CHINA LAW CONNECT 中国法律连接

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China Guiding Cases Project
Stanford Law School

中国指导性案例项目
斯坦福法学院

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Editor's Note*

Dr. Mei Gechlik

Dear Readers,

Since its establishment in February 2011, the China Guiding Cases Project (the "CGCP") has been growing rapidly, traveling on a trajectory that surprises even me, its founder. For example, over the past two years, the number of CGCP website visitors has increased 15 times, from around 5,000 to over 75,000! In response to this strong support, the project has decided to publish a bilingual professional journal, through which all parties interested in Chinese law can be better connected. Thus, *China Law Connect* ("*CLC*") is born.

Aimed at advancing the understanding of Chinese law and increasing judicial transparency and accountability in China, *CLC* primarily consists of three different types of commentaries (traditional commentaries, China Cases *Insights*™, and Experts *Connect*™), featured pieces identified as part of the CLC *Spotlight*™ series, and news and events about the CGCP as well as its partners and sponsors.

This inaugural issue of *CLC* includes seven pieces contributed by speakers from the tremendously successful conference, *China's Case Guidance System and Belt & Road Initiative: Practical Insights and Prospects*, which the CGCP hosted on **March 30, 2018, in Beijing** (see the "**News and Events**" section).

Included as the journal's first "**traditional commentary**" is a piece adapted from a speech delivered by **Judge GUO Feng**, Deputy Director, Research Office of the Supreme People's Court (the "SPC"), at the above-mentioned conference. *CLC*'s traditional commentaries are expected to provide in-depth and/or extensive contributions to scholarship on China's Case Guidance System, the Belt & Road Initiative, and/or other matters related to Chinese law. In his piece, Judge Guo sheds light on China's Case Guidance System by, *inter alia*, revealing the number of cases in which Chinese courts, from all levels, *applied* Guiding Cases and explaining two sets of circumstances under which Chinese judges need not refer to Guiding Cases in rendering judgments or rulings.

Following Judge Guo's commentary are three pieces authored by the winners of the **2017 China Cases *Insights*™ Writing Contest** (see the "**News and Events**" section). A special type of *CLC* commentary, **China Cases *Insights*™** aims to provide legal and business professionals with concise and practical information, as well as insightful analyses and indispensable takeaways, about cases in or related to China to help these professionals in their practice of law and business.

- **Alison Lu Xu**, PhD Candidate and Teaching Assistant, University of Leeds, analyzes the SPC's liberal interpretation, in Belt & Road Typical Case 13, of the reciprocity principle for recognition and enforcement of foreign judgments. She also writes, "[t]he case indicates specific factors and strategies which practitioners should consider in evaluating their chances of success applying for the recognition and enforcement of foreign commercial judgments." To learn more about Belt & Road Typical Case 13 itself, see the video about the case released as part of CGCP *Classroom*™ by visiting https://cgc.law.stanford.edu/cgcp-classroom-lesson-3 or scanning the QR code included in this China Cases *Insights*™ piece.

- **Minghe Liu**, Legal Assistant, Beijing Shangquan Law Office, points out that in the retrial judgment of *MA Le, A Case About Using Nonpublic Information for Trading* ("*MA Le*"), the SPC used a flexible method of legal interpretation to interpret the "crime of using nonpublic information for trading" provided for in China's *Criminal Law*. The selection of *MA Le* as Guiding Case No. 61 will likely guide courts to use this flexible method to interpret similar provisions in the law.

- **Tereza Gao and Edison Li**, Registered Foreign Lawyers of DLA Piper Hong Kong, review actions taken by the SPC before and after the release of Belt & Road Typical Case 12 and conclude that the highest court's liberal interpretation of the term "foreign-related civil relationship" in the case (resulting in an unprecedented enforcement of a foreign arbitral award involving legal persons of China located in a free trade zone) is part of a bigger plan to develop a sound Belt and Road dispute resolution mechanism.

This first issue does not include an **Experts** *Connect*™ piece. These pieces are dedicated to the views of Chinese and foreign experts on select legal issues presented for the benefit of legal practitioners, business professionals, and students around the world. The first piece of this series will be published in the second (i.e., September 2018) issue of *CLC* and will discuss the implications of the U.S. Supreme Court's recently released decision in ***Animal Science Products, Inc. et al. v. Hebei Welcome Pharmaceutical Co. Ltd. et al.*** (the "*Vitamin C* case"). See the related **Call for Submissions** on page 17.

In addition to commentaries, each issue of *CLC* contains at least two **CLC** *Spotlight*™ pieces, which have a less formal but more focused approach, covering topics related to **China's Belt & Road Initiative** as well as **CGCP Interviews** with leading legal practitioners, prominent business professionals, and other luminaries. In this issue, there are three CLC *Spotlight*™ pieces:

- In a **CGCP Interview**, **Judge William A. Fletcher** of the United States Court of Appeals for the Ninth Circuit explains why, among recent Chinese legal reforms, he is "most interested in the development of China's Case Guidance System" and what topics or skills he thinks will be most critical for judicial training programs in China to focus on. In addition, Judge Fletcher shares how he feels about his opinions being reversed. To see the portion of this interview released as part of CGCP *Classroom*™, visit https://cgc.law.stanford.edu/cgcp-classroom-lesson-4 or scan the QR code included in the piece.

- In another **CGCP Interview**, **Dr. HU Zhenyuan**, Partner of Fangda Partners and former Deputy Chief Judge of the Intellectual Property Division and Financial Division of the Shanghai First Intermediate People's Court, recalls his relatively early involvement in the establishment of the Case Guidance System. He suggests three reform measures to improve the system. To see the portion of this interview released as part of CGCP *Classroom*™, visit https://cgc.law.stanford.edu/cgcp-classroom-lesson-5 or scan the QR code included in the piece.

- In a piece titled ***China Law Connect*** **and Belt & Road** *Countries*™, **Jennifer Ingram**, Managing Editor of the CGCP, first points out that there is no official count of the number of countries participating in China's Belt and Road Initiative. Then, she explains how the CGCP has identified 101 countries that nevertheless seem to be involved and what the CGCP plans to do to deepen understanding of the global initiative.

At the end of each issue of *CLC* is a section covering the latest news and recent and forthcoming events related to the CGCP as well as its partners and sponsors. This inaugural issue covers the above-mentioned conference that the CGCP hosted in March 2018, the launch of the **2018 China Cases** *Insights*™ **Writing Contest**, and my forthcoming participation in the **Forum on the Belt and Road Legal Cooperation** organized by China's Ministry of Foreign Affairs.

Distributed through the CGCP's extensive network built through its website, CGCP *Classroom*™, and social media platforms, *CLC* is expected to become an important channel for facilitating legal exchange and cooperation. To achieve this goal, we welcome:

- **Letters to the Editor**. *CLC* issues may feature select letters, or excerpts thereof, sent to *CLC* by its readers and responses from *CLC* Editors.
- **Submissions for publication** in the journal in the form of traditional commentaries, China Cases *Insights*™, or Experts *Connect*™ pieces. Submissions should satisfy the corresponding guidelines summarized in the **Submission Guidelines** (see page 17). For details, see https://cgc.law.stanford.edu/clc-submission-guidelines.

All letters to the editor and submissions for publication should be sent to Jennifer Ingram, Managing Editor of the CGCP, at jaingram@stanford.edu.

Given the CGCP's successful trajectory, our global team of nearly 200 CGCP members and I are confident that *CLC* will become an important channel for facilitating legal exchange and cooperation ***if*** we have your financial support. Incubated with significant support from Stanford Law School, the CGCP is ready to take up the challenge of becoming financially independent, in the hope of generating more resources to pursue bigger goals. **Are you ready to help us? We hope you can consider the following donation options:**

$150	to receive hard copies of *all*	3	issues published in	2018
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The $50 per issue helps cover the high costs of production (i.e., the professionally edited pieces, exceptionally high-quality translations, and beautiful designs and printing). To support the long-term development of the CGCP, we certainly **need generous donations**. Those who **donate $300 or more per year** will also be guaranteed seats at all CGCP events organized for that year. Given the extremely high level of interest in our events, this is a great opportunity to avoid our long wait lists!

Please make your online donations at https://cgc.law.stanford.edu/donate and then complete the form posted on https://stanford.io/2KrVfvl to let us know your mailing address. The hard copies of *CLC* will likely be a nice addition to your office.

We appreciate your support and look forward to sharing more insights and information with you through this new publication!

Sincerely,

Dr. Mei Gechlik
Founder and Director, China Guiding Cases Project
Editor-in-Chief, *China Law Connect*

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* Dr. Mei Gechlik, *Editor's Note*, 1 China Law Connect 5 (June 2018), https://cgc.law.stanford.edu/clc-1-201806.

Dr. Mei Gechlik

Founder and Director, China Guiding Cases Project, Stanford Law School

Dr. Mei Gechlik is the Founder and Director of the China Guiding Cases Project (the "CGCP"; http://cgc.stanford.edu). Formerly a tenured professor in Hong Kong, she founded the CGCP in February 2011. With support from an international team of nearly 200 members and an advisory board of approximately 50 distinguished experts, including justices from the U.S. Supreme Court and the Supreme People's Court of China, the CGCP has quickly become the premier source of high-quality translations and analyses of Guiding Cases, China's *de facto* binding precedents. In November 2016, the CGCP launched the Belt and Road Series, taking the lead to analyze the growing importance of Belt and Road Typical Cases and their role in the development of China's case system.

The CGCP has presented at various notable forums, including the World Bank, the Open Government Partnership Global Summit, and U.S.-China Legal Exchange Conferences. In October 2017, with approvals from China's judiciary, the CGCP organized events featuring judges from the Beijing Intellectual Property Court to explain how China's Case Guidance System has expanded from Guiding Cases to cover select judgments rendered by the Beijing Intellectual Property Court. In March 2018, the CGCP also received high-level support to successfully organize a conference titled "China's Case Guidance System and Belt & Road Initiative: Practical Insights and Prospects", which featured U.S. and Chinese judges as well as other experts from different parts of the world.

Prior to joining Stanford Law School in 2007 to teach courses related to China law and business, Dr. Gechlik worked from 2001 to 2005 for the Carnegie Endowment for International Peace, a Washington D.C.–based think tank, testifying before the U.S. Congress on various topics about China and advising the United Nations and the Chinese government on implementing rule of law programs. Dr. Gechlik is admitted as a barrister in England, Wales, and Hong Kong and is a member of the Bar in New York and the District of Columbia. She received an M.B.A. in Finance from the Wharton School at the University of Pennsylvania and a Doctor of Science of Law (J.S.D.) from Stanford Law School.

熊美英博士

斯坦福法学院中国指导性案例项目创办人、总监

熊美英博士是斯坦福法学院中国指导性案例项目（"CGCP"）的创办人与总监。曾于香港任终身教授的熊美英博士，于2011年2月创立CGCP。CGCP拥有一支由近200位成员组成的国际工作团队，以及一个包括美国联邦最高法院法官和中国最高人民法院法官在内、由50多位杰出专家组成的顾问团体。在成员和顾问的支持下，CGCP已迅速成为指导性案例（具有事实约束力的案例）的优质翻译和分析的重要来源（https://cgc.law.stanford.edu）。2016年11月，CGCP开发了一带一路系列，率先分析一带一路典型案例的重要性及其在中国案例制度发展中扮演的角色。

CGCP亦受邀在世界银行、开放政府伙伴关系全球峰会，以及中美法律交流会议等各个知名论坛上发表演讲。2017年10月，CGCP获得中国司法机关的支持，组织了一系列活动，让北京知识产权法院法官介绍了中国案例指导制度的最新发展并如何覆盖了该院所作出的部分判决。2018年3月，CGCP还获得了重要的支持，成功举办了题为"中国案例指导制度和'一带一路'倡议：实务见解与前景"的会议。中美法官以及其他来自不同地区的专家都参与盛会。

在2007年加入斯坦福法学院教授有关中国法律和商业的课程之前，熊美英博士于2001至2005年期间担任华盛顿智囊机构卡内基国际和平基金会的研究员。她曾向美国国会就有关中国的各种课题作证，并对推行法治计划向联合国和中国政府提供建议。熊博士在英格兰、威尔士和香港均有出庭律师执业资格，同时也是纽约和哥伦比亚特区的律师。她获得宾夕法尼亚大学沃顿商学院金融学工商管理硕士（MBA）和斯坦福法学院法律科学博士（JSD）。

熊美英博士

编辑短笺*

亲爱的读者：

中国指导性案例项目（“CGCP”）自2011年2月成立以来，一直在迅速成长。其成长的轨迹，甚至让作为创办人的我都感到惊讶。比如，在过去两年中，CGCP网站的访客人数从5000增长到超过75000，增长了15倍。为了响应这强大的支持，CGCP决定出版一份专业的双语期刊，与对中国法律有兴趣之士夙常连接。《中国法律连接》（“《中法连》”）随之而生。

《中法连》旨在促进对中国法律的理解，提高中国司法透明度和问责。它主要包括三种类型的评论（传统评论、中国案例*见解*™、专家*连接*™）、中法连*聚焦*™系列的精选文章，和CGCP及其合作伙伴、赞助方的新闻和活动。

《中法连》创刊号中有七篇由《中国案例指导制度和“一带一路”倡议：实务见解与前景》大型会议上的几位演讲人撰稿。大会于2018年3月30日由CGCP在北京成功主办。（见“**新闻和活动**”部分）。

本刊首篇“**传统评论**”是改编自最高人民法院（“最高法”）研究室副主任**郭锋法官**在上述大会的演讲。一般而言，《中法连》的传统评论会较深入地探讨中国案例指导制度、一带一路倡议和其他中国法律问题。在文中，郭法官通过揭示中国各级法院共有多少案件参照适用了指导性案例，和解释法官可以不参照指导性案例作出裁判的两种情况等方面对中国案例指导制度作出阐明。

在郭法官的文章之后，是三篇由 **2017年中国案例*见解*™写作比赛**的获胜者撰写的文章（见“**新闻和活动**”部分）。作为《中法连》的一种特别评论形式，**中国案例*见解*™**旨在为法律和商业专业人士提供关于中国案例的简明实用信息、有见地的分析和不可或缺的要点，从而帮助这些专业人士的法律和商业实践。

- 英国利兹大学法学博士生兼助教**许璐女士**分析了最高法如何在一带一路典型案例13中，开明地解读互惠原则以承认和执行外国判决。她亦写道：“该案例指出了从业人员在评估其申请承认和执行外国商事判决成功机会时，应当考虑的具体因素和策略。”若想进一步了解一带一路典型案例13，请访问 https://cgc.law.stanford.edu/zh-hans/cgcp-classroom-lesson-3 或扫描本篇中国案例*见解*™中的二维码，观看CGCP*学堂*™发布的案例视频。

- 北京市尚权律师事务所**刘鸣赫先生**指出，最高法在《马乐利用未公开信息交易案》（“《马乐案》”）的再审判决中，以灵活的法律解释方法对中国《刑法》规定的“利用未公开信息交易罪”作出解释。《马乐案》被选为指导案例61号很可能会引导法院以该灵活方法解读《刑法》其他类似的规定。

- **高尚女士和李隽文先生**是欧华律师事务所香港办事处的注册外国律师。通过观察最高法在发布一带一路典型案例12前后的一些行为，他们得出的结论是最高法在该案中对“涉外民事关系”一词的从宽解释（导致涉及位于自由贸易区的中国法人的外国仲裁裁决被史无前例地执行）是作为发展健全的一带一路争端解决机制这一更为庞大计划的一部分。

本创刊号未收录**专家*连接*™**文章。该系列的文章专供中外专家就某些法律问题发表观点，让世界各地的法律从业人员、商业专业人士和学生能从中受益。《中法连》将在第二期（即2018年9月刊）刊登该系列的首篇文章，讨论美国联邦最高法院最近宣布的**《动物科学产品公司等诉河北维尔康制药有限公司等》（“维生素C案”）（*Animal Science Products, Inc. et al. v. Hebei Welcome Pharmaceutical Co. Ltd. et al.*）（*the “Vitamin C case”*）**的裁决的影响。详见第18 页**邀稿函**。

除了评论，每一期的《中法连》刊登至少两篇形式较随意但内容更关注一些专题的**中法连*聚焦*™**文章。内容包括与**中国一带一路倡议**相关的专题和**CGCP专访**法律从业人员、商业专业人士和其他具影响力的专家。本期共有三篇中法连*聚焦*™文章：

- 在一个**CGCP专访**中，美国联邦第九巡回上诉法院**William A. Fletcher法官**解释为何在众多近期的中国法律改革中，他“最感兴趣的是中国案例指导制度的发展”。他亦解释哪些方面或技能是中国司法培训项目最应关注的。此外，Fletcher法官对其判决被推翻发表了观点。若想观看专访视频部分内容，请访问https://cgc.law.stanford.edu/zh-hans/cgcp-classroom-lesson-4 或扫描文中的二维码，观看CGCP *学堂*™发布的视频。

- 在另一个**CGCP专访**中，方达律师事务所合伙人、上海市第一中级人民法院知识产权审判庭和金融审判庭前副庭长**胡震远博士**回顾了他早期参与建立中国案例指导制度的经历。他也提出三项改革措施以改善该制度。若想观看专访视频部分内容，请访问https://cgc.law.stanford.edu/zh-hans/cgcp-classroom-lesson-5 或扫描文中的二维码，观看CGCP *学堂*™发布的视频。

- 在题为**《中国法律连接》与一带一路*国家*™** 一文中，CGCP执行编辑**英珍妮女士**先指出中国官方没有对参与一带一路倡议的国家作出具体统计。随后，她说明了CGCP如何认定101个涉及该倡议的国家，以及CGCP计划如何深化对这一全球倡议的认识。

每期《中法连》末有一栏报道CGCP及其合作伙伴、赞助方的新闻和近期活动。此创刊号报道了上述CGCP在2018年3月主办的大会、**2018年中国案例*见解*™写作比赛**的展开，以及我受邀参加中国外交部组织的**“一带一路”法治合作国际论坛**。

《中法连》通过一个由CGCP网站、CGCP *学堂*™ 和社交媒体平台构建而成的大型网络推广。我们相信本刊会成为促进法律交流和合作的重要渠道。为实现这一目标，我们欢迎：

- **读者来信**。《中法连》会选登读者来信或其摘录，以及《中法连》编辑的回复。
- **投稿**。投稿需以传统评论、中国案例*见解*™或专家*连接*™文章的形式，并符合**“投稿指引”**中的要求（见第18页面）。详情请见https://cgc.law.stanford.edu/zh-hans/clc-submission-guidelines。

所有读者来信和投稿请寄至CGCP执行编辑英珍妮女士：jaingram@stanford.edu。

鉴于CGCP此前的成功，***如果***我们能得到您的慷慨支持，我们全球团队中将近200名的成员和我都有信心《中法连》会成为促进法律交流和合作的重要渠道。CGCP 成立之初受惠于斯坦福法学院的资助。如今我们已做好准备，面对实现财务独立的挑战，希望能获得更多资源，实现更宏大的目标。**您是否也准备好，助我们一臂之力？我们希望您可以考虑以下捐赠选项：**

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我们感谢您的支持，并期待通过《中法连》这一全新的刊物和您分享更多观点和信息！

敬祝 顺心

熊美英博士
中国指导性案例项目创办人、总监
《中国法律连接》主编辑

* 熊美英博士，编辑短笺，《中国法律连接》，第1期，第9页（2018年6月），https://cgc.law.stanford.edu/zh-hans/clc-1-201806。

About the CGCP

Mission

The China Guiding Cases Project (the "CGCP") of Stanford Law School aims to advance the understanding of Chinese law and to help develop a more transparent and accountable judiciary in China by engaging experts and other stakeholders around the world to contribute to a unique knowledge-base, undertaking capacity-building activities for legal actors, and promoting public education and participation.

Brief History

In November 2010, the Supreme People's Court of China (the "SPC") established the Case Guidance System (案例指导制度), a ground-breaking system in which certain Chinese court judgments are selected and re-issued as *de facto* binding Guiding Cases ("GCs"; 指导性案例) to guide the adjudication of similar subsequent cases and ensure the uniform application of law. Immediately thereafter, Dr. Mei Gechlik founded the CGCP to carry out its historic mission.

Subsequent developments show that select important cases issued to date by the SPC under the Case Guidance System also include Belt and Road ("B&R") Typical Cases (一带一路典型案例), which showcase how courts in China adjudicate legal issues related to the country's Belt and Road Initiative (the "BRI"). The enshrinement of the BRI in the Chinese constitution, the growing significance of B&R Typical Cases, and the potential impact of the Case Guidance System on the establishment of BRI dispute settlement mechanisms reveal the timeliness and exceptional importance of the CGCP's mission.

The Team

The CGCP team has grown to nearly 200 law students, other graduate students, lawyers, and translation professionals working across the globe and is advised by more than 50 distinguished experts, including justices from the U.S. Supreme Court and the SPC.

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Products

In addition to *China Law Connect*, a bilingual professional journal launched in June 2018 that serves as the main channel for the CGCP to publish commentaries, the CGCP hosts a free online knowledge-base (**http://cgc.law.stanford.edu**) featuring three sets of bilingual products:

- Full-text versions and high-quality English translations of all released GCs;
- Guiding Cases *in Perspective*™ materials, a unique set of publications that identifies the original judgments selected by the SPC, examines their transformation into GCs, and explores the treatment of the GCs in subsequent cases;
- Guiding Cases *Analytics*™, a publication that aggregates important information on all GCs released to date and performs quantitative analyses to identify trends and issues worthy of further study;
- Guiding Cases *Surveys*™, a publication illustrating how GCs are perceived and used by presenting empirical data collected through surveys of Chinese legal actors and analyses of subsequent cases referring to GCs; and
- Guiding Cases *Seminars*™, which feature talks on GC-related subjects presented by scholars, lawyers, policymakers, and other experts and are disseminated in text summary to reach the CGCP's global audience.

- B&R *Cases*™, a serial publication of the CGCP that provides full-text versions and high-quality English translations of court cases in China that are related to the country's BRI, including B&R Typical Cases;
- B&R *Texts*™, a compilation of primary sources forming the legal framework of China's Belt and Road Initiative, including legal cooperation agreements between China and countries along the "Belt and Road" routes; and
- B&R *Countries*™, a series highlighting countries that have been identified by Chinese authorities as related to the BRI and/or that have otherwise indicated their interest or involvement, with a focus on the impact of the initiative on these countries' domestic developments and relations with China.

CGCP *Classroom*™ is an online, mobile-friendly, and interactive platform through which the CGCP releases videos about GCs, cases related to the BRI, and other topics. Through these informative videos, the CGCP spreads knowledge of Chinese law to the global community so as to promote public education and participation. ■

关于中国指导性案例项目（“CGCP”）

使命

斯坦福法学院的中国指导性案例项目（“CGCP”）旨在通过与世界各地的专家和其他利益相关者共同完善我们独特的知识库、为法律工作人员开展能力建设活动、以及促进公共教育和参与，提升对中国法律的理解，并且帮助中国建立一个更加透明、更有问责性的司法制度。

历史简介

2010年11月，中国最高人民法院（“最高法”）建立了具开创性的案例指导制度，把中国各级人民法院的案例经过遴选、提炼成为指导性案例，以指导类似的后续案件的审判工作，确保法律的统一适用。此后，斯坦福法学院的熊美英博士立即创立了 CGCP，展开其具历史性的使命。

随后的发展表明，最高法根据案例指导制度所发布的重要案例还包括一带一路典型案例。这些案例展示了中国法院如何判决涉及一带一路倡议的法律问题。一带一路倡议在中国宪法中的地位、一带一路典型案例的日益重要性，以及案例指导制度对建立一带一路争端解决机制的潜在影响都揭示了CGCP使命的及时性和特殊重要性。

团队

CGCP拥有一支由法学院学生、其他研究生、律师、专业翻译人员组成的约200位成员的国际团队，并有包括在美国联邦最高法院和中国最高人民法院法官在内的50多位杰出的专家顾问。

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产品

除了2018年6月推出的、作为 CGCP发表评论的主要渠道的专业双语季刊《中国法律连接》之外，CGCP还建立了一个免费开放的知识库（http://cgc.law.stanford.edu），其包含三个系列的双语产品：

- 指导性案例全文和其优质英文翻译文本；
- 指导性案例*透视*™是CGCP独创的出版物，旨在提供最高法所遴选的指导性案例之原裁判文书，审视原裁判文书如何被转化为指导性案例，并探讨指导性案例在后续案件中的适用情形；
- 指导性案例*分析*™涵盖迄今为止所发布的指导性案例之重要信息，且运用定量分析方法辨识指导性案例的发展趋势及值得进一步研究的问题；
- 指导性案例*调查*™是CGCP采用经验数据以反映指导性案例的认可度及适用性的出版物。此类数据来源于对中国的法律工作者进行问卷调查而获取的第一手信息资料，以及对参照指导性案例之后续案件所进行的数据分析；
- 指导性案例*研讨会*™旨在以文字摘要的方式为CGCP的全球观众提供学者、律师、政策决策人及有关专家针对指导性案例的相关课题所进行的探讨。

- 一带一路*案例*™ 是CGCP提供与一带一路倡议所相关的中国法院案例原文及优质英文翻译之系列刊物；
- 一带一路*案文*™ 是包含中国与一带一路沿线国家之间的法律合作协议在内的一带一路倡议相关的所有原始法律框架性文件资料汇编；
- 一带一路*国家*™ 是专探讨中国当局认定与一带一路倡议有关的国家和/或通过其他方面表示对该倡议有兴趣或会参与其中的国家的系列刊物，其重点是探讨该倡议对这些国家的国内发展和其与中国的关系的影响。

CGCP *学堂*™是一个在线的、具有移动友好性的互动平台。CGCP通过这一平台发布关于指导性案例、中国一带一路倡议案例和其它相关话题的视频。这些视频内容丰富，面向全球传播中国法律知识，从而促进公众教育和参与。■

China Law Connect ("*CLC*") is a quarterly journal of the China Guiding Cases Project (the "CGCP") of Stanford Law School aimed at advancing the understanding of Chinese law and increasing judicial transparency and accountability in China. *CLC* primarily consists of:

1. **Editor's Note**. Each issue of *CLC* opens with a note from the *CLC* Editor-in-Chief to introduce the content of the issue and discuss related topics.

2. **Letters to the Editor**. *CLC* issues may feature select letters, or excerpts thereof, sent to *CLC* by its readers and responses from *CLC* Editors.

3. **Commentaries**. Each issue of *CLC* contains at least two of the following types of commentaries:

   - **Traditional commentaries**, which are usually longer and provide in-depth and/or extensive contributions to scholarship on China's Case Guidance System, the Belt & Road Initiative, and/or other matters related to Chinese law.

   - **China Cases *Insights***™, a series which aims at providing legal and business professionals with concise and practical information, as well as insightful analyses and indispensable takeaways, about cases in or related to China to help these professionals in their practice of law and business.

   - **Experts *Connect***™, a series dedicated to the views of Chinese and foreign experts on select legal issues presented for the benefit of legal practitioners, business professionals, and students around the world.

4. **CLC *Spotlight***™. Each issue of *CLC* contains at least two pieces which have a less formal but more focused approach, covering topics related to **China's Belt & Road Initiative** as well as **CGCP Interviews** with leading legal practitioners, prominent business professionals, and other luminaries.

5. **News, Events, and Sponsored Content**. Each issue of *CLC* includes the latest news and recent and forthcoming events related to the CGCP as well as its partners and sponsors.

《中国法律连接》（"《中法连》"）是斯坦福法学院中国指导性案例项目（"CGCP"）的季刊。该刊旨在促进对中国法律的理解，提高中国司法透明度和问责。《中法连》主要包括：

1. **编辑短笺。**每一期《中法连》都以主编的短笺作开端，介绍该期的内容并讨论相关主题。

2. **读者来信。**《中法连》会选登读者来信或其摘录，以及《中法连》编辑的回复。

3. **评论。** 每一期《中法连》包括至少两种以下类型的评论：

   - **传统评论。**这些文章通常篇幅较长、更深入地探讨中国案例指导制度、一带一路倡议和其他中国法律问题。

   - **中国案例*见解***™。该系列旨在为法律和商业专业人士提供关于中国案例的简明实用信息、有见地的分析和不可或缺的要点，从而帮助这些专业人士的法律和商业实践。

   - **专家*连接***™。该系列专供中外专家就某些法律问题发表观点，让世界各地的法律从业人员、商业专业人士和学生能从中受益。

4. **中法连*聚焦***™。每一期《中法连》刊登至少两篇形式较随意但内容更关注一些专题的文章。内容包括与**中国一带一路倡议**相关的专题和**CGCP专访**法律从业人员、商业专业人士和其他具影响力的专家。

5. **新闻、活动与赞助内容。**每期《中法连》发布**CGCP**及其合作伙伴、赞助方的最新消息和近期活动。

Want to have hard copies of *China Law Connect*?

The China Guiding Cases Project (the "CGCP") relies on the kind donations of readers to publish *China Law Connect*.

Visit **https://cgc.law.stanford.edu/home/support-us/donate** to make a contribution to ensure that the CGCP can continue to produce the original content and cutting edge scholarship illuminating the latest Chinese legal developments that impact you and others around the world.

DONATION OPTIONS
$150 for the THREE 2018 issues
$200 for the FOUR 2019 issues
$200 for the FOUR 2020 issues

Those who donate **$300 or more per year** will also be guaranteed seats at all CGCP events organized for that year.
This is a great opportunity to avoid our long wait lists!

Please complete the following form to let us know where to mail your hard copies of *China Law Connect*: https://stanford.io/2KrVfvl.

Events organized by the China Guiding Cases Project throughout the year are made possible by the kind support of our sponsors.

For a complete list of our current sponsors, visit **https://cgc.law.stanford.edu/home/support-us/sponsor**.

Interested in supporting future events of the China Guiding Cases Project?

Contact **Dr. Mei Gechlik**, Founder & Director of the China Guiding Cases Project, at **mgechlik@law.stanford.edu**, to discuss sponsorship opportunities.

想获得《中国法律连接》的纸本?

中国指导性案例项目（"CGCP"）有赖于读者的慷慨捐赠，才能出版《中国法律连接》。

访问**https://cgc.law.stanford.edu/home/support-us/donate** 作出捐款，让CGCP能够继续以原创内容和杰出学术知识阐明影响着您和全世界的中国法律发展。

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每年**捐赠额达到$300或以上的**捐赠者
将获得CGCP该年组织的所有活动的保留席位。
这是跳过等候名单的大好机会！

请填写此表格，以便我们把《中国法律连接》的纸本邮寄给您: https://stanford.io/2KrVfvl。

中国指导性案例项目能举办各项活动，全因我们赞助方的慷慨支持。

我们赞助方的完整清单载于：
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想支持中国指导性案例项目未来的活动吗?

请联系中国指导性案例项目创办人、
总监**熊美英博士**
mgechlik@law.stanford.edu商洽赞助事宜。

Submission Guidelines

China Law Connect ("*CLC*") is a quarterly journal of the China Guiding Cases Project (the "CGCP") of Stanford Law School aimed at advancing the understanding of Chinese law and increasing judicial transparency and accountability in China.

CLC welcomes submissions for publication in the following forms:

1. Traditional commentaries
2. China Cases *Insights*™
3. Experts *Connect*™

Submissions should satisfy the corresponding guidelines summarized here. For details, see http://cgc.law.stanford.edu/clc-submission-guidelines.

1. **Traditional commentaries**, which are usually longer and provide in-depth and/or extensive contributions to scholarship on China's Case Guidance System, the Belt & Road Initiative, and/or other matters related to Chinese law:
   - Typically 6,000–8,000 words, generally structured as called for by the substance (e.g., section headings, with one or two levels of subsection headings).
2. **China Cases *Insights*™**, a series which aims at providing legal and business professionals with concise and practical information, as well as insightful analyses and indispensable takeaways, about cases in or related to China to help these professionals in their practice of law and business:
   - Generally narrower than traditional commentaries in scope, dealing with only one or a handful of legal case(s)—usually only some issues therein—framed in a set structure comprised of "The Takeaway" (approx. 100 words), "The Rundown" (up to 500 words), "The Breakdown" (up to 2,500 words), and "The Conclusion" (up to 250 words).
3. **Experts *Connect*™**, a series dedicated to the views of Chinese and foreign experts on select legal issues presented for the benefit of legal practitioners, business professionals, and students around the world:
   - 2–4 submissions (max. 1,000 words each, contributed by experts from different jurisdictions) of observations, questions, etc. on 1–3 specific and timely issue(s), together with related synopses and short discussions prepared by the CGCP, published as a set serving as a written channel for exchanging succinct thoughts on these issues.
   - Submissions in response to a specific CGCP call for submissions as well as submissions initiated by any expert are welcome. In the latter situation, the CGCP will invite experts from other jurisdictions to enrich the content of each set.

CGCP Call for Experts *Connect*™ Submissions: Significance of the U.S. Supreme Court's decision in *Animal Science Products, Inc. et al. v. Hebei Welcome Pharmaceutical Co. Ltd. et al.* (the "*Vitamin C* case")

On June 14, 2018, the U.S. Supreme Court released its decision in *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, No. 16-1220 (U.S. Sup. Ct. June 14, 2018), https://www.supremecourt.gov/opinions/17pdf/16-1220_3e04.pdf. The main issue was the degree of deference that should be afforded to a foreign government's interpretation of its own laws. Is a U.S. court, as held by the Second Circuit, "bound to defer" to such an interpretation when it is offered by an appearing foreign government and is "reasonable under the circumstances presented"? Or, as argued by petitioners, should the court be permitted to engage in an independent review of the foreign law?

In a unanimous opinion vacating and remanding the Second Circuit's decision, the Supreme Court held that a federal court should accord "respectful consideration" to a foreign government's submission but, as reflected by Federal Rule of Civil Procedure 44.1, is not bound to accord conclusive effect to the foreign government's statements, and may instead consider any material or source relevant to the determination of the foreign law at issue.

While the case is one of price- and quantity-fixing, the Supreme Court's determination has the potential to impact a broad range of areas in cross-border practice. Given the potential significance, ***the CGCP welcomes submissions*** (not more than 1,000 words, in English or Chinese, plus, if necessary, approximately 250 words for well-formatted footnotes) from practitioners and other experts inside and outside the United States on the implications of the court's decision. Authors of accepted submissions will receive editorial support from the CGCP and edited versions approved by authors will be published in English and Chinese in our new series **Experts *Connect*™**. As part of our commentaries featured in *China Law Connect*, this series is dedicated to the views of Chinese and foreign experts on select legal issues presented for the benefit of legal practitioners, business professionals, and students around the world.

Interested contributors should direct queries and send completed submissions to Jennifer Ingram, Managing Editor of the CGCP, at jaingram@stanford.edu. ***Deadline: July 20, 2018.***

投稿指引

《中国法律连接》（“《中法连》”）是斯坦福法学院中国指导性案例项目（“CGCP”）的季刊。该刊旨在促进对中国法律的理解，提高中国司法透明度和问责。

《中法连》欢迎您投稿让我们以如下形式出版：

1. 传统评论
2. 中国案例*见解*™
3. 专家*连接*™

投稿需符合下列指引。详情请见 http://cgc.law.stanford.edu/zh-hans/clc-submission-guidelines。

1. 传统评论。这些文章通常篇幅较长、更深入地探讨中国案例指导制度、一带一路倡议和其他中国法律问题：

- 篇幅一般为6000–8000字，围绕文章内容进行结构布局（例如，标题下分一至两级副标题）。

2. 中国案例*见解*™。该系列旨在为法律和商业专业人士提供关于中国案例的简明实用信息、有见地的分析和不可或缺的要点，从而帮助这些专业人士的法律和商业实践：

- 内容范围一般比传统评论小，仅讨论一个或几个法律案例（通常只是针对案例里的某些问题），文章结构设定为“要点”（约100字）、“概要”（500字内）、“分析”（2500字内）和“结论”（250字内）。

3. 专家*连接*™。该系列专供中外专家就某些法律问题发表观点，让世界各地的法律从业人员、商业专业人士和学生能从中受益：

- 2–4篇稿件（每篇字数在1000字内，由不同司法管辖区的专家撰稿），针对1–3个具体的、适时的议题作出观察、提问等。稿件和CGCP准备的相关简介和简评一同出版，全套材料作为就这些议题交换简洁想法的书面渠道。
- 投稿内容可以回应CGCP的特定邀稿，也欢迎专家们自主撰文投稿。对于专家自主投稿的内容，CGCP会邀请其他司法管辖区的专家参与，丰富栏目内容。

中国指导性案例项目专家*连接*™诚挚邀稿：
美国联邦最高法院
《动物科学产品公司等诉河北维尔康制药有限公司等》（“维生素C案”）的判决之
重要意义

2018年6月14日，美国联邦最高法院就《动物科学产品公司等诉河北维尔康制药有限公司等》（*Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, No. 16-1220 (U.S. Sup. Ct. June 14, 2018), https://www.supremecourt.gov/opinions/17pdf/16-1220_3e04.pdf）作出判决。该案的主要问题是外国政府对自己法律的解释应该得到尊重的程度。美国法院是否，如美国联邦第二巡回上诉法院对此所作出的裁决一样，“在合理情况下”“必须尊重”外国政府出庭提供的法律解释？还是，如上诉人所言，美国法院应获准对外国法律进行独立的评估？

美国联邦最高法院的法官一致同意撤销第二巡回上诉法院的判决，并将该案发回重新审议。其意见书认定，联邦法院应对外国政府所提交的声明给予“表示尊重的考虑”，但根据《联邦民事诉讼法》第44.1条的规定，法院不一定要赋予外国政府的声明决定性效力，而相反法院可考虑与确定有争议的外国法律相关的任何材料或信息来源。

尽管该案为固定价格和数量的垄断案件，但美国联邦最高法院的裁决有可能影响到跨境实践的广泛领域。鉴于其潜在重要性，**CGCP诚邀**美国国内外法律执业人士与专家撰文（字数在1,000字以内，中、英文均可；如有必要，可以也提供格式良好、约250字数的脚注）对本案裁决的含义、影响进行讨论。CGCP将为获选稿件提供编辑协助，并经作者同意后，其最终定稿将以中、英文双语形式，发表在我们新推出的**专家*连接***™系列专栏。作为《中国法律连接》中评论的一部分，该系列专供中外专家就某些法律问题发表观点，让世界各地的法律从业人员、商业专业人士和学生能从中受益。

*有兴趣的投稿者，请把任何查询和完整的稿件发送至CGCP执行编辑英珍妮女士，jaingram@stanford.edu。**截止日期：2018年7月20日。***

On the Issue of the Application of the Supreme Court's Guiding Cases*

Judge GUO Feng
Deputy Director, Research Office of the Supreme People's Court

Distinguished guests, distinguished Dr. Mei Gechlik, ladies and gentlemen:

Good morning!

First of all, on behalf of the Research Office of the Supreme People's Court of China (the "Supreme Court"), I congratulate the China Guiding Case Project of Stanford Law School on the grand opening of the conference hosted in Beijing. I welcome advice and suggestions regarding China's Guiding Cases from professionals from the United States, Japan, and China, including professors, judges, and lawyers. I thank Dr. Mei Gechlik for inviting me to participate in the conference and for providing opportunities for mutual learning and sharing.

I work for the Supreme Court and my work mainly focuses on Guiding Cases. Ever since joining the Supreme Court in 2014, I have handled nearly all of the Guiding Cases before their submission to the Adjudication Committee [of the Supreme Court]. I will briefly introduce the application of the Supreme Court's Guiding Cases as well as some issues and my personal thoughts [on this subject].

The Supreme Court's Guiding Cases refer to rulings and judgments that have already come into legal effect, that have been confirmed and released by the Supreme Court according to prescribed procedures, and that have universal guiding effect.[1] Guiding Cases, constituting an innovative system developed from China's rule-of-law system, have enriched and developed the in-depth content of China's judicial system by their functions of remedying deficiencies in statutory law, unifying the judiciary, regulating adjudication, and promoting an impartial judiciary. Guiding Cases are of significant importance and value in guiding judges on handling adjudications in accordance with law, unifying judicial standards, and regulating discretionary power. In China, Guiding Cases, as seen from their nature, are a form of interpreting law [through which] judges interpret law rather than make law, and [a form of] summarizing legal rules and principles rather than creating legal rules and principles. Unlike binding precedents in Anglo-American legal systems, Guiding Cases are not sources of law. That said, under the premise of not affecting formulated laws as the major source of law, Guiding Cases have inherited certain precedential elements from traditional Chinese legal culture and, at the same time, have absorbed and borrowed some specific practices from the precedent systems of Western countries.

Ever since the release of the *Provisions of the Supreme People's Court Concerning Work on Case Guidance*[2] by the Supreme Court in November 2010 and the release of the first batch of Guiding Cases on December 20, 2011, 17 batches totaling 92 Guiding Cases have been released. Among these 92 Guiding Cases, there are 56 civil cases (including enforcement cases), accounting for 61% of all Guiding Cases; 15 criminal cases, accounting for 16% of all Guiding Cases; 17 administrative cases, accounting for 19% of all Guiding Cases; and 4 state compensation cases, accounting for 4% of all Guiding Cases. Among the civil cases, there are 20 intellectual property cases, accounting for 36% of all civil cases, and 8 foreign-related cases (including intellectual property cases), accounting for 14% of all civil cases.

> ***"Only in two sets of circumstances can judges not refer to Guiding Cases in rendering judgments and rulings."***

According to statistical analysis by the China Justice Big Data Institute,[3] from January 1, 2012, to July 12, 2017, a total number of 531 cases [adjudicated by] courts at all levels in China referred to and applied Guiding Cases, among which there are 489 civil cases, 35 administrative cases, and 7 criminal cases. The characteristics regarding the application [of Guiding Cases in these 531 cases] are:

1. In terms of regions where courts that applied [Guiding Cases] are located, Guangdong, Fujian, Shandong, Zhejiang, and other coastal provinces applied Guiding Cases more often, whereas the central and western regions applied them less often.

2. In terms of the causes of cases, civil Guiding Cases were more frequently applied, including traffic accident liability disputes (accounting for 27.68%), sale and purchase contract disputes (accounting for 18.08%), and commercial housing pre-sale contract disputes (accounting for 10.92%).

Judge GUO Feng is the Deputy Director of the Research Office of the Supreme People's Court of China. Serving in this position since 2014, he has been in charge of, among other responsibilities, the development of the Case Guidance System. Prior to this, Judge Guo was the dean of the law school of the Central University of Finance and Economics in Beijing for eight years. As a result of his leadership, the school has become a first-tier law school in China, with particular strengths in such fields as banking law, capital markets, and financial regulation.

Judge Guo founded the China Securities Law Institute ("CSLI"), for which he served as chairman for eight years. CSLI remains China's most prestigious legal institute in the field of capital markets. As one of a few pioneers to receive a PhD in law in the early 1990s, Judge Guo was appointed as a professor at the reputable law school of Renmin University of China.

3. In terms of the level of adjudication, most cases that applied Guiding Cases were second-instance [cases], with second-instance civil cases accounting for 54% of the total number of civil cases [applying Guiding Cases], second-instance administrative cases accounting for 46% of administrative cases [applying Guiding Cases], and second-instance criminal cases accounting for 57% of criminal cases [applying Guiding Cases].

4. Plaintiffs or appellants were the principal advocates for the application of Guiding Cases. Of the 232 first-instance cases that referred to and applied Guiding Cases, 120 cases were [cases in which] a plaintiff proposed the application [of Guiding Cases], accounting for just over 52% [of the cases]. The remaining 299 cases that referred to and applied Guiding Cases were second-instance cases, with appellants advocating for the application of Guiding Cases in 200 (i.e., 67%) of these cases.

5. The proportion of judges who took the initiative to apply Guiding Cases was not high. Of all the 531 [cases included] in the statistics, the number of [cases in which] a judge took the initiative to apply a Guiding Case is [only] 126, 24% [of the total]. Nevertheless, more than half of the cases in which plaintiffs or defendants advocated for the application of Guiding Cases obtained the support of judges.

According to the *Provisions of the Supreme People's Court Concerning Work on Case Guidance*, courts at all levels should refer to the Guiding Cases released by the Supreme Court when adjudicating similar cases.[4] The term "refer to" includes two points. First, it is a requirement of the adjudication process. Where a case is similar to a Guiding Case, it requires the judge to follow, as closely as possible, the train of thought [used] in the adjudication of the Guiding Case and to reflect, as far as possible, consistency with the Guiding Case in the determination of the facts of the [similar] case and in the application of the adjudication bases, especially in the selection, understanding, and application of legal norms. Second, it is a requirement of the adjudication results, i.e., there should be no obvious difference between the judgment of the similar case and the judgment of the Guiding Case.

Judge GUO Feng

The layout of Guiding Cases consists of seven sections: the "Title", "Keywords", "Main Points of the Adjudication", "Related Legal Rule(s)", "Basic Facts of the Case", "Results of the Adjudication", and "Reasons for the Adjudication". Of these, the "Main Points of the Adjudication" [section] is the summary of the main points of the Guiding Case. [The main points of a Guiding Case] are the innovative determination of issues regarding applicable legal rules, adjudication methods, judicial concepts, etc. as well as their solutions, both of which are made by judges in interpreting and applying law during the process of adjudicating a specific case. The ["Main Points of the Adjudication"] section is the core and essence of a Guiding Case and judges must refer to and apply [the section].[5] When adjudicating a similar case, judges should convert their correct understanding of the "Main Points of the Adjudication" of a Guiding Case into judicial determination of issues of legality and reasonableness in the [pending] case.

Judge GUO Feng speaks at the 2018 Beijing conference organized by the China Guiding Cases Project

Considering that Guiding Cases are not sources of law, they should not be cited as legal bases in the holding section of adjudication documents, but they can serve as important reasons that influence judges during adjudication and be quoted in the reasoning part of the adjudication documents.[6] Establishing this kind of a requirement not only can lead judges to refer to Guiding Cases more often in handling cases, enhancing the persuasiveness of judgments and rulings, and fully using the guiding effect of Guiding Cases, but also is conducive to the objective presentation in adjudication documents of the judges' train of thought during adjudication, increasing the transparency and credibility of adjudication.

The main reasons for the requirement that judges should refer to Guiding Cases when adjudicating similar cases are: first, the Case Guidance System would exist in name only if Guiding Cases were not granted a certain effect. Because Guiding Cases are granted *de facto* binding effect, if a judgment or ruling that differs [with a Guiding Case] is rendered in a similar case, the judgment or ruling is subject to the risk of being amended when the upper-level court adjudicates the appeal of the case. The reason for the amendment is ostensibly that the original judgment or ruling deviates from a Guiding Case, but is in fact that it violates the law on which the Guiding Case is based. Second, [the selection of] Guiding Cases is confirmed after the Adjudication Committee of the Supreme Court discusses [them]; this reflects Supreme Court judges' understanding of law and judicial opinions. Applying the adjudication rules established by Guiding Cases when adjudicating cases similar to Guiding Cases is also [a type of] respect that judges in lower-level courts should have for the judicial opinions of the Supreme Court.

Only in two sets of circumstances can judges not refer to Guiding Cases in rendering judgments and rulings. The first is where the [pending] case is indeed not similar to [any] Guiding Case. The second is where, even though the [pending] case is similar to a Guiding Case, judges have sufficient reasons to explain why [they] should not refer [to the Guiding Case]. [In a situation] where judges should refer to a Guiding Case but do not do so, [the judges] must have persuasive reasons for this. [In a situation] where [the judges] neither refer to [a Guiding Case] nor explain the reasons for [not referring to the Guiding Case], resulting in a judgment being entirely different from the Guiding Case and the loss of judicial impartiality, the judgment is possibly one that is not impartial and the [relevant] party has the right to appeal or petition [for retrial]. Courts, in adjudicating the second instance or the retrial of the case, should correct [the situation] in accordance with law.

When applying Guiding Cases, it is necessary to borrow, from Anglo-American case law, techniques for distinguishing [cases]. As we know, the techniques to distinguish previous precedents consist of three parts: (1) identifying the focal points of dispute in the litigation, (2) analyzing the reasons for the adjudication, and (3) making a choice about the results of the adjudication. In China, the core of the techniques to distinguish [cases] is a determination of whether the Main Points of the Adjudication of a Guiding Case are applicable to the pending case; that is, a determination of whether [the pending case] is a similar case so as to decide [whether the Guiding Case should be applied]. The Supreme Court requires that courts at all levels, in adjudicating a case in which the basic facts and application of law are similar to those in Guiding Cases released by the Supreme Court, should refer to the relevant Guiding Cases.[7] Of course, we understand that there are no universally applicable standards for the method of applying Guiding Cases. [The method] involves various elements, including logic, rules, policy, the evaluation of interests, value judgments, formulated laws, and customary law. Generally speaking, when utilizing techniques to distinguish [a case], judges should have a comprehensive understanding of the adjudication methods, adjudication rules, legal thinking, judicial concepts, and the spirit of the rule of law used in the Guiding Case.

There are two main opinions regarding the scope of what [in an applicable Guiding Case] should be referred to: one opinion is that the Guiding Case in its entirety should be referred to and applied. The other opinion is that only the Reasons for the Adjudication and the Main Points of the Adjudication should be referred to. Looking at precedents in Anglo-American legal systems and civil law systems, the parts of an adjudication document [showing] the process of judges' reasoning and drawing conclusions as well as their rendering of the judgment or ruling are generally content of the precedent to which special attention needs to be given. However, Guiding Cases are different from these precedents in that the Main Points of the Adjudication are specifically extracted and these main points are actually "retail" [products] of judicial interpretations.[8] Therefore,

the view of the majority tends to confine the scope of what should be referred to to the Main Points of the Adjudication; and while the entirety of a Guiding Case can serve as a reference for similar cases, it is not within the scope of what should be referred to.

In second-instance and adjudication supervision procedures, the function of Guiding Cases in unifying judicial standards should be emphasized and used. Like the Supreme Court in any other country, the judgments, rulings, and decisions made by the Supreme Court of China should certainly have binding effect on adjudication in lower-level courts. Since the Guiding Cases are decided on and released after being discussed by the Adjudication Committee of the Supreme Court, they have binding effect on adjudication in lower-level courts of similar cases. If adjudications of similar cases conflict with Guiding Cases, they are essentially conflicting with the provisions of laws, regulations, or judicial interpretations on which Guiding Cases are based; therefore, they should be handled correspondingly in accordance with law. For example, they [should be] amended or remanded for retrial.

Due to China's vast territory, unbalanced regional economic development, and differences in judicial environments and competence, the work of the courts at all levels in China in recommending candidate Guiding Cases and in referring to and applying Guiding Cases does not develop in a balanced manner. In general, there are currently three types of inconsistencies in the development of Guiding Cases. First, the number of Guiding Cases that have been released is inconsistent with the dramatic increase in [the number of] cases in courts nationwide and the growing judicial demands of the people. Second, the traditional way in which Guiding Cases are primarily recommended hierarchically by the courts and in which they are selected and edited manually and offline are inconsistent with the development and proliferation of information and big data technology. Third, the reference to and application of Guiding Cases are inconsistent with [the need for] using their valuable functions of resolving [the problem of] adjudicating similar cases differently and unifying judicial adjudication standards.

Guiding Cases are the products of the combination of law and practice and are the crystallization of judicial experience and wisdom. Therefore, [people engaged in] legal research and legal education cannot lack understanding of Guiding Cases. The spirit of the law, the concept of the rule of law, judicial logic, and the value orientation contained in Guiding Cases often become important sources of innovation and theoretical development in legal research and are good material for legal education and research. In addition, the academic community's interpretation of legal theories in [Guiding] Cases and even criticism of these cases can provide new thinking and perspectives for legislation and judicial interpretations. We hope to join hands with experts and friends present today to promote the development and progress of China's Guiding Cases System!

Thank you all! ■

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* The citation of this Commentary is: Judge GUO Feng, *On the Issue of the Application of the Supreme Court's Guiding Cases*, 1 China Law Connect 19 (June 2018), *also available at* Stanford Law School China Guiding Cases Project, June 2018, https://cgc.law.stanford.edu/commentaries/clc-1-201806-23-guo-feng. The original, Chinese version of this Commentary was edited by LI Xuejiao and Dr. Mei Gechlik. The English version was prepared by Yi Chen, Liam Lambert, LI Xuejiao, Siyi Lin, and Lin Zhu, and was finalized by Sean Webb, Dimitri Phillips, and Dr. Mei Gechlik. The information and views set out in this Commentary are the responsibility of the author and do not necessarily reflect the work or views of the China Guiding Cases Project.
This is an adapted version of Judge GUO Feng's speech delivered at the conference titled "China's Case Guidance System and Belt & Road Initiative: Practical Insights and Prospects" held in the Stanford Center at Peking University on March 30, 2018. All of the footnotes were added by the editors.

[1] 《最高人民法院关于案例指导工作的规定》(*Provisions of the Supreme People's Court Concerning Work on Case Guidance*), passed by the Adjudication Committee of the Supreme People's Court on Nov. 15, 2010, issued on and effective as of Nov. 26, 2010, Stanford Law School China Guiding Cases Project, English Guiding Cases Rules, June 12, 2015 Edition, https://cgc.law.stanford.edu/guiding-cases-rules/20101126-english. Article 2 provides: "The Guiding Cases referred to in this [set of] Provisions [must be] rulings and judgments that have already come into legal effect and meet" one of the five requirements stated in the provision. Article 1 explicitly points out, "Guiding Cases, which have guiding effect on adjudication and enforcement work in courts throughout the country, shall be determined and uniformly released by the Supreme People's Court."

[2] *Id.*

[3] For an introduction of the China Justice Big Data Institute, see its website at http://data.court.gov.cn.

[4] 《最高人民法院关于案例指导工作的规定》(*Provisions of the Supreme People's Court Concerning Work on Case Guidance*), *supra* note 1, Article 7. The provision states: "People's courts at all levels should refer to the Guiding Cases released by the Supreme People's Court when adjudicating similar cases."

[5] 《〈最高人民法院关于案例指导工作的规定〉实施细则》(*Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"*), passed by the Adjudication Committee of the Supreme People's Court on Apr. 27, 2015, issued on and effective as of May 13, 2015, Stanford Law School China Guiding Cases Project, English Guiding Cases Rules, June 12, 2015 Edition, https://cgc.law.stanford.edu/guiding-cases-rules/20150513-english. Article 9 provides: "Where a case being adjudicated is, in terms of the basic facts and application of law, similar to a Guiding Case released by the Supreme People's Court, the [deciding] people's court at any level should refer to the "Main Points of the Adjudication" of that relevant Guiding Case to render its ruling or judgment."

[6] *Id.* Article 10. This provision states: "Where a people's court at any level refers to a Guiding Case when adjudicating a similar case, [it] should quote the Guiding Case as a reason for its adjudication, but not cite [the Guiding Case] as the basis of its adjudication."

[7] *Id.* Article 9.

[8] The original text reads "实际上是司法解释的 "零售" " ("are actually "retail" [products] of judicial interpretations"), which, in effect, contrasts the piecemeal approach used in cases vs. the holistic approach used in judicial interpretations.

关于最高法院指导性案例的适用问题*

郭锋法官
最高人民法院研究室副主任

尊敬的各位来宾、尊敬的熊美英博士、女士们、先生们：

上午好！

首先，我代表中国最高人民法院（“最高法院”）研究室祝贺由斯坦福大学法学院中国指导性案例项目在北京举办的这次会议隆重开幕，欢迎来自美、日、中等国的教授、法官、律师及其他专业人士对中国指导性案例建言献策，感谢熊美英博士邀请我参加会议，提供互相学习和分享的机会。

我在最高法院主要做指导性案例的工作，自从2014年加入最高法院以来，几乎所有的指导性案例都是经过我的手，往审判委员会提交。在此，我向大家介绍一下最高法院指导性案例适用方面的情况、问题和一些个人思考。

最高法院指导性案例是指裁判已经发生法律效力，经最高法院按照规定程序确认并发布的具有普遍指导作用的案例。[1] 指导性案例作为中国法治体系中内生的创新性制度，以其对成文法不足的弥补和统一司法、规范裁判、促进公正司法的功能，进一步丰富和发展了中国司法制度的内涵。对指导法官依法审判，统一司法尺度，规范自由裁量权具有重要意义和价值。在中国，指导性案例从其性质上看是解释法律的一种形式，是法官释法而不是法官造法，是总结法律经验法则而不是创制法律经验法则。指导性案例与英美法上的判例不同，不属于法律渊源。当然，在不影响制定法作为主要法律渊源的前提下，指导性案例继承了中国传统法律文化中的某些判例因素，同时吸收和借鉴西方国家判例制度的一些具体做法。

自2010年11月最高法院发布《最高人民法院关于案例指导工作的规定》、[2] 2011年12月20日发布第一批指导性案例以来，迄今共发布了17批92个指导性案例。其中，民事案例（含执行）共56件，占61%；刑事案例15件，占16%；行政案例17件，占19%；国赔案例4件，占4%。民事案例中知识产权案例20件，占民事案例的36%，涉外案例8件（含知产案例），占民事案例的14%。

根据中国司法大数据研究院的统计分析，[3] 自2012年1月1日至2017年7月12日，中国各级法院共有531件案件参照适用了指导性案例。其中，民事案件489件，行政案件35件，刑事案件7件。其适用特点是：

1. 从适用法院地域来看，广东、福建、山东、浙江等沿海省份适用指导性案例次数较多，中西部地区相对偏少。

2. 从案由来看，适用频次较高的均为民事指导性案例，其中交通事故责任纠纷（占比为27.68%）、买卖合同纠纷（占比为18.08%）、商品房预售合同纠纷（占比为10.92%）等适用频次较高。

3. 从审级来看，二审适用指导性案例数量最多，民事二审案件占民事案件总数的54%，行政二审案件占行政案件数的46%，刑事二审案件占刑事案件数的57%。

4. 原告或上诉人是主张适用指导性案例的主体。在一审的232个参照适用了指导性案例的案件中，有120个案件是由原告提出适用，其比例达52%。其余299个参照适用了指导性案例的案件都是二审案件，上诉人主张适用指导性案例的案件有200个，其比例为67%。

5. 法官主动适用指导性案例比重不高。在所有的531件统计中，法官主动适用的数量为126件，占比为24%。但原被告主张适用指导性案例过半得到法官支持。

> ***“只有两种情况下，法官可以不参照指导性案例作出裁判[…]。”***

根据《最高人民法院关于案例指导工作的规定》，最高法院发布的指导性案例，各级法院审判类似案例时应当参照。[4] 所谓“参照”，包括两点：一是对审理过程的要求，要求法官在遇有与指导性案例相类似的案件时，尽可能地遵循指导性案例的审理思路，在对案件事实认定、裁判依据适用，尤其是对法律规范的选择、理解及适用上，尽可能体现出与指导性案例的一致性；二是对裁判结果的要求，即对于类似案件的判决与指导性案例的判决之间不应存在明显的差别。

指导性案例的体例包括标题、关键词、裁判要点、相关法条、基本案情、裁判结果、裁判理由七个部

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郭法官创立了中国证券法学研究会，自创立迄今被连续选任担当会长。直到现在，中国证券法学研究会依然是中国在资本市场研究领域中最负盛名的法律研究协会。作为九十年代初为数不多获得法学博士学位的先进，郭法官曾长期担任著名的中国人民大学法学院的教职。

分。其中，裁判要点是指导案例要点的概要表述，是法官在裁判具体案件过程中，通过解释和适用法律，对法律适用规则、裁判方法、司法理念等方面问题，作出的创新性判断及其解决方案。它是指导案例的核心和精华部分，要求法官必须参照适用。[5] 法官在审理类似案件时，应将对指导性案例裁判要点的正确理解转化为针对案件中合法性与合理性问题的司法判断。

鉴于指导性案例不属于法律渊源，因此，其不应当作为裁判文书判决部分的法律依据来援引，但可以作为影响法官作出裁判时的重要理由在裁判文书说理部分予以引述。[6] 作出这样要求，既能引导法官更多地参照指导性案例办理案件，增强裁判的说服力，充分发挥指导性案例的指导作用，又有利于在裁判文书中客观呈现法官作裁判时的思路，增强裁判的透明度和公信力。

要求法官在审判类似案件时应当参照指导性案例的主要理由是：其一，如果不赋予指导性案例以一定的效力，案例指导制度就形同虚设。赋予指导性案例以事实拘束力，类似案件如果作出了不同的裁判，上级法院在审理该案件的上诉时，原判将面临改判风险。表面上是因为原审判决背离了指导性案例，但其实质是违反了指导性案例所依据的法律。其二，指导性案例是经过最高法院审判委员会讨论后确认的，体现的是最高法院大法官对法律的理解和司法意见。审理与指导性案例相类似的案件时，适用指导性案例所确立的裁判规则，也是下级法院法官对最高法院的司法意见所应有的尊重。

只有两种情况下，法官可以不参照指导性案例作出裁判：一是案件和指导性案例确实不相类似；二是案件尽管与指导性案例相类似，但法官有充分理由说明不应当参照。应当参照而未参照的，必须有令人信服的理由；否则，既不参照又不说明理由，导致裁判与指导性案例大相径庭，显失司法公正的，就可能是一个不公正的判决，当事人有权利提出上诉、申诉。法院在审理二审、再审案件时，应当依法予以纠正。

在适用指导性案例时，有必要借鉴英美判例法中的区别技术。我们知道，先例式参照的区别技术由三个环节构成：一是诉讼争点的识别，二是裁判理由的解析，三是裁判结果的取舍。在我国，区别技术的核心是确定指导性案例中的裁判要点对当前案件

郭锋法官

是否适用，判断是否为类似案件以决定取舍。最高法院要求，各级法院正在审理的案件，在基本案情和法律适用方面，与最高法院发布的指导性案例相类似时，应当参照相关指导性案例。[7] 当然，我们理解，适用指导性案例的方法并不存在一个放之四海皆适用的标准，它涉及逻辑、规则、政策、利益衡量、价值判断、制定法、习惯法等因素。一般地说，法官在运用区别技术时，应当综合理解、把握指导性案例所运用的裁判方法、裁判规则、法律思维、司法理念和法治精神。

对应当参照的范围，主要有两种意见：一种意见认为，整个指导性案例都应当参照适用。另一种意见认为，只有裁判理由和裁判要点应当参照。从英美法系、大陆法系判例情况看，在裁判文书中，法官

郭锋法官在中国指导性案例项目组织的2018年北京会议上发表讲话

提出理由和推导出结论的过程、作出裁判的部分，一般也是该判例需要“特别予以重视”的内容。但指导性案例与之区别在于有专门提炼出的裁判要点，指导性案例所提炼的裁判要点实际上是司法解释的“零售”。因此，多数观点倾向于应当参照范围限定在裁判要点上，而整个案例都可以作为类似案件的参考，但不属于应当参照的范围。

在二审和审判监督程序中，应当重视发挥指导性案例统一司法标准的作用。同其他任何一个国家的最高法院一样，我国最高法院作出的裁判和决定，对下级法院审判应当具有当然的拘束力。指导性案例是经最高法院审判委员会讨论决定发布的案例，其对下级法院类似案件裁判具有拘束力。类似案件裁判与指导性案例相冲突的，其实质是与指导性案例所依据的法律、法规或者司法解释规定冲突的，因此应当依法作出相应处理，比如，改判、发回重审。

由于我国幅员辽阔，各地经济发展不平衡，司法环境、司法水平有差异，全国各级法院在候选案例的推荐、对指导性案例参照适用等方面工作发展不平衡。总体上看，目前指导性案例发展存在三个不相适应：一是指导性案例发布数量与全国法院案件大幅攀升、人民群众不断增长的司法需求不相适应；二是指导性案例主要依靠法院按层级推荐、人工线下编选的传统方式与信息化、大数据技术的发展普及不相适应；三是指导性案例的参照适用与解决类案不类判、统一司法裁判标准的价值功能发挥不相适应。

指导性案例是法律与实践结合的产物，是司法经验和智慧的结晶，因此，法学研究、法学教育不能不了解指导性案例。指导性案例本身所蕴含的法律精神、法治理念、司法逻辑、价值导向，往往成为法学研究创新和理论发展的重要源泉，是法学教育和研究的良好素材。另一方面，学术界对于案例的法理诠释甚至批评，又能够为立法和司法解释提供新的思路和视角。我们希望与在座的各位专家、朋友一起，共同推进中国指导性案例制度的发展进步！

谢谢大家！■

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* 此评论的引用是：郭锋法官，关于最高法院指导性案例的适用问题，《中国法律连接》，第1期，第23页（2018年6月），*亦见于*斯坦福法学院中国指导性案例项目，2018年6月，https://cgc.law.stanford.edu/zh-hans/commentaries/clc-1-201806-23-guo-feng。此评论的中文原文由李雪皎编辑，并由熊美英博士最后审阅。载于本评论中的信息和意见作者对其负责。它们并不一定代表中国指导性案例项目的工作或意见。
本文改编自郭锋法官在2018年3月30日于北京大学斯坦福中心举办的题为《中国案例指导制度和“一带一路”倡议：实务见解与前景》会议上所发表的演讲，并由编辑增添注释。

[1] 《最高人民法院关于案例指导工作的规定》，2010年11月15日由最高人民法院审判委员会通过，2010年11月26日公布，同日起施行，斯坦福法学院中国指导性案例项目，中文指导性案例规则，2010年11月26日（最终版本），https://cgc.law.stanford.edu/zh-hans/guiding-cases-rules/20101126-chinese。根据第二条的规定，“指导性案例，是指裁判已经发生法律效力，并符合”该规定所列的5项条件之一的案例。第一条明确指出，“对全国法院审判、执行工作具有指导作用的指导性案例，由最高人民法院确定并统一发布。”

[2] *同上*。

[3] 关于中国司法大数据研究院的介绍，见该院的网站：http://data.court.gov.cn。

[4] 《最高人民法院关于案例指导工作的规定》，注释1，第七条。该条规定，“最高人民法院发布的指导性案例，各级人民法院审判类似案例时应当参照。”

[5] 《〈最高人民法院关于案例指导工作的规定〉实施细则》，2015年4月27日由最高人民法院审判委员会通过，2015年5月13日公布，同日起施行，斯坦福法学院中国指导性案例项目，中文指导性案例规则，2015年6月12日（最终版本），https://cgc.law.stanford.edu/zh-hans/guiding-cases-rules/20150513-chinese。第九条规定：“各级人民法院正在审理的案件，在基本案情和法律适用方面，与最高人民法院发布的指导性案例相类似的，应当参照相关指导性案例的裁判要点作出裁判。”

[6] *同上*，第十条。该条规定：“各级人民法院审理类似案件参照指导性案例的，应当将指导性案例作为裁判理由引述，但不作为裁判依据引用。”

[7] *同上*，第九条。

Belt & Road Typical Case 13: Towards a Liberal Interpretation of the Reciprocity Principle for Recognition and Enforcement of Foreign Judgments*

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The Takeaway

In Belt & Road Typical Case 13,[1] the Supreme People's Court (the "SPC") endorsed the liberal approach that the Intermediate People's Court of Nanjing Municipality, Jiangsu Province, adopted to determine the existence of a relationship of reciprocity to recognize and enforce a commercial judgment of a Singaporean court. The Typical Case demonstrates the SPC's keen interest in fueling the development of the Belt & Road Initiative by offering cross-border judicial assistance, especially for commercial transactions. The case indicates specific factors and strategies which practitioners should consider in evaluating their chances of success applying for the recognition and enforcement of foreign commercial judgments.

The Rundown

In 2014, Kolmar Group AG ("Kolmar Group"), a Swiss company, entered into a settlement agreement with Jiangsu Textile Industry (Group) Import & Export Co., Ltd. ("Sutex"), whose principal office was located in Jiangsu Province, China, concerning a dispute over a sales contract. Later, claiming Sutex was in default of its obligation to pay USD 350,000 under the settlement agreement, Kolmar Group sued Sutex in the High Court of Singapore, in accordance with the jurisdiction clause in the settlement agreement. Sutex was summoned in accordance with law but did not appear in court. On October 22, 2015, the High Court of Singapore rendered a judgment ordering Sutex to pay Kolmar Group USD 350,000 plus interest as well as fees. As Sutex did not respond to the judgment, Kolmar Group applied to the Intermediate People's Court of Nanjing Municipality, Jiangsu Province (the "Nanjing IPC"), requesting that the court recognize and enforce the Singaporean judgment against Sutex.

For more information about Belt & Road Typical Case 13, visit the CGCP *Classroom*™, at https://cgc.law.stanford.edu/cgcp-classroom-lesson-3.

Article 282 of the *Civil Procedure Law of the People's Republic of China*[2] provides the requirements for a court in mainland China (a "people's court") to recognize and enforce a foreign judgment: a court should assess an application "in accordance with the international treaties concluded or acceded to by the People's Republic of China or based on the principle of reciprocity". The court can recognize and enforce the foreign judgment if it does not violate the basic principles of law, the state sovereignty and security, or the public interests of the People's Republic of China (the "PRC"). Article 544 of the *Interpretation of the Supreme People's Court Concerning the Application of the "Civil Procedure Law of the People's Republic of China"*[3] further affirms that the court shall rule to reject the application for the recognition and enforcement of a foreign judgment in the absence of an effective treaty or reciprocal relationship between the PRC and the foreign country. Treaties and reciprocity, therefore, are considered to be the two, exhaustive bases for a successful recognition and enforcement application.

In *Kolmar Group AG and Jiangsu Textile Industry (Group) Import & Export Co., Ltd., The Special-Procedure Civil Ruling on an Application for the Recognition and Enforcement of a Civil Judgment and Ruling of a Foreign Court* ("*Kolmar*"),[4] which is the ruling that was re-released as Belt & Road ("B&R") Typical Case 13 ("TC13"), Sutex used Article 282 to challenge Kolmar Group's application for recognition and enforcement of the Singaporean judgment. (The *Kolmar* ruling, like most rulings and judgments of this type, does not specify the legal grounds for the application; it records the legal grounds upon which the respondent challenged the application, followed by the court's findings, reasoning, and decision.) Sutex argued that although the PRC concluded a bilateral treaty with Singapore regarding judicial assistance matters in 1997,[5] the treaty did not extend to the recognition and enforcement of judgments, and therefore, the Nanjing IPC should reject Kolmar Group's application.

The Nanjing IPC addressed the central issue in three steps. First, it considered whether the application could be granted on the basis of any treaty. The court agreed with Sutex that the cited bilateral judicial assistance treaty did not apply. It concluded that the PRC and Singapore have neither concluded between themselves nor jointly acceded

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to any international treaty on mutual recognition and enforcement of effective judgments or rulings. Second, given the absence of applicable treaties, it considered whether the Singaporean judgment could be recognized based on the principle of reciprocity. The court found that, in 2014, the High Court of Singapore enforced a civil judgment rendered by the Intermediate People's Court of Suzhou Municipality, Jiangsu Province.[6] Because of this case of a Singaporean judgment enforcing a people's court civil judgment (a "cross-border enforcement precedent"), the Nanjing IPC concluded there was a reciprocal relationship between the PRC and Singapore. Third, the court considered whether granting the application on the judgment sought to be recognized and enforced would violate the basic principles of law, the sovereignty and security, or the public interests of the PRC. It answered the third inquiry in the negative and decided to recognize and enforce the judgment against the Chinese company.

The Breakdown

TC13 noted that this was the first time a Singaporean commercial judgment was recognized and enforced in mainland China. The case is significant in at least three specific respects. First, it represents a liberal approach in the determination of the existence of a relationship of reciprocity, an approach which significantly departs from the restrictive approach to which the PRC courts, including the Supreme People's Court (the "SPC"), had been inclined. Second, it connects with the SPC's zealous interest in taking measures to fuel the development of the Belt & Road Initiative. Third, it sheds light on specific factors and strategies which practitioners should consider in evaluating their chances of success in applying for the recognition and enforcement of foreign commercial judgments.

Before Kolmar*: The Restrictive Approach*

Before *Kolmar*, the principle of reciprocity was invoked only negatively by the courts, as a ground to refuse to recognize or enforce a foreign judgment, although legislation gave it as a ground *for* recognition and enforcement. The reason behind this lies in the restrictive approach adopted to ascertain the existence of a reciprocal relationship. If a judgment of a people's court had been refused recognition and enforcement in the relevant country, it certainly makes

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sense for a court to consider the refusal as strong evidence that no reciprocity relationship exists. However, even in the absence of any such refusal, people's courts never found a relationship of reciprocity.

A Case of an Application for the Recognition and Enforcement of a Japanese Court Judgment Made by Japanese Citizen Gomi Akira[7] ("*Gomi Akira*") is a representative case: Gomi Akira, a Japanese citizen, applied to the Intermediate People's Court of Dalian Municipality, Liaoning Province, to recognize and enforce a Japanese judgment involving a payment of debts. The court rejected the application, concluding that the PRC and Japan have neither concluded between themselves nor jointly acceded to any international treaty on mutual recognition and enforcement of effective judgments or rulings and that there was not a relevant reciprocal relationship between the two countries. However, the court made no mention of the recognition or enforcement of people's court judgments by Japanese courts. Notably, the High People's Court of Liaoning Province, perhaps upon the request of the Intermediate

People's Court, sought opinions from the SPC before the judgment was handed down,[8] so the approach in this case contained an element of the SPC's thinking at the time, and it is no surprise to see a similar approach used in other cases since *Gomi Akira*.[9] In practice, it was not possible to apply to a people's court for recognition and enforcement of commercial judgments from countries with which the PRC had no relevant treaty.

> ***"Kolmar marks a reboot, with a new approach adopted by the Nanjing IPC in favor of the affirmative use of reciprocity."***

A New Approach: The Kolmar *Case*

Kolmar marks a reboot, with a new approach adopted by the Nanjing IPC in favor of the affirmative use of reciprocity. The main message sent by *Kolmar* is that a people's court can find a relationship of reciprocity between the PRC and a foreign country upon proof that the foreign country previously enforced a people's court civil judgment, i.e., proof of a cross-border enforcement precedent. Certain subsequent cases illustrating *Kolmar*'s approach suggest there may also be a regional factor affecting courts' consideration of reciprocity.

In *Kolmar*, the Nanjing IPC did not specify any conditions for the cross-border enforcement precedent, except that it should be of a civil nature. For finding reciprocity, therefore, all that needs to be proved is that the relevant foreign country enforced a civil judgment of a people's court. Importantly, the foreign court's grounds for the enforcement are irrelevant, e.g., it is not necessary for the relevant country to have incorporated a reciprocity principle in its domestic law.[10] Thus, litigants may seek cross-border recognition and enforcement even of judgments rendered in countries whose civil procedure rules are substantially different from those of mainland China, e.g., common law jurisdictions. Furthermore, there is strong evidence that the relevant cross-border enforcement precedent[11] in *Kolmar* was not submitted by the applicant, but rather was found by the court.[12] This shows that the Nanjing IPC was acting very proactively to challenge the traditional approach. Moreover, if a people's court may exercise *ex officio* the power to find relevant cross-border enforcement precedents, applicants will have even more chances of success on their applications.

However, it appears that courts may consider a condition or at least a factor for finding a reciprocity relationship: whether the judgment enforced by the foreign court was rendered by a people's court residing in the same province as the court to which the recognition and enforcement application is brought. This regional factor was implicitly satisfied in *Kolmar*,[13] but the Nanjing IPC's ruling did not explicitly refer to such a condition. However, in two later cases, there are indications that the courts examined the existence of reciprocity at only the provincial level. One case is *Applicant LIU Li and Respondents TAO Li & TONG Wu, The Civil Judgment of a Case of an Application for the Recognition and Enforcement of a Civil Judgment of a Foreign Court*[14] (*"LIU Li"*, discussed in more detail below), where the Intermediate People's Court of Wuhan Municipality, Hubei Province, found a reciprocal relationship on the basis of a foreign judgment enforcing a people's court judgment rendered by a court in the same province.

Timeline

1. June 6, 2015: the release of the SPC Judicial Opinions on the Belt and Road Initiative.
2. June 7, 2016: the *Kolmar* case accepted by the Nanjing IPC.
3. Dec. 9, 2016: the *Kolmar* ruling was handed down.
4. May 15, 2017: the SPC re-released the *Kolmar* ruling as Typical Case 13.
5. May 18, 2017: the Nanjing IPC explained its new approach to the public.
6. June 30, 2017: the *LIU Li* case was decided, applying the new approach.

The other is *The Civil Ruling of [a Case of] an Application by S.L. Jonas Ltd. for the Recognition and Enforcement of a [Judgment] of Israel's Jerusalem Magistracy*[15] (*"S.L. Jonas"*), where the Intermediate People's Court of Fuzhou Municipality, Fujian Province, refused to recognize and enforce an Israeli judgment despite the fact that, in 2015, the Tel Aviv-Jaffa District Court of Israel enforced a civil judgment rendered by a people's court, but in a different province.[16] Since the *S.L. Jonas* ruling made no reference to this cross-border enforcement precedent, it is not clear whether the Fuzhou court was aware of it at the time.[17] Thus, the result, i.e., finding no reciprocity relationship, may reflect an oversight (by a party and/or the court) or it may indicate that the court implicitly considered the regional factor as a condition—and courts may be justified in doing so. People's courts probably find it too ambitious a task to determine whether the PRC, as a country, has established a relationship of reciprocity with another country. Therefore, it is more practical for a court to carry out an examination at the provincial level, unless the court concerned is the SPC. Given the early stage of the new approach to finding a reciprocal relationship, it is understandable that the nature and applicability of a regional factor remains unclear.

The SPC's Endorsement of the New Approach: Typical Case 13

The Nanjing IPC's ruling might have ultimately remained a legal outlier, with little effect on future recognition and enforcement of foreign judgments, had not the SPC endorsed the case by releasing it as a Typical Case, TC13, greatly increasing its impact. However, TC13 highlights the commercial nature of the enforced Singaporean judgment in *Kolmar*.[18] This reflects the SPC's current emphasis on providing judicial assistance for cross-border commercial transactions. Indeed, whether a country has an effective mechanism for recognition and enforcement of foreign judgments is crucial for conducting cross-border trade. TC13, by endorsing a liberal approach to construing reciprocity, sends a message to the international trade community that the judicial environment of mainland China is heading towards a high level of openness and inclusiveness, elevating the reputation of people's courts worldwide.

> ***"[...] if attempting to recognize and enforce a judgment from a B&R country, you have good chances of success even if a cross-border enforcement precedent cannot be identified as long as [...]."***

However, TC13 does not go into the details of the legal reasoning in *Kolmar*, prompting the question: does TC13 impose any conditions for the cross-border enforcement precedent or will any civil—or only any commercial—judgment from the relevant foreign country enforcing any people's court judgment suffice for finding a reciprocal relationship? Two cases, mentioned above, illustrate this problem and the approach that other people's courts may take in the absence of further guidance from the SPC.

LIU Li was handed down by the Intermediate People's Court of Wuhan Municipality, Hubei Province, on June 30, 2017, one month after TC13 was published. The court recognized and enforced, based on the principle of reciprocity, a U.S. commercial judgment rendered by the Superior Court of Los Angeles County, reportedly the first instance of a U.S. commercial judgment recognized in mainland China.[19] The judgment did not refer to *Kolmar* or TC13, but the cross-border enforcement precedent used to find reciprocity fit *Kolmar*'s framework. First, the court did not consider the basis of the U.S. judgment. In contrast to *Kolmar*, however, in *LIU Li*, it was the applicant, instead of the judges, who submitted the U.S. judgment as proof of a cross-border enforcement precedent. Second, the cross-border enforcement precedent concerned a judgment rendered by the High People's Court of Hubei Province, where the court that considered the recognition and enforcement application sits: the regional factor described above was thus satisfied.

However, *LIU Li* raises another question concerning the regional factor: how would it apply to a foreign country which has more than one jurisdictional region and/or level? The U.S. cross-border enforcement precedent on which reciprocity was found in *LIU Li* was a judgment of a California *federal* court, the U.S. judgment sought to be enforced was of a California *state* court, and the *LIU Li* judgment only stated that the application was granted on the ground of a reciprocity relationship existing between the PRC and the United States. It is not clear whether the *LIU Li* court considered a relationship of reciprocity between Hubei Province and California, Hubei Province and the United States, or the PRC and the United States. The uncertainty concerning the nature and application of the regional factor is accentuated by the other post-TC13 case mentioned above, *S.L. Jonas*, in which a court in Fujian Province rejected an application to recognize and enforce an Israeli judgment even though a court in Israel had enforced a judgment from a court in Jiangsu Province.

In short, while the SPC's re-release of the *Kolmar* ruling as TC13 reinforces the new, more liberal approach recognizing and enforcing foreign judgments on the basis of a reciprocal relationship, the brevity of TC13 itself leaves much to be desired. In particular, the SPC could expand on the conditions, if any, for the cross-border enforcement precedent as well as whether and how reciprocity findings made by different courts in China are to be harmonized.

Why the Endorsement? The Belt and Road Initiative

TC13 highlights the SPC's keen interest in advancing the Belt & Road Initiative (the "BRI"). One fact that may have influenced *Kolmar*'s selection as TC13 is that the foreign judgment was rendered in Singapore, a country participating in the BRI. As the PRC and Singapore have not concluded any binding treaty regarding the recognition and enforcement of foreign judgments,[20] an application such as Kolmar Group's would have been refused if the restrictive approach towards construing the relationship of reciprocity had been followed. The SPC's endorsement of *Kolmar*, in which a B&R country's judgment was recognized and enforced by a people's court, sets a good example for other B&R countries which do not have relevant treaties with China.[21] Furthermore, the SPC's preferred approach for construing the existence of reciprocity may already go a step further than the approach in *Kolmar*.

In *Kolmar*, the determination of reciprocity was based on the fact the foreign country had taken the first step to recognize and enforce a people's court judgment.

However, as early as 2015, the SPC issued the *Several Opinions of the Supreme People's Court Concerning Judicial Services and Safeguards Provided by the People's Courts for the "Belt and Road" Construction*[22] (the "*SPC Opinions*"), offering guidance on the roles courts have in the development of the BRI. Paragraph 6 of the *SPC Opinions* suggests that a people's court has the option of initiating the circle of reciprocity, being the one first to offer cross-border judicial assistance relating to B&R countries. It implies that even in the absence of any cross-border enforcement precedent from the relevant foreign country, the people's court to which a recognition and enforcement application is made can still consider granting the application if it relates to a B&R country.

Given the restrictive approach courts kept to before *Kolmar*, it may have been too progressive and "risky" for them to leap to the approach suggested in the *SPC Opinions*. *Kolmar*, in this regard, may help to encourage courts in recognizing and enforcing foreign judgments, ultimately perhaps to the point of implementing Paragraph 6 of the *SPC Opinions* to take the initiative in such recognition and enforcement. This would be in line with the aim, of the SPC as well as the PRC government more broadly, of supporting the BRI.

Practice Points

TC13 gives rise to several pointers for a practitioner seeking to apply for the recognition and enforcement of a foreign commercial judgment in a people's court when the PRC does not have a governing treaty with the country from which the judgment comes. First, finding a judgment (from the relevant country) which recognizes and enforces a people's court civil judgment will greatly, if not critically, support your application for recognition and enforcement—directing the court's attention to TC13. Your chances are increased even more if the foreign judgment enforced a judgment from the Chinese province in which you make your application. Second, if attempting to recognize and enforce a judgment from a B&R country, you have good chances of success even if a cross-border enforcement precedent cannot be identified as long as there is no case in which a judgment of a people's court has been refused recognition in the relevant country—directing the court's attention also to the *SPC Opinions*. Third, it is uncertain what a court would decide if judgments have been both refused and recognized in the relevant country; however, given the flexible approach suggested in the *SPC Opinions*, the applicant may still have a chance if the foreign judgment recognizing and enforcing the people's court judgment is the more recent one and the party can argue that it should represent the status quo of the reciprocity relationship between the countries.

The Conclusion

At the very least, TC13 provides explicit, authoritative support for a people's court to find a relationship of reciprocity between the PRC and a foreign country for the purpose of recognizing and enforcing a judgment from that country. More than that, however, the approach of the court in the underlying case, *Kolmar*, was applicant-friendly in several respects, compared with the previous practice of people's courts, and the endorsement of the SPC as well as subsequent developments have given new promise worth exploring. Representing itself as a facilitator under the BRI, the SPC is providing effective mechanisms enabling cross-border litigants to put their trust in China's judicial system, either by choosing to litigate in it or by having foreign judgments recognized and enforced by it. TC13 showcases an appealing promise for countries joining the BRI. ■

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[1] 《高尔集团股份有限公司申请承认和执行新加坡高等法院民事判决案》(*Kolmar Group AG, A Case of an Application for the Recognition and Enforcement of a Civil Judgment of the High Court of Singapore*), Stanford Law School China Guiding Cases Project, B&R *Cases*™, Typical Case 13 (TC13), Oct. 9, 2017 Edition, https://cgc.law.stanford.edu/belt-and-road/b-and-r-cases/typical-case-13.

[2] *See* 《中华人民共和国民事诉讼法》 (*Civil Procedure Law of the People's Republic of China*), passed on, issued on, and effective as of Apr. 9, 1991, amended three times, most recently on June 27, 2017, effective as of July 1, 2017, http://www.npc.gov.cn/npc/xinwen/2017-06/29/content_2024892.htm. The law was amended the second time in 2012 and this version of the law was applied in the case. The amendment in 2017 did not affect the numbering or substance of this article.

[3] 《最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释》 (*Interpretation of the Supreme People's Court Concerning the Application of the "Civil Procedure Law of the People's Republic of China"*), passed by the Adjudication Committee of the Supreme People's Court on Dec. 18, 2014, issued on Jan. 30, 2015, effective as of Feb. 4, 2015, http://www.chinacourt.org/law/detail/2015/01/id/148091.shtml. Pursuant to Article 544, the only exception is an application for recognizing a foreign divorce judgment, in which case it is not necessary for the applicant to base the application on either treaty or reciprocity.

[4] 《Kolmar Group AG 与江苏省纺织工业（集团）进出口有限公司申请承认和执行外国法院民事判决、裁定特别程序民事裁定书》 (*Kolmar Group AG and Jiangsu Textile Industry (Group) Import & Export Co., Ltd., The Special-Procedure Civil Ruling on an Application for the Recognition and Enforcement of a Civil Judgment and Ruling of a Foreign Court*) (2016)苏01协外认3号民事裁定 ((2016) Su 01 Xie Wai Ren No. 3 Civil Ruling), rendered by the Intermediate People's Court of Nanjing Municipality, Jiangsu Province, on Dec. 9, 2016, full text available on the Stanford Law School China Guiding Cases Project's website, at https://cgc.law.stanford.edu/judgments/jiangsu-2016-su-01-xie-wai-ren-3-civil-ruling.

[5]《中华人民共和国和新加坡共和国关于民事和商事司法协助的条约》(*Treaty on Judicial Assistance in Civil and Commercial Matters Between the Republic of Singapore and the People's Republic of China*), signed in Beijing on Apr. 28, 1997, effective as of June 27, 1999, http://www.npc.gov.cn/wxzl/gongbao/2001-01/03/content_5007108.htm (Chinese). The Singaporean version was first published in the Government Gazette, Electronic Edition, on December 28, 2001.

[6] *Giant Light Metal Technology (Kunshan) Co Ltd v. Aksa Far East Pte Ltd* [2014] SGHC 16, http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/15488-giant-light-metal-technology-kunshan-co-ltd-v-aksa-far-east-pte-ltd-2014-sghc-16.

[7]《日本国民五味晃申请中国法院承认和执行日本法院判决案》(*A Case of an Application for the Recognition and Enforcement of a Japanese Court Judgment Made by Japanese Citizen Gomi Akira*),《中华人民共和国最高人民法院公报》(*Gazette of the Supreme People's Court of the People's Republic of China*), No. 1 (1996), p. 29, http://gongbao.court.gov.cn/Details/0ec2b41197060a8c43bb7fac8d56ca.html.

[8] In its Reply, the SPC did not refer to any cross-border enforcement precedent in ruling there was no relationship of reciprocity between the PRC and Japan. *See*《最高人民法院关于我国人民法院应否承认和执行日本国法院具有债权债务内容裁判的复函》(*Reply of the Supreme People's Court on Whether People's Courts of Our Country Should Recognize and Enforce Japanese Courts' Judgments and Rulings with Contents About Claims and Debts*), issued on and effective as of June 26, 1995, http://www.people.com.cn/zixun/flfgk/item/dwjjf/falv/9/9-1-7-2.html.

[9] *See, e.g.*,《申请人董斌申请承认与执行外国法院民事判决纠纷一案一审裁定书》(*The First-Instance Ruling of a Case of an Application by Applicant DONG Bin for the Recognition and Enforcement of a Civil Judgment of a Foreign Court*) (2014)潭中民三初字第181号民事裁定 ((2014) Tan Zhong Min San Chu Zi No. 181 Civil Ruling), rendered by the Intermediate People's Court of Xiangtan Municipality, Hunan Province, on Apr. 22, 2015, http://wenshu.court.gov.cn/content/content?DocID=872f7193-83ce-4b77-9bd5-8bf9469b6f54;《申请人张晓曦申请承认外国法院民事判决一审民事裁定书》(*The First-Instance Civil Ruling of [a Case of] an Application by Applicant ZHANG Xiaoxi for the Recognition of a Civil Judgment of a Foreign Court*) (2015)沈中民四特字第2号民事裁定 ((2015) Shen Zhong Min Si Te Zi No. 2 Civil Ruling), rendered by the Intermediate People's Court of Shenyang Municipality, Liaoning Province, on Apr. 8, 2015, http://wenshu.court.gov.cn/content/content?DocID=e5e14a41-022f-4717-bb35-57c4eea65cdd.

[10] In the cross-border enforcement precedent referred to in *Kolmar*, the High Court of Singapore enforced a people's court judgment on the ground of common law conflict of law rules.

[11] *Giant Light Metal Technology (Kunshan) Co Ltd, supra* note 6.

[12] In the Nanjing IPC's ruling, the Singaporean judgment is mentioned only after the summary of the applicant's and respondent's arguments. It appears under the section where courts usually begin with approved findings which lead to the adjudication. Further evidence comes from a recently-released documentary, "The Power of Equity and Justice", co-produced by the SPC and China Central Television. In the episode "Can Court Judgments Have the Principle of Reciprocity?", *Kolmar*'s presiding judges were interviewed on its adjudication. One presiding judge, Justice JIANG Xin, said that she found the cross-border enforcement precedent from earlier case reports. *See* SPC & CCTV,《公平正义的力量》(*The Power of Equity and Justice*), CCTV (July 3-7, 2017), http://jingji.cctv.com/special/justice/index.shtml.

[13] In *Kolmar*, the cross-border enforcement precedent concerned a case of the Intermediate People's Court of Suzhou Municipality, Jiangsu Province, the province in which the Nanjing IPC sits.

[14]《申请人刘利与被申请人陶莉、童武申请承认和执行外国法院民事判决案》(*Applicant LIU Li and Respondents TAO Li & TONG Wu, The Civil Judgment of a Case of an Application for the Recognition and Enforcement of a Civil Judgment of a Foreign Court*) (2015)鄂武汉中民商外初字第00026号民事裁定 ((2015) E Wu Han Zhong Min Shang Wai Chu Zi No. 00026 Civil Ruling), rendered by the Intermediate People's Court of Wuhan Municipality, Hubei Province, on June 30, 2017, http://wenshu.court.gov.cn/content/content?DocID=498d1508-6e7a-4f61-9a54-a7b6012dafaa.

[15]《艾斯艾洛乔纳斯有限公司(S.L.JONAS LTD)申请承认以色列国耶路撒冷裁判法院民事裁定书》(*The Civil Ruling of [a Case of] an Application by S.L. Jonas Ltd. for the Recognition and Enforcement of a [Judgment] of Israel's Jerusalem Magistracy*) (2017)闽01协外认4号民事裁定 ((2017) Min 01 Xie Wai Ren No. 4 Civil Ruling), rendered by the Intermediate People's Court of Fuzhou Municipality, Fujian Province, on June 6, 2017, http://wenshu.court.gov.cn/content/content?DocID=3502f009-b0eb-4a8a-a46e-a82d00064087.

[16] *Jiangsu Overseas Group Co. Ltd. v. Isaac Reitmann,* Tel Aviv-Jaffa District Court, Civil File 48946-11-12.

[17] The Israeli case was, however, reported on major media channels and commented on by academics and practitioners. *See, e.g.,* 国浩律师事务所 (Grandall Law Firm),国浩视点:中国民商事判决在外国法院的承认与执行系列之一:以色列 (*Grandall Viewpoint: Series on the Recognition and Enforcement of Civil and Commercial Judgments of China in Foreign Courts: the State of Israel*), July 26, 2016, http://chuansong.me/n/462882145993; Michelle Tzhori, 具有里程碑意义的裁决:以色列法院首次执行中国判决 (*A Landmark Ruling: an Israeli Court for the First Time Enforced a People's Court's Judgment*), 以色列西博雷特律师事务所 (SHIBOLET & CO. LAW FIRM), Dec. 9, 2015, http://www.shibolet.com/5671-2.

[18] In explaining the typical significance of TC13, the SPC several times referred to the Singaporean judgment as a "commercial judgment", while the Nanjing IPC's ruling referred to it only as a "civil judgment". TC13, *supra* note 1, and *Kolmar*, *supra* note 4.

[19] *See, e.g.,* 人民法院新闻传媒总社 (People's Court News Media Head Office), 武汉中院在全国率先裁定承认和执行美国法院商事判决 (*Wuhan Intermediate Court Is the First to Recognize and Enforce a Commercial Judgment Rendered by an American Court*), Sept. 12, 2017, http://www.court.gov.cn/zixun-xiangqing-59352.html.

[20] In September 2017, China signed The Hague Convention on Choice of Court Agreements, to which Singapore is also a contracting country, so treaty-based recognition may become available for Singaporean judgments once the convention is ratified by the PRC National People's Congress.

[21] More than half of the estimated 71 countries participating in the BRI cannot use any treaty as the basis for the recognition and enforcement of commercial judgments in China.

[22]《最高人民法院关于人民法院为"一带一路"建设提供司法服务和保障的若干意见》(*Several Opinions of the Supreme People's Court Concerning Judicial Services and Safeguards Provided by the People's Courts for the "Belt and Road" Construction*), issued on and effective as of June 16, 2015, http://www.chinacourt.org/law/detail/2015/06/id/148302.shtml.

一带一路典型案例13：更加开明地解读互惠原则以承认和执行外国判决*

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要点

在一带一路典型案例13中，[1] 最高人民法院（“最高法”）认可江苏省南京市中级人民法院采用的开明方法来确定互惠关系的存在，以承认和执行新加坡法院商事判决。该典型案例表明最高法对通过提供跨境司法协助，尤其对于商事交易，来促进一带一路倡议发展的强烈兴趣。该案例指出了从业人员在评估其申请承认和执行外国商事判决成功机会时，应当考虑的具体因素和策略。

概要

2014年，瑞士公司高尔集团股份有限公司（“高尔集团”）与主要办公地点位于中国江苏省的江苏省纺织工业（集团）进出口有限公司（“省纺集团”）就双方买卖合同纠纷达成和解协议。后因省纺集团未履行其于和解协议中作出的赔偿高尔集团35万美元的承诺，高尔集团依据和解协议中的约定管辖条款向新加坡高等法院提起诉讼。经合法传唤，省纺集团未到庭。新加坡高等法院于2015年10月22日作出判决，判令省纺集团偿付高尔集团35万美元及利息、费用。省纺集团完全不理会判决。高尔集团向江苏省南京市中级人民法院（“南京中院”）申请，请求法院对该新加坡判决予以承认和执行。

《中华人民共和国民事诉讼法》[2]第二百八十二条规定中国大陆的法院（“人民法院”）承认和执行外国判决的要求：法院应当“依照中华人民共和国缔结或者参加的国际条约，或者按照互惠原则”审查申请。法院可以承认和执行外国判决如果其不违反中华人民共和国（“中国”）法律的基本原则或者国家主权、安全、社会公共利益。《最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释》第五百四十四条进一步确认，[3] 法院须裁定驳回对承认和执行外国判决的申请，如果该外国法院所在国与中国没有缔结或者共同参加国际条约，也没有互惠关系。因此，条约和互惠被认为是成功承认和执行外国判决的申请仅有的两个基础。

在《Kolmar Group AG与江苏省纺织工业（集团）进出口有限公司申请承认和执行外国法院民事判决、裁定特别程序民事裁定书》[4]（“《高尔案》”）——该裁定后来被再发布为一带一路典型案例13（“典型案例13”）——中，省纺集团用第二百八十二条来质疑高尔集团承认和执行该新加坡法院判决的申请。（像大多数这类型的裁定、判决一样，《高尔案》的裁定没有明确指出申请的法律依据；其记录了被申请人质疑申请的法律依据，随后是法院的调查结果、推理和决定。）省纺集团陈述意见称，尽管中国和新加坡于1997年缔结关于司法协助的双边条约，[5] 该条约的范围并不包括承认和执行法院判决和裁定，故南京中院应驳回高尔集团的申请。

南京中院分三步处理该核心争议。第一，其考虑是否可以根据任何条约批准申请。法院同意省纺集团的意见，所引用的司法协助的双边条约并不适用。它得出结论，中国和新加坡并未缔结或者共同参加关于相互承认和执行生效裁判文书的国际条约。第二，在缺乏可适用条约的情况下，南京中院考虑新加坡判决是否可以基于互惠原则被承认。该法院发现新加坡高等法院曾于2014年执行江苏省苏州市中级人民法院的民事判决。[6] 因为有这个新加坡判决执行了人民法院民事判决的案例（一个“跨境执行的先例”），南京中院总结，中国和新加坡存在互惠关系。第三，南京中院考虑到批准承认和执行该判决的申请是否会违反中国法律的基本原则或者国家主权、安全、社会公共利益。它对这第三个问题给予了否定的答复并决定对该中国公司承认和执行判决。

分析

典型案例13指出该案系中国法院首次承认和执行新加坡法院商事判决。该案至少在三个具体方面有重大意义。首先，它在决定互惠关系存在时采用了开明的方法，该方法明显偏离了中国法院，包括最高人民法院（“最高法”），之前一直倾向的限制性方法。其次，它与最高法采取措施来推动一带一路倡议发展的热情息息相关。最后，它揭示了从业人员在评估申请承认和执行外国商事判决成功机会时应当考虑的具体因素和策略。

若想进一步了解一带一路典型案例13，请访问https://cgc.law.stanford.edu/zh-hans/cgcp-classroom-lesson-3，观看CGCP*学堂*™发布的案例视频。

许璐是中国指导性案例项目2017年中国案例*见解*™写作比赛的获胜者、英国利兹大学法学博士生。自2015年起，她同时在该大学担任助教和科研助理。她曾任伦敦南岸大学和比利时鲁汶天主教大学的客座讲师。许女士曾先后就读于华中科技大学和中国政法大学，于2011年和2014年分别取得法学学士和法学硕士学位（荣誉毕业生）。2011年，许女士获得中国法律职业资格。

在《高尔案》之前：限制性方法

在《高尔案》之前，互惠原则仅被法院以否定方式引用，作为拒绝承认或执行某外国判决的理由，尽管立法中将其作为承认和执行外国判决的一个理由。这背后的原因在于当时采用了限制性方法来确认互惠关系的存在。如果人民法院的判决在有关国家被拒绝承认和执行，则法院认为该拒绝充分证明了互惠关系的不存在，这当然是合理的。然而，即便没有此类拒绝的存在，人民法院也从未认定任何互惠关系。

《日本国民五味晃申请中国法院承认和执行日本法院判决案》[7]（“《五味晃案》”）是一个代表性案件：日本国民五味晃向辽宁省大连市中级人民法院申请承认和执行一个涉及债务支付的日本判决。该法院驳回申请，认为中国与日本之间没有缔结或者参加相互承认和执行法院判决、裁定的国际条约，亦未建立相应的互惠关系。但是，法院没有提及日本法院对人民法院判决的承认或执行。值得注意的是，辽宁省高级人民法院，可能在中级人民法院的要求下，在作出判决前征询了最高法的意见。[8] 因此，本案中的方法包含了最高法当时的思想因素，且相似的方法在《五味晃案》后用到其他案件中，这也并不奇怪。[9] 实践中，申请人民法院承认和执行与中国没有相关条约的国家的商事判决是不可能的。

许璐

新的方法：《高尔案》

《高尔案》标志着重新启动，以南京中院采用的新的方法，支持互惠的肯定性的使用。《高尔案》传达的主要信息是：人民法院可以根据外国法院曾执行人民法院的民事判决的证据（如，跨境执行的先例的证据），认定中国与某境外国家的互惠关系。某些后续案件展现《高尔案》的方式，意味着可能还有一个地域因素影响法院对于互惠的考量。

在《高尔案》中，南京中院除说明跨境执行先例应是民事性质之外，没有明确其他任何条件。因此，为找到互惠，所需要证明的仅是有关境外国家执行了人民法院民事判决。重要的是，外国法院执行的依据与此无关，例如，并不需要相关国家已将互惠原则纳入其国内法中。[10] 因此，当事人甚至可以申请跨境承认和执行判决，即使判决作出在民事程序与中国大陆民事程序完全不同的国家中，例如，普通法管辖区。另外，有强而有力的证据表明，《高尔案》中的相关跨境执行的先例[11]不是由申请人提出的，而是由法院找到的。[12] 这表明了南京中院在挑战传统方式上表现得非常积极。此外，如果人民法院可以依职权行使权力来发现相关跨境执行的先例，申请人申请成功的可能性会增加。

然而，在认定互惠关系时，法院似乎可以考虑某项条件或至少某个因素：作出外国法院执行的判决的人民法院，是否和正在处理承认和执行申请的法院位于同一省份。《高尔案》隐含地满足了这个地域因素，[13] 但南京中院的裁定并未明确提及这项条件。但是，在两个后续案件中，有迹象显示，法院仅在省级层面审查互惠的存在。一个案件是《申请人刘利与被申请人陶莉、童武申请承认和执行外国法院民事判决案》[14]（《刘利案》，详见下文）。在该案中，湖北省武汉市中级人民法院根据外国判决执行的人民法院判决由同省的法院作出，认定了互惠关系。

另一案件是《艾斯艾洛乔纳斯有限公司（S.L.JONAS LTD）申请承认以色列国耶路撒冷裁判法院民事裁定》[15]（“《乔纳斯案》”）。在该案中，福建省福州市中级人民法院拒绝承认和执行一份以色列的判决，尽管在2015年，以色列特拉维夫-雅法地区法院

曾执行人民法院作出的民事判决，但是该人民法院是在另一省份。[16] 由于《乔纳斯案》的裁定没有提及这个跨境执行的先例，福州法院当时对它是否知晓也未可知。[17] 因此，该结果，即认定没有互惠关系，可能反映了（一方和/或法院的）疏忽，或者它可能表明法院隐含地将地区因素作为一项条件——且法院可能是有理由这样做的。人民法院很可能认为要确定中国作为一个国家和另一国家是否建立了互惠关系，这项任务太过雄心勃勃。因此，除非涉及的法院是最高法，否则法院在省级上考察更实际。考虑到认定互惠关系的新方法还处于早期阶段，地区因素的性质和适用性尚不明确也是可以理解的。

"《高尔案》标志着重新启动，以南京中院采用的新的方法，支持互惠的肯定性的使用。"

最高法对新方法的认可：典型案例13

如果最高法没有通过将南京中院的裁定再次发布为典型案例，即典型案例13，并对其认可，大大提高了它的影响力，该裁定最终可能只是作为一个法律的异常案件，对未来承认和执行外国判决影响甚微。然而，典型案例13强调了《高尔案》中被执行的新加坡判决的商事性质。[18] 这反映了最高法目前的重点是为跨境商事交易提供司法协助。的确，一个国家是否具有一个承认和执行外国判决的有效机制对开展跨境贸易非常重要。典型案例13，通过认可开明的方法来解读互惠，给国际贸易界传达了一个信息，即中国大陆的司法环境正在走向高层次的开放和包容，提高了人民法院在世界范围内的声誉。

然而，典型案例13没有对《高尔案》的法律推理进行详细分析，并由此引出一个问题：典型案例13对跨境执行的先例施加任何条件吗？还是只要相关境外国家的任何民事（或仅限于商事）判决执行了人民法院判决便足以认定互惠关系？上述两个案件说明了这一问题，以及在缺少最高法进一步指引时，其它人民法院可能采取的方法。

《刘利案》由湖北省武汉市中级人民法院在2017年6月30日作出，即典型案例13发布后一个月。该法院基于互惠原则，承认和执行一个由美国洛杉矶高等法院作出的美国商事判决。据报道，这是第一例在中国大陆被承认的美国商事判决。[19]《刘利案》的判决并没有提到《高尔案》或典型案例13，但是用来认定互惠的跨境执行的先例符合《高尔案》的框架。首先，该法院没有考虑美国判决的基础。但是，与《高尔案》不同，《刘利案》中是申请人而不是法官提交了该美国判决，作为跨境执行的先例的证据。其次，跨境执行的先例涉及湖北省高级人民法院作出的一份判决，该省份正是考虑承认和执行申请的法院所在地：因此满足了上述地区因素。

然而，《刘利案》引出了关于地域因素的另一个问题：如何将它适用于有不止一个管辖区域和/或层级的境外国家？《刘利案》中，认定互惠的跨境执行的先例是一个加利福尼亚联邦法院的判决，当事人申请执行的美国判决是一个加利福尼亚州法院的判决，且《刘利案》判决仅提到，申请批准是基于中国和美国之间存在互惠关系。《刘利案》法院是否认为互惠关系是存在湖北省和加利福尼亚之间，湖北省和美国之间，还是中国和美国之间，这一点尚不清楚。关于地域因素性质和适用的不确定性在上述提到的典型案例13发布后的案件中更明显，即《乔纳斯案》，其中福建省的一个法院拒绝承认和执行一份以色列的判决，即使以色列的一个法院曾执行来自江苏省一个法院的判决。

简而言之，虽然最高法将《高尔案》裁定作为典型案例13重新发布，以支持这个基于互惠关系而承认和执行外国判决的新颖、更开明的方法，但是典型案例13的简短内容本身留下太多空间。特别是，最高法可以详细说明跨境执行的先例的条件，如果存在任何条件的话，同时说明在中国不同法院作出的互惠认定是否会被统一和如何能做到统一。

时间轴

1. 2015年6月6日:最高法一带一路倡议司法意见发布。
2. 2016年6月7日:《高尔案》被南京中院立案。
3. 2016年12月9日: 法院作出《高尔案》裁定。
4. 2017年5月15日: 最高法将《高尔案》裁定作为典型案例13发布。
5. 2017年5月18日: 南京中院向公众解释其新方法。
6. 2017年6月30日: 法院采用新方法判决《刘利案》。

为何作出认可？：一带一路倡议

典型案例13点出了最高法对推进一带一路倡议的强烈兴趣。 有一个事实可能影响了《高尔案》作为典型案例13的选择，即该外国判决在新加坡——一个参与一带一路倡议的国家——作出。 由于中国和新加坡之间并未缔结任何有关承认和执行外国判决的约束性条约，[20] 如果遵循限制性方法来解释互惠关系，类似高尔集团的申请将会被拒绝。在《高尔案》中，一个一带一路国家的判决被人民法院承认和执行，最高法对该案认可，这为未与中国有相关条约的其他一带一路国家，树立了一个好榜样。[21] 另外，最高法用其首选方法解释互惠存在，这可能已比《高尔案》的方法走得更前。

在《高尔案》中，互惠的认定是基于境外国家首先承认和执行人民法院判决这一事实。但是早在2015年，最高法就发布了《最高人民法院关于人民法院为"一带一路"建设提供司法服务和保障的若干意见》[22]（"《最高法意见》"），为发挥人民法院在

推进一带一路倡议中的作用提供指导意见。《最高法意见》第6段提到人民法院可以启动互惠循环，首先为一带一路国家提供跨境司法协助。这暗示即便相关境外国家没有任何跨境执行的先例，处理申请承认和执行的人民法院仍然可以考虑批准申请，如果它涉及一带一路国家。

> ***"[…] 如果您试图承认和执行的判决来自一个一带一路国家，只要[…]，即使不能确定跨境执行的先例，你仍有很好的成功机会[…]。"***

鉴于法院在《高尔案》前采取的限制性方法，如果法院跳跃到《最高法意见》所提议的方法，可能过于激进和冒险。在这点上，《高尔案》可以帮助鼓励人民法院承认和执行外国判决，以期最终达到实施《最高法意见》第6段，主动进行这样的承认和执行。这也符合最高法乃至于中国政府推进一带一路倡议的目标。

实践要点

当中国与判决所在的国家没有适用条约时，典型案例13为在人民法院申请承认和执行该外国的商事判决的从业人员提供了几个指标。第一，找到（来自相关国家）承认和执行人民法院民事判决的判决，将极大地（如果不是至关重要的话）支持你承认和执行的申请——直接把法院的注意力转移到典型案例13。如果外国判决所执行的中国判决和你的申请都在同一个中国省份，你的机会将进一步增加。第二，如果您试图承认和执行的判决来自一个一带一路国家，只要没有人民法院的判决在相关国家被拒绝承认，即使不能确定跨境执行的先例，你仍有很好的成功机会——将法院的注意力转移到《最高法意见》。第三，如果有中国的判决曾在相关国家被拒绝，亦有中国的判决在该国被承认，则尚不确定法院会如何决定。但是，鉴于《最高法意见》中提到的灵活方法，如果承认和执行人民法院判决的外国判决是较近期的判决，且当事人可以辩称它代表两国间目前的互惠关系，申请人可能仍有机会。

结论

典型案例13至少为人民法院提供了明确、具有权威性的支持，让其认定中国和境外国家之间存在以承认和执行该国判决为目的的互惠关系。但是，除此之外，法院在《高尔案》中采取的方法，与其他法院此前的做法相比，在几个方面都对申请人更友好，且最高法的认可和后续的发展都给出了值得探索的新承诺。作为一个一带一路倡议下的促进者，最高法正在提供有效的机制，让跨境诉讼人信任中国的司法制度，无论是通过选择在中国提起诉讼还是通过承认和执行外国的判决。典型案例13为加入一带一路倡议的国家展示了一个有吸引力的承诺。■

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* 此中国案例*见解*™的引用是：许璐，一带一路典型案例13：更加开明地解读互惠原则以承认和执行外国判决，《中国法律连接》，第1期，第32页（2018年6月），*亦见于*斯坦福法学院中国指导性案例项目，中国案例*见解*™，2018年6月，https://cgc.law.stanford.edu/zh-hans/commentaries/clc-1-201806-insights-3-alison-xu。
英文原文由Dimitri Phillips和Mei Gechlik博士在Sean Webb的协助下编辑。本中文版本由作者、黄莉莎、李嘉宇、罗雯翻译，并由罗雯和熊美英博士最后审阅。载于本中国案例*见解*™的信息和意见作者对其负责，它们并不一定代表中国指导性案例项目的工作或意见。

1 《高尔集团股份有限公司申请承认和执行新加坡高等法院民事判决案》，斯坦福法学院中国指导性案例项目，一带一路*案例*™，典型案例13（TC13），2017年8月31日（最终版本），https://cgc.law.stanford.edu/belt-and-road/b-and-r-cases/typical-case-13。

2 见《中华人民共和国民事诉讼法》，1991年4月9日通过和公布，同日起施行，经三次修正，最新修正于2017年6月27日，2017年7月1日起施行，http://www.npc.gov.cn/npc/xinwen/2017-06/29/content_2024892.htm。该法于2012年第二次修正，并适用于此案。2017年修正案并未影响本条的编号或内容。

3 《最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释》，2014年12月18日由最高人民法院审判委员会通过，2015年1月30日公布，2015年2月4日起施行，http://www.chinacourt.org/law/detail/2015/01/id/148091.shtml。根据第五百四十四条，唯一的例外是当事人向人民法院申请承认外国法院作出的发生法律效力的离婚判决。在这种情况下，申请人没有必要以条约或互惠为基础提出申请。

4 《Kolmar Group AG与江苏省纺织工业（集团）进出口有限公司申请承认和执行外国法院民事判决、裁定特别程序民事裁定书》（2016）苏01协外认3号民事裁定，2016年12月9日由江苏省南京市中级人民法院作出，全文载于斯坦福法学院中国指导性案例项目网站，https://cgc.law.stanford.edu/judgments/jiangsu-2016-su-01-xie-wai-ren-3-civil-ruling。

5 《中华人民共和国和新加坡共和国关于民事和商事司法协助的条约》，1997年4月28日在北京签订，1999年6月27日生效，http://www.npc.gov.cn/wxzl/gongbao/2001-01/03/content_5007108.htm。该条约的新加坡版于2001年12月28日首次发表在政府公报电子版中。

6 *Giant Light Metal Technology (Kunshan) Co Ltd* v. *Aksa Far East Pte Ltd* [2014] SGHC 16, http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/15488-giant-light-metal-technology-kunshan-co-ltd-v-aksa-far-east-pte-ltd-2014-sghc-16。

7 《日本国民五味晃申请中国法院承认和执行日本法院判决案》，《中华人民共和国最高人民法院公报》1996年第一期，29页，http://gongbao.court.gov.cn/Details/0ec2b41197060a8c43bb7fac8d56ca.html。

8 在复函中，最高法没有引用任何跨境执行的先例以决定中国和日本没有互惠关系。 见《最高人民法院关于我国人民法院应否承认和执行日本国法院具有债权债务内容裁判的复函》，1995年6月26日公布，同日起施行，http://www.people.com.cn/zixun/flfgk/item/dwjjf/falv/9/9-1-7-2.html。

9 *见，例如，*《申请人董斌申请承认与执行外国法院民事判决纠纷一案一审裁定书》(2014)潭中民三初字第181号民事裁定，2015年4月22日由湖南省湘潭市中级人民法院作出， http://wenshu.court.gov.cn/content/content?DocID=872f7193-83ce-4b77-9bd5-8bf9469b6f54； 《申请人张晓曦申请承认外国法院民事判决一审民事裁定书》(2015)沈中民四特字第2号民事裁定，2015年4月8日由辽宁省沈阳市中级人民法院作出，http://wenshu.court.gov.cn/content/content?DocID=e5e14a41-022f-4717-bb35-57c4eea65cdd。

10 在《高尔案》中提到的跨境执行的先例中，新加坡高等法院依据普通法的冲突法规则执行人民法院的判决。

11 *Giant Light Metal Technology (Kunshan) Co Ltd*，注释6。

[12] 在南京中院的裁定中，新加坡判决仅在申请人及被申请人辩词总结后被提及。它出现在法院裁决前常用的认定事实部分之下。更多的证据来自最近发行的一部纪录片《公平正义的力量》，其由最高法和中国中央电视台联合制作。在《法院判决能有互惠原则吗？》这个片段中，《高尔案》的主审法官们就其裁决接受了采访。主审法官之一姜欣表示，她在早期案件报道中发现了这个跨境执行的先例。见最高人民法院、中央电视台，《公平正义的力量》，中央电视（2017年7月3-7日），http://jingji.cctv.com/special/justice/index.shtml。

[13] 在《高尔案》中，跨境执行的先例涉及的案件由江苏省苏州市中级人民法院作出，其位于南京中院所在的省。

[14] 《申请人刘利与被申请人陶莉、童武申请承认和执行外国法院民事判决案》(2015)鄂武汉中民商外初字第00026号民事裁定，2017年6月30日由湖北省武汉市中级人民法院作出，http://wenshu.court.gov.cn/content/content?DocID=498d1508-6e7a-4f61-9a54-a7b6012dafaa。

[15] 《艾斯艾洛乔纳斯有限公司(S.L.JONAS LTD)申请承认以色列国耶路撒冷裁判法院民事裁定书》(2017)闽01协外认4号民事裁定，2017年6月6日由福建省福州市中级人民法院作出，http://wenshu.court.gov.cn/content/content?DocID=3502f009-b0eb-4a8a-a46e-a82d00064087。

[16] *Jiangsu Overseas Group Co. Ltd. v. Isaac Reitmann*, Tel Aviv-Jaffa District Court, Civil File 48946-11-12。

[17] 然而，以色列的这个案例在主要媒体渠道上有报道，并由学者和从业者评论。*见，例如*，国浩律师事务所，国浩视点：中国民商事判决在外国法院的承认与执行系列之一：以色列，2016年7月26日，http://chuansong.me/n/462882145993；Michelle Tzhori，具有里程碑意义的裁决：以色列法院首次执行中国判决，以色列西博雷特律师事务所，2015 年12月9日，http://www.shibolet.com/5671-2。

[18] 在解释典型案例13的典型意义时，最高法几次称新加坡判决为“商事判决”，而南京中院的裁定则仅称之为“民事判决”。典型案例13，注释1；《高尔案》，注释4。

[19] *见，例如*，人民法院新闻传媒总社，武汉中院在全国率先裁定承认和执行美国法院商事判决，2017年9月12日，http://www.court.gov.cn/zixun-xiangqing-59352.html。

[20] 2017年9月，中国签署了有关选择法院协议的海牙公约，而新加坡也是签约国之一。因此，如果中国全国人民代表大会核准该条约，新加坡的判决也可采用基于条约的承认。

[21] 71个参与一带一路倡议的国家中，约有一半以上，无法适用任何条约，作为在中国承认和执行其商事判决的基础。

[22] 《最高人民法院关于人民法院为“一带一路”建设提供司法服务和保障的若干意见》，2015年6月16日公布，同日起施行，http://www.chinacourt.org/law/detail/2015/06/id/148302.shtml。

Guiding Case No. 61: Clarifying the Sentencing Levels of the "Crime of Using Nonpublic Information for Trading" and Its Significance*

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The Takeaway

With the rapid development of China's economy, financial crimes are increasingly serious, and deficiencies in relevant legislation are becoming more apparent. In the retrial judgment of *MA Le, A Case About Using Nonpublic Information for Trading* ("*MA Le*"),[1] the Supreme People's Court (the "SPC") used a flexible method of legal interpretation to interpret the "crime of using nonpublic information for trading" provided for in Article 180 Paragraph 4 of the *Criminal Law of the People's Republic of China*[2] (the "*Criminal Law*") as including situations in which "circumstances are particularly serious". The selection of *MA Le* as Guiding Case No. 61 not only has guiding effect on the adjudication of similar subsequent cases, but also will likely guide courts to use similar methods for interpreting other provisions where statutory sentences are cited.

The Rundown

From March 9, 2011, to May 30, 2013, MA Le used nonpublic information that he acquired as an investment manager to buy and sell shares of stock. [These illegal transactions] had a cumulative trading amount of more than RMB 1.05 billion and [MA Le] illegally derived benefits of RMB 19,120,246.98.[3] On July 17, 2013, MA Le surrendered.

In the first-instance judgment, the Intermediate People's Court of Shenzhen Municipality opined that MA Le's acts constituted the "crime of using nonpublic information for trading" provided for in Article 180 Paragraph 4 of the *Criminal Law*. However, Paragraph 4 does not explicitly mention the phrase "circumstances are particularly serious". Therefore, [the court] could only determine that MA Le's acts [constituted a situation where] "circumstances are serious" and sentenced MA Le to a limited-term imprisonment of three years with a five-year suspension of sentence.

The people's procuratorate of the same level lodged a protest, arguing that MA Le's acts should be determined, with reference to Article 180 Paragraph 1 of the *Criminal Law*, to be a commission of a crime under circumstances that were particularly serious (see **Sidebar 1**). In the second-instance ruling, the High People's Court of Guangdong Province, based on the same reasons as those used in the first-instance judgment, upheld the original judgment.[4]

After the second-instance ruling's coming into legal effect, the Supreme People's Procuratorate (the "SPP") lodged a protest with the SPC. The SPP's main reasons were: (1) Article 180 Paragraph 4 of the *Criminal Law* [shows] a situation where statutory sentences are cited and [the citation] should [be considered as] a citation to all of the provisions regarding punishment [stated] in Paragraph 1; (2) the degrees of illegality and liability for

Sidebar 1:

Article 180 of the *Criminal Law*

Paragraph 1

Where before the information involving the issuance of securities or the trading of securities or futures, or other information that has major effects on the trading prices of securities or futures, is made public, a person who has inside information regarding the trading of the securities or futures or a person who illegally obtains inside information regarding the trading of the securities or futures buys or sells the securities, engages in futures trading related to the inside information, divulges the information, or explicitly or implicitly suggests that others engage in the above-mentioned trading activities, and *the circumstances are serious*, [the person] shall be sentenced to a limited-term imprisonment or detention of no more than five years and in addition or as sole [punishment] shall be fined one to five times [his] unlawful gains. If[, however,] *the circumstances are particularly serious*, [the person] shall be sentenced to a limited-term imprisonment of five to ten years and in addition or as sole [punishment] shall be fined one to five times [his] unlawful gains. (emphasis added)

Paragraph 4

Where an employee of a stock exchange, futures exchange, securities company, futures brokerage company, fund management company, commercial bank, insurance company, or other financial institution, or a staff member of a related regulatory department or industry association, uses *nonpublic information which is not inside information* but which is obtained through conveniences of [his] office to engage, in violation of provisions, in securities or futures trading activities related to the information, or to explicitly or implicitly suggest that others engage in related trading activities, and *the circumstances are serious*, [the employee or the staff member] shall be punished in accordance with the provisions of Paragraph 1. (emphasis added)

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the "crime of using nonpublic information for trading" and for the "crime of insider trading or divulging inside information" are more-or-less equivalent and thus [their] statutory sentences should be more-or-less equivalent; (3) MA Le's acts should be determined to be a commission of a crime where the "circumstances were particularly serious", and the suspension of his sentence was manifestly improper.

On November 23, 2015, the SPC rendered the retrial judgment, in which it basically accepted the SPP's protest opinions and opined that in the first-instance judgment and the second-instance ruling, the conviction was accurate but the sentencing was improper and that MA Le's acts [constituted a situation where] circumstances were particularly serious. [The SPC] revoked the suspension of sentence [stated in] the original judgment and ruling.[5] On June 30, 2016, the Adjudication Committee of the SPC discussed and agreed to select the case as Guiding Case No. 61.[6]

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Sidebar 2:

Article 285 Paragraph 3 of the *Criminal Law*

Where [a person] provides a program or tool specifically used for the invasion or illegal control of a computer information system or provides a program or tool to another person while knowing that he carries out an unlawful, criminal act of invading or illegally controlling a computer information system, and the *circumstances are serious, [the person] shall be punished in accordance with the provisions of the preceding paragraph.* (emphasis added)

Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of Laws in Handling Criminal Cases of Endangering the Security of Computer Information Systems

Article 3

Where [a person] provides a program or tool for the invasion or illegal control of a computer information system in one of the following situations, it should be determined that the *"circumstances are serious"* as provided for in Article 285 Paragraph 3 of the *Criminal Law*:

(1) […];
(2) […];
(3) […];
(4) […];
(5) […];
(6) Other situations where the circumstances are serious.

Where [a person] carries out an act provided for in the preceding paragraph in one of the following situations, it should be determined that [the person] has provided a program or tool for the invasion or illegal control of a computer information system [in a situation] where the *"circumstances are particularly serious"*:

(1) […];
(2) Other situations where the circumstances are particularly serious.

(emphasis added)

The Breakdown

There was little dispute about the determination of facts in *MA Le*. The focal point of the dispute was in interpretation of legal provisions: does [the expression] "circumstances are serious" in Article 180 Paragraph 4 of the *Criminal Law* (1) only serve as a conviction provision, thus citing the two sentencing levels in [Article 180] Paragraph 1, [namely,] "circumstances are serious" and "circumstances are particularly serious", or (2) also serve as a sentencing provision, thus only citing the sentencing level "circumstances are serious" in [Article 180] Paragraph 1?

The Reasoning of the SPC in the MA Le *Case*

MA Le is the first economic crime case against which the SPP has lodged a protest, and this reflects the importance of this case. In this case, the SPP claimed that legislation should strive to reduce repetition in legal rules. The purpose of citing provisions is to make [legal] expressions more concise, and therefore not all the sentencing levels need to be repeated. The SPP elaborated on this by using Article 285 Paragraph 3 of the *Criminal Law* as an example. Similar to Article

180 Paragraph 4, Article 285 Paragraph 3 merely uses [the expression] "where […] the circumstances are serious, [the person] shall be punished in accordance with the preceding paragraph" to cite to the sentencing provision in the preceding paragraph. Through a judicial interpretation, the SPC and the SPP have clearly pointed out that Article 285 Paragraph 3 contains two sentencing levels, namely, "circumstances are serious" and "circumstances are particularly serious" (see **Sidebar 2**).[7] By analogy, the SPP opined that [the phrase] "circumstances are serious" in Article 180 Paragraph 4 should be regarded as a conviction provision.

> ***"[…] the judgment was influenced by certain policy orientations and reflected the attitude of the harsh crackdown which targeted the "rat trading" that has been occurring frequently in China's fund industry […]."***

The SPC not only adopted this viewpoint, but also pointed out that in the articles of the *Criminal Law* where [the expression] "circumstances are serious" also serves as a sentencing provision, the expression, without exception, is followed by a specific statutory sentence. [This observation] supports [the viewpoint] that [the expression] "circumstances are serious" in Article 180 Paragraph 4 (which is not followed by a specific statutory sentence) should only be considered as a conviction provision. On this basis, the retrial judgment, referring to the sentencing standards of the "crime of insider trading" (see **Sidebar 3**),[8] confirmed that MA Le's acts of using nonpublic information for trading involved circumstances that were particularly serious and a statutory sentence of a limited-term imprisonment of five to ten years was applicable.

Reservations About the Retrial Judgment of the MA Le *Case*

While the reasons of the SPC in *MA Le* are, to a certain extent, consistent with legal reasoning, the author believes that this interpretation method has some problems.

First, the two [identical] phrases, "circumstances are serious", in Article 180 Paragraphs 1 and 4 of the *Criminal Law* are given different meanings—[the phrase] in Paragraph 1 is a sentencing provision, pointing to one sentencing level, while [the phrase] in Paragraph 4 is a conviction provision, pointing to two sentencing levels.[9] Will this "identical expressions, different meanings" interpretation method "inspire" other cases to use a similar interpretation method to construe other expressions, thus bringing greater uncertainty to the *Criminal Law*?

Second, the interpretation method that the SPC used in *MA Le* makes the expression "where […] the circumstances are serious" in Article 180 Paragraph 4 of the *Criminal Law* appear to be slightly redundant. It is worth noting that other conviction provisions in the *Criminal Law* that cite to [sentencing provisions] do not need to use such an expression explicitly. For instance, Article 265 of the *Criminal Law*, when citing Article 264, does not explicitly use expressions such as "a relatively large amount" (see **Sidebar 4**). Doesn't the expression "where […] the circumstances are serious" in Article 180 Paragraph 4 indicate that it has a special function—it serves as a sentencing provision?

Third, from a macro perspective, [the court rendering] the retrial judgment of this case, where there was a dispute about legal interpretation, did not choose an interpretation method which would have benefited the defendant. [This choice] did not satisfy the requirement, advocated by some scholars, of interpreting laws "in favor of the defendant when in doubt".[10] Therefore, there is room for more discussion from [the perspective of] academic theory.

The retrial judgment of *MA Le* has another limitation. The judgment determined an important point: the degrees of illegality and liability for the "crime of using nonpublic information for trading" and for the "crime of insider trading or divulging inside information" are more-or-less equivalent and thus [their] statutory sentences should be more-or-less equivalent. However, with regard to the determination of relevant information, which is the key constitutive element of the crimes here, the standards used

Sidebar 3:

Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Specific Application of Laws in Handling Criminal Cases of Insider Trading or Divulging Inside Information

Article 7

Where, during a period in which inside information is sensitive, [a person] engages in securities or futures trading related to the inside information, explicitly or implicitly suggests that others engage in [such trading], or divulges inside information causing others to engage in [such trading] in one of the following situations, it should be determined that the *"circumstances are particularly serious"* as provided for in Article 180 Paragraph 1 of the *Criminal Law*:

(1) The turnover of the securities trading is RMB 2.5 million or more;
(2) The amount of margin used for the futures trading is RMB 1.5 million or more;
(3) The amount of benefits derived or losses avoided is RMB 750,000 or more;
(4) There are other particularly serious circumstances.

(emphasis added)

for the "crime of insider trading" and the "crime of divulging inside information" are stricter than those for the "crime of using nonpublic information for trading". In particular, "nonpublic information" is defined as information other than "inside information".[11]

> ***"[...] the guiding effect of Guiding Case No. 61 suggests that the interpretation method of the SPP and the SPC will likely be considered as the preferred method [used to address] similar issues."***

To put it simply, inside information and nonpublic information are different in nature, and insider trading and use of nonpublic information for trading are also different in nature. Inside information is often directly related to company operations and closely linked to the price of securities and futures. More importantly, there is a significant difference between the subject entities of insider trading and those of using nonpublic information for trading: the subject entities of the former are primarily directors, supervisors, and senior management personnel of companies, while the subject entities of the latter are primarily employees of security funds. Shareholders of a company have a higher degree of trust in directors, supervisors, and senior management personnel than in employees of security funds. Therefore, insider trading is a serious crime involving breach of trust. The subjective malice of using nonpublic information for trading should, in criminal law, be considered weaker than that of insider trading.

Sidebar 4:

Article 264 of the *Criminal Law*

Where [a person] steals a *relatively large amount* of public or private property or steals multiple times, enters a house and steals, steals while carrying a weapon, or pickpockets, [the person] shall be sentenced to a limited-term imprisonment, detention, or control of no more than three years and in addition or as sole [punishment] shall be fined.

If[, however,] *the amount is huge or there are other serious circumstances*, [the person] shall be sentenced to a limited-term imprisonment of three to ten years and shall be fined;

If[, however,] *the amount is particularly huge or there are other particularly serious circumstances*, [the person] shall be sentenced to a limited-term imprisonment of ten years to life imprisonment and shall be fined or have his property confiscated.

Article 265 of the *Criminal Law*

Where [a person], for the purpose of making profit, stealthily connects to another person's communication line, duplicates another person's telecommunication code number, or uses telecommunication equipment or a facility that he knows has been stealthily connected [to another person's communication line] or duplicated, *[the person] shall be convicted and punished in accordance with the provisions of Article 264 of this Law*.

(emphasis added)

Therefore, the author believes that although the "crime of using nonpublic information for trading" applies the same two levels of statutory sentences as the "crime of insider trading", the specific thresholds of the sentencing standards used for the former should be slightly higher. Specifically, according to the *Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Specific Application of Laws in Handling Criminal Cases of Insider Trading or Divulging Inside Information*, [in order to] determine that the "circumstances are serious" and the "circumstances are particularly serious", the turnover of the securities trading needs to be at least RMB 500,000 and RMB 2.5 million, respectively; the amount of margin used for the futures trading needs to be at least RMB 300,000 and RMB 1.5 million, respectively; the amount of benefits derived or losses avoided needs to be at least RMB 150,00 and RMB 750,000, respectively. In comparison, the respective statutory sentences [above] cannot be directly applied if circumstances in the "crime of using nonpublic information for trading" only meet the above standards. Instead, they need to meet standards significantly higher than those of the "crime of insider trading" and then the two respective levels of statutory sentences can be applied.

The retrial judgment of *MA Le*, however, did not provide further analysis on the differences discussed above. Instead, it emphasized the harm of using nonpublic information for trading. Evidently, the judgment was influenced by certain policy orientations and reflected the attitude of the harsh crackdown which targeted the "rat trading" that had been occurring frequently in China's fund industry—in particular, [after] the "Fall of Thousands of Shares" in 2015.[12]

In fact, the judgment has significantly increased the sentences for the "crime of using nonpublic information for trading". For example, before the retrial [of *MA Le*], the amounts of money involved in *The Jing'an District People's Procuratorate of Shanghai Municipality v. XU Chunmao, A Case About Using Nonpublic Information for Trading*[13] in October 2011 and *The Case About ZHANG Dunyong's Crime of Using Nonpublic Information for Trading*[14] in February 2015 were over RMB 90 million and over RMB 150 million, respectively, but both defendants were only sentenced to suspended sentences because they surrendered themselves. After the retrial judgment of *MA Le*, however, *LI Jianchao, A Case About Using Nonpublic Information for Trading* in April 2016 was determined [to involve] "circumstances [that] are particularly serious".[15] Despite the fact that LI Jianchao also surrendered himself, he was sentenced to a limited-term imprisonment of three years without a suspension of sentence.

Guiding Case No. 61 and Its Impact

Despite the above-mentioned issues, *MA Le* became Guiding Case No. 61. The most direct significance is that where a

subsequent cases is, "in terms of the basic facts and application of law", similar to Guiding Case No. 61, the deciding court "should refer to" the "Main Points of the Adjudication" of the Guiding Case to "render its ruling or judgment".[16] The "Main Points of the Adjudication" section of Guiding Case No. 61 is:

> The citation of statutory sentences for the crime of using nonpublic information for trading provided for in Article 180 Paragraph 4 of the *Criminal Law* should be [considered as] the citation of all statutory sentences for the crime of insider trading or divulging inside information [provided for] in Paragraph 1. This means that the crime of using nonpublic information for trading should have two types of situations—where "circumstances are serious" and where "circumstances are particularly serious"—and two [corresponding] sentencing levels.

According to *China Judgments Online*, a website maintained by the SPC, these Main Points of the Adjudication have already been applied in two subsequent cases. In both *The Second-Instance Criminal Judgment of a Case of LI Tao's Use of Nonpublic Information for Trading*[17] and *An Appeal Case About LUO Zeping et al.'s Crime of Using Nonpublic Information for Trading*,[18] the collegial panels referred to Guiding Case No. 61 as part of their reasons for adjudication to support [the finding] that the "crime of using nonpublic information for trading" was committed in a situation where "circumstances are particularly serious" and the corresponding sentencing level [was applied].

It is worth noting that the guiding effect of Guiding Case No. 61 suggests that the interpretation method of the SPP and the SPC will likely be considered as the preferred method [used to address] similar issues. In the current [version of] the *Criminal Law*, however, apart from Article 180, only a few provisions use expressions like "where the circumstances/consequences are serious, the [case] shall be handled in accordance with the preceding paragraph" to cite to [sentencing] provisions that explicitly state multiple sentencing levels for different situations, including "where the circumstances/consequences are serious" and "where the circumstances/consequences are particularly serious". [Two examples are:] Article 285 Paragraph 3 (citing the statutory sentences provided for in Paragraph 2 of that article) and Article 286 Paragraphs 2 and 3 (citing the statutory sentences provided for in Paragraph 1 of that article).

In other words, only the aforementioned articles may give rise to disputes over "whether one or all of the sentencing levels provided for in the preceding paragraph are cited". Among these articles, Article 285 has already been given an unambiguous interpretation.[19] Therefore, the interpretation method confirmed in Guiding Case No. 61 will have almost no direct impact on the interpretation of other provisions in the current [version of the] *Criminal Law*. Of course, if future amendments to the *Criminal Law* add provisions that use this type of citing method, the interpretation method established by Guiding Case No. 61 will likely be referenced.

The Conclusion

The significance of the SPC's retrial judgment in *MA Le* is that it not only has clarified that the "crime of using nonpublic information for trading" has two sentencing levels, [namely,] "circumstances are serious" and "circumstances are particularly serious", but also has changed prior judicial practices of handling the crime leniently. Considering that the subjective malice of using nonpublic information for trading is weaker than that of insider trading, the author believes that the specific thresholds of sentencing standards for the former crime should be slightly higher than those for the latter.

Although the method of legal interpretation applied in the retrial judgment has certain flaws, the [fact that] *MA Le* became Guiding Case No. 61 suggests that this interpretation method will likely be an important method for interpreting current and future rules in the *Criminal Law* where statutory sentences are cited [by other provisions in the legislation]. This demonstrates the ability of the SPC to guide criminal adjudication through Guiding Cases and reflects the feature of having more flexibility in releasing Guiding Cases than releasing judicial interpretations. With rapid economic and social development in China, the flexibility of Guiding Cases allows judicial organs to agilely adjudicate cases of economic crimes so as to facilitate changes in economic policy. ■

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[1] 《原审被告人马乐利用未公开信息交易案再审刑事判决书》 (*The Retrial Criminal Judgment of a Case About Defendant MA Le's Use of Nonpublic Information for Trading*) (2015)刑抗字第1号刑事判决 ((2015) Xing Kang Zi No. 1 Criminal Judgment), rendered by the Supreme People's Court on Nov. 23, 2015, full text available on the Stanford Law School China Guiding Cases Project's website, at https://cgc.law.stanford.edu/judgments/spc-2015-xing-kang-zi-1-criminal-judgment.

[2] 《中华人民共和国刑法》 (*Criminal Law of the People's Republic of China*), passed on July 1, 1979, issued on July 6, 1979, effective as of Jan. 1, 1980, revised on Mar. 14, 1997, effective as of Oct. 1, 1997, amended ten times, most recently on Nov. 4, 2017, effective as of Nov. 4, 2017, http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=703dba7964330b85bdfb.

The current form of Article 180 came into effect in February 2009, when the *Criminal Law of the People's Republic of China* was amended for the seventh time. *See* 《中华人民共和国刑法修正案（七）》(*Amendment (VII) to the Criminal Law of the People's Republic of China*), passed on, issued on, and effective as of Feb. 28, 2009, http://www.gov.cn/flfg/2009-02/28/content_1246438.htm.

[3] The amount was determined to be RMB 18,833,374.74 in the first-instance judgment. However, this calculation was found to be erroneous and the amount was corrected to RMB 19,120,246.98 in the retrial judgment. *See*《马某利用未公开信息交易罪一审刑事判决书》(*The First-Instance Criminal Judgment of MA X's Crime of Using Nonpublic Information for Trading*) (2014) 深中法刑二初字第27号刑事判决 ((2014) Shen Zhong Fa Xing Er Chu Zi No. 27 Criminal Judgment), rendered by the Intermediate People's Court of Shenzhen Municipality, Guangdong Province, on Mar. 24, 2014, full text available on the Stanford Law School China Guiding Cases Project's website, at https://cgc.law.stanford.edu/judgments/guangdong-2014-shen-zhong-fa-xing-er-chu-zi-27-criminal-judgment.

[4]《马乐利用未公开信息交易二审刑事裁定书》(*The Second-Instance Criminal Ruling of MA Le's Use of Nonpublic Information for Trading*) (2014) 粤高法刑二终字第137号刑事裁定((2014) Yue Gao Fa Xing Er Zhong Zi No. 137 Criminal Ruling), rendered by the High People's Court of Guangdong Province on Oct. 20, 2014, full text available on the Stanford Law School China Guiding Cases Project's website, at https://cgc.law.stanford.edu/judgments/guangdong-2014-yue-gao-fa-xing-er-zhong-zi-137-criminal-ruling.

[5] *See*《原审被告人马乐利用未公开信息交易案再审刑事判决书》(*The Retrial Criminal Judgment of a Case About Defendant MA Le's Use of Nonpublic Information for Trading*) (2015) 刑抗字第1号刑事判决 ((2015) Xing Kang Zi No. 1 Criminal Judgment), *supra* note 1.

[6]《马乐利用未公开信息交易案》(*MA Le, A Case About Using Nonpublic Information for Trading*), Stanford Law School China Guiding Cases Project, English Guiding Case (EGC61), May 8, 2018 Edition, https://cgc.law.stanford.edu/guiding-cases/guiding-case-61.

[7]《最高人民法院、最高人民检察院关于办理危害计算机信息系统安全刑事案件应用法律若干问题的解释》(*Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of Laws in Handling Criminal Cases of Endangering the Security of Computer Information Systems*), passed by the Adjudication Committee of the Supreme People's Court on June 20, 2011, and by the Procuratorial Committee of the Supreme People's Procuratorate on July 11, 2011, issued on Aug. 1, 2011, effective as of Sept. 1, 2011, http://sxlyfy.chinacourt.org/public/detail.php?id=247.

[8]《最高人民法院、最高人民检察院关于办理内幕交易、泄露内幕信息刑事案件具体应用法律若干问题的解释》(*Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Specific Application of Laws in Handling Criminal Cases of Insider Trading or Divulging Inside Information*), passed by the Adjudication Committee of the Supreme People's Court on Oct. 31, 2011, and by the Procuratorial Committee of the Supreme People's Procuratorate on Feb. 27, 2012, issued on Mar. 29, 2012, effective as of June 1, 2012, http://www.csrc.gov.cn/pub/newsite/flb/flfg/sfjs_8249/201312/t20131205_239352.html.

[9] This was also the defense of the lawyer and the main opinion in the argument of the defense's expert in the retrial of *MA Le*.

[10] *See, e.g.*, 邢馨宇 (XING Xinyu), 有利被告的定位 (*Adopting a Position That Benefits the Defendant*),《法学》(Law Science), Issue 2 (2012); 张建军 (ZHANG Jianjun), 立法意旨不明才可作有利于被告人解释 (*Only When Legislative Intent Is Unclear Can It Be Interpreted to the Benefit of the Defendant*),《检察日报》(Procuratorate Daily), May 7, 2014, p. 3.

[11]《中华人民共和国刑法》(*Criminal Law of the People's Republic of China*), *supra* note 2, Article 180 Paragraph 4. For more discussion of this topic, see 陈兴良 (CHEN Xingliang),《规范刑法学》(*Standardizing Criminal Law*) (Remin University of China Press, 2nd ed., 2013), pp. 633–634.

[12] *See* 2015 年，我们所经历的千股跌停 (*The Fall of Thousands of Shares that We Experienced in 2015*),《证券时报网》(*Securities Times Online*), Aug. 24, 2015, http://kuaixun.stcn.com/2015/0824/12424778.shtml. Editors' note: at that time, the market price of over two thousand companies' shares fell by 10% in a single day.

[13]《上海市静安区人民检察院诉许春茂利用未公开信息交易案》(*The Jing'an District People's Procuratorate of Shanghai Municipality v. XU Chunmao, A Case About Using Nonpublic Information for Trading*), rendered by the Jing'an District People's Court of Shanghai Municipality on Oct. 14, 2011,《最高人民法院公报》(*Gazette of the Supreme People's Court*), Issue No. 10 (2012) (Overall Issue No. 192); 孙玮、魏凯 (SUN Wei & WEI Kai), 许春茂利用未公开信息交易案——利用未公开信息交易罪的司法认定 (*XU Chunmao, A Case About Using Nonpublic Information for Trading—Judicial Determination of the Crime of Using Nonpublic Information for Trading*),《人民司法·案例》(People's Judicature – Cases), Issue No. 4 (2013).

[14]《诉张敦勇利用未公开信息交易罪一案一审刑事判决书》(*The First-Instance Criminal Judgment of a Case About ZHANG Dunyong's Crime of Using Nonpublic Information for Trading*) (2015) 沪一中刑初字第26号刑事判决 ((2015) Hu Yi Zhong Xing Chu Zi No. 26 Criminal Judgment), rendered by the No. 1 Intermediate People's Court of Shanghai Municipality on Feb. 28, 2015, http://wenshu.court.gov.cn/content/content?DocID=bdae8ee3-e189-49b3-bdba-7971582287a2.

[15]《厉建超利用未公开信息交易案》(*LI Jianchao, A Case About Using Nonpublic Information for Trading*) (2016) 鲁刑终146号刑事判决 ((2016) Lu Xing Zhong No. 146 Criminal Judgment), rendered by the High People's Court of Guangdong Province on Apr. 15, 2016, wenshu.court.gov.cn/content/content?DocID=cc295ba4-19b7-4996-9163-292e363a1a77.

[16]《〈最高人民法院关于案例指导工作的规定〉实施细则》(*Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"*), Article 9, passed by the Adjudication Committee of the Supreme People's Court on Apr. 27, 2015, issued on and effective as of May 13, 2015, Stanford Law School China Guiding Cases Project, English Guiding Cases Rules, June 12, 2015 Edition, https://cgc.law.stanford.edu/guiding-cases-rules/20150513-english.

[17]《李涛利用未公开信息交易案二审刑事判决书》(*The Second-Instance Criminal Judgment of a Case of LI Tao's Use of Nonpublic Information for Trading*) (2017)京刑终153号刑事判决((2017) Jing Xing Zhong No. 153 Criminal Judgment), rendered by the High People's Court of Beijing Municipality on Sept. 28, 2017, http://wenshu.court.gov.cn/content/content?DocID=a7b615f2-c7b4-4aa5-bccf-a8130010c609.

[18]《罗泽萍等利用未公开信息交易罪上诉一案》(*An Appeal Case About LUO Zeping et al.'s Crime of Using Nonpublic Information for Trading*) (2016) 京刑终60号刑事判决 ((2016) Jing Xing Zhong No. 60 Criminal Judgment), rendered by the High People's Court of Beijing Municipality on Aug. 26, 2016, http://wenshu.court.gov.cn/content/content?DocID=28f52d7b-5d9e-443a-9414-c8d592a044fc.

[19]《最高人民法院、最高人民检察院关于办理危害计算机信息系统安全刑事案件应用法律若干问题的解释》(*Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of Laws in Handling Criminal Cases of Endangering the Security of Computer Information Systems*), *supra* note 7.

指导案例61号：明确“利用未公开信息交易罪”量刑档次及其意义*

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要点

随着中国经济的快速发展，金融犯罪日益严重，相关立法规定的不足也越趋明显。最高人民法院（“最高法”）在《马乐利用未公开信息交易案》[1]（“《马乐案》”）的再审判决中以灵活的法律解释方法把《中华人民共和国刑法》（“《刑法》”）第一百八十条第四款规定的“利用未公开信息交易罪”解释为也包括“情节特别严重”的情形。[2] 《马乐案》被选为指导案例61号，不仅对类似的后续案件的审判发挥指导作用，也很可能会引导法院以类似方法解读其他援引法定刑的规定。

概要

2011年3月9日至2013年5月30日，原投资经理马乐利用其掌握的未公开信息买卖股票，累计成交金额10.5亿余元（人民币，下同），获利19120246.98元。[3] 2013年7月17日，马乐投案自首。

一审中，深圳市中级人民法院认为马乐的行为构成《刑法》第一百八十条第四款规定的“利用未公开信息交易罪”，但该款并未明确提及“情节特别严重”一词，因此只能认定其行为属于“情节严重”，判处有期徒刑三年，缓刑五年。同级检察院提出抗诉，认为应参照《刑法》第一百八十条第一款认定马乐的犯罪行为为“情节特别严重”（见**侧边栏1**）。二审中，广东省高级人民法院以与一审判决相同的理由裁定维持原判。[4]

二审裁定生效后，最高人民检察院（“最高检”）向最高法提出抗诉，其主要理由为：(1)《刑法》第一百八十条第四款为援引法定刑的情形，应当引用第一款处罚的全部规定；(2)“利用未公开信息交易罪”与“内幕交易、泄露内幕信息罪”的违法与责任程度相当，法定刑亦应相当；(3)马乐的行为应当被认定为犯罪“情节特别严重”，不应适用缓刑。

2015年11月23日，最高法作出再审判决，基本接受了最高检的抗诉意见，认为一审判决、二审裁定定罪正确但量刑不当，马乐的行为属于“情节特别严重”，撤销原裁判的缓刑。[5] 2016年6月30日，最高法审判委员会讨论通过该案成为指导案例61号。[6]

分析

《马乐案》的事实认定无甚争议，矛盾的焦点为对法条的解释：《刑法》第一百八十条第四款中的“情节严重”是 (1) 仅作为定罪条款从而援引第一款中的“情节严重”和“情节特别严重”共两个量刑档次，还是 (2) 同时作为量刑条款从而只援引第一款中的“情节严重”这一个量刑档次？

最高法在《马乐案》中的说理

《马乐案》是最高检第一次对经济犯罪案件提出抗诉，反映了该案的重要性。本案中，最高检主张立法应当力求减少法条的重复，援引条款是为了使表达更简洁，因此不必重复所有的量刑档次。最高检以《刑法》第二百八十五条第三款为例作出说明。与第一百八十条第四款类似，第二百八十五条第三款仅以“情节严重的，依照前款的规定处罚”来引用前款的量刑规定。最高法及最高检曾通过司法解释明确指出第二百八十五条第三款包

侧边栏1：

《刑法》第一百八十条

第一款

证券、期货交易内幕信息的知情人员或者非法获取证券、期货交易内幕信息的人员，在涉及证券的发行，证券、期货交易或者其他对证券、期货交易价格有重大影响的信息尚未公开前，买入或者卖出该证券，或者从事与该内幕信息有关的期货交易，或者泄露该信息，或者明示、暗示他人从事上述交易活动，**情节严重**的，处五年以下有期徒刑或者拘役，并处或者单处违法所得一倍以上五倍以下罚金；**情节特别严重**的，处五年以上十年以下有期徒刑，并处违法所得一倍以上五倍以下罚金。（强调后加）

第四款

证券交易所、期货交易所、证券公司、期货经纪公司、基金管理公司、商业银行、保险公司等金融机构的从业人员以及有关监管部门或者行业协会的工作人员，利用因职务便利获取的**内幕信息以外的其他未公开的信息**，违反规定，从事与该信息相关的证券、期货交易活动，或者明示、暗示他人从事相关交易活动，**情节严重**的，依照第一款的规定处罚。（强调后加）

刘鸣赫是中国指导性案例项目2017年中国案例*见解*™写作比赛的获胜者、北京市尚权律师事务所资深律师兼全国律师协会刑事专业委员会副秘书长张青松律师的助理。刘先生专门从事刑事辩护工作，曾参与江苏省某市信托公司董事长受贿案、华北某国家级开发区管委会主任滥用职权案等刑事案件的辩护。他获北京大学法学学士学位，并被评为“北京大学优秀毕业生”。

含了“情节严重”和“情节特别严重”两个量刑档次（见**侧边栏2**）。[7] 最高检由此类推，认为应将第一百八十条第四款中的“情节严重”视为定罪条款。

最高法不仅接纳了该观点，还指出《刑法》中“情节严重”同时作为量刑条款的条文无一例外均在其后列明了具体的法定刑，以支持将第一百八十条第四款中的“情节严重”（其后没有列明具体法定刑）应仅被视为定罪条款。在此基础上，再审判决参照了“内幕交易罪”的量刑标准（见**侧边栏3**），[8] 确定马乐利用未公开信息交易的行为属“情节特别严重”，适用五年以上十年以下有期徒刑的法定刑。

对《马乐案》再审判决的商榷

最高法在《马乐案》中的说理一定程度上符合法理，但笔者认为，这样的解释方法存在一些问题：

其一，《刑法》第一百八十条第一款和第四款中的两个“情节严重”被赋予了不同的含义——第一款中的是量刑条款，指向一个量刑档次；而第四款中的则是定罪条款，指向两个量刑档次。[9] 这种“同一表述、不同含义”的解释方法会否“启发”其他案件用类似解释方法解读其他表述，从而给《刑法》带来更大的不确定性？

刘鸣赫

其二，最高法在《马乐案》中的解释方法使得《刑法》第一百八十条第四款中“情节严重的”这一表述稍显赘余。因为值得注意的是，《刑法》中援引定罪条款未必要写明这种表述。例如，《刑法》第二百六十五条在援引第二百六十四条时就未写明“数额较大的”等表述（见**侧边栏4**）。第一百八十条第四款中有“情节严重的”一词，是否正表明它有特别作用，即其亦作为量刑条款？

其三，从更宏观的视角看，本案再审判决在法律解释存在争议时未选择有利被告的解释方法，没有满足部分学者所主张的法律解释“存疑有利被告”的要求，[10] 在学理上存在讨论的空间。

《马乐案》的再审判决还有另一点局限性。该判决作出了重要的判断：“利用未公开信息交易罪”与“内幕交易、泄露内幕信息罪”的违法与责任程度相当，故而法定刑亦应相当。然而，就相关信息这一核心犯罪构成要件的认定来看，“内幕交易罪”及“泄露内幕信息罪”的标准都要严于“利用

侧边栏2：

《刑法》第二百八十五条第三款

提供专门用于侵入、非法控制计算机信息系统的程序、工具，或者明知他人实施侵入、非法控制计算机信息系统的违法犯罪行为而为其提供程序、工具，**情节严重的，依照前款的规定处罚。**（强调后加）

《最高人民法院、最高人民检察院关于办理危害计算机信息系统安全刑事案件应用法律若干问题的解释》

第三条

提供侵入、非法控制计算机信息系统的程序、工具，具有下列情形之一的，应当认定为刑法第二百八十五条第三款规定的“**情节严重**”：

（一）[…]；

（二）[…]；

（三）[…]；

（四）[…]；

（五）[…]；

（六）其他情节严重的情形。

实施前款规定行为，具有下列情形之一的，应当认定为提供侵入、非法控制计算机信息系统的程序、工具“**情节特别严重**”：

（一）[…]；

（二）其他情节特别严重的情形。

（强调后加）

侧边栏3：

《最高人民法院、最高人民检察院关于办理内幕交易、泄露内幕信息刑事案件具体应用法律若干问题的解释》

第七条

在内幕信息敏感期内从事或者明示、暗示他人从事或者泄露内幕信息导致他人从事与该内幕信息有关的证券、期货交易，具有下列情形之一的，应当认定为刑法第一百八十条第一款规定的“**情节特别严重**”：

（一）证券交易成交额在二百五十万元以上的；

（二）期货交易占用保证金数额在一百五十万元以上的；

（三）获利或者避免损失数额在七十五万元以上的；

（四）具有其他特别严重情节的。

（强调后加）

侧边栏4：

《刑法》第二百六十四条

盗窃公私财物，**数额较大的**，或者多次盗窃、入户盗窃、携带凶器盗窃、扒窃的，处三年以下有期徒刑、拘役或者管制，并处或者单处罚金；**数额巨大或者有其他严重情节的**，处三年以上十年以下有期徒刑，并处罚金；**数额特别巨大或者有其他特别严重情节的**，处十年以上有期徒刑或者无期徒刑，并处罚金或者没收财产。

《刑法》第二百六十五条

以牟利为目的，盗接他人通信线路、复制他人电信码号或者明知是盗接、复制的电信设备、设施而使用的，**依照本法第二百六十四条的规定定罪处罚**。

（强调后加）

未公开信息交易罪”，特别是“未公开信息”的定义即“内幕信息”以外的其他信息。[11] 简单而言，内幕信息与未公开信息的性质有所不同，内幕交易与利用未公开信息交易的性质亦不尽相同。内幕信息多与公司经营直接相关，和证券、期货的价格有紧密的联系。更重要的是，内幕交易与利用未公开信息交易的主体有明显差异：前者的主体主要为公司的董事、监事与高级管理人员，后者的主体则多为证券基金从业人员，公司股东对董事、监事与高级管理人员的信赖要高于对证券基金从业人员的依赖。因此，内幕交易是严重的背信犯罪，利用未公开信息交易的主观恶性在刑法评价上应当弱于内幕交易的主观恶性。

因此，笔者认为，尽管“利用未公开信息交易罪”适用与“内幕交易罪”相同的两档法定刑，但前者具体的量刑标准起点应该略高。具体而言，根据《关于办理内幕交易、泄露内幕信息刑事案件具体应用法律若干问题的解释》，认定“情节严重”与“情节特别严重”，证券交易成交额需分别达到50万元与250万元，期货交易占用保证金数额需分别达到30万元与150万元，获利或避免损失需分别达到15万元与75万元。与之相对应的，“利用未公开信息交易罪”的情节仅达到这些标准尚不能直接适用相应法定刑，而需要达到明显高于“内幕交易罪”的量刑标准的程度，才可分别适用两个档次的法定刑。

但《马乐案》的再审判决却未针对以上讨论的这一不同进行分析，而着重强调了利用未公开信息交易的危害。显见，该判决受到一定的政策导向影响，针对中国基金行业当时“老鼠仓”频发的现实，特别是2015年“千股跌停”的情况，[12] 体现了从严打击的态度。事实上，该判决明显提高了“利用未公开信息交易罪”的量刑力度。例如，本案再审之前，2011年10月的《上海市静安区人民检察院诉许春茂利用未公开信息交易案》[13] 和2015年2月的《诉张敦勇利用未公开信息交易罪一案》[14]的涉案金额为9000余万元到1.5亿元不等，但因两名被告人具有自首情节，均被判处缓刑。但在《马乐案》再审宣判之后，2016年4月的《厉建超利用未公开信息交易案》被认定为“情节特别严重”。[15] 尽管厉建超同时具有自首情节，但却被判处有期徒刑三年半，未处缓刑。

指导案例61号与其影响

尽管存在上述争议，《马乐案》成为了指导案例61号。其最直接意义是如果后续案件“在基本案情和法律适用方面”与指导案例61号相类似，法院“应当参照”该案例的“裁判要点作出裁判”。[16] 指导案例61号的“裁判要点”是：

> 刑法第一百八十条第四款规定的利用未公开信息交易罪援引法定刑的情形，应当是对第一款内幕交易、泄露内幕信息罪全部法定刑的引用，即利用未公开信息交易罪应有“情节严重”“情节特别严重”两种情形和两个量刑档次。

根据最高法的《中国裁判文书网》，这一裁判要点已被应用于两个后续案件。在《李涛利用未公开信息交易案二审刑事判决书》[17]和《罗泽萍等利用未公开信息交易罪上诉一案》[18]中，合议庭均通过援引指导案例61号来论证“利用未公开信息交易罪”具有“情节特别严重”的情形与相应量刑档次，以此作为裁判理由。

“[…]该判决受到一定的政策导向影响，针对中国基金行业当时“老鼠仓”频发的现实，[…]体现了从严打击的态度。”

值得注意的是，指导案例61号具有的指导性，意味着最高检及最高法的解释方式很有可能会被视作类似问题优先适用的方法。不过目前在《刑法》中，除第一百八十条外，仅有第二百八十五条第三款（援引该条第二款中的法定刑）及第二百八十六条第二款和第三款（援引该条第一款中的法定刑）这几处存在使

用“情节/后果严重的，依照前款处理”的表述方式援引条款，且被引用的条款规定了“情节/后果严重的”、“情节/后果特别严重的”等多个量刑档次的情况。换句话说，只有上述这几个条款可能存在“引用的是前款中的一个还是全部的量刑档次”的争议。而其中第二百八十五条已得到了明确的解释。[19] 因此，指导案例61号所确定的解释方法几乎不会直接影响现行《刑法》中其他条文的解释。当然，如果未来的刑法修正案增加了采用此类援引形式的条文，指导案例61号确立的解释方法很可能得到参照。

结论

最高法就《马乐案》作出的再审判决的意义不仅在于明确了“利用未公开信息交易罪”具有“情节严重”、“情节特别严重”两个量刑档次，更在于改变了之前司法实践中对该罪从轻处理的情况。基于利用未公开信息交易的主观恶性弱于内幕交易的主观恶性，笔者认为前者罪行的具体量刑标准起点应略高于后者罪行。

> ***“[…]指导案例61号具有的指导性，意味着最高检及最高法的解释方式很有可能会被视作类似问题优先适用的方法。”***

尽管该再审判决中的法律解释方法存在一定瑕疵，但《马乐案》成为指导案例61号意味着此解释方法很有可能成为《刑法》目前和将来的援引法定刑条文解释的重要方法。这体现了最高法通过指导性案例引导刑事司法裁判的能力，也反映了发布指导性案例的方式相较发布司法解释更为灵活的特点。伴随着中国经济社会的飞速发展，指导性案例的灵活性能让司法机关更敏捷地处理经济犯罪案件的裁判以顺应经济政策的变化。■

* 此中国案例*见解*™的引用是：刘鸣赫，指导案例61号：明确“利用未公开信息交易罪”量刑档次及其意义，《中国法律连接》，第1期，第43页（2018年6月），*亦见于*斯坦福法学院中国指导性案例项目，中国案例*见解*™，2018年6月，https://cgc.law.stanford.edu/zh-hans/commentaries/clc-1-201806-insights-4-minghe-liu。
中文原文由Sean Webb、应允和Dr. Mei Gechlik编辑。载于本中国案例*见解*™的信息和意见作者对其负责，它们并不一定代表中国指导性案例项目的工作或意见。

[1] 《原审被告人马乐利用未公开信息交易案再审刑事判决书》（2015）刑抗字第1号刑事判决，2015年11月23日由最高人民法院作出，全文载于斯坦福法学院中国指导性案例项目网站，https://cgc.law.stanford.edu/zh-hans/judgments/spc-2015-xing-kang-zi-1-criminal-judgment。

[2] 《中华人民共和国刑法》，1979年7月1日通过，1979年7月6日公布，1980年1月1日起施行，1997年3月14日修订，1997年10月1日起施行，经十次修正，最新修正于2017年11月4日，2017年11月4日起施行，http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=703dba7964330b85bdfb。
现行的第一百八十条是自2009年2月《中华人民共和国刑法修正案（七）》施行后，一直保持不变。*见*《中华人民共和国刑法修正案（七）》，2009年2月28日通过和公布，同日起施行，http://www.gov.cn/flfg/2009-02/28/content_1246438.htm。

[3] 一审判决认定为18833374.74元，再审判决认定一审对此数额存在计算错误，并纠正数额为19120246.98元。*见*《马某利用未公开信息交易罪一审刑事判决书》（2014)深中法刑二初字第27号刑事判决，2014年3月24日由广东省深圳市中级人民法院作出，全文载于斯坦福法学院中国指导性案例项目网站，https://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2014-shen-zhong-fa-xing-er-chu-zi-27-criminal-judgment。

[4] 《马乐利用未公开信息交易二审刑事裁定书》（2014)粤高法刑二终字第137号刑事裁定，2014年10月20日由广东省高级人民法院作出，全文载于斯坦福法学院中国指导性案例项目网站，https://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2014-yue-gao-fa-xing-er-zhong-zi-137-criminal-ruling。

[5] *见*《原审被告人马乐利用未公开信息交易案再审刑事判决书》（2015)刑抗字第1号刑事判决，注释1。

[6] 《马乐利用未公开信息交易案》，斯坦福法学院中国指导性案例项目，中文指导性案例(CGC61)，2016年7月6日（最终版本），https://cgc.law.stanford.edu/zh-hans/guiding-cases/guiding-case-61。

[7] 《最高人民法院、最高人民检察院关于办理危害计算机信息系统安全刑事案件应用法律若干问题的解释》，2011年6月20日由最高人民法院审判委员会、2011年7月11日由最高人民检察院通过，2011年8月1日公布，2011年9月1日起施行，http://sxlyfy.chinacourt.org/public/detail.php?id=247。

[8] 《最高人民法院、最高人民检察院关于办理内幕交易、泄露内幕信息刑事案件具体应用法律若干问题的解释》，2011年10月31日由最高人民法院审判委员会、2012年2月27日由最高人民检察院通过，2012年3月29日公布，2012年6月1日起施行，http://www.csrc.gov.cn/pub/newsite/flb/flfg/sfjs_8249/201312/t20131205_239352.html。

[9] 这也是《马乐案》再审中律师辩护、辩方专家论证的主要意见。

[10] *见，例如*，邢馨宇，有利被告的定位，《法学》，2012年第2期；张建军，立法意旨不明才可作有利于被告人解释，《检察日报》，2014年5月7日，第3版。

[11] 《中华人民共和国刑法》，注释2，第一百八十条第四款。有关此主题的更多讨论，见陈兴良，《规范刑法学》（中国人民大学出版社2013年第2版），633–634页。

[12] *见*2015年，我们所经历的千股跌停，《证券时报网》，2015年8月24日，http://kuaixun.stcn.com/2015/0824/12424778.shtml。

[13] 《上海市静安区人民检察院诉许春茂利用未公开信息交易案》，2011年10月14日由上海市静安区人民法院作出，《最高人民法院公报》，2012年第10期（总第192期）；孙玮、魏凯，许春茂利用未公开信息交易案——利用未公开信息交易罪的司法认定，《人民司法·案例》，2013年第4期。

[14] 《诉张敦勇利用未公开信息交易罪一案一审刑事判决书》(2015)沪一中刑初字第26号刑事判决，2015年2月28日由上海市第一中级人民法院作出，http://wenshu.court.gov.cn/content/content?DocID=bdae8ee3-e189-49b3-bdba-7971582287a2。

[15] 《厉建超利用未公开信息交易案》(2016)鲁刑终146号刑事判决，2016年4月15日由山东省高级人民法院作出，http://wenshu.court.gov.cn/content/content?DocID=cc295ba4-19b7-4996-9163-292e363a1a77。

[16] 《〈最高人民法院关于案例指导工作的规定〉实施细则》，第九条，2015年4月27日由最高人民法院审判委员会通过，2015年5月13日公布，同日起施行，斯坦福法学院中国指导性案例项目，中文指导性案例规则，2015年6月12日（最终版本），https://cgc.law.stanford.edu/zh-hans/guiding-cases-rules/20150513-chinese。

[17] 《李涛利用未公开信息交易案二审刑事判决书》(2017)京刑终153号刑事判决，2017年9月28日由北京市高级人民法院作出，http://wenshu.court.gov.cn/content/content?DocID=a7b615f2-c7b4-4aa5-bccf-a8130010c609。

[18] 《罗泽萍等利用未公开信息交易罪上诉一案》(2016)京刑终60号刑事判决，2016年8月26日由北京市高级人民法院作出，http://wenshu.court.gov.cn/content/content?DocID=28f52d7b-5d9e-443a-9414-c8d592a044fc。

[19] 《最高人民法院、最高人民检察院关于办理危害计算机信息系统安全刑事案件应用法律若干问题的解释》，注释7。

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Through *Siemens v. Golden Landmark*, China Reforms Arbitration for Free Trade Zones in Order to Prepare for "Belt & Road"*

Tereza Gao and Edison Li
Winners of the 2017 China Cases *Insights*™ Writing Contest
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The Takeaway

In Belt & Road ("B&R") Typical Case 12 ("TC12"), *Siemens v. Golden Landmark*,[1] the Supreme People's Court's (the "SPC") explanation of the significance of the case to China's Belt and Road Initiative (the "BRI") is unclear. A review of the SPC's pre- and post-TC12 actions reveals that the liberal interpretation of the term "foreign-related civil relationship" in the case (resulting in an unprecedented enforcement of a foreign award involving legal persons of China located in a free trade zone (an "FTZ")) is part of a bigger plan to develop a sound B&R dispute resolution mechanism. Given the importance of FTZs to the BRI, reforms in these zones are probably bellwethers for how the mechanism will evolve, and practitioners interested in B&R projects should follow these reforms closely.

The Rundown

Belt & Road ("B&R") Typical Case 12 ("TC12"), *Siemens International Trading (Shanghai) Co., Ltd. and Shanghai Golden Landmark Company Limited, A Case of an Application for the Recognition and Enforcement of a Foreign Arbitral Award* ("*Siemens v. Golden Landmark*"), is a brief summary of the civil ruling rendered by the No. 1 Intermediate People's Court of Shanghai Municipality (the "Shanghai IPC") on November 27, 2015.[2] The dispute involved in the case arose out of a contract for the supply of goods between Siemens International Trading (Shanghai) Co., Ltd. ("Siemens") and Shanghai Golden Landmark Company Limited ("Golden Landmark"), two wholly foreign-owned enterprises ("WFOEs") registered in the China (Shanghai) Pilot Free Trade Zone (an "FTZ"). The contract was governed by PRC law and stipulated that the parties had to submit any disputes to arbitration before the Singapore International Arbitration Centre ("SIAC").

On September 21, 2007, Golden Landmark initiated arbitration proceedings at SIAC, requesting that an award be made to rescind the contract and to stop its obligations to pay for the goods. After an unsuccessful challenge to the arbitral tribunal's jurisdiction, Siemens brought a counterclaim, demanding payment for all of the goods, for interest, and for compensation for other losses. In 2011, SIAC rendered an arbitral award rejecting Golden Landmark's arbitration claim and supporting Siemens's arbitration counterclaim.

When Golden Landmark failed to fully perform its obligations under the award, Siemens sought recognition and enforcement of the award before the Shanghai IPC. Golden Landmark raised an objection, alleging that the parties' agreement to submit disputes to a foreign arbitration institution for arbitration was invalid because the contractual relationship at issue lacked foreign-related elements. Golden Landmark relied on the fact that both parties were legal persons of China and the place for the performance of the contract was within China.

After reporting the case level by level within China's court system to reach the Supreme People's Court (the "SPC") and receiving the highest court's guidance via a formal reply issued in October 2015 (the "*Reply*"),[3] the Shanghai IPC followed the SPC's reasoning (see below) and rendered a groundbreaking ruling in November 2015 to recognize and enforce the arbitral award. The ruling was further summarized and re-issued as TC12 by the SPC in May 2017 to provide courts in mainland China ("people's courts") with guidance on how to handle similar subsequent cases.

The Breakdown

The SPC took a new position in *Siemens v. Golden Landmark*. How is it different from the SPC's prior position? More importantly, what drove the SPC to change its position?

SPC's Restrictive Approach before Siemens v. Golden Landmark

Before *Siemens v. Golden Landmark*, the SPC adopted a restrictive approach to handling issues regarding "foreign" arbitration of disputes between two legal persons of China. The restrictive approach is best explained by the SPC's reply, issued in August 2012, to the request for instructions made by the High People's Court of Jiangsu Province:[4]

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> [...] the parties prepared, in the *Trade Agreement*, an arbitration clause stipulating that related disputes could be submitted to the International Chamber of Commerce in Beijing for arbitration. The two parties who entered into the *Trade Agreement are legal persons of China, the subject-matter was in China, and the agreement was entered into and was to be performed in China.* There are no elements constituting a foreign-related civil relationship. The agreement is not a type of foreign-related contract.
>
> As the jurisdiction of arbitration is a power conferred by law and *our country's law does not provide that parties may submit their disputes without foreign-related elements to overseas arbitration institutions or ad hoc arbitration outside the territory of China*, there was no legal basis for the parties in this case to agree to submit related disputes to the International Chamber of Commerce for arbitration. [We] agree with your court's review opinion determining that the arbitration agreement is invalid. (emphasis added)

In December 2012, four months after the issuance of the above-mentioned reply, the SPC passed the *Interpretation (I) of the Supreme People's Court on Several Issues Concerning the Application of the "Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relationships"* (the "*Interpretation (I)*"), in which four circumstances under which a contractual relationship can be determined to be a foreign-civil relationship were provided for. This list of four circumstances ends with the phrase "other circumstances under which [the civil relationship] may be determined to be a foreign-related civil relationship" (the "'other circumstances' criterion of the *Interpretation (I)*")[5] (see **Sidebar**). Since then, people's courts have followed these five criteria to determine the nature of a civil relationship. In cases where a foreign arbitral award was issued to resolve a dispute arising from a civil relationship that lacked "foreign-related" elements, people's courts generally refuse to recognize and enforce the award on the basis of two provisions of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the "*New York Convention*"):[6] (i) that there is no valid arbitration agreement between the parties (Article V(1)(a)) or (ii) that "the recognition or enforcement of the award would be contrary to the public policy" of China (Article V(2)(b)).

Tereza Gao (left) and Edison Li (middle)

SPC's Liberal Interpretation of "Foreign-Related Civil Relationship"

In *Siemens v. Golden Landmark*, the SPC changed its position to one that led to an unprecedented enforcement of an arbitral award concerning a dispute that would otherwise have been considered "domestic". Although Siemens and Golden Landmark were legal persons of China, the subject-matter was in China, and the agreement was entered into and expected to be performed in China, the SPC, as explained in the *Reply*, relied on the "other circumstances" criterion of the *Interpretation (I)* to determine that there was a foreign-related civil relationship. In the *Reply*, the SPC pointed out, *inter alia*, some circumstances that distinguished this case from typical "domestic" cases: the case took place in an FTZ, the two companies were WFOEs and had participated in the entire arbitration proceeding, and Golden Landmark had partially performed its obligations under the arbitral award.

The *Reply*, however, is brief. TC12 is a better source for understanding the SPC's reasoning because it was prepared

by the SPC to summarize the ruling rendered by the Shanghai IPC, which was obligated to follow the SPC's instructions. As stated in TC12, the civil relationship at issue was determined to be "foreign-related" for two reasons: (1) Siemens and Golden Landmark were WFOEs registered in an FTZ and had close relationships with their investors outside China; and (2) "the characteristics of the performance" of the supply of goods contract had foreign-related elements because "the course of circulation of the subject-matter of the contract also had certain characteristics of an international sale and purchase of goods": the goods involved in the case were first transported from outside China to the FTZ, where procedures for customs clearance were handled later, before they left the FTZ (only at this point were the procedures for the importation of the goods considered to be complete). Once the civil relationship was determined to be "foreign-related", the arbitration clause was thus valid.

> ***"[…] why was the Supreme People's Court taking these measures within such a short time to provide, for the construction of free trade zones, judicial safeguards that go beyond the scope of* Siemens v. Golden Landmark*?"***

The Shanghai IPC then explained how the content of the arbitral award did not conflict with China's public policy, and the court, therefore, ruled to recognize and enforce the award. The court also relied on the legal principles of estoppel, good faith, and fairness and reasonableness to rule against Golden Landmark because the company's initial recognition of the validity of the arbitration clause (as reflected in its participation in all the arbitration proceedings and partial performance of the obligations determined by the award) and subsequent denial of the clause did not conform with these principles.

SPC's Changed Position and "Belt & Road"

A closer look at the *Reply* shows that the SPC's liberal interpretation of the term "foreign-related civil relationship" was related to the B&R Initiative (the "BRI"). In the *Reply*, the SPC stated explicitly that the new interpretation was to, *inter alia*, coherently meet the requirements of the *Several Opinions of the Supreme People's Court Concerning Judicial Services and Safeguards Provided by the People's Courts for the "Belt and Road" Construction* (the "*B&R Construction Opinions*"),[7] which was issued in 2015, and follow the spirit of supporting "the pioneering trial implementation of rule-of-law construction in free trade zones".

In Paragraph 8 of the *B&R Construction Opinions*, the SPC sets some goals related to arbitration, including the following:

> [The people's courts] shall strengthen, in accordance with law, the judicial review of arbitral awards involving parties from countries along the "Belt and Road" routes and shall *promote the important roles of international commercial and maritime arbitrations in the construction of the "Belt and Road"*. […. The people's courts] shall explore methods and ways for the judiciary to support the optimization of the roles of *trade, investment, and other international dispute resolution mechanisms*; shall safeguard the performance of obligations of agreements of countries along the "Belt and Road" routes such as agreements on bilateral investment protection and *agreements on free trade zones*; and shall give support to the resolution by arbitration of disputes in the construction of the "Belt and Road". (emphasis added)

These details from the Reply and the *B&R Construction Opinions* shed light on the emphasis placed by the SPC on FTZs and the BRI in the SPC's explanation of the significance of *Siemens v. Golden Landmark*. In TC12, the SPC wrote:

> *Pilot free trade zones are foundational platforms, important nodes, and strategic footholds for China's promotion of the "Belt and Road" construction.* […]
>
> [The ruling rendered in *Siemens v. Golden Landmark*] has put into practice the concept of [rendering judgments] "conducive to the enforcement of [arbitral] awards" [stated in] the *New York Convention* and has

> ***Interpretation (I) of the Supreme People's Court on Several Issues Concerning the Application of the "Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relationships"***
>
> **Article 1**
>
> Where a civil relationship falls under any of the following circumstances, a people's court may determine it to be a foreign-related civil relationship:
> 1. either one or both parties is/are foreign citizen(s), foreign legal person(s), or other organization(s)/ stateless person(s);
> 2. the habitual residence(s) of either one or both parties is/are located outside the territory of the People's Republic of China;
> 3. the subject-matter is outside the territory of the People's Republic of China;
> 4. the legal fact that creates, changes, or terminates the civil relationship happens outside the territory of the People's Republic of China; or
> 5. other circumstances under which [the civil relationship] may be determined to be a foreign-related civil relationship.

> reflected China's fundamental position of abiding by its obligations under international treaties. At the same time, this case, "from points to surfaces", drives forward the groundbreaking reform of [allowing] enterprises within pilot free trade zones to choose arbitration outside the territory [of China]. *[This case] is a successful example of judicial experience that can be replicated and extended to [other cases involving] pilot free trade zones.* (emphasis added)

"A deeper understanding of [Typical Case 12] and actions taken by the Supreme People's Court before and after the case allows one to further predict that more reforms favorable to foreign businesses will be introduced in free trade zones […]."

The SPC did not simply stand by and let the "successful example of judicial experience" in *Siemens v. Golden Landmark* become gradually replicated and extended to all of the eleven FTZs in China[8] through the adjudication of similar cases. Instead, in January 2017, the SPC issued the *Opinions of the Supreme People's Court on the Provision of Judicial Safeguards for the Construction of Pilot Free Trade Zones*[9] (the "*2017 Opinions*"), Paragraph 9 of which provides:

> where wholly foreign-owned enterprises registered in pilot free trade zones mutually agree to submit a commercial dispute to arbitration outside the territory [of China], [a people's court] should not determine that the related arbitration agreement is invalid merely on the grounds that the [enterprises'] dispute does not have foreign-related elements.

This provision "codifies" what was decided in *Siemens v. Golden Landmark*, but its scope is broader than the case, where the two WFOEs were registered in the same FTZ. The first part of this provision suggests that WFOEs registered in *any* one of China's FTZs are covered by the provision.

Paragraph 9 of the *2017 Opinions* also provides for two situations where "one or two of the parties are foreign-invested enterprises registered in a pilot free trade zone" and the two parties, say, Party A and Party B, have agreed to submit a commercial dispute to arbitration outside China. In the first situation, Party A submits a dispute to arbitration outside China but, after the related arbitral award is rendered, argues that the arbitration agreement is invalid. In the second situation, Party B does not raise an objection to the validity of the arbitration agreement during the proceedings of arbitration initiated by Party A but, after the related arbitral award is rendered, challenges the validity of the arbitration agreement on the grounds that the dispute does not have foreign-related elements. In either situation, according to Paragraph 9, "a people's court shall not support [the argument]."

A roundtable discussion with the China Cases Insights™ Writing Contest Winners at the CGCP 2018 Beijing Conference

The provision described in the preceding paragraph is a clear attempt by the SPC to "codify" the legal principles of estoppel, good faith, and fairness and reasonableness that were relied upon in ruling against Golden Landmark in *Siemens v. Golden Landmark*. A deviation from the case (where two parties were WFOEs registered in the same FTZ) is that only one party needs to be a "foreign-invested enterprise" (which, apart from WFOE, covers joint ventures) registered in an FTZ in China.

The above analysis leads to an intriguing question: why was the SPC taking these measures within such a short time to provide, for the construction of FTZs, judicial safeguards that go beyond the scope of *Siemens v. Golden Landmark*? The SPC's statement in TC12 that the above provisions of the *2017 Opinions* are "helpful for the construction of a more stable and predictable rule-of-law 'Belt and Road' business environment" suggests that the answer is related to the BRI. But what is the urgent matter in the BRI that needs to be addressed so rapidly by the SPC, to the extent that the highest court had to issue the *2017 Opinions* in January 2017, followed by the release of TC12 to further bolster the impact of the *2017 Opinions*?

Recent developments show that the answer is the need to set up a cost-efficient and fair B&R dispute resolution mechanism to facilitate China's global economic expansion. In January 2018, China's leaders passed, at the second meeting of the Leading Group for Deepening Overall Reform of the 19th Central Committee of the Communist Party of China, a guideline on the establishment of a dispute resolution mechanism to resolve, in accordance with law, disputes among the B&R countries.[10] The mechanism will reportedly provide litigation, arbitration, and mediation that are based on systems used in China, with appropriate adaptations.[11] With respect to litigation, China has already announced that it will establish three courts, in Xi'an, Shenzhen, and Beijing, to handle B&R

disputes, all of which will be under the leadership of the SPC, though related details remain unclear.[12]

As for arbitration, Western models have drawn concerns because they are generally complicated, time-consuming, and costly. Most B&R countries are developing countries with limited economic strength and are unlikely to find these models suitable. Neither would China, the main player in these projects, because these models generally apply laws from Western countries and use English as the common language.[13] It is thus not surprising that China would like to build a B&R arbitration system that is based on its own legal system. Yet there is an urgent need for this system to be seen as fair and stable. This explains the SPC's efforts in rolling out a series of measures to quickly reform arbitration in China's FTZs. In TC12, the SPC put it this way:

> *Pilot free trade zones are [….] strategic footholds for China's promotion of the "Belt and Road" construction.* Aligning [China's practices] with common international practices, supporting the development of pilot free trade zones, and improving international arbitration and other non-litigation dispute resolution mechanisms will [all] help strengthen the international credibility and influence of China's rule of law. (emphasis added)

The Conclusion

TC12, *Siemens v. Golden Landmark*, marks significant steps by people's courts to stay in line with China's rapid economic development and further internationalization, heading towards a more expansive approach to recognize and enforce foreign arbitral awards. An obvious lesson learned is that it would be wise for foreign businesses to establish their presence in FTZs to have the freedom to refer their disputes to foreign arbitration. A deeper understanding of the case and actions taken by the SPC before and after the case allows one to further predict that more reforms favorable to foreign businesses will be introduced in FTZs because China needs to build a B&R dispute resolution mechanism that is seen as fair by parties involved in B&R projects. TC12 exemplifies how much a short case can entail; practitioners must read all the telltales to chart their B&R course successfully. ■

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[1] 《西门子国际贸易（上海）有限公司与上海黄金置地有限公司申请承认和执行外国仲裁裁决案》 (*Siemens International Trading (Shanghai) Co., Ltd. and Shanghai Golden Landmark Company Limited, A Case of an Application for the Recognition and Enforcement of a Foreign Arbitral Award*), Stanford Law School China Guiding Cases Project, B&R *Cases*™, Typical Case 12 (TC12), Mar. 27, 2018 Edition, https://cgc.law.stanford.edu/belt-and-road/b-and-r-cases/typical-case-12.

[2] 《西门子国际贸易（上海）有限公司诉上海黄金置地有限公司申请承认和执行外国仲裁裁决一案一审民事裁定书》 (*Siemens International Trading (Shanghai) Co., Ltd. v. Shanghai Golden Landmark Company Limited, The First-Instance Civil Ruling of a Case of an Application for the Recognition and Enforcement of a Foreign Arbitral Award*) （2013）沪一中民认（外仲）字第2号民事裁定 ((2013) Hu Yi Zhong Min Ren (Wai Zhong) Zi No. 2 Civil Ruling), rendered by the No. 1 Intermediate People's Court of Shanghai Municipality on Nov. 27, 2015, full text available on the Stanford Law School China Guiding Cases Project's website, at https://cgc.law.stanford.edu/judgments/shanghai-2013-hu-yi-zhong-min-ren-wai-zhong-zi-02-civil-ruling.

[3] 《最高人民法院关于西门子国际贸易（上海）有限公司申请承认与执行外国仲裁裁决一案的请示的复函》 (*Reply of the Supreme People's Court to the Request for Instructions on a Case of an Application by Siemens International Trading (Shanghai) Co., Ltd. for the Recognition and Enforcement of a Foreign Arbitral Award*), issued on and effective as of Oct. 10, 2015, http://en.pkulaw.cn/display.aspx?cgid=295500&lib=law.

[4] 《最高人民法院关于江苏航天万源风电设备制造有限公司与艾尔姆风能叶片制品（天津）有限公司申请确认仲裁协议效力纠纷一案的请示的复函》 (*Reply of the Supreme People's Court to the Request for Instructions on a Case of an Application for the Determination of the Validity of an Arbitration Agreement Between Jiangsu Aerospace Wanyuan Wind Power Equipment Manufacturing Co., Ltd. and LM Wind Energy Blade Products (Tianjin) Co., Ltd.*), issued on and effective as of Aug. 31, 2012, https://law.wkinfo.com.cn/legislation/detail/MTAxMDAwOTgxODA%3D.
For more discussion of this reply and related topics, see GAO Feng, TENG Haidi, & WU Mingyan, *Dispute Resolution & Choice of Law in China-Related Contracts*, Insights, Oct. 16, 2015, http://www.kwm.com/knowledge/insights/dispute-resolution-and-choice-of-law-in-china-related-contracts-20151016.

[5] 《最高人民法院关于适用〈中华人民共和国涉外民事关系法律适用法〉若干问题的解释（一）》 (*Interpretation (I) of the Supreme People's Court on Several Issues Concerning the Application of the "Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relationships"*), passed by the Adjudication Committee of the Supreme People's Court on Dec. 10, 2012, issued on Dec. 28, 2012, effective as of Jan. 7, 2013, http://www.chinacourt.org/law/detail/2012/12/id/146055.shtml.

[6] Full-text English and Chinese versions of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* are available on the Convention's website, http://www.newyorkconvention.org.

[7] 《最高人民法院关于人民法院为"一带一路"建设提供司法服务和保障的若干意见》 (*Several Opinions of the Supreme People's Court Concerning Judicial Services and Safeguards Provided by the People's Courts for the "Belt and Road" Construction*), issued on and effective as of June 16, 2015, http://www.chinacourt.org/law/detail/2015/06/id/148302.shtml.

[8] For more information about China's FTZs, see, e.g., *China Focus: China FTZs Expand Opening for Foreign Business*, Xinhua, Jan. 14, 2018, http://www.xinhuanet.com/english/2018-01/14/c_136894961.htm; Dezan Shira & Associates, *Investing in China's Free Trade Zones*, China Briefing, Sept. 21, 2017, http://www.china-briefing.com/news/2017/09/21/investing-in-chinas-free-trade-zones.html.

[9] 《最高人民法院关于为自由贸易试验区建设提供司法保障的意见》 (*Opinions of the Supreme People's Court on the Provision of Judicial Safeguards for the Construction of Pilot Free Trade Zones*), issued on and effective as of Dec. 30, 2016, http://www.court.gov.cn/zixun-xiangqing-34502.html.

[10] *Senior Leaders Stress Trade Dispute Mechanism for Belt & Road*, Xinhua, Jan. 24, 2018, http://www.china.org.cn/business/2018-01/24/content_50288588.htm.

[11] *Id.*

[12] *See* Janne Suokas, *China to Set Up Belt and Road Court for Settling Disputes*, gbtimes.com, Jan. 25, 2018, https://gbtimes.com/china-to-set-up-belt-and-road-court-for-settling-disputes; Dezan Shira & Associates, *Confusion over Dispute Resolution at China's New Belt and Road Courts*, China Briefing, Feb. 2, 2018, http://www.china-briefing.com/news/2018/02/02/bilateral-confusion-dispute-resolution-chinas-new-belt-road-courts.html.

[13] *See* Sabena Siddiqui, *Beijing Plans New Mechanism for Belt and Road Arbitration*, Asia Times, Feb. 7, 2018, http://www.atimes.com/belt-road-arbitration-new-mechanism.

通过《西门子诉黄金置地案》，中国改革涉及自由贸易区的仲裁，为“一带一路”作出准备*

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要点

在一带一路典型案例12《西门子诉黄金置地案》中，[1] 最高人民法院（“最高法”）就该案对于中国一带一路倡议意义的解释并不清晰。通过观察最高法在发布典型案例12前后的一些行为，发现该案中对“涉外民事关系”一词的从宽解释（导致涉及位于自由贸易区（“自贸区”）的中国法人的外国仲裁裁决被史无前例地执行）是作为发展健全的一带一路争端解决机制这一更为庞大计划的一部分。鉴于自贸区对于一带一路倡议的重要性，在这些地区的改革很可能成为该机制将如何演变的领头羊，对一带一路项目有兴趣的执业者应该密切关注这些改革。

概要

一带一路典型案例12《西门子国际贸易（上海）有限公司与上海黄金置地有限公司申请承认和执行外国仲裁裁决案》（“《西门子诉黄金置地案》”）是对上海市第一中级人民法院（“上海一中院”）于2015年11月27日作出的民事裁定的概要。[2] 该案所涉的争议由西门子国际贸易（上海）有限公司（“西门子”）和上海黄金置地有限公司（“黄金置地”）之间的一份货物供应合同所引起，两家公司均为在中国（上海）自由贸易试验区（“自贸区”）注册的外商独资企业。合同受中国法管辖并且双方约定须把任何争议提交新加坡国际仲裁中心进行仲裁解决。

2007年9月21日，黄金置地在新加坡国际仲裁中心提起仲裁，要求解除合同、停止其支付货款的义务。对仲裁庭的管辖权作出挑战但不成功后，西门子提出反请求，要求支付全部货款、利息并赔偿其他损失。2011年，新加坡国际仲裁中心作出裁决，驳回黄金置地的仲裁请求，支持西门子的仲裁反请求。

在黄金置地未能完全履行仲裁裁决确定的义务的情况下，西门子向上海一中院请求承认和执行该仲裁裁决。黄金置地抗辩认为，案涉合同关系不具有涉外因素，故双方约定将争议提交外国仲裁机构仲裁的协议无效。黄金置地主要依赖双方当事人均为中国法人，合同履行地也在国内的事实。

上海一中院逐级报告至最高人民法院（“最高法”）。从最高法于2015年10月所发出的正式答复（“《复函》”）[3] 获得指导后，上海一中院遵循了最高法的推理（见下文）并在2015年11月作出了承认和执行涉案仲裁裁决这一突破性的裁定。该裁定在2017年5月被最高法进一步总结并发布为典型案例12，以就如何处理类似的后续案件向中国大陆法院（“人民法院”）提供指导。

分析

最高法在《西门子诉黄金置地案》中采取了新的立场。它与最高法之前的立场有何不同？更重要的是，是什么导致最高法改变了其立场？

最高法于《西门子诉黄金置地案》前的限制性方法

在《西门子诉黄金置地案》之前，最高法采取了限制性方法来处理两个中国法人之间争议提交“外国”仲裁的事宜。最高法于2012年8月作出回复江苏省高级人民法院请示的复函，对该限制性方法给予很好的阐释：[4]

> […] 当事人在《贸易协议》中订立了仲裁条款，约定有关争议事项可提交国际商会在北京仲裁。订立《贸易协议》的**双方当事人均为中国法人，标的物在中国，协议也在中国订立和履行**，无涉外民事关系的构成要素，该协议不属于涉外合同。由于仲裁管辖权系法律授予的权力，而**我国法律没有规定当事人可以将不具有涉外因素的争议交由境外仲裁机构或者在我国境外临时仲裁**，故本案当事人约定将有关争议提交国际商会仲裁没有法律依据。同意你院认定仲裁协议无效的审查意见。（强调后加）

2012年12月，即上述回复发出4个月后，最高法通过《最高人民法院关于适用〈中华人民共和国涉外民事关系法律适用法〉若干问题的解释（一）》（“《解释（一）》”），规定民事关系具有四种情形之一的，人民法院可以认定为涉外民事关系。这四种情形的列举以“可以认定为涉外民事关系的其他情形”为结尾（“《解释（一）》‘其他情形’的标准”）[5]（见**侧边栏**）。此后，人民法院遵循这五个标准来判定民事关系的性质。当案件中出现用外国仲裁裁决解决缺乏“涉外”因素的民事关系所引起的争议时，人民法院通常会根据《承认与执行外国仲裁裁决

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高律师是欧华律师事务所香港办事处的注册外国律师（纽约）。在此之前，她任职于该所旧金山办事处。高律师的主要业务包括复杂商事诉讼和国际仲裁，对处理知识产权纠纷、环境保护诉讼、雇佣事务和行政行为司法审查均有经验。

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公约》（“《纽约公约》”）的两项规定：[6] (i) 当事人之间没有有效的仲裁协议（第五條（一）(甲)）或 (ii) “承认或执行裁决有违该国公共政策者。”(第五條（二）(乙))，拒绝承认和执行涉案仲裁裁决。

最高法对“涉外民事关系”一词的从宽解释

在《西门子诉黄金置地案》中，最高法改变了其立场，史无前例地执行了涉及本应被认定为“国内”争议的仲裁裁决。尽管西门子和黄金置地均为中国法人，标的物在中国，协议也在中国订立和履行，但是最高法根据《解释（一）》“其他情形”的标准来认定涉外民事关系的存在，如其在《复函》中解释的那样。在《复函》中，最高法提到，本案存在一些有别于典型的“国内”案件的情况：本案属于涉自贸区案件，两公司均为外商独资企业并实际参与了全部仲裁程序，以及黄金置地也部分履行了仲裁裁决确定的义务。

但是，《复函》很简要。典型案例12是理解最高法推理的一个更好的途径，因为它是最高法用来概括上海一中院的裁定，而后者有义务遵循最高法的指示。如在典型案例12中提到的，系争民事关系被认定是“涉外”，具体理由有二：(1) 西门子和黄金置地均是在自贸区内注册的外商独资企业，并与其境外投资者关联密切；和 (2) 本案一份货物供应合同的“履行特征”具有涉外因素，这是由于“合同标的物的流转过程也具有一定的国际货物买卖特征”：案涉货物系先从中国境外运至自贸区内，适时办理清关完税手续后，再从区内流转到区外（至此货物进口手续方才完成）。一旦民事关系被认定为“涉外”，仲裁条款有效。

上海一中院随后解释了仲裁裁决内容如何没有与中国公共政策抵触，故该法院裁定承认和执行涉案仲裁裁决。上海一中院还根据禁止反言、诚实信用和公平合理等法律原则作出对于黄金置地不利的裁定，因为该公司最初承认仲裁条款有效（表现为其参与了全部仲裁程序和部分履行了仲裁裁决确定的义务）但随后否认该条款等行为不符合这些原则。

最高法改变的立场和“一带一路”

对《复函》再仔细分析后，会发现最高法对“涉外民事关系”一词的从宽解释与一带一路倡议有关。在《复函》中，最高法明确指出其新的解释，除了其他原因外，是为贯彻2015年发布的《最高人民法院关于人民法院为“一带一路”建设提供司法保障的若干意见》（“《“一带一路”建设意见》”）的要求，[7] 以及本着支持“自贸区法治建设可先行先试”的精神。

在《“一带一路”建设意见》第8段中，最高法列明了与仲裁有关的目标，包括以下内容：

> [人民法院] 依法加强涉沿线国家当事人的仲裁裁决司法审查工作，**促进国际商事海事仲裁在“一带一路”建设中发挥重要作用。**[…人民法院] 要探索司法支持**贸易、投资等国际争端解决机制**充分发挥作用的方法与途径，保障沿线各国双边投资保护协定、**自由贸易区协定**等协定义务的履行，支持“一带一路”建设相关纠纷的仲裁解决。（强调后加）

高尚（左）、李隽文（中）

这些《复函》和《“一带一路”建设意见》中的细节阐明了，最高法在解释《西门子诉黄金置地案》的意义时，对自贸区和一带一路倡议给予重视。在典型案例12中，最高法写道：

> **自贸试验区是中国推进“一带一路”建设的基础平台、重要节点和战略支撑。**[…]
>
> 本案裁定[…]践行了《纽约公约》“有利于裁决执行”的理念，体现了中国恪守国际条约义务的基本立场。同时，该案由点及面推动了自贸试验区

> 内企业选择境外仲裁的突破性改革，**是自贸试验区可复制可推广司法经验的一宗成功范例。**（强调后加）

最高法并没有简单袖手旁观，让《西门子诉黄金置地案》这“司法经验的一宗成功范例”通过类似案件的审判被逐渐复制并扩大至中国所有的11个自贸区。[8] 相反的，在2017年1月，最高法发布了《最高人民法院关于为自由贸易试验区建设提供司法保障的意见》（“《2017意见》”）。[9]《2017意见》第9段规定：

> 在自贸试验区内注册的外商独资企业相互之间约定商事争议提交域外仲裁的，不应仅以其争议不具有涉外因素为由认定相关仲裁协议无效。

该条款将《西门子诉黄金置地案》决定的事项“成文”，但其范围却广于该案例；在该案例中，两家外商独资企业均注册在同一自贸区内。该条款的第一部分意味着，在任何一个中国自贸区内注册的外商独资企业都适用该条款。

“[…]为什么最高法在这么短的时间内采取这些措施，为自贸区的建设，提供超出《西门子诉黄金置地案》范围的司法保障呢?”

《2017意见》第9段亦提供了两个情况，其中“一方或者双方均为在自贸试验区内注册的外商投资企业”且双方，比如甲方和乙方，约定将商事争议提交域外仲裁。在第一种情况中，甲方将争议提交域外仲裁，但相关仲裁裁决做出后，其又主张仲裁协议无效。在第二种情况中，乙方在甲方启动的仲裁程序中未对仲裁协议效力提出异议，但相关仲裁裁决做出后，乙方以有关争议不具有涉外因素为由主张仲裁协议无效。无论是哪种情况，根据第9段，“人民法院不予支持”。

上述段落中提到的条款是最高法将禁止反言、诚实信用和公平合理等法律原则“成文”的一次明确尝试，该原则在《西门子诉黄金置地案》中被依据作出不利于黄金置地公司的裁定。与该案中双方均为注册在同一自贸区的外商独资企业不同的是：该条款只需要一方是在中国自贸区内注册的“外商投资企业”（即除了外商独资企业外，还包括合资企业）。

上述分析引出一个有趣的问题：为什么最高法在这么短的时间内采取这些措施，为自贸区的建设，提供超出《西门子诉黄金置地案》范围的司法保障呢?最高法在典型案例12中提到，上述《2017意见》的条款“有助于构建更加稳定和可预期的‘一带一路’法治化营商环境”，这意味着答案与一带一路倡议有关。但是，一带一路倡议中的什么紧急事项需要最高法如此迅速地予以解决，以致于最高法要在2017年1月发布《2017意见》，又接着发布典型案例12以进一步扩大《2017意见》的影响呢?

近期的发展表明，答案是为了确立一个经济有效且公平的一带一路争端解决机制，以促进中国的全球经济扩张。2018年1月，中国领导人在中共十九届中央全面深化改革领导小组第二次会议中通过了一份指导方针，该指导方针是关于建设争端解决机制来依法解决一带一路国家之间的争议的。[10] 据报道，该机制将根据中国现有体系，加上适当改进，提供诉讼、仲裁和调解。[11] 就诉讼而言，中国已宣布其将在西安、深圳和北京设立三个在最高法的领导下的法院，处理一带一路争议，但是相关细节尚不明确。[12]

就仲裁而言，西方模式令人担忧，因为它们通常比较复杂、耗时且昂贵。大多数的一带一路国家是发展中国家，经济实力有限并且不太可能会觉得这些模式是合适的。作为这些项目的主要参与者，中国也不会觉得这些模式是合适的，因为这些模式通常适用西方国家的法律并以英语作为通用的语言。[13] 因此，中国希望打造一个基于其自身法律体系的一带一路仲裁体系并不令人感到奇怪。但是，该等体系非常需要被认为是公平且稳定的。这就解释了为什么最高法致力于推出一系列的措施，以迅速改革中国自贸区内的仲裁。在典型案例12中，最高法这样写道：

> **自贸试验区是中国推进“一带一路”建设的[…]战略支撑。**[…] 接轨国际通行做法，支持自贸试验区发展、健全国际仲裁以及其他非诉讼纠纷解决机制，有助于增强中国法治的国际公信力和影响力。（强调后加）

结论

典型案例12，即《西门子诉黄金置地案》，标志着人民法院采取重要步骤，以配和中国快速的经济发展和进一步的国际化，在承认和执行外国仲裁裁决上采用更包容的立场。一个明显的经验教训是，外国企业应当在自贸区注册，以便能够自由地将它们的争议提交外国仲裁。通过深入分析该案和最高法在该案前后

侧边栏：

《最高人民法院关于适用《中华人民共和国涉外民事关系法律适用法》若干问题的解释(一)》

第一条

民事关系具有下列情形之一的，人民法院可以认定为涉外民事关系：

（一）当事人一方或双方是外国公民、外国法人或者其他组织、无国籍人；
（二）当事人一方或双方的经常居所地在中华人民共和国领域外；
（三）标的物在中华人民共和国领域外；
（四）产生、变更或者消灭民事关系的法律事实发生在中华人民共和国领域外；
（五）可以认定为涉外民事关系的其他情形。

> *"通过深入分析[典型案例12]和最高法在该案前后的行为，我们可以进一步预测在自贸区将会有更多有利于外国企业的改革 [...]。"*

的行为，我们可以进一步预测在自贸区将会有更多有利于外国企业的改革，因为中国需要建立一个被一带一路项目各方代表认为是公平的一带一路争端解决机制。典型案例12证明了，一个简短的案件如何传递如此多的内容；执业者必须阅读所有这些信息，以成功地绘制其一带一路旅程。■

2017年中国案例见解™写作比赛获胜者在CGCP 2018年北京会议上进行圆桌讨论

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* 此中国案例*见解*™的引用是：高尚、李隽文，通过《西门子诉黄金置地案》，中国改革涉及自由贸易区的仲裁，为"一带一路"作出准备，《中国法律连接》，第1期，第53页（2018年6月），*亦见于*斯坦福法学院中国指导性案例项目，中国案例*见解*™，2018年6月，https://cgc.law.stanford.edu/zh-hans/commentaries/clc-1-201806-insights-5-gao-li。
英文原文由Dimitri Phillips和Mei Gechlik博士编辑。本中文版本由作者和罗雯翻译，并由罗雯和熊美英博士最后审阅。载于本中国案例*见解*™的信息和意见作者对其负责，它们并不一定代表中国指导性案例项目的工作或意见。

[1] 《西门子国际贸易（上海）有限公司与上海黄金置地有限公司申请承认和执行外国仲裁裁决案》，斯坦福法学院中国指导性案例项目，一带一路*案例*™，典型案例12(TC12), 2017年8月31日（最终版本），https://cgc.law.stanford.edu/zh-hans/belt-and-road/b-and-r-cases/typical-case-12。

[2] 《西门子国际贸易（上海）有限公司诉上海黄金置地有限公司申请承认和执行外国仲裁裁决一案一审民事裁定书》（2013）沪一中民认（外仲）字第2号民事裁定，2015年11月27日由上海市第一中级人民法院作出，全文载于斯坦福法学院中国指导性案例项目网站，https://cgc.law.stanford.edu/zh-hans/judgments/shanghai-2013-hu-yi-zhong-min-ren-wai-zhong-zi-02-civil-ruling。

[3] 《最高人民法院关于西门子国际贸易（上海）有限公司申请承认与执行外国仲裁裁决一案的请示的复函》，2015年10月10日公布，同日起施行，http://en.pkulaw.cn/display.aspx?cgid=295500&lib=law。

[4] 《最高人民法院关于江苏航天万源风电设备制造有限公司与艾尔姆风能叶片制品（天津）有限公司申请确认仲裁协议效力纠纷一案的请示的复函》，2012年8月31日公布，同日起施行，https://law.wkinfo.com.cn/legislation/detail/MTAxMDAwOTgxODA%3D。
有关此复函和相关主题的更多讨论，见高峰、滕海迪和吴明焱，涉外合同的法律选择及管辖，INSIGHTS，2015年10月16日，http://www.kwm.com/zh/knowledge/insights/dispute-resolution-and-choice-of-law-in-china-related-contracts-20151016。

[5] 《最高人民法院关于适用〈中华人民共和国涉外民事关系法律适用法〉若干问题的解释（一）》，2012年12月10日由最高人民法院审判委员会通过，2012年12月28日公布，2013年1月7日起施行，http://www.chinacourt.org/law/detail/2012/12/id/146055.shtml。

[6] 关于《承认与执行外国仲裁裁决公约》的英文和中文全文版本，见该公约网站，http://www.newyorkconvention.org。

[7] 《最高人民法院关于人民法院为"一带一路"建设提供司法服务和保障的若干意见》，2015年6月16日公布，同日起施行，http://www.chinacourt.org/law/detail/2015/06/id/148302.shtml。

[8] 有关中国自由贸易区的更多信息，见，例如，*China Focus: China FTZs Expand Opening for Foreign Business*，XINHUA，2018年1月14日，http://www.xinhuanet.com/english/2018-01/14/c_136894961.htm；Dezan Shira & Associates，*Investing in China's Free Trade Zones*，CHINA BRIEFING，2017年9月21日，http://www.china-briefing.com/news/2017/09/21/investing-in-chinas-free-trade-zones.html。

[9] 《最高人民法院关于为自由贸易试验区建设提供司法保障的意见》，2016年12月30日公布，同日起施行，http://www.court.gov.cn/zixun-xiangqing-34502.html。

[10] *Senior Leaders Stress Trade Dispute Mechanism for Belt & Road*，XINHUA，2018年1月24日，http://www.china.org.cn/business/2018-01/24/content_50288588.htm。

[11] *同上*。

[12] *见*Janne Suokas，*China to Set Up Belt and Road Court for Settling Disputes*，GBTIMES.COM，2018年1月25日，https://gbtimes.com/china-to-set-up-belt-and-road-court-for-settling-dispute；Dezan Shira & Associates，*Confusion over Dispute Resolution at China's New Belt and Road Courts*，CHINA BRIEFING，2018年2月2日，http://www.china-briefing.com/news/2018/02/02/bilateral-confusion-dispute-resolution-chinas-new-belt-road-courts.html。

[13] *见*Sabena Siddiqui，*Beijing Plans New Mechanism for Belt and Road Arbitration*，ASIA TIMES，2018年2月7日，http://www.atimes.com/belt-road-arbitration-new-mechanism。

CGCP Interview: Judge William A. Fletcher*

Jordan Corrente Beck
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Associate at Debevoise & Plimpton LLP

"No judge likes to be reversed."
—Judge William A. Fletcher

The following interview of Judge William A. Fletcher was conducted by Jordan Corrente Beck in Beijing in March 2018.

- *Now, you have sat on the United States Court of Appeals for the Ninth Circuit for nearly 20 years, and your mother—the illustrious Honorable Betty Binns Fletcher—sat on the Ninth Circuit for over 30 years. Chinese parties may be familiar with the Ninth Circuit for its particular history involving turn-of-the-century immigration cases to the more recent case* Sanlian v. Robinson,[1] *which involved the first recognition and enforcement of a Chinese court judgment in the Unites States. Our audience would surely love to know about your interest in China and Chinese law.*

  What first sparked your interest in China?

I first visited China about eight years ago. I was invited by the Peking University School of Transnational Law in Shenzhen to give a lecture and teach classes as a visiting judge for about ten days. During that visit, my wife and I also traveled on our own in Hong Kong and mainland China for another ten days or so. We were fascinated by China and very much wanted to return.

My interest in China, however, began long before that. A close friend and fellow Rhodes Scholar from the State of Washington, Frank Aller, was a student of Chinese language and history. During our time together at Oxford (from 1968 to 1970), Frank told me a great deal about China. I was studying English history and literature at the time, and knew very little about China. It was from Frank, for example, that I first learned about the Long March.

- *What do you find to be of greatest interest among recent Chinese legal reforms or about Chinese legal development as it affects the United States (whether directly, e.g., on U.S. businesses or investors acting in the Chinese market, or more abstractly, e.g., as it relates back to U.S. legal development)?*

I am most interested in the development of China's Case Guidance System,[2] which will make the Chinese legal system more understandable to outsiders and will also, I think, allow Chinese judges to be more uniform and predictable in their decisions. From my historical academic study of American commercial cases in the first half of the 19th century, this is a familiar development.[3] As we sought to develop a uniform and predictable commercial legal system during that period, one of the most important things that we did—at both the state and federal levels—was to develop systems of case reporting, thereby allowing lawyers and judges to know what our law was.

- *Before ascending to the bench, you held clerkships with Judge Stanley Weigel of the U.S. District Court in San Francisco and Justice William J. Brennan Jr. of the U.S. Supreme Court. You must have learned a great deal over the course of your career, lessons that not only illuminate U.S. judicial practice but also that might be useful to Chinese judges as the country develops a more robust Case Guidance System.*

  You have been involved in some very high-profile cases that have concerned important and complex issues central to American law and society (e.g., Demers v. Austin,[4] *where the Ninth Circuit affirmed the First Amendment free speech rights of public university faculty, and the case of death-row inmate Kevin Cooper, where your dissenting opinion[5] highlights the sort of endemic issues at the police, prosecutorial, and state levels that you have discussed in your scholarship).[6] As China introduces a more precedent-based system covering multiple areas of law, is there any advice you can give Chinese judges for how to approach individual cases when their rulings may now have a much larger and widespread impact?*

One of the most important things I have learned as a judge is to explain carefully both the facts of the case and the legal reasoning behind my decision. It is sometimes easy to reach a decision, but then difficult to explain to someone else why one has come to that decision. I have learned that the exercise of providing an explanation is not only useful

To view an excerpt of the full interview of Judge William A. Fletcher, visit the CGCP *Classroom*™, at https://cgc.law.stanford.edu/cgcp-classroom-lesson-4.

William A. Fletcher
Judge, United States Court of Appeals for the Ninth Circuit

Judge William A. Fletcher was sworn in as United States Circuit Judge for the Ninth Circuit on February 1, 1999. He received a B.A. from Harvard College in 1968 in English History and Literature, magna cum laude; a B.A. from Oxford University in 1970 in English Language and Literature, where he studied as a Rhodes Scholar; and a J.D. from Yale Law School in 1975. He was honorably discharged from the United States Navy as a Lieutenant in 1972.

Judge Fletcher clerked for the Honorable William J. Brennan, Jr., of the United States Supreme Court from 1976 to 1977. He was a law professor at the University of California, Berkeley (Boalt Hall) from 1977 to 1999, specializing in Federal Courts and Jurisdiction and in Civil Procedure. At the time of his appointment to the Ninth Circuit, he was the Richard W. Jennings, Jr., Professor of Law. He is a member of the American Law Institute.

Judge Fletcher is the author of numerous articles, including *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982); *A Historical Interpretation of the Eleventh Amendment*, 35 STAN. L. REV. 1033 (1983); *The General Common Law and Section 34 of the Judiciary Act of 1789*, 97 HARV. L. REV. 1513 (1984); *The Structure of Standing*, 98 YALE L.J. 221 (1988); *The Eleventh Amendment: Unfinished Business*, 75 NOTRE DAME L. REV. 843 (2000); *International Human Rights in American Courts*, 93 VA. L. REV. 653 (2007); *International Human Rights and the Role of the United States*, 104 NW. U. L. REV. 293 (2010); *Congressional Power over the Jurisdiction of Federal Courts: The Meaning of the Word 'All' in Article III*, 59 DUKE L.J. 929 (2010); *Tribute to Judge Betty Binns Fletcher*, 84 WASH. L. REV. 1 (2010); *Our Broken Death Penalty*, 89 N.Y.U. L. REV. 805 (2014). He is the co-author, with Professors Geoffrey C. Hazard, Jr., Stephen McG. Bundy, and Andrew G. Bradt, of *Pleading and Procedure* (11th ed., Foundation Press, 2015).

to someone reading my decisions; it is also important to me in the decision-making process. It sometimes happens that I cannot properly explain the decision I have reached. I take that as a signal that my decision may be wrong. If I cannot explain it using a truthful narrative of the facts and an accurate statement of the law, that means that the decision that I had thought was correct is, in fact, incorrect. My experience is not unusual among American judges. There is even a well-known expression among judges describing the experience. We say, "the decision would not write"—by which we mean that when we sat down to write the opinion we realized the mistake in our earlier view of the case, and that we were obliged to change our minds.

- *In preparing for this interview, we stumbled across a comment made by your mother, the first Judge Fletcher of the Ninth Circuit, that you included in a tribute to her: that her "favorite opinions were often reversed by the Supreme Court."[7] Could you speak to the felt experience of reversal? While we would guess that the personal responses to reversal are many, is there a professional approach to reversal that you recommend?*

No judge likes to be reversed. But there are different kinds of reversals. A friend of mine—who is an experienced federal district judge (trial court judge) in a different circuit—once remarked to me that in his view in about 20% of the cases in which he was reversed, he was clearly wrong. In about 60% of the cases, it was a judgment call; he was not wrong, but neither was the court of appeals. In the final 20% of the cases, however, in his view he was clearly right. Only the reversals in this last 20% of his cases really bothered him.

Judge William A. Fletcher

The situation for a court of appeals judge is different. There are only two ways I, as a court of appeals judge, get reversed. First, if my court (the Ninth Circuit Court of Appeals) takes en banc, with eleven judges, a case in which I was on a three-judge panel, the en banc panel can disagree with what my three-judge panel did. Second, the United States Supreme Court can grant certiorari in a case of mine and can reverse. The Supreme Court hears about 60 or 70 cases a year from the entire country—both federal and state courts included—so the odds of any particular case of mine getting to the Supreme Court are extremely low. When the Supreme Court grants certiorari, the result is usually a reversal. The overall reversal rate by the Supreme Court is somewhere around 75%. The Supreme Court almost never grants certiorari because of a simple error of law by the court below. It most typically grants certiorari for four primary reasons: first, if there is an unresolved important question of federal

Judge Fletcher delivers his keynote speech at the CGCP's 2018 conference in Beijing

constitutional law (or, more rarely, statutory law), the Court will grant certiorari to resolve the question. Second, if there is a split among the lower courts on a particular question of federal law, the Supreme Court will grant certiorari to tell us what the answer is so that the law will be uniform throughout the country. Third, if the Supreme Court is changing the direction of the law (usually in constitutional cases), it will grant certiorari, often in a series of cases, to gradually move the law. Fourth, if the Supreme Court thinks a particular circuit is consistently out of line with what the Supreme Court considers to be the existing law, the Court will sometimes grant certiorari in order to "send a message" to the judges of that circuit. Examples are some capital cases in the Fifth and Eleventh Circuits in the southeastern United States, and some habeas corpus (criminal cases) in the Ninth Circuit in the far western United States.

I have rarely been reversed by an en banc panel of my court. I can remember only two occasions in nineteen years. I confess that I was unhappy on both occasions, because I thought (and still think) I was right on the question of law presented. But I recognize that a majority of my judicial colleagues disagreed with me. I respect their intelligence and integrity as judges, and I respect the process by which they reached their decision. So, while I think I was right, in a legal sense I have to recognize that I was wrong. I have also rarely been reversed by the Supreme Court. I can remember only five occasions (though there may have been one or two more that I don't remember). In none of the cases do I believe that my decision was wrong in a technical sense. Rather, the Supreme Court was exercising its power to resolve a circuit split or to change the direction of the law. In one of them, I think the Supreme Court's decision is best viewed as having resolved an unresolved question. In two others, I think the Court's decisions are best viewed as having changed the direction of the law.

To come back to my mother's comment about some of her "favorite opinions" having been reversed by the Supreme Court, I will explain what she meant. For a sustained period while my mother was a court of appeals judge, the United States Supreme Court was changing some aspects of our constitutional law, moving it in a conservative direction. My mother viewed herself as applying the law as it existed at the time of her decisions, and regretted that the Supreme Court, in reversing her decisions, was moving the law in a direction she did not like. But, of course, she recognized her place in our legal system, and recognized the established authority of the Supreme Court to act as the final judicial arbiter on questions of federal law.

- *In the same tribute, you mention certain human elements of your work, such as the toll the undercurrent of human turmoil can take as the cases "roll in" and the struggle to remain focused in the face of the long hours and tedium of case screening.[8] How do you steel against this psychological and physical wear?*

The "roll in" comment is based on a melancholy poem, "Dover Beach", by the English poet Matthew Arnold. Arnold writes of the waves that roll onto the beach "With tremulous cadence slow, and bring / The eternal note of sadness in."[9] This is, in substantial part, the experience of an appellate judge. People generally do not bring lawsuits, and pursue appeals, because they are happy. They do so because they are unhappy. In their view, something has gone wrong and they have been aggrieved. One of the functions of the judicial system is to deal with cases brought by unhappy people. It can be a discouraging job to deal with such cases day after day, year after year. In light of this, how can I keep my focus and keep doing my job?

Part of the answer is that, even though many of the cases deal with difficult situations and unhappy people, I can take pride in a system that endeavors to administer a system of laws uniformly, and in that sense, fairly. Another part of the answer is that not all of the cases involve individual circumstances and individual unhappiness. Some of the cases that come before me involve questions of deep and important principles, fundamental to our system of government. The questions in those cases go far beyond the particular individuals in the appeal before me.

The most important part of the answer, however, is that it is a privilege and an honor to be a judge. The work is difficult, unremitting, and sometimes tedious. But I never take for granted the privilege and honor that have been granted.

- *Drawing from your experience as a judge working within the U.S. common law system, as China continues to develop its Case Guidance System, what topics or skills do you think will be most critical for judicial training programs in China to focus on?*

Probably the most important thing, beyond the obvious need for legal education of judges, is the development of a culture of decision making. By this I mean a judicial culture in which it is expected that judges will—to the extent of their ability and to the extent human nature will permit—state carefully, fully, and honestly the factual and legal bases for their decisions. I make no claim that American judges always live up to that ideal. We do not. But we try.

- *Given the CGCP's mission to increase transparency in the Chinese judicial system, we were struck by your comments at the recent Guiding Cases Seminar™: On Building China's New IP Case System: A Discussion with Chinese Judges as well as Legal and Big Data Experts.[10] You noted that a successful system of commercial law requires both knowledge of what the law is and, regardless of whether the jurisdiction has adopted a common law or civil law system, publicly available cases that illustrate how the law is applied.*

  Can you speak more about the function of publicly available cases in both common and civil law jurisdictions?

Publicly available decisions are important in both common law and civil law jurisdictions. It is increasingly rare in the United States for judges to be common law judges in the old sense. That is, it is increasingly rare for us to "make" law without statutory guidance, as traditional common law judges did. Most of what we do, particularly under federal law, is governed by text—constitutional, treaty, or statutory. Whenever the source of law is a text, our analysis is similar to civil law judges, who also base their decisions on texts. However, I think it is fair to say that we feel ourselves less bound to text than civil law judges, particularly in cases based on the U.S. Constitution. Our Constitution is now over 200 years old, and many of its provisions are very generally worded. The Supreme Court over the years has attached different meanings to some clauses of the Constitution in response to industrial and commercial advances, changes in technologies, and changing attitudes. This is pretty much inevitable, given the necessity of change, the general wording of many constitutional provisions, and the great difficulty in amending the text. However, statutes are quite different. American judges are typically careful to follow the wording of a statutory text—particularly in the case of statutes that are written in a very detailed fashion. In such cases, our work resembles fairly closely that of civil law judges. However, I should point out that our style of opinion writing, and to some degree our manner of thinking, differs from that of civil law judges. Our opinions are much longer and more discursive, giving the facts in much greater detail, and paying much more attention to factual distinctions that can lead to different legal

Judge Fletcher (center), Chief Judge Diane P. Wood (U.S. Court of Appeals for the Second Circuit; right) and former Chief Judge Toshiaki Iimura (Intellectual Property High Court of Japan; left) rule on a hypothetical case at the CGCP's 2018 conference in Beijing

consequences. As a result, judicial decisions based on American law—even statutory law—are often more nuanced than judicial decisions based on civil law.

- *Prior to your legal career, you taught Civil Procedure and Federal Courts at Berkeley Law and published extensively in these areas. Let's end by discussing your teaching and scholarship.*

  Your scholarship often draws on legal history. Could you speak to the role legal history plays in your scholarship and your methods of analysis? What role can legal history play in the comparative context?

Legal history can rarely tell us precise answers to modern legal problems. But it can give a sense of the range of problems our legal system has faced over the centuries, and the range of solutions to those problems. In a sense, the study of legal history provides similar insights as those gained from the study of comparative law. One thing I have learned in my study of legal history is that our predecessors were every bit as careful and intelligent as we are. And, as well, they were every bit as flawed as we are. We can see their flaws pretty easily. It is my hope that our ability to see their flaws will increase our ability to see our own.

- *Some scholars of Chinese law have suggested that, at least in the context of commercial law, judicial development can be hastened by directing disputes to the courts (presumably to create more available case precedent) and removing any obstacles that would keep them out, more so than focusing on traditionally proposed substantive and procedural reforms.[11] Do you agree with this assessment?*

Yes, I do agree.

It is of critical importance in commercial law that all of the relevant actors know, with some degree of confidence, what

the law is that will govern their actions. It sometimes does not matter what the law is; in such instances it only matters that the law be certain. If it is certain, commercial actors can act accordingly—writing contracts, guaranteeing performance, or even setting prices taking the law into account. However, the substantive content of the law, of course, is often of paramount importance, and there are certain substantive rules that cannot be "contracted around". Any legal system must pay careful attention as it sets substantive rules.

A related point is that disputes should be directed to courts with the ability to publish their decisions as guidance, rather than to decision-making bodies that lack the ability to publish legally authoritative decisions (such as arbitral tribunals). There need to be enough published and precedential decisions so that commercial actors, lawyers, and judges have a more-or-less complete body of law to inform their actions and judgment.

Not all decisions need to be published and made precedential, of course. The publication of all decisions as precedential or guiding would rapidly overload the legal system. Non-precedential decisions should be made public in order to keep the system honest and transparent, but they do not need to be published in the sense that they become precedential or guiding cases. ■

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The original, English version of this CGCP Interview was prepared by Jordan Corrente Beck and Jennifer Ingram. The information and views set out in this Interview are the responsibility of the interviewee and do not necessarily reflect the work or views of the China Guiding Cases Project.

1 *Hubei Gezhouba Sanlian Industrial Co., Ltd. et al. v. Robinson Helicopter Co., Inc.*, No. 2:06-cv-01798-FMC-SSx, 2009 WL 2190187, at *1 (C.D. Cal. July 22, 2009), aff'd, 425 F. App'x 580 (9th Cir. 2011).

2 China's Case Guidance System ("案例指导制度") was formally established in late 2010 when the Supreme People's Court issued the *Provisions of the Supreme People's Court Concerning Work on Case Guidance*. The primary goal of the system is to ensure uniform application of law in China through the issuance of select important cases to guide the adjudication of subsequent cases that are similar to these important cases. Apart from Guiding Cases, select important cases issued to date under the Case Guidance System include Belt and Road Typical Cases and more than 500 judgments selected by the Beijing Intellectual Property Court. For more discussion of this topic, see Mei Gechlik, Chenchen Zhang, & Li Huang, *China's Case Guidance System: Application and Lessons Learned (Part I)*, Stanford Law School China Guiding Cases Project, Guiding Cases *Surveys*™, Issue No. 3, Mar. 1, 2018, https://cgc.law.stanford.edu/guiding-cases-surveys. *See also*《最高人民法院关于案例指导工作的规定》 (*Provisions of the Supreme People's Court Concerning Work on Case Guidance*), passed by the Adjudication Committee of the Supreme People's Court on Nov. 15, 2010, issued on and effective as of Nov. 26, 2010, Stanford Law School China Guiding Cases Project, English Guiding Cases Rules, June 12, 2015 Edition, https://cgc.law.stanford.edu/guiding-cases-rules/20101126-english.

3 Some of the results of this study are presented in Judge Fletcher's *The General Common Law and Section 34 of the Judiciary Act: The Example of Marine Insurance*, 97 Harv. L. Rev. 1513 (1984).

4 *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014).

5 *Cooper v. Brown*, 565 F. 3d. 581, 581–635 (9th Cir. 2009) (Fletcher, J., dissenting from denial of rehearing en banc).

6 *See, e.g.*, William A. Fletcher, *Our Broken Death Penalty*, 89 NYU L. Rev., 805 (2014).

7 William A. Fletcher, *Tribute to Judge Betty Binns Fletcher*, 85 Wash. L. Rev. & St. B.J. 1, 6 (2010).

8 *Id.*, 4–5.

9 Matthew Arnold, *Dover Beach*, *in* The Poems of Matthew Arnold 253, 255 (Miriam Allot ed., 2d ed. Longmans 1979) (1867). A fuller excerpt warrants inclusion here:

> Listen! You hear the grating roar
> Of pebbles which the waves draw back and fling
> At their return, up the high strand,
> Begin, and cease, and then again begin,
> With tremulous cadence slow, and bring
> The eternal note of sadness in.
>
> Sophocles long ago
> Heard it on the Aegean, and it brought
> Into his mind the turbid ebb and flow
> Of human misery; we
> Find also in the sound a thought,
> Hearing it by this distant northern sea.

The poem is also made available online by the Poetry Foundation, https://www.poetryfoundation.org/poems/43588/dover-beach.

10 Video footage of the seminar is also available at https://www.youtube.com/watch?v=x9BqJj8VJKQ.

11 *See, e.g.*, "China's Judicial System and Judicial Reform." Law Quad. Notes 54, no. 1 (2011): 62–4, 64 (extract from a statement delivered by Nicholas C. Howson at the inaugural "China-U.S. Rule of of Law Dialogue" held at Beijing's Tsinghua University, July 29–30, 2010), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1002&context=other.

CGCP专访：William A. Fletcher法官*

Jordan Corrente Beck
中国指导性案例项目副执行编辑
美国德普律师事务所（日本）律师

“没有法官喜欢其判决被推翻的。”
—William A. Fletcher法官

以下William A. Fletcher法官的专访是由Jordan Corrente Beck于2018年3月在北京进行。

- *目前，您已在美国联邦第九巡回上诉法院工作了近二十年，而您的母亲—杰出的Betty Binns Fletcher法官阁下—在联邦第九巡回上诉法院工作了超过三十年。从世纪之交的移民案件到最近的《Sanlian诉Robinson案》[1]（此案涉及美国首次承认和执行中国法院的判决），中国的各方人士可能特别因这段历史而熟悉联邦第九巡回上诉法院。我们的读者一定非常乐意了解您对中国和中国法律的兴趣。*

  是什么首先激发了您对中国的兴趣？

我大约八年前第一次来到中国。位于深圳的北京大学国际法学院邀请我作为访问法官举办了一场讲座并进行了十天左右的授课。访问期间，我和我的妻子也自行在香港和中国大陆旅行了十天左右。我们对中国很着迷，非常想再次回来探访。

然而，我对中国的兴趣早在此之前就开始了。我有一位来自华盛顿州的好友，也是罗德学者，名叫Frank Aller，他当时是研究汉语和中国历史的学生。我们一起在牛津大学时（1968年—1970年），Frank告诉了我许多关于中国的事情。我当时正在学习英国历史和文学，对中国知之甚少。例如，从Frank那儿我第一次了解到了长征。

- *在近来影响美国（不论是直接地，例如影响美国企业或投资者在中国市场的行为，还是更抽象地，例如影响美国法律的发展）的中国法律改革或发展，您最感兴趣的是什么？*

我最感兴趣的是中国案例指导制度的发展，[2] 这将使中国的法律制度更容易让外界理解，并且我认为，这也将能令中国法官的裁判更加统一和可预测。从我对19世纪上半叶美国商事案例的历史研究来看，这是一个熟悉的发展。[3] 当我们在那个时期寻求制定一套统一和可预测的商事法律体系时，我们在州和联邦两级法院所做的最重要的举措之一就是发展案例报告制度，从而使律师和法官能够知道我们的法律是什么。

- *在获任法官前，您曾担任美国旧金山地区法院Stanley Weigel法官和美国联邦最高法院William J. Brennan Jr. 大法官的法官助理。在您的职业生涯中，您一定积累了不少学识、经验，它们不仅可以帮助深入洞察美国的司法实践，而且随着中国日益发展完善的案例指导制度，它们可能对中国法官也有所裨益。*

  您曾参与过一些广受关注的案件，这些案件涉及的重要和复杂问题都是美国法律和社会的核心问题（例如，在《Demers诉Austin案》中，[4] 联邦第九巡回上诉法院确认了公立大学教师享有受宪法第一修正案保护的言论自由的权利；在死囚犯Kevin Cooper的案件中，您的反对意见[5] 突出了您在学术研究中讨论过的警察、检察和州一级的地方性问题）。[6] 随着中国发展出涵盖多个法律领域、更加基于先前判决的制度，中国法官的裁判现在可能会产生更大、更广泛的影响，您是否可以给予他们如何处理个案的建议？

我作为一名法官学到的最重要的事情之一，就是对案件事实和我的决定背后的法律推理都要作出审慎的解释。有时候很容易做出决定，但很难向其他人解释为什么如此决定。我了解到，提供解释说明不仅对阅读我的裁决的人有用，而且对我在决策过程中也非常重要。有时候，我无法适当地解释我所做出的决定。我认为这是一个信号，表明我的决定可能是错误的。如果我不能用对案件事实的真实叙述和准确的法律陈述来解释它，那表示我本认为是正确的决定其实是错误的。我的经历在美国法官中并不罕见。法官们甚至在描述这种经历时都有一个众所周知的表述。我们说“决定写不出来”——我们的意思是，当我们坐下来写下决定时，我们意识到我们先前的看法有错，并且我们必须改变主意。

- *在准备此采访时，我们偶然发现您对母亲（联邦第九巡回上诉法院第一位Fletcher法官）的致敬词中引述了她的一句话：“（我）最喜爱的意见经常被最高法院推翻”。[7] 您能否就判决被推翻发表*

关于CGCP专访William A. Fletcher法官的视频部分内容，请访问https://cgc.law.stanford.edu/zh-hans/cgcp-classroom-lesson-4，观看CGCP学堂™发布的视频。

William A. Fletcher法官

美国联邦第九巡回上诉法院法官

William A. Fletcher 法官于1991年2月1日宣誓成为美国联邦第九巡回上诉法院法官。1968年，他以极优的成绩毕业于哈佛学院（HarvardCollege），获得英国历史与文学学士学位。而后，他作为罗德学者（Rhodes Scholar）在牛津大学（OxfordUniversity）学习，并于1970年获得英语语言和文学学士学位。1975年获得耶鲁法学院（Yale Law School）法学博士学位（J.D.）。1972年，他作为海军中尉从美国海军光荣退伍。

1976–1977年间，Fletcher法官在美国联邦最高法院担任William J. Brennan Jr. 法官阁下的法律书记。1977–1999年，其担任加州大学伯克利分校（University of California, Berkeley）的法学教授，专研联邦法院和管辖权，以及民事诉讼。在获得联邦第九巡回法院任命时，他是Richard W. Jennings Jr. 法学教授。此外，他也是美国法律协会的会员。

Fletcher法官著作丰富，包括《自由裁量的宪法：机构性救济与司法合法性》（*The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982) ）、《第十一修正案的历史解读》（*A Historical Interpretation of the Eleventh Amendment*, 35 STAN. L. REV. 1033 (1983)）、《普通法与1789年司法法第34条》（*The General Common Law and Section 34 of the Judiciary Act of 1789*, 97 HARV. L. REV. 1513 (1984) ）、《起诉身份的结构》*The Structure of Standing*, 98 YALE L.J. 221 (1988) ）、《第十一修正案：未尽事宜》（*The Eleventh Amendment: Unfinished Business*, 75 NOTRE DAME L. REV. 843 (2000) ）、《美国法院中的国际人权》（*International Human Rights in American Courts*, 93 VA. L. REV. 653 (2007)）、《国际人权和美国的角色》（*International Human Rights and the Role of the United States*, 104 NW. U. L. Rev. 293 (2010); ）、《国会对联邦法院管辖权的权力：宪法第三条中“All”一词的意义》（*Congressional Power over the Jurisdiction of Federal Courts: The Meaning of the Word 'All' in Article III*, 59 DUKE L.J. 929 (2010)）、《向 Betty Binns Fletcher 法官致敬》（*Tribute to Judge Betty Binns Fletcher*, 84 WASH. L. REV. 1 (2010)）、《我们破裂的死刑》（*Our Broken Death Penalty*, 89 N.Y.U. L. REV. 805 (2014)）等。此外，他与 Geoffrey C. Hazard, Jr.、Stephen McG. Bundy、Andrew G. Bradt三位教授共同著有《诉状与程序》一书（Pleading and Procedure (11th ed., Foundation Press, 2015）。

一下观点？尽管我们猜测对判决被推翻的个人反应有很多，但是否有一种您推荐的专业方式应对此情况？

没有法官喜欢其判决被推翻的。但判决的推翻存在不同类型。我的一位朋友（另一位经验丰富的、任职于另一巡回的联邦地区法院法官（庭审法官））曾向我表示，他认为在他被推翻的案件中约20%是他明显错了；约60%既不是他的错又不是上诉法院的错，而只是一个主观判断；而最后的20%中他是明显正确的。只有最后的这20%案件真正困扰他。

对一名上诉法院的法官而言，情况有所不同。作为一名上诉法院的法官，只有两种情形我的判决会被推翻。第一，如果我的法院（联邦第九巡回上诉法院）对一个由包括我在内的三人庭审小组所审判的案件采取11名法官“满席审理”的模式审理，那么“满席审理”小组就可以不同意我们三人庭审小组先前所做的判决。第二，美国联邦最高法院能对我的案件签发调卷令并推翻原判决。最高法院每年审理全国（包括联邦和州法院）约60或70个案件，所以我的某一案件进入最高法院的机率极低。当最高法院签发调卷令时，结果通常是推翻原判决的。最高法院总的推翻原判决的概率约为75%左右。最高法院几乎从未因下级法院的简单法律错误而签发调卷令。

最高法院签发调卷令通常有四个主要原因：第一，如果存在一个未解决的涉及联邦宪法（或者更少见的涉及成文法）的重要问题，最高法院将签发调卷令以解决该问题。第二，如果下级法院间就某一具体的联邦法律问题产生分歧，最高法院将签发调卷令以告知我们答案是什么，这样法律才能在全国范围内统一。第三，如果最高法院正在改变法律的导向（通常发生在宪法案件中），它通常会在一系列案件中签发调卷令以逐渐调整法律。第四，如果最高法院认为某一巡回的法院始终与其对现行法律的认识不相一致，最高法院会签发调卷令，给该巡回的法官们“传递一个信息”。例如美国东南部第五和第十一巡回法院中的一些死刑案件和偏远的美国西部第九巡回法院中的一些（刑事案件）人身保护案。

William A. Fletcher法官

我很少被我的法院的“满席审理”小组推翻裁决，在19年里我只记得有两次。我承认我在这两次里都并不开心，因为那时我认为（并且现在仍认为）就所提出的法律问题我的看法是正确的。但我承认，我的大多数司法同事不同意我的看法。我尊重他们作为法官的智慧和正直；我亦尊重他们作出其决定的过程。所以，即使我认为我是对的，但在法律意义上我必须承认我错了。我也很少被最高法院推翻判决。我只记得五次（但有可能有更多的一两次是我不记得的）。没有一个案件我认为在技术层面上我的决定是错误的。相反，最高法院是用它的权力去解决巡回法院间的分歧或改变法律的导向。在其中一个我被推翻判决的案件中，我认为最高法院的决定最好被看作是为解决一个待解决的问题。在另外两个案件中，我认为最高法院的决定最好被看作是为改变法律的导向。

回到我母亲说的她的一些“最喜爱的意见”被最高法院推翻，我会解释她的意思。在我母亲持续担任上诉法院法官期间，美国联邦最高法院正在改变着我们宪法的某些方面，将其推向保守的方向。我母亲认为她自己是适用她作出裁决时当下的法律，并对最高法院在推翻她的裁决时将法律推向了她不喜欢的方向表示遗憾。但是，她当然认识到她在我们的法律体系中的位置，并承认最高法院有着既定权威来担任联邦法律问题的最终司法裁决者。

- *在同一篇致敬词中，您提到您工作中的某些人性因素，比如案件“滚滚而来”时，人性起伏的暗流可能会带来的影响，以及在面对冗长烦闷的案件审阅时仍需努力保持专注。[8] 您是如何抵抗这些身心消磨的？*

这个“滚滚而来”的评论是基于英国诗人马修阿诺德（Matthew Arnold）一首忧郁的诗歌《多佛海滩》。阿诺德写到海浪滚到海滩上，“以缓慢颤抖的韵律，带来永恒的悲伤之音”。[9] 这在很大程度上是上诉法官的经验。人们通常不会因为感到高兴而提出诉讼或上诉，之所以这么做是因为他们不高兴。在他们看来，一定是哪里出了问题而自己受到了委屈。司法体系的作用之一就是处理这些不高兴的人们所提起的诉讼。日复一日、年复一年地处理这类案件是一份令人沮丧的工作。鉴于此，我如何能保持专注并坚持我的工作呢？

我的部分答案是，即使很多案件是要处理困难的情况和面对不快乐的人，但我为一个致力于统一地、并在这个意义上公平地施行法律制度的体系感到骄傲。我的另一部分答案是，并非所有案件都涉及个人问题和个人不幸。有些我审理过的案件涉及到深入而重要的原则问题，并对我们的政府体制至关重要。这些案件中的问题远超出了我审理的上诉案件中的特定个人。

然而，答案中最重要的部分是，成为一名法官是获得了一种特权和荣誉。这份工作非常困难且不能懈怠，

Fletcher法官在CGCP 2018年北京会议上发表主题演讲

有时甚至非常乏味。但我从来不把授予我的特权和荣誉视为理所当然的。

- *根据您在美国普通法体系中担任法官的经验，鉴于中国正持续发展其案例指导制度，您认为哪些方面或技能是中国司法培训项目最应关注的？*

除了对法官进行法律教育的明显需求之外，或许最重要的是发展一种作出决定的文化。我的意思是，发展一种在法官的能力和人性允许的范围内，能够期待他们细致、全面、诚实地陈述他们作出决定的事实和法律依据的司法文化。我并没有说美国法官都总能实现这个理想。我们确实没有，但我们努力这么做。

- *鉴于CGCP的使命是提高中国司法体系的透明度，我们对您最近在题为“建立中国新的知识产权案例制度：与中国法官、法律和大数据专家的讨论（On Building China's New IP Case System: A Discussion with Chinese Judges as well as Legal and Big Data Experts)”的指导性案例研讨会™中所作的评论印象深刻。[10] 您提到一个成功的商法体系既需要让人们知道法律是什么，还需要——不论该管辖区是采用普通法体系还是大陆法体系——有公开可得的案件来说明法律是怎么被适用的。*

  您能再多谈论一下公开可用的案件在普通法体系和大陆法体系中的作用吗？

公开可得的案件在普通法体系和大陆法体系中都很重要。在美国，法官是旧有意义上的普通法系法官越来越罕见。换言之，我们越来越少像传统的普通法系法官一样，在没有成文法指导的情况下去“造”法。绝大部分我们所做的事情，尤其在联邦法律下，是受宪法、条约或成文法规的文本约束的。每当法律渊源是文本时，我们的分析就会和以文本为基础作出裁决的大陆法系法官类似。不过我认为，平心而论，我们觉得自己受到法律文本的约束要少于大陆法系的法官，尤其是基于美国宪法的案件。我们的宪法迄今已有200多年，并且它的很多条款都很宽泛。多年来最

Fletcher法官（中）、Diane P. Wood首席法官（美国联邦第二巡回上诉法院；右）和Toshiaki Iimura前首席法官（日本知识产权高等法院）；左）在CGCP 2018年北京会议上就模拟案件做出裁决

高法院为了回应工商业的发展、技术的改变和不断改变的社会态度，已对宪法的一些条款赋予了不同的含义。这是不可避免的，考虑到改变的必要性、许多宪法条款中的一般措词，以及修改条文的困难。

但成文法规却截然不同。美国法官通常都谨慎地遵循法定文本的措辞，尤其是当成文法规以非常详尽的方式撰写时。在这种情况下，我们的工作就和大陆法系的法官非常相似了。但我应当说明的是，我们的意见的书写风格，以及在某种程度上我们的思维方式，都与大陆法系的法官不同。我们的意见更长且涉及面更广，更详细地陈述事实，更加关注能导致不同法律后果的事实差别。因此，基于美国法律（甚至是成文法）做出的司法裁决，通常比基于大陆法的司法裁决更为细致。

- *在您从事法律职业前，您曾在伯克利法学院教授《民事诉讼与联邦法院》课程，并在这些领域内广泛发表著作。我们就通过讨论您的教学和学术研究来结束此次采访吧。*

  您的学术研究经常参考法律史。您能否谈论一下法律史在您的学术研究及分析方法中所扮演的角色？法律史在比较语境中发挥什么样的作用？

法律史难以为我们在现代法律难题上提供准确答案。但它可以让我们了解这些世纪以来我们的法律体系所面对的各种问题，以及解决这些问题的方法的范围。在某种意义上，法律史的研究提供了与比较法学研究所能得到的相似的见解。我在法律史研究中所学到一点就是，我们的前辈与我们一样谨慎、聪明。而且，他们和我们一样也有缺陷。我们能很容易地发现他们的缺陷。我希望我们发现他们缺陷的能力能够提高我们发现自身缺陷的能力。

- *有些中国法律学者认为，至少在商法领域，相比关注传统上提出的实质性和程序性改革，将争端诉诸法院（大概是为了创造更多可用的案例）和消除将争端排除在法院之外的任何障碍，更能加速司法发展。[11] 您是否同意此种评价？*

是的，我同意。

在商法上，所有相关人员能够有一定信心知道约束他们行为的法律是什么，这是非常重要的。有时法律具体是什么并不重要；在这些情况下，最重要的是法律是确定的。如果法律是确定的，商业从业人员就能依此从事活动——签订合同、担保履约，甚至定价时将法律因素考虑进去。当然，法律的实质性内容往往是至关重要，并且有些实质性规则当事人不能“约定绕过”不顾的。任何法律系统在制定实质性规则时都应小心谨慎。

相关的一点是，应将争端诉诸能够公布其裁决而使之成为指导的法院，而不是将争端诉诸那些没有能力发布具有法律权威性的决定的决策机构（如仲裁庭）。我们需要有足够的公开的先例性裁决，让商业从业人员、律师及法官拥有差不多完整的法律体系帮助他们作出行为和判断。

当然，并非所有裁决都需要被公开并成为先例。公开所有的裁决使之成为先例或指导会使法律系统迅速超负荷。非先例性的裁决应当被公开以保持法律体系的的诚实和透明，但这些案件的公开不是为了让它们成为先例或指导性案例。■

* 此中法连*聚焦*™的引用是：Jordan Corrente Beck，CGCP专访：William A. Fletcher法官，《中国法律连接》，第1期，第62页（2018年6月），*亦见于*斯坦福法学院中国指导性案例项目，中法连*聚焦*™，2018年6月，https://cgc.law.stanford.edu/zh-hans/clc-spotlight/clc-1-201806-interview-1-jordan-corrente-beck。
此专访的英文原文由Jordan Corrente Beck、英珍妮撰写。中文版本由簡欣怡、全嘉、赵炜、周墨奇翻译，并由傅铄涵、周子皓和熊美英博士最后审阅。载于本专访中的信息和意见受访者对其负责。它们并不一定代表中国指导性案例项目的工作或意见。

1 *Hubei Gezhouba Sanlian Industrial Co., Ltd. et al. v. Robinson Helicopter Co., Inc.*, No. 2:06-cv-01798-FMC-SSx, 2009 WL 2190187, at *1 (C.D. Cal. July 22, 2009), aff'd, 425 F. App'x 580 (9th Cir 2011)。

2 随着最高人民法院于2010年底发布《最高人民法院关于案例指导工作的规定》，中国的案例指导制度正式成立。该制度的首要目标是通过发布选定的重要案例来指导类似于这些重要案例的后续案件的审判，以确保法律在中国的统一适用。除指导性案例外，这些选定的重要案例目前还包括“一带一路典型案例”和北京知识产权法院所选择的500多起判决。有关此主题的更多讨论，见熊美英、张宸宸、黄鹏，中国案例指导制度：应用和汲取的经验（第一部分），斯坦福法学院中国指导性案例项目，指导性案例*调查*™，第3期，2018年3月1日，https://cgc.law.stanford.edu/guiding-cases-surveys。*亦见*《最高人民法院关于案例指导工作的规定》，2010年11月15日由最高人民法院审判委员会通过，2010年11月26日公布，同日起施行，斯坦福法学院中国指导性案例项目，中文指导性案例规则，2010年11月26日（最终版本），https://cgc.law.stanford.edu/zh-hans/guiding-cases-rules/20101126-chinese。

3 这项研究的一些结果在Fletcher 法官一文中有介绍，*见The General Common Law and Section 34 of the Judiciary Act: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984)。

[4] 《Demers 诉Austin》, 746 F.3d 402 (9th Cir. 2014)。

[5] 《Cooper 诉Brown》, 565 F. 3d. 581, 581–635 (9th Cir. 2009) (Fletcher, J., dissenting from denial of rehearing en banc)。

[6] *见，例如*，William A. Fletcher, *Our Broken Death Penalty*, 89 N.Y.U.L. Rev. 805–829 (2014)。

[7] William A. Fletcher, *Tribute to Judge Betty Binns Fletcher*, 85 Wash. L. Rev. & St. B.J. 1, 第6页 (2010)。

[8] *同上*, 4-5页。 [9] Matthew Arnold, *Dover Beach*, *载于*The Poems of Matthew Arnold 253, 第255页 (Miriam Allot 编，第二版 Longmans 1979) (1867)。更全面的摘录如下：

> Listen! You hear the grating roar
> Of pebbles which the waves draw back and fling
> At their return, up the high strand,
> Begin, and cease, and then again begin,
> With tremulous cadence slow, and bring
> The eternal note of sadness in.
>
> Sophocles long ago
> Heard it on the Aegean, and it brought
> Into his mind the turbid ebb and flow
> Of human misery; we
> Find also in the sound a thought,
> Hearing it by this distant northern sea.

这首诗也由诗歌基金会 (the Poetry Foundation) 在线提供， https://www.poetryfoundation.org/poems/43588/dover-beach。

[10] 研讨会的录像片段在线提供：https://www.youtube.com/watch?v=x9BqJj8VJKQ。

[11] *见，例如*，"China's Judicial System and Judicial Reform." Law Quad. Notes 54, no. 1 (2011): 62-4, 第64页 （摘自Nicholas C. Howson于2010年7月29日至30日在北京清华大学举行的 "中美法治对话" 所作的发言），https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1002&context=other。

CGCP Interview: Dr. HU Zhenyuan*

Ke James Yuan
Associate Managing Editor of the China Guiding Cases Project
Associate at Covington & Burling LLP

"[B]oth judges and lawyers must […] be skilled in using cases. To some extent, lawyers are even more reliant on cases than judges."
—Dr. HU Zhenyuan

The following interview of Dr. HU Zhenyuan was conducted by Ke James Yuan in Beijing in March 2018.

- *When did you first begin to take notice of Guiding Cases?*

In 2010, when the Supreme People's Court issued the *Provisions of the Supreme People's Court Concerning Work on Case Guidance* (the "*Provisions*"),[1] I was working in the research office of my court and participated in a series of meetings related to it. After the issuance of the *Provisions*, I organized some of my thoughts on this subject into a paper and published an article titled《案例指导制度初论》(*A Preliminary Discussion of the Case Guidance System*) in《法治论丛》(*The Rule of Law Forum*). In this article, I suggest that the specific operating mechanisms of the Guiding Cases be refined: leveraging the strength of the trial supervision system to endow the Guiding Cases with *de facto* binding force; selecting Guiding Cases with a view to solving issues related to the application of law in situations where legal rules are unclear, contradictory, abstract, and filled with gaps; summarizing the major points of the adjudication of Guiding Cases and publishing them on a unified platform in a timely manner; and updating Guiding Cases through the establishment of an argumentation mechanism, an appeal mechanism, and a reporting mechanism for handling judgments that deviate from Guiding Cases.

- *What do you think is the significance of developing a case guidance system in a statutory-law country like China?*

I think this is something that is very meaningful. However, I'm wondering whether you have noticed an interesting phenomenon about our two major legal systems: countries with a case law system, represented by the United States and the United Kingdom, have a complete set of statutory laws; and in countries with statutory law, represented by Germany and Japan, you will notice, if lower courts do not follow the judgments of higher courts, their decisions may be amended or the cases may be remanded for retrial. Thus, the two legal systems seem to have already seen each other's strengths. From this perspective, they have already started to embrace one another. Therefore, the Case Guidance System plays an extremely important role here. In a society that is constantly changing, if its law only consists of statutory law, the law normally lags behind. Judges must face new issues, solve new problems, and even create new rules. What can be done if there is a divergence of opinion in this process? How do we bridge [the differences in opinion]? How do we protect judicial authority? If we consider [the issue] at these levels, then the Case Guidance System is very useful.

Today's China is going through a judicial reform and this judicial reform involves a wide range of aspects. Roughly speaking, there are at least three levels [of this judicial reform] that relate to the Case Guidance System. First, there is the staffing of judges. We have implemented a quota system for staffing judges. Under this system, only personnel who adjudicate cases have the title "judge". In this process, judges fill in the front line to handle cases and adjudication power has returned to judges. Second, there is a judicial democratic reform. There have been proposals to further enable people's assessors to participate in the adjudication of cases. Third, there is judicial openness. The preexisting requirement for posting judgments and rulings on the Internet is being further developed and perfected. At the same time, there have been proposals to have the hearing of cases by courts go online. These [developments] are already or in the process of further promoting judicial justice.

They are all related to case guidance. For instance, the issue of the staffing quota—we have returned adjudication power to the hands of judges. Initially, for the results of the adjudication of a case, the decision-making power was in the hands of the chief judge [of a division of the court], but now this power has returned to the hands of the judges who preside over the case. This certainly conforms more closely to the principle of direct adjudication and is in line with the requirements of litigation procedures. This is very correct. At the same time, a real problem is that as we move from a centralized decision-making process to a decentralized one,

To view an excerpt of the full interview of Dr. HU Zhenyuan, visit the CGCP *Classroom*™, at https://cgc.law.stanford.edu/cgcp-classroom-lesson-5.

Dr. HU Zhenyuan
Partner, Fangda Partners
Former Deputy Chief Judge, IP Division and Financial Division, Shanghai First Intermediate People's Court

Dr. HU Zhenyuan joined Fangda Partners as a partner in 2017, specializing in dispute resolution, especially complex dispute resolution related to intellectual property (IP), competition, antitrust, financial, and commercial laws. Prior to that, he worked for 20 years at the Shanghai First Intermediate People's Court, acting as Deputy Chief Judge of the IP Division and the Financial Division successively since 2011. He handled a number of lead cases nationwide and also twice took part in research programs organized by the Supreme People's Court (the "SPC"), contributing his wisdom to the drafting of related SPC interpretations.

Dr. Hu is also a member of the Shanghai Law Society Commercial Law Council, a part-time supervisor of LLM candidates at Fudan University, at Shanghai University of Finance and Economics, and at Shanghai International Studies University, and a researcher of Fudan IP Research Center. Dr. Hu graduated with an undergraduate degree from East China University of Political Science and Law, specializing in the study of economic law. Afterwards, he obtained his master's degree and PhD from Fudan University and returned to East China University of Political Science and Law to complete his post-doctoral research.

we will see that the possibility of a divergence of opinions increases. How can we solve this problem?

The same is true of judicial democracy—when people's assessors become more involved in the adjudication of cases, they have a greater tendency to use common sense in adjudicating a case. Because a judge is trained, he or she will use [legal] techniques to adjudicate the case in addition to common sense. How can we bridge the differences in these two [approaches]? With the opening of the judiciary to the public, these differences will be magnified. Therefore, I think it is very important to consider [what role] the case guidance system [will play] at this point in time. It can be said that [such a system] will be a good medicine for protecting judicial authority.

Dr. HU Zhenyuan

- *What are your comments on the Guiding Cases chosen until now?*

In the initial stage of establishing a database of Guiding Cases, a very important step was to fill the gaps. The current Guiding Cases have summarized past judicial experience well. Many of these cases were selected from the Supreme People's Court's published cases or typical cases involving different areas of law decided by different levels of courts. These cases have a wide range of representation, involving criminal, administrative, civil, commercial, intellectual property, and other legal fields. According to my observations, this initial stage is now largely completed. Thus, as legal professionals, we have higher expectations and hope to see more new Guiding Cases that have more guiding significance and are time-efficient in the field of legal interpretation.

In China, Guiding Cases are very clearly defined not as law, but as interpretations of the law. We already have legal and judicial interpretations, so why do we still need Guiding Cases? I think that although Guiding Cases can be used as vivid, real-life cases to explain the law to society and to present the spirit of the law in a simple and concise way, the core worth of Guiding Cases is as a declaration to society of the attitude of the Supreme People's Court towards filling in legal loopholes and explaining legal norms and the court's roles in the unification of the application of laws and the safeguarding of judicial authority. Therefore, with further development of legal methodology and legal interpretation, there should still be more development of Guiding Cases, in terms of their depth of legal interpretation, through the selection of Guiding Cases and the presentation of their main points of the adjudication.

At the same time, the pace of development in modern society is accelerating, and the emergence of many new things poses new challenges to our current legal rules. In addition to the existing case database framework, the community of legal practitioners is paying more attention to the Supreme People's Court's views on novel issues brought about by these new things. Sometimes, society does not have enough

time to wait for new legal or judicial interpretations. Once problems arise, they need to be resolved immediately. The efficiency characteristics of Guiding Cases are precisely what can meet this time-sensitive demand. Therefore, the expectations for Guiding Cases in the community of legal practitioners will increase day by day.

- *Do you think that the implementation of the Case Guidance System needs to be supplemented by other procedural laws?*

That's a very good question. If we only consider the application of a [Guiding] Case at the judgment stage, it can be said that we have omitted an important aspect of the application of Guiding Cases. According to the provisions of Article 7 of the *Provisions of the Supreme People's Court Concerning Work on Case Guidance*, "[p]eople's courts at all levels should refer to the Guiding Cases released by the Supreme People's Court when adjudicating similar cases." Here, "should" suggests that people's courts at all levels must include Guiding Cases in the scope of legal interpretation when adjudicating similar cases; but "refer to" is not "follow", and hence, people's courts at all levels need to distinguish between specific situations to consider whether or not [the Guiding Cases] are applicable.

Is distinguishing between cases solely the task of the judges? Of course not; the facts of a case are established by the attack and defense methods put forth by the litigants, and these attack and defense methods need to be verified through debate. In addition, distinguishing cases is the objective, but achieving this objective requires techniques. If we know nothing about the techniques used to distinguish cases, it is hard to imagine how this case is distinguished from another case through the joint efforts of lawyers and judges. Therefore, how to fully develop the role of debates in court trials and how to effectively employ techniques used to distinguish cases to achieve the effects of debates are particularly important. Without a perfect trial, there can be no perfect judgment. Since the Case Guidance System has not yet made clear provisions regarding these issues, and in judicial practice, there are indeed judges who retrieve cases on their own and make direct reference to such cases without debate, this deserves more of our attention. If our judges, for the purpose of applying Guiding Cases, carry out adjudications without debate, this good system may be adversely affected.

- *As an experienced former judge and lawyer, what reform measures do you think are most needed for China's Case Guidance System?*

I think China's Case Guidance System is still in its process of development. As legal practitioners, we are probably more concerned about its implementation, that is, whether the system really works. Therefore, for issues related to enforcement of cases, we need to consider their binding force. This is the same in any law-related system, which is difficult to take root if there are no legal consequences for making it binding.

Regarding the issue of binding force, I do have some suggestions—perhaps, we could establish three mechanisms. First, after a Guiding Case is released, if a lower court renders a judgment deviating from the Guiding Case in the sense that the judgment rendered by the lower court is inconsistent with the "Main Points of the Adjudication" of the Guiding Case, if such a deviating judgment is rendered, I think we need to have an argumentation mechanism—that is to say, when the lower court decides the case, it is required to fully discuss why it does not follow the Guiding Case. Each case is different from others and thus we must clarify the differences among them. In this respect, I think we can learn from the techniques employed by case law countries, for instance, techniques used to distinguish cases—how this case is different from that case, why a case is not applicable, etc.

The second mechanism is an appeal mechanism. After a judgment deviating from a Guiding Case is rendered, both parties should have the right to lodge an appeal on the grounds that the Guiding Case is not applied to the case. If, in the course of reviewing the case, the upper level court agrees and believes that this really is an issue, it can remand the case for a retrial or amend the judgment.

The third mechanism is a reporting mechanism. Cases change over time. As our society develops, some cases that were decided a long time ago may no longer be suitable for the society. A lower court, in making a value judgment, may think that a certain [Guiding] Case is no longer suitable for the pending case and may render a new decision. Under that circumstance, in addition to the argumentation and appeal mechanisms that I just mentioned, I think we could establish a reporting mechanism. That is, at the same time when such a decision is made, the lower court would report its thoughts on the [Guiding] Case to the upper court and the report could be submitted level by level to the Supreme Court, which could decide whether the original case is still suitable for application.

In the provisions on Guiding Cases, the Supreme [People's] Court states that [people's courts] "should refer to" Guiding Cases, and my understanding covers the following two aspects: "should" suggests that we must consider the possibility of applying the Guiding Cases and "refer to" suggests that different cases have different facts, and thus, one should examine each case

and decide whether to apply a Guiding Case. This is still quite abstract, and therefore, if this is supplemented with the three mechanisms, I think that [the idea that people's courts] "should refer to" [Guiding Cases] will be implemented more effectively.

These are some of my rough ideas [on reform measures].

- *How has your previous experience as a judge helped your professional career as a lawyer? Did it take you some time to transition into your new role as a lawyer? As a lawyer, do you have the opportunity to use cases in your work? Could you give a few examples?*

There are indeed different perspectives as a judge or lawyer. Judges must adjudicate cases from a neutral standpoint, whereas lawyers must, within the confines of the law, think about issues from their client's perspective. Nevertheless, both judges and lawyers must have case-based thinking and be skilled in using cases. To some extent, lawyers are even more reliant on cases than judges. Regardless of handling non-litigation projects or litigation cases, lawyers often need to answer many questions from clients. Some questions can be answered more persuasively by using case analytics. In such circumstances, cases are not confined to Guiding Cases, but include all related cases with reference value.

In one instance, we dealt with a case in which our client was sued for compensation because of an alleged "erroneous preservation [of property]". The client was the plaintiff in another case, in which the client had brought suit against two defendants who had defaulted on payment for goods and the client had also applied to seal up the second defendant's bank account. However, the result of the suit was that only the first defendant was held liable for the payment for the goods. Thereafter, the second defendant sued our client for sealing up his bank account, which had caused the second defendant's immense losses. [The second defendant also contended that our client] had made a subjective mistake in the application for the preservation of the second defendant's property and therefore requested compensation. Our client lost the first-instance suit handled by a basic people's court and appealed to the intermediate people's court, engaging us to analyze the case.

Dr. Hu (2nd from right) and other distinguished legal experts discuss the possible outcomes of the hypothetical case at the CGCP's 2018 conference in Beijing

We noticed that compensation for mistakes made in relation to applications for preservation [of property] is only mentioned in China's *Civil Procedure Law* and is not clearly defined in the *Tort Law*, nor are there relevant judicial interpretations. In other words, this issue was ambiguous in legal rules. Thus, we employed thorough research on cases and looked through dozens of judgments rendered by that intermediate people's court as well as those rendered by related higher people's courts and the Supreme People's Court. We identified similar adjudications and chose the relevant reasoning in these adjudications, based on various perspectives and principles, such as subjective fault, loss and damage, causation, etc., that we could use to argue our own points. In combing through these judgments, we created an "adjudication tracking map".

From this map, the second-instance court of this case could clearly see from every angle the different perspectives held by the court and upper courts, and how the first-instance court's reasons were different from these perspectives. Ultimately, the second-instance court reversed the decision of the first-instance court according to law and rejected all of the other party's litigation requests. We believe that this "adjudication tracking map" was instrumental to the success of our case and left an intuitive and lasting impression on the judges in the second-instance court. ■

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[1] 《最高人民法院关于案例指导工作的规定》 (*Provisions of the Supreme People's Court Concerning Work on Case Guidance*), passed by the Adjudication Committee of the Supreme People's Court on Nov. 15, 2010, issued on and effective as of Nov. 26, 2010, Stanford Law School China Guiding Cases Project, English Guiding Cases Rules, June 12, 2015 Edition, https://cgc.law.stanford.edu/guiding-cases-rules/20101126-english.

"法官和律师都必须[…]熟练运用案例，在某种程度上，律师对案例的依赖更甚。"
—胡震远博士

CGCP专访：胡震远博士*

苑轲
中国指导性案例项目副执行编辑
美国科文顿•柏灵律师事务所（上海）律师

以下胡震远博士的专访是由苑轲于2018年3月在北京进行。

- *请问您最早是从什么时候开始关注指导性案例的？*

最早是在2010年最高人民法院发布《关于案例指导工作的规定》时，[1] 我当时在法院研究室工作，并参与了与此相关的系列会议。在《规定》发布后，我把自己的一些思路整理成文，在《法治论丛》（*The Rule of Law Forum*）发表了一篇名为《案例指导制度初论》的文章。在这篇文章里，我建议对指导性案例的具体运作机制进行细化，也即以审级监督制度的张力赋予指导性案例事实上的拘束力；针对法律规则模糊、矛盾、抽象和空白的情况，以解决法律适用问题为标准对指导性案例进行遴选；归纳出指导性案例的裁判要旨，在统一的平台上及时公布；通过建立背离判决的论证机制、上诉机制和报告机制对指导性案例进行更新。

- *您觉得在中国这样一个成文法国家发展案例指导制度的意义是什么？*

我觉得这是一个非常有意义的事情。可是，您有没有发现一个很有趣的现象，就是我们两大法系：案例法国家，以英国或者美国为代表，它们却是有一套完整的成文法典；作为成文法国家的代表，像德国、日本，您会发现，就是下级法院如果没有遵循上级法院的判决，它有可能被改判或者被发回重审，所以两大法系好像已经看到了对方身上的闪光点，就这个角度而言呢，它们张开怀抱，热情相拥。所以，这个案例指导制度，其实在这里面扮演了非常重要的一个角色，我们是觉得，在一个社会变动不居的情况下，我们的法律如果只是成文法的话，通常情况下会有些滞后，法官就必须要去面对一些新的问题，解决一些新的问题，甚至于需要创设一些规则。在这个过程当中，意见发生分歧怎么办？怎么来弥合这个问题？怎么来维护司法权威？所以在这个层面上考虑的话，案例指导制度就非常管用。

那么，今天的中国实际上在进行一场司法改革，这个司法改革涉及的面非常广，以我粗浅的理解来讲的话，跟我们案例指导制度相关的至少有三个层面：一是我们的人员配置，我们现在法官实行员额制，规定只有审理案件的人员才有法官职称，在这个过程当中，让法官充实到一线去办案，把审判权还给法官。第二个就是司法民主改革当中，我们提出要进一步的让人民陪审员能够参与好案件的审理。第三个就是司法公开，我们原来就有裁判文书上网的要求，现在又进一步的发展和完善，同时又提出法庭审理也要上网，那么这些实际上已经或者正在进一步地促进司法公正。

它和案例指导都是有关系的，比方说员额的问题，我们把这个审判权又还到法官手里，就是原来这个案件裁判的结果，案件的决定权是在庭长手里，现在把这个权力又回到审判法官手里，那么，这当然是符合了我们直接审理原则，跟诉讼程序上的要求是合拍的，非常正确的。同时，另外一个实际的问题就是说意见从决策的集中向分散发展的时候，我们会发现，这里面分歧的可能性就增大。怎么来解决这个问题？司法民主也是这样。当陪审员更多的介入到案件的审理当中去的时候，陪审员更倾向于用常识去审理案件，而法官因为经过训练，所以他除了常识以外，他会用技术去审理案件，这两者之间的差异怎么来弥合？ 那么随着司法公开，这种差异会被放大。所以，我想在这个时间点上考虑案例指导制度就显得非常重要，它可以说是维护司法权威的一剂良药。

- *您如何评价目前遴选的指导性案例？*

在建立指导性案例库的起始阶段，很重要的一个环节就是填补空白。目前的指导性案例已经很好地总结了以往的司法经验，其中有不少案例来自最高人民法院的公报案例或者各审判业务条线的典型案例。这些案例具有广泛的代表性，涉及到刑事、行政、民事、商事、知识产权等各个法律领域。据我的观察，现在这个阶段已经大致完成。于是，作为法律职业者，我们又有了更高的期望，希望能看到更多在法律解释学上更具有引领意义、更具有时效性的新案例。

关于CGCP专访胡震远博士的视频部分内容，请访问https://cgc.law.stanford.edu/zh-hans/cgcp-classroom-lesson-5，观看CGCP*学堂*™发布的视频。

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方达律师事务所合伙人

上海市第一中级人民法院知识产权审判庭和金融审判庭前副庭长

胡震远博士于2017年作为合伙人加入方达律师事务所，专业从事纠纷解决，尤其是关于知识产权、竞争法、反垄断、金融和商法领域的复杂纠纷解决。此前，他曾经在上海市第一中级人民法院工作二十年，自2011年开始先后担任知识产权审判庭和金融审判庭副庭长。他处理过一批有影响的案例，并曾两次参与最高人民法院的课题研究，为相关司法解释的起草提供智力支持。

胡博士还兼任上海市法学会商法研究会理事、复旦大学法学院、上海财经大学法学院、上海外国语大学法学院硕士生导师等社会职务，以及复旦大学知识产权研究中心研究员。胡博士本科（专业是经济法）毕业于华东政法大学，随后在复旦大学获得硕士和博士学位，并回到华东政法大学完成博士后研究。

在中国，一个很清晰的界定是，指导性案例不是法律，而是对法律的解释，我们已经有了法律和司法解释，为什么还需要指导性案例？我认为，指导性案例虽然可以用鲜活的案例向社会以案说法，深入浅出地提示法律的精神内涵，但其核心的价值更在于向社会宣布最高人民法院在法律漏洞填补或者法律规范解释上的态度，统一法律适用，维护司法权威。因此，随着法律方法论和法律解释学的进一步深入发展，无论是从案例的遴选还是裁判要旨的表述，指导性案例应该还会在法律解释深度上获得更大的发展。

同时，现代社会发展的步伐加快，许多新生事物的出现对固有的法律规则提出新的挑战。除了现有的框架性案例库外，法律实务界会更关心最高人民法院对于新生事物带来的新问题所持的见解。有时候，社会没有足够的时间去等待新的法律或司法解释，一旦问题出现，即刻就需要得到解决。指导性案例所具有的效率性特征则正好可以满足这种时效性的需求。因此，法律实务界对指导性案例的期待会日益增强。

胡震远博士

- *您觉得案例指导制度的实施，需要其他程序法的配合吗？*

这是一个很好的问题。如果我们只在判决阶段来考虑案例的适用，那么可以说，我们已经在指导性案例的适用上遗漏了一个重要的环节。根据最高人民法院《关于案例指导工作的规定》第七条的规定，“最高人民法院发布的指导性案例，各级人民法院审判类似案例时应当参照。”“应当”意味着各级人民法院在审理类似案件时，必须把指导性案例纳入法律解释的视线范围，但“参照”并非“依照”，故各级人民法院又需要区分具体案情来考虑适用与否。

案情如何区分，仅仅是法官自己的事情吗？当然不是，案情由诉讼当事人提出的攻击防御方法构成，而这些攻击防御方法则需要通过辩论的验证。此外，区分案情是目标，但是达成目标需要技术，如果我们对于区分技术一无所知，那么很难想象，此案与彼案如何在律师和法官的共同努力下进行区分。于是，如何在法庭审理中充分发挥辩论的作用，并且有效地运用区分技术来实现辩论效果，就显得尤为重要。没有完美的庭审，就没有完美的判决。由于案例指导制度尚未对此作出明确规定，而司法实践中也确实有法官自行检索案例，不经辩论直接参照的情况，故这一点需要引起足够的重视，如果为了适用指导性案例而突袭裁判，反倒令这一良好的制度产生了负面效果。

- *作为一位经验丰富的前法官、律师，您认为中国案例指导制度最需要的改革措施是什么？*

我觉得这个中国的案例指导制度，实际上还处在一个发展的过程当中。作为实务工作者来讲，我们可能更关注它的执行能不能落到实处。所以，我想执行案例这一类的问题，可能要考虑它的拘束力问题。因为任何一项法律制度都是这样，如果没有法律后果去约束的话，很难生根落地。

考虑它拘束力的问题呢，我倒是有这么一些建议。我们是不是可以建立三个机制：第一个呢就是这个指导性的案例颁布了以后，如果下级法院又做出一个背离判决，而我们说的这个背离判决，是指下级法院做出的裁判和这个指导性案例的裁判要旨不吻合。那如果做出这样的判决的话，我想第一个要有一个论证机制，也就是说，下级法院在判决的时候，要充分的去论证这个案子为什么不去按照指导性案例去判。每个案子千差万别，所以要把这个之间的差异讲清楚，这个方面我觉得可以更多的向有案例处理经验的这些国家去学习他们的技术，比方说区分技术、此案和彼案的差异在哪里、它为什么不能适用等。

第二个机制就是上诉机制。当一个背离判决做出来以后，双方当事人应该有权利就这个案子没有适用指导性案例为理由而提出上诉。上级法院同样在审查的过程当中，如果认为这个确实是个问题，它可以以此为理由发回重审或者改判。

第三个就是报告机制，因为案例它是随着时间的推移会发生变化。在一个社会发展的过程当中，有一些案例，时间久了，它可能就不适应这个社会，那下级法院通过价值判断，可能觉得这个案子今天再来用不太合适，可能要做出一些另外的判断，那么这个除了刚才我们提到的论证和赋予上诉的权利以外，我觉得是不是可以建立一种报告机制，即在做出这样的判决的时候，同时把自己的想法呈现给上级法院，这种报告可以层递到最高法院，由最高法院判断原来的案例是不是已经不合适。

所以，我想，因为我们最高法院对于指导性案例的规定是说“应当参照”，我的理解是两个方面，“应当”就是说必须要考虑[指导案例]适用的可能性，“参照”意味着不同的案子有不同的案情，所以您可以甄别是不是可以去适用。但是这个还相对比较抽象，如果有三个机制可以去配合呢，我想这个“应当参照”可能会做得更好。

这是我的一些粗浅的建议。

- *您之前的法官工作经验对您现在的律师执业有何帮助？您是否花了一些时间来适应律师这一个新的角色？作为一名律师，您是否有机会在工作中使用案例？可否举几个例？*

法官和律师的立场的确存在着差异，法官必须从中立的角度去审案，而律师则要在法律允许的框架内，站在客户的立场上去考虑问题。然而，法官和律师都必须具备案例思维，熟练运用案例，在某种

胡博士（图右二）与其他杰出的法律专家一起，在CGCP 2018年北京会议上讨论模拟案件的可能结果

程度上，律师对案例的依赖更甚。无论是在非诉项目中还是在诉讼案件中，律师常常需要回答客户的很多问题，有些问题通过案例统计分析的方式呈现会更有说服力。这时的案例并不仅仅局限于指导性案例，而是包括所有相关的参考性案例。

我们曾经代表客户处理了一起因为“保全错误”而被诉赔偿的案件。客户是另一起案件的原告，因两被告拖欠货款而起诉，并申请查封了被告二的银行存款。不过，案件的审理结果是仅被告一承担支付货款的责任。于是，被告二起诉客户在前案中查封其银行存款，导致其巨额损失，且申请财产保全具有主观过错，故提出赔偿请求。客户在基层人民法院一审败诉，上诉到中级人民法院，并委托我们进行案情分析。

我们注意到，保全错误的赔偿只是在民事诉讼法中提及，在侵权行为法上并没有具体规定，也没有相关司法解释，换句话说，这个问题在规则层面还不够明确。于是，我们充分利用案例检索的方法，查阅了该中级人民法院、高级人民法院以及最高人民法院的几十份判决，从中找出类似裁判，并进一步从主观过错、损害结果、因果关系等不同角度，选择这些裁判中的相关裁判理由，论证自己的观点。通过梳理，一份“裁判轨迹图”跃然纸上。二审法院可以清晰地看到，在每一个角度，本院和上级人民法院持有什么观点，一审判决的理由与上述观点呈现怎样的差异。最终，二审法院依法改判驳回对方的全部诉讼请求。我们相信，这份“裁判轨迹图”对案件胜诉起到了极其关键的作用，给二审法官一定留下非常直观和深刻的印象。■

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* 此中法连*聚焦*™的引用是：苑轲，CGCP专访：胡震远博士，《中国法律连接》，第1期，第71页（2018年6月），*亦见于*斯坦福法学院中国指导性案例项目，中法连*聚焦*™，2018年6月，https://cgc.law.stanford.edu/zh-hans/clc-spotlight/clc-1-201806-interview-2-ke-yuan。此专访的中文原文由苑轲撰写。载于本专访中的信息和意见受访者对其负责。它们并不一定代表中国指导性案例项目的工作或意见。

[1]《最高人民法院关于案例指导工作的规定》，2010年11月15日由最高人民法院审判委员会通过，2010年11月26日公布，同日起施行，斯坦福法学院中国指导性案例项目，中文指导性案例规则，2010年11月26日（最终版本），https://cgc.law.stanford.edu/zh-hans/guiding-cases-rules/20101126-chinese。

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China Law Connect and Belt & Road *Countries*™*

Jennifer Ingram
Managing Editor of the China Guiding Cases Project

China's Belt and Road Initiative

More than 2,000 years ago, the major civilizations of Asia, Europe, and Africa were linked through an extensive network of trade routes, along which they traded silk and many other goods, shared technologies, and had various intellectual and cultural exchanges that influenced the languages, practices, and religions of the region and, from there, the world (see **Image 1**). The term "Silk Road" is often used to refer to this network, evoking images of large caravans traveling across the desert landscape. These routes, however, were not only on land but also traversed the sea.[1]

Fast forward to the Fall of 2013, when Chinese President XI Jinping, while on an official tour of Central and Southeast Asia, first mentioned China's idea to revamp the historical Silk Road and bolster the modern-day land and sea links across these regions and the Middle East and other parts of Asia, Europe, and Africa. In March 2015, the Chinese government formally announced its plans to develop the "*Silk Road Economic Belt and the 21st Century Maritime Silk Road*" or the "Belt and Road Initiative" (the "BRI"), with five major "cooperation priorities": policy coordination, facilities connectivity, unimpeded trade, financial integration, and people-to-people bonds.[2]

Countries Participating in the Initiative

While the substantive priorities of the BRI are clear, its geographical coverage is not. The map first used by the official Chinese press to illustrate the BRI highlights two main routes

Image 1: Part of 9th century fresco from Bezeklik Thousand Buddha Caves near Turfan, Xinjiang, China, depicting Sogdian merchants of ancient Iran. Color reproduction of mural, which was destroyed during WWII.
Source: https://commons.wikimedia.org/wiki/File:BezeklikSogdianMerchants.jpg

Image 2

Jennifer Ingram
Managing Editor, China Guiding Cases Project, Stanford Law School

Jennifer Ingram is the Managing Editor of the China Guiding Cases Project (the "CGCP"). Ms. Ingram began working with the CGCP when it was founded, while a student at Stanford Law School. She has worked closely with Dr. Mei Gechlik, Founder and Director of the CGCP, on the management and development of the project, releasing groundbreaking products related to Guiding Cases and launching the Belt and Road Series to deepen stakeholders' understanding of this significant but not yet fully understood development. She also has experience in dispute resolution across diverse jurisdictions, ranging from South Africa and India to the Netherlands and Hungary, and has reviewed large-scale investment projects from a corporate and legal perspective as well as their impact on communities, recently focusing on projects in Kenya with Chinese investment. Ms. Ingram received a B.A. in Literature from Yale College, where she also majored in Ethnicity, Race & Migration, and a J.D. from Stanford Law School.

Image 3

(see **Image 2**): a land route connecting inland China to Europe through the Middle East, including a pass through Moscow ("Silk Road Economic Belt"), and a sea route originating on the southern Chinese coast and moving through Southeast Asia and the Pacific Island region, the Indian Ocean, and over to eastern Africa before traveling through the Red Sea up to the Mediterranean ("21st Century Maritime Silk Road"). This map is, however, misleading. The above-mentioned 2015 official document states explicitly that all countries as well as international and regional organizations are welcome to actively participate in the BRI.[3]

No Official Count

There is no official count of countries involved in the BRI. At the first Belt and Road Forum for International Cooperation, held in May 2017 in Beijing (the "2017 Belt and Road Forum"), President Xi said that 68 countries *and* international organizations had signed "Belt and Road cooperation agreements".[4] The official Belt and Road Portal (www.yidaiyilu.gov.cn), which was launched in March 2017, profiles 72 countries in a section titled "International Cooperation". It is, however, unclear whether only these 72 countries are considered to be officially participating in the global initiative.

The CGCP's Count

The significance of the BRI and its implications for the world, especially legal developments inside and outside China, cannot be thoroughly understood unless it is clear who the players are. Driven by a desire to shed light on these important topics, the China Guiding Cases Project (the "CGCP") of Stanford Law School launched its Belt and Road Series in November 2016 to, *inter alia*, track the involvement of countries around the world in the BRI and feature these countries in the Belt & Road *Countries*™ (" B&R *Countries*™") portion of the Belt and Road Series.

According to the CGCP's research, there are, not including China, currently 101 B&R *Countries*™, which, according to the CGCP's definition, are broadly divided into two groups. The first group consists of countries that are expressly targeted by China in its plans for the BRI, as evidenced by their inclusion on the Belt and Road Portal and/or the fact that their citizens or companies registered there were involved in Belt & Road *Cases*™ ("B&R *Cases*™"), which are exemplary cases released by the Supreme People's Court showing how disputes relevant to the BRI have been successfully resolved by Chinese courts.[5] The second group consists of countries which have taken affirmative steps to indicate their interest and/or involvement in the BRI by signing memoranda of understanding or cooperation agreements at the 2017 Belt and Road Forum[6] or by signing BRI-related agreements or pledging their support for the BRI at other times (see **Image 3**).

Following this definition, the CGCP counts as B&R *Countries*™ 29 countries in addition to the 72 currently listed on the Belt and Road Portal. These 29 countries include:

- six countries whose private citizens or companies were involved in B&R *Cases*™;
- 11 countries that signed memoranda of understanding or cooperation agreements at the 2017 Belt and Road Forum (at least 47 of the 72 countries profiled on the Belt and Road Portal signed such agreements);[7] and

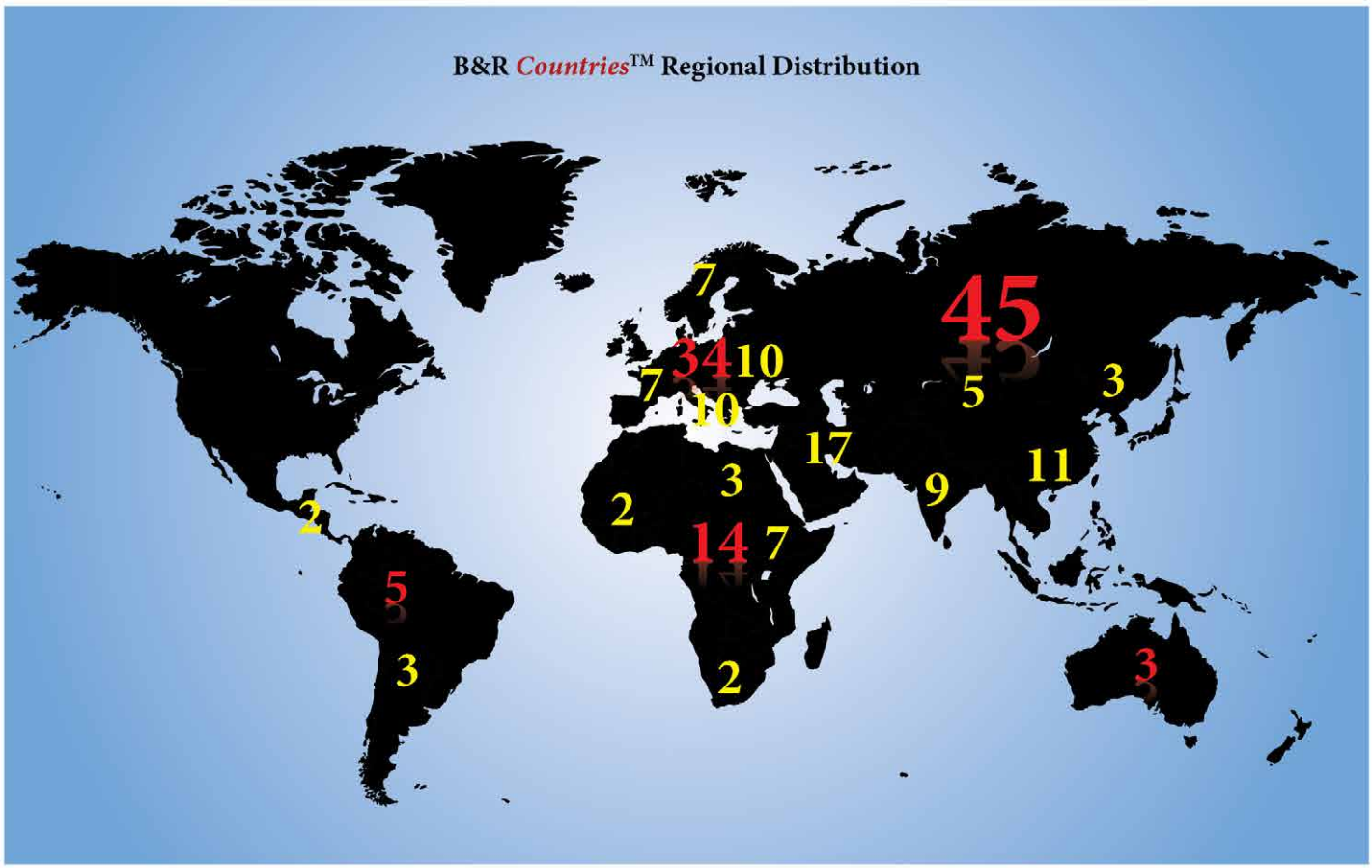

Image 4

- 12 countries that have indicated their interest at other times through pledges or joint statements or other agreements signed with China that relate to the BRI.

Image 4 shows the geographical distribution of the 101 B&R *Countries*™ identified by the CGCP.[8] A few observations are worth noting:

- 45 countries (almost all) in Asia

All of the countries in Central Asia (i.e., five), South-Eastern Asia (i.e., 11), Southern Asia (i.e., nine), and all but one of the 18 countries of Western Asia (that is, 17 countries) are B&R *Countries*™ based on the fact that they have been featured on the Belt and Road Portal (see **Table 1**).[9] China's authorities have also highlighted the country's closest neighbors in Eastern Asia (three countries), with two (i.e., Mongolia and South Korea) being listed on the Belt and Road Portal and one (i.e., Japan) involved in a B&R *Case*™. Given the region's central importance to the ancient Silk Road, the fact that the BRI was first introduced by President Xi while on an official visit to Central Asia, and the opportunities for the development of infrastructure and other ties across the continent, Asian countries are expected to play a central role in the global plan. It is, therefore, not a surprise that almost all of these countries are B&R *Countries*™.

Table 1

B&R *Countries*™	TOTAL	Identified by Chinese authorities: on Portal*	Identified by Chinese authorities: in B&R *Case*™	Identified by the CGCP: *agreement(s) at Forum***	Identified by the CGCP: *other pledge/ agreement*
ASIA	**45**	**44**	**1**		
Central	**5**	5			
East	**3**	2	1		
South-east	**11**	11			
South	**9**	9			
West	**17**	17			

* "Portal" means official Chinese Belt and Road Portal
** "Forum" means the 2017 Belt and Road Forum

- 34 countries in Europe

From its origins in Central Asia, the BRI, like the ancient Silk Road, has also attracted the participation of many European parties. All Eastern European countries (i.e., 10) and a majority of Southern European countries (i.e., seven) are profiled on the Belt and Road Portal, with the remainder of Southern European countries (i.e., three) having indicated their participation through BRI-related agreements.[10] While the Belt and Road Portal also highlights some Northern European countries (i.e., three), there are four other B&R *Countries*™ in this sub-region: two involved in B&R *Cases*™ and two having signed BRI-

Table 2 B&R *Countries*™	TOTAL	Identified by Chinese authorities: on Portal*	Identified by Chinese authorities: in B&R *Case*™	Identified by the CGCP: *agreement(s) at Forum***	Identified by the CGCP: *other pledge/ agreement*
EUROPE	**34**	**21**	**4**	**6**	**3**
East	**10**	10			
South	**10**	7		1	2
West	**7**	1	2	3	1
North	**7**	3	2	2	

* "Portal" means official Chinese Belt and Road Portal
** "Forum" means the 2017 Belt and Road Forum

related agreements. Western Europe is the least represented European sub-region on the Belt and Road Portal (with just one country profiled), though more in the region have been identified as B&R *Countries*™ based on their involvement in B&R *Cases*™ (two countries) and their signing of BRI-related agreements (four countries) (see **Table 2**). This seems to suggest that while Western European countries are quite interested in the BRI and are certainly welcome to participate, more needs to be done to bring them into the core of the Chinese plan.

- 14 countries in Africa

As much as China wants to continue strengthening its relationships with African countries, **Table 3** shows that many of these countries have not yet expressed clear intentions to join the BRI. While parts of Africa are profiled on the Belt and Road Portal (five countries), most of the African nations involved in the BRI (nine additional countries) have been identified as B&R *Countries*™ for other reasons.

Eastern and Northern Africa are important to the BRI given the main maritime route traced in the first BRI map provided by the Chinese authorities (see above, **Image 2**). Most of the African countries profiled on the Belt and Road Portal are located in these regions (two Eastern African countries and two Northern African countries). The CGCP has identified even more B&R *Countries*™ in these areas

Table 3 B&R *Countries*™	TOTAL	Identified by Chinese authorities: on Portal*	Identified by Chinese authorities: in B&R *Case*™	Identified by the CGCP: *agreement(s) at Forum***	Identified by the CGCP: *other pledge/ agreement*
AFRICA	**14**	**5**	**1**	**3**	**5**
East	**7**	2		2	3
South	**2**	1	1		1
West	**2**				1
North	**3**	2		1	

* "Portal" means official Chinese Belt and Road Portal
** "Forum" means the 2017 Belt and Road Forum

by discovering that five more Eastern African countries and one more Northern African country have signed BRI-related agreements.

Southern Africa and Western Africa are farther away from the main BRI routes, but a total of four countries in these regions are B&R *Countries*™. The involvement of these countries despite their geographical distance from the main BRI routes is likely driven by the strategic consideration on the part of both China and these nations to leverage their existing relationships for cooperation under the global plan (e.g., China's relationship with South Africa as a fellow "BRICS" nation as well as the extensive investments and relationships China has developed with these African countries over recent years).

- Eight other countries

The remaining B&R *Countries*™ truly reflect the open and inclusive nature of the initiative. The CGCP now counts five B&R *Countries*™ in Latin (i.e., Central and Southern) America, as well as three in the distant Oceania region (see **Table 4**). Like Africa, Latin America in recent years has been increasingly recognized by China for its strategic importance, and the BRI is expected to drive more opportunities in the region, especially in the areas of trade and investment.[11]

Table 4 B&R *Countries*™	TOTAL	Identified by Chinese authorities: on Portal*	Identified by Chinese authorities: in B&R *Case*™	Identified by the CGCP: *agreement(s) at Forum***	Identified by the CGCP: *other pledge/ agreement*
AMERICAS	**14**	**5**	**1**	**3**	**5**
Central	**7**	2		2	3
South	**2**	1	1		1
OCEANIA	**3**	1			2

* "Portal" means official Chinese Belt and Road Portal
** "Forum" means the 2017 Belt and Road Forum

Analysis of B&R *Countries*™ in *China Law Connect*

Identifying which countries have joined or will likely join the BRI is just the beginning of the CGCP's in-depth study of the BRI. Since the initiative was first announced, interested parties around the world have been trying to understand what it actually means. Pessimists have expressed concerns over whether countries will indeed benefit from their participation. For instance, will the transnational infrastructure projects at the center of the global plan result in impossibly high debt burdens for participating countries? Optimists, however, predict that these infrastructure projects will promote economic development in less developed countries. In addition, optimists may argue that China's need to make the BRI

a success following its enshrinement in the Chinese Constitution will help encourage reforms that can benefit all stakeholders.

All of these issues demand long-term commitment to focused research and analysis. As a result, the CGCP has decided to feature in each issue of *China Law Connect* (as part of the CLC *Spotlight*™ Series) a few B&R *Countries*™ to show exactly how the BRI is playing out on the ground, along with analyses contributed by interested observers. By looking closely at how the global initiative is being translated into national policy and how people around the world (e.g., local businesspeople and regular citizens alike) are getting involved, the CGCP will help unearth lessons and reveal the degree to which the BRI's promise of win-win cooperation will be easy or difficult to achieve in different regions. The information and analyses shared through the CLC *Spotlight*™ pieces will also enrich the content of individual B&R *Countries*™ pages featured on the CGCP website.

The BRI is an ambitious and complex plan with an expansive scope. If the initiative is implemented well, China can come to be seen as a truly responsible and respectable global power that can help shape international policy to solve worldwide challenges. It is the CGCP's hope that, through the CLC *Spotlight*™ Series on B&R *Countries*™, the significance of the initiative will be understood, and all stakeholders, including China, can thereby be better informed to find good solutions for tackling legal, business, and other issues arising under the far-reaching initiative. ■

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* The citation of this CLC *Spotlight*™ is: Jennifer Ingram, *China Law Connect* and Belt & Road *Countries*™, 1 China Law Connect 75 (June 2018), *also available at* Stanford Law School China Guiding Cases Project, CLC *Spotlight*™, June 2018, https://cgc.law.stanford.edu/clc-spotlight/clc-1-201806-bandr-1-jennifer-ingram. The author thanks Liyi Ye, Associate Managing Editor of the China Guiding Cases Project, for her research support and editorial assistance.
The original, English version of this piece was edited by Dimitri Phillips and Dr. Mei Gechlik. The information and views set out in this piece are the responsibility of the author and do not necessarily reflect the work or views of the China Guiding Cases Project.

[1] The United Nations Educational, Scientific and Cultural Organization notes that the maritime routes, which came to be known as the "Spice Routes", were also an important part of this network. For more information, see *About the Silk Road*, U.N. Educ., Sci. & Cult. Org., https://en.unesco.org/silkroad/about-silk-road.

[2] 《推动共建丝绸之路经济带和21世纪海上丝绸之路的愿景与行动》(*Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road*), issued by the National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China, with State Council authorization, on Mar. 28, 2015, https://eng.yidaiyilu.gov.cn/qwyw/qwfb/1084.htm.

[3] *Id.* Section VII.

[4] *See, e.g.*, *Xi Says Belt and Road Forum Fruitful*, Xinhua, May 15, 2017, http://www.xinhuanet.com/english/2017-05/15/c_136285787.htm.

[5] The CGCP produces high-quality translations of these cases and publishes them as B&R *Cases*™ on the CGCP website, at https://cgc.law.stanford.edu/belt-and-road/b-and-r-cases.

[6] Over 160 bilateral agreements were signed at the 2017 Belt and Road Forum across the five major "cooperation priorities" of the BRI.

[7] This number only includes those countries explicitly identified as signatories in the *List of Deliverables of the Belt and Road Forum for International Cooperation*, which lists the cooperation agreements signed by representatives attending the 2017 Belt and Road Forum. Other countries featured or not featured on the Belt and Road Portal may have also signed cooperation agreements at the high-level event but are not specifically identified as signatories in this list. *See, e.g.*, *List of Deliverables of Belt and Road Forum*, Xinhua, May 16, 2017, https://eng.yidaiyilu.gov.cn/qwyw/rdxw/13698.htm.

[8] The regional breakdown is based on the U.N. Statistics Division groupings commonly referred to as the M49 Standard. Standard Country or Area Codes for Statistical Use, U.N. Statistics Division, https://unstats.un.org/unsd/methodology/m49.

[9] There is no Northern Asia region under the M49 Standard, with Russia being grouped in Eastern Europe.

[10] Annual summits aimed at increasing cooperation between China and Eastern and Southern European countries have been organized since 2012. For more information, see Coop. Betw'n China & Cent. & E. Eur. Countries, http://www.china-ceec.org/eng.

[11] China specifically invited Latin American countries to join the BRI at the beginning of this year. *See, e.g.*, *Chinese President Calls for Concerted Efforts with Latin America on Be&R Initiative*, Xinhua, Jan. 23, 2018, http://www.xinhuanet.com/english/2018-01/23/c_136915970.htm.

《中国法律连接》与一带一路国家™*

英珍妮
中国指导性案例项目执行编辑

中国的一带一路倡议

2000多年前，亚洲、欧洲和非洲的主要文明通过广泛的贸易路线网络相互联系在一起，他们沿着这些路线交易丝绸和许多其它商品，共享科技，并进行各种知识和文化交流，影响着这个地区乃至于全世界的语言、实践和宗教（见**图1**）。“丝绸之路”这个术语通常指的就是这个网络，它让人联想到大型商队穿越沙漠的景象。然而，这些路线并不局限在陆地，还穿越了海洋。[1]

快速前进到2013年秋季，当时中国国家主席习近平在中亚和东南亚进行正式访问，首次提到中国希望以新的形式重建历史性的丝绸之路的想法，并加强这些地区和中东，以及亚洲、欧洲和非洲其他部分现代化的海陆连接。2015年3月，中国政府正式宣布其发展“丝绸之路经济带和21世纪海上丝绸之路”或“一带一路倡议”（“BRI”）的计划，其中有五大“合作重点”：政策沟通、设施联通、贸易畅通、资金融通、民心相通。[2]

图1：中国新疆吐鲁番附近的Bezeklik千佛洞里9世纪的壁画特写，描绘了古代伊朗的粟特商人。原壁画于第二次世界大战期间被摧毁，该图显示的是彩色复制品。
来源：https://commons.wikimedia.org/wiki/File:BezeklikSogdianMerchants.jpg

参与倡议的国家

尽管BRI的实质性重点事项是明确的，但是其具体地理覆盖范围却并不如此。中国官方报道首次用于说明BRI的地图突出了两条主要路线（见**图2**）：一条通过中东连接中国内陆至欧洲，中途通过莫斯科的陆路（“丝绸之路经济带”）；一条始于中国南部沿海，经过东南亚和太平洋岛屿地区、印度洋和非洲东部，然后穿越红海直至地中海的海路（“21世纪海上丝绸之路”）。然而，这张地图有误导性。上述的2015年官方文件中明确表示，欢迎所有国家以及国际和地区组织积极参与BRI。[3]

图 2

英珍妮
斯坦福法学院中国指导性案例项目执行编辑

英珍妮是斯坦福法学院中国指导性案例项目（CGCP）执行编辑。自CGCP创建时起，她就开始为其工作，尽管当时还是斯坦福法学院学生。她与CGCP创办人、总监熊美英博士就该项目的管理和发展紧密地合作，推出了关于指导性案例的突破性产品，并启动了一带一路系列从而深化利益相关者对此重要发展的理解。她还在不同司法管辖区（南非、印度、荷兰和匈牙利）的争议解决方面拥有经验。她亦一直从企业和法律角度审查大型投资项目，并分析其对社区的影响。最近她重点分析肯尼亚的中国投资项目。英女士获得耶鲁大学的文学学士学位（主修种族、人种和迁移）和斯坦福法学院的法学博士学位。

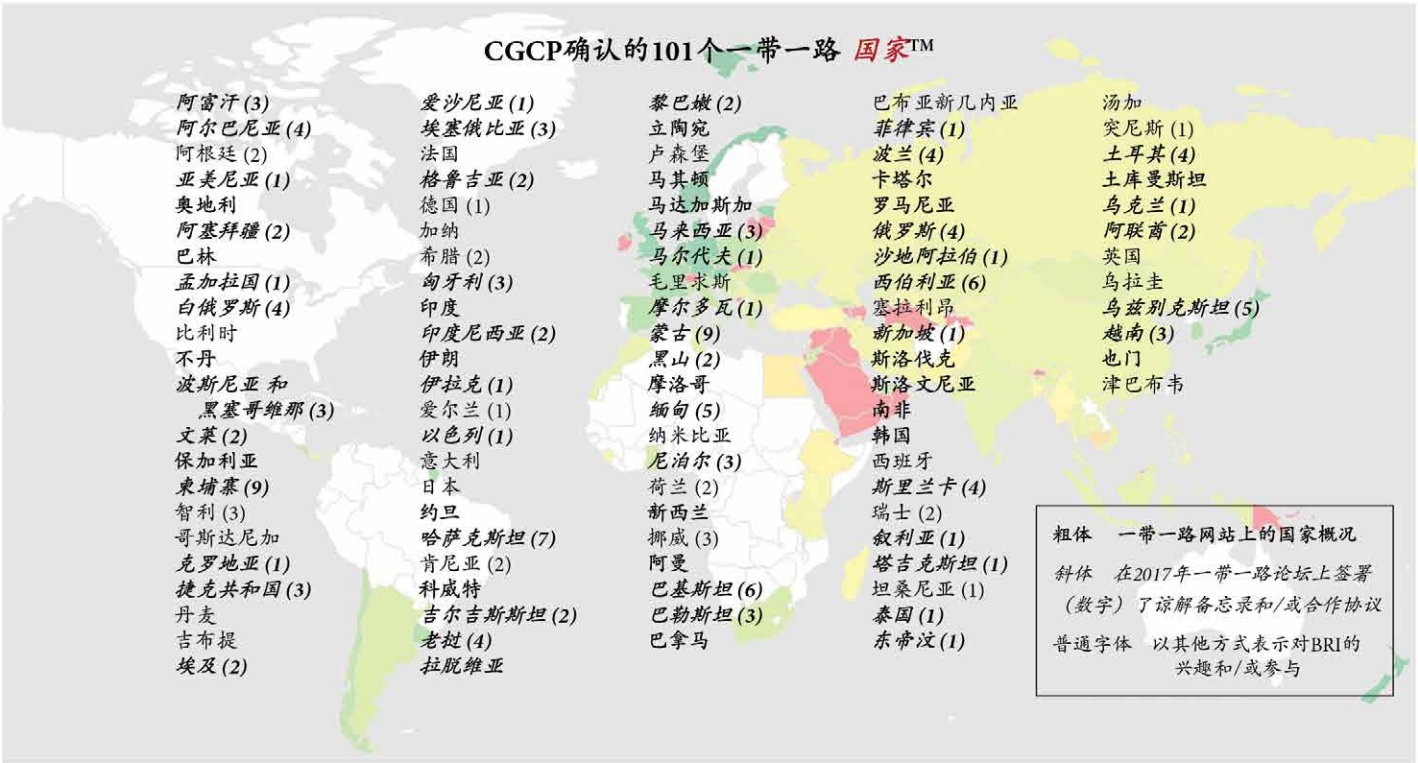

图 3

无官方统计

官方没有对参与BRI的国家作出具体统计。2017年5月在北京召开的首届一带一路国际合作论坛（“2017一带一路论坛”）上，习主席表示已有68国家和国际组织签署了“一带一路合作协议”。[4] 在2017年3月开通的的官方一带一路网站（www.yidaiyilu.gov.cn）上，其“国际合作”一栏介绍了72个国家。但是，是否只有这72个国家被视为正式加入这一全球倡议，这点尚不明确。

CGCP的统计

除非明确参与者是谁，否则BRI的重要性和其对全世界的影响，尤其是对中国国内外的法律发展的影响，无法得到彻底的理解。在希望阐明这些重要主题的驱使下，斯坦福法学院中国指导性案例项目（“CGCP”）于2016年11月启动了《一带一路系列》，跟踪世界各国参与BRI的情况，并在这系列中一带一路*国家*™部分专门介绍这些国家。

根据CGCP的研究，不包括中国在内，目前有101个一带一路*国家*™。依照CGCP的定义，这些国家大致分为两组。第一组是中国在其BRI计划中明确对准的国家，这一点可以通过将这些国家纳入一带一路门户网站和/或其公民、登记的公司涉及一带一路*案例*™这一事实来证明。一带一路*案例*™是最高人民法院发布的示范案例，展示了中国法院如何成功解决与BRI有关的争议。[5] 第二组是已经迈出肯定的一步来表示对BRI的兴趣和/或已经参与BRI的国家。这些国家或在2017年一带一路论坛上签署了谅解备忘录或者合作协议，[6] 或签署了和BRI相关的协议，或是在其他时间承诺支持BRI（见**图3**）。

根据这一定义，CGCP统计目前除了在一带一路网站上列出的72个国家外，还有另外29个一带一路*国家*™。这29个国家包括：

- 6个其公民或者公司涉及一带一路*案例*™的国家；
- 11个在2017年一带一路论坛上签订了谅解备忘录或者合作协议的国家（一带一路网站上列出的72个国家中，至少42个国家签署了这样的协议）；[7] 以及
- 12个在其他时间通过承诺或联合声明或与中国签署与BRI有关得协议，表达了他们的兴趣的国家。

图4 展示了CGCP确定的101个一带一路*国家*™的地理分布。[8] 有几点值得一提：

- 45个（几乎全部）位于亚洲的国家

所有中亚（5个）、东南亚（11个）、南亚（9个）的国家，和西亚18个国家中的一个除外（即17个国家）都是一带一路*国家*™。这些国家都是在一带一路网站上有专题介绍（见**表1**）。[9] 中国当局还强调了中国在东亚最近的邻居（3个国家），其中两个（即蒙古和韩国）被列入一带一路网站，而另一个涉及一带一路*案例*™（即日本）。鉴于该地区对古代丝绸之路的重要性、习主席是在对中亚正式访问时首次提出BRI这一事实、在该大陆发展基础设施和其他关系的机会，亚洲国家预计会在这一全球计划中发挥核心作用。因此，几乎所有亚洲国家都是一带一路*国家*™丝毫不让人觉得意外。

图 4

- 34个位于欧洲的国家

BRI起源于中亚，像古代丝绸之路一样，也吸引了许多欧洲国家的参与。所有东欧国家（10个）和大部分南欧国家（7个）在一带一路网站上都有介绍。南欧其他国家（3个）通过签署与BRI有关的协议表示其对BRI的参与。[10] 虽然一带一路网站还重点介绍了一些北欧国家（即3个），但该分区域还有其他四个一带一路*国家*™：其中两个涉及一带一路*案例*™，另外两个已签署BRI相关协议。从一带一路网站上看，西欧是参与国最少的欧洲次区域（仅介绍了1个国家），尽管更多该区的国家因涉及一带一路*案例*™ （2个国家），或者签订了BRI相关协议（4个国家）而被视为一带一路*国家*™（见**表2**）。这似乎意味着，虽然西欧国家对BRI相当感兴趣，中国也乐见其参与，但还需要做更多的工作才能使其成为中国计划的核心。

- 14个位于非洲的国家

尽管中国希望继续加强与非洲国家的关系，但表3显示，许多这些国家还没有明确表达加入BRI的意愿。尽管非洲部分国家在一带一路网站上已被介绍（5个国家），但大部分参与BRI的非洲国家是因其他原因被列为一带一路*国家*™（另外9个国家）。

从中国当局提供的第一张BRI地图中描绘的主要海上航线可见，非洲东部和北部对BRI非常重要（见上**图2**）。一带一路网站介绍的非洲国家大多位于这些地区（2个东非国家和2个北非国家）。通过发现另外5个东非国家和1个北非国家签署了与BRI有关的协议，CGCP在这些地区确认了更多的一带一路*国家*™。

非洲南部和西部离BRI主干线较远，但这些地区共有4个国家是一带一路*国家*™。尽管这些国家与BRI主要路线地理距离远，但这些国家的参与可能是由中国和这些国家的战略考虑所驱动的，以利用其现有关系在这全球计划下进行合作（例如，中国与南非作为“金砖五国”的关系，以及近年来中国与这些非洲国家共同发展的广泛投资和关系）。

表 1

一带一路 *国家*™	总数	由中国官方确认		由CGCP确认	
		官网*	一带一路 *案例*™	*论坛*** *上签订协议*	*其它 承诺/协议*
亚洲	45	44	1		
中亚	5	5			
东亚	3	2	1		
东南亚	11	11			
南亚	9	9			
西亚	17	17			

表 2

一带一路 *国家*™	总数	由中国官方确认		由CGCP确认	
		官网*	一带一路 *案例*™	*论坛*** *上签订协议*	*其它 承诺/协议*
欧洲	34	21	4	6	3
东欧	10	10			
南欧	10	7		1	2
西欧	7	1	2	3	1
北欧	7	3	2	2	

*“官网”是指中国一带一路官网
**“论坛”是指2017 一带一路论坛

表3

一带一路国家™	总数	由中国官方确认		由CGCP确认	
		官网*	一带一路案例™	论坛** 上签订协议	其它承诺/协议
非洲	14	5	1	3	5
东非	7	2		2	3
南非	2	1	1		1
西非	2				1
北非	3	2		1	

表4

一带一路国家™	总数	由中国官方确认		由CGCP确认	
		官网*	一带一路案例™	论坛** 上签订协议	其它承诺/协议
美洲	14	5	1	3	5
中美	7	2		2	3
南美	2	1	1		1
大洋洲	3	1			2

*“官网”是指中国一带一路官网
**“论坛”是指2017 一带一路论坛

- 8个其他国家

剩下的一带一路国家™真正体现了该倡议的开放性和包容性。CGCP统计出在拉丁美洲（即中南美）以及遥远的大洋洲地区分别有5个和3个一带一路国家™（见**表4**）。与非洲一样，近年来拉丁美洲的战略意义越来越受到中国的认可，而且可以预计BRI将为该地区带来更多机会，特别是在贸易和投资领域方面。[11]

《中国法律连接》中的一带一路国家™分析

确定哪些国家已加入或将加入BRI只是CGCP深入研究BRI的开始。自倡议首次宣布以来，世界各地的有关各方一直在试图理解它的实际含义。悲观主义者担心参与国是否确实会从参与中受益。例如，作为这一全球计划的核心的跨国基础设施项目是否会让参与国债台高筑？然而，乐观主义者预测，这些基础设施项目将促进欠发达国家的经济发展。此外，乐观者可能会认为，BRI被写进中国宪法后，中国对BRI成功的需求将有助于带来让所有利益相关者受益的改革。

所有这些问题都需要长期专注的研究和分析。因此，CGCP决定在每期《中国法律连接》中（作为中法连聚焦™系列的一部分），专题讨论一些一带一路国家™，以展示BRI的实际实施情况，同时分享对此感兴趣的观察员所提供的分析。通过密切关注这个全球倡议如何转化为国家政策，以及世界各地的人们（例如当地商人和普通公民）如何参与其中，CGCP将帮助挖掘出当中的经验教训，并披露BRI承诺的双赢合作在不同地区实现的难易程度。中法连聚焦™作品所分享的信息和分析也将丰富CGCP网站上的各个一带一路国家™页面的内容。

BRI是一个雄心勃勃且复杂的计划，并有广泛的范围。如果这一倡议实施良好，中国会被视为一个真正负责任、受人尊敬的强国，并能够帮助制定解决全球挑战的国际政策。通过中法连聚焦™系列中对一带一路国家™的分析，CGCP希望该倡议的重要性得到了解，从而使包括中国在内的所有利益相关者，能够更好地寻求在这一影响深远的倡议下出现的法律、商业和其他问题的良好解决方案。■

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* 此中法连聚焦™的引用是：英珍妮，《中国法律连接》与一带一路国家™，《中国法律连接》，第1期，第80页（2018年6月），亦见于斯坦福法学院中国指导性案例项目，中法连聚焦™，2018年6月，https://cgc.law.stanford.edu/zh-hans/clc-spotlight/clc-1-201806-bandr-1-jennifer-ingram。作者感谢中国指导性案例项目副执行编辑叶里依的研究支持和编辑协助。
英文原文由Dimitri Phillips和Mei Gechlik博士编辑。本中文版本由黄莉莎翻译，并由罗雯和熊美英博士最后审阅。载于本文的信息和意见作者对其负责，它们并不一定代表中国指导性案例项目的工作或意见。

1 联合国教育、科学及文化组织指出，被称为“香料之路”的海上航线也是该网络的重要组成部分。欲了解更多信息，见《关于丝绸之路》，联合国教育、科学及文化组织，https://zh.unesco.org/silkroad/guan-yu-si-chou-zhi-lu。

2 《推动共建丝绸之路经济带和21世纪海上丝绸之路的愿景与行动》，2015年3月28日由国家发展改革委、外交部、商务部（经国务院授权）联合发布，https://www.yidaiyilu.gov.cn/wcm.files/upload/CMSydylgw/201702/201702070519013.pdf。

3 同上，第七节。

4 见，例如，*Xi Says Belt and Road Forum Fruitful*，Xinhua，2017年5月15日，http://www.xinhuanet.com/english/2017-05/15/c_136285787.htm。

5 CGCP对这些案例进行高质量的翻译，并在CGCP网站（https://cgc.law.stanford.edu/belt-and-road/b-and-r-cases）上发布为一带一路案例™。

6 在2017年一带一路论坛举行期间，就一带一路倡议的五大“合作重点”，签署了共160多份双边协议。

7 这一数字仅包括在《“一带一路”国际合作高峰论坛成果清单》中被明确确定为签署方的国家。该清单列出了出席2017年一带一路论坛的代表所签署的合作协议。“一带一路”门户网站上有或未有刊登的其他国家也可能在这高级别活动上签署了合作协议，但未在此清单中被明确标识为签署方。见，例如，“一带一路”国际合作高峰论坛成果清单（全文），《新华社》，2017年5月16日，http://www.xinhuanet.com/world/2017-05/16/c_1120976848.htm。

8 区域细分是基于联合国统计司通常被称为M49标准的分组方法。Standard Country or Area Codes for Statistical Use，U.N. Statistics Division，https://unstats.un.org/unsd/methodology/m49。

9 M49标准下没有北亚地区，俄罗斯在东欧分组。

10 2012年以来，举办了旨在加强中国与东欧和南欧国家合作的年度首脑会议。要获取更多信息，见《中国—中东欧国家合作》网站，http://www.china-ceec.org/chn。

11 今年年初，中国特意邀请拉美国家加入一带一路倡议。见，例如，*Chinese President Calls for Concerted Efforts with Latin America on B&R Initiative*，Xinhua，2018年1月23日，http://www.xinhuanet.com/english/2018-01/23/c_136915970.htm。

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News and Events

March 2018 | CGCP Conference in Beijing

On March 30, 2018, the China Guiding Cases Project (the "CGCP") of Stanford Law School hosted a large-scale conference titled *China's Case Guidance System and Belt and Road Initiative: Practical Insights and Prospects* at the Stanford Center at Peking University in Beijing. Consisting of a lawyers' oral presentation over a hypothetical case and panel sessions covering key areas of the law, including commercial law and intellectual property ("IP") rights, the full-day conference served as a critical platform for distinguished foreign and Chinese legal experts to share their insights about China's Guiding Cases and other important cases released by the Supreme People's Court of China, such as "Belt and Road" Typical Cases, and to discuss their prospects.

More than 160 participants attended the conference, including judges, lawyers, academics, and students from across China, as well as winners and finalists of the 2017 China Cases *Insights*™ Writing Contest. Speakers included, among many other distinguished experts, Judge William A. Fletcher (Judge of the U.S. Court of Appeals for the Ninth Circuit), Judge Toshiaki Iimura (former Chief Judge of the Intellectual Property High Court of Japan), and Chief Judge Diane Wood (Chief Judge of the U.S. Court of Appeals for the Seventh Circuit), as well as Judge GUO Feng (Deputy Director, Research Office of the Supreme People's Court) and Mr. SU Chi (former President of the Beijing IP Court).

Speakers of the Keynote Session (from left): Judge William A. Fletcher, Judge Toshiaki Iimura, Chief Judge Diane Wood, Judge GUO Feng, and Mr. SU Chi

The response from the conference participants was tremendous. In a post-conference survey administered by the CGCP, many attendees praised the excellent speakers at the event and the conference materials provided. The lawyers' oral presentation was the highest-rated session of the conference. Audiences were impressed with the interactive and informative exchanges between judges, lawyers, and discussants surrounding the hypothetical intellectual property case written for the occasion.

Lawyers' oral presentation over a hypothetical case

For more information about the conference, please visit the CGCP website, at https://cgc.law.stanford.edu/event/20180330-conference-in-beijing.

Speakers of the CGCP's 2018 Conference in Beijing (front – from left to right): Dr. Mei Gechlik, Judge William A. Fletcher, Judge GUO Feng, Chief Judge Diane Wood, Mr. SU Chi, Mr. Rick Tang (Fu Tak Iam Foundation), Judge Toshiaki Iimura, and Dr. Leon Lee (Central University of Finance and Economics); (back – from left to right): Jennifer Ingram (CGCP), Weiguo "Will" Chen (Sheppard, Mullin, Richter & Hampton LLP), Guilherme Rizzo Amaral (Souto Correa Cesa Lummertz & Amaral Advogados), James McManis (McManis Faulkner), Xianyun Lin (Shenzhen Municipal Public Security Bureau), Dr. James J. Zhu (JunHe LLP), Professor GUO Li (Peking University Law School), Dr. HU Zhenyuan (Fangda Partners), and Katharine A. Bostick (Microsoft (China) Co. Ltd.)

A book presenting highlights of the conference, including chapters and shorter notes contributed by some speakers, will be published later this year. ■

China Cases *Insights*™; Writing Contests 2017 and 2018

In May 2017, the CGCP launched **China Cases *Insights*™**, a series which aims at providing legal and business professionals with concise and practical information, as well as insightful analyses and indispensable takeaways, about cases in or related to China to help these professionals in their practice of law and business. To draw more attention to this important new series, the CGCP organized an international writing contest for students and legal professionals around the world to draft their own China Cases *Insights*™ pieces. Submissions were received from students, lawyers, and judges located in Europe, different parts of Asia, and all across China. Four authors of three outstanding pieces were chosen as winners of the contest, and they presented their works at the CGCP's large-scale conference held in Beijing in March 2018. Over 25 contest finalists were also invited to participate in the conference.

Building on the success of the 2017 contest, the CGCP is excited to announce its **2018 China Cases *Insights*™ Writing Contest**! Students and professionals, including judges, lawyers, academics, and other experts, both inside and outside China, are invited to submit concise, original pieces analyzing the most important recent cases related to China and discussing their significance to Chinese and international legal and business communities.

Authors of quality submissions will have the opportunity to **receive feedback from the CGCP's experienced editorial team and have their pieces published as China Cases *Insights*™** in *China Law Connect* (https://cgc.law.stanford.edu/china-law-connect).

The author(s) of the best submission(s) may also have the opportunity to **participate in a large-scale conference in China in the Fall of 2019**, alongside foreign and Chinese judges and other leading experts, and/or in other CGCP events, funding permitting.

Contest participants are welcome to submit individually or partner with another eligible person to co-author a piece. Submissions should be emailed to **contactcgcp@law.stanford.edu by October 15, 2018**.

For details about the contest, please visit https://cgc.law.stanford.edu/event/china-cases-insights-writing-contest-2018. ■

July 2018 | CGCP to Participate in the Forum on the Belt and Road Legal Cooperation

CGCP Founder and Director Dr. Mei Gechlik has accepted an invitation from China's Ministry of Foreign Affairs to participate in the **Forum on the Belt and Road Legal Cooperation**, which will be held on July 2–3, 2018, at the Diaoyutai State Guesthouse in Beijing. Dr. Gechlik will present the CGCP's most recent findings related to "Belt and Road Initiative Legal Exchange and Cooperation" to the Chinese and international high-level officials and representatives in attendance. She will be joined on the panel by top representatives from the Association of Southeast Asian Nations (ASEAN) Law Association, Ministry of Foreign Affairs of Ethiopia, Foreign Ministry of Brazil, and Ministry of Foreign Affairs and East African Cooperation of Tanzania, among others. ■

新闻和活动

2018年3月 | CGCP北京会议

2018年3月30日，斯坦福法学院中国指导性案例项目（“CGCP”）在北京大学斯坦福中心举行了题为《中国案例指导制度和“一带一路”倡议：实务见解与前景》的会议。会议环节包括律师对一起模拟案件的口头陈述和涵盖商业法和知识产权法等重要法律领域的座谈讨论。这一整天的会议旨在为优秀的中外法律专家提供重要平台，分享他们对最高人民法院发布的中国指导性案例和其他重要案例（例如，“一带一路”典型案例）的见解，并探讨案例的前景。

与会人员包括来自中国各地的法官、律师、学术界人士和学生，以及2017年中国案例*见解*™写作比赛获胜者和入围者等，共160余人。演讲人包括William A. Fletcher法官（美国联邦第九巡回上诉法院法官）、饭村敏明

主题演讲人（左起）：William A. Fletcher法官、饭村敏明法官、Diane P. Wood法官、郭锋法官和宿迟先生

法官（日本知识产权高等法院前首席法官）、Diane P. Wood法官（美国联邦第七巡回上诉法院首席法官）、郭锋法官（最高人民法院研究室副主任）和宿迟先生（北京知识产权法院原院长）等优秀的专家。

律师对一起模拟案件的口头陈述

与会人员对本次会议反应热烈。在CGCP的会后调查中，许多与会人员都赞扬了会上各位出色的演讲人以及会议材料。律师的口头陈述是会议里最受好评的环节。法官、律师和其他发言人围绕着模拟的知识产权案件热烈互动，交换意见，让观众们留下深刻印象。

欲了解更多会议资讯，请访问CGCP网站：https://cgc.law.stanford.edu/event/20180330-conference-in-beijing。

CGCP 2018北京会议的演讲人（前排左至右）：熊美英博士、William A. Fletcher法官、郭锋法官、Diane P. Wood法官、 宿迟先生、Rick Tang先生（傅德蓥基金有限公司）、饭村敏明法官、历咏博士（中央财经大学）；（后排左至右）：英珍妮女士(CGCP)、陈维国先生（美国盛智律师事务所合伙人）、Guilherme Rizzo Amaral 先生（Souto Correa Cesa Lummertz & Amaral Advogados律师事务所创始合伙人)、马克已先生（McManis Faulkner律师事务所）、林显运先生（深圳市公安局经济犯罪侦查局副局长）、朱坚博士（君合律师事务所合伙人）、郭雳教授（北京大学法学院）、胡震远博士（方达律师事务所合伙人）和柏凯莉女士（微软（中国）有限公司）

今年下旬，我们将会出版一本书，内容涵盖这次会议的重点，包括部分演讲人撰写的章节和短文。■

中国案例*见解*™; 2017和2018年写作比赛

2017年5月，CGCP推出中国案例*见解*™。该系列旨在为法律和商业专业人士提供关于中国案例的简明实用信息、有见地的分析和不可或缺的要点，从而帮助这些专业人士的法律和商业实践。为了让这一重要的新系列获得更多的关注，CGCP组织了一项国际写作比赛，邀请世界各地的学生和法律专业人士撰写中国案例*见解*™文章。我们收到了来自欧洲、亚洲、和中国各地的学生、律师和法官的投稿。三篇优秀文章的共四位作者获选成为比赛优胜者，他们在CGCP于2018年3月在北京举行的大型会议展示了自己的作品。超过25名入围者也受邀参加该会议。

鉴于2017年比赛的成功举办，CGCP很高兴宣布将开展**2018**中国案例*见解*™写作比赛。我们诚邀中国国内外的学生和专业人士包括法官、律师、学术界人士和其他专家们参与。参赛者要提交一篇简明扼要的原创文章，分析近期与中国相关的重要案例，并讨论该案例对中国和国际法律和商业界的重要性。

优秀作品将有机会获得**CGCP**资深编辑团队的意见反馈，并且作品将在《中国法律连接》的中国案例*见解*™栏发表（https://cgc.law.stanford.edu/china-law-connect）。

如经费许可，最好的作品的作者将有机会参加我们于**2019**年秋天在中国举行的大型会议，与国内外法官和其他专家聚首一堂，及／或参与其它CGCP活动。

我们欢迎参赛作者独立提交作品，或与另一位符合参赛条件的作者合著一篇作品。作品提交至**contactcgcp@law.stanford.edu，截止日期为2018年10月15日。**

关于比赛详情，请访问：https://cgc.law.stanford.edu/event/china-cases-insights-writing-contest-2018。■

2018年7月 | CGCP将参加“一带一路”法治合作国际论坛

CGCP创办人、总监熊美英博士接受中国外交部邀请，将参加于2018年7月2至3日在北京钓鱼台国宾馆举行的**“一带一路”法治合作国际论坛**。熊博士届时会向与会的中国和国际高层官员和代表，展示CGCP在“一带一路倡议法律交流与合作”方面的最新研究。与熊博士同台参与座谈小组的还有来自东南亚国家联盟（东盟）法律协会、额塞尔比亚外交部、巴西外交部、和坦桑尼亚外交和东非合作部等的代表。■