与中国有足够的联系。

四、总结和下一步行动

中国投资者能够采取一些积极的步骤保护他们的海外投资免遭社会动荡和政治风险的损害。我们建议中国投资者采取积极途径与政府和当地社会建立更强的联系。我们也建议中国投资者寻求投资协定的保护以作为最后的保护手段。

如果你需要更多有关中国投资者公司社会责任或投资协议保护的信息，请联系我们。你也可通过下列链接获取相关信息：
http://www.chinalawinsight.com/2012/11/articles/dispute-resolution/guide-to-obtaining-investment-protection-for-chinese-investors/

Investment treaties provide protection against “political risk” events by giving investors the right to seek compensation from a foreign government for harm caused to foreign investments or suffered by foreign investors.

Without investment treaty protection, you take the risk of investing in a foreign country with no protections beyond those offered by that country’s domestic legal system. This can be a real concern in countries without stable, political environments and sophisticated legal systems. Accordingly, if you are investing in Myanmar (or another foreign jurisdiction), we recommend that you also obtain investment treaty protection.

B.China’s investment treaty with Myanmar

China and Myanmar have entered into an investment treaty called “the Agreement on the Promotion and Protection of Investments between China and Myanmar” (**China-Myanmar BIT**). This treaty provides broad protection to Chinese investors in Myanmar including:

a. Full Protection and Security (**FPS**). This requires the Myanmar Government to exercise due diligence in ensuring a basic level of protection to Chinese investments. It might be breached if, for example, the Myanmar Government did not take adequate steps to protect protestors from causing physical damage to investments.

b. Fair and Equitable Treatment (**FET**). This protection is very broad and generally provides protection from court, tribunal or administrative decisions which do not afford the investor due process or are tainted with bias, fraud, dishonesty, or lack of impartiality, as well as, against “arbitrary” treatment and significant alterations to the legal and business environment in which it invested. It could be relied upon by a Chinese investor in Myanmar if the Myanmar Government revoked the investor’s business licence or undermined the investor’s expectation that its investment would be supported by the Government, generally, or in a particular manner.

c. Protection from unreasonable or discriminatory measures which harm the management, maintenance, use, enjoyment and disposal of the investments. This protection might be breached if the Myanmar government introduced regulations which severely restricted the management and operation of foreign investment in Myanmar.

d. Compensation for Expropriation or Nationalisation of investments without adequate compensation. This protection will also protect against acts or government measures which, over time, have the effect of nationalising or destroying the value of your investment.

e. Compensation for Damages and Losses. The treaty also gives Chinese investors rights to compensation equal to that provided to local investors or investors from any other state, when their investment suffers damages or losses from war, a state of national emergency, insurrection, riot or other similar events.

f. Repatriation of Investments and Returns. The treaty guarantees the ability of Chinese investors to transfer to China returns from their investment including profits, dividends, interests and other legitimate income, proceeds obtained from the total or partial sale or liquidation of investment and royalties in relation to intellectual property rights.

Similar protections can be obtained via the China-ASEAN Investment Agreement.

C. How to obtain protection

Each investment treaty defines the investors and investments which will be protected, the protections provided and the rights of investors to seek redress for breach of these protections. The China-Myanmar BIT protects “every kind of asset” invested by Chinese nationals (including corporate and other economic entities) in Myanmar, in accordance with Myanmar laws and procedures. Whilst this provides broad protection, Chinese investors need to ensure that their investments meet the legal definition of ‘investment’ and, if a corporate or economic entity, that they have a sufficient connection with China.

IV. Conclusion and next steps

There are pro-active steps Chinese investors can take to protect their foreign investments from social unrest and political risks. We recommend that Chinese investors adopt this pro-active approach, and thereby build stronger Government and community relationships. We also recommend that Chinese investors obtain investment-treaty protection as a last resort guarantee for their investments.

(This article was originally written in Chinese, the English version is a translation.)

If you would like further information on how Chinese investors can adopt CSR or investment treaty protection please contact us. You can also obtain further information at the following link: http://www.chinalawinsight.com/2012/11/articles/dispute-resolution/guide-to-obtaining-investment-protection-for-chinese-investors/

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