CHINA LAW CONNECT

中国法律连接

CGCP

Issue 2 (September 2018) | 第2期 (2018年9月)

China Guiding Cases Project
Stanford Law School

中国指导性案例项目
斯坦福法学院

Editor-in-Chief	*主编辑*
Dr. Mei Gechlik	熊美英博士
Managing Editor	*执行编辑*
Jennifer Ingram	英珍妮
Associate Managing Editors	*副执行编辑*
Jordan Corrente Beck	Jordan Corrente Beck
Shuohan Fu	傅铄涵
Jeremy Schlosser	舒杰瑞
Liyi Ye	叶里依
Ke James Yuan	苑轲
Assistant Managing Editors	*助理执行编辑*
Nathan Harpainter	韩霖森
Li Huang	黄鹂
Wen Luo	罗雯
Sean Webb	Sean Webb
Zihao Zhou	周子皓
Lin Zhu	朱琳
Designers	*设计师*
Bojan Ostojic	安博阳
Jacklyn Withers	方欣慈

The CGCP would like to express our gratitude to the following members
for assisting us in editing and translating pieces included in this issue:
CGCP感谢以下成员协助我们编辑和翻译本期内容：
English: Olivia Chen, Allison Goh, Cami Elyse Katz, Jia Quan, WU Yin, and David Wei Zhao
中文：黄莉莎、黄雁航、马越、全嘉、吴胤、赵炜、张磊、周墨奇

Sponsorship and Other Inquiries | 赞助和其他查询： contactcgcp@law.stanford.edu

The CGCP thanks the following sponsors for their kind and generous support:
CGCP感谢以下赞助方的友好和慷慨支持：

Alston & Bird LLP, the Center for East Asian Studies of Stanford University, China Fund of the Freeman Spogli Institute for International Studies of Stanford University, the Fu Tak Iam Foundation Limited, Gridsum Holding Inc., Karisma Institute, the McManis Wigh China Foundation, and Tencent Research Institute
奥斯顿律师事务所、斯坦福大学东亚研究中心、弗里曼•斯伯格里国际问题研究中心中国基金 、傅德荫基金有限公司、国双科技有限公司、愫缔美聚、McManis Wigh中国基金会、腾讯研究院

China Law Connect 《中国法律连接》
China Guiding Cases Project
Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305-8610

Reproduction of any part of this publication must be authorized by the publisher.
本出版物任何部分的复制必须由出版者授权。

ISSN 2576-1927 (PRINT | 印刷版)
ISSN 2576-1935 (ONLINE | 在线版)

Published by the China Guiding Cases Project of Stanford Law School
Copyright 2018 by Stanford University

由斯坦福法学院中国指导性案例项目*出版*
2018年 斯坦福大学 版权所有

Table of Contents
目录

Editor's Note
v

编辑短笺
ix

Submission Guidelines
xviii

投稿指引
xviii

Commentaries
评论

Traditional Commentary

Propagation of a Case Culture in China and Potentially Beyond
Dr. Mei Gechlik, Li Huang, & Jennifer Ingram
1

传统评论

案例文化在中国内外的传播
熊美英博士、黄鹂、英珍妮
15

Experts *Connect*™

Experts Connect*™*:
In re Vitamin C Antitrust Litigation
Jordan Corrente Beck, Jeremy Schlosser, & Ke James Yuan
27

The Vitamin C *Case: Important Role for the Federal Courts and Clear Message to Foreign Countries*
Yee Wah Chin
35

How to Adduce Evidence on Chinese Law: Looking at the Function of China's Guiding Cases from the Vitamin C *Case*
Dr. Zuocheng Hao
39

The Importance of Guiding Cases for U. S. Courts in Determining Chinese Law, A Trial Lawyer's Perspective
James McManis
43

U.S. Antidumping Law and the Vitamin C *Case: An Important but Forgotten Issue*
William E. Perry
47

专家*连接*™

专家*连接*™：
《维生素C反垄断诉讼案》
Jordan Corrente Beck、舒杰瑞、苑轲
31

《维生素C案》：
联邦法院的重要角色和给外国的明确信息
陈懿华
37

如何举证中国法——从《维生素C案》看中国指导性案例的作用
郝作成博士
41

指导性案例对美国法院确定中国法的重要性：一位出庭律师的视角
马克己
45

美国反倾销法和《维生素C案》：
一个重要却被遗忘的问题
William E. Perry
51

Table of Contents
目录

CLC *Spotlight*™
中法连*聚焦*™

CGCP Interview: James McManis
Jordan Corrente Beck
55

CGCP专访：马克己
Jordan Corrente Beck
59

China's "Belt and Road" Blueprint: Promoting Unilateral Ambition or Multilateral Gains?
Jennifer Ingram, WU Yin, & Jia Quan
63

中国的"一带一路"蓝图：促进单边的雄心还是多边的利益？
英珍妮、吴胤、全嘉
69

Questionnaire: Rules on China's International Commercial Courts
Zihao Zhou & Nathan Harpainter
75

问卷调查:中国国际商事法庭规则
周子皓、韩霖森
79

B&R *Text*™
一带一路*案文*™

Provisions of the Supreme People's Court on Several Issues Concerning the Establishment of the International Commercial Courts
83

《最高人民法院关于设立国际商事法庭若干问题的规定》
87

News and Events
新闻和活动

July 2018 | Forum on the Belt and Road Legal Cooperation
89

2018年7月 | "一带一路"法治合作国际论坛
92

July 2018 | CGCP Presentation at European Union Chamber of Commerce in Beijing
90

2018年7月 | CGCP在北京欧盟商会的演讲
93

China Cases *Insights*™ 2018 Writing Contest (Deadline: November 15, 2018)
90

2018中国案例*见解*™写作比赛（截止日期：2018年11月15日）
93

September 2018 | Meeting with High-Level Delegation from the Ministry of Commerce of China
91

2018年9月 | 与中国商务部高层代表团的会面
94

Upcoming Release of the Post-Beijing Conference Book
91

北京会议书籍即将出版
94

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

The CGCP is ready to take up the challenge of raising more funds to pursue bigger goals and further develop *China Law Connect*.

Are you ready to help us?

Subscribe and receive hard copies of *CLC*!

USD 75 for *THREE issues* published in 2018

USD 100 for *FOUR issues* per year after 2018

USD 30 for *any SINGLE issue*

We also send **free copies** to any donor who donates at least **USD300** per year.

To donate online, visit **https://cgc.law.stanford.edu/home/support-us/donate**.

To subscribe to *China Law Connect*, visit **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?

CGCP已准备好迎接挑战，募集更多资金以实现更宏大的目标，并进一步发展《中国法律连接》

您愿意助我们一臂之力吗?

订阅并获得《中国法律连接》的纸本！

2018年订阅费：**75美元**（共*3期*）

2018年后每年订阅费：**100美元**（每年*4期*

*一期*订阅费：**30美元**

我们还向每年捐赠至少**300**美元的捐赠者发送免费纸本。

请访问**https://cgc.law.stanford.edu/zh-hans/home/support-us/donate** 进行在线捐款。

欲订阅《中国法律连接》，请访问 **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：**https://cgc.law.stanford.edu/zh-hans/support-us/sponsor**。

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。

Editor's Note*

Dr. Mei Gechlik

Dear Readers,

In response to the strong support for the China Guiding Cases Project (the "CGCP") of Stanford Law School, the project launched its professional, bilingual journal, *China Law Connect* ("*CLC*"), in June to spread knowledge about important Chinese legal developments. As of June 2018, slightly over 75,000 people had visited the CGCP website since the website was upgraded in 2016. Now, the number is nearly 85,000. The overwhelming, positive response has reassured us that we are on the right path. This second issue of *CLC* pushes our work even further, with new pieces highlighting why Chinese law matters around the world.

This issue of *CLC* begins with a "**traditional commentary**" co-authored by myself and two members of the CGCP team. We identify trends among **all 96 *de facto* binding Guiding Cases** ("GCs") released by China's Supreme People's Court (the "SPC") since 2011 as well as the **1,281 subsequent Chinese court cases mentioning GCs** that the CGCP identified up to the end of 2017. Highlighting the large number of GCs concerning various legal issues, especially intellectual property, unfair competition, and anti-monopoly laws, the article analyzes how China's Case Guidance System is currently working across the country and explains why the latest developments matter to the United States and other countries, especially at a time when the U.S.–China trade war appears to be escalating and concerns over China's Belt and Road Initiative (the "BRI") seem to be growing. The piece ends with recommendations on how China can improve its Case Guidance System and concludes that these improvements will help alleviate concerns underlying the U.S.–China trade war and the BRI.

Then, we present Experts *Connect*™ pieces contributed by distinguished U.S. and international legal experts in response to our first Call for Experts *Connect*™ Submissions. These pieces analyze the significance of the recent U.S. Supreme Court case *Animal Science Products, Inc., et al. v. Hebei Welcome Pharmaceutical Co. Ltd. et al.* (the "*Vitamin C* case"), specifically what its clarification of how U.S. federal courts should determine issues of foreign law means for U.S. litigation and Chinese law going forward. A special type of *CLC* commentary, the **Experts *Connect*™** 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. The five Experts *Connect*™ pieces included in this issue are:

- CGCP members **Jordan Corrente Beck**, **Jeremy Schlosser**, and **Ke James Yuan** clarify the facts and reasoning of the important decision, and introduce the key lessons of the case as articulated by the distinguished Chinese and U.S. practitioners who author the four Experts *Connect*™ pieces that follow. Highlighting the "ongoing confusion about the basic workings and structure of the Chinese legal system, as well as the challenges of working in translation" apparent in the case, the piece ends with an acknowledgement of the importance of the CGCP's ongoing work to promote broader and deeper understanding of the Chinese legal system.

- **Yee Wah Chin**, Counsel to Ingram, Yuzek, Gainen, Carroll & Bertolotti, LLP, calls the U.S. Supreme Court's unanimous decision an "inevitable outcome". She says that it provides helpful clarifications and "should not be considered as a threat to foreign entities doing business with U.S. entities, but rather as a cautionary note that conduct known to violate U.S. law should be undertaken if and only if a clear record of the foreign government's role is created."

- **Dr. Zuocheng Hao**, CGCP Advisor as well as Founding Director of the Center for Legal Policy, Didi Chuxing, discusses how evidence can be adduced to help determine Chinese law. After clarifying the hierarchy of lawmaking authority within the Chinese legal system as well as the sources of authoritative interpretations of Chinese law, he discusses the role that GCs (and the CGCP's English translations of them) could potentially play in U.S. federal court proceedings following the *Vitamin C* case.

- **James McManis**, Founder and Partner of McManis Faulkner, Fellow of the International Academy of Trial Lawyers ("IATL"), and Chair of the IATL China Program, highlights the most important takeaways from the *Vitamin C* case from a trial lawyer's perspective. He explains that the U.S. Supreme Court's decision makes it worthwhile to examine the importance of GCs in determining Chinese law. He also explains how a trial lawyer can argue for the applicability of a GC in any given litigation.

- **William E. Perry**, Partner of Harris Bricken, focuses his discussion on the important but forgotten issue in the background of the *Vitamin C* case: China's very real (and "justified") fear of a U.S. antidumping case targeting Chinese vitamin C exports to the United States. Describing the underlying challenge motivating China's trade practices, he ends his piece with a thoughtful statement:

  > The *Vitamin C* case reveals a real challenge facing Chinese exporters. If their exports are sold at low prices, the U.S. government can hit them with antidumping cases. If the prices are too high, the U.S. government can hit them with antitrust cases. The unfairness in this case does not come from China.

Following the commentaries, this issue of *CLC* then presents four **CLC *Spotlight*™** pieces, which have a less formal but more focused approach, covering topics related to **the BRI** as well as **CGCP Interviews** with leading legal practitioners, prominent business professionals, and other luminaries.

- In a **CGCP Interview**, **James McManis** shares the lessons he has learned during his 50-year career, including his most famous case (in which he represented a Ringling Brothers Barnum & Bailey circus trainer), and the insights he has gained from his extensive work in China. Repeating the old adage "[s]uccess in trial is 1% inspiration, and 99% perspiration", he emphasizes that predictability is the most important aspect of the law and explains why he thinks China's GCs are significant. To see the portion of this interview released as part of CGCP *Classroom*™, visit https://cgc.law.stanford.edu/cgcp-classroom-lesson-7 or scan the QR code included in the piece.

- In a piece titled **China's "Belt and Road" Blueprint: Promoting Unilateral Ambitions or Multilateral Gains?**, CGCP Managing Editor Jennifer Ingram and two CGCP members highlight the major takeaways from the Belt and Road Forum on the Legal Cooperation organized by China's Ministry of Foreign Affairs and the China Law Society in July 2018 in Beijing. The piece breaks down the goals articulated in the Joint Statement issued at the close of the forum and discusses progress achieved so far with respect to each, ending with a discussion of whether the BRI has the potential to allow for multilateral gains.

- Next, the **Questionnaire: Rules on China's International Commercial Courts** presents the text of the survey that the CGCP is conducting on the new international commercial courts China has established to oversee BRI-related disputes. This important new development has the potential to change the face of international dispute resolution for China-related claims, and so the CGCP is soliciting your feedback on ten key articles of the *Provisions of the Supreme People's Court on Several Issues Concerning the Establishment of the International Commercial Courts*. To submit your answers, visit the online version of the survey at https://bit.ly/2Cs6Ry4.

- Following the questionnaire is the English and original, Chinese versions of the ***Provisions of the Supreme People's Court on Several Issues Concerning the Establishment of the International Commercial Courts***. To understand the larger context and learn about all of the specific provisions related to China's new international commercial courts, we invite readers to review the CGCP's high-quality English translation of this important document, which is also included in the online database part of the project's Belt and Road Series titled B&R *Texts*™. B&R *Texts*™ compiles primary sources forming the legal framework of the BRI, including legal cooperation agreements between China and countries along the "Belt and Road" routes.

At the end of each issue of *CLC*, we highlight the latest news and recent and forthcoming events related to the CGCP as well as its partners and sponsors. This issue covers my participation in the **Forum on the Belt and Road Legal Cooperation**, my presentation in July at the **European Union Chamber of Commerce in Beijing**, and the CGCP's September meeting with **China's Ministry of Commerce** at Stanford Law School. It also announces the forthcoming release of a **book presenting highlights of the CGCP's conference** titled "China's Case Guidance System and Belt & Road Initiative: Practical Insights and Prospects", which was held in March 2018 in Beijing, as well as the **new (November 15) deadline** for the **2018 China Cases *Insights*™ Writing Contest**.

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 xviii). For details, see https://cgc.law.stanford.edu/china-law-connect-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 raising more funds to pursue bigger goals. **Are you ready to help us? We hope you can consider becoming our subscriber:** the annual subscription fee is USD 100 (for 4 issues); for USD 75, you can receive the three issues of 2018; you can also purchase any single issue for USD 30. Please complete this form to become our subscriber: https://stanford.io/2KrVfvl.

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*

* Dr. Mei Gechlik, *Editor's Note*, 2 China Law Connect v (Sept. 2018), http://cgc.law.stanford.edu/clc-2-201809.

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 ("CGCP"). Formerly a tenured professor in Hong Kong, she began teaching China law and business at Stanford Law School in 2007 and founded the CGCP in 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—and related legal developments (http://cgc.law.stanford.edu). In November 2016, the CGCP launched the Belt and Road Series, taking the lead to analyze the legal and political implications of China's ambitious global initiative. In June 2018, the CGCP began publishing its quarterly journal, *China Law Connect*, to help deepen the understanding of legal developments related to China, covering various topics, including the important U.S. Supreme Court's case on vitamin C imports from China.

The CGCP has presented at notable forums, including the World Bank, the Open Government Partnership Global Summit, and U.S.–China Legal Exchange Conferences. In addition, the CGCP and Dr. Gechlik have hosted or participated in multiple events to increase the project's impact. In October 2017, with approvals from China's judiciary, the CGCP organized meetings featuring judges from the Beijing Intellectual Property Court to explain how the court's unique case system has increased judicial consistency and transparency. In March 2018, the CGCP successfully organized 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. In July 2018, Dr. Gechlik spoke on legal exchange and collaboration at the Belt and Road Forum organized by China's Ministry of Foreign Affairs and, in September, she met with a delegation from the country's Ministry of Commerce to discuss U.S.–China relations and trade issues.

Prior to joining Stanford Law School, 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 the 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

熊美英博士是中国指导性案例项目（China Guiding Cases Project；"CGCP"）的创办人与总监。曾于香港任终身教授的熊美英博士，于2007年开始在斯坦福法学院教授中国法律和商业，并于2011年创立CGCP。CGCP拥有一支由近200位成员组成的国际团队，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、具有事实约束力的先例和相关法律发展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，领先分析中国这一雄心勃勃的全球倡议的法律和政治影响。2018年6月，CGCP开始出版其季刊《中国法律连接》，帮助深化对中国相关法律发展的理解，其内容覆盖话题广泛，包括美国联邦最高法院有关进口中国维生素C的这一重要案例等。

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。此外，CGCP和熊美英博士也主办和参加了许多活动以提升项目的影响。2017年10月，CGCP在中国司法机关的支持下组织了多场会议，邀请北京知识产权法院法官介绍了法院的独特案例制度是如何提高司法透明度和问责。2018年3月，CGCP成功举办了"中国案例指导制度和'一带一路'倡议：实务见解与前景"大会。会议邀请到了中美法官和来自全球各地的专家。2018年7月，熊美英博士受邀在中国外交部组织的"一带一路"论坛上就法律交流和合作发表演讲。同年9月，她和中国商务部代表团会面，探讨了中美关系和贸易问题。

在加入斯坦福法学院之前，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：

为了响应对斯坦福法学院中国指导性案例项目（“CGCP”）的强大支持，CGCP于6月份出版了《中国法律连接》（“《中法连》”）这份专业的双语期刊，以传播有关中国重要法律发展的知识。截至2018年6月，CGCP的网站访问人数自2016年网站升级以来已超过75,000人。现在，这个数字已接近85,000。这种极好的反响让我们坚信我们走在正确的道路上。第2期《中法连》进一步推进我们的工作，当中有一些文章强调了中国法律为何在全世界都很重要。

本期的首篇是由我和CGCP的两位成员共同撰写的一篇**“传统评论”**。我们分析了由中国最高人民法院（“最高法”）自2011年发布的所有**96个**具有事实上约束力的**指导性案例**以及由CGCP在2017年底所确认的**1281个提及指导性案例的后续案件**的发展趋势。通过重点介绍大量涉及各种法律问题，特别是知识产权、不正当竞争和反垄断法的指导性案例，文章分析了中国案例指导制度目前在全国范围内是如何运作。文章亦解释了为什么这些最新进展对美国和其他国家很重要，尤其是在美中贸易战似乎愈演愈烈以及对中国“一带一路”倡议的担忧不断增加的时期。该文最后对中国如何能改进其案例指导制度提出了建议，并得出结论认为这些改进将有助于缓解美中贸易战和对“一带一路”倡议潜在的担忧。

然后，本期《中法连》介绍知名美国和国际法律专家为响应我们首个专家*连接*™的邀稿函而撰写的专家*连接*™系列文章。这些文章分析了最近美国联邦最高法院裁判的*Animal Science Products, Inc., et al.诉 Hebei Welcome Pharmaceutical Co. Ltd. et al.*（常被称为“《维生素C案》”）的重要性，特别是其对美国联邦法院应如何确定外国法律的问题的说明对美国诉讼和中国法律今后发展所产生的影响。作为《中法连》评论的特殊类型，专家*连接*™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。本期共有五篇专家*连接*™文章：

- CGCP成员**Jordan Corrente Beck、舒杰瑞 (Jeremy Schlosser)和苑轲**清楚道出了这一重要裁决的事实和理由，并介绍了由撰写以下四篇专家*连接*™的著名中国和美国从业者说明的本案主要经验教训。该文强调了在此案出现的“对中国法律制度基本运作和结构的持续混淆　，以及依赖翻译所产生的困难”，并在结尾指出了CGCP正在进行的工作对于促进更广泛和更深入地了解中国法律体系的重要性。

- CGCP成员**Jordan Corrente Beck、舒杰瑞 (Jeremy Schlosser)和苑轲**清楚道出了这一重要裁决的事实和理由，并介绍了由撰写以下四篇专家*连接*™的著名中国和美国从业者说明的本案主要经验教训。该文强调了在此案出现的“对中国法律制度基本运作和结构的持续混淆　，以及依赖翻译所产生的困难”，并在结尾指出了CGCP正在进行的工作对于促进更广泛和更深入地了解中国法律体系的重要性。

- Ingram, Yuzek, Gainen, Carroll & Bertolotti, LLP的陈懿华律师称，美国联邦最高法院的一致决定是一个“不可避免的结果”。她指出该决定提供了有用的澄清，并且“不应被视为对与美国实体开展业务的外国实体构成威胁，而应当视为警告，即对已知是违反美国法律的行为，只有在外国政府所扮演的角色得到明确记录时，才应施行。”

- CGCP顾问和滴滴出行法律政策中心创始主任**郝作成博士**讨论如何举证来帮助确定中国法。在阐明了中国法律体系中立法权的等级制度以及中国法律权威解释的来源之后，他讨论了指导性案例（及CGCP的英文翻译本）继《维生素C案》后在美国联邦法院诉讼程序中可能发挥的作用。

- McManis Faulkner律师事务所创办人兼合伙人和国际出庭律师学会院士、中国项目主席**马克己**从一个出庭律师的角度强调了《维生素C案》中的要点。他解释说，美国联邦最高法院的决定反映出是值得研究

中国指导性案例在确定中国法方面的重要性。他还说明了出庭律师如何在任何特定的诉讼中争辩指导性案例的适用性。

- Harris Bricken律师事务所合伙人**William E. Perry**重点讨论了《维生素C案》背后一个重要却被遗忘的问题：中国对美国针对出口至美国的中国维生素C的反倾销案的担忧非常真实（而且“有理可循”）。在描述推动中国贸易活动的根本挑战时，他以一个经过深思的阐述结束了他的文章：

> 《维生素C案》揭示了中国出口商面临的真正挑战。如果他们的出口产品以低价出售，美国政府可以用反倾销案来打击他们。如果价格太高，美国政府可以用反垄断来打击他们。此案的不公平并非来自中国。

除了评论，每一期的《中法连》都会刊登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。本期共有四篇中法连*聚焦*™文章：

- 在一个**CGCP专访**中，**马可已**分享了他从50年职业生涯中学到的经验教训，包括他最著名的案件（代表“玲玲马戏团”的一驯兽师）以及他从在中国的大量工作中所获得的见解。通过重复古谚：“庭审的成功就是1%的灵感加上99%的汗水”，他强调法律最重要的方面是可预测性，并解释了为什么他认为中国的指导性案例具有重要意义。若想观看专访视频的部分内容，请访问https://cgc.law.stanford.edu/zh-hans/cgcp-classroom-lesson-7或扫描文中的二维码，观看**CGCP*学堂*™**发布的视频。

- 在题为《中国“一带一路”蓝图：促进单边的雄心还是多边的利益？》的文章中，CGCP执行编辑英珍妮和两位CGCP成员重点介绍了由中国外交部和中国法学会于2018年7月在北京联合举办的“一带一路”法治合作国际论坛中的要点。该文解析了论坛闭幕时发表的共同声明中所阐述的目标，并讨论了迄今为止各方面取得的进展，最后以“一带一路”倡议是否有可能实现多边利益作结。

- 接下来，**“问卷调查：中国国际商事法庭规则”**所呈现的文本是CGCP目前对中国为监管“一带一路”倡议有关纠纷而新设立的国际商事法庭而进行的调查。这一重要的新进展有可能改变中国有关诉求国际争端解决的面貌。因此，CGCP现征求您对《最高人民法院关于设立国际商事法庭若干问题的规定》的10项重要条款的反馈意见。请访问https://bit.ly/2Cs6Ry4提交问卷。

- 问卷调查之后是**《最高人民法院关于设立国际商事法庭若干问题的规定》**的中文原文和英文翻译本。为了解更多背景并学习与中国新的国际商事法庭相关的所有具体规定，我们邀请读者们阅读CGCP对该重要规定的高质量英文翻译。该翻译本也包含在CGCP“一带一路”系列的在线数据库**一带一路*案文*™**部分，此部分汇编了形成“一带一路”倡议法律框架的主要文献来源，包括中国与“一带一路”沿线国家之间的法律合作协议。

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。本期报道了我出席**“一带一路”法治合作国际论坛**、7月份我在**北京欧盟商会的演讲**，以及9月份CGCP与**中国商务部**在斯坦福法学院的会面。还宣布了即将发布**一本介绍**2018年3月于北京举办的**CGCP会议**（题为“中国案例指导制度和‘一带一路’倡议：实务见解与前景”）**重点的书**，以及**2018中国案例*见解*™写作比赛新的（11月15日）截止日期**。

《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xviii页面）。详情请见https://cgc.law.stanford.edu/china-law-connect-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，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成为我们的订户**：年度订阅费为100美元（每年4期），订阅2018年出版的三期费用为75美元，只订阅某一期的费用为30美元。请填写此在线表格，成为我们的订户：https://stanford.io/2KrVfvl。

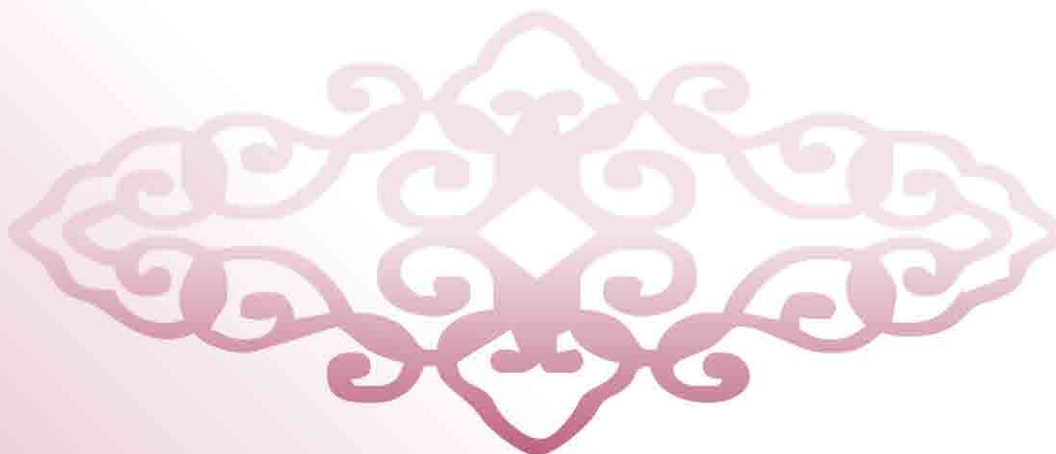
我们感谢您的支持，并期待通过《中法连》这一全新的刊物和您分享更多观点和信息！

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2期，第ix页（2018年9月），http://cgc.law.stanford.edu/zh-hans/clc-2-201809。



The achievements of the China Guiding Cases Project are made possible through the hard work of our 200-member strong team of volunteer law school students, other graduate students, translation professionals, and attorneys based around the world.

Do you want to get involved?

Want to contribute to our mission to advance the understanding of Chinese law and help to develop a more transparent and accountable judiciary in China?

For more information about how to join our team, visit **https://cgc.law.stanford.edu/get-involved/volunteer**.

China Law Connect welcomes sponsored content from law firms, businesses, or other organizations around the world that are interested in reaching our global readership.

Want to advertise open positions with your firm, business, or organization; recent news and accomplishments; or upcoming events?

If you are interested in sponsoring content to appear in future issues of the journal, please contact **Shuohan Fu**, Associate Managing Editor of the CGCP, at **shuohanf@stanford.edu**.

中国指导性案例项目的成就得益于其强大的志愿者团队中200名成员的辛勤努力，当中有来自世界各地的法学院学生、其他研究生、专业翻译和律师。

你想参与其中吗?

想要为CGCP贡献一份力量，增进对中国法律的了解和帮助中国发展一个更透明负责的司法体系吗？

关于如何加入CGCP团队的信息，请访问:
https://cgc.law.stanford.edu/get-involved/volunteer。

全世界律所、企业和其他有意面向我们的全球读者的组织，《中国法律连接》欢迎你们的赞助内容。

想宣传您的律所、企业或者组织的招聘职位、新闻和成就、或最近的活动?

如果您有兴趣在本刊上刊登赞助内容，请联系中国指导性案例项目副执行编辑
傅铄涵：shuohanf@stanford.edu。

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.

Follow the CGCP

@ChinaGuidingCasesProject

中国指导性案例项目

China Guiding Cases Project - Stanford Law School Showcase Page

@cgcp_sls

SLSCGCP; CGCPClassroom

Make a Gift @ http://giving.stanford.edu/goto/cgcpgift

Website: https://cgc.law.stanford.edu

China Law Connect: https://cgc.law.stanford.edu/china-law-connect

Subscribe to Mailing List: https://mailman.stanford.edu/mailman/listinfo/chinaguidingcasesproject

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。

关注 CGCP

@ChinaGuidingCasesProject

中国指导性案例项目

China Guiding Cases Project - Stanford Law School Showcase Page

@cgcp_sls

SLSCGCP; CGCPClassroom

捐赠支持 @
https://giving.stanford.edu/goto/cgcpgift

网站:
https://cgc.law.stanford.edu/zh-hans

《中国法律连接》:
https://cgc.law.stanford.edu/zh-hans/china-law-connect

订阅邮件列表:
https://mailman.stanford.edu/mailman/listinfo/chinaguidingcasesproject

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。

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. 2,500 words each, contributed by experts from different jurisdictions) of observations, questions, etc. on 1–3 specific and timely issue(s), 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.

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2,500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。这些稿件会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。

CGCP's Call for Experts *Connect*™ Submissions: The Potential Impact of the "Poison Pill" Provision of the New United States-Mexico-Canada Agreement on China

Article 32.10 of the new United States-Mexico-Canada Agreement ("USMCA"), which is slated to replace the North American Free Trade Agreement, provides:

> 4. Entry by any Party into a free trade agreement with a non-market country, shall allow the other Parties to terminate this Agreement on six-month notice and replace this Agreement with an agreement as between them (bilateral agreement).[1]

This provision essentially gives the United States veto power over trade deals that Mexico or Canada may wish to reach with China, a non-market country. Referring to the provision as a "poison pill", U.S. Department of Commerce Secretary Wilbur Ross suggested that similar provisions may be replicated in future trade deals between the United States and other trading partners, such as Japan, India, and the European Union.[2]

Might this "poison pill" provision turn out to be an unexpected panacea for China, prompting the second largest economy in the world to become a market economy amidst growing concerns over the country's latest emphasis on the role of the state sector? If China does so, this would be a remarkable achievement for the country four decades after the adoption of its open door policy in 1978 and five years after the launch of its ambitious Belt and Road Initiative (the "BRI"). Or will the Chinese leadership resort to other measures in response to the USMCA?

If mishandled, China will face serious challenges that could undermine the country's development, especially the BRI, as the United States is increasingly flexing its muscles in China's neighborhood. In late July, U.S. Secretary of State Michael R. Pompeo announced America's Indo-Pacific Economic Vision, emphasizing the current administration's strategy for "advancing a free and open Indo-Pacific" with U.S. business engagement at the center.[3] This new U.S. strategy may, like the "poison pill" provision, be replicated elsewhere.

Given the significance of the above-mentioned developments, the CGCP welcomes submissions (ranging from 1,000 to 2,500 words, in English or Chinese, plus, if necessary, approximately 250 to 500 words for well-formatted footnotes) from practitioners and other experts inside and outside the United States on the potential impact of the "poison pill" provision of the new USMCA on China and related topics. 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 Experts *Connect*™ series in the December 2018 or March 2019 issue of *China Law Connect*. Among the commentaries featured in the journal, 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: November 15, 2018.**

---

[1] Office of the United States Trade Representative, United States-Mexico-Canada Agreement Text, Oct. 1, 2018, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico.

[2] David Lawder & Karen Freifeld, *Exclusive: U.S. Commerce's Ross Eyes Anti-China 'Poison Pill' for New Trade Deals*, Oct. 5, 2018, Reuters, https://www.reuters.com/article/us-usa-trade-ross-exclusive/exclusive-us-commerces-ross-eyes-anti-china-poison-pill-for-new-trade-deals-idUSKCN1MF2HJ.

[3] U.S. Secretary of State Michael R. Pompeo, Remarks at Indo-Pacific Business Forum: "America's Indo-Pacific Economic Vision", July 30, 2018, https://www.state.gov/secretary/remarks/2018/07/284722.htm.

中国指导性案例项目专家*连接*™诚挚邀稿：
新的美国–墨西哥–加拿大协定中的"毒丸"条款对中国的潜在影响

将会取代北美自由贸易协定的新的美国–墨西哥–加拿大协定（"USMCA"）第32.10条规定：

> 4. 任何缔约方与非市场国家作出自由贸易协议的签订，会允许其他缔约方在六个月通知后终止本协定，并以双方之间的协议（双边协议）取代本协定。[1]

这条款基本上给予美国否决权，以阻止墨西哥或加拿大与中国（一个非市场国家）所可能达成的贸易协议。美国商务部部长威尔伯·罗斯（Wilbur Ross）将该条款称为"毒丸"，并表示在美国与日本、印度和欧盟等其他贸易伙伴之间的未来贸易协议中可能会复制类似的条款。[2]

这"毒丸"条款有可能成为意想不到的灵丹妙药，促使中国这世界第二大经济体，在目前人们越来越担心该国近期所强调的国有经济的情况下，采取积极措施而成为市场经济体吗？如果中国这样做，这将是该国在1978年通过其门户开放政策四十年后以及其雄心勃勃的"一带一路"倡议启动五年后的一项了不起的成就。还是，中国领导层会采取其他措施来回应USMCA？

如果处理不当，中国将面临严重的挑战，可能会破坏国家的发展，特别是"一带一路"倡议的发展。这是因为美国正逐渐在中国的邻近地区中发挥其影响力。七月下旬，美国国务卿迈克·蓬佩奥（Michael R. Pompeo）宣布"美国对印度–太平洋地区经济前景的构想"（America's Indo-Pacific Economic Vision），强调了现任政府的"推进自由开放的印度太平洋地区"的战略，并以美国商业参与为中心。[3] 这项新的美国战略可能像"毒丸"条款一样会在其他地方复制。

鉴于上述发展的重要性，CGCP欢迎来自美国国内外的法律执业者与专家提交稿件（1,000至2,500字，中英文皆可；如有必要，也可附上格式良好、约250至500字的脚注），探讨新的USMCA中的"毒丸"条款对中国的潜在影响以及相关题目。CGCP将为获选稿件的作者提供编辑支持，编辑后并经作者同意的稿件版本将以中英双语形式发表在《中国法律连接》2018年12月期或2019年3月期的专家*连接*™系列专栏。作为《中国法律连接》中评论性文章的一部分，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11月15日。**

---

[1] Office of the United States Trade Representative, United States-Mexico-Canada Agreement Text, 2018年10月1日, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico。

[2] David Lawder、Karen Freifeld, *Exclusive: U.S. Commerce's Ross Eyes Anti-China 'Poison Pill' for New Trade Deals*, 2018年10月5日, Reuters, https://www.reuters.com/article/us-usa-trade-ross-exclusive/exclusive-us-commerces-ross-eyes-anti-china-poison-pill-for-new-trade-deals-idUSKCN1MF2HJ。

[3] U.S. Secretary of State Michael R. Pompeo, Remarks at Indo-Pacific Business Forum: "America's Indo-Pacific Economic Vision", 2018年7月30日, https://www.state.gov/secretary/remarks/2018/07/284722.htm。

Propagation of a Case Culture in China and Potentially Beyond*

Dr. Mei Gechlik
Founder and Director, China Guiding Cases Project
Li Huang
Assistant Managing Editor, China Guiding Cases Project
Jennifer Ingram
Managing Editor, China Guiding Cases Project

In late 1978, China adopted its open door policy to welcome foreign investment, setting in motion a series of economic and legal reforms. Four decades passed. The country has become the world's second largest economy. More than 2,500 national laws and thousands of other types of legislation are on the books. But what is the law in action? Judicial cases offer a glimpse of the Chinese legal system which is otherwise rather opaque.

> ***"To alleviate growing concerns over the escalating [U.S.-China] trade war […], China's ability to show concrete judicial practices demonstrating a history of relative success in abiding by [the principles of fairness and equality] will help them keep their counterpart at the negotiation table."***

What the law in action is in the Far East matters to the United States. The *Vitamin C* case recently decided by the U.S. Supreme Court is illustrative. The unanimous decision highlights that a foreign government's (in this case, China's Ministry of Commerce's) statement on the law of its country should only be accorded "respectful consideration", instead of binding deference, and in their independent determination of a question of foreign law, U.S. federal courts may consider "any relevant material or source", as provided for in Rule 44.1 of the Federal Rules of Civil Procedure.[1] Yee Wah Chin, an antitrust expert commenting on the *Vitamin C* case, observed that "[a] statement by the highest court of the foreign jurisdiction, which is consistent with the country's previous statements and actions, and is not subject to attack as a litigation position paper, would likely be persuasive as to the foreign law."[2]

How the law is applied in specific cases, especially cases addressing issues related to the World Trade Organization ("WTO") (e.g., intellectual property ("IP")), before Chinese courts of different levels and in different provinces also helps reveal whether China is truly committed to the protection of legal rights and interests based on the principles of fairness and equality. All of these are core values that members of the WTO have expected China to embrace since the country joined the organization in December 2001. To alleviate growing concerns over the escalating trade war between the United States and China, China's ability to show concrete judicial practices demonstrating a history of relative success in abiding by these principles will help them keep their counterpart at the negotiation table.

Legal reforms taking place in China also matter to the world. Thirty-five years after it opened its door for foreign investment, the country launched the Belt and Road Initiative (the "BRI") in 2013, essentially urging the rest of the world to open their doors to Chinese investment. The BRI has placed China in the same position as that of the country's own foreign investors who have, for decades, called for a Chinese legal system that is governed by the rule of law. Now, China is appealing to BRI host countries for the same. At the July 2018 Belt and Road Forum for the Legal Cooperation, Foreign Minister WANG Yi said, "We believe rules and rule of law are essential for [the] BRI to develop in the world. They are also the safety valve against uncertainties and challenges."[3] This appeal will work more effectively outside China if the country can show that it is committed to the rule of law at home by, for example, showing the uniform application of law in judicial cases. With clear commitment demonstrated by China, foreign countries will be more willing to open not only their doors to Chinese investment but also their hearts to having genuine partnerships with Chinese leaders who have emphasized that China's rise is peaceful and conducive to the well-being of the world.

With so much at stake, it is to China's own benefit if the country's culture of using judicial cases takes roots and grows strong. This article aims to examine whether this is happening in China, a country that has not been known for having a strong tradition of using cases, let alone binding cases. The authors discuss the development of China's Guiding Cases ("GCs"), *de facto* binding precedents,[4] since the Supreme People's Court of China (the "SPC") released the first batch of these cases in 2011, and analyze the impact that these cases have produced so far. The authors conclude that the preliminary success of GCs seems to have provided fertile ground for the propagation of a case culture in China and, given the country's eagerness to increase its presence around the world, this culture may have a chance to be propagated elsewhere.

Dr. Mei Gechlik
Founder & Director, China Guiding Cases Project of Stanford Law School

Dr. Mei Gechlik is the Founder and Director of the China Guiding Cases Project ("CGCP"). Formerly a tenured professor in Hong Kong, she founded the CGCP in February 2011. 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, focusing on China's accession to the World Trade Organization and legal reforms. 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 the Science of Law (J.S.D.) from Stanford Law School.

96 Guiding Cases, 1,281 Subsequent Cases

In November 2010, the SPC issued the *Provisions of the Supreme People's Court Concerning Work on Case Guidance* (the "*Provisions*") to establish the groundbreaking Case Guidance System, which is aimed at "summariz[ing] adjudication experiences, unify[ing] the application of law, enhanc[ing] adjudication quality, and safeguard[ing] judicial impartiality".[5] Under this system, the SPC determines and uniformly releases GCs, "which have guiding effect on adjudication and enforcement work in courts throughout the country".[6] In particular, according to Article 7 of the *Provisions*, courts adjudicating subsequent cases similar to GCs "should refer to" GCs.[7] As of now, almost 100 GCs have been released and more than a thousand subsequent cases ("SCs") mentioning these GCs have been discovered by the China Guiding Cases Project ("CGCP") of Stanford Law School.

96 Guiding Cases

Since 2011, the SPC has issued 18 batches of GCs, bringing the total number of GCs to 96. The number of batches of GCs released each year appears to be random and the number of GCs released per batch varies. **Chart One** shows the total number of GCs released per quarter. Overall, 2014 saw the greatest number of GCs (i.e., 22) released in one calendar year.

Each GC is a summary of the original ruling or judgment from which the GC is derived, supplemented with a crucial section titled "Main Points of the Adjudication". The legal rule(s) considered in the case, the facts, the outcomes of legal proceedings, and the reasons for the final ruling/judgment are summarized in the "Related Legal Rule(s)", "Basic Facts of the Case", "Results of the Adjudication", and the "Reasons for the Adjudication"

Li Huang
Assistant Managing Editor, China Guiding Cases Project of Stanford Law School

Li Huang is a Ph.D. student in Criminology, Law and Society at University of California, Irvine. She graduated from Stanford Law School in 2017 with a Master of the Science of Law (J.S.M.) degree. Before going to Stanford, she earned her Juris Master degree (J.D. equivalent) and B.A. in economics in China. As a young scholar, Li focuses her research on criminal justice, procedure, class action, comparative law, and securities law with an emphasis on the socio-legal approach and empirical study. Over the past four years, she has worked on various research projects both in the United States and China and published several papers in Chinese journals.

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

Jennifer Ingram began working with the CGCP when it was founded and now primarily oversees the project's Belt and Road Series to deepen stakeholders' understanding of this significant but not yet fully understood development. She has experience in dispute resolution across diverse jurisdictions, ranging from South Africa, Kenya, 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. 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.

Chart One: Number of GCs Released per Quarter

sections, respectively. General principles prepared by the SPC and that it expects all of the courts in China to refer to are presented as (a) short paragraph(s) in the "Main Points of the Adjudication" section. In addition, the original rulings or judgments from which GCs are derived must be those that "have already come into legal effect" and that "are of widespread concern to society", "[involve] legal provisions [that] are of relatively general nature", "are of a typical nature", "are difficult, complicated, or of new types", or are "other cases which have guiding effect".[8]

1,281 Subsequent Cases

In May 2015, the SPC issued the *Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"* (the "*Detailed Implementing Rules*"),[9] which explains how GCs should be referred to in similar subsequent cases. Article 9 of the *Detailed Implementing Rules* states:

> 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 (emphasis added).

The phrase "in terms of the basic facts and application of law" suggests that the "Basic Facts of the Case" and the "Reasons for the Adjudication" sections of each GC should be examined closely when a case is being handled to decide whether a fact of the pending case is distinguishable and whether the legal issues of the pending case involve the application of law as explained in the reasoning part of the GC. After these two sections are examined and the deciding people's court determines that the pending case is similar to a GC, the deciding people's court should then cite the "Main Points of the Adjudication" of that relevant GC to apply to the pending case the general principles summarized by the SPC as these main points.

Because the use of GCs is rather new, the CGCP's search for SCs is not confined to those cases that "apply" GCs, but includes all cases that explicitly mention GCs (with the case names identified in full or in part, or with only the GC Nos. stated) in any part of the full-text judgments or rulings of the SCs. The CGCP has taken this approach in the hopes of showing the awareness that Chinese judges and lawyers have about GCs. When the Case Guidance System becomes more mature and GCs are more frequently cited in the reasoning parts of judgments or rulings, it will be time to study how Chinese jurisprudence gradually evolves through cases.

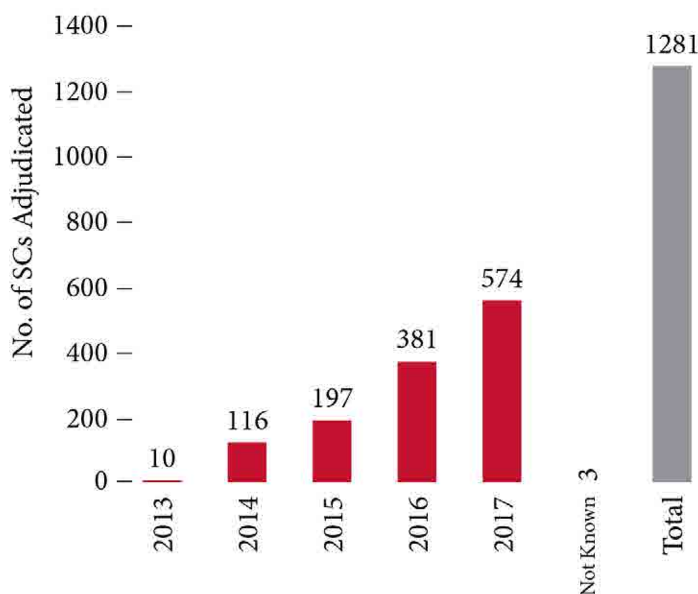


Chart Two: Comparative Years of Adjudication for SCs Mentioning GCs

The CGCP has focused its search for SCs on the official SPC website (i.e., "China Judgements [sic] Online" ("中国裁判文书网"; http://wenshu.court.gov.cn)), which presents the full-text of Chinese court judgments or rulings online. Using this official, but, unfortunately, less than user-friendly, website through the end of 2017, the CGCP was able to identify a total of 1,281 SCs mentioning GCs. The **Appendix** catalogues the number of these SCs that mention each listed GC.[10] A total of 1,281 SCs may not seem impressive, compared with the millions of cases adjudicated in Chinese courts (the official website states that, to date, it has published more than 52 million judgments or rulings rendered by courts of different levels in China), but **Chart Two** shows the increasing number of SCs adjudicated during the period from 2013 to 2017. From just 10 cases in 2013, the number of SCs has jumped significantly each year to 574 in 2017. This upward trend makes it clear that GCs are increasingly considered in Chinese courts.

Application of the Law on the Books

Different Types of Guiding Cases

GCs provide a valuable means to understanding how multiple areas of Chinese law have been applied in Chinese courts. Of the 96 GCs, 16 are criminal cases (mentioned in 34 SCs), 19 administrative cases (mentioned in 312 SCs), 57 civil cases (mentioned in 934 SCs), and 4 cases of other types (mentioned in one SC) (see **Table One**). **Table Two** shows a list of legal rules that have been cited in the 96 GCs released thus far.

More "Reasoned" Civil Guiding Cases, Better Application?

The area of law with the most GCs (i.e., 57) and SCs (i.e., 934) is civil law. Of the 57 civil cases, 20 involve IP, anti-monopoly law, and/or unfair competition law with the remaining shedding light on various topics of contract law (eight), company law (seven), and other areas of civil law (see **Table Three**).

An intriguing question is: what drives the relatively more frequent use of civil GCs? Apart from the fact that legal issues arising from civil GCs are more commonly encountered, is the answer somewhat related to the fact that civil GCs are generally more "reasoned"?

As noted above, the "Basic Facts of the Case" and "Reasons for the Adjudication" sections of each GC are critical when determining whether a particular GC should apply to a pending case. Based on the analysis of all 57 civil GCs released to date, on average, approximately 40% of the total number of Chinese characters in the main sections of each GC are found in the "Basic Facts of the Case" and another 40% (and in recent

Types of Guiding Cases	Number of GCs (released to date)	Number of SCs Mentioning GCs (identified through end of 2017)
Criminal (GC Nos. 3–4, 11–14, 27–28, 32, 61–63, 70–71, 87, 93)	16	34
Administrative (GC Nos. 5–6, 21–22, 26, 38–41, 59–60, 69, 76–77, 88–91, 94)	19	312
Civil (the remaining GCs)	57	934
Others (e.g., Maritime, State Compensation) (GC Nos. 16, 42–44)	4	1
Total	**96**	**1,281**

Table One: GCs and SCs Mentioning GCs by Type

batches, about 50%) in the "Reasons for the Adjudication".[11] Given that, on average, a civil GC has about 3,000 Chinese characters, 40% of this length means 1,200 Chinese characters. Yet this is already longer than many other GCs, especially criminal GCs, whose "Basic Facts" and "Reasons" sections have, on average, about 600 Chinese characters and 600–1,200 Chinese characters, respectively.[12] It is plausible that more reasons provided in civil GCs allow courts and lawyers handling subsequent cases similar to these civil GCs to carefully analyze whether the subsequent cases are truly similar to the civil GCs considered or whether they should be distinguished.

GCs Related to IP, Unfair Competition, and Anti-Monopoly Laws are Well-Prepared but Underused

Of the 57 civil GCs released so far, 20 clarify issues of IP law, unfair competition law, and/or anti-monopoly law. Many of these 20 GCs are longer and well-reasoned (on average, about 55% of the length dedicated to the "Reasons" section; see **Chart Three**)—probably because the underlying judgments/rulings of all but one of these GCs were rendered by a provincial high court or the SPC itself, highlighting the recognition of the importance of these cases among the highest levels of China's judiciary. Yet the number of SCs mentioning these GCs is surprisingly low (see **Table Four**). As of the end of 2017, the CGCP had only found ten SCs mentioning these types of GCs.

One possible explanation of this phenomenon is that many of these GCs were released relatively recently, and so it may take more time to see SCs using these GCs. Another possible explanation is that although the "Reasons" section accounts for a higher percentage in these GCs, compared with other GCs, the "Basic Facts" section is relatively short (about 30%) and, thus, lacks the details to provide the nuances necessary for the effective application of GCs (see **Chart Three**). Given the importance of these areas of law, especially their importance to U.S.–China trade relations at a time when doubts are being cast on China's ability to

Related Legal Rules	**GC No(s).**	**Total No. of GCs**
Administrative Licensing Law	5	1
Administrative Litigation Law	5, 22, 38, 41, 69, 76, 77, 88, 91	9
Administrative Penalties Law	5, 6	2
Anti-Monopoly Law	78, 79	2
Anti–Unfair Competition Law	29, 30, 45, 47, 58	5
Auction Law	35	1
Bankruptcy Law	73	1
Civil Air Defense Law	21	1
Civil Procedure Law	2, 7, 25, 34, 36, 37, 56, 68, 82, 84	10
Company Law	8, 9, 10, 15, 96	5
Contract Law	1, 33, 64, 67, 72, 73, 86	7
Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw in 1929, amended at The Hague in 1955	51	1
Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier	51	1
Copyright Law	48, 80, 81	3
Criminal Law	3, 4, 11-14, 27, 28, 32, 61-63, 70, 71, 87, 93	16
Criminal Procedure Law	63	1
Education Law	38	1
Environmental Protection Law	75	1
Fire Protection Law	59	1
Food Safety Law	23, 60	2
General Principles of the Civil Law	15, 29, 35, 50, 51, 65, 89	7
Guarantee Law	57	1
Insurance Law	25, 52, 74	3
Interim Implementing Measures of the Regulation on Degrees	39	1
Interpretation of the Standing Committee of the National People's Congress on Article 99 Paragraph 1 of the "General Principles of the Civil Law of the People's Republic of China" and Article 22 of the "Marriage Law of the People's Republic of China"	89	1
Implementing Regulation of the Copyright Law	80, 81	2
Labor Contract Law	18	1
Law on Protection of Consumer Rights and Interests	17	1
Legislation Law	5	1
Maritime Law	16, 31	2
Marriage Law	66, 89	2
Patent Law	20, 55, 84, 85	4
Property Law	53, 54, 65, 72, 95	5
Regulation on Degrees	38, 39	2
Regulation on the Protection of New Plant Varieties	86, 92	2
Regulation on Open Government Information	26	1
Regulation on Property Management	65	1
Regulation on the Protection of Computer Software	48, 49	2
Regulation on Work-Related Injury Insurances	40, 94	2
Road Traffic Safety Law	19, 24, 90	3
Special Procedure Law on Maritime Litigation	16	1
State Compensation Law	42, 43, 44	3
Succession Law	50	1
Tort Liability Law	19, 24, 83	3
Trademark Law	46, 58, 82	3

Table Two: Number of GCs by Legal Rules Cited

protect IP rights, it is essential to keep a close eye on these GCs and find out whether other factors are contributing to their under-usage by Chinese courts.

Nationwide Spread of Guiding Cases and Subsequent Cases

Courts of Different Levels in Different Provinces Are Producing and Using GCs

The underlying ruling or judgment of a GC can be rendered by any regular court within China's four-tier system or by a special court. In China, special courts have jurisdiction to handle specific types of cases, such as military, railroad transportation, maritime, and IP cases. Candidate GCs are submitted level by level through the court system until they are ultimately selected and approved by the Adjudication Committee of the SPC.[13]

Of the 96 GCs released to date, 29 are based on rulings/judgments originally rendered by high people's courts, 25 by the SPC itself, 23 by intermediate people's courts, 18 by basic people's courts, and one by a maritime court, which is a special court (GC No. 31). Among those rulings/judgments that were not originally rendered by the SPC itself, the SPC has selected relatively more from Jiangsu (14 GCs) and Shanghai (11 GCs) for release as GCs (see **Chart Four**).

The nationwide spread of SCs can also be observed. Most of the 1,281 SCs were handled by courts located in Guangdong (191 SCs), Shandong (131 SCs), Zhejiang (97 SCs), Henan (91 SCs), and Jiangsu (79 SCs). Shandong (six GCs), Zhejiang (nine GCs), and Jiangsu (14 GCs) are among the localities with relatively more original judgments based on which GCs were issued. One might argue that the

Types of Civil Guiding Cases	Number of Civil GCs (released to date)
Intellectual Property, Unfair Competition, and/or Anti-Monopoly Law (GC Nos. 20, 29–30, 45–49, 55, 58, 78–86, 92)	20
Company (GC Nos. 8–10, 15, 67–68, 96)	7
Contract (GC Nos. 1, 7, 17–18, 23, 33, 64, 72)	8
Others (e.g., Bankruptcy, Divorce, Environment, Finance) (GC Nos. 2, 19, 24–25, 31, 34–37, 50–54, 56–57, 65–66, 73–75, 95)	22
Total	**57**

Table Three: Four Major Types of Civil Guiding Cases

greater number of GCs originating from these localities has increased lawyers' and judges' awareness of GCs and these legal actors are, therefore, more ready to use GCs in similar subsequent cases. Nevertheless, the fact that many SCs are from Guangdong and Henan—two provinces that have each originated only one GC—suggests that there are additional driving forces. This issue is worthy of further research when more SCs are available.

Table Five and **Image One** show that very large numbers of SCs are found in some provinces from which only a few GCs originated (colored red in both the table and the map). Moreover, some provinces producing no GCs are seeing their courts use GCs produced elsewhere (colored grey), demonstrating the expansive reach of the Case Guidance System. While GCs tend to be from provinces/provincial-level municipalities that are more economically developed (as reflected in higher GDP), the use of GCs shows no correlations with economic development. With respect to

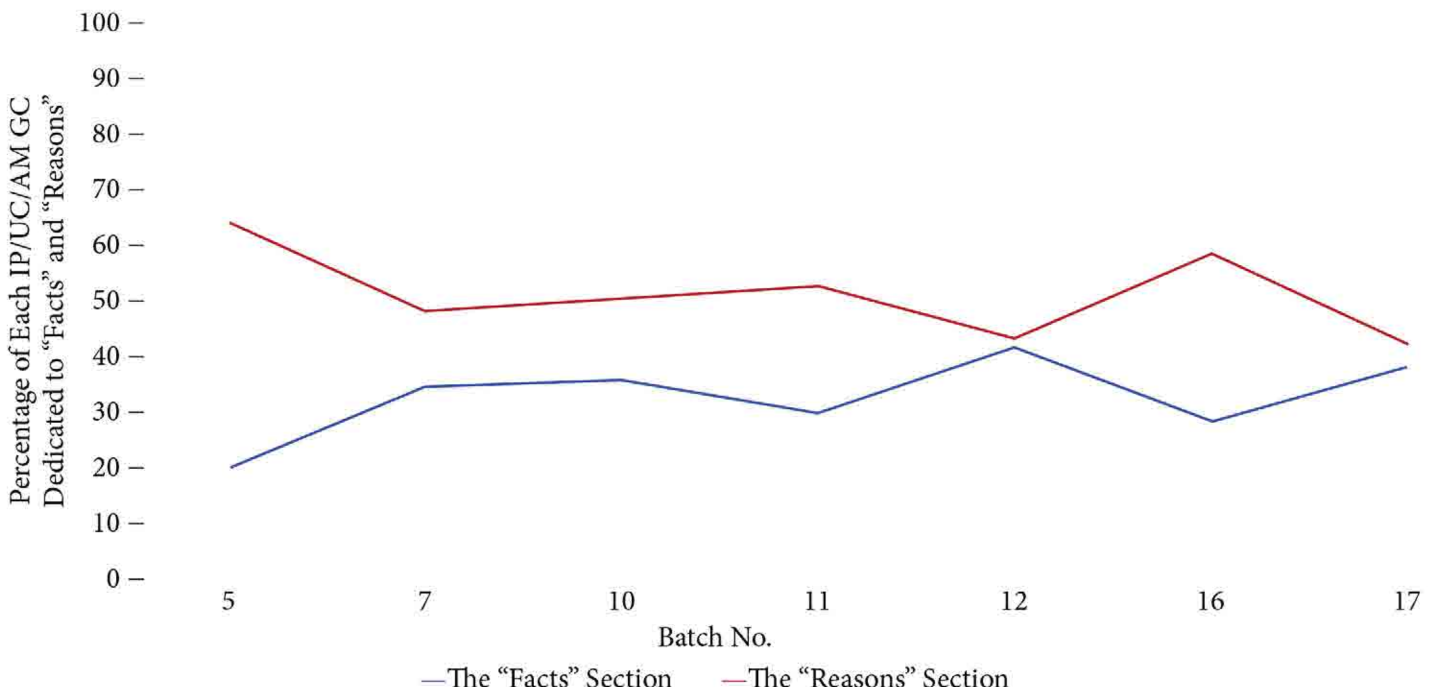


Chart Three: Relative Length of the "Facts" and "Reasons" Sections of Each Civil GC Concerning IP, Unfair Competition, and/or Anti-Monopoly Laws

GC No.	Released in	Type of Case	Original Judgment/Ruling Rendered By	No. of SCs Mentioning GC
20	2013 Q4	An Invention Patent Infringement Dispute	Supreme People's Court	0
29	2014 Q2	A Dispute over an Unauthorized Use of Another's Enterprise Name	High People's Court of Tianjin Municipality	1
30	2014 Q2	A Trademark Infringement and Unfair Competition Dispute	High People's Court of Tianjin Municipality	0
45	2015 Q2	An Unfair Competition Dispute	High People's Court of Shandong Province	3
46	2015 Q2	A Trademark Infringement and Unfair Competition Dispute	High People's Court of Shandong Province	2
47	2015 Q2	An Unfair Competition Dispute	Supreme People's Court (retrial)	1
48	2015 Q2	A Computer Software Copyright Infringement Dispute	High People's Court of Shanghai Municipality	0
49	2015 Q2	A Dispute over Computer Software Copyright Infringement	High People's Court of Jiangsu Province	0
55	2015 Q4	A Utility Model Patent Infringement Dispute	Supreme People's Court	0
58	2016 Q2	A Trademark Infringement and Unfair Competition Dispute	High People's Court of Chongqing Municipality	0
78	2017 Q1	A Dispute over Abusing Dominant Market Positions	Supreme People's Court	0
79	2017 Q1	A Dispute over Bundled Transactions	Supreme People's Court	0
80	2017 Q1	A Copyright Infringement Dispute	Intermediate People's Court of Guiyang Municipality, Guizhou Province	0
81	2017 Q1	A Copyright Infringement Dispute	Supreme People's Court	0
82	2017 Q1	A Trademark Infringement Dispute	Supreme People's Court	2
83	2017 Q1	A Dispute over Infringement of an Invention Patent	High People's Court of Zhejiang Province	0
84	2017 Q1	A Dispute over Infringement of an Invention Patent	Supreme People's Court	0
85	2017 Q1	A Dispute over Infringement of an Exterior Design Patent	Supreme People's Court	1
86	2017 Q1	A Dispute over Infringement of Rights to New Plant Varieties	High People's Court of Jiangsu Province	0
92	2017 Q4	A Dispute over Infringement of Rights to a New Plant Variety	High People's Court of Gansu Province	0

Table Four: 20 Civil GCs Related to IP, Unfair Competition, and/or Anti-Monopoly Laws

having more GCs in more developed provinces, is it because judges from more developed places are more ready to submit candidate GCs for consideration? Or is it because these places tend to have more cases concerning new issues of law and, as a result, the SPC is more likely to find these cases representative and select them as GCs. Or, perhaps, both factors are relevant in addition to other factors. The study as discussed here cannot provide a clear answer. What is clear, however, is that once GCs are available, legal actors from provinces across the country are quite ready to use them.

Lawyers and Judges Are Polishing Their Skills in Using GCs

A closer look at the 1,281 SCs helps reveal the roles played by lawyers and judges in using GCs. **Table Six** tabulates the CGCP's analysis of who mentioned the GCs in these 1,281 SCs. In 428 of the 1,281 SCs, GCs were not mentioned by any party involved in the dispute; nevertheless, the deciding courts took the initiative to consider the relevant GCs.

In the remaining 853 SCs, at least one party (or its lawyer) mentioned a GC in its arguments. In 165 of these 853 cases, the deciding courts mentioned the GCs explicitly inside and/or outside the "Reasoning" section of the judgment or ruling, while in the other 688 cases, the deciding courts did not mention the GCs at all, let alone explain in detail whether or not the GCs mentioned by the parties or lawyers should be applied. The judges' lack of response to the parties' arguments could partly reflect inadequate understanding of GCs among judges, but may also reveal judges' uncertainty as to whether and how they should explicitly cite GCs in judgments.[14]

On the other hand, the fact that in hundreds of SCs (here, 428) the deciding court took the initiative to consider the relevant GCs despite the parties' failure to do so is promising. More Chinese courts are clearly being exposed to GCs, which bodes well for further development of the Case Guidance System in the country.

Outlook: Spreading Case Culture?

The increasing numbers of GCs and SCs show that China's Case Guidance System is developing fairly well, and its preliminary success seems to have provided fertile ground for the propagation of a case culture across the country. Seemingly more confident in the role of courts, China has established new courts to focus on the application of specific areas of law. Nationwide, various specialized courts have been established (e.g., IP courts,[15] the Shanghai Financial Court,[16] and internet courts[17]). For the international sphere, to support the BRI, the country has set up two international commercial courts.[18]

The establishment of these new courts is obviously accompanied with Chinese leaders' high hopes that these courts, together with the existing ones, will help achieve the goals of the

Case Guidance System (i.e., "summariz[ing] adjudication experiences, unify[ing] the application of law, enhanc[ing] adjudication quality, and safeguard[ing] judicial impartiality"). Based on the above analysis, the authors have the following recommendations for improving the Case Guidance System:

- Clarifying the legal status and role of GCs

  Article 7 of the *Provisions* provides merely that courts in China "should", rather than "must", "refer to" GCs when adjudicating similar cases. The lack of expressions stating that judges are formally bound by GCs reflects the unclear legal status of these cases.[19] Therefore, while it seems certain that the SPC expects GCs to play an important role in the Chinese legal system, as evidenced by the clear language to this effect in the *Provisions* and the *Detailed Implementing Rules*, the fact that GCs remain *de facto* binding makes it unsurprising that some lawyers and judges have been slower to integrate GCs into their work. The outlook for the long-term success of China's Case Guidance System hinges on whether the unclear legal status of GCs in the country's statute-based legal tradition and other uncertainties will be effectively addressed by the SPC in the near future. Once the legal status of GCs is clarified, it should be expected that they will become cited more often and by more legal practitioners and judges in similar subsequent cases, which should cause a significant jump in the number of SCs.

- Upgrading the official SPC website of Chinese judgments and rulings to facilitate research

  The SPC has made great progress with respect to increasing the transparency surrounding Chinese adjudication. Article 4 of the *Provisions of the Supreme People's Court on the Publication of Adjudication Documents on the Internet by People's Courts*[20] requires the publication of all adjudication documents on the Internet unless they are withheld due to exceptional circumstances, such as where the underlying cases "involve state secrets or personal privacy", "involve the commission of crimes by minors", or have been "settled by mediation". This led to the launch of the official SPC website in July 2013, which, as mentioned above, makes available tens of millions of Chinese judgments and rulings online. The availability of essentially all Chinese judgments and rulings presents an unprecedented opportunity for conducting empirical analyses of court decisions in China. However, as the CGCP discovered in its search for SCs, this website is not user-friendly. The SPC should invest in improvements to the website, especially

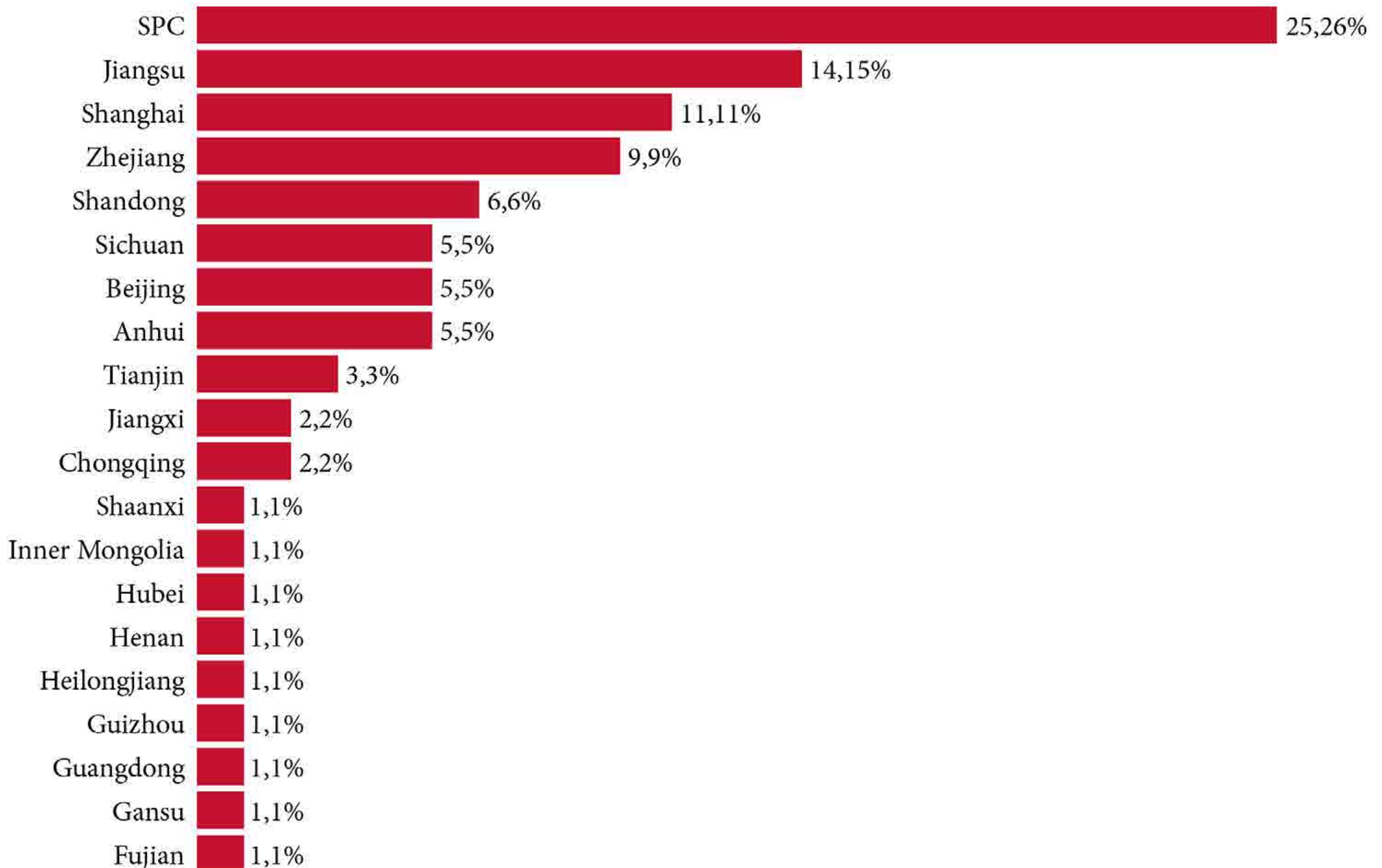


*Chart Four: Number of Rulings/Judgments Rendered by the SPC and Courts in the Following Provinces/Provincial-Level Municipalities Released as GCs***

*** The first number is the number of rulings/judgments, followed by the percentage.*

Provinces/ Provincial-Level Municipalities	GDP per capita (yuan)*	No. of GCs	No. of SCs	SCs/GCs
Beijing (北京)	128,927	5	64	12.8
Shanghai (上海)	124,571	11	25	2.3
Tianjin (天津)	119,240	3	19	6.3
Jiangsu (江苏)	107,189	14	79	5.6
Zhejiang (浙江)	92,057	9	97	10.8
Fujian (福建)	82,976	1	33	33
Inner Mongolia (内蒙古)	81,791	1	68	68
Guangdong (广东)	81,089	1	191	191
Shandong (山东)	72,851	6	131	21.8
Chongqing (重庆)	63,689	2	29	14.5
Hubei (湖北)	61,971	1	44	44
Shaanxi (陕西)	57,266	1	12	12
Jilin (吉林)	56,101	0	29	!
Liaoning (辽宁)	54,745	0	50	!
Ningxia (宁夏)	50,917	0	6	!
Hunan (湖南)	50,563	0	26	!
Hainan (海南)	48,429	0	9	!
Hebei (河北)	47,985	0	36	!
Henan (河南)	47,129	1	91	91
Jiangxi (江西)	45,187	2	34	17
Xinjiang (新疆)	45,099	0	6	!
Sichuan (四川)	44,651	5	50	10
Qinghai (青海)	44,348	0	1	!
Anhui (安徽)	44,206	5	47	9.4
Heilongjiang (黑龙江)	42,699	1	25	25
Guangxi (广西)	41,955	0	10	!
Shanxi (山西)	40,557	0	15	!
Tibet (西藏)	39,258	0	2	!
Guizhou (贵州)	37,956	1	29	29
Yunnan (云南)	34,546	0	7	!
Gansu (甘肃)	29,326	1	3	3
SPC (最高法)		**25**	**13**	**0.52**
TOTAL:		96	1,281	

Table Five: Numbers of GCs and SCs in Different Provinces/Provincial-Level Municipalities
**Data from the National Bureau of Statistics of China (http://data.stats.gov.cn); compiled by Wikipedia (http://en.wikipedia.org)*

search functionality across the wealth of information it provides, to benefit not only academic researchers but also legal practitioners and judges themselves.

- Including more "Reasons" and "Facts" in GCs to facilitate their application

The portions of a GC dedicated to providing the "Basic Facts of the Case" and "Reasons for the Adjudication" are both important, as these are the bases for determining whether a pending case is similar to the GC. The "Reasons" that the SPC highlights when transforming chosen representative cases into GCs are the foundation of the Case Guidance System, as they clarify the legal reasoning that Chinese courts should apply in similar subsequent cases. Just as important, however, is a clear identification of the facts of GCs, to enable lawyers and judges to determine whether a pending case is sufficiently similar

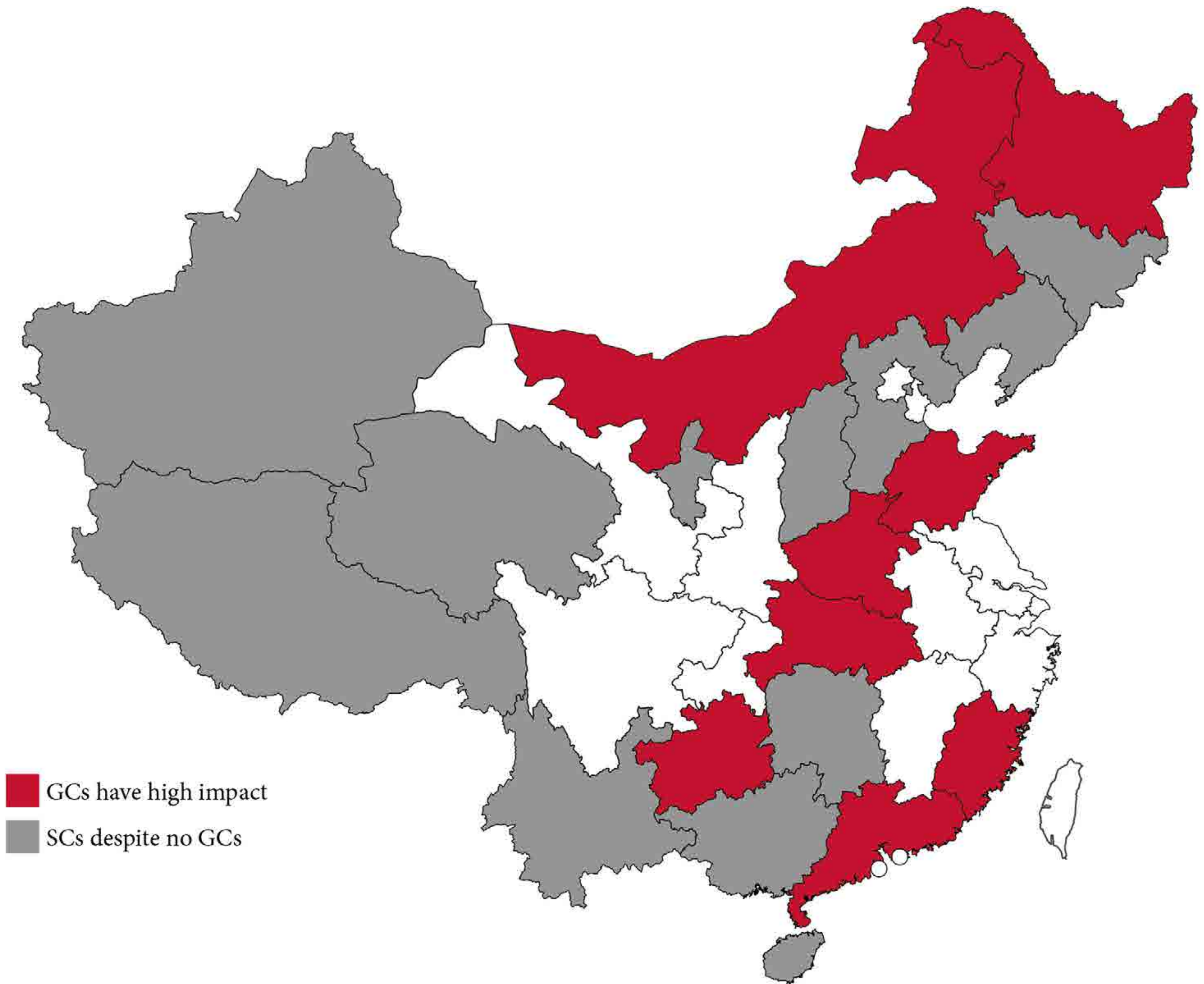


Image One: Map of Top Chinese Provinces Where GCs Are Being Used

to a GC or whether it can be distinguished. As noted above, more SCs will need to be identified to determine the exact relationship between the lengths of "Reasons" and "Basic Facts" in GCs and the usage of these GCs in subsequent cases. However, the *Detailed Implementing Rules* makes it clear that "the basic facts and application of the law" are what determine whether Chinese courts should refer to the "Main Points of the Adjudication" of a GC. Therefore, more "Reasons" and "Facts" should be included in all GCs, to facilitate their application by Chinese courts in the manner and frequency envisioned by the SPC.

No. of SCs	Subtotal	GC(s) mentioned by parties/ lawyers?	GC(s) mentioned by court?	* Location in relation to "Reasoning" section
688	688	Yes	No	*N/A*
103	165	Yes	Yes	Inside
35		Yes	Yes	Outside
27		Yes	Yes	Inside AND Outside
313	428	No	Yes	Inside
106		No	Yes	Outside
9		No	Yes	Inside AND Outside
1,281				

Table Six: Comparison of Who Mentioned the GC(s) in SCs

By taking the above steps, China will be able to improve its Case Guidance System, getting closer to the goals of achieving fair and uniform application of Chinese law highlighted in GCs. As the country continues to spread its case culture, as discussed above, demonstrating its commitment to the rule of law at home, China may be able to extend the reach of its developing case culture beyond the country's borders, sowing the seed of international rule of law that the country has called for to facilitate the development of the BRI. With this potential of making a major contribution to the world, China can command more respect, which may, in turn, lead to more doors being opened to the country.

Appendix: List of 96 Guiding Cases and Corresponding Numbers of Subsequent Cases (identified through end of 2017)

GC No.	Case Name (translated by the CGCP)	Number of SCs Identified through Dec. 31, 2017
1	*Shanghai Centaline Property Consultants Limited v. TAO Dehua, An Intermediation Contract Dispute*	26
2	*WU Mei v. Meishan Xicheng Paper Co., Ltd. of Sichuan Province, A Sale and Purchase Contract Dispute*	5
3	*PAN Yumei and CHEN Ning, A Bribe-Accepting Case*	1
4	*WANG Zhicai, An Intentional Homicide Case*	1
5	*Luwei (Fujian) Salt Industry Import and Export Co., Ltd. Suzhou Branch v. The Salt Administration Bureau of Suzhou Municipality, Jiangsu Province, A Salt Industry Administrative Penalty Case*	18
6	*HUANG Zefu, HE Boqiong, and HE Yi v. The Jintang Administration for Industry and Commerce of Chengdu Municipality, Sichuan Province, An Administrative Penalty Case*	8
7	*Mudanjiang Municipality Hongge Construction and Installation Co., Ltd. v. Mudanjiang Municipality Hualong Real Estate Development Co., Ltd. and ZHANG Jizeng, A Construction Project Contract Dispute*	0
8	*LIN Fangqing v. Changshu Kailai Industry Co., Ltd. and DAI Xiaoming, A Corporate Dissolution Dispute*	28
9	*Shanghai Cunliang Trading Co., Ltd. v. JIANG Zhidong, WANG Weiming et al., A Sale and Purchase Contract Dispute*	66
10	*LI Jianjun v. Shanghai Jiapower Environment Protection Science and Technology Co., Ltd., A Corporate Resolution Revocation Dispute*	9
11	*YANG Yanhu et al., A Graft Case*	3
12	*LI Fei, An Intentional Homicide Case*	2
13	*WANG Zhaocheng et al., An Illegal Trading and Storage of Hazardous Substances Case*	9
14	*A certain DONG and a certain SONG, A Robbery Case*	6
15	*XCMG Construction Machinery Co., Ltd. v. Chengdu Chuanjiao Industry and Trade Co., Ltd. et al., A Sale and Purchase Contract Dispute*	122
16	*China Shipping Development Co., Ltd. Tramp Company, A Case of an Application for the Establishment of a Limitation of Liability Fund for Maritime Claims*	0
17	*ZHANG Li v. Beijing Heli Huatong Automobile Service Co., Ltd., A Sale and Purchase Contract Dispute*	29
18	*ZTE (Hangzhou) Company Limited v. WANG Peng, A Labor Contract Dispute*	1
19	*ZHAO Chunming et al. v. The Automobile Transport Company of Fushan District, Yantai Municipality, WEI Deping, et al., A Motor Vehicle Traffic Accident Liability Dispute*	26
20	*Shenzhen Siruiman Fine Chemicals Co., Ltd. v. Shenzhen Kengzi Water Supply Co., Ltd. and Shenzhen Kangtailan Water Treatment Equipment Co., Ltd., An Invention Patent Infringement Dispute*	0
21	*Inner Mongolia Qiushi Real Estate Development Limited Liability Company v. The Civil Air Defense Office of Hohhot Municipality, A Civil Defense Administrative Levy Case*	8
22	*WEI Yonggao and CHEN Shouzhi v. The People's Government of Lai'an County, A Case About a Reply to Recover Land-Use Rights*	27
23	*SUN Yinshan v. Nanjing Auchan Hypermarket Co., Ltd. Jiangning Store, A Sale and Purchase Contract Dispute*	76
24	*RONG Baoying v. WANG Yang and Alltrust Insurance Co., Ltd. Jiangyin Branch, A Motor Vehicle Traffic Accident Liability Dispute*	357
25	*Huatai Property & Casualty Insurance Co., Ltd. Beijing Branch v. LI Zhigui and Zhangjiakou Subbranch of Tianan Property Insurance Company Limited of China Hebei Provincial Branch, An Insurer's Subrogation Right Dispute*	23
26	*LI Jianxiong v. Department of Transport of Guangdong Province, A Case About Open Government Information*	5
27	*ZANG Jinquan et al., A Theft and Fraud Case*	0
28	*HU Kejin, A Case of a Refusal to Pay Remuneration*	1
29	*Tianjin China Youth Travel Service v. Tianjin Guoqing International Travel Agency, A Dispute over an Unauthorized Use of Another's Enterprise Name*	1
30	*LAN Jianjun and Hangzhou Suremoov Automotive Technology Company Limited v. Tianjin Xiaomuzhi Automobile Maintenance and Repair Services Co., Ltd. et al., A Trademark Infringement and Unfair Competition Dispute*	0
31	*Jiangsu Weilun Shipping Co., Ltd. v. Miranda Rose Limited, A Ship Collision Damages Dispute*	0
32	*A certain ZHANG and a certain JIN, A Dangerous Driving Case*	1
33	*Cargill International S.A. v. Fujian Jinshi Vegetable Oil Producing Co., Limited et al., A Dispute over Contracts Affirmed to be Invalid*	13
34	*Application by LI Xiaoling and LI Pengyu for Enforcement against Xiamen Marine Industry (Group) Co., Ltd. and Xiamen Marine Industry Controlling Corporation, An Enforcement Reconsideration Case*	29
35	*Guangdong Longzheng Investment Development Co., Ltd. and Guangdong Jingmao Auction Co., Ltd., An Enforcement Reconsideration Case on an Entrusted Auction*	1
36	*Zhongtou Credit Guarantee Co., Ltd. and Haitong Securities Co., Ltd. et al., An Enforcement Reconsideration Case on a Dispute over the Rights and Interests in Securities*	1
37	*Shanghai Jwell Machinery Co., Ltd. and Retech Aktiengesellschaft, Switzerland, An Enforcement Reconsideration Case on an Arbitral Award*	0

GC No.	Case Name (translated by the CGCP)	Number of SCs Identified through Dec. 31, 2017
38	*TIAN Yong v. The University of Science and Technology Beijing, A Case of a Refusal to Award a Graduation Certificate and a Degree Certificate*	2
39	*HE Xiaoqiang v. Huazhong University of Science and Technology, A Case of a Refusal to Confer a Degree*	0
40	*SUN Lixing v. The Labor and Personnel Bureau of Tianjin New Technology Industrial Park, A Work-Related Injuries Determination Case*	3
41	*XUAN Yicheng et al. v. Bureau of Land and Resources of Quzhou Municipality, Zhejiang Province, A Case of a Recovery of the Rights to Use State-Owned Land*	24
42	*ZHU Hongwei, A Case of an Application for Compensation for Arrest without a Finding of Guilt*	0
43	*Haikou Binhai Avenue (Tianfu Hotel) Securities Business Department of Guotai Junan Securities Co., Ltd., A Case of an Application for Compensation for Erroneous Enforcement*	1
44	*BU Xinguang, A Case of an Application for Compensation for Illegal Criminal Recovery*	0
45	*Beijing Baidu Netcom Science and Technology Co., Ltd. v. Qingdao Aoshang Network Technology Co., Ltd., An Unfair Competition Dispute*	3
46	*Shandong Lu Jin Industrial Co., Ltd. v. Juancheng Lu Jin Crafts Co., Ltd. and Jining Lizhibang Home Textiles Co., Ltd., A Trademark Infringement and Unfair Competition Dispute*	2
47	*Ferrero International S.A. in Italy v. Montresor (Zhangjiagang) Food Co., Ltd. and Zhengyuan Marketing Co., Ltd. in Tianjin Economic - Technological Development Area, An Unfair Competition Dispute*	1
48	*Beijing Jingdiao Co., Ltd. v. Shanghai Naikai Electronic Science and Technology Co., Ltd., A Computer Software Copyright Infringement Dispute*	0
49	*SHI Honglin v. Taizhou Huaren Electronic Information Co., Ltd., A Dispute over Computer Software Copyright Infringement*	0
50	*A certain Ms. LI and GUO X Yang v. GUO X He and a certain Ms. TONG, A Succession Dispute*	0
51	*Abdul Waheed v. China Eastern Airlines Corporation Limited, A Dispute over a Contract for the Carriage of Passengers by Air*	1
52	*Hainan Fenghai Grain and Oil Industry Co., Ltd. v. The Hainan Branch of PICC Property and Casualty Company Limited, A Dispute over An Insurance Contract for the Carriage of Goods By Sea*	1
53	*The Fuzhou Wuyi Sub-Branch of Fujian Haixia Bank Co., Ltd. v. Changle Yaxin Sewage Treatment Co., Ltd. and Fuzhou Municipal Administration Engineering Co., Ltd., A Dispute over a Financial Borrowing Contract*	7
54	*The Anhui Branch of the Agricultural Development Bank of China v. ZHANG Dabiao and Anhui Changjiang Financing Guarantee Group Co., Ltd., A Dispute Concerning a Suit over an Objection to Enforcement*	58
55	*BAI Wanqing v. Chengdu Hard-To-Find Items Marketing Services Center et al., A Utility Model Patent Infringement Dispute*	0
56	*HAN Fengbin v. Inner Mongolia Jiujun Pharmaceutical Co., Ltd. et al., A Case of Objections to Jurisdiction in a Product Liability Dispute*	1
57	*The Ningbo Branch of Bank of Wenzhou Co., Ltd. v. Zhejiang Chuangling Electric Appliance Co., Ltd. et al., A Dispute over a Financial Borrowing Contract*	6
58	*Chengdu Tongdefu Hechuan Peach Piece Co., Ltd. v. Chongqing Hechuan Tongdefu Sliced-Walnut Cake Co., Ltd. and YU Xiaohua, A Trademark Infringement and Unfair Competition Dispute*	0
59	*DAI Shihua v. The Public Security Fire Protection Brigade of Jinan Municipality, A Dispute over an Inspection for Acceptance of Fire Protection*	1
60	*The Dongtai Branch of Aokang Food Co., Ltd. of Yancheng Municipality v. The Dongtai Administration for Industry and Commerce of Yancheng Municipality, An Industry and Commerce Administrative Penalty Case*	200
61	*MA Le, A Case About Using Nonpublic Information for Trading*	3
62	*WANG Xinming, A Contract Fraud Case*	3
63	*XU Jiafu, A Case About Compulsory Medical Treatment*	0
64	*LIU Chaojie v. The Xuzhou Branch of China Mobile Group Jiangsu Company Limited, A Dispute Over a Telecommunications Service Contract*	0
65	*The Owners' Association of the Jiule Building Community, Hongkou District, Shanghai Municipality v. Shanghai Huanya Industrial Corporation, A Dispute over Owners' Joint Ownership Rights*	2
66	*A certain LEI v. a certain SONG, A Dispute over Divorce*	6
67	*TANG Changlong v. ZHOU Shihai, A Dispute over a Transfer of Shareholding*	0
68	*Shanghai Oubao Biotechnology Co., Ltd. v. Liaoning Trevi Real Estate Development Co., Ltd., A Dispute over Corporate Lending*	1
69	*WANG Mingde v. The Human Resources and Social Security Bureau of Leshan Municipality, A Case About the Determination of Work-Related Injuries*	3
70	*Beijing Sunshine100 Biotechnology Development Co., Ltd., XI Wenyou, et al., A Case of Producing and Selling Toxic and Harmful Food*	0
71	*MAO Jianwen, A Case of Refusing to Carry Out a Judgment or Ruling*	4
72	*TANG Long, LIU Xinlong, MA Zhongtai, and WANG Honggang v. Xinjiang Ordos Yanhai Real Estate Development Co., Ltd., A Dispute over a Contract for the Sale and Purchase of Commercial Housing*	25
73	*Tongzhou Construction General Contracting Group Co., Ltd. v. Anhui Tianyu Chemical Co., Ltd., A Dispute over a Right of Exclusion*	1
74	*The Jiangsu Branch of Ping An Property & Casualty Insurance Company of China, Ltd. v. Jiangsu Zhenjiang Installation Group Co., Ltd., A Dispute over an Insurer's Right of Subrogation*	3

GC No.	Case Name (translated by the CGCP)	Number of SCs Identified through Dec. 31, 2017
75	*China Biodiversity Conservation and Green Development Foundation v. Ningxia Ruitai Technology Co., Ltd., A Case of Public Interest Litigation over Environmental Pollution*	0
76	*Pingxiang Yapeng Real Estate Development Co., Ltd. v. Bureau of Land and Resources of Pingxiang Municipality, A Case about Non-Performance of an Administrative Agreement*	1
77	*LUO Rongrong v. The Price Bureau of Ji'an Municipality, A Case About Handling Price Administration*	12
78	*Beijing Qihu Technology Co., Ltd. v. Tencent Technology (Shenzhen) Company Limited and Shenzhen Tencent Computer Systems Company Limited, A Dispute over Abusing Dominant Market Positions*	0
79	*WU Xiaoqin v. Shaanxi Broadcast & TV Network Intermediary (Group) Co., Ltd., A Dispute over a Bundled Transaction*	0
80	*HONG Fuyuan and DENG Chunxiang v. Guizhou Wufufang Foods Co., Ltd. and Guizhou Jincai Ethnic Culture R & D Co., Ltd., A Copyright Infringement Dispute*	0
81	*ZHANG Xiaoyan v. LEI Xianhe, ZHAO Qi, and Shandong Aishuren Audio-Video & Book Co., Ltd., A Copyright Infringement Dispute*	0
82	*WANG Suiyong v. Shenzhen Ellassay Fashion Co., Ltd. and Hangzhou Intime Century Department Store Co., Ltd., A Trademark Infringement Dispute*	2
83	*Weihai Jiayikao Household Appliance Co., Ltd. v. Yongkangshi Jinshide Industry & Trading Co., Ltd. and Zhejiang Tmall.com Network Co., Ltd., A Dispute over Infringement of an Invention Patent*	0
84	*Lilly Company v. WATSON Pharmaceuticals (Changzhou) Co., Ltd., A Dispute over Infringement of an Invention Patent*	0
85	*Grohe AG v. Zhejiang Jianlong Sanitary Ware Co., Ltd., A Dispute over Infringement of an Exterior Design Patent*	1
86	*Tianjin Tianlong Seeds Science and Technology Co., Ltd. and Jiangsu Xunong Seeds Science and Technology Co., Ltd., A Dispute over Infringement of Rights to New Plant Varieties*	0
87	*GUO Mingsheng, GUO Mingfeng, and SUN Shubiao, A Case About Counterfeiting a Registered Trademark*	0
88[21]	*ZHANG Daowen, TAO Ren, et al. v. The People's Government of Jianyang Municipality, Sichuan Province, A Case of Infringing Upon the Right to Operate Manpower Passenger Tricycle Businesses*	0
89	*"BEIYAN Yunyi" v. Yanshan Police Station, Lixia District Branch, Public Security Bureau of Jinan Municipality, A Public Security Administrative Registration Case*	0
90	*BEI Huifeng v. The Traffic Police Brigade of the Public Security Bureau of Haining Municipality, A Case of Administrative Penalties of Road Traffic Administration*	0
91	*SHA Mingbao et al. v. The People's Government of Huashan District, Ma'anshan Municipality, A Case of Administrative Compensation for Compulsory Demolition of Housing*	0
92	*Laizhou Jinhai Seeds Co., Ltd. v. Zhangye Fukai Agricultural Science and Technology Limited Liability Company, A Dispute over Infringement of Rights to a New Plant Variety*	0
93	*YU Huan, An Intentional Injury Case*	-
94	*Chongqing Fuling Zhida Property Management Co., Ltd. v. Fuling District Human Resources and Social Security Bureau of Chongqing Municipality, An Administrative Confirmation Case Concerning Labor and Social Security*	-
95	*Xuancheng Longshou Branch of the Industrial and Commercial Bank of China v. Xuancheng Baiguan Trading Co., Ltd. and Jiangsu Kaisheng Property Company Limited, A Dispute over a Financial Borrowing Contract*	-
96	*SONG Wenjun v. Xi'an Dahua Food and Beverage Co., Ltd., A Dispute over a Confirmation of the Qualification of Shareholders*	-
TOTAL		**1,281**

* The citation of this Commentary is: Dr. Mei Gechlik, Li Huang, & Jennifer Ingram, *Propagation of a Case Culture in China and Potentially Beyond*, 2 China Law Connect 1 (Sept. 2018), *also available at* Stanford Law School China Guiding Cases Project, Sept. 2018, http://cgc.law.stanford.edu/commentaries/clc-2-201809-24-gechlik-huang-ingram. The authors extend special thanks to the team led by Li Huang for identifying all subsequent cases analyzed in this piece.
The original, English version of this Commentary was edited by Dimitri Phillips. The information and views set out in this Commentary are the responsibility of the authors and do not necessarily reflect the work or views of the China Guiding Cases Project.

[1] *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, 585 U.S. ___, 138 S. Ct. 1865 (2018). The slip opinion of the Supreme Court is available at https://www.supremecourt.gov/opinions/17pdf/16-1220_3e04.pdf.

[2] Yee Wah Chin, *The* Vitamin C *Case: Important Role for the Federal Courts and Clear Message to Foreign Countries*, 2 China Law Connect 35 (Sept. 2018), *also available at* Stanford Law School China Guiding Cases Project, Experts *Connect*™, Sept. 2018, http://cgc.law.stanford.edu/commentaries/clc-2-201809-connect-2-yee-wah-chin.

[3] Chinese State Councilor and Foreign Minister WANG Yi's Speech at the 2018 Forum on the Belt and Road Legal Cooperation: Stronger Legal Cooperation for Sound and Steady Development of the Belt and Road Initiative, July 2, 2018, www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1573636.shtml. The Chinese version (加强国际法治合作 推动"一带一路"建设行稳致远) can be accessed at https://www.fmprc.gov.cn/web/wjbz_673089/zyjh_673099/t1573308.shtml.

[4] Leading judges of the SPC have explicitly identified GCs as *de facto* binding precedents. *See, e.g.*, Judge GUO Feng, *On the Issue of the Application of the Supreme Court's Guiding Cases*, 1 China Law Connect 19, 21 (June 2018), *also available at* Stanford Law School China Guiding Cases Project, June 2018, http://cgc.law.stanford.edu/commentaries/clc-1-201806-23-guo-feng.

[5] 《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*), Preamble, 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, http://cgc.law.stanford.edu/guiding-cases-rules/20101126-english.

[6] *Id.*, Article 1.

[7] *Id.*, Article 7.

[8] *Id.*, Article 2.

[9] 《〈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, http://cgc.law.stanford.edu/guiding-cases-rules/20150513-english.

[10] For a complete list of SCs that explicitly mention each of the GCs listed in the Appendix, please go to the corresponding webpage of the GC. For example, a list of SCs that explicitly mention GC24 is available at http://cgc.law.stanford.edu/guiding-cases/guiding-case-24.

[11] Mei Gechlik and Jennifer Ingram, *China's Fifty-Seven Civil Guiding Cases*, Stanford Law School China Guiding Cases Project, Guiding Cases *Analytics*™, Issue No. 7, Sept. 2018, http://cgc.law.stanford.edu/guiding-cases-analytics.

[12] Mei Gechlik and Jennifer Ingram, *China's Sixteen Criminal Guiding Cases*, Stanford Law School China Guiding Cases Project, Guiding Cases *Analytics*™, Issue No. 8, Sept. 2018, http://cgc.law.stanford.edu/guiding-cases-analytics.

[13] 《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 5, Articles 3–6.

[14] Mei Gechlik, Li Huang, & Jennifer Ingram, *China's Case Guidance System: Application and Lessons Learned (Part II)*, Stanford Law School China Guiding Cases Project, Guiding Cases *Surveys*™, Issue No. 4, Sept. 2018, http://cgc.law.stanford.edu/guiding-cases-surveys.

[15] 《全国人大常委会关于在北京、上海、广州设立知识产权法院的决定》 (*Decision of the Standing Committee of the National People's Congress on the Establishment of Intellectual Property Courts in Beijing, Shanghai, and Guangzhou*), passed on, issued on, and effective as of Aug. 31, 2014, http://www.npc.gov.cn/npc/xinwen/2014-09/01/content_1877042.htm.

[16] 《全国人大常委会关于设立上海金融法院的决定》 (*Decision of the Standing Committee of the National People's Congress on the Establishment of the Shanghai Financial Court*), passed and issued on Apr. 27, 2018, effective as of Apr. 28, 2018, http://paper.people.com.cn/rmrb/html/2018-04/28/nw.D110000renmrb_20180428_8-04.htm.

[17] 《最高人民法院关于互联网法院审理案件若干问题的规定》 (*Provisions of the Supreme People's Court on Several Issues Concerning the Handling of Cases by Internet Courts*), passed by the Adjudication Committee of the Supreme People's Court on Sept. 3, 2018, issued on Sept. 6, 2018, effective as of Sept. 7, 2018, http://www.court.gov.cn/zixun-xiangqing-116981.html.

[18] 《最高人民法院关于设立国际商事法庭若干问题的规定》 (*Provisions of the Supreme People's Court on Several Issues Concerning the Establishment of the International Commercial Courts*), passed by the Adjudication Committee of the Supreme People's Court on June 25, 2018, issued on June 27, 2018, effective as of July 1, 2018, 2 China Law Connect 83 (Sept. 2018), *also available at* Stanford Law School China Guiding Cases Project, B&R *Texts*™, Sept. 2018, http://cgc.law.stanford.edu/belt-and-road/b-and-r-texts/20180701-provisions-re-intl-commercial-courts.

[19] *See, e.g.*, 郭锋、吴光侠、李兵 (GUO Feng, WU Guangxia, LI Bing), 《〈关于案例指导工作的规定〉实施细则》的理解与适用 (*Understanding and Applying the Detailed Implementing Rules on the "Provisions Concerning Work on Case Guidance"*), 《人民司法》 (The People's Judicature), Issue No. 17 (2015), at 30.

[20] 《最高人民法院关于人民法院在互联网公布裁判文书的规定》 (*Provisions of the Supreme People's Court on the Publication of Adjudication Documents on the Internet by People's Courts*), passed by the Adjudication Committee of the Supreme People's Court on Nov. 13, 2013, issued on Nov. 21, 2013, effective as of Jan. 1, 2014, http://www.chinacourt.org/law/detail/2013/11/id/147242.shtml.

[21] GC Nos. 88–92 were released on Nov. 15, 2017, and GC Nos. 93–96 were released on June 20, 2018.

案例文化在中国内外的传播*

熊美英博士
中国指导性案例项目创办人与总监
黄鹂
中国指导性案例项目助理执行编辑
英珍妮
中国指导性案例项目执行编辑

1978年底，中国采取门户开放政策欢迎外国投资，启动了一系列经济和法律改革。四十年过去了，该国已成为世界第二大经济体。文献记载了超过2,500项国家法律和数以千计的其他类型的立法。但“行动中的法律”发展得怎么样？通过司法案例，我们可以瞥见中国法律制度，加深了解，否则该制度还会是相当不透明。

远东地区“行动中的法律”发展得怎样对美国而言是重要的。最近由美国联邦最高法院裁定的《维生素C案》十分具有说明性。该法院一致决定并强调，外国政府（在该案中，即为中国商务部）关于其国家法律的声明只应给予“尊重性的考虑”，而非具有约束力，并且在独立确定外国法律问题时，美国联邦法院可以考虑《联邦民事诉讼规则》第44.1条规定的“任何相关材料或来源”。[1] 反垄断法专家陈懿华在评论《维生素C案》中指出，“[...]声明由外国司法管辖区的最高法院发出、与国家以往的陈述与行为一致，且不作为是诉讼立场文件而受到攻击，则其对外国法律的陈述具有说服力。”[2]

法律在特定案件（特别是涉及世界贸易组织（“WTO”）相关问题的案件（如知识产权）在不同级别和不同省份的中国法院前如何应用也有助于揭示中国是否真正致力于在公平和平等原则的基础上保护合法权益。所有上述观念都是世贸组织成员自中国于2001年12月加入该组织以来所期望的中国能拥护的核心价值。为了缓解对美中之间不断升级的贸易战日益增长的担忧，中国能够展示具体的司法实践来证明在遵守这些原则方面取得相对成功的历史将有助于双方继续谈判。

中国发生的法律改革对世界也很重要。中国在打开自己的外国投资之门三十五年后，于2013年启动了“一带一路”倡议，实际上敦促了世界其他国家向中国投资敞开大门。“一带一路”将中国置于与其外国投资者相同的位置，这些外国投资者几十年来一直在呼吁中国建立一个受法治支配的法律体系。现在，中国对“一带一路”东道国也作出同样的呼吁。在2018年7月“一带一路”法治合作国际论坛上，外交部长王毅说：“我们深信，规则和法治既是‘一带一路’走向世界的通行证，也是应对各种不确定性风险和挑战的安全阀。”[3] 如果中国能表明其致力于国内的法治，例如能在司法案件中统一适用法律，那么这样的呼吁将在中国境外更有效地发挥作用。在中国表现出明确承诺的情况下，外国不仅更加愿意

> ***“为了缓解对美中之间不断升级的贸易战日益增长的担忧，中国能够展示具体的司法实践来证明在遵守[公平和平等]原则方面取得相对成功的历史将有助于双方继续谈判。”***

为中国投资敞开大门，而且更愿意与强调中国的崛起是和平的且有利于世界福祉的中国领导人敞开心扉建立真诚的伙伴关系。

鉴于诸多利益会受影响，如果中国使用司法案例的文化能扎根并发展壮大，那将有利于中国自身的利益。本文旨在探讨这文化是否正在中国——一个基本上没有使用案例（更不用说使用有约束力的案例）的传统的国家——扎根。作者分析了中国指导性案例（一种事实上具有约束力的先例[4]）自最高人民法院（“最高法”）于2011年发布第一批指导性案例后的发展，并探讨该等案例迄今产生的影响。作者的结论是，指导性案例的初步成功似乎为中国案例文化的传播提供了肥沃的土壤，而鉴于中国渴望增加其在世界各地的影响，中国案例文化可能有机会在其他地方传播。

96个指导性案例、1,281个后续案件

中国最高人民法院（“最高法”）于2010年11月发布《最高人民法院关于案例指导工作的规定》（“《规定》”），建立一个开创性的案例指导制度，旨在“总结审判经验，统一法律适用，提高审判质量，维护司法公正”。[5] 在此制度下，最高法确定并统一发布指导性案例，而这些案例“对全国法院审判、执行工作具有指导作用”。[6] 《规定》第七条明确指出，各级法院审判类似指导性案例的后续案件时“应当参照”指导性案例。[7] 迄今为止，最高法已经发布了接近100个指导性案例，而斯坦福法学院的中国指导性案例项目（“CGCP”）已经发现了一千多个明确提到这些指导性案例的后续案件。

96个指导性案例

自2011年以来，最高法已经发布了18批指导性案例，使总数达到96个。每年发布多少批指导性案例似乎没有标准，而每批发布的指导性案例数量都有所不同。**图1**显示了每季度发布的指导性案例数量。总体来说，2014年发布的指导性案例数量最多（即：22个）。

熊美英博士
斯坦福法学院中国指导性案例项目创办人与总监

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。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，重点关注中国加入世界贸易组织的影响和法律改革。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）。

每一个指导性案例都总结了法院对该案所作出的原裁定或判决，并补充以名为“裁判要点”的关键部分。案例中考虑到的法条、案情、诉讼结果和最终裁定/判决的理由都分别总结归纳在“相关法条”、“基本案情”、“裁判结果”和“裁判理由”的部分。最高法所准备的总体原则则是以短小段落的形式呈现在“裁判要点”部分。这些原则也是最高法期望中国各法院会参照的。再者，指导性案例所依据的原裁判只能是“已经发生法律效力”的裁判，并且是“社会广泛关注的”，“法律规定比较原则的”，“具有典型性的”，或是“疑难复杂或者新类型的”的案例，又或是“其他具有指导作用的案例”。[8]

1,281个后续案件

2015年5月，最高法发布《〈最高人民法院关于案例指导工作的规定〉实施细则》（“《实施细则》”），[9] 说明了在类似的后续案件中应如何参照指导性案例。其中第九条规定：

> 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。（强调后加）

“在基本案情和法律适用方面”这表述意味着每个指导性案例的“基本案情”和“裁判理由”两部分应被仔细分析，以决定一个待决案件的案情是否属可区分的，以及该待决案件的法律问题是否涉及指导性案例推理部分所解释的法律适用。在审阅这两部分并且决定待决案件与指导性案例类似之后，处理该待决案件的人民法院应引用相关指导性案例的“裁判要点”，将由最高法总结的一般原则应用到待决案件中。

由于指导性案例的使用还是相当新，CGCP对后续案件的搜索并不局限于“适用”指导性案例的情况，而是包括在裁判文书的任何部分中明确提及指导性案例（无论是案例名称的全部或部分被提及，或仅提及指导案例案号）的所有后续案件。CGCP采取了这种方法，希望可以展示中国法官和律师对指导性案例的认识。当案例指导制度变得更加成熟并且在裁判的推理部分中更频繁地引用指导性案例时，将是时候研究中国法学如何通过案例逐渐演变。

CGCP专注于在最高法官方网站上搜索后续案件（即“中国裁判文书网”；http://wenshu.court.gov.cn）。该网站提供了中国法院裁判文书的全文。使用这个官方（但可惜的是，不太好用）的网站，CGCP能够在2017年

黄鹂
斯坦福法学院中国指导性案例项目助理执行编辑

黄鹂是加州大学尔湾分校犯罪学法律与社会的博士项目学生。她于2017年毕业于斯坦福法学院，获法学硕士学位。来斯坦福之前，她在中国拿到了经济学学士和法律硕士学位。作为一名年轻学者，黄鹂的研究领域集中于刑事司法、程序、集体诉讼、比较法和证券法，重点是社会法律方法和实证研究。在过去的四年中，她曾在美国和中国从事过各种研究项目，并在中国期刊上发表过数篇论文。

英珍妮
斯坦福法学院中国指导性案例项目执行编辑

自CGCP创建时起，英珍妮就开始为其工作。目前，她主要负责CGCP的“一带一路”系列，以加深利益相关者对这一重要但尚未完全清晰的发展的理解。她还在不同司法管辖区（南非、肯尼亚、印度、荷兰和匈牙利）的争议解决方面拥有经验。她亦曾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。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。

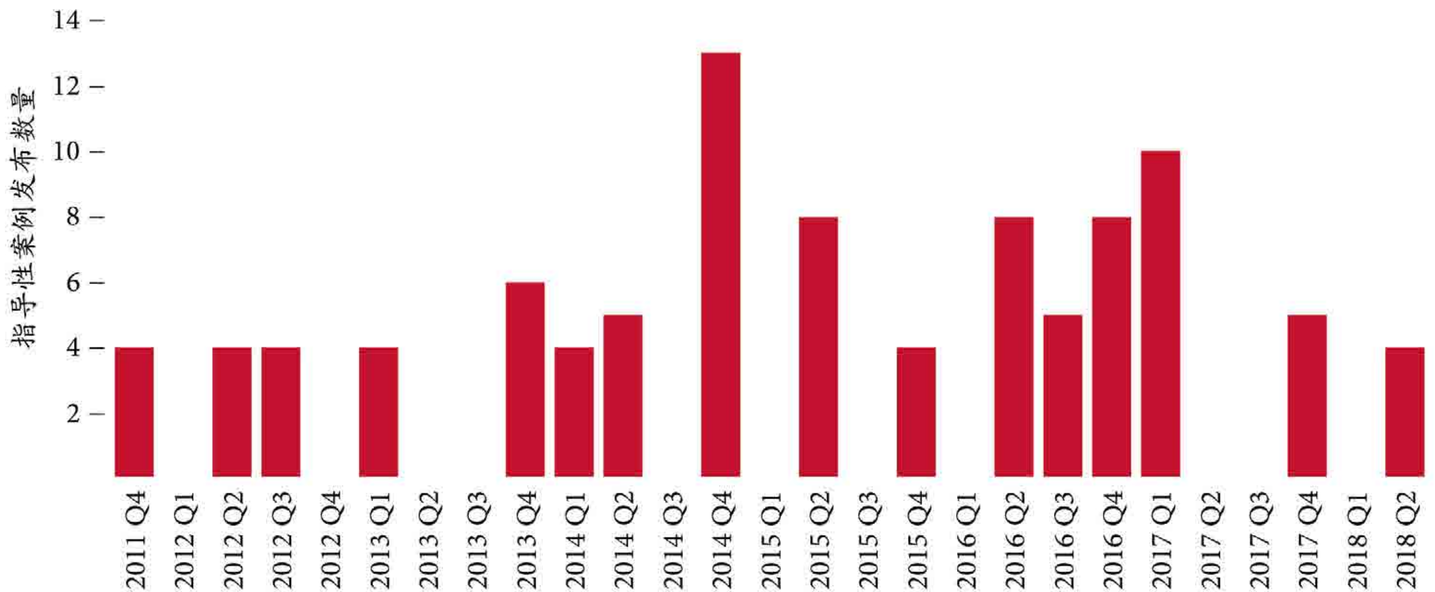


图1：各季度指导性案例发布数量

底，识别总共1,281个提到指导性案例的后续案件。附录列出了每个指导性案例的后续案件数量。[10] 相比中国法院裁判的数百万案件（官方网站称，到目前为止，它已经发布了超过5200万件中国不同级别法院作出的判决或裁定），1,281后续案件似乎并不很多，但**图2**显示了2013年至2017年期间裁判的后续案件数量不断增加。从2013年的10个案件中，后续案件的数量每年都增加至2017年的574个。这种上升趋势清楚地表明，中国法院越来越多地考虑到指导性案例。

"书本上的法律"的应用

不同类型的指导性案例

指导性案例提供了一种有价值的方法来了解中国法院如何应用不同领域的中国法律。目前已发布的96个指导性案例中，16个是刑事案例（于34个后续案件中被提及），19个是行政案例（于312个后续案件中被提及），57个是民事案例（于934个后续案件中被提及）和其他四个案例（于1个后续案件中被提及）（见**表1**）。**表2**列出了这96个指导性案例所引用的法条。

"说理更好"的民事指导性案例，更好的应用？

有最多指导性案例（即57个）和相关的后续案件（即934个）的法律领域是民法。在 57个民事案例中，20个涉及知识产权、反垄断法和/或反不正当竞争法，而其余的案例揭示了合同法（8个）、公司法（7个）和其他民事法律的问题（见**表3**）。

一个有趣的问题是：是什么推动了对民事指导性案例相对更频繁的使用？除了民事指导性案例所出现的法律问题更常见之外，答案是否与民事指导性案例通常"说理更好"这一事实有关？

如上所述，在确定一个指导性案例是否应适用于未决案件时，该案例的"基本案情"和"裁判理由"部分是非常重要的。基于对已发布的57个民事指导性案例的分析，平均而言，"基本案情"部分的字数约占每个指导性案例主要部分总字数的40%，"裁判理由"部分的字数亦约占40%（而最近几批的指导性案例，该百分比是50%）。[11] 鉴于平均而言，民事指导性案例有大约3,000个字，40％的字意味着1,200个字。然而，这已经比许多其他指导性案例更长，尤其是刑事指导性案例，其"基本案情"和"理由"部分平均分别有600字和600–1,200字。[12] 以上情况，一个有可能的解释是民事指导性案例所提供的更多理由能让法院和律师处理与这些民事指导性案例类似的后续案件时，仔细分析后续案件是否真正与所考虑的民事指导性案例类似或是否应予以区分。

知识产权、反不正当竞争法和/或反垄断法的民事指导性案例编制得很好，但未得到充分使用

在迄今为止发布的57个民事指导性案例中，有20个澄清了知识产权法、不正当竞争法和/或反垄断法的

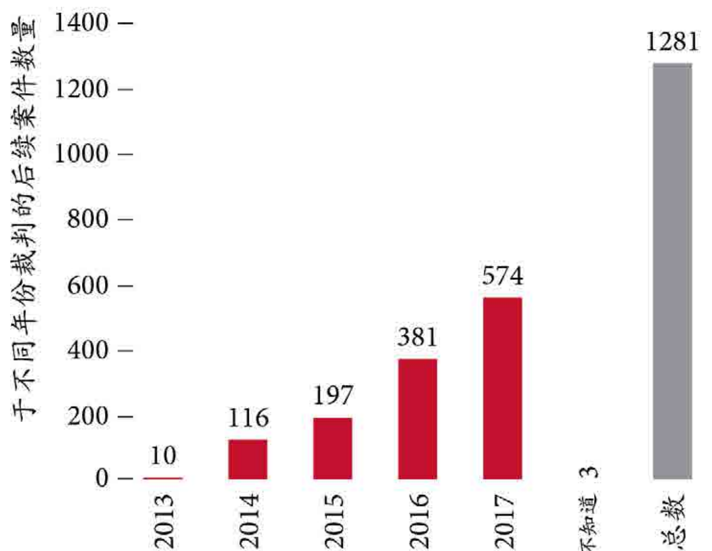


图2：后续案件裁判年份的比较

问题。 这20个指导性案例中有许多是更长和说理更清晰的（平均而言，“理由”部分约占全案例长度的55%；见**图3**）。这可能是因为除了其中一个指导性案例之外，其余19个的原裁判是由省级高等法院或最高法本身作出，体现出中国最高司法机构对这些案例的重视。然而，提及这些指导性案例的后续案件的数量出人意料地少（见**表4**）。截至2017年底，CGCP仅发现10个后续案件提及这些指导性案例。

对这种现象的一种可能解释是，很多这些指导性案例都是最近才发布的，因此可能需要更长时间才看到使用这些案例的后续案件。另一个可能的解释是，虽然“理由”部分在这些指导性案例中占较高的百分比，但“基本案情”部分相对较短（约30%），因此缺乏提供细微差别的细节，影响这些案例的有效应用（见**图3**）。鉴于这些法律领域的重要性，尤其是目前对中国保护知识产权的能力产生怀疑的时候，这些法律领域对中美贸易关系很重要，我们必须密切关注这些指导性案例，并了解是否还有其他导致中国法院未充分利用这些案例的因素。

指导性案例及后续案件的全国传播

不同省份、不同级别的法院正在产生和使用指导性案例

指导性案例可以衍生自中国四级普通法院和专门法院中的任何一个法院所作出的裁定或判决。在中国，专门法院可以负责审理军事、铁路运输、海事、知识产权等案件。备选指导性案例是通过法院体系层层上报，直至最高法审判委员会同意遴选其为指导性案例。[13]

在96个已发布的指导性案例中，29个基于高级人民法院的裁判，25个基于最高法的裁判，23个基于中级人民法院的裁判， 18个基于基层人民法院的裁判，1个（指导案例31号）基于专门法院（即海事法院）的裁判（即指导案例31号）。关于那些非来自最高法裁判的指导性案例，最高法挑选了较多来自江苏（14个案例）和上海（11个案例）法院的裁判，作为指导性案例而发布（见**图4**）。

后续案件全国性的拓展也正在发生。1,281个后续案件中，大多数由位于广东（191个后续案件）、山东（131个后续案件）、浙江（97个后续案件）、河南（91个后续案件）和江苏（79个后续案件）的法院处理。山东（6个指导性案例），浙江（9个指导性案例）和江苏（14个指导性案例）是产生较多最终被挑选为指导性案例的裁判的地方之一。有人可能会争辩说，一个地方有更多的案例最终被挑选为指导性案例，该地方的律师和法官对指导性案例的认识自然提高了，因此，这些法律行为者更愿意在类似的后续案件中使用指导性案例。尽管如此，许多后续案件是来自广东和河南两个省（每个省都只有一个指导性案例）的这一事实，表明了还有其他驱动力。当有更多后续案件时，这个问题值得进一步研究。

指导性案例的类型	指导案例总数	提及指导案例的后续案件数量（截至2017年底）
刑事 （指导案例案号： 3–4，11–14，27–28，32， 61–63，70–71，87，93）	16	34
行政 （指导案例案号： 5–6，21–22，26，38–41， 59–60，69，76–77，88–91，94）	19	312
民事 （其余指导性案例）	57	934
其他（例如：海事、国家赔偿） （指导案例案号：16，42–44）	4	1
总数	**96**	**1281**

表1：指导性案例的四大类型和其后续案件

表5和**图像1**显示，在一些只产生很少指导性案例的省份中，发现了大量的后续案件（在表和图像中均为红色）。此外，一些不产生指导性案例的省份，其法院使用其他地方产生的指导性案例（灰色），这表明了案例指导制度的广泛覆盖范围。虽然指导性案例往往来自经济较发达的省/省级城市（反映在较高的国内生产总值中），但指导性案例的使用与经济发展没有任何关联。关于较发达省份有更多指导性案例的情况，这是否因为较发达地区的法官更愿意提交备选指导性案例让最高法考虑？还是因为这些地方往往有更多涉及新法律问题的案例，因此，最高法更有可能认为这些案例具有代表性，并选择它们作为指导性案例发布。或者，这两个因素和其他因素都与该情况有关。这里讨论的研究无法提供明确的答案。然而，显而易见的是，一旦指导性案例出现了，全国各省的法律行动者都比较积极地使用它们。

律师和法官正磨练其使用指导性案例的技能

仔细研究1,281个后续案件有助于揭示律师和法官在使用指导性案例方面所扮演的角色。**表6**列出了在1,281个后续案件中，是谁提到指导性案例的。在1,281个后续案件中，有428个的案件，任何一方都没有提及指导性案例；尽管如此，处理该些案件的法院主动考虑了相关的指导性案例。

在其余的853个后续案件中，至少有一方（或其律师）在其论点中提到了指导性案例。在这853个案件中的165个案件中，审理的法院在裁判文书的“推理”部分内和/或外明确提到了指导性案例，而在其他688个案件中，审理的法院完全没有提及指导性案例，更不用说详细解释是否应当适用当事人或律师提到的指导性案例。法官对当事人的论点缺乏回应可能部分反映了法官对指导性案例的理解不足，但也可能揭示了对是否应该和如何在裁判中明确引用指导性案例，法官们还是不确定的。[14]

另一方面，尽管在数百个后续案件中（即428个），当事人未提到指导性案例，但审判法院主动考虑相关

相关法条	指导案例案号	指导案例总数
《行政许可法》	5	1
《行政诉讼法》	5, 22, 38, 41, 69, 76, 77, 88, 91	9
《行政处罚法》	5, 6	2
《反垄断法》	78, 79	2
《反不正当竞争法》	29, 30, 45, 47, 58	5
《拍卖法》	35	1
《破产法》	73	1
《人民防空法》	21	1
《民事诉讼法》	2, 7, 25, 34, 36, 37, 56, 68, 82, 84	10
《公司法》	8, 9, 10, 15, 96	5
《合同法》	1, 33, 64, 67, 72, 73, 86	7
《经1955年海牙议定书修订的1929年华沙统一国际航空运输一些规则的公约》	51	1
《统一非立约承运人所作国际航空运输的某些规则以补充华沙公约的公约》	51	1
《著作权法》	48, 80, 81	3
《刑法》	3, 4, 11-14, 27, 28, 32, 61-63, 70, 71, 87, 93	16
《刑事诉讼法》	63	1
《教育法》	38	1
《环境保护法》	75	1
《消防法》	59	1
《食品安全法》	23, 60	2
《民法通则》	15, 29, 35, 50, 51, 65, 89	7
《担保法》	57	1
《保险法》	25, 52, 74	3
《学位条例暂行实施办法》	39	1
《全国人民代表大会常务委员会关于〈中华人民共和国民法通则〉第99条第1款、〈中华人民共和国婚姻法〉第22条的解释》	89	1
《著作权法实施条例》	80, 81	2
《劳动合同法》	18	1
《消费者权益保护法》	17	1
《立法法》	5	1
《海商法》	16, 31	2
《婚姻法》	66, 89	2
《专利法》	20, 55, 84, 85	4
《物权法》	53, 54, 65, 72, 95	5
《学位条例》	38, 39	2
《植物新品种保护条例》	86, 92	2
《政府信息公开条例》	26	1
《物业管理条例》	65	1
《计算机软件保护条例》	48, 49	2
《工伤保险条例》	40, 94	2
《道路交通安全法》	19, 24, 90	3
《海事诉讼特别程序法》	16	1
《国家赔偿法》	42, 43, 44	3
《继承法》	50	1
《侵权责任法》	19, 24, 83	3
《商标法》	46, 58, 82	3

表2：指导性案例和被引用的法条

的指导性案例，这事实给我们带来希望。更多的中国法院显然正在接触到指导性案例，这对于该国案例指导制度的进一步发展是个好兆头。

展望：传播案例文化？

越来越多的指导性案例和后续案件表明了中国的案例指导制度发展得相当好，其初步成功似乎为全国案例文化的传播提供了肥沃的土壤。中国似乎对法院的角色更有信心，建立了新的法院，专注于特定法律领域的应用。在全国范围内，已经建立了各种专门法院（例如，知识产权法院、[15]上海金融法院、[16]互联网法院[17]）。 在国际领域方面，为了支持一带一路倡议，该国已经建立了两个国际商事法庭。[18]

这些新法院的设立显然伴随着中国领导人的高度期望，即这些法院与现有法院一起，将协助实现案例指导制度的目标（即"总结审判经验，统一法律适用，提高审判质量，维护司法公正"）。基于以上分析，作者对改进案例指导制度提出了以下建议：

- 明确指导性案例的法律地位和作用

《规定》第七条仅规定，中国法院在审判类似案件时"应"而不是"必须""参照"指导性案例。缺乏指出法官受到指导性案例正式约束的表达，反映了这些案例的法律地位不明确。[19] 因此，尽管最高法希望指导性案例在中国法律体系中发挥重要作用（从"规定"和"实施细则"中明确的语言证明了这一点），但这些案例仍仅具事实上的约束力，故律师和法官在将指导性案例融入其工作方面的速度较慢，这不足为奇。中国案例指导制度取得长期成功的前景取决于最高法在不久的将来会否有效地解决在这个以立法为传统的国家中，指导性案例法律地位不明确的问题和其他不清晰的问题。一旦澄清了指导性案例的法律地位，就预期它们会被更频繁地引用，并且更多的法律从业者和法官会在类似的后续案件中引用这些案例，这将导致后续案件的数量大幅增加。

民事指导性案例的类型	民事指导案例总数
知识产权、反不正当竞争法和/或反垄断法（指导案例案号：20, 29–30, 45–49, 55, 58, 78–86, 92）	20
公司法（指导案例案号：8–10, 15, 67–68, 96）	7
合同法（指导案例案号：1, 7, 17–18, 23, 33, 64, 72）	8
其他（例如：关于破产、离婚、环境、财务等）（指导案例案号：2, 19, 24–25, 31, 34–37, 50–54, 56–57, 65–66, 73–75, 95）	22
总数	**57**

表3：民事指导性案例的四大类型

- 升级最高法中国裁判文书的官方网站，以促进研究

最高法在提高中国审判透明度方面取得了很大进展。《最高人民法院关于人民法院在互联网公布裁判文书的规定》第四条[20] 规定在互联网上公布所有裁判文书，除非因特殊情况而不公布。这些情况包括案件"涉及国家秘密、个人隐私"，"涉及未成年人违法犯罪"，"以调解方式结案"。该规定使得最高法在2013年7月推出官方网站，并如上所述在该网站在线提供了数以千万计的中国判决和裁定。现在，基本上所有中国判决和裁定都公开了，这为对中国法院裁判进行实证分析提供了前所未有的机会。但是，正如CGCP在搜索后续案件时发现的那样，该网站并不好用。最高法应该投放更多资源改进网站，特别改进其搜索功能，这不仅使学术研究人员受益，也使法律从业者和法官受益。

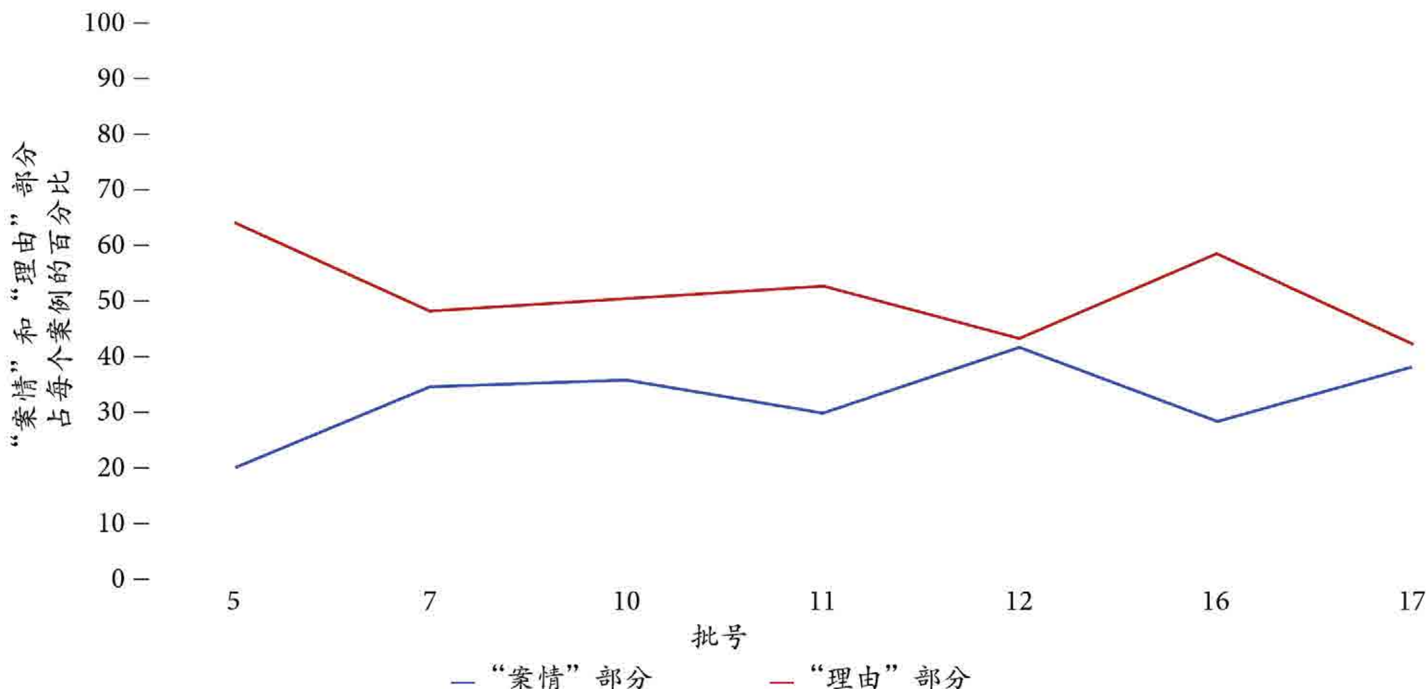


图3：知识产权、反不正当竞争法和/或反垄断法的民事指导性案例"案情"和"理由"部分的相对长度

指导案例案号	发布于	案例类型	作出原裁判的法院	提及指导案例的后续案件数量（截至2017年底）
20	2013年第四季	侵害发明专利权纠纷案	最高人民法院	0
29	2014年第二季	擅自使用他人企业名称纠纷案	天津市高级人民法院	1
30	2014年第二季	侵害商标权及不正当竞争纠纷案	天津市高级人民法院	0
45	2015年第二季	不正当竞争纠纷案	山东省高级人民法院	3
46	2015年第二季	侵害商标权及不正当竞争纠纷案	山东省高级人民法院	2
47	2015年第二季	不正当竞争纠纷案	最高人民法院	1
48	2015年第二季	侵害计算机软件著作权纠纷案	上海市高级人民法院	0
49	2015年第二季	侵害计算机软件著作权纠纷案	江苏省高级人民法院	0
55	2015年第四季	侵害实用新型专利权纠纷案	最高人民法院	0
58	2016年第二季	侵害商标权及不正当竞争纠纷案	重庆市高级人民法院	0
78	2017年第一季	滥用市场支配地位纠纷案	最高人民法院	0
79	2017年第一季	捆绑交易纠纷案	最高人民法院	0
80	2017年第一季	著作权侵权纠纷案	贵州省贵阳市中级人民法院	0
81	2017年第一季	著作权侵权纠纷案	最高人民法院	0
82	2017年第一季	侵害商标权纠纷案	最高人民法院	2
83	2017年第一季	侵害发明专利权纠纷案	浙江省高级人民法院	0
84	2017年第一季	侵害发明专利权纠纷案	最高人民法院	0
85	2017年第一季	侵害外观设计专利权纠纷案	最高人民法院	1
86	2017年第一季	侵害植物新品种权纠纷案	江苏省高级人民法院	0
92	2017年第四季	侵犯植物新品种权纠纷案	甘肃省高级人民法院	0

表4：20个知识产权、反不正当竞争法和/或反垄断法的民事指导性案例

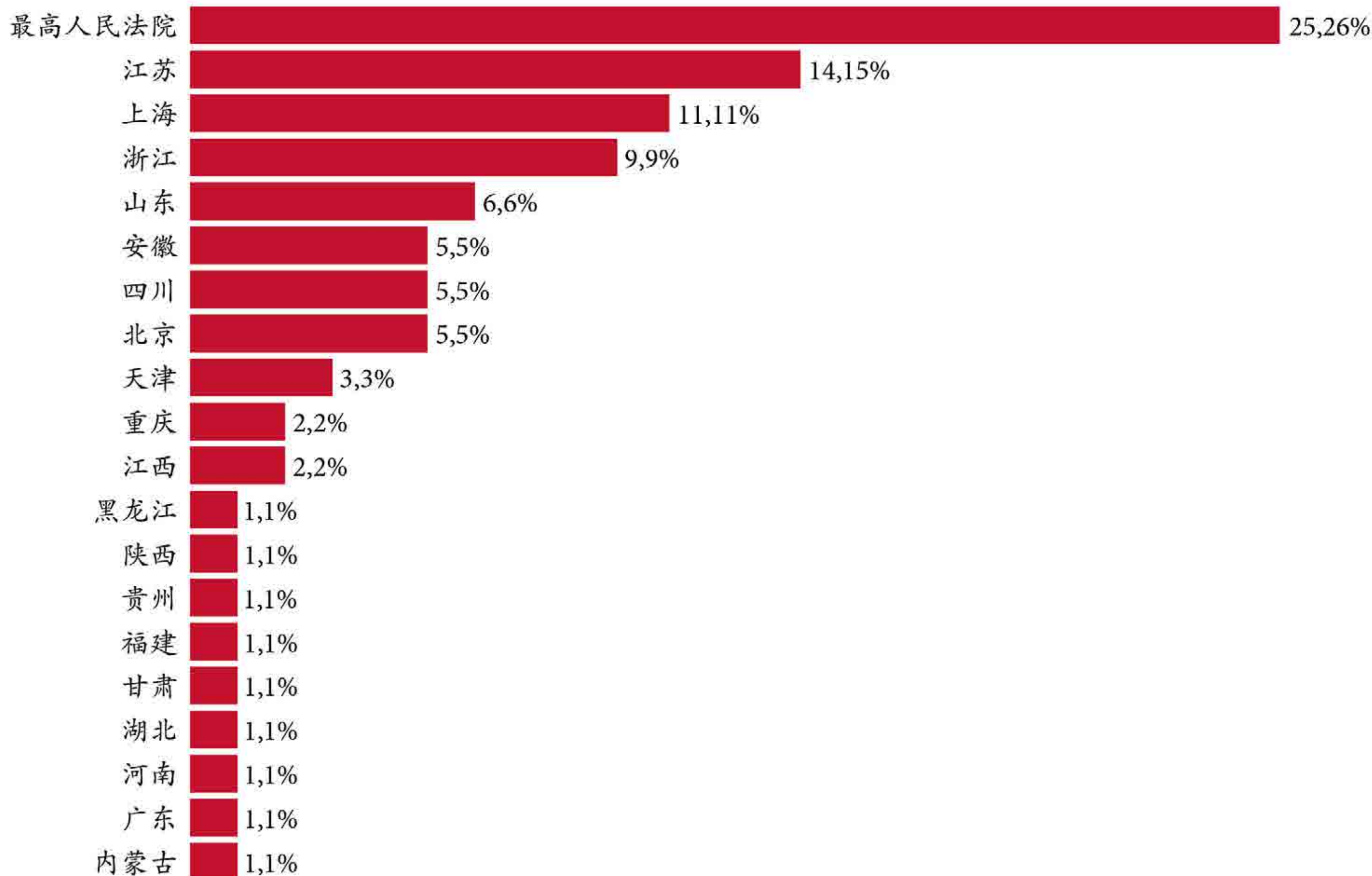
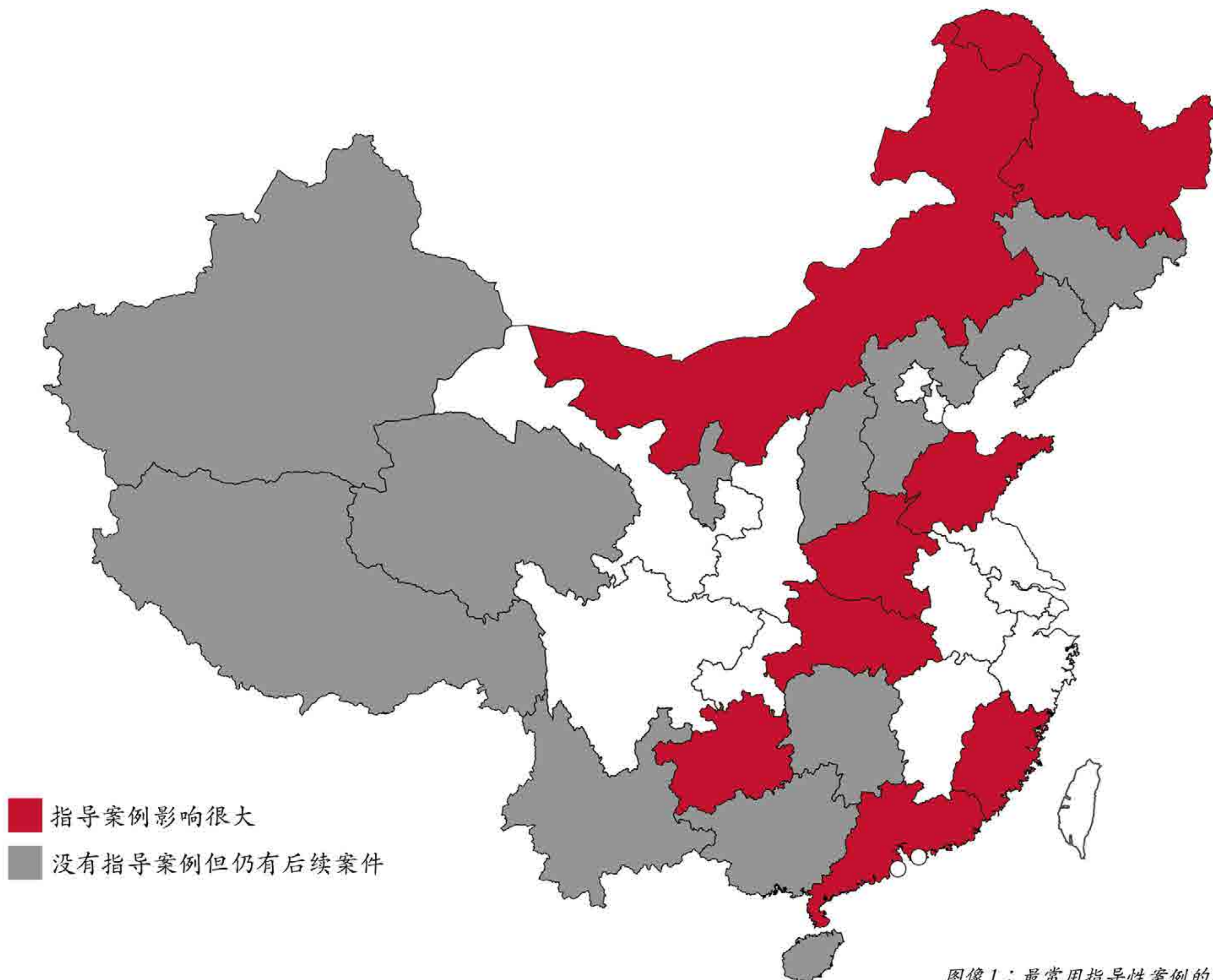


*图4：基于不同省或省级直辖市的法院裁判的指导性案例的数量***
*** 第一个数字是裁定/判决的数量，之后是百分比。*

省/省级市	人均GDP（元）*	指导案例总数	后续案件总数	后续案件数量/指导案例数量
北京	128,927	5	64	12.8
上海	124,571	11	25	2.3
天津	119,240	3	19	6.3
江苏	107,189	14	79	5.6
浙江	92,057	9	97	10.8
福建	82,976	1	33	33
内蒙古	81,791	1	68	68
广东	81,089	1	191	191
山东	72,851	6	131	21.8
重庆	63,689	2	29	14.5
湖北	61,971	1	44	44
陕西	57,266	1	12	12
吉林	56,101	0	29	!
辽宁	54,745	0	50	!
宁夏	50,917	0	6	!
湖南	50,563	0	26	!
海南	48,429	0	9	!
河北	47,985	0	36	!
河南	47,129	1	91	91
江西	45,187	2	34	17
新疆	45,099	0	6	!
四川	44,651	5	50	10
青海	44,348	0	1	!
安徽	44,206	5	47	9.4
黑龙江	42,699	1	25	25
广西	41,955	0	10	!
山西	40,557	0	15	!
西藏	39,258	0	2	!
贵州	37,956	1	29	29
云南	34,546	0	7	!
甘肃	29,326	1	3	3
最高法		**25**	**13**	**0.52**
总数：		96	1,281	

表5：指导性案例和后续案件在不同省/省级市的数量
**数据来自中国国家统计局（http://data.stats.gov.cn）；由维基百科编制（http://en.wikipedia.org）*



图像1：最常用指导性案例的省份

- 在指导性案例中加入更多“理由”和“案情”，以促进其应用

指导性案例的“基本案情”和“裁判理由”部分都很重要，因为它们是确定未决案件是否与指导性案例类似的基础。最高法在将选定的有代表性案件转变为指导性案例时强调的“理由”是案例指导制度的基础，因为这澄清了中国法院在类似的后续案件中所应适用的法律推理。然而，同样重要的是明确确定指导性案例的“案情”，使律师和法官能够确定未决案件是否与指导性案例充分相似或是否可以区分。如上所述，需要有更多的后续案件来决定指导性案例中的“理由”和“案情”的长度与这些案例在后续案件中的使用之间的确切关系。但是，《实施细则》明确规定，“基本案情和法律适用方面”决定了中国法院是否应该参照指导性案例的“裁判要点”。因此，所有指导性案例都应包括更多“理由”和“案情”，以便中国法院以最高法所想的方式和频率对指导性案例作出更多的应用。

后续案件数量	小计	指导案例由当事人/律师提及？	指导案例由法院*提及？	*法院是在裁判文书那一部分提及指导案例（“本院认为”内/外）
688	688	是	不是	不适用
103	165	是	是	内
35		是	是	外
27		是	是	内与外
313	428	不是	是	内
106		不是	是	外
9		不是	是	内与外
1,281				

表6：谁于后续案件中提及指导性案例

通过采取上述步骤，中国将能够改进其案例指导制度，更接近实现指导性案例所强调的公平和统一适用中国法律的目标。正如上文所讨论的那样，随着国家继续传播其案例文化，展示其对国内法治的承诺，中国可能能够将其发展中的案例文化的范围扩展到国家边界之外，播下国际法治的种子。国际法治是中国在促进“一带一路”倡议发展时所呼吁的。凭借这种为世界作出重大贡献的潜力，中国可以获得更多尊重，继而有可能使得更多的门向中国开放。■

附录：96个指导性案例与其后续案件数量（截至2017年底）

指导案例案号	案例名称	提及指导案例的后续案件数量（截至2017年底）
1	《上海中原物业顾问有限公司诉陶德华居间合同纠纷案》	26
2	《吴梅诉四川省眉山西城纸业有限公司买卖合同纠纷案》	5
3	《潘玉梅、陈宁受贿案》	1
4	《王志才故意杀人案》	1
5	《鲁潍（福建）盐业进出口有限公司苏州分公司诉江苏省苏州市盐务管理局盐业行政处罚案》	18
6	《黄泽富、何伯琼、何熠诉四川省成都市金堂工商行政管理局行政处罚案》	8
7	《牡丹江市宏阁建筑安装有限责任公司诉牡丹江市华隆房地产开发有限责任公司、张继增建设工程施工合同纠纷案》	0
8	《林方清诉常熟市凯莱实业有限公司、戴小明公司解散纠纷案》	28
9	《上海存亮贸易有限公司诉蒋志东、王卫明等买卖合同纠纷案》	66
10	《李建军诉上海佳动力环保科技有限公司公司决议撤销纠纷案》	9
11	《杨延虎等贪污案》	3
12	《李飞故意杀人案》	2
13	《王召成等非法买卖、储存危险物质案》	9
14	《董某某、宋某某抢劫案》	6
15	《徐工集团工程机械股份有限公司诉成都川交工贸有限责任公司等买卖合同纠纷案》	122
16	《中海发展股份有限公司货轮公司申请设立海事赔偿责任限制基金案》	0
17	《张莉诉北京合力华通汽车服务有限公司买卖合同纠纷案》	29
18	《中兴通讯（杭州）有限责任公司诉王鹏劳动合同纠纷案》	1
19	《赵春明等诉烟台市福山区汽车运输公司卫德平等机动车交通事故责任纠纷案》	26
20	《深圳市斯瑞曼精细化工有限公司诉深圳市坑梓自来水有限公司、深圳市康泰蓝水处理设备有限公司侵害发明专利权纠纷案》	0
21	《内蒙古秋实房地产开发有限责任公司诉呼和浩特市人民防空办公室人防行政征收案》	8
22	《魏永高、陈守志诉来安县人民政府收回土地使用权批复案》	27
23	《孙银山诉南京欧尚超市有限公司江宁店买卖合同纠纷案》	76
24	《荣宝英诉王阳、永诚财产保险股份有限公司江阴支公司机动车交通事故责任纠纷案》	357
25	《华泰财产保险有限公司北京分公司诉李志贵、天安财产保险股份有限公司河北省分公司张家口支公司保险人代位求偿权纠纷案》	23
26	《李健雄诉广东省交通运输厅政府信息公开案》	5
27	《臧进泉等盗窃、诈骗案》	0
28	《胡克金拒不支付劳动报酬案》	1
29	《天津中国青年旅行社诉天津国青国际旅行社擅自使用他人企业名称纠纷案》	1
30	《兰建军、杭州小拇指汽车维修科技股份有限公司诉天津市小拇指汽车维修服务有限公司等侵害商标权及不正当竞争纠纷案》	0
31	《江苏炜伦航运股份有限公司诉米拉达玫瑰公司船舶碰撞损害赔偿纠纷案》	0
32	《张某某、金某危险驾驶案》	1
33	《瑞士嘉吉国际公司诉福建金石制油有限公司等确认合同无效纠纷案》	13
34	《李晓玲、李鹏裕申请执行厦门海洋实业（集团）股份有限公司、厦门海洋实业总公司执行复议案》	29
35	《广东龙正投资发展有限公司与广东景茂拍卖行有限公司委托拍卖执行复议案》	1
36	《中投信用担保有限公司与海通证券股份有限公司等证券权益纠纷执行复议案》	1
37	《上海金纬机械制造有限公司与瑞士瑞泰克公司仲裁裁决执行复议案》	0
38	《田永诉北京科技大学拒绝颁发毕业证、学位证案》	2
39	《何小强诉华中科技大学拒绝授予学位案》	0
40	《孙立兴诉天津新技术产业园区劳动人事局工伤认定案》	3
41	《宣懿成等诉浙江省衢州市国土资源局收回国有土地使用权案》	24
42	《朱红蔚申请无罪逮捕赔偿案》	0
43	《国泰君安证券股份有限公司海口滨海大道（天福酒店）证券营业部申请错误执行赔偿案》	1
44	《卜新光申请刑事违法追缴赔偿案》	0

指导案例案号	案例名称	提及指导案例的后续案件数量（截至2017年底）
45	《北京百度网讯科技有限公司诉青岛奥商网络技术有限公司等不正当竞争纠纷案》	3
46	《山东鲁锦实业有限公司诉鄄城县鲁锦工艺品有限责任公司、济宁礼之邦家纺有限公司侵害商标权及不正当竞争纠纷案》	2
47	《意大利费列罗公司诉蒙特莎（张家港）食品有限公司、天津经济技术开发区正元行销有限公司不正当竞争纠纷案》	1
48	《北京精雕科技有限公司诉上海奈凯电子科技有限公司侵害计算机软件著作权纠纷案》	0
49	《石鸿林诉泰州华仁电子资讯有限公司侵害计算机软件著作权纠纷案》	0
50	《李某、郭某阳诉郭某和、童某某继承纠纷案》	0
51	《阿卜杜勒•瓦希德诉中国东方航空股份有限公司航空旅客运输合同纠纷案》	1
52	《海南丰海粮油工业有限公司诉中国人民财产保险股份有限公司海南省分公司海上货物运输保险合同纠纷案》	1
53	《福建海峡银行股份有限公司福州五一支行诉长乐亚新污水处理有限公司、福州市政工程有限公司金融借款合同纠纷案》	7
54	《中国农业发展银行安徽省分行诉张大标、安徽长江融资担保集团有限公司执行异议之诉纠纷案》	58
55	《柏万清诉成都难寻物品营销服务中心等侵害实用新型专利权纠纷案》	0
56	《韩凤彬诉内蒙古九郡药业有限责任公司等产品责任纠纷管辖权异议案》	1
57	《温州银行股份有限公司宁波分行诉浙江创菱电器有限公司等金融借款合同纠纷案》	6
58	《成都同德福合川桃片有限公司诉重庆市合川区同德福桃片有限公司、余晓华侵害商标权及不正当竞争纠纷案》	0
59	《戴世华诉济南市公安消防支队消防验收纠纷案》	1
60	《盐城市奥康食品有限公司东台分公司诉盐城市东台工商行政管理局工商行政处罚案》	200
61	《马乐利用未公开信息交易案》	3
62	《王新明合同诈骗案》	3
63	《徐加富强制医疗案》	0
64	《刘超捷诉中国移动通信集团江苏有限公司徐州分公司电信服务合同纠纷案》	0
65	《上海市虹口区久乐大厦小区业主大会诉上海环亚实业总公司业主共有权纠纷案》	2
66	《雷某某诉宋某某离婚纠纷案》	6
67	《汤长龙诉周士海股权转让纠纷案》	0
68	《上海欧宝生物科技有限公司诉辽宁特莱维置业发展有限公司企业借贷纠纷案》	1
69	《王明德诉乐山市人力资源和社会保障局工伤认定案》	3
70	《北京阳光一佰生物技术开发有限公司、习文有等生产、销售有毒、有害食品案》	0
71	《毛建文拒不执行判决、裁定案》	4
72	《汤龙、刘新龙、马忠太、王洪刚诉新疆鄂尔多斯彦海房地产开发有限公司商品房买卖合同纠纷案》	25
73	《通州建总集团有限公司诉安徽天宇化工有限公司别除权纠纷案》	1
74	《中国平安财产保险股份有限公司江苏分公司诉江苏镇江安装集团有限公司保险人代位求偿权纠纷案》	3
75	《中国生物多样性保护与绿色发展基金会诉宁夏瑞泰科技股份有限公司环境污染公益诉讼案》	0
76	《萍乡市亚鹏房地产开发有限公司诉萍乡市国土资源局不履行行政协议案》	1
77	《罗镕荣诉吉安市物价局物价行政处理案》	12
78	《北京奇虎科技有限公司诉腾讯科技（深圳）有限公司、深圳市腾讯计算机系统有限公司滥用市场支配地位纠纷案》	0
79	《吴小秦诉陕西广电网络传媒（集团）股份有限公司捆绑交易纠纷案》	0
80	《洪福远、邓春香诉贵州五福坊食品有限公司、贵州今彩民族文化研发有限公司著作权侵权纠纷案》	0
81	《张晓燕诉雷献和、赵琪、山东爱书人音像图书有限公司著作权侵权纠纷案》	0
82	《王碎永诉深圳歌力思服饰股份有限公司、杭州银泰世纪百货有限公司侵害商标权纠纷案》	2
83	《威海嘉易烤生活家电有限公司诉永康市金仕德工贸有限公司、浙江天猫网络有限公司侵害发明专利权纠纷案》	0
84	《礼来公司诉常州华生制药有限公司侵害发明专利权纠纷案》	0
85	《高仪股份公司诉浙江健龙卫浴有限公司侵害外观设计专利权纠纷案》	1
86	《天津天隆种业科技有限公司与江苏徐农种业科技有限公司侵害植物新品种权纠纷案》	0
87	《郭明升、郭明锋、孙淑标假冒注册商标案》	0
88[21]	《张道文、陶仁等诉四川省简阳市人民政府侵犯客运人力三轮车经营权案》	0
89	《“北雁云依”诉济南市公安局历下区分局燕山派出所公安行政登记案》	0
90	《贝汇丰诉海宁市公安局交通警察大队道路交通管理行政处罚案》	0

指导案例案号	案例名称	提及指导案例的后续案件数量（截至2017年底）
91	《沙明保等诉马鞍山市花山区人民政府房屋强制拆除行政赔偿案》	0
92	《莱州市金海种业有限公司诉张掖市富凯农业科技有限责任公司侵犯植物新品种权纠纷案》	0
93	《于欢故意伤害案》	-
94	《重庆市涪陵志大物业管理有限公司诉重庆市涪陵区人力资源和社会保障局劳动和社会保障行政确认案》	-
95	《中国工商银行股份有限公司宣城龙首支行诉宣城柏冠贸易有限公司、江苏凯盛置业有限公司等金融借款合同纠纷案》	-
96	《宋文军诉西安市大华餐饮有限公司股东资格确认纠纷案》	-
总数		**1,281**

* 此评论的引用是：熊美英博士、黄鹂、英珍妮，案例文化在中国内外的传播，《中国法律连接》，第2期，第15页（2018年9月），*亦见于*斯坦福法学院中国指导性案例项目，2018年 9月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-2-201809-24-gechlik-huang-ingram。作者特别感谢由黄鹂领导的团队协助确定本文分析的后续案件。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。

[1] *Animal Science Products, Inc. 诉 Hebei Welcome Pharmaceutical Co. Ltd.*，585 U.S. ___，138 S. Ct. 1865 （2018）。联邦最高法院的判决意见书单行本可见于 https://www.supremecourt.gov/opinions/17pdf/16-1220_3e04.pdf。

[2] 陈懿华，《维生素C案》：联邦法院的重要角色和给外国的明确信息，《中国法律连接》，第2期，第37页（2018年9月），*亦见于*斯坦福法学院中国指导性案例项目，专家*连接*™，2018年9月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-2-201809-connect-2-yee-wah-chin。

[3] 加强国际法治合作推动"一带一路"建设行稳致远——王毅国务委员兼外长在"一带一路"法治合作国际论坛开幕式上的演讲，2018年7月2日，htttps://www.fmprc.gov.cn/web/wjbz_673089/zyjh_673099/t1573308.shtml。

[4] 最高法的主要法官明确指出，指导性案例是具有事实上约束力的先例。*见，例如.*，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，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-1-201806-23-guo-feng。

[5] 《最高人民法院关于案例指导工作的规定》，序言，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。

[6] *同上*，第一条。

[7] *同上*，第七条。

[8] *同上*，第二条。

[9] 《〈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。

[10] 有关明确提及附录中某个指导性案例的后续案件的完整列表，请到CGCP指导性案例的相应网页。例如，要找到明确提到指导案例24号的后续案件的列表，请到http://cgc.law.stanford.edu/guiding-cases/guiding-case-24。

[11] 熊美英、英珍妮，中国的57个民事指导性案例，斯坦福法学院中国指导性案例项目，指导性案例*分析*™，第7期，2018年9月，http://cgc.law.stanford.edu/guiding-cases-analytics。

[12] 熊美英、英珍妮，中国的16个刑事指导性案例，斯坦福法学院中国指导性案例项目，指导性案例*分析*™，第8期，2018年9月，http://cgc.law.stanford.edu/guiding-cases-analytics。

[13] 《最高人民法院关于案例指导工作的规定》，注释5，第三至六条。

[14] 熊美英、黄鹂、英珍妮，中国案例指导制度：应用和汲取的经验（第二部分），斯坦福法学院中国指导性案例项目，指导性案例*调查*™，第4期，2018年9月，http://cgc.law.stanford.edu/guiding-cases-surveys。

[15] 《全国人大常委会关于在北京、上海、广州设立知识产权法院的决定》，2014年8月31日通过和公布，同日起施行，http://www.npc.gov.cn/npc/xinwen/2014-09/01/content_1877042.htm。

[16] 《全国人大常委会关于设立上海金融法院的决定》，2018年4月27日通过和公布，2018年4月28日起施行，http://paper.people.com.cn/rmrb/html/2018-04/28/nw.D110000renmrb_20180428_8-04.htm。

[17] 《最高人民法院关于互联网法院审理案件若干问题的规定》，2018年9月3日由最高人民法院审判委员会通过，2018年9月6日公布，2018年9月7日起施行，http://www.court.gov.cn/zixun-xiangqing-116981.html。

[18] 《最高人民法院关于设立国际商事法庭若干问题的规定》，2018年6月25日由最高人民法院审判委员会通过，2018年6月27日公布，2018年7月1日起施行，《中国法律连接》，第2期，第87页（2018年9月），*亦见于*斯坦福法学院中国指导性案例项目，一带一路*案文*™，2018年9月，http://cgc.law.stanford.edu/zh-hans/belt-and-road/b-and-r-texts/20180701-provisions-re-intl-commercial-courts。

[19] *见，例如*，郭锋、吴光侠、李兵，《〈关于案例指导工作的规定〉实施细则》的理解与适用，《人民司法》，第17期（2015），第30页。

[20] 《最高人民法院关于人民法院在互联网公布裁判文书的规定》，2013年11月13日由最高人民法院审判委员会通过，2013年11月21日公布，2014年1月1日起施行，http://www.chinacourt.org/law/detail/2013/11/id/147242.shtml。

[21] 最高法于2017年11月15日发布指导案例88–92号，并于2018年6月20日发布指导案例93–96号。

Experts *Connect*™: *In re Vitamin C Antitrust Litigation**

Jordan Corrente Beck, Jeremy Schlosser, & Ke James Yuan
Associate Managing Editors of the China Guiding Cases Project

On June 14, 2018, the United States Supreme Court released its decision in *Animal Science Products, Inc., et al. v. Hebei Welcome Pharmaceutical Co. Ltd., et al.* (commonly known as the "*Vitamin C* case").[1] In a unanimous opinion delivered by Justice Ginsburg, the Supreme Court held that a federal court making a determination of foreign law in accordance with Federal Rule of Civil Procedure 44.1 must "accord respectful consideration" to a submission made by a foreign government on the meaning and interpretation of its own law, but that such court is "not bound to accord conclusive effect" to the submission.[2]

While the Supreme Court's decision reins in the potentially far-reaching consequences of the "binding deference" standard applied by the Second Circuit below, it is not without lessons for practitioners:

- First, as **Yee Wah Chin** explains, by hewing closely to the language of Federal Rule of Civil Procedure 44.1, the Supreme Court confirmed that the federal courts have an important role to play in clarifying legal issues—including the meaning of foreign law—and sent a clear message to foreign countries that legal clarity and transparency is critical when presenting a government's position with respect to its own law.[3]

- Second, as discussed by **Zuocheng Hao**, in order for a federal court to determine what weight to give a Chinese governmental statement interpreting Chinese law, the court must understand the hierarchy of lawmaking authority under the Chinese legal system, as well as the sources of authoritative interpretations of Chinese law, including legislative interpretations issued by the National People's Congress as well as judicial interpretations and Guiding Cases issued by the Supreme People's Court.[4]

- Third, as **James McManis** notes, the broad latitude afforded to federal courts in determining Chinese and other foreign law invites trial lawyers to argue for the consideration of China's Guiding Cases as "relevant material" that a federal judge should review under Federal Rule of Civil Procedure 44.1, and trial lawyers should be prepared to address a majority of the factors highlighted by the Supreme Court in support of the applicability of a Guiding Case, which illustrates the ever-growing relevance of the Case Guidance System.[5]

- Fourth, as stressed by **William E. Perry**, it is important to understand the motivation of governments like China in establishing allegedly unfair trade practices in the first place, as this perspective can highlight areas of U.S. policy requiring further consideration and possible reform in order to incentivize other countries to operate in accordance with fair trade norms.[6]

Background

In re Vitamin C Antitrust Litigation began as a multi-district antitrust class action brought by Animal Science Products, Inc. and other plaintiffs—U.S. purchasers of vitamin C—against Hebei Welcome Pharmaceutical Co. Ltd. and other defendants—Chinese manufacturers of vitamin C. The plaintiffs alleged that from December 2001 to 2005, the defendants conspired to fix the price and supply of vitamin C in violation of U.S. antitrust laws. The defendants did not dispute the conduct alleged by plaintiffs; rather, they argued that Chinese law compelled this conduct, and filed a motion to dismiss plaintiffs' claims based on, among other grounds, principles of international comity.

The Ministry of Commerce of the People's Republic of China ("MOFCOM") made an historic appearance before the district court, filing an amicus brief in support of the defendants' motion to dismiss. In its brief, MOFCOM asserted its authority to regulate foreign trade and provided specific evidence of its efforts to regulate the prices of vitamin C in coordination with the Chamber of Commerce of Medicines & Health Importers & Exporters (the "Chamber"), an entity supervised by MOFCOM. Among other efforts was a "price verification and chop" policy implemented in 2002, which required that contracts for the export of vitamin C receive the approval—by affixation of a seal or "chop"—of the Chamber, and made such approval contingent on the contracted price of sale being at or above a certain minimum level set by vitamin C manufacturers in coordination with the Chamber. In response, plaintiffs argued that MOFCOM did not cite to any specific law or regulation that compelled the defendants' conduct, and

noted statements made by the Chamber asserting that the quantity of exports was determined without government intervention.

The district court denied the defendants' motion to dismiss, noting that while MOFCOM's submission was entitled to "substantial deference", it was not "conclusive" given the conflicting evidence presented by the plaintiffs, and that further discovery was therefore necessary.[7] When the defendants later filed a motion for summary judgment, MOFCOM made a second appearance in support of the defendants, restating its authority and its interpretation of Chinese law. In response, the plaintiffs, among other arguments, pointed to a representation made by the Chinese government to the WTO that it had ended its export administration of vitamin C in 2002. The court denied summary judgment and the case proceeded to trial, where a jury found for the plaintiffs and held the defendants liable for $147 million in damages.

On appeal, the Second Circuit vacated the jury award and reversed the district court's order denying the defendants' motion to dismiss, holding that the district court "abused its discretion by not abstaining, on international comity grounds, from asserting jurisdiction", and "erred by not extending adequate deference to [the Chinese government's] interpretation of its own laws."[8] The correct standard, according to the Second Circuit, was one of binding deference "when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn evidentiary proffer[9] regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented".[10]

The Supreme Court granted certiorari to resolve a circuit split over the level of deference to be afforded to a foreign government's submission regarding the meaning and interpretation of its own laws and concluded, contrary to the Second Circuit's holding, that a federal court is not required to treat such submissions as conclusive. Rather, while the "spirit of international comity" requires a federal court to "carefully consider" a foreign government's submission, the appropriate weight of deference will "depend upon the circumstances".[11] The Supreme Court highlighted "the statement's clarity, thoroughness and support", "context and purpose", and "consistency with the foreign government's past positions" as "relevant considerations", as well as the "transparency of the foreign legal system" and "the role and authority of the entity or official offering the statement".[12]

The Supreme Court held that the "unyielding rule" of the Second Circuit was "inconsistent with Rule 44.1", which, in making the determination of foreign law a question of law and not of fact, afforded to the federal courts the freedom to consider "any relevant material or source" and brought the practice of determining foreign law in line with federal courts' *de novo* review of matters of domestic law.[13] The Supreme Court noted that its standard is consistent with its own treatment of the laws of the states—where a statement made by a state's highest court is binding, but a statement by a state's attorney general is afforded only "respectful consideration"[14]— as well as with international practice.[15] As the Second Circuit's analysis stopped with its review of MOFCOM's statement, and did not consider the other evidence on the record, the Supreme Court vacated and remanded the Second Circuit's decision for further consideration in accordance with its ruling.

Significance

The Second Circuit's "binding deference" standard was heavily criticized in amicus briefs filed by the United States, as well by other practitioners and legal scholars, which noted the inconsistency of such a standard with Rule 44.1 and the practice of other countries, as well as the potential for abuse.

The Supreme Court's decision largely echoed and assuaged these concerns. However, the standard adopted by the court is not without significance of its own. Indeed, as discussed in the contributions by **Yee Wah Chin**, **Zuocheng Hao**, and **James McManis**, the decision's framework for determining the weight to afford a foreign government's characterization of its own law requires that a federal court carefully vet such a submission within the context of the foreign country's legal system and that foreign governments present their positions with legal clarity and full transparency to avoid the appearance of partiality.

This case may also have further significance in light of ongoing attention to trade relations between the United States and China. In his contribution, **William E. Perry** highlights the lesser-known history of the allegedly unfair trade practices at the center of the *Vitamin C* case from the unique perspective of the person in the room: amid fears of an antidumping case affecting the vitamin C market following the saccharin antidumping cases of the early 2000s, Mr. Perry suggested the adoption of a price floor in a meeting with the Chamber, MOFCOM, and vitamin C exporters as a possible solution; his prescient proposed corollary MOFCOM regulation to insulate the vitamin C exporters from antitrust liability was rejected for reasons Mr. Perry would later learn were tied to the WTO agreement cited in the *Vitamin C* case. With this history in mind, the difficulties encountered by the parties in this case—caught between antidumping and antitrust liability—may spur both the U.S. government and industry to review current regulatory policies and consider how they may be rationalized to create a more favorable bilateral trade environment.

A closer look at *In re Vitamin C Antitrust Litigation* reveals yet another more subtle point of interest: comments at the margin—questions posed at oral argument and dicta of the lower courts—reveal ongoing confusion about the basic workings and structure of the Chinese legal system, as well as the challenges of working in translation.

For example, in attempting to determine the level of deference due to statements of foreign entities like MOFCOM, Justice Alito inquired at oral argument whether the Supreme People's Court could take up the issue of the requirements of China's export administration regime, and if so, whether it would defer to MOFCOM's interpretation. Immediately thereafter, Justice Ginsburg questioned whether it is even common practice for Chinese courts—as opposed to arbitrators—to rule on commercial matters. Given the complex jurisdictional structure of China's judiciary, the unique administrative role played by the Supreme People's Court, and the legal system's relative lack of transparency, such questions regarding Chinese judicial practice are common and not necessarily easily answered. Foreign judges who deal infrequently with issues of Chinese law face a high bar when seeking to place them within the context of domestic practice.

At the lower court level, both the Second Circuit and the district court noted the difficulties inherent in relying on translations when making a determination of foreign law, particularly where the foreign legal system bears little resemblance to that of the United States. As stated by the Second Circuit, the "danger that 'an interpretation suggested by the plain language of a governmental directive may not accurately reflect Chinese law' is all the more plausible where the documents [...] relied upon are translations and use terms of art which are unique to the Chinese system."[16]

These comments underscore the importance of the ongoing work of the CGCP, together with its partners in academia and legal practice, to promote a broader and deeper understanding of the Chinese legal system through high-quality translations, rigorous analyses, and more frequent people-to-people exchanges, including seminars and trainings. As China's economy continues to grow in influence, and interactions between Chinese and foreign parties—both public and private—proliferate at every level, the need to better apprehend the function and operation of China's laws and institutions has become more pressing than ever before.

---

* The citation of this Experts *Connect*™ is: Jordan Corrente Beck, Jeremy Schlosser, & Ke James Yuan, *Experts Connect™*: In re Vitamin C Antitrust Litigation, 2 CHINA LAW CONNECT 27 (Sept. 2018), *also available at* STANFORD LAW SCHOOL CHINA GUIDING CASES PROJECT, Experts *Connect*™, Sept. 2018, http://cgc.law.stanford.edu/commentaries/clc-2-201809-connect-1-corrente-beck-schlosser-yuan.
Jordan Corrente Beck, Jeremy Schlosser, and Ke James Yuan are associates at Debevoise & Plimpton LLP, Dorsey & Whitney LLP, and Covington & Burling LLP, respectively.
The original, English version of this Experts *Connect*™ piece was edited by Dimitri Phillips and Dr. Mei Gechlik. The information and views set out in this piece are the responsibility of the authors and do not necessarily reflect the work or views of the China Guiding Cases Project.

1 *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, 585 U.S. ___, 138 S. Ct. 1865 (2018). The slip opinion of the Supreme Court is available at https://www.supremecourt.gov/opinions/17pdf/16-1220_3e04.pdf.

2 *Id.* at 1869.

3 Yee Wah Chin, *The* Vitamin C *Case: Important Role for the Federal Courts and Clear Message to Foreign Countries*, 2 CHINA LAW CONNECT 35 (Sept. 2018), *also available at* STANFORD LAW SCHOOL CHINA GUIDING CASES PROJECT, Experts *Connect*™, Sept. 2018, http://cgc.law.stanford.edu/commentaries/clc-2-201809-connect-2-yee-wah-chin.

4 Dr. Zuocheng Hao, *How to Adduce Evidence on Chinese Law: Looking at the Function of China's Guiding Cases from the* Vitamin C *Case*, 2 CHINA LAW CONNECT 39 (Sept. 2018), *also available at* STANFORD LAW SCHOOL CHINA GUIDING CASES PROJECT, Experts *Connect*™, Sept. 2018, http://cgc.law.stanford.edu/commentaries/clc-2-201809-connect-3-zuocheng-hao.

5 James McManis, *The Importance of Guiding Cases for U. S. Courts in Determining Chinese Law, A Trial Lawyer's Perspective*, 2 CHINA LAW CONNECT 43 (Sept. 2018), *also available at* STANFORD LAW SCHOOL CHINA GUIDING CASES PROJECT, Experts *Connect*™, Sept. 2018, http://cgc.law.stanford.edu/commentaries/clc-2-201809-connect-4-james-mcmanis.

6 William E. Perry, *U.S. Antidumping Law and the* Vitamin C *Case: An Important but Forgotten Issue*, 2 CHINA LAW CONNECT 47 (Sept. 2018), *also available at* STANFORD LAW SCHOOL CHINA GUIDING CASES PROJECT, Experts *Connect*™, Sept. 2018, http://cgc.law.stanford.edu/commentaries/clc-2-201809-connect-5-william-perry.

7 *In re Vitamin C Antitrust Litigation*, 584 F. Supp. 2d 546, 557 (E.D.N.Y. 2008).

8 *In re Vitamin C Antitrust Litigation*, 837 F.3d 175, 182 (2d. Cir. 2016).

9 The Supreme Court corrected the Second Circuit's description of MOFCOM's statement as a "sworn evidentiary proffer", noting that such a characterization is inconsistent with Rule 44.1's mandate that determinations of foreign law "be treated as a ruling on a question of law" and not, where a sworn evidentiary proffer would be conclusive, of fact. *Animal Science Products*, 138 S. Ct., *supra* note 1, at 1874.

10 *In re Vitamin C Antitrust Litigation*, 837 F.3d, *supra* note 8, at 189.

11 *Animal Science Products*, 138 S. Ct., *supra* note 1, at 1873.

12 *Id.*

13 *Id.* at 1874.

14 *Id.* (citing *Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (*per curiam*)).

15 The Supreme Court here made reference to two international treaties—the European Convention on Information on Foreign Law, Art. 8, June 7, 1968, 720 U.N.T.S. 154, and the Inter-American Convention on Proof of and Information on Foreign Law, Art. 6, May 8, 1979, O.A.S.T.S. 1439 U.N.T.S. 111 (neither of which counts the United States as a party)—containing similar mechanisms by which a government may obtain an official statement from another government characterizing its own law, but which make clear that such statements shall not be binding on the requesting authority.

16 *In re Vitamin C Antitrust Litigation*, 837 F.3d, *supra* note 8, at 190–191.

CGCP's Call for Experts *Connect*™ Submissions:
The Potential Impact of the "Poison Pill" Provision of
the New United States-Mexico-Canada Agreement on China

Article 32.10 of the new United States-Mexico-Canada Agreement ("USMCA"), which is slated to replace the North American Free Trade Agreement, provides:

> 4. Entry by any Party into a free trade agreement with a non-market country, shall allow the other Parties to terminate this Agreement on six-month notice and replace this Agreement with an agreement as between them (bilateral agreement).[1]

This provision essentially gives the United States veto power over trade deals that Mexico or Canada may wish to reach with China, a non-market country. Referring to the provision as a "poison pill", U.S. Department of Commerce Secretary Wilbur Ross suggested that similar provisions may be replicated in future trade deals between the United States and other trading partners, such as Japan, India, and the European Union.[2]

Might this "poison pill" provision turn out to be an unexpected panacea for China, prompting the second largest economy in the world to become a market economy amidst growing concerns over the country's latest emphasis on the role of the state sector? If China does so, this would be a remarkable achievement for the country four decades after the adoption of its open door policy in 1978 and five years after the launch of its ambitious Belt and Road Initiative (the "BRI"). Or will the Chinese leadership resort to other measures in response to the USMCA?

If mishandled, China will face serious challenges that could undermine the country's development, especially the BRI, as the United States is increasingly flexing its muscles in China's neighborhood. In late July, U.S. Secretary of State Michael R. Pompeo announced America's Indo-Pacific Economic Vision, emphasizing the current administration's strategy for "advancing a free and open Indo-Pacific" with U.S. business engagement at the center.[3] This new U.S. strategy may, like the "poison pill" provision, be replicated elsewhere.

Given the significance of the above-mentioned developments, the CGCP welcomes submissions (ranging from 1,000 to 2,500 words, in English or Chinese, plus, if necessary, approximately 250 to 500 words for well-formatted footnotes) from practitioners and other experts inside and outside the United States on the potential impact of the "poison pill" provision of the new USMCA on China and related topics. 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 Experts *Connect*™ series in the December 2018 or March 2019 issue of *China Law Connect*. Among the commentaries featured in the journal, 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.

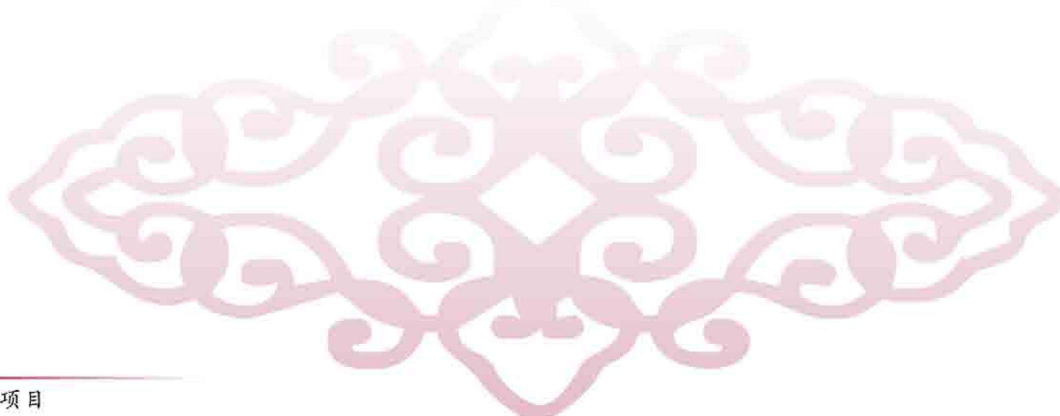
Interested contributors should direct queries and send completed submissions to **Jennifer Ingram, Managing Editor of the CGCP, at jaingram@stanford.edu. Deadline: November 15, 2018.**

---

[1] Office of the United States Trade Representative, United States-Mexico-Canada Agreement Text, Oct. 1, 2018, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico.

[2] David Lawder & Karen Freifeld, *Exclusive: U.S. Commerce's Ross Eyes Anti-China 'Poison Pill' for New Trade Deals*, Oct. 5, 2018, Reuters, https://www.reuters.com/article/us-usa-trade-ross-exclusive/exclusive-us-commerces-ross-eyes-anti-china-poison-pill-for-new-trade-deals-idUSKCN1MF2HJ.

[3] U.S. Secretary of State Michael R. Pompeo, Remarks at Indo-Pacific Business Forum: "America's Indo-Pacific Economic Vision", July 30, 2018, https://www.state.gov/secretary/remarks/2018/07/284722.htm.



专家连接™：《维生素C反垄断诉讼案》*

Jordan Corrente Beck、舒杰瑞 (Jeremy Schlosser)、苑轲
中国指导性案例项目副执行编辑

2018年6月14日，美国联邦最高法院对*Animal Science Products, Inc., et al.* 诉 *Hebei Welcome Pharmaceutical Co. Ltd., et al.*（常被称为"《维生素C案》"）一案公布了裁决。[1] 在Ginsburg大法官执笔撰写的一致性的决定中，联邦最高法院裁定，联邦法院在根据《联邦民事诉讼规则》第44.1条确定外国法律时，必须对外国政府就其本国法律的含义和解释提出的声明"给予尊重性的考虑"，但联邦法院对该声明"不一定要视之为具有定论性"。[2]

虽然联邦最高法院的裁决限制了第二巡回上诉法院适用"约束性尊重"标准所可能产生的深远影响，但对于法律从业者而言，其依然存在值得汲取的经验教训：

- 第一，**陈懿华（Yee Wah Chin）**解释道，通过遵循《联邦民事诉讼规则》第44.1条的语言表述，联邦最高法院确认了联邦法院在澄清法律问题方面，包括外国法律的含义，发挥着重要的作用。联邦最高法院向海外国家发出了明确的信息，即当外国政府阐述其自身法律的立场时，法律的清晰度和透明度是至关重要的。[3]

- 第二，**郝作成博士**讨论指出，为了让联邦法院决定如何衡量中国政府为解释中国法律而出具的声明，法院必须了解中国法律体系下的立法权限等级，以及中国法律权威解释的来源，包括由全国人民代表大会作出的立法解释，以及最高人民法院发布的司法解释和指导性案例。[4]

- 第三，**马克己（James McManis）**指出，联邦法院在确定中国和其他外国法律方面拥有广泛的自由裁定权，这给予诉讼律师空间，将中国指导性案例作为联邦法官根据《联邦民事诉讼规则》第44.1条所应该审议的"相关材料"进行争辩。诉讼律师应做充份准备，应对和解释联邦最高法院所强调的主要因素，以支持指导性案例的可适用性，这揭示了案例指导制度日益增长的相关性。[5]

- 第四，**William E. Perry**强调，了解外国政府如中国政府首先实施被指为不公平的贸易行为的动机是十分重要的。因为这种观点可以突出美国政策需要进一步考虑和可能改革的领域，以激励其他国家按照公平贸易的标准运作。[6]

背景

《维生素C反垄断诉讼案》开始于德州Animal Science Products, Inc.和其他原告——美国维生素C购买者——对河北维尔康制药有限公司（Hebei Welcome Pharmaceutical Co. Ltd.）及其他被告——中国维生素C制造商——提起了涉及多地区的反垄断集体诉讼。原告称，自2001年12月至2005年，被告合谋固定维生素C的价格和供应，违反了美国反垄断法。被告并未对原告诉称的行为提出异议；他们仅主张是中国法律迫使他们采取该种行为，并基于国际礼让原则等理由提出动议，驳回原告的请求。

中华人民共和国商务部（"商务部"）在地区法院作了历史性的出庭，提交了一份支持被告驳回动议的法庭之友简报。商务部在简报中声称，其有权监管对外贸易，并提供了具体证据，证明商务部与受其监管的医药保健进出口商会（"商会"）协调，努力规范维生素C的价格。当中的努力包括2002年实施的"价格核查和敲章"政策，该政策要求维生素C的出口合同需得到商会批准——通过加盖印章或"敲章"，而合同是否获批取决于销售合同价格是否达到或超过维生素C制造商与商会协调确定的最低水平。原告回应辩称，商务部没有引用强制被告做出此类行为的任何具体法律或法规，并指出商会的声明所称的出口数量是在没有政府干预的情况下确定的。

地区法院拒绝了被告要求的驳回动议，指出虽然商务部提交的文件有权得到"很多的尊重"，但鉴于与原告提供的证据有矛盾，它不具有"定论性"，并有必要作出进一步的调查。[7] 当被告后来提出简易判决的动议时，商务部再次出庭支持被告，重申其职权及其对中国法律的解释。原告回应时作出不同论点，其中指出中国政府向世界贸易组织表示，中国已于2002年结束了对维生素C的出口管理。法院驳回了简易判决的请求，案件进入审判阶段，陪审团裁决原告胜诉并要求被告支付1.47亿美元的赔偿金。

在上诉中，第二巡回上诉法院撤销了陪审团的裁决，并推翻了地区法院否决被告驳回动议的命令。上诉法院裁定地区法院"没有以国际礼让为由放弃主张其管辖权，这是滥用其酌处权"，并且"没有充分尊重[中国政府]对本国法律的解释，这是错误。"[8] 根据第二巡回上诉法院，"当外国政府通过律师或其他方式直接参与美国法院诉讼程序，且在所呈现的情况下

合理地提供关于其法律法规的构建和效力的宣誓证据"[9]，正确的标准是具有约束力的尊重。[10]

联邦最高法院同意受理该案，以解决法院对应给予外国政府关于自身法律的含义和解释的声明多少尊重所持的分歧。与第二巡回上诉法院的裁定相反，联邦最高法院的结论是，联邦法院无需将此类声明视为具有定论性。相反，虽然"国际礼让精神"要求联邦法院"认真考虑"外国政府的声明，但对适当尊重的衡量"将视情况而定"。[11] 联邦最高法院强调将"该声明的明确性、全面性和根据"，"背景和目的"和"与该外国政府此前的立场的一致性"，以及"外国法律体系的透明性"和"提供声明的机构或官员的角色和权限"作为"相关考虑因素"。[12]

联邦最高法院裁定，第二巡回上诉法院的"不妥协规则""与第44.1条不一致"。该法条规定了对外国法律的确定是一个法律问题而非事实问题，这给予联邦法院考虑"任何相关材料或来源"的自由，并使对外国法律的确定与联邦法院对国内法事项的重新审查两者一致。[13] 联邦最高法院指出，其标准与其对各州法律的处理方式一致——州最高的法院的陈述具有约束力，但州检察长的陈述仅被给予"尊重性的考虑"[14]——以及与国际惯例一样。[15] 由于第二巡回上诉法院的分析只停留于对商务部声明的审议，没有考虑记录中的其他证据，联邦最高法院撤销第二巡回上诉法院的决定，并把案件发回该法院让它根据联邦最高法院的裁决作进一步审议。

重要意义

美国以及其他从业人员和法律学者提交的法庭之友简报严格批评了第二巡回上诉法院"约束性尊重"的标准，并指出这标准与第44.1条和其他国家的做法不一致，以及有被滥用的可能性。

联邦最高法院的决定在很大程度上回应并缓和了这些担忧。但是，该法院所采用的标准并非没有本身的重要性。事实上，正如**陈懿华、郝作成**和**马克己**撰写的论文中所讨论的那样，该决定关于衡量外国政府对自身法律的描述的框架，要求联邦法院在外国的法律制度的背景下谨慎审查此类声明，也要求外国政府是在法律明确和完全透明的情况下提出其立场以避免出现偏袒。

鉴于对美国和中国贸易关系的持续关注，此案例可能还具有进一步的意义。**William E. Perry**在他的论文中，从"室内人"这一独特视角，点出了处于《维生素C案》核心的、被指为不公平贸易行为的鲜为人知的历史：继21世纪初的糖精反倾销案后，[中国方面]担心反倾销案件将会影响维生素C市场，Perry先生在与商会、商务部和维生素C出口商进行的会议中建议实施价格下限作为可能的解决方案；Perry先生进一步提出的、具有先见之明的方案（即通过商务部的法律条文将维生素C出口商与反垄断责任隔离）遭到了拒绝，这是由于——据Perry先生后来得到的信息——涉及到在《维生素C案》中所引用的世界贸易组织协议。考虑到这些历史，双方在该案中遇到的困难——在反倾销和反垄断责任之间陷入困境——可能会促使美国政府和行业人士审议当前的监管政策，并考虑如何将之合理化，以建立更有利的双边贸易环境。

仔细研究《维生素C反垄断诉讼案》，揭示了另一个更微妙之处：口头辩论中提出的问题和下级法院的附带意见揭示了对中国法律制度基本运作和结构的持续混淆，以及依赖翻译所产生的困难。

例如，在试图确定商务部等外国机构的陈述应受的尊重程度时，Alito大法官在口头辩论中询问中国最高人民法院是否可以处理中国出口管理制度要求方面的问题，如果可以，该法院是否会尊重商务部的解释。紧接着，Ginsburg大法官质疑中国法院（而不是仲裁员）对商业事务进行裁决是否为普遍做法。鉴于中国司法机关的复杂管辖结构、最高人民法院具有独特的行政角色、该法律制度相对缺乏透明度，诸如此类关于中国司法实践的问题很普遍，亦不一定容易回答。不经常处理中国法律问题的外国法官在寻求将这些问题置于国内实践背景下考虑时，面临着很大的障碍。

在下级法院层面，第二巡回上诉法院和地区法院都指出了在确定外国法律时依赖翻译的内在困难，尤其是外国法律体系与美国法律体系几乎没有相似之处的情况下。正如第二巡回上诉法院所述，"当所依据的文件[...]是翻译稿，并且使用中国体系所独有的专门术语，'政府指令的简明语言所意味的解释可能无法准确反映中国法律'的这一危险性更有可能[出现]"。[16]

这些评论强调了中国指导性案例项目（CGCP）以及其在学术界和法律实践界的合作伙伴所进行的的工作的重要性。他们通过高质量的翻译、严谨的分析和更频繁的人员交流，包括研讨会和培训，促进对中国法律体系更广泛和更深入的理解。随着中国经济影响力的不断增强，中外各方（公共和私人）的互动在各个层面激增，更好地理解中国法律和机构的功能和运作的需求变得前所未有的迫切。■

* 此专家*连接*™的引用是：Jordan Corrente Beck、舒杰瑞、苑轲，专家*连接*™：《维生素C反垄断诉讼案》，《中国法律连接》，第2期，第31页（2018年9月），*亦见于斯坦福法学院中国指导性案例项目*，专家*连接*™，2018年9月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-2-201809-connect-1-corrente-beck-schlosser-yuan。

Jordan Corrente Beck、舒杰瑞和苑轲分别为美国德普律师事务所、美国德汇律师事务所、及美国科文顿·柏灵律师事务所的律师。

英文原文由Dimitri Phillips和熊美英博士编辑。本中文版本由苑轲、舒杰瑞翻译，并由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] *Animal Science Products, Inc.* 诉 *Hebei Welcome Pharmaceutical Co. Ltd.*，585 U.S. ___，138 S. Ct. 1865 （2018）。联邦最高法院的判决意见书单行本可见于 https://www.supremecourt.gov/opinions/17pdf/16-1220_3e04.pdf。

[2] 同上，第1869页。

[3] 陈懿华，《维生素C案》：联邦法院的重要角色和给外国的明确信息，《中国法律连接》，第2期，第37页（2018年9月），亦见于斯坦福法学院中国指导性案例项目，专家*连接*™，2018年9月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-2-201809-connect-2-yee-wah-chin。

[4] 郝作成博士，如何举证中国法——从《维生素C案》看中国指导性案例的作用，《中国法律连接》，第2期，第41页（2018年9月），亦见于斯坦福法学院中国指导性案例项目，专家*连接*™，2018年9月，http://cgc.law.stanford.edu/zh-hans/ commentaries/clc-2-201809-connect-3-zuocheng-hao。

[5] 马克己，指导性案例对美国法院确定中国法的重要性：一位出庭律师的视角，《中国法律连接》，第2期，第45页（2018年9月），亦见于斯坦福法学院中国指导性案例项目，专家*连接*™，2018年9月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-2-201809-connect-4-james-mcmanis。

[6] William E. Perry，美国反倾销法和《维生素C案》：一个重要却被遗忘的问题，《中国法律连接》，第2期，第51页（2018年9月），亦见于斯坦福法学院中国指导性案例项目，专家*连接*™，2018年9月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-2-201809-connect-5-william-perry。

[7] *In re Vitamin C Antitrust Litigation*，584 F. Supp. 2d 546，557（E.D.N.Y. 2008）。

[8] *In re Vitamin C Antitrust Litigation*，837 F.3d 175，182（2d. Cir. 2016）。

[9] 联邦最高法院更正了第二上诉巡回法院将商务部声明描述为"宣誓证据"的说法，并指出这种表征与44.1条的要求不一致，即法院对外国法律的决定"必须被视为对法律问题的裁定"，而不是对事实问题的裁定（此时，宣誓证据具有定论性）。*Animal Science Products*, 138 S. Ct.，注释 1，第 1874页。

[10] *In re Vitamin C Antitrust Litigation*，837 F.3d，注释8，第189页。

[11] *Animal Science Products*，138 S. Ct.，注释1，第1873页。

[12] 同上。

[13] 同上，第1874页。

[14] 同上（引用*Wainwright*诉*Goode*，464 U.S. 78，84 （1983） （法院全体意见））。

[15] 联邦最高法院此处提到了两项国际条约：《欧洲外国法信息公约》，第8条，1968年6月7日，720 U.N.T.S. 154，以及《美洲国家外国法证据和信息公约》，第6条，1979年5月8日，O.A.S.T.S. 1439 U.N.T.S. 111（两者都不视美国为缔约方）。它们都包含类似的机制，而通过这些机制，一个政府可以获得另一个政府对其自身的法律的官方声明，但这些条约都明确表明这些声明不对请求方具有约束力。

[16] *In re Vitamin C Antitrust Litigation*，837 F.3d，注释8，第190–191页。

中国指导性案例项目专家*连接*™诚挚邀稿：
新的美国–墨西哥–加拿大协定中的"毒丸"条款对中国的潜在影响

将会取代北美自由贸易协定的新的美国–墨西哥–加拿大协定（"USMCA"）第32.10条规定：

> 4. 任何缔约方与非市场国家作出自由贸易协议的签订，会允许其他缔约方在六个月通知后终止本协定，并以双方之间的协议（双边协议）取代本协定。[1]

这条款基本上给予美国否决权，以阻止墨西哥或加拿大与中国（一个非市场国家）所可能达成的贸易协议。美国商务部部长威尔伯·罗斯（Wilbur Ross）将该条款称为"毒丸"，并表示在美国与日本、印度和欧盟等其他贸易伙伴之间的未来贸易协议中可能会复制类似的条款。[2]

这"毒丸"条款有可能成为意想不到的灵丹妙药，促使中国这世界第二大经济体，在目前人们越来越担心该国近期所强调的国有经济的情况下，采取积极措施而成为市场经济体吗？如果中国这样做，这将是该国在1978年通过其门户开放政策四十年后以及其雄心勃勃的"一带一路"倡议启动五年后的一项了不起的成就。还是，中国领导层会采取其他措施来回应USMCA？

如果处理不当，中国将面临严重的挑战，可能会破坏国家的发展，特别是"一带一路"倡议的发展。这是因为美国正逐渐在中国的邻近地区中发挥其影响力。七月下旬，美国国务卿迈克·蓬佩奥（Michael R. Pompeo）宣布"美国对印度–太平洋地区经济前景的构想"（America's Indo-Pacific Economic Vision），强调了现任政府的"推进自由开放的印度太平洋地区"的战略，并以美国商业参与为中心。[3] 这项新的美国战略可能像"毒丸"条款一样会在其他地方复制。

鉴于上述发展的重要性，CGCP欢迎来自美国国内外的法律执业者与专家提交稿件（1,000至2,500字，中英文皆可；如有必要，也可附上格式良好、约250至500字的脚注），探讨新的USMCA中的"毒丸"条款对中国的潜在影响以及相关题目。CGCP将为获选稿件的作者提供编辑支持，编辑后并经作者同意的稿件版本将以中英双语形式发表在《中国法律连接》2018年12月期或2019年3月期的专家*连接*™系列专栏。作为《中国法律连接》中评论性文章的一部分，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11月15日。**

---

[1] Office of the United States Trade Representative，United States-Mexico-Canada Agreement Text，2018年10月1日，https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico。

[2] David Lawder、Karen Freifeld，*Exclusive: U.S. Commerce's Ross Eyes Anti-China 'Poison Pill' for New Trade Deals*，2018年10月5日，Reuters，https://www.reuters.com/article/us-usa-trade-ross-exclusive/exclusive-us-commerces-ross-eyes-anti-china-poison-pill-for-new-trade-deals-idUSKCN1MF2HJ。

[3] U.S. Secretary of State Michael R. Pompeo，Remarks at Indo-Pacific Business Forum: "America's Indo-Pacific Economic Vision"，2018年7月30日，https://www.state.gov/secretary/remarks/2018/07/284722.htm。

The *Vitamin C* Case: Important Role for the Federal Courts and Clear Message to Foreign Countries*

Yee Wah Chin

Counsel, Ingram, Yuzek, Gainen, Carroll & Bertolotti, LLP

The U.S. Supreme Court's unanimous decision in *Animal Science Products, Inc., et al. v. Hebei Welcome Pharmaceutical Co. Ltd., et. al.* (commonly known as the "*Vitamin C* case")[1] on the issue of determining foreign law—whether a federal court determining foreign law under Federal Rule of Civil Procedure 44.1 is required to treat as conclusive a submission from the foreign government characterizing its own law—is unsurprising, but confirms an important role for the federal courts and sends a clear message to foreign countries, including China.

Supreme Court's Decision: Inevitable Outcome

China showed great interest in the *Vitamin C* case, with its Ministry of Commerce ("MOFCOM") submitting amicus briefs stating that Chinese law required the defendants' export cartel, and its embassy in the United States sending a diplomatic note to the U.S. Department of State that "China has attached great importance to this case" and that MOFCOM accurately "described China's compulsory requirements concerning vitamin C exports".[2] MOFCOM stated that the District Court and the Solicitor General were "disrespectful" in questioning its representations on China's law.[3]

This level of China's interest in the case, together with the facts that irrebuttable presumptions are often viewed skeptically in U.S. jurisprudence[4] and that the underlying issues of foreign sovereign compulsion, state action, and comity are significant, likely made the justices feel a need to render a unanimous decision on the threshold question of how to determine the applicable foreign law.[5]

In the end, Justice Ruth Bader Ginsburg, the Supreme Court's civil procedure expert,[6] wrote a unanimous decision for the Court, articulating that a "federal court should accord respectful consideration to a foreign government's submission"[7] regarding foreign law, but must make an independent determination of the law. Justice Ginsburg, who is a proponent of referencing foreign law to inform U.S. judicial decisions,[8] made it clear that a standard of binding deference to a foreign government's statement characterizing its own law is unacceptable.

Federal Courts' Important Role

The Supreme Court's decision is arguably simply a reading of the plain language of Federal Rule of Civil Procedure 44.1. Rule 44.1 established that the determination of foreign law is a question of law, so that federal courts "may consider any relevant material or source [...] whether or not [...] admissible under the Federal Rules of Evidence". The Supreme Court clarified that the weight given a foreign governmental statement regarding foreign law "will depend on the circumstances", including "the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions."[9] The Supreme Court, however, expressly refrained from deciding the outcome in *Vitamin C* once all relevant factors are considered.[10]

On remand, the Second Circuit has an important role to play to clarify some legal issues, regardless of its final decision. On the one hand, the Second Circuit might consider evidence beyond MOFCOM's statements, still conclude that Chinese vitamin C exporters were legally compelled to fix prices, and then find again that comity requires dismissal of the action or remand to the District Court for reconsideration of the motions to dismiss and for summary judgment.

In its consideration of all relevant factors, the Second Circuit will have a chance to elaborate on how these factors are weighed. The court might also consider the fact (which was apparently little noted by the parties in the case) that this vitamin C lawsuit did not follow a U.S. government investigation. The U.S. government brought no antitrust action against the exporters, in contrast to the major criminal investigation it conducted in the mid-1990s that led to dozens of civil treble damage lawsuits against vitamin manufacturers from other countries, including the action that resulted in the Supreme Court's application of the Foreign Trade Antitrust Improvements Act in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*[11] This might reflect recognition by the Department of Justice that at least some compulsion from the Chinese government may have been involved in the case of the Chinese vitamin C exporters, so that the Department of Justice exercised prosecutorial discretion to refrain from action.[12]

Yee Wah Chin is Counsel to Ingram, Yuzek, Gainen, Carroll & Bertolotti, LLP. Her practice encompasses all aspects of antitrust counseling and litigation, advising on all matters with antitrust exposure. She has defended clients before the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission in investigations over transactions and conduct, as well as for criminal price fixing, and litigated antitrust matters in Federal Courts in New York and other parts of the United States.

Prior to joining Ingram, Yuzek, Gainen, Carroll & Bertolotti, LLP, Ms. Chin was a partner and a senior counsel at two AmLaw 100 law firms, as well as Assistant General Counsel of a Fortune 100 company. She is a leader at the American Bar Association in antitrust, particularly on the intellectual property–antitrust interface, and in China and other international antitrust jurisdictions. She has an AV-Preeminent rating by the publishers of the Martindale-Hubbell legal directory. Ms. Chin received a J.D. from Columbia University and a S.B. in Mathematics from Massachusetts Institute of Technology.

If, on the other hand, the Second Circuit on remand concludes that the vitamin C exporters were not compelled by Chinese law to fix prices and comity does not require dismissal, then entities may be exposed to *ex post* challenges under U.S. law for conduct they might have thought legally required. Nonetheless, in reaching this decision that there is no direct conflict between U.S. and Chinese law,[13] the Second Circuit can help avoid conflicts that the doctrines of act of state, foreign sovereign compulsion, and comity seek to prevent.

Message Sent to Foreign Countries

The Supreme Court's decision in the *Vitamin C* case may be a roadmap for what is needed to support a statement of foreign law. A statement by the highest court of the foreign jurisdiction, which is consistent with the country's previous statements and actions, and is not subject to attack as a litigation position paper, would likely be persuasive as to the foreign law. Such a roadmap should not be considered as a threat to foreign entities doing business with U.S. entities but rather as a cautionary note that conduct known to violate U.S. law should be undertaken if and only if a clear record of the foreign government's role is created.

On balance, the Supreme Court's decision in the *Vitamin C* case is a helpful clarification of an important point of civil procedure, while giving the federal courts the important role to clarify legal issues and sending a clear message to foreign governments that legal clarity and transparency is important. ■

* The citation of this Experts *Connect*™ is: Yee Wah Chin, *The* Vitamin C *Case: Important Role for the Federal Courts and Clear Message to Foreign Countries*, 2 China Law Connect 35 (Sept. 2018), *also available at* Stanford Law School China Guiding Cases Project, Experts *Connect*™, Sept. 2018, http://cgc.law.stanford.edu/commentaries/clc-2-201809-connect-2-yee-wah-chin.
The original, English version of this Experts *Connect*™ piece was edited by Jordan Corrente Beck, Jeremy Schlosser, Sean Webb, 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] *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, 585 U.S. ___, 138 S. Ct. 1865 (2018). The slip opinion of the Supreme Court is available at https://www.supremecourt.gov/opinions/17pdf/16-1220_3e04.pdf.

[2] Joint Appendix on Writ of Certiorari to the United States Court of Appeals for the Second Circuit at 782–84, https://www.supremecourt.gov/DocketPDF/16/16-1220/36711/20180226192522246_Appendix.pdf.

[3] Brief of *Amicus Curiae* Ministry of Commerce of the People's Republic of China in Support of Respondents at 2, 5, 22, https://www.supremecourt.gov/DocketPDF/16/16-1220/42398/20180404190231218_MOFCOM%20brief.pdf.

[4] *See, e.g.*, Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 Harv. L. Rev. 1534 (1974); James J. Duane, *The Constitutionality of Irrebuttable Presumptions*, 19 Regent U. L. Rev. 149 (2006).

[5] The views of the U.S. Solicitor General, which the Court requested, were likely also persuasive. The Solicitor General argued that a "foreign government's characterization of its own law is entitled to substantial weight, but it is not conclusive", so that the "Court of Appeals erred by treating the Ministry's amicus brief as conclusive and disregarding other relevant materials". Brief for United States as Amicus Curiae at 6, 9, https://www.supremecourt.gov/DocketPDF/16/16-1220/20062/20171114160440437_16-1220%20Brief%20as%20A.C..pdf.

[6] Justice Ginsburg taught civil procedure for many years. *See* Ruth Bader Ginsburg, Remarks for the Second Circuit Judicial Conference at 11 (June 12, 2015), https://www.supremecourt.gov/publicinfo/speeches/RBG_Speech_Second_Circuit_Judical_Conference_06_12_15.pdf.

[7] *Animal Science Products*, 138 S. Ct., *supra* note 1, at 1869.

[8] *See, e.g.*, Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States, Speech at the International Academy of Comparative Law, American University, "A decent Respect to the Opinions of [Human]kind"; The Value of a Comparative Perspective in Constitutional Adjudication (July 30, 2010), https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_08-02-10.

[9] *Animal Science Products*, 138 S. Ct., *supra* note 1, at 1873–74.

[10] *Id.* at 1875.

[11] 542 U.S. 155 (2004).

[12] It is noteworthy that the state action doctrine exempts from the Sherman Act the intentional or foreseeable result of state government policy. *See Parker v. Brown*, 317 U.S. 341 (1943); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980).

[13] *Cf.* 《中华人民共和国价格法》 (*Price Law of the People's Republic of China*), Article 14, passed and issued on Dec. 29, 1997, effective as of May 1, 1998, http://www.gov.cn/banshi/2005-09/12/content_69757.htm (partly superseded by《中华人民共和国反垄断法》(*Anti-Monopoly Law of the People's Republic of China*), passed and issued on Aug. 30, 2007, effective as of Aug. 1, 2008, http://www.npc.gov.cn/wxzl/gongbao/2007-10/09/content_5374672.htm [hereinafter "AML"], prohibiting unofficial cartels). The AML extends the prohibition to governmental action. AML Chapter 5. Moreover, AML Article 16 prohibits trade associations from organizing cartels. *Cf.* Export Trading Company Act, Pub L. No. 97–290, 96 Stat. 1233 (1982), and the Webb-Pomerene Act, 15 U.S.C. §§ 61–65, which exempt certain export cartels from the Sherman Act, but provide no protection from foreign law.

《维生素C案》：联邦法院的重要角色和给外国的明确信息*

陈懿华
Ingram, Yuzek, Gainen, Carroll & Bertolotti, LLP律师

美国联邦最高法院在*Animal Science Products, Inc., et al.*诉*Hebei Welcome Pharmaceutical Co. Ltd., et. al.*（常被称为"《维生素C案》"）[1] 中就外国法的确定问题——联邦法院根据《联邦民事诉讼规则》第44.1条确定外国法律时是否需要将外国政府对其自身法律的陈述视为具定论性——上的一致决定并不让人意外，但确认了联邦法院的重要角色，并向包括中国在内的外国发出了明确的信息。

联邦最高法院的决定：不可避免的结果

中国对《维生素C案》非常关注，其商务部提交了法庭之友简报，声称中国法律要求被告的出口卡特尔，并且其驻美使馆向美国国务院发送外交照会说明"中国高度重视此案"、商务部准确地"描述了中国对维生素C出口的强制性要求"。[2] 商务部表示，美国地区法院和司法部长质疑商务部对中国法律的陈述是"不尊重"的。[3]

中国对该案有如此程度的关注，连同无法反驳的推定在美国法理中经常被以怀疑的眼光看待的事实，[4] 以及外国主权强制、国家行为和礼让几个根本问题在该案中是重大的、国家行为和礼让几个根本问题在该案中是重大的，都可能使法官感到需要就如何确定适用的外国法律的门槛问题做出一致决定。[5]

最终，联邦最高法院民事诉讼法专家Ruth Bader Ginsburg大法官为法院撰写了一致决定，[6] 指出就外国法律方面，"联邦法院应该对外国政府的陈述给予尊重性的考虑"，[7] 但必须对该法律做出独立确定。Ginsburg大法官是参考外国法律以使美国司法判决更全面的支持者；[8] 但是她明确表示，外国政府描述自身法律的陈述具有约束力这样的标准是不可以接受的。

联邦法院的重要角色

联邦最高法院的判决可以说是仅仅是解读了《联邦民事诉讼规则》第44.1条的简明语言。第44.1条规定了外国法律的确定是一个法律问题，於是联邦法院"可以考虑任何相关材料或来源[...]，无论它是否[...]根据《联邦证据规则》而可采纳的"。联邦最高法院澄清，外国政府关于外国法律的声明所具有的重要性"将视情况而定"，包括"该声明的明确性、全面性和根据；[该声明的]背景和目的；提供国法律体系的透明性；提供声明的机构或官员的角色和权限；以及该声明与该外国政府此前的立场的一致性。"[9] 然而，联邦最高法院明确地避免决定，当考虑过所有相关因素后，《维生素C案》的结果会是什么。[10]

发回重审期间，不管第二巡回上诉法院的最终决定是什么，其在澄清一些法律问题上发挥重要角色。一方面，第二巡回上诉法院可能会在考虑中国商务部声明之外的证据之后，仍然得出中国维生素C出口商是在法律上被迫定价的结论，由此再次决定，礼让[原则]要求驳回诉讼或者发回联邦地区法院重新考虑驳回诉讼和简易判决的动议。

在考虑所有相关因素时，第二巡回上诉法院有机会详细说明如何权衡这些因素。该法院也可能会考虑到这一维生素C诉讼不是跟随美国政府调查这一事实（案件当事人显然少注意到这一点）。美国政府并没有对出口商提起任何反垄断诉讼，这与其在上世纪九十年代中期进行的重大刑事调查形成对比。当时的调查导致数十起针对其他国家维生素制造商的民事三倍赔偿诉讼，其中包括最高法院适用了《对外贸易反托拉斯改进法》的*F. Hoffmann-La Roche Ltd.*诉*Empagran S.A.*一案在内。[11] 这可能反映了美国司法部都承认，在中国维生素出口商的案件中确实涉及一些来自中国政府的强迫，因此司法部行使检察裁量权而避免采取行动。[12]

另一方面，如果第二巡回上诉法院在发回重审期间得出结论，认为维生素C出口商没有被中国法律强制要求确定价格且礼让[原则]不要求驳回诉讼，那么出口商可能会因为他们自认为是中国法律要求做出的行为，而面临美国法律的事后追究。但是在做出中美法律之间没有直接冲突这一决定时，[13] 第二巡回上诉法院能够帮助避免国家行为、外国主权强制和礼让原则所试图阻止的冲突。

给外国的明确信息

联邦最高法院对《维生素C案》的判决可能是一个路线图，指出需要什么来支持外国法律的声明。倘若声明由外国司法管辖区的最高法院发出、与国家以往的陈述与行为一致，且不作为是诉讼立场文件而受到攻击，则其对外国法律的陈述具有说服力。这样的路线图不应被视为对与美国实体开展业务的外国实体构成威胁，而应当视为警告，即对已知是违反美国法律的行为，只有在外国政府所扮演的角色得到明确记录时，才应施行。

陈懿华是Ingram, Yuzek, Gainen, Carroll & Bertolotti, LLP的律师。她的执业领域包括反垄断咨询及诉讼的所有方面，就反垄断风险的所有事宜提供法律建议。她曾就交易和行为调查及刑事价格固定在美国司法部反垄断部门和联邦贸易委员会为客户进行辩护，同时也在纽约及美国其他地区的联邦法院就反垄断事宜进行诉讼。

在加入Ingram, Yuzek, Gainen, Carroll & Bertolotti, LLP之前，陈女士曾担任AmLaw前100名中的两家律师事务所的合伙人及高级法律顾问，以及一家财富100强企业的助理总法律顾问。她是美国律师协会反垄断方面（尤其是知识产权和反垄断交叉领域）的领导者，也是中国和其他司法管辖区反垄断法方面的翘楚。她获得了Martindale-Hubbell法律目录出版社的AV-Preeminent（杰出）评级。陈女士获得了哥伦比亚大学法律博士学位和麻省理工学院数学系理学学士学位。

总的来说，联邦最高法院对《维生素C案》的决定有助于澄清民事诉讼程序的重要内容，同时给予联邦法院澄清法律问题的重要角色，并向外国政府发出一个明确信息：法律清晰和透明是重要的。■

* 此专家*连接*™的引用是：陈懿华，《维生素C案》：联邦法院的重要角色和给外国的明确信息，《中国法律连接》，第2期，第37页（2018年9月），*亦见于*斯坦福法学院中国指导性案例项目，专家*连接*™，2018年9月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-2-201809-connect-2-yee-wah-chin。
英文原文由Jordan Corrente Beck、Jeremy Schlosser、Sean Webb、Dimitri Phillips和熊美英博士编辑。本中文版本由张磊、周墨奇翻译，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] *Animal Science Products, Inc. 诉 Hebei Welcome Pharmaceutical Co. Ltd.*，585 U.S. ___，138 S. Ct. 1865（2018）。联邦最高法院的判决意见书单行本可见于 https://www.supremecourt.gov/opinions/17pdf/16-1220_3e04.pdf。

[2] Joint Appendix on Writ of Certiorari to the United States Court of Appeals for the Second Circuit，第782–84页，https://www.supremecourt.gov/DocketPDF/16/16-1220/36711/20180226192522246_Appendix.pdf。

[3] Brief of *Amicus Curiae* Ministry of Commerce of the People's Republic of China in Support of Respondents，第2、5、22页，https://www.supremecourt.gov/DocketPDF/16/16-1220/42398/20180404190231218_MOFCOM%20brief.pdf。

[4] *见，例如*，Note，*The Irrebuttable Presumption Doctrine in the Supreme Court*，87 Harv. L. Rev. 1534（1974）；James J. Duane，*The Constitutionality of Irrebuttable Presumptions*，19 Regent U. L. Rev. 149（2006）。

[5] 法院要求的美国司法部长的意见可能也具有说服力。司法部长认为，"外国政府对其自身法律的描述有权获得很大的重视，但它并不具有定论性"，因此"上诉法院将[商务]部的法庭之友简报视为具定论性而无视其他相关材料是错误的"。Brief for United States as Amicus Curiae，第6、9页，https://www.supremecourt.gov/DocketPDF/16/16-1220/20062/20171114160440437_16-1220%20Brief%20as%20A.C..pdf。

[6] Ginsburg大法官教授民事诉讼多年。*见* Ruth Bader Ginsburg，Remarks for the Second Circuit Judicial Conference，第11页（2015年6月12日），https://www.supremecourt.gov/publicinfo/speeches/RBG_Speech_Second_Circuit_Judical_Conference_06_12_15.pdf。

[7] *Animal Science Products*，138 S. Ct.，注释1，第1869页。

[8] *见，例如*，Ruth Bader Ginsburg，Associate Justice，Supreme Court of the United States，Speech at the International Academy of Comparative Law，American University，"A decent Respect to the Opinions of [Human]kind"; The Value of a Comparative Perspective in Constitutional Adjudication（2010年7月30日），https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_08-02-10。

[9] *Animal Science Products*，138 S. Ct.，注释1，第1873–74页。

[10] *同上*，第1875页。

[11] 542 U.S. 155（2004）。

[12] 值得注意的是，州行为原则从《谢尔曼法案》中豁免州政府政策的故意或可预见的结果。*见 Parker诉Brown*，317 U.S. 341（1943）；*California Retail Liquor Dealers Ass'n诉Midcal Aluminum*，445 U.S. 97（1980）。

[13] *比照*《中华人民共和国价格法》，第十四条，1997年12月29日通过和公布，1998年5月1日起施行，http://www.gov.cn/banshi/2005-09/12/content_69757.htm（禁止非官方的卡特尔）。该法有一部分被《中华人民共和国反垄断法》中所取代。见《中华人民共和国反垄断法》，2007年8月30日通过和公布，2008年8月1日起施行，http://www.npc.gov.cn/wxzl/gongbao/2007-10/09/content_5374672.htm［简称"《反垄断法》"］。《反垄断法》将禁止范围扩大到政府行为。《反垄断法》第五章。此外，《反垄断法》第十六条禁止贸易协会组织卡特尔。*比照* Export Trading Company Act，Pub L. No. 97–290，96 Stat. 1233（1982）和Webb-Pomerene Act，15 U.S.C. §§ 61–65，后者使某些出口卡特尔从《谢尔曼法案》中豁免，但不提供任何外国法律保护。

How to Adduce Evidence on Chinese Law: Looking at the Function of China's Guiding Cases from the *Vitamin C* Case*

Dr. Zuocheng Hao
Founding Director, Center for Legal Policy, Didi Chuxing
Adviser of the China Guiding Cases Project

On June 14, 2018, the U.S. Supreme Court decided *Animal Science Products, Inc., et al. v. Hebei Welcome Pharmaceutical Co. Ltd., et al.* (commonly known as the "*Vitamin C* case"). With respect to how U.S. federal courts determine "foreign law" in adjudicating cases, the judgment has clarified the following: first, according to Rule 44.1 of the Federal Rules of Civil Procedure, the courts may consider any material or source that is relevant to the foreign law. Second, in determining foreign law, a foreign government's statement is not conclusive; federal courts need to consider various factors, including the statement's clarity, the transparency of the foreign legal system, the authority of the entity offering the statement, and the statement's consistency with the foreign government's past positions. In the above-mentioned judgment, the U.S. Supreme Court pointed out that the Court of Appeals for the Second Circuit erroneously believed that the court had to defer to a statement concerning Chinese legal issues submitted by the Ministry of Commerce of the People's Republic of China as amicus curiae.[1]

The *Vitamin C* case has led to some important questions: how to adduce evidence on Chinese law in U.S. federal court proceedings? What is the status of documents issued by ministries (for example, the Ministry of Commerce) and commissions in the Chinese legal system? After the provisions of the Chinese law are determined, how is the content of the provisions to be understood?

The *Constitution of the People's Republic of China*[2] (the "*Constitution*") has supreme legal authority.[3] According to the *Constitution* and the *Law on Legislation of the People's Republic of China*,[4] the highest legislative organ of China, i.e., the National People's Congress (the "NPC") and its Standing Committee, formulate national laws and legislative interpretations.[5] The highest administrative organ of China, i.e., the State Council, formulates administrative regulations in accordance with the *Constitution* and laws.[6] For provinces and provincial-level areas in China, such as the Beijing Municipality, their people's congresses may formulate local regulations applicable to the [corresponding] local regions.[7] All laws, administrative regulations, and local regulations must not conflict with the *Constitution*.[8] The laws, administrative regulations, and local regulations are legally binding and are judicial organs' bases of adjudication.[9]

In addition, the Supreme People's Court (the "SPC") and the Supreme People's Procuratorate may also issue, in accordance with authority stated in the NPC's laws, some binding documents. The SPC may formulate judicial interpretations of specific legal issues.[10] In courts' adjudication, judicial interpretations also serve as bases of adjudication.[11]

Are rules or documents issued by the ministries and commissions of the State Council part of Chinese law? In China, an authoritative and objective standard for determining whether or not an official document has legal effect is a determination of its legal effect by the court during adjudication. At the judicial level, rules or documents issued by ministries and commissions do not have legal effect; courts may refer to them during adjudication, but they cannot serve as bases of judicial adjudication.[12] In particular, although the general and normative documents issued by ministries and commissions have administrative binding force, they, strictly speaking, are not part of Chinese law and do not have legal effect.

The next question is: after determining Chinese law, how is the content of [legal] provisions to be understood? In China, there are two types of authoritative interpretations of laws. One type is issued by legislative organs; the NPC and its Standing Committee may issue legislative interpretations of a certain provision of a law. The other type is judicial interpretations made by the SPC. With respect to judicial interpretations, the SPC confirms how courts interpret and apply a specific legal provision primarily through the issuance of different judicial interpretations. However, since the establishment of the Case Guidance System in late 2010, the SPC also has another channel to interpret legal provisions. Following the needs for judicial openness and uniform application of law, the SPC, in the form of Guiding Cases, issues judicial cases decided by courts of different levels and approved by the SPC, and requires courts in China to explicitly refer to Guiding Cases in the adjudication of similar subsequent cases. Through the "Main Points of the Adjudication" section of each Guiding Case, the SPC determines how courts interpret and apply a specific legal provision. Because the formulation of judicial

Dr. Zuocheng Hao is currently the founding director of the Center for Legal Policy of Didi Chuxing, and is a member of the Advisory Committee of the China Guiding Cases Project at Stanford University. From 1995 to 2014, Dr. Hao was involved in legislative work as part of the legal committee of the Standing Committee of the National People's Congress, the highest legislative organ in China, where he also served as the Director (2009–2014). He participated in the research and drafting of various laws, including the *Contract Law*, the *Property Law*, the *Tort Liability Law*, the *Copyright Law*, the *Consumer Rights Protection Law*, the *Civil Procedure Law*, the *Arbitration Law*, and the *Lawyers Law*. Dr. Hao has obtained various degrees, including a bachelor's degree in law from the China University of Political Science and Law, a master's degree in common law from the University of Hong Kong, a master's degree in law from the London School of Economics (LL.M.), a master's degree in law from Stanford Law School (J.S.M.), and a doctorate in law from the China University of Political Science and Law.

interpretations is time-consuming, the release of Guiding Cases allows the SPC to provide interpretations of legal provisions more efficiently.

At present, there are 96 Guiding Cases in China and all of them were released in Chinese, the country's official language. In determining Chinese law, how U.S. courts or lawyers are to use suitable English versions of these Guiding Cases is a practical issue that needs to be considered. In this respect, the English versions prepared by the China Guiding Cases Project of Stanford University, to which high recognition has been given by the Research Office of the SPC (the specific unit that recommends candidate Guiding Cases), are quite a good choice.

* The citation of this Experts *Connect*™ is: Dr. Zuocheng Hao, *How to Adduce Evidence on Chinese Law: Looking at the Function of China's Guiding Cases from the* Vitamin C *Case*, 2 China Law Connect 39 (Sept. 2018), *also available at* Stanford Law School China Guiding Cases Project, Experts *Connect*™, Sept. 2018, http://cgc.law.stanford.edu/commentaries/clc-2-201809-connect-3-zuocheng-hao.
The original, Chinese version of this Experts *Connect*™ piece was edited by Dr. Mei Gechlik. The English version was prepared by Olivia Chen and Allison Goh, and was finalized 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 or other institutions.

1 *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, 585 U.S. ___, 138 S. Ct. 1865 (2018). The slip opinion of the Supreme Court is available at https://www.supremecourt.gov/opinions/17pdf/16-1220_3e04.pdf.

2 《中华人民共和国宪法》(*Constitution of the People's Republic of China*), passed on, issued on, and effective as of Dec. 4, 1982, amended five times, most recently on Mar. 11, 2018, effective as of Mar. 11, 2018, http://www.xinhuanet.com/politics/2018lh/2018-03/22/c_1122572202.htm [hereinafter "*Constitution*"].

3 *Id.*, Preamble.

4 《中华人民共和国立法法》(*Law on Legislation of the People's Republic of China*), passed and issued on Mar. 15, 2000, effective as of July 1, 2000, amended on and effective as of Mar. 15, 2015, http://www.npc.gov.cn/npc/dbdhhy/12_3/2015-03/18/content_1930713.htm [hereinafter "*Legislation Law*"].

5 *Constitution*, *supra* note 2, Articles 58 and 67; *Legislation Law*, *supra* note 4, Articles 7 and 45.

6 *Constitution*, *supra* note 2, Article 89; *Legislation Law*, *supra* note 4, Article 65.

7 *Legislation Law*, *supra* note 4, Article 72.

8 *Id.*, Article 87.

9 *See, e.g.*, 《中华人民共和国行政诉讼法》(*Administrative Litigation Law of the People's Republic of China*), passed and issued on Apr. 4, 1989, effective as of Oct. 1, 1990, amended two times, most recently on June 27, 2017, effective as of July 1, 2017, http://www.npc.gov.cn/npc/xinwen/2017-06/29/content_2024894.htm. Article 63 provides: "People's courts adjudicate administrative cases based on laws, administrative regulations, and local regulations. Local regulations are applicable to administrative cases that occur within the administrative area of the locality. [...] People's courts adjudicate administrative cases by referring to rules."

10 《最高人民法院关于司法解释工作的规定》(*Provisions of the Supreme People's Court Concerning Work on Judicial Interpretation*), passed by the Adjudication Committee of the Supreme People's Court on Dec. 11, 2006, issued on Mar. 9, 2007, effective as of Apr. 1, 2007, http://www.npc.gov.cn/npc/xinwen/fztd/sfgz/2007-03/23/content_362927.htm.

11 *Id.*, Article 27. The legal provision provides: "Where a judicial interpretation has come into effect and is used as a basis of adjudication, it should be cited in the judicial document. Where a people's court cites both the law and the judicial interpretation as bases of adjudication, it should first cite the law and then cite the judicial interpretation."

12 *See supra* note 9.

如何举证中国法
——从《维生素C案》看中国指导性案例的作用*

郝作成博士

滴滴出行法律政策中心创始主任

中国指导性案例项目顾问

2018年6月14日，美国联邦最高法院对*Animal Science Products, Inc., et al. v. Hebei Welcome Pharmaceutical Co. Ltd., et al.* （常被称为"《维生素C案》"）一案作出判决。该判决对美国联邦法院在审理案件中，如何确定有关"外国法"，明确以下几点：一是，根据《联邦民事诉讼规则》第44.1条，法院可考虑与外国法相关的任何材料或信息来源。二是，确定外国法是什么，外国政府的声明不具决定性，联邦法院需要考虑多种因素，包括该声明的明确性、该国法律体系的透明性、发表该声明机关的职能、以及该声明与该国政府此前的立场的一致性等。在上述判决中，最高院指出，联邦第二巡回上诉法院错误地认为该法院必须尊重中国商务部以法院之友（amicus curiae）身份所出具的关于中国法律问题的解释声明。[1]

《维生素C案》引申出一些重要问题：在美国联邦法院的诉讼中，如何举证中国法？部委（例如：商务部）所作出的文件到底在中国法系本身的地位是如何？确定了中国法的规定后，又如何理解规定的内容？

《中华人民共和国宪法》[2]（"《宪法》"）具有最高的法律效力。[3] 根据《宪法》、《中华人民共和国立法法》[4] 的规定，中国的最高立法机关，即全国人民代表大会（"全国人大"）及其常委会，制定全国性的法律和立法解释。[5] 中国的最高行政机关，即国务院，根据宪法和法律，制定行政法规。[6] 中国的省市地方，如北京市，其人民代表大会也可以制定适用于本地辖区的地方性法规。[7] 一切法律、行政法规、地方性法规都不得同宪法相抵触。[8] 而法律、行政法规、地方性法规，都有法律上的约束力，是司法机关裁判的依据。[9]

此外，最高人民法院（"最高法"）、最高人民检察院也会根据全国人大的法律的授权，出台一些具有约束力的文件。最高法可以就特定的法律问题制定司法解释。[10] 司法解释，在法院审判时，也会作为裁判依据。[11]

但国务院的部委机构出台的规章和文件是否算是中国法的一部分？在中国，一份官方文件是否具有法律效力，一个权威、客观的判断标准，就是法院在审判当中对其法律效力的认定。部委出台的规章和文件在司法上不具有法律效力，法院在审判案件时，可以参考，不能作为司法裁判的依据。[12] 尤其是，部委发布的一般性的规范性文件，从严格意义上，虽具有行政约束力，但不属于中国法，不具有法律的效力。

接下来的问题就是，确定了中国法的规定后，又如何理解规定的内容？在中国，有两个权威的法律解释。一个就是立法机关，全国人大及其常委会就法律某一具体条文，作出的立法解释；另一个就是最高法作出的司法解释。关于司法解释，最高法主要通过发布不同的司法解释文件，来确认法院如何解释和适用某一具体法律规定。但是，从2010年末建立了案例指导制度后，最高法亦有另一渠道作出其对法律规定的解释。随着司法公开、统一法律适用的需要，最高法以指导性案例的形式，发布其认可的各级法院所作出的司法案例，并要求全国法院在审理类似的后续案件时明确参照指导性案例。通过指导性案例的"裁判要点"部分，最高法确认法院如何解释和适用某一具体法律规定。由于制定司法解释文件需时，指导性案例的发布能让最高法更有效率地提供其对法律规定的解释。

目前，中国的指导性案例共有96个，都是以其官方语言中文进行发布的。美国法院或者律师在认定中国法时，如何采纳合适的英文翻译文本也是个需要考虑的实际问题。这方面，斯坦福大学的指导性案例项目提供的英文翻译，得到了最高院研究室（推荐中国指导性案例的具体部门）的高度认可，是个不错的选择。

郝作成博士，现任滴滴出行法律政策中心创始主任、美国斯坦福大学中国指导性案例项目顾问委员会成员。从1995年至2014年，郝博士在中国最高立法机关全国人大常委会的立法工作机关——法制工作委员会——工作，并担任处长（2009年–2014年）。他参与了《合同法》、《物权法》、《侵权责任法》、《著作权法》、《消费者权益保护法》、《民事诉讼法》、《仲裁法》、《律师法》等法律的立法研究和法案草拟工作。郝博士先后获得不同学位，包括中国政法大学的法学学士、香港大学的普通法硕士、伦敦经济学院的法律硕士（LLM）、斯坦福法学院的法学硕士（JSM）和中国政法大学的法学博士。

* 此专家*连接*™的引用是：郝作成博士，如何举证中国法——从《维生素C案》看中国指导性案例的作用，《中国法律连接》，第2期，第41页（2018年9月），*亦见于*斯坦福法学院中国指导性案例项目，专家*连接*™，2018年9月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-2-201809-connect-3-zuocheng-hao。
中文原文由熊美英博士编辑。载于本专家*连接*™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或其它机构的工作或意见。

1 *Animal Science Products, Inc.* 诉 *Hebei Welcome Pharmaceutical Co. Ltd.*，585 U.S. ___，138 S. Ct. 1865 （2018）。联邦最高法院的判决意见书单行本可见于 https://www.supremecourt.gov/opinions/17pdf/16-1220_3e04.pdf。

2 《中华人民共和国宪法》，1982年12月4日通过和公布，同日起施行，经五次修正，最新修正于2018年3月11日，同日起施行，http://www.xinhuanet.com/politics/2018lh/2018-03/22/c_1122572202.htm。

3 *同上*，序言。

4 《中华人民共和国立法法》，2000年3月15日通过和公布，2000年7月1日起施行，并于2015年3月15日修正，同日起施行，http://www.npc.gov.cn/npc/dbdhhy/12_3/2015-03/18/content_1930713.htm。

5 《中华人民共和国宪法》，注释2，第五十八条、第六十七条；《中华人民共和国立法法》，注释4，第七条、第四十五条。

6 《中华人民共和国宪法》，注释2，第八十九条；《中华人民共和国立法法》，注释4，第六十五条。

7 《中华人民共和国立法法》，注释4，第七十二条。

8 *同上*，第八十七条。

9 *见，例如*，《中华人民共和国行政诉讼法》，1989年4月4日通过和公布，1990年10月1日起施行，经两次修正，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_2024894.htm。第六十三条规定："人民法院审理行政案件，以法律和行政法规、地方性法规为依据。地方性法规适用于本行政区域内发生的行政案件。[...]人民法院审理行政案件，参照规章。"

10 《最高人民法院关于司法解释工作的规定》，2006年12月11日由最高人民法院审判委员会通过，2007年3月9日公布，2007年4月1日起施行，http://www.npc.gov.cn/npc/xinwen/fztd/sfgz/2007-03/23/content_362927.htm。

11 *同上*，第二十七条。该条规定："司法解释施行后，人民法院作为裁判依据的，应当在司法文书中援引。人民法院同时引用法律和司法解释作为裁判依据的，应当先援引法律，后援引司法解释。"

12 *见*注释9。

The Importance of Guiding Cases for U.S. Courts in Determining Chinese Law, A Trial Lawyer's Perspective*

James McManis
Founder and Partner, McManis Faulkner
Fellow, International Academy of Trial Lawyers ("IATL")
Chair, IATL China Program

In drawing attention to the broad latitude afforded to a U.S. federal judge in making a determination of foreign law under Rule 44.1 of the Federal Rules of Civil Procedure ("FRCP 44.1"), the U.S. Supreme Court's decision in *Animal Science Products, Inc., et al. v. Hebei Welcome Pharmaceutical Co. Ltd., et al.* (commonly known as the "*Vitamin C* case") makes it worthwhile to examine the importance of China's Guiding Cases ("GCs") in determining Chinese law.

FRCP 44.1 provides:

> A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any *relevant material* or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law. (emphasis added)

China's Supreme People's Court (the "SPC") has stated that GCs are issued in accordance with the *Provisions of the Supreme People's Court Concerning Work on Case Guidance*,[1] which was formulated to achieve the goals of "summariz[ing] adjudication experiences, unify[ing] the application of law, enhanc[ing] adjudication quality, and safeguard[ing] judicial impartiality".[2] In particular, courts at all levels in China have been instructed to refer to GCs when adjudicating similar cases.[3] It seems certain that GCs should, at least, qualify as "relevant material" which a federal judge could consider under FRCP 44.1. But, assuming a GC is relevant to the case at hand, how would a practitioner argue for the applicability of a GC, drawing from the statements of the Supreme Court in the *Vitamin C* case?

In arguing for the applicability of a GC in any given litigation, the trial lawyer must pay attention to the following factors enunciated by the Supreme Court when it explained how a foreign government's statement describing its own law should be considered:

> [R]elevant considerations include the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions.[4]

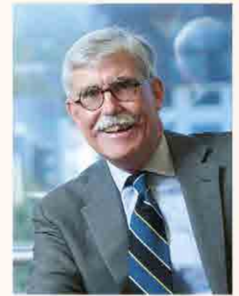
As a result, the trial lawyer must be prepared to address in every instance at least three of the five factors: the clarity, thoroughness, and support of the statement of law found in the GC; the context and purpose of the statement of law contained in the GC; and the consistency of that statement with past positions, presumably other GCs or other cases with guiding effect selected by the SPC,[5] or relevant SPC judicial interpretations[6] or other guidance.

Trial counsel must also be prepared to speak in every case to the two other factors stated in the *Vitamin C* case: the transparency of China's legal system and the role and authority of the SPC in issuing the GC. These factors involve a demonstration of the legitimacy of the Chinese legal system and its highest court. With each passing year, such a demonstration should become more readily achievable.

Another interesting question is presented by the Supreme Court's distinction between the treatment accorded a statement regarding the law of a state of the United States made by that state's highest court and a statement on the subject made by an official of the state:

> If the relevant state law is established by a decision of "the State's highest court," that decision is "binding on the federal courts." [citations omitted] But views of the State's attorney general, while attracting "respectful consideration," do not garner controlling weight.[7]

Reasoning by analogy to the example given above—likening China's Ministry of Commerce to a state's attorney general—the views of the Ministry were given "respectful consideration" but not controlling weight. But would an applicable GC, insofar as GCs are selected and issued by the SPC, be on the same footing as a decision of a state's highest court, and be considered binding in this context? Would a GC's "guiding" nature be used as



James McManis, Founder and Partner of McManis Faulkner, is one of the leading trial lawyers in the United States. After receiving a degree in history from Stanford University, he was awarded a J.D. from Berkeley and began his legal career in San Jose, California, the capital of Silicon Valley. Mr. McManis trained as a prosecutor, trying criminal cases, and then entered private practice, where he tried numerous cases, both civil and criminal, in both federal and state courts. He has been a member of the Bar for over 50 years. His clients include both Silicon Valley companies and individuals in a wide variety of matters.

Mr. McManis is a Fellow of the International Academy of Trial Lawyers (IATL) and has chaired the Academy's renowned China Program for many years, arranging for lawyers from the State Council Legislative Affairs Office, the National People's Congress, and the Central Party School to come to the United States to study the U.S. legal system. He also served on the executive committee of the IATL and chaired its International Relations Committee.

a distinguishing factor, with the court or practitioners drawing distinctions between China's civil law system and the United States' common law system? Or would principles of international comity simply not extend far enough, and the U.S. Supreme Court's treatment of state court decisions be distinguished as rooted in U.S. constitutional law?

In considering the above questions, one should note that Judge GUO Feng, a senior SPC judge who oversees the selection of GCs, explained that GCs are *de facto* binding. He wrote,

> 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.[8]

Whatever the answer to the foregoing questions and other interesting consequences of the *Vitamin C* case are, the work of the China Guiding Cases Project (the "CGCP") of Stanford Law School will be of great assistance to lawyers charged with assisting trial judges when they turn to GCs (or other cases with guiding effect) in trying to determine Chinese law. More and more lawsuits in the United States will require its courts to determine Chinese law, and GCs and the scholarship of the CGCP will continue to grow in importance.

* The citation of this Experts *Connect*™ is: James McManis, *The Importance of Guiding Cases for U.S. Courts in Determining Chinese Law, A Trial Lawyer's Perspective*, 2 China Law Connect 43 (Sept. 2018), *also available at* Stanford Law School China Guiding Cases Project, Experts *Connect*™, Sept. 2018, http://cgc.law.stanford.edu/commentaries/clc-2-201809-connect-4-james-mcmanis.
The original, English version of this Experts *Connect*™ piece was edited by Jordan Corrente Beck, 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 《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, http://cgc.law.stanford.edu/guiding-cases-rules/20101126-english.

2 *Id.*, Preamble.

3 *Id.*, Article 7.

4 *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, 585 U.S. ___, 138 S. Ct. 1865, 1868, 1873–74 (2018). The slip opinion of the Supreme Court is available at https://www.supremecourt.gov/opinions/17pdf/16-1220_3e04.pdf.

5 For more discussion of other cases with guiding effect, 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, http://cgc.law.stanford.edu/guiding-cases-surveys.

6 《最高人民法院关于司法解释工作的规定》 (*Provisions of the Supreme People's Court Concerning Work on Judicial Interpretation*), passed by the Adjudication Committee of the Supreme People's Court on Dec. 11, 2006, issued on Mar. 9, 2007, effective as of Apr. 1, 2007, http://www.npc.gov.cn/npc/xinwen/fztd/sfgz/2007-03/23/content_362927.htm.

7 *Animal Science Products*, 138 S. Ct., *supra* note 4, at 1874.

8 Judge GUO Feng, *On the Issue of the Application of the Supreme Court's Guiding Cases*, 1 China Law Connect 19, 21 (June 2018), *also available at* Stanford Law School China Guiding Cases Project, June 2018, http://cgc.law.stanford.edu/commentaries/clc-1-201806-23-guo-feng.

指导性案例对美国法院确定中国法的重要性：一位出庭律师的视角*

马克己
McManis Faulkner 律师事务所创办人兼合伙人
国际出庭律师学会（"IATL"）院士、中国项目主席

美国联邦最高法院对*Animal Science Products, Inc., et al. v. Hebei Welcome Pharmaceutical Co. Ltd., et al.*（常被称为"《维生素C案》"）一案作出的判决让人们注意到美国联邦法官在根据《联邦民事诉讼规则》第44.1条查明外国法过程中所拥有的广泛自由度。同时，该案也反映出是值得研究中国指导性案例在确定中国法方面的重要性。

《联邦民事诉讼规则》第44.1条规定：

> 欲提出有关外国法律问题的一方当事人必须通过状书或其他书面形式发出通知。在确定外国法时，法院可以考虑任何*相关材料*或来源，包括证词，无论它是否由当事人提交或根据《联邦证据规则》而可采纳的。法院的决定必须被视为对法律问题的裁定。（强调后加）

中国最高人民法院（"最高法"）已指出，指导性案例是按照《最高人民法院关于案例指导工作的规定》发布。[1] 该规定是以"总结审判经验，统一法律适用，提高审判质量，维护司法公正"为目标而制定的。[2] 中国各级人民法院已被指示，在审判类似案件时应当参照指导性案例。[3] 似乎可以肯定的是，指导性案例至少应该能成为美国联邦法官根据《联邦民事诉讼规则》第44.1条而可以考虑的"相关材料"。但是，假设指导性案例与手头的案件相关，依据联邦最高法院在《维生素C案》中的陈述，法律从业者应如何主张指导性案例的适用性？

在任何特定诉讼中主张指导性案例适用性时，出庭律师必须关注联邦最高法院在解释应如何考虑外国政府描述自身法律的声明时，所阐述的以下因素：

> 相关考虑因素包括该声明的明确性、全面性和根据；[该声明的]背景和目的；该外国法律体系的透明性；提供声明的机构或官员的角色和权限；以及该声明与该外国政府此前的立场的一致性。[4]

因此，出庭律师必须准备好在每种情况下至少解说五个因素中的三个：指导性案例中的法律声明的明确性、全面性和根据；指导性案例中的法律声明的背景和目的；以及该声明与过去立场—包括最高法挑选的其他指导性案例或其他具有指导性的案例，[5] 或相关的最高法的司法解释[6]或其他指导——的一致性。

出庭律师还必须准备好在每个案件中说明《维生素C案》中所述的其他两个因素：中国法律体系的透明性，以及最高法发布指导性案例的角色和权限。这些因素涉及对中国法律体系及其最高法院的合法性的证明。每过一年，这种证明应该更容易实现。

另一个有趣的问题是，联邦最高法院对州最高法院做出的关于该州法律的声明与该州官员就该事项做出的声明进行了区分：

> 如果相关州的法律是通过"州最高法院"的决定而确立的，那么该决定"对联邦法院具有约束力"。[引文被省略]但是，州总检察长的意见尽管受到"尊重性的考虑"，却不能获得决定性的效力。[7]

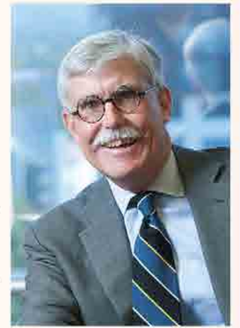
通过对上述例子进行类比推理，将中国商务部比作州总检察长，商务部的意见被给予了"尊重性的考虑"而非决定性效力。但是，在最高法选择和发布指导性案例的情况下，适用的指导性案例是否与州最高法院的决定基本相同，并且被视为具有约束力？还是，法院或从业者将中国的大陆法体系与美国的普通法体系区分开来，进而把指导性案例的"指导性"性质用作区分因素？又或者国际礼让原则还是伸展不够，因此美国联邦最高法院对州法院判决的处理会被视为源于美国宪法而不能应用于其他体系？

在考虑上述问题时，应当注意到郭锋法官，一位主管指导性案例挑选的最高法高级法官，解释说指导性案例具有事实约束力。他写道：

> 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。[8]

无论上述问题的答案和《维生素C案》的其他有趣后果是什么，斯坦福法学院中国指导性案例项目（"CGCP"）的工作将对那些负责通过指导性案例（或其他具指导性的案例）以查明中国法来协助审判法官的律师提供很大帮助。美国越来越多的诉讼将需要法院确定中国法律，而指导性案例和CGCP的研究的重要性将持续增加。■

马克已（James McManis）是McManis Faulkner律师事务所创办人兼合伙人、美国最优秀的出庭律师之一。他先于斯坦福大学取得历史学位，后又在加州大学伯克利分校取得了法律博士学位，继而在硅谷大本营——加州圣荷西，开始了法律职业生涯。马先生作为检察官出身，处理刑事案件，而后开始私人执业，在联邦及州法院代理了不计其数的民事和刑事案件。他成为律师已有50多年。他的客户包括硅谷的公司和个人，业务涉猎范围广泛。



马先生是国际出庭律师学会（International Academy of Trial Lawyers）的院士，他主管该学会知名的中国项目多年，安排国务院法制办公室、全国人民代表大会及中央党校的律师赴美学习美国法律体系。马先生也曾是国际出庭律师学会执行委员会委员及该学会国际关系委员会会长。

---

* 此专家*连接*™的引用是：马克已，指导性案例对美国法院确定中国法的重要性：一位出庭律师的视角，《中国法律连接》，第2期，第45页（2018年9月），*亦见于*斯坦福大学法学院中国指导性案例项目，专家*连接*™，2018年9月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-2-201809-connect-4-james-mcmanis。
英文原文由Jordan Corrente Beck、Dimitri Phillips和熊美英博士编辑。本中文版本由马越、朱琳翻译，并由罗雯和熊美英博士最后审阅。载于本专家*连接*™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] 《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。

[2] *同上*，序言。

[3] *同上*，第七条。

[4] *Animal Science Products, Inc.* 诉 *Hebei Welcome Pharmaceutical Co. Ltd.*，585 U.S. ___，138 S. Ct. 1865，第1868、1873–74页（2018）。联邦最高法院的判决意见书单行本可见于 https://www.supremecourt.gov/opinions/17pdf/16-1220_3e04.pdf。

[5] 关于对其他具指导性的案例的讨论， 见熊美英、张宸宸、黄鹂，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，http://cgc.law.stanford.edu/guiding-cases-surveys。

[6] 《最高人民法院关于司法解释工作的规定》，2006年12月11日由最高人民法院审判委员会通过，2007年3月9日公布，2007年4月1日起施行，http://www.npc.gov.cn/npc/xinwen/fztd/sfgz/2007-03/23/content_362927.htm。

[7] *Animal Science Products*，注释4，第1874页。

[8] 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，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-1-201806-23-guo-feng。

U.S. Antidumping Law and the *Vitamin C* Case: An Important but Forgotten Issue*

William E. Perry

Partner, Harris Bricken

Much of the discussion of the U.S. Supreme Court's decision in *Animal Science Products, Inc., et al. v. Hebei Welcome Pharmaceutical Co. Ltd., et. al.* (commonly known as the "*Vitamin C* case") is focused on the holding that a foreign government's statement about its own law has no conclusive effect on the federal court determining the foreign law.[1] The statement at issue was one provided by China's Ministry of Commerce ("MOFCOM") explaining that it had ordered Chinese vitamin C exporters and their trade association (i.e., the Chamber of Commerce of Medicines and Health Products Importers and Exporters; the "Chamber") to set a price floor for vitamin C exports and that these parties should, therefore, be shielded from liability under U.S. antitrust law.

Lost in the proceedings in the Federal District Court, the Second Circuit, and the Supreme Court is the reason the Chamber and the Chinese companies set a price floor with the help of MOFCOM. It was not done to gouge U.S. importers but rather because of the Chamber's, MOFCOM's, and the Chinese companies' justified real fear of a U.S. antidumping case, which could wipe out all Chinese vitamin C from the U.S. market for decades and expose the U.S. importers—the same parties who initiated the *Vitamin C* antitrust case—to millions of dollars in retroactive liability.

China's Preemptive Measure Against a U.S. Antidumping Case

On July 9, 2003, the U.S. Department of Commerce (the "DOC") issued an antidumping duty order, imposing 249.39–329.24 percent antidumping rates on saccharin imported from China.[2] As a result, any U.S. importer seeking to import saccharin into the United States from China was required to pay, as the antidumping cash deposit, 249.39 to 329.24 percent of the entered value, (i.e., the value of the import). Because of this order, most Chinese saccharin was shut out of the United States until 2015, when the antidumping order was finally lifted.[3]

Fearing that China's vitamin C exports would have the same fate as its saccharin exports if the DOC initiated an antidumping investigation, the Chamber and MOFCOM, together with Chinese vitamin C exporters, sought my advice because I represented the Chinese saccharin exporters and many U.S. importers in that case.

After the antidumping order was issued, the Chamber invited me to a meeting in Beijing with the vitamin C exporters and MOFCOM. Because of the DOC's decision in the *Saccharin* antidumping case, the Chamber and MOFCOM were very afraid that the United States or some other country would launch an antidumping case against vitamin C exports resulting in the total exclusion of vitamin C from the U.S. market or that foreign market.

When asked what the companies could do, I suggested that the companies, with the help of the Chamber and the Chinese government, could set a price floor, as this strategy had been very successful to deter U.S. antidumping cases against other Chinese products. But I went on to state that MOFCOM should pass a regulation or law to specifically insulate the vitamin C exporters from any potential antitrust liability.

In response, the MOFCOM official said that the Chinese government could not take such an action, the reason for which, as I learned later, was that China had agreed in the *U.S.–China Bilateral WTO Agreement*[4] not to put any restraints on exports.

Fear of a U.S. Antidumping Case Was and Is Justified

The question is whether the fear of a U.S. antidumping case against Chinese vitamin C products was justified. It sure was.

Many past and present cases show that such fears were and are absolutely justified. Many pundits may declare that Chinese companies can know when they are dumping and simply eliminate the practice. In his 2018 book, *Trump's America: The Truth About Our Nation's Greatest Comeback*, former Speaker of the U.S. House of Representatives Newt Gingrich describes in detail the strategy behind the Trump Administration's trade policy and explains why trade deficits matter. Mr. Gingrich makes the strong argument that trade agreements must be renegotiated because other countries have blatantly taken advantage of the low tariffs set by the United States, and that it is extremely important for the United States to have a strong manufacturing base.[5] However, with respect to China, Mr. Gingrich makes an incorrect point by

William E. Perry, Partner of Harris Bricken, is an attorney who has focused on trade policy and assisted clients with international trade issues for over 30 years. From 1980 to 1987, Mr. Perry worked in the Office of General Counsel at the U.S. International Trade Commission and the Office of Chief Counsel and the Office of Antidumping Investigations at the U.S. Department of Commerce. Mr. Perry has extensive experience representing U.S. and foreign companies in antidumping and countervailing duty cases, and has won over 50 trade cases in private practice. He writes about trade policy on his blog, US China Trade War (https://uschinatradewar.com/), on a regular basis.

United States Department of Commerce (Photo credit: William E. Perry)

stating that Chinese companies are cheating and engaged in unfair trade because they are dumping. He writes:

> Dumping is a technical term for what happens when a foreign entity (in this case, China) floods a market with goods that are priced substantially lower than the price in the country where they are made. The goal of dumping is to drive other manufacturers out of business by dramatically underbidding them on prices.[6]

In fact, in simplistic terms, dumping is defined as the selling of goods at prices in the United States below prices in the home market or below the fully allocated cost of production.

In the case of China, however, the DOC does not look at Chinese home market prices or Chinese costs and compare them with prices in the United States to determine whether there is dumping. Instead, the DOC considers China to be a "nonmarket economy" country where all prices and costs are set by the government. Although this may be true with respect to steel and aluminum, where state ownership dominates the industry, does the Chinese government really set the prices of preserved mushrooms, crawfish tail meat, garlic, hardwood plywood, wooden bedroom furniture, and many other products in China?

To determine whether Chinese exporters engage in dumping, the DOC uses a more complicated method. It constructs a cost of production for the Chinese company by using "consumption factors" in China (e.g., the amount of raw materials, energy, and labor used to produce a product in China) and then multiplies those "consumption factors" by surrogate values (i.e., values from import statistics in a surrogate country). The DOC will then add certain percentages for overhead, "selling, general, and administrative" expenses, and profit by referencing a financial statement of a company producing a comparable product in the surrogate country. The comparable product need not be identical to the product under investigation.

When antidumping cases were brought against China in the 1990s and 2000s, the DOC always looked to India as the surrogate country. This allowed law firms to dig down

The White House (Photo credit: William E. Perry)

and find the surrogate values in India that were most comparable to market prices in China. Approximately 10 years ago, however, the DOC determined that China had become too advanced to continue to regard India as having a comparable economy for these purposes. As a result, the DOC altered its practice and began using a basket of comparable countries. It now looks at import statistics from a number of different countries, including Bulgaria, Colombia, Ecuador, Indonesia, Mexico, Peru, the Philippines, Romania, Thailand, and Ukraine. From these countries, the DOC picks a surrogate country and then uses imports statistics of the specific country to obtain the surrogate values for the specific case.

During the investigation itself, the DOC can switch the surrogate country from the preliminary to the final determination, thereby completely changing the surrogate values used to construct the cost for the specific company. Following the issuance of an antidumping order, the DOC conducts review investigations every year, and it can switch surrogate countries between its initial investigation and a review investigation and between different review investigations. Because a Chinese company cannot know which country the DOC will select as a surrogate country, it cannot really know whether or not it is dumping. In fact, because of this nonmarket economy methodology, the DOC itself cannot know whether a Chinese company is truly dumping.

Two cases illustrate how this methodology works in practice. The first is the above-mentioned *Saccharin* case. In the initial investigation of Chinese saccharin exports, the DOC chose the highest surrogate values it could find to drive dumping rates above 200 percent. One of the raw material inputs for saccharin was sodium hypochlorite, a water-based chemical. This chemical is sold based on the amount of active chemical in the water. For example, when ten tons of sodium hypochlorite are sold, in fact, the sodium hypochlorite is nine tons of water, one ton of sodium hypochlorite. The price for the chemical is, in reality, determined only for the one metric ton of active chemical, sodium hypochlorite, not the nine tons of water. In the initial investigation of Chinese saccharin exports, however, the DOC valued all ten tons of sodium hypochlorite, including the nine tons of water, substantially inflating the cost of producing saccharin, which was already hyperinflated due to the very high surrogate value that the DOC selected.

Another case that illustrates how the surrogate value methodology operates is the *Certain Preserved Mushrooms from the People's Republic of China* case (the "*Preserved Mushrooms* case"). In 1998, U.S. mushroom producers

filed an antidumping case against Chinese exporters of preserved mushrooms. After the antidumping order was issued in December 1998,[7] Chinese producers, through a series of annual review investigations from 1998 to 2012, were able to obtain antidumping rates ranging from zero to over 100 percent.[8] However, in the 2012 antidumping review investigation, the calculated antidumping rates for all of the Chinese producers/exporters skyrocketed to 223.74 to 308.33 percent.[9] The increase was solely due to the DOC's change of the surrogate country from India to Colombia. The DOC used as surrogate values import statistics for rice straw and cow manure into Colombia that were multiple times higher than prices for the same inputs in India. One question is how much straw and cow manure is actually imported into Colombia?

The point is that the actual antidumping rates have no relationship to actual prices and costs in China, and thus the Chamber and the vitamin C companies were more than justified in fearing a U.S. antidumping case.

One may ask: how often does the DOC find dumping in antidumping cases against China? With this methodology and by regulation, the DOC must find dumping in 100 percent of the cases against China. The DOC is a hanging judge.

Because of the arbitrariness and one-sided nature of the DOC's antidumping procedure, one could understand why the Chamber and the companies were extremely concerned about U.S. antidumping cases and antidumping cases in other countries.

But one may ask: how long do antidumping orders stay in place? In the *Saccharin* case, the antidumping order lasted for more than a decade (i.e., from 2003 to 2015). In the *Preserved Mushrooms* case, the antidumping order has been in effect for two decades (i.e., from 1998 to the present). In the *Potassium Permanganate* case, the antidumping order, which was issued to protect Carus Chemical, the sole company in the industry in the United States, has been in place for 34 years (i.e., from 1984 to the present).[10]

U.S. Regulatory Mechanism Hurts Both Chinese and U.S. Companies

The above discussion analyzes the forgotten issue in the *Vitamin C* case about why MOFCOM covertly forced the Chinese companies, through the Chamber, to create a price floor. However, there is another important dimension to this issue: China is not the only victim; U.S. importers could be seriously hurt if an antidumping order against Chinese vitamin C exports were issued.

The United States is the only country in the world that has retroactive liability for U.S. importers in an antidumping case. If antidumping rates go up because the DOC changes the surrogate country in a review investigation, U.S. importers must pay the difference between the initial cash deposit, which may be in single digits, and the final rates decided by the DOC during the annual review investigation, which may be in three digits. These inflated antidumping rates create millions of dollars in retroactive liability for U.S. importers.

The *Vitamin C* case reveals a real challenge facing Chinese exporters. If their exports are sold at low prices, the U.S. government can hit them with antidumping cases. If the prices are too high, the U.S. government can hit them with antitrust cases. The unfairness in this case does not come from China. ■

* The citation of this Experts *Connect*™ is: William E. Perry, *U.S. Antidumping Law and the* Vitamin C *Case: An Important but Forgotten Issue*, 2 China Law Connect 47 (Sept. 2018), *also available at* Stanford Law School China Guiding Cases Project, Experts *Connect*™, Sept. 2018, http://cgc.law.stanford.edu/commentaries/clc-2-201809-connect-5-william-perry.
The original, English version of this Experts *Connect*™ piece was edited by Jeremy Schlosser, Sean Webb, 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 *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, 585 U.S. ___, 138 S. Ct. 1865 (2018). The slip opinion of the Supreme Court is available at https://www.supremecourt.gov/opinions/17pdf/16-1220_3e04.pdf.

2 Notice of Antidumping Duty Order: Saccharin from the People's Republic of China, 68 Fed. Reg. 40906 (July 9, 2003), https://www.federalregister.gov/documents/2003/07/09/03-17375/notice-of-antidumping-duty-order-saccharin-from-the-peoples-republic-of-china.

3 *See* Saccharin from the People's Republic of China: Revocation of the Antidumping Duty Order, 80 Fed. Reg. 32533 (June 9, 2015), https://www.federalregister.gov/documents/2015/06/09/2015-14069/saccharin-from-the-peoples-republic-of-china-revocation-of-the-antidumping-duty-order.

4 For a summary of the agreement, see, e.g., Summary of U.S.–China Bilateral WTO Agreement, November 16, 1999, https://clintonwhitehouse4.archives.gov/textonly/WH/new/WTO-Conf-1999/factsheets/fs-006.html.

5 Newt Gingrich, *Comeback of Sovereignty, Ending the New World Order*, *in* Trump's America: The Truth About Our Nation's Greatest Comeback 58–84 (Center Street, 2018).

6 *Id.* at 340–41.

7 Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from the People's Republic of China, 63 Fed. Reg. 72255 (Dec. 31, 1998), https://www.gpo.gov/fdsys/pkg/FR-1998-12-31/pdf/98-34704.pdf.

8 *See* Preserved Mushrooms from Chile, China, India, and Indonesia, Inv. Nos. 731-TA-776-779 (Second Review), USITC Pub. 4135 at I-4, https://www.usitc.gov/publications/701_731/pub4135.pdf.

9 Certain Preserved Mushrooms from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 77 Fed. Reg. 55809 (Sept. 11, 2012), https://www.gpo.gov/fdsys/pkg/FR-2012-09-11/pdf/2012-22353.pdf.

10 Antidumping Duty Order; Potassium Permanganate from the People's Republic of China, 49 Fed. Reg. 3897 (Jan. 31, 1984).

美国反倾销法和《维生素C案》：一个重要却被遗忘的问题*

William E. Perry
Harris Bricken 律师事务所合伙人

对美国联邦最高法院在*Animal Science Products, Inc., et al.*诉*Hebei Welcome Pharmaceutical Co. Ltd., et. al.*（常被称为"《维生素C案》"）一案的讨论，大部分围绕在该案的判决，即外国政府就其本国法律的声明对联邦法院如何确定该国法律没有定论性影响。[1] 该案受争议的是中国商务部提供的一份声明，说明其已下令中国维生素C出口商及他们的贸易协会（即医药保健品进出口商会；"商会"）就维生素C出口设定价格下限，而因此，这些出口商应免除承担美国反垄断法相关的责任。

在联邦地区法院、第二巡回上诉法院和最高法院的诉讼程序中，都没有探讨商会和中国公司在中国商务部帮助下设定价格下限的原因。当中原因不是为了占美国进口商便宜，而是因为商会、中国商务部和中国公司实实在在担心美国提起反倾销案，导致所有中国维生素C有可能从美国市场上消失几十年，并使美国进口商们（亦是发起《维生素C反垄断案》的一方）有可能要承担数百万美元的追溯责任。

中国针对美国反倾销案的先发制人措施

2003年7月9日，美国商务部发布反倾销税令，对从中国进口的糖精征收249.39%至329.24%的反倾销税。[2] 因此，任何欲从中国进口糖精的美国进口商都需要支付反倾销现金存款，即输入价值（指进口价值）的249.39%至329.24%。就是因为这反倾销税令，大多数中国糖精被美国拒之门外，直到2015年该税令终于被解除。[3]

由于担心美国商务部一旦启动反倾销调查，中国出口的维生素C将会和当年出口的糖精面临同样的命运，商会、中国商务部，连同中国维生素C出口商，寻求我的建议，因为我在糖精案中代表了中国糖精出口商和许多美国进口商。

在[针对中国进口糖精的]反倾销令发布后，商会邀请我到北京与维生素C出口商和中国商务部会面。由于美国商务部在糖精反倾销案中作出的决定，商会和中国商务部非常担心美国或其他国家会针对维生素C出口发起反倾销案，导致中国的维生素C被完全排除在美国或国外市场之外。

当我被问及中国公司可以做些什么时，我建议这些公司在商会和中国政府的帮助下设定价格下限，因为这一策略曾非常成功地阻止了美国对其他中国产品的反倾销案。但我接着说，中国商务部还应通过一项法规或法律，专门保护维生素C出口商免除他们承担任何潜在的反垄断责任。

对此，中国商务部官员表示中国政府无法这样做。我后来了解到其原因是中国在《中美双边WTO协议》[4]中同意对出口不施加任何限制。

对美国反倾销案的担心一直都是有理可循的

问题在于对美国针对中国维生素C产品的反倾销案的担心是否有理可循？当然有。

许多过去和现在的案例表明，这种担忧是绝对合理的。许多权威人士可能会宣称，中国公司能够知道自己何时倾销，他们停止其行为就是了。美国众议院前发言人Newt Gingrich 在其2018年出版的名为《川普下的美国：我们国家最伟大的回归崛起之真相》（Trump's America: The Truth About Our Nation's Greatest Comeback）书中，详细描述了川普政府下的贸易政策背后的策略，并解释了贸易逆差为何如此重要。

Gingrich先生强烈主张必须重新谈判贸易协定，因为其他国家公然利用美国设定的低关税而获得好处。他亦指出美国拥有强大的制造业基础极为重要。[5] 然而，就中国而言，Gingrich先生在谈到中国公司通过倾销作弊进行不公平贸易时，提出了一点是不正确的。他写道：

> 倾销是技术性名词，指外国实体（在此指中国）将商品以远低于原产国价格的定价涌入市场中。倾销的目的是通过大幅降低价格使其他制造商不能继续经营。[6]

事实上，简单来说，倾销被定义为在美国以低于本地市场价格或低于完全分配生产成本的价格销售商品。

然而，就中国而言，美国商务部不会看中国本地市场价格或中国成本，并将其与美国的价格进行比较，以确定是否存在倾销。美国商务部认为中国是"非市场经济"国家，所有价格和成本均由政府设定。在钢铁和铝上或许确是如此，这两个产业都是国有企业主导。但是中国政府真的给保鲜蘑菇、小龙虾尾肉、大蒜、硬木胶合板、木制卧室家具和其他许多产品设定价格吗？

William E. Perry 先生是Harris Bricken律师事务所合伙人，也是一名专注于贸易政策、协助客户处理国际贸易问题超过30年的律师。从1980年到1987年，Perry先生在美国国际贸易委员会总法律顾问办公室，以及美国商务部首席律师办公室和反倾销调查办公室工作。Perry先生在反倾销和反补贴税案件中曾代表美国和外国公司，经验丰富，在其私人执业生涯中，曾在50多个贸易案中获胜。他还定期在“美国中国贸易战”博客（https://uschinatradewar.com/）上撰写有关贸易政策的文章。

美国商务部（照片来源：William E. Perry）

为了确定中国出口商是否进行倾销，美国商务部采用了更复杂的方法。它用中国的“消费因素”（如，在中国生产一产品所需要的原材料数量、能源和劳动力）来构建中国公司的生产成本，再将这些“消费因素”乘以替代价值　（即来自替代国的进口数据的值）。然后，美国商务部通过参考替代国中一家生产可比产品的公司的财务报表，涨几个百分点，作为管理费用、“销售、一般和行政”费用和利润。这个可比产品不需要和被调查产品是一样的。

在1990–2000年间，每每有针对中国的反倾销案，美国商务部总是以印度作为替代国。这使得律师事务所能刨根究底，查找在印度与中国市场价格最具可比性的替代值。然而，在约10年前，美国商务部认为中国已经变得很先进，不能继续以印度作为一个可比经济体。于是，商务部改变了其做法，开始使用一篮子的可比国家。现在商务部会看多个国家的进口数据，包括保加利亚、哥伦比亚、厄瓜多尔、印度尼西亚、墨西哥、秘鲁、菲律宾、罗马尼亚、泰国和乌克兰。从这些国家中，商务部选择一个替代国，以其进口数据为特定案件取得替代值。

在调查期间，美国商务部可以更换替代国，使调查初始阶段和最终确认阶段所用国家不一样，由此完全改变用于构建某公司成本的替代值。在发布反倾销令之后，美国商务部每年会进行审查调查。从初步调查到审查调查，以及不同的审查调查期间，商务部都可以更换替代国。由于中国的公司无从知晓美国商务部会选择哪个国家作为替代国，自然也无从确认自己是否在倾销。事实上，按照这种非市场经济方法，美国商务部自己都不能确定中国公司是否真的在倾销。

两个案例说明了这种方法在实践中如何运作。第一个是上面提到的《糖精案》。在对中国糖精出口的初步调查中，美国商务部选择了能够找到的最高替代值，将倾销率推高到200%以上。糖精的原材料之一是次氯酸钠，一种水基化学品。这种化学品是根据水中活性化学物质的含量出售的。例如，当销售10吨次氯酸钠时，其实是九吨水，一吨次氯酸钠。在现实中，这种化学品的价格取决于当中的一公吨活性化学品，也就是次氯酸钠，而非九吨水。然而，在对中国糖精出口的初步调查中，美国商务部对包括九吨水在内的整整十吨次氯酸安进行了估价，大幅虚增了生产糖精的

白宫（照片来源：William E. Perry）

成本。由于美国商务部选择的替代价值很高，糖精成本本身已经虚高了。

另一个说明替代值方法如何运作的案例是*Certain Preserved Mushrooms from the People's Republic of China*（"《保鲜蘑菇案》"）。1998年，美国蘑菇生产商对中国保鲜蘑菇出口商提起反倾销案。在1998年12月发布反倾销令后，[7] 中国生产商通过1998年至2012年的一系列年度审查调查，获得了从零到超过100%的反倾销税率。[8] 然而，在2012年反倾销审查调查中，中国所有生产商/出口商的反倾销率飙升至223.74%至308.33%。[9] 这一增长完全是由于美国商务部将替代国从印度改为了哥伦比亚。美国商务部将哥伦比亚稻草和牛粪的进口统计数据用作替代值，这些数据比印度同类产品的价格高出数倍。那问题来了，到底有多少稻草和牛粪实际进口到哥伦比亚？

以上讨论的重点在于实际的反倾销率与中国的实际价格和成本无关，因此商会和维生素C公司担心美国反倾销案是十分合理的。

有人可能会问，美国商务部在对中国的反倾销案件中有几次是判定存在倾销的？按照这种方法和监管，美国商务部能在针对中国的反倾销案中百分之百判定存在倾销行为。商务部犹如一名严厉的判刑官。

由于美国商务部反倾销程序的随意性和片面性，人们可以理解为什么商会及[维生素C]公司极其关注美国和其他国家的反倾销案件。

但有人可能会问，反倾销令生效多久？在《糖精案》中，反倾销令持续了十多年（即从2003到2015）。在《保鲜蘑菇案》中，反倾销令已经实施了二十年（即从1998到现在）。在《高锰酸钾案》中，为保护Carus Chemical而发布的反倾销命令已经实施了34年（即从1984年到现在），Carus Chemical是美国该产业中唯一的公司。[10]

美国的监管机制同时损害中国和美国的公司

以上讨论分析了《维生素C案》中被遗忘的问题，即中国商务部为什么会通过商会暗中强迫中国公司设立价格下限。然而，这个问题还有另一个重要方面：中国不是唯一的受害者；如果发布针对中国维生素C出口的反倾销令，美国进口商可能会受到严重损害。

美国是世界上唯一一个在反倾销案中使美国进口商负有追溯责任的国家。如果因为美国商务部在审查调查中改变了替代国导致反倾销率上升，美国进口商必须支付初始现金存款与商务部在年度审查调查中决定的最终数额间的差额；前者可能只是个位数，后者则可能是三位数。这些膨胀的反倾销率为美国进口商带来了数百万美元的追溯责任。

《维生素C案》揭示了中国出口商面临的真正挑战。如果他们的出口产品以低价出售，美国政府可以用反倾销案来打击他们。如果价格太高，美国政府可以用反垄断来打击他们。此案的不公平并非来自中国。

* 此专家*连接*™的引用是：William E. Perry，美国反倾销法和《维生素C案》：一个重要却被遗忘的问题，《中国法律连接》，第2期，第51页（2018年9月），*亦见于*斯坦福法学院中国指导性案例项目，专家*连接*™，2018年9月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-2-201809-connect-5-william-perry。
英文原文由Jeremy Schlosser、Sean Webb、Dimitri Phillips和熊美英博士编辑。本中文版本由马越、周墨奇翻译，并由黄莉莎和熊美英博士最后审阅。载于本专家*连接*™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] *Animal Science Products, Inc. 诉 Hebei Welcome Pharmaceutical Co. Ltd.*，585 U.S. ___，138 S. Ct. 1865 （2018）。联邦最高法院的判决意见书单行本可见于 https://www.supremecourt.gov/opinions/17pdf/16-1220_3e04.pdf。

[2] Notice of Antidumping Duty Order: Saccharin from the People's Republic of China，68 Fed. Reg. 40906 （2003年7月9日），https://www.federalregister.gov/documents/2003/07/09/03-17375/notice-of-antidumping-duty-order-saccharin-from-the-peoples-republic-of-china。

[3] *见*Saccharin from the People's Republic of China: Revocation of the Antidumping Duty Order，80 Fed. Reg. 32533 （2015年6月9日），https://www.federalregister.gov/documents/2015/06/09/2015-14069/saccharin-from-the-peoples-republic-of-china-revocation-of-the-antidumping-duty-order。

[4] 有关协议的摘要，见，例如，Summary of U.S.- China Bilateral WTO Agreement，1999年11月16日，https://clintonwhitehouse4.archives.gov/textonly/WH/new/WTO-Conf-1999/factsheets/fs-006.html。

[5] Newt Gingrich，*Comeback of Sovereignty, Ending the New World Order*，*载于* TRUMP'S AMERICA: THE TRUTH ABOUT OUR NATION'S GREATEST COMEBACK，第58–84页（Center Street，2018）。

[6] *同上*，第340–41页。

[7] Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from the People's Republic of China，63 Fed. Reg. 72255 （1998年12月31日），https://www.gpo.gov/fdsys/pkg/FR-1998-12-31/pdf/98-34704.pdf。

[8] *见*Preserved Mushrooms from Chile, China, India, and Indonesia，Inv. Nos. 731-TA-776-779 (Second Review)，USITC Pub. 4135 at I-4，https://www.usitc.gov/publications/701_731/pub4135.pdf。

[9] Certain Preserved Mushrooms from the People's Republic of China: Final Results of Antidumping Duty Administrative Review，77 Fed. Reg. 55809 （2012年9月11日），https://www.gpo.gov/fdsys/pkg/FR-2012-09-11/pdf/2012-22353.pdf。

[10] Antidumping Duty Order; Potassium Permanganate from the People's Republic of China，49 Fed. Reg. 3897 （1984年1月31日）。

CGCP Interview: James McManis*

Jordan Corrente Beck
Associate Managing Editor of the China Guiding Cases Project
Associate at Debevoise & Plimpton LLP

"[...] it is—or should be—a universal principle of trial advocacy that the lawyer must always put the client's interests ahead of his own."
—James McManis

- ***You have been active in initiatives to foster legal development and exchange in China, including your role as Chair of the China Program of the International Academy of Trial Lawyers (the "IATL") and Founder of the McManis-Wigh China Foundation. How did your "China journey" begin?***

In 2001, I was admitted to the IATL, an honorary society reportedly composed of the top 500 trial lawyers in the United States. I was told that the best program in the Academy was its China Program, which was established in 1994 to assist China in developing its legal system. Each year, the Program brought ten of the top government lawyers from China to the United States, assigning each to live with an IATL fellow and the fellow's family for two weeks to learn about the professional and personal life of an American trial lawyer. The Chinese lawyers were called "delegates" for some reason. My wife, Sara Wigh, and I hosted three delegates, and we were hooked from the outset. I cannot say how much the delegates learned about the U.S. legal system, but I can say Sara and I learned a great deal about China from our time with our delegates, whom to this day we consider good friends.

I did not know a lot about China before we welcomed our first delegate, but I was so inspired by the experience of hosting a top Chinese lawyer that I began buying books about China and learning everything I could about its history, culture, art, and music. What a wonderful country!

In 2009, Sara and I were honored when the Academy asked us to co-chair the China Program after its founders, Ray and Audrey Tam, retired. As chairs of the Program, we traveled to Beijing each fall to interview 25 candidates nominated by the Chinese government, and select ten to come to the United States. The interviews took about a week. After we made our selection, the government would then take us to one of the provinces to learn more about China and to promote the China Program. We visited Fujian, Guizhou, Zhejiang, and Shandong provinces, among others, and the municipalities of Nanjing and Suzhou.

Shortly after we became co-chairs of the China Program, we established the McManis-Wigh China Foundation to supplement the IATL's support of the Program. Although, due to China's changing needs, the above-mentioned training of Chinese lawyers is not currently running, we are exploring other opportunities for U.S. lawyers to contribute their expertise to deepen U.S.-China understanding. The McManis-Wigh China Foundation, however, has also expanded to fund other China initiatives, such as the Dui Hua Foundation, the China Guiding Cases Project (the "CGCP"), and Chinese artists and other cultural figures.

- ***What do you feel are the major milestones of your work related to China? Is there anything you look back on and think, "That was pivotal to shaping my understanding of China" or "That was a particular turning point for me" or "I am particularly proud of that"?***

On a personal note, Sara and I grew to understand China from our travel to and about the country, and, more importantly, from the many friendships we made with the China Program delegates, as well as the government officials who managed the Program at the Chinese end. Professionally, I cannot overstate the learning experience that resulted from the time spent with China's top government lawyers, from such bodies as the Legislative Affairs Office of the State Council, the National People's Congress, the Central Party School, and other ministries and offices of the People's Republic of China. Sara and I are proud of whatever contributions we, and the other fellows and spouses of the IATL, have made to an understanding of the U.S. legal system by China's top lawyers. It is a two-way street. The American trial lawyers have learned a lot about China and the Chinese people that they would never have had the opportunity to learn but for our legal exchange program. And vice versa, I believe that the over 200 Chinese government lawyers the China Program has served were and continue to be benefitted as well. This experience has made me think that legal exchange programs are marvelous. They really help people get to know each other.

- ***In your comments made during the CGCP panel at the World Bank Group's Law, Justice and Development Week***

To view an excerpt of the full interview of James McManis, visit the CGCP *Classroom*™ at https://cgc.law.stanford.edu/cgcp-classroom-lesson-7.

James McManis
Founder and Partner, McManis Faulkner
Fellow, International Academy of Trial Lawyers ("IATL")
Chair, IATL China Program

James McManis is one of the leading trial lawyers in the United States. After receiving a degree in history from Stanford University, he was awarded a J.D. from Berkeley and began his legal career in San Jose, California, the capital of Silicon Valley. Mr. McManis trained as a prosecutor, trying criminal cases, and then entered private practice, where he tried numerous cases, both civil and criminal, in both federal and state courts. He has been a member of the Bar for over 50 years. His clients include both Silicon Valley companies and individuals in a wide variety of matters.

Mr. McManis is a Fellow of the International Academy of Trial Lawyers (the "IATL") and has chaired the Academy's renowned China Program for many years, arranging for lawyers from the State Council Legislative Affairs Office, the National People's Congress, and the Central Party School to come to the United States to study the U.S. legal system. He also served on the executive committee of the IATL and chaired its International Relations Committee.

Mr. McManis was a keynote speaker at the 2015 Stanford University China Law and Policy Conference. He was also a panelist at the U.S.–China Legal Exchange sponsored by the U.S. Department of Commerce and Stanford University in 2016. In addition, he spoke on a panel titled "The Role of 'Precedents'/Guiding Cases in the Effective Application, Interpretation, and Implementation of Law: Comparative Experiences from China, Japan and the United States" at the World Bank Group's Law, Justice and Development Week 2015. At the March 2018 conference titled "China's Case Guidance System and Belt & Road Initiative: Practical Insights and Prospects" held in Beijing by the China Guiding Cases Project, Mr. McManis spoke on the "Cases, Commercial Law, and Related Practical Insights" panel and served as a distinguished discussant of a moot court presided over by Judge William A. Fletcher of the United States 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 P. Wood of United States Court of Appeals for the Seventh Circuit.

In addition to membership in the American College of Trial Lawyers, the American Bar Foundation, and Litigation Counsel of America, Mr. McManis is an honorary bencher in The Honorable Society of King's Inns, Ireland's oldest legal institution. Mr. McManis is proud of his Irish heritage, noting it was the Irish and the Chinese who built the first transcontinental railroad in America.

2015, you referenced the U.S. Supreme Court debate on how much (if any) of a role foreign legal systems should play in the decision-making process of U.S. judges. Has your involvement in the China Program changed how you view the place of foreign laws in U .S. courts?

Not at all—in fact, quite the contrary. I think the United States can learn a lot from the legal systems of other countries, including China. There is a lot to learn both ways. In its opinion about the *Vitamin C* case, the Second Circuit noted that U.S. courts should defer to a foreign government's statements regarding the interpretation and effect of its laws, unless those statements are unreasonable. Prior to the release of the Supreme Court's decision, I predicted that the Supreme Court would not be quite that deferential but would, however, recognize that a foreign government's views are entitled to receive respectful consideration. Indeed, the Supreme Court made this view clear in its judgment.[1]

- ***In addition to being a friend of China, you are also a friend of the CGCP. You have kindly agreed to speak at numerous events hosted by Stanford and the CGCP, including, among others, the 2015 Stanford University China Law and Policy Conference and the inaugural Guiding Cases Seminar™: Why China's Guiding Cases Matter. We would love to know what drew you to the CGCP and what drives your continued support of our work. What have you learned through participation in CGCP events? Has anything surprised you?***

James McManis

Nothing surprises me. What drew me to the CGCP? Well, don't tell her this, but in a word: Mei Gechlik. She was introduced to me by a mutual friend, and I found her

James McManis (right) and other distinguished legal experts discuss the possible outcomes of the hypothetical case at the CGCP's 2018 conference in Beijing

to be a very impressive individual. Her energy and insight are boundless. Every one of her programs has been well-organized and has attracted many distinguished persons, both panelists and audience members. I have learned a lot from every program I have been privileged to attend.

- ***Let's shift now to discuss your extensive career as a trial lawyer. You have spent over 50 years in the courtroom, both as a prosecutor and in private practice. Drawing from your experience, can you speak to the role of precedent in the U.S. legal system? How does this role dictate the way a trial lawyer selects and employs precedent in practice?***

The most important aspect of the law, in my opinion, is its predictability, to the extent that is possible. To predict the likely, or possible, outcome of a case requires you to look at old cases, and if the facts of those cases match the facts of your case, then you should be able to advise your clients how their matters are going to turn out. What I think is so encouraging about China's Guiding Cases System is that, as I understand it, China is moving in that same direction, even though the details are not exactly the same. They have a long way to go, but they are moving in that direction.

- ***Could you tell us about your most memorable case (won or lost)?***

I have tried many cases over a 50-year period, but the one which received the most worldwide attention was "The Elephant Case".

The case arose in August 2001, at the San Jose Arena, where Ringling Brothers Barnum & Bailey circus was performing. A Humane Society official alleged that star Ringling Brothers trainer Mark Gebel, son of legendary Gunter Gebel Williams, had stabbed an elephant by the name of Asia with an ankus between performances. An ankus is an ancient Indian device for guiding the movements of domestic elephants. Mark denied the allegation.

Our firm had represented Ringling Brothers for several years. On the day in question, a Saturday, I was at the office catching up on some paperwork when I received a call from one of our lawyers, who said, "You better get over here, they're trying to frame Mark." I immediately drove over to the arena, was briefed by my colleague and several Ringling officials, and inspected Asia.

I couldn't see any marks on the elephant, and I asked the Humane Society representative to show me where she thought the animal had been injured. She refused. I then invited her to have a veterinarian of her choice examine Asia. She again refused.

The District Attorney subsequently charged Mark Gebel with a violation of California Penal Code section 596.5, abuse of an elephant. The case got quite a big build up with the Humane Society's sending postcards to all of its members, inviting them to write the District Attorney and urge him to prosecute the case to the fullest extent of the law. When the case was called for trial in December, the courtroom was packed, with almost everyone in the audience rooting for the prosecution.

The trial drew a lot of press attention because of the unusual charge, the notoriety of the Gebel family, and the promotion of the case in the media by the Humane Society and various animal rights activists. Each evening after court, I attended a press conference on the courthouse steps commenting on the events of the day.

The two main prosecution witnesses were the Humane Society official and a San Jose police officer who had been present at the scene. It turned out that the police officer, while off-duty, spent a lot of time and money supporting animal rights causes. She had been observed picketing the circus at its Oakland performance the week before the incident, and had attended an animal rights convention in Washington, D.C., where she had registered for courses with titles such as "How to Shut Down the Circus" and "Making a Case against Performers in the Center Ring". Suffice to say, her credibility as a witness was marginal at best.

The prosecutor took the Humane Society official through her version of the event. When it was my turn to cross-examine, I asked her about our conversation at the scene, and got her to admit she had refused to inspect Asia with me, and she had declined my invitation to have the elephant examined by her own vet. I thanked her and sat down. The deputy district attorney then asked the question which I had been afraid to ask, and which became the turning point in the case: "Why didn't you call your own vet to look at the elephant?" The answer: "I didn't think it would help my case."

When the prosecution rested, I stated that the defense rested as well. In other words, we offered no defense evidence, I was so convinced the People had not met its burden of proof. Happily, the jury agreed, returning a verdict of "Not Guilty" in less than an hour.

The epilogue to the case was an exchange at the press briefing outside the courthouse. I started by saying I could not be more pleased with the outcome of the trial, given it was the shortest verdict on the shortest day of the year (December 21). The Humane Society executive director replied that the jury "just didn't get it." I got the last word: "Oh, the jury got it alright. These people (gesturing at the activists) were the ones who didn't get it." In fact, the jury foreman reportedly said, "[the prosecutors] never tied the defendant to the actual act".[2]

- ***For Chinese legal practitioners interested in a glimpse of what life is like as a U.S. trial lawyer, can you tell us a bit about the mechanics of your work? How do you assemble precedents into an argument? Do you work with others in your case research?***

Trial work is hard work. A lot is at stake in each trial, and every case is an important case to the client. So, one must expect long hours, and a lot of stress. Somebody once summed it up well: "Success in trial is 1% inspiration, and 99% perspiration".

The United States is a common law system, so case precedents are very important, and every argument should be the product of thorough research and careful preparation of the brief. At our firm, the younger lawyers do much of the preliminary research, and prepare a first draft of the trial brief. For all of my cases, however, I always edit the drafts and make sure to read the important cases myself.

I would not presume to advise Chinese lawyers what they should do to be great trial lawyers. The China Program has as its first rule, "We do not tell China's lawyers what to do. We show them what we do. They may then decide what, if anything, is useful to them." I believe, however, it is—or should be—a universal principle of trial advocacy that the lawyer must always put the client's interests ahead of his own. ■

* The citation of this CLC *Spotlight*™ is: Jordan Corrente Beck, *CGCP Interview: James McManis*, 2 China Law Connect 55 (Sept. 2018), *also available at* Stanford Law School China Guiding Cases Project, CLC *Spotlight*™, Sept. 2018, http://cgc.law.stanford.edu/clc-spotlight/clc-2-201809-interview-3-jordan-corrente-beck.
The original, English version of this CGCP Interview was prepared by Jordan Corrente Beck, Cami Elyse Katz, and Jennifer Ingram, and was finalized by Dimitri Phillips and Dr. Mei Gechlik. 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 For more discussion of this case, see James McManis, *The Importance of Guiding Cases for U. S. Courts in Determining Chinese Law, A Trial Lawyer's Perspective*, 2 China Law Connect 43 (Sept. 2018), *also available at* Stanford Law School China Guiding Cases Project, Experts *Connect*™, Sept. 2018, http://cgc.law.stanford.edu/commentaries/clc-2-201809-connect-4-james-mcmanis.

2 *See Jury Acquits Ringling Bros. Trainer of Elephant Abuse*, The San Diego Union-Tribune, Dec. 22, 2001, http://www.sandiegouniontribune.com/sdut-jury-acquits-ringling-bros-trainer-of-elephant-2001dec22-story.html.

CGCP 专访：马克己*

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律师

"律师必须始终把客户的利益置于他自己的利益之上，这是或者应该是出庭辩护的普遍原则。"

—马克己

- *您一直积极推动促进中国的法律发展和交流，包括您担任国际出庭律师学会（International Academy of Trial Lawyers）的中国项目主席及McManis-Wigh中国基金会创始人。您的"中国之旅"是如何开始的？*

2001年时，我被国际出庭律师学会接纳为会员，这是一个据报道由美国最顶尖的500名出庭律师组成的名誉社团。有人告诉我，学会最好的项目是成立于1994年的中国项目，其旨在帮助中国发展法律体系。每年，该项目将10名来自中国的顶尖政府律师带到美国，指派每个人与国际出庭律师学会院士和家人一起生活两周，以了解美国出庭律师的工作与个人生活。由于某种原因，中国律师被称为"代表"。我的妻子Sara Wigh和我接待过三位代表；我们从一开始就深感有趣。 我不能说代表们对美国的法律制度学习了多少，但我可以说Sara和我从与中国代表相处的时光中学到了很多关于中国的知识，直到今天我们都把他们视为好朋友。

在接待第一位代表之前，我对中国了解不多。但是我从接待第一位中国顶尖律师的经历中受到启发，我开始购买关于中国的书籍，并学习它的历史、文化、艺术和音乐。多么奇妙的国家！

2009年，当中国项目创始人Ray Tam与 Audrey Tam退休后，国际出庭律师学会邀请我和Sara共同主持中国项目，我们深感荣幸。每年秋天，我们会前往北京面试中国政府提名的25名候选人，并选出10 名来到美国。面试大约需要一周的时间。在我们做出选择后，政府会带我们去一个省，了解更多关于中国的事情并推广中国项目。我们访问了福建、贵州、浙江和山东等省份，以及南京和苏州。

在我们成为中国项目的联合主席后不久，我们成立了McManis-Wigh中国基金会，作为国际出庭律师学会对中国项目支持的补充。虽然由于中国不断变化的需求，上述中国律师培训项目前已经停办，但我们正在探索其他机会，让美国律师提供专业知识，以加深中美之间的了解。McManis-Wigh中国基金会也扩大至为其他中国的项目提供资金，如对话基金会、中国指导性案例项目（"CGCP"），以及中国艺术家和其他文化人物。

- *您已经做了很多关于中国的工作，您认为当中主要的里程碑是什么？有哪些工作，您回头看，会觉得"这对塑造我的中国理解至关重要"或"这对我是一个特别的转折点"或"我为此感到特别自豪"？*

从个人的角度看，通过我们到中国的旅行，Sara和我更了解中国；更重要的是，我们与中国项目代表以及管理该项目的中国政府官员建立了友谊。从专业层面来说，我毫不夸大与中国政府的高级律师相处所带来的学习经历，他们来自国务院法制办公室，全国人民代表大会，中央党校，以及其他部委办公室等。Sara和我为我们和国际出庭律师学会的其他院士们和配偶为中国顶尖律师了解美国法律制度做出的贡献感到自豪。这是一条双行道。若没有我们的法律交流项目，美国出庭律师们也不会有机会学习并了解许多关于中国和中国人民的事情。反之亦然，我相信中国项目所服务的200多名中国政府律师也将继续受益。这种经历让我觉得法律交流项目非常棒。它们真正地增进了人们的相互了解。

- *您在2015年世界银行法律、正义、发展周上的中国指导性案例项目专家小组讨论中，提到了美国联邦最高法院关于外国法律制度在美国法官决策过程中应发挥多大作用（如果有的话）的辩论。通过参与中国项目，您是否改变了您对外国法律在美国法院的地位的看法？*

并没有，实际完全相反。我认为美国可以从包括中国在内的其他国家的法律体系中学到很多东西。两国都有很多东西需要互相学习。在对《维生素C案》的意见中，美国联邦第二巡回上诉法院指出，美国法院应该对外国政府关于其法律的解释和效力的陈述表示顺从，除非这些陈述并不合理。在联邦最高法院的决定公布之前，我就预测该法院不会那么顺从，但还是会承认，外国政府的意见应得到受尊重的考虑。事实上最高法院在其判决中也明确表达了这一观点。[1]

- *您是中国的朋友，也是中国指导性案例项目的朋友。您参与了斯坦福大学和中国指导性案例项目主办的诸多活动且发表演讲，其中包括2015年斯坦福大学中国法律与政策会议，及首届"指导性案例研*

关于CGCP专访James McManis法官的视频部分内容，请访问https://cgc.law.stanford.edu/zh-hans/cgcp-classroom-lesson-7，观看CGCP学堂™发布的视频。

马克已
McManis Faulkner 律师事务所创办人兼合伙人
国际出庭律师学会院士、中国项目主席

马克已（James McManis）是美国最优秀的出庭律师之一。他先于斯坦福大学取得历史学位，后又在加州大学伯克利分校取得了法律博士学位，继而在硅谷大本营——加州圣荷西，开始了法律职业生涯。马先生作为检察官出身，处理刑事案件，而后开始私人执业，在联邦及州法院代理了不计其数的民事和刑事案件。他成为律师已有50多年。他的客户包括硅谷的公司和个人，业务涉猎范围广泛。

马先生是国际出庭律师学会（International Academy of Trial Lawyers）的院士。他主管该学会知名的中国项目多年，安排国务院法制办公室、全国人民代表大会及中央党校的律师赴美学习美国法律体系。马先生也曾是国际出庭律师学会执行委员会委员及该学会国际关系委员会会长。

马先生是2015年斯坦福大学中国法律和政策会议的主题演讲人。他也是由美国商务部和斯坦福大学2016年共同赞助的中美法律交流会的座谈小组嘉宾。此外，在2015年世界银行集团的法律、正义与发展周上，他曾在题为"'先例'/指导性案例在法律的有效应用、解读和实施中的角色：比较中国、日本及美国的经验"（*The Role of "Precedents"/Guiding Cases in the Effective Application, Interpretation, and Implementation of Law: Comparative Experiences from China, Japan and the United States*）的座谈小组上发言。在2018年3月由中国指导性案例项目在北京召开的题为"中国案例指导制度和"一带一路"倡议：实务见解与前景"的会议上，马先生就"案例、商法和相关实务见解"专题发表了演讲，并担任由美国联邦第九巡回上诉法院William A. Fletcher法官、日本知识产权高等法院前首席法官Toshiaki Iimura法官、美国联邦第七巡回上诉法院Diane P. Wood首席法官所主持的模拟法庭的杰出讨论者。

除了是美国出庭律师协会（American College of Trial Lawyers）会员、美国律师基金会（American Bar Foundation）会员和美国诉讼顾问协会（Litigation Counsel of America）会员外，马先生还是爱尔兰最古老的法律机构——国王法学院（The Honorable Society of King's Inns）——的荣誉委员。马先生对于其爱尔兰血统十分自豪，指出美国第一条横贯大陆铁路就是爱尔兰人和中国人建造的。

讨会TM：为什么中国指导性案例至关重要"。我们很想知道是什么吸引您参加中国指导性案例项目，以及您继续支持我们工作的动力。您通过参加中国指导性案例项目活动了解到了什么？有什么让您感到意外吗？

没什么让我感到意外。是什么吸引我到中国指导性案例项目？ 好吧，不要告诉她这个，但简而言之，就是熊美英。一位共同的朋友介绍她给我认识，我发现她是一位非常令人印象深刻的人。她精力充沛，富有洞察力。她的每个项目都组织精良，吸引了许多杰出人士，包括小组专家和观众。我从有幸参加的每个项目中学到了很多东西。

- *现在让我们转变一下，谈谈您作为出庭律师的职业生涯。您作为检察官和执业律师在法庭上工作已有50多年。根据您的经验，您能否谈谈先例在美国法律体系中的角色？这个角色如何影响一个出庭律师在实际中选取和应用先例的方式？*

在我看来，法律最重要的方面是在可能的范围内达到其可预测性。要预测一个案件很有可能或可能出现的结果，你需要查看旧的案例，如果这些案例的事实符合你案件的事实，那么你应该能告知你的当事人他们的事项将有什么结果。我认为中国的指导性案例制度之所以如此令人鼓舞，就是因为中国也正朝着同一方向前进，即使细节不尽相同。他们还有很长的路要走，但他们正朝着这个方向前进。

马克已

- *您能告诉我们您最难忘的案件（赢或输）吗？*

在50多年的时间里，我承办了很多案件，但受到全世界关注最多的案件是"大象案"。

该案于2001年8月发生在"圣何西竞技场"（San Jose Arena），"玲玲马戏团"（Ringling Brothers Barnum & Bailey circus）正在那里表演。一名人道协会的官员声称，传奇人物冈特·戈贝尔·威廉姆斯（Gunter Gebel Williams）的儿子，"玲玲马戏团"的著名驯兽师马克·戈贝尔（Mark Gebel）在表演之间以刺棒刺伤了一头名为"亚洲"的大象。该刺棒是一种用来指挥圈养大象行动的古老印度器具。马克否认了这一指控。

马克己（图右一）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

我们的律所代表“玲玲马戏团”多年。在某星期六，我正在办公室处理一些文件，突然接到了同事律师的电话，他说：“你最好过来这里，有人试图陷害马克。”我立刻赶到竞技场，听取了我的同事和几位玲玲职员的介绍，并查看了“亚洲”。

我看不到大象上的任何伤痕，就要求人道协会的代表告诉我她认为动物哪里受伤了。她拒绝了。然后，我邀请她，让她选择的兽医去检查“亚洲”。她再次拒绝了。

随后地区检察官指控马克·戈贝尔（Mark Gebel）违反了加州刑法第596.5条“禁止虐待大象”之规定。人道协会向其所有成员寄送明信片，邀请他们致信地区检察官并敦促他在法律的最大范围内起诉该案。当该案在12月开庭审理时，法庭上挤满了人，几乎所有在场人士都支持起诉。

因为这不寻常的指控、戈贝尔（Gebel）家族的坏名声、人道协会和多方动物权利活动人士在媒体上对此案的宣传，这次审判吸引了众多媒体的关注。每天庭审后的晚上，我都会参加关于法庭动态的新闻发布会，评论当日的事项。

两名主要控方证人是人道协会的职员和一名当时在场的圣何西警官。后来发现，这名警官业余花费大量时间和金钱用以支持动物权利事业。该事件发生前一周，她曾被看到参与在马戏团奥克兰的演出上的抗议活动，并且还参加了在华盛顿特区的一场动物权利大会，在那里她报名参加了名为“如何关闭马戏团”和“针对中心场地表扬者提出诉讼”的课程。可以说，她作为证人的可信度充其量是在边际的。

检察官先让人道协会的职员道出了其对该事件的描述。当轮到我盘问时，我向她询问了我们当时在场的谈话，使得她承认了她拒绝与我一起检查“亚洲”，并拒绝我邀请她让其兽医对大象进行检查的事实。我谢过她后坐下。副地区检察官随后问了一个我一直不敢问的问题，而这后来成为了案件的转折点：“你为什么不叫自己的兽医看大象呢？”回答是：“我不认为这会对我的案子有帮助。”

当控方完成时，我表示辩方也完成了。换言之，我们没有提供任何辩护证据，我确信控方没有履行其举证责任。令人高兴的是，陪审团同意了，在不到一个小时内就做出了“无罪”的判决。

此案的尾声是在法院外的新闻发布会上所进行的交流。我一开始就表示，我对审判结果不能再满意了，因为这是在一年中最短的一天（12月21日）作出的最短的判决。人道协会的执行主任回复道：陪审团“只是没明白。”我最后表示：“噢，陪审团是明白的。是他们（指着那些动物权利积极分子）不明白。”事实上，据报道，陪审团团长说：“(检察官)从未把被告与实际行为联系起来”。[2]

- *对于有兴趣了解美国出庭律师生活的中国法律从业者，您能否向我们介绍您的工作机制？您如何将先例纳入论证？您在研究案例时与他人合作吗？*

出庭工作很艰苦。每次庭审都会影响很多方面，并且每一个案件对客户都是重要案件。因此，必须有心理准备工作时间很长和压力很大。有人曾把它总结得很好：“庭审的成功就是1%的灵感加上99%的汗水”。

美国是普通法体系，所以案件先例非常重要，每一个论点都应该是彻底研究且精心准备的产物。在我们律所，年轻的律师会做大量的初步研究，并准备律师出庭辩论意见书的初稿。然而，对于我所有的案件，我总是自己编辑此类初稿并确保自己把重要案例读完。

我不会冒昧地建议中国律师应该做些什么才能成为优秀的出庭律师。我们的中国项目的第一条规则就是：“我们不告诉中国的律师该做什么，我们向他们展示我们的工作，然后他们可以决定什么（如果有的话）对他们有用。”但是，我认为律师必须始终把客户的利益置于他自己的利益之上，这是或应该是出庭辩护的普遍原则。■

---

* 此中法连*聚焦*™的引用是：Jordan Corrente Beck CGCP专访：马克己，《中国法律连接》，第2期，第59页（2018年9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9月，http://cgc.law.stanford.edu/zh-hans/clc-spotlight/clc-2-201809-interview-3-jordan-corrente-beck。
此专访的英文原文由Jordan Corrente Beck、Cami Elyse Katz、英珍妮撰写，并由Dimitri Phillips和熊美英博士最后审阅。中文版本由黄雁航、马越和赵炜翻译，并由罗雯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] 关于此案例的更多讨论，见马克己，指导性案例对美国法院认定中国法律的重要性——一位出庭律师的观点，《中国法律连接》，第2期，第45页（2018年9月），*亦见于*斯坦福法学院中国指导性案例项目，专家*连接*™，2018年9月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-2-201809-connect-4-james-mcmanis。

[2] 见*Jury Acquits Ringling Bros. Trainer of Elephant Abuse*，The San Diego Union-Tribune，2001年12月22日，http://www.sandiegouniontribune.com/sdut-jury-acquits-ringling-bros-trainer-of-elephant-2001dec22-story.html。

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

The CGCP is ready to take up the challenge of raising more funds to pursue bigger goals and further develop *China Law Connect*.

Are you ready to help us?

Subscribe and receive hard copies of *CLC*!

USD 75 for *THREE issues* published in 2018
USD 100 for *FOUR issues* per year after 2018
USD 30 for *any SINGLE issue*

We also send **free copies** to any donor who donates at least **USD300** per year.

To donate online, visit **https://cgc.law.stanford.edu/home/support-us/donate**.

To subscribe to *China Law Connect*, visit **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？

CGCP已准备好迎接挑战，募集更多资金以实现更宏大的目标，并进一步发展《中国法律连接》

您愿意助我们一臂之力吗？

订阅并获得《中国法律连接》的纸本！

2018年订阅费：**75美元**（共*3期*）
2018年后每年订阅费：**100美元**（每年*4期*
*一期*订阅费：**30美元**

我们还向每年捐赠至少**300**美元的捐赠者发送免费纸本。

请访问**https://cgc.law.stanford.edu/zh-hans/home/support-us/donate** 进行在线捐款。

欲订阅《中国法律连接》，请访问 **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：**https://cgc.law.stanford.edu/zh-hans/support-us/sponsor**。

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。

China's "Belt and Road" Blueprint: Promoting Unilateral Ambitions or Multilateral Gains?*

Jennifer Ingram
Managing Editor of the China Guiding Cases Project
WU Yin & Jia Quan
Editors of the China Guiding Cases Project

Resistance from host countries like Malaysia and doubt cast by developed countries have overshadowed the development of China's Belt and Road Initiative (the "BRI").[1] Apart from the five major "cooperation priorities"—policy coordination, facilities connectivity, unimpeded trade, financial integration, and people-to-people bonds—identified in the March 2015 document outlining the Chinese government's overall vision for the initiative,[2] what exactly is China's plan to implement the BRI?

On this, a joint statement (the "Joint Statement") issued at the close of the **Forum on the Belt and Road Legal Cooperation** (the "2018 B&R Legal Forum"), which was co-organized by China's Ministry of Foreign Affairs and the China Law Society in Beijing and took place on July 2–3, 2018, sheds some light.[3] The Joint Statement sets forth four main goals:

1. "Abiding by and improving relevant international rules-based systems",
2. "Actively preventing and properly settling disputes",
3. "Promoting international rule of law by enhancing cooperation under the BRI", and
4. "Advancing legal exchange under the BRI".

Amidst the ongoing concerns over China's full commitment to abiding by standards set by international organizations, such as the World Trade Organization, of which the country is a member, the first goal is clearly welcome. The CGCP will keep a close eye on concrete measures taken by China to achieve this goal. Meanwhile, this CLC *Spotlight*™ piece focuses on the other three goals by tracking the progress made by the Chinese government and related parties thus far. The piece concludes by discussing whether the current BRI trajectory demonstrates China's commitment to bringing mutual benefits to itself *and* host countries.

GOAL 2: "Actively Preventing and Properly Settling Disputes"

The section of the Joint Statement that focuses on this goal articulates the efforts being made to safeguard the BRI, especially "to settle trade and investment disputes in the implementation of the BRI projects, fairly protect the [legal][4] rights and interests of all parties, and foster a business environment under the rule of law featuring stability, fairness, transparency and predictability."[5] It specifically calls for the establishment of diversified mechanisms and institutions of dispute settlement as well as deepening cooperation in judicial affairs and law enforcement.[6] So far, impressive efforts have been made by China's judiciary towards these two objectives.

Establishment of Diversified Mechanisms and Institutions of Dispute Settlement

In June 2018, China issued the *Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions* (the "*B&R Dispute Resolution Mechanism Opinion*") to announce its plan to establish a comprehensive dispute settlement system that integrates litigation, mediation, and arbitration for the BRI.[7] The document highlights the need to uphold four principles: "the principle of planning together, building together, and benefiting together", "the principle of justice, efficiency, and convenience", "the principle of party autonomy", and "the principle of diversified dispute resolution". While the framework presented is appealing, it remains unclear how new institutions and mechanisms will work together as well as with existing alternative dispute resolution mechanisms to resolve transnational disputes. The following two new entities, however, seem promising.

International Commercial Courts. In late June 2018, the Supreme People's Court (the "SPC") established the First International Commercial Court in Shenzhen, Guangdong Province, and the Second International Commercial Court in Xi'an, Shaanxi Province. These two international commercial courts are coordinated and guided by the Fourth Civil Division of the SPC.[8] According to the preamble of the *Provisions of the Supreme People's Court on Several Issues Concerning the Establishment of the International Commercial Courts* (the "*Provisions*"), the purpose of establishing these courts is to "impartially and promptly handle international commercial cases in accordance with law, equally protect the legal rights and interests of Chinese and foreign parties, create a stable, fair, transparent, and convenient international business environment governed by the rule of law, and serve and safeguard the construction of the 'Belt and Road'".[9] The *Provisions* also shed light on the jurisdiction and operation

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

Jennifer Ingram began working with the CGCP when it was founded and now primarily oversees the project's Belt and Road Series to deepen stakeholders' understanding of this significant but not yet fully understood development. She has experience in dispute resolution across diverse jurisdictions, ranging from South Africa, Kenya, 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. 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.

of these new courts and how they may, with the consent of the parties involved, coordinate with relevant mediation and arbitration institutions towards the more effective resolution of disputes. It will be important to clarify how these courts will interact with other courts of China and those of BRI host countries and/or countries otherwise involved in BRI projects which have jurisdiction over BRI-related disputes, both where a relevant legal cooperation agreement exists and where one does not.

International Commercial Expert Committee. To further support the international commercial courts, the International Commercial Expert Committee was officially established by the SPC in August 2018.[10] Members of the committee may mediate cases entrusted by the international commercial courts and provide the international commercial courts with advisory opinions on issues of foreign law that arise in the course of the courts' handling of international commercial disputes.[11] In addition, these members may give advice on the formulation of judicial interpretations and judicial policies related to international commercial disputes. The expert committee will benefit from the collective experience of members from different jurisdictions and legal systems, with the first group comprised of 32 Chinese and foreign experts from a variety of geographic regions and different fields of expertise.[12] The degree to which the practical experiences and expertise of the committee come into play in the resolution of legal disputes as well as how the international background of different members informs their activities will ultimately determine the significance of this new body.

Deepening Cooperation in Judicial Affairs and Law Enforcement

China has generally stated that it supports "parties participating in the BRI in their efforts to deepen cooperation in [these areas], including exploring the establishment of cooperation mechanisms to strengthen mutual recognition and enforcement of judgments in civil and commercial matters and to promote service of judicial documents as well as investigation and evidence collection in civil and commercial matters".[13] On July 17, 2018, 21 Chinese local courts "along the Belt and Road" entered into a framework agreement on cooperation in judicial affairs.[14] While the official agreement is not yet publicly available, sources say that China is seeking to strengthen comprehensive collaboration among the 21 local courts in judicial matters including, *inter alia*, the filing of cases,

WU Yin & Jia Quan
Editors, China Guiding Cases Project, Stanford Law School

WU Yin graduated from Peking University Law School in 2016, with the honor of being named an outstanding graduate. Thereafter, he joined the Beijing office of Davis Polk & Wardwell LLP, where he worked as a legal professional for more than two years. Mr. Wu has a demonstrated long-time commitment to the development of Chinese society and the country's legal system. While a law student, he served as president of the Peking University Legal Aid Association and led a volunteer team of a Chinese government program offering basic legal courses to more than 5,000 primary- and middle-school students.

Jia Quan is a legal assistant at the Hong Kong office of King & Wood Mallesons. She specializes in the formation of private equity funds, fund restructuring, and co-investment arrangements. She has worked on behalf of over ten famous asset management companies, large sovereign wealth funds, top international institutional investors, Chinese insurance companies and banking entities on funds formation and their investments in global and Asian private funds. Ms. Quan received her LL.B. from Nanjing University in China and her LL.M. from the London School of Economics and Political Science (LSE) in the United Kingdom.

The July 2018 Belt and Road Forum on the Legal Cooperation organized by China's Ministry of Foreign Affairs and the China Law Society

exercise of jurisdiction, legal enforcement, and information exchange.[15] As the experiences accumulated by the local courts will likely be used in a wider context in the future, especially to show how the courts of the many countries participating in the BRI might collaborate, it is worth keeping close track of updates and progress with respect to this pilot program.

GOALS 3 and 4: "Promoting International Rule of Law by Enhancing Cooperation under the BRI" and "Advancing Legal Exchange under the BRI"

The Joint Statement frames increased cooperation and legal exchange under the BRI as not only aimed at supporting the initiative but also promoting international rule of law. Goal 3 calls for cooperation on the basis of "extensive consultation, joint contribution and shared benefits" consistent with fundamental principles of international law and the basic norms of international relations as well as multi-level, multi-channel, and comprehensive legal cooperation that includes the involvement of international and regional organizations.[16] With respect to legal exchange, Goal 4 calls for greater cooperation among legal services industries, especially the development of training programs and platforms to exchange legal information on foreign law as well as treaties concluded and acceded to by parties participating in the BRI.[17] These goals are closely related, as the greater amount and quality of legal exchange addressing the complex issues arising under the BRI will lead to cooperation that is consistent with the international rule of law so as to achieve greater benefits for all parties. The following activities have made some progress in this regard.

Empowering Lawyers to Handle BRI-Related Practice

International and regional organizations, civil society, research institutions, and the private sector have been encouraged to work together to train legal professionals on BRI-related issues as well as increase their capacity related to the initiative.

Legal Cooperation Platform. On July 29, 2017, during the One Belt One Road Legal Services International Forum held in Chengdu, China, a platform for cross-border cooperation among legal services industries was established to support the BRI.[18] Thirty-four law firms from various countries jointly established a global legal services organization that gives law firms from different

countries involved in the initiative more opportunities to exchange knowledge and experience regarding international business practices as well as their views on specific regulatory concerns and risk mitigation strategies from local law perspectives. As parties participating in the initiative will inevitably face complex and sensitive issues from new business environments and different legal systems, law firms will play a vital role in providing legal advice on domestic laws, procedural rules, and the generally accepted business practices of participating countries to illuminate and mitigate the risks involved in BRI projects. Sharing accumulated knowledge on platforms like this one will enable legal service providers to clarify how individual projects can achieve their commercial objectives while complying with relevant legal requirements.

Training Programs. To boost legal cooperation and provide relevant training to support the BRI, China also announced at the 2018 B&R Legal Forum a plan to fund the "Belt and Road Legal Cooperation Research and Training Program".[19] Though the details are currently unclear, the initiative will likely provide benefits similar to those offered by existing programs, like the All China Lawyers Association (the "ACLA") training program for cross-border lawyers seeking to become leaders in BRI-related legal issues.[20] The ACLA training program has already organized four training sessions annually since 2013, training more than 500 cross-border lawyers and organizing 164 lawyers to study abroad.[21]

The "Belt and Road Legal Cooperation Research and Training Program" will have a great deal of influence over the initiative based on its curricula. Will the overall framing of trainings organized under the program go beyond highlighting relevant international and national laws and take into account China's particular views of the rule of law, i.e., "socialist rule of law with Chinese characteristics",[22] which critics consider to be more akin to rule by law?[23] Or will the concept "international rule of law" carry another connotation: that the new goal of international rule of law is to center international relations on cooperation and mutual benefit?[24] Including more universal perspectives on international rule of law issues that are not unique to China will give BRI training programs greater legitimacy and produce more lawyers who are able to tackle complex cross-border issues in other jurisdictions.

Legal Network. Another development has been the joint establishment by the ACLA and China's Ministry of Justice of a pool of high-level legal professionals who can be engaged to support the BRI. Announced at the June 2017 launching ceremony for the "Legal Environment Report of the Belt and Road Countries" in Beijing, the pool includes law firms and legal professionals hailing from different countries and with expertise in different practice areas who can be recommended to oversee BRI-related arbitrations or represent Chinese companies investing in countries and regions involved in the global initiative.[25] According to reports, there are currently 143 Chinese and foreign law firms, and 205 Chinese and foreign lawyers in the pool. As the BRI grows and related disputes arise, this can be a resource for those seeking representation equipped to handle the unique complexities and issues posed by the initiative. For it to be seen as useful and unbiased, the pool must continue to include lawyers and firms not only with the necessary expertise to advise on various BRI-related issues but also a good portion with real ties to different countries and regions.

Exchanging Information Relevant to the BRI

Multiple official Chinese resources have been developed over recent years which can be utilized by the legal sector when advising on matters related to the initiative.

Official Website. The Belt and Road Portal (the "B&R Portal") is the official Chinese website that serves as the authoritative source of the latest news, policies, and stories about the BRI for Chinese and overseas readers.[26] Presented in six international languages (i.e., Chinese, English, French, Russian, Spanish, and Arabic) and highlighting the official priorities and policies related to the BRI, the B&R Portal is the first step to increasing cross-border legal exchange under the initiative. The resource makes available some bilateral treaties between China and participating countries, which directly aligns with the objective of establishing a public database of relevant treaties between China and countries involved in the initiative. The Chinese and English versions of the website include considerably more resources and information, however, and so more effort should be placed on filling out the other language versions to increase access to important BRI legal materials among those who do not speak English or Chinese.

Annual publications. China's Ministry of Commerce also publishes two important resources annually which can serve to support the BRI. First, its annual *Guide for Countries and Regions on Overseas Investment and Cooperation* introduces the laws and regulations as well as business opportunities and operational risks associated with the 172 countries and regions where Chinese enterprises are contemplating investment, contract projects, and labor services cooperation.[27] In addition, the *Report on Development of China's Outward Investment and Economic Cooperation in 2017* notes the experience of Chinese parties in outward investment and cooperation in the previous year.[28] Both of these resources highlight the legal landscape that has underlain recent Chinese investment,

which can be shared under the goal of advancing legal exchange which ultimately supports the BRI.

Legal Database. The SPC has also been proactive in promoting legal exchange, with its launch in September 2017 of the bilingual Chinese legal information database Global China Law.[29] Targeting both domestic and foreign users, Global China Law presents important laws, regulations, and judicial interpretations promulgated by China's central and local governments since 1949, as well as guidance and reference cases issued by the SPC and courts of all levels. Reflecting the judicial practice of Chinese courts as well as the reasoning and opinions of Chinese judges, these cases present a general picture of China's legal system and show how Chinese law can be interpreted and applied in practice, which promotes more in-depth understanding of the Chinese legislative system and judicial practice among legal professionals from different countries involved in the BRI. In addition, the database presents the evolution of the Chinese legal system from ancient to modern times, and introduces China's current judicial system. The platform may serve as an example for other countries involved in the BRI, and perhaps inspire them to establish similar platforms which may eventually be integrated into a single, comprehensive platform to support the global initiative.

Clearer Blueprint with Potential for Win-Win

The 2018 B&R Legal Forum provided more clarity surrounding what China's BRI blueprint is. By pursuing the goals discussed above, China may be able to achieve "win win cooperation" especially with those countries that stand to gain new access to international markets and valuable infrastructure development from their participation in the BRI. However, the fine points of cooperation—for instance, the curricula of BRI-related training programs, the actual impact that the international commercial expert committee can produce, and the quantity and quality of legal exchange—will ultimately guide the resolution of individual disputes under the BRI, which will determine the biggest winners of the global initiative in the end.

More efforts must be made by China and other participating countries to train more cross-border lawyers in relevant laws that have an international scope as well as domestic and regional regulations. In addition, it is important for China and countries participating in the BRI to negotiate and sign new, and update existing, agreements in a wide variety of areas to reduce the overall number and severity of disputes under the global initiative. Legal cooperation agreements will be especially important going forward, to clarify how disputes that cannot be avoided will be resolved.[30]

At the 2018 B&R Legal Forum, Chinese State Councilor and Foreign Minister WANG Yi said, "We believe rules and rule of law are essential for [the] BRI to develop in the world. They are also the safety valve against uncertainties and challenges."[31] It is in specific countries and cases that the degree of protection as well as the benefits enjoyed by individual parties involved in the initiative will become clear. Therefore, while China has made significant progress towards the goals discussed above, which seem consistent with bringing mutual benefits to host countries, it will be important to continue to monitor developments with respect to each as the initiative gains more ground and influences legal developments in China and around the world. Only then will it be possible to determine whether the BRI lives up to the goals set forth in documents like the Joint Statement, and whether the initiative serves to promote China's unilateral ambitions or truly allows for multilateral gains. ■

* The citation of this CLC *Spotlight*™ is: Jennifer Ingram, WU Yin, & Jia Quan, *China's "Belt and Road" Blueprint: Promoting Unilateral Ambition or Multilateral Gains?*, 2 China Law Connect 63 (Sept. 2018), *also available at* Stanford Law School China Guiding Cases Project, CLC *Spotlight*™, Sept. 2018, http://cgc.law.stanford.edu/clc-spotlight/clc-2-201809-bandr-2-ingram-wu-quan.
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 authors and do not necessarily reflect the work or views of the China Guiding Cases Project.

[1] *See, e.g., Malaysia Has Axed $22 Billion of Chinese-Backed Projects, in a Blow to China's Grand Plan to Dominate World Trade*, Business Insider, Aug. 21, 2018, https://www.businessinsider.com/malaysia-axes-22-billion-of-belt-and-road-projects-blow-to-china-2018-8; Douglas Bullock, *After A Brief Silence, Skeptics of China's Belt and Road Initiative Are Speaking Up Again*, Forbes, Apr. 18, 2018, https://www.forbes.com/sites/douglasbulloch/2018/04/18/china-belt-road-initiative-obor-silk-road/#2e4d1eb54daa.

[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] *Statement of the Co-Chairs of the Forum on the Belt and Road Legal Cooperation*, July 3, 2018, https://www.fmprc.gov.cn/mfa_eng/wjbxw/t1573635.shtml [hereinafter "*Joint Statement*"]. The Chinese version (“一带一路”法治合作国际论坛共同主席声明) can be accessed at https://www.mfa.gov.cn/web/wjbxw_673019/t1573634.shtml.

[4] The English version translates this term as "legitimate" but it should be "legal".

[5] *Joint Statement*, *supra* note 3, paragraph 18.

[6] *Id.*, paragraphs 20–22.

[7] 《关于建立“一带一路”国际商事争端解决机制和机构的意见》(*Opinion Concerning the Establishment of the "Belt And Road" International Commercial Dispute Resolution Mechanism and Institutions*), issued by the General Office of the Communist Party of China Central Committee and the General Office of the State Council on June 27, 2018, http://www.gov.cn/zhengce/2018-06/27/content_5301657.htm. An English version of this document is available for reference only at the official website of the international commercial courts, at http://cicc.court.gov.cn/html/1/219/208/210/819.html.

8 *Id.*

9 《最高人民法院关于设立国际商事法庭若干问题的规定》 (*Provisions of the Supreme People's Court on Several Issues Concerning the Establishment of the International Commercial Courts*), passed by the Adjudication Committee of the Supreme People's Court on June 25, 2018, issued on June 27, 2018, effective as of July 1, 2018, 2 China Law Connect 83 (Sept. 2018), *also available at* Stanford Law School China Guiding Cases Project, B&R *Texts*™, Sept. 2018, http://cgc.law.stanford.edu/belt-and-road/b-and-r-texts/20180701-provisions-re-intl-commercial-courts [hereinafter "*Provisions*"].

10 《最高人民法院关于成立国际商事专家委员会的决定》 (*Decision of the Supreme People's Court on the Establishment of the International Commercial Expert Committee*), issued by the Supreme People's Court on Aug. 24, 2018, http://cicc.court.gov.cn/html/1/219/235/243/index.html.

11 *Provisions*, *supra* note 9, Articles 8 and 12.

12 《最高人民法院关于聘任国际商事专家委员会首批专家委员的决定》 (*Decision of the Supreme People's Court on the Appointment of the First Group of Members of the International Commercial Expert Committee*), issued by the Supreme People's Court on Aug. 24, 2018, http://cicc.court.gov.cn/html/1/219/235/245/index.html.

13 *Joint Statement*, *supra* note 3, paragraph 21.

14 21家"一带一路"沿线城市法院在连云港签署司法协作框架协议 (*21 Local Courts Along the "Belt and Road" Sign a Judicial Cooperation Framework Agreement in Lianyungang*), July 17, 2018, 《最高人民法院网》 (www.court.gov.cn), www.court.gov.cn/zixun-xiangqing-107961.html.

15 *Id.*

16 *Joint Statement*, *supra* note 3, paragraphs 5–8.

17 *Id.*, paragraphs 23–28,

18 《"一带一路"法律服务协作体成立》(*A BRI-Focused Global Legal Services Organization Has Been Established*), Xinhua, July 30, 2017, http://www.xinhuanet.com/2017-07/30/c_1121403198.htm.

19 Speech of Chinese State Councilor and Foreign Minister WANG Yi at the 2018 Forum on the Belt and Road Legal Cooperation: Stronger Legal Cooperation for Sound and Steady Development of the Belt and Road Initiative, July 2, 2018, www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1573636.shtml. The Chinese version (加强国际法治合作推动"一带一路"建设行稳致远) can be accessed at https://www.fmprc.gov.cn/web/wjbz_673089/zyjh_673099/t1573308.shtml.

20 《司法部全国律协发布"一带一路"沿线国家法律环境国别报告》 (*Ministry of Justice of China and ACLA Released Reports of Legal Environments of B&R Countries*) https://www.yidaiyilu.gov.cn/info/iList.jsp?tm_id=126&cat_id=10122&info_id=17071.

21 *Id.*

22 *See* 《中共中央关于全面推进依法治国若干重大问题的决定》(*Decision of the CPC Central Committee on Several Major Issues Concerning the Comprehensive Promotion of the Rule of Law*), passed at the Fourth Plenary Session of the 18th Central Committee of the Communist Party of China on Oct. 23, 2014, http://www.gov.cn/xinwen/2014-10/28/content_2771714.htm (which mentions this phrase).

23 *See* Josh Chin, *'Rule of Law' or 'Rule by Law'? In China, a Preposition Makes All the Difference*, The Wall Street Journal, Oct. 20, 2014, https://blogs.wsj.com/chinarealtime/2014/10/20/rule-of-law-or-rule-by-law-in-china-a-preposition-makes-all-the-difference.

24 *See* Chinese Vice Minister LIU Zhenmin's Keynote Speech at the International Symposium on "The Charter of the United Nations and the Post-War International Order", 维护《宪章》权威,共促合作共赢 (*Safeguarding the Authority of the UN Charter and Promoting Win-Win Cooperation*), Apr. 14, 2015, http://www.mfa.gov.cn/web/ziliao_674904/zyjh_674906/t1255141.shtml (proposing the new goal of international rule of law in which international relations are centered on cooperation and mutual benefit).

25 《中国律协与"一带一路"沿线多国搭建法律服务合作网》(*ACLA Established Cooperation Network with B&R countries*), Xinhua, June 24, 2017, http://www.xinhuanet.com/silkroad/2017-06/24/c_1121203227.htm.

26 For the Chinese version of the official B&R Portal, visit https://www.yidaiyilu.gov.cn. For the English version, visit https://eng.yidaiyilu.gov.cn.

27 《对外投资合作国别（地区）指南》 (*Guide for Countries and Regions on Overseas Investment and Cooperation*), http://fec.mofcom.gov.cn/article/gbdqzn.

28 《中国对外投资合作发展报告》(*Report on Development of China's Outward Investment and Economic Cooperation*), https://www.yidaiyilu.gov.cn/wcm.files/upload/CMSydylgw/201705/201705240923004.pdf.

29 *See* President and Chief Justice of SPC ZHOU Qiang's keynote speech at the launch ceremony of Global China Law held on September 26, 2017, http://www.court.gov.cn/zixun-xiangqing-62022.html. The Global China Law website can be accessed at https://www.globalchinalaw.com.

30 The CGCP compiles primary sources forming the legal framework of the BRI, including currently effective legal cooperation agreements between China and Belt & Road *Countries*™, and posts them on its website as Belt & Road *Texts*™.

31 Speech of Chinese State Councilor and Foreign Minister WANG Yi, *supra* note 19.

中国的"一带一路"蓝图：促进单边的雄心还是多边的利益？*

英珍妮
中国指导性案例项目执行编辑
吴胤、全嘉
中国指导性案例项目编辑

来自马来西亚等东道国的阻力和发达国家的质疑为中国"一带一路"倡议的发展蒙上了一层阴影。[1] 2015年3月中国政府发布的倡议愿景大纲文件中，列出了五项"合作重点"——政策沟通、设施联通、贸易畅通、资金融通和民心相通。[2] 除此之外，中国到底计划如何实施"一带一路"？

"一带一路"法治合作国际论坛（"2018'一带一路'法治论坛"）在闭幕之际发布了一项共同声明（"《共同声明》"），对以上问题提供了一些说明。[3] 这一论坛由中国外交部和中国法学会于2018年7月2日至3日在北京联合举办。该《共同声明》设定了四项主要目标：

1. "遵守和完善有关国际规则体系"，
2. "积极预防和妥善解决有关争端"，
3. "加强'一带一路'建设促进国际法治"，和
4. "深化"一带一路"法治交流"。

鉴于对中国是否会完全承诺遵守其作为成员国的国际组织所制定的标准（例如：世界贸易组织的标准）的质疑仍持续不断，第一个目标显然是受到欢迎的。中国指导性案例项目会密切留意中国将采取什么具体措施以实现这一目标。而本篇中法连*聚焦*™文章将以追踪中国政府和有关各方当前取得进展的方式围绕其它三个目标讨论。本文最后讨论了目前"一带一路"的进展道路是否证明了中国致力于为自己和东道国带来互惠互利。

目标2："积极预防和妥善解决有关争端"

《共同声明》中关于这一目标的部分阐释了目前为保障"一带一路"所做出的努力，尤其是"积极化解'一带一路'贸易和投资争端，平等保护各方当事人合法权益，营造稳定公平透明、可预期的法治化营商环境。"[4]《共同声明》特别呼吁建立多元化争端解决机制和机构以及深化司法执法领域合作。[5] 目前，中国司法机关已做出令人瞩目的努力以实现这两个目标。

建立多元化争端解决机制和机构

2018年6月，中国发布了《关于建立"一带一路"国际商事争端解决机制和机构的意见》（"'一带一路'争端解决机制意见"），宣布中国计划为"一带一路"建立一套完善的争端解决机制，整合诉讼、调解和仲裁。[6] 该文件强调了坚持四项原则的需要："共商共建共享原则"，"公正高效便利原则"，"尊重当事人意思自治原则"和"纠纷解决方式多元化原则"。虽然提出的框架具有吸引力，但其将如何与现有的其他争端解决机制共同解决跨国争端仍不明朗。然而，以下两个新的机构似乎有一定前景。

国际商事法庭。2018年6月底，最高人民法院（"最高法"）在广东省深圳市设立"第一国际商事法庭"，在陕西省西安市设立"第二国际商事法庭"。最高法民事审判第四庭负责协调并指导两个国际商事法庭工作。[7] 根据《最高人民法院关于设立国际商事法庭若干问题的规定》（"《规定》"） 的前言，设立这些商事法庭的目的是："为依法公正及时审理国际商事案件，平等保护中外当事人合法权益，营造稳定、公平、透明、便捷的法治化国际营商环境，服务和保障'一带一路'建设。"[8]《规定》也说明了这些新法庭的管辖权和运行，以及如何在当事人的同意下可以和相关调解及仲裁机构协调更有效的争端解决方案。重要的是要澄清这些法庭将如何和中国的其他法院及"一带一路"东道国的法院进行互动。同时，也要澄清在有和没有相关法律合作协议的两种情况下，国际商事法庭将如何和参与了"一带一路"项目国家的法院合作，以及如何和其他有相关争端管辖权的国家的法院合作。

国际商事专家委员会。为进一步支持国际商事法庭，最高法于2018年8月正式成立国际商事专家委员会。[9] 委员会成员可以调解国际商事法庭委托的案件，以及在法院审理国际商事争端过程中就引发的外国法律问题提供专家意见。[10] 另外，委员会成员可以就和国际商事争端相关的司法解释和司法政策的制定提供意见。专家委员会将受益于来自不同司法辖区和法律体系的成员的集合经验。首批成员包含了来自于不同国家地区、有各自领域专长的32名中外专家。[11] 委员会的实践经验和专家知识在法律争端解决中能多大程度发挥，以及不同成员的国际背景对他们的活动的影响将最终决定这一新机构的重要性。

深化司法事务和执法合作

中国曾总体上表明支持"'一带一路'参与方深化[这些领域]合作，包括探讨加强民商事判决相互承认和执行、促进民商事司法文书送达及调查取证的合作机制"。[12] 2018年7月17日，21家"一带一路"沿线

英珍妮
斯坦福法学院中国指导性案例项目执行编辑

自CGCP创建时起，英珍妮就开始为其工作。目前，她主要管理CGCP的“一带一路”系列，以加深利益相关者对这一重要但尚未完全清晰的发展的理解。她还在不同司法管辖区（南非、肯尼亚、印度、荷兰和匈牙利）的争议解决方面拥有经验。她亦曾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。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。

城市法院签署了司法协作框架协议。[13] 尽管官方协议尚未正式公布，但有消息指出中国寻求加强这21家地方法院在司法事务上的全面合作，包括立案、管辖、执法和信息交流等。[14] 由于这些地方法院累积的经验在未来可能得到广泛运用，尤其是示范众多“一带一路”参与国法院能够如何合作，因此，值得对这一试验项目的最新消息和进展保持关注。

目标3和4：“加强‘一带一路’建设促进国际法治”和“深化‘一带一路’法治交流”

《共同声明》将提高“一带一路”的法治交流与合作，定位为不仅旨在支持“一带一路”倡议，同时也促进国际法治。目标3呼吁在“共商、共建、共享”的基础上进行合作，这符合国际法的基本原则和国际关系的基本准则，也有助于开展多层次、多渠道、全方位（包括国际和地区组织间）的法治合作。[15] 在法治交流方面，目标4呼吁加强法律服务业之间的合作，尤其是发展培训项目和平台，以交换有关“一带一路”参与国的法律和其达成或加入的条约的法律信息。[16] 这些目标之间密切相关，随着法律交流的数量和质量增加，协助解决“一带一路”中出现的复杂问题，这将带来符合国际法治的合作，以便实现各方的更大利益。以下活动在这方面取得了一些进展。

加强律师处理“一带一路”相关实践的能力

国际和地区组织、社会团体、研究机构和私营部门一直被鼓励共同培养“一带一路”法律专业人士，提升其与“一带一路”倡议相关的能力。

法治合作平台。2017年7月29日，“一带一路”法律服务国际交流合作会议在中国成都举行。该会议建立了法律服务行业跨境合作平台从而为“一带一路”提供支持。[17] 来自不同国家的34家律所共同建立了全球性法律服务组织，从而为参与该倡议的各个国家的律所提供更多机会就国际商务实践以及本土法律视角下的特定监管问题和降低风险的策略方面的知识和经验进行交流。由于参与“一带一路”倡议的各方会不可避免地面临由新的商业环境和不同的法律体系带来的复杂和敏感的问题，律所将就参与国家本国法律、程序性规则、普遍接受的商业实践提供法律意见以阐明和降低参与“一带一路”项目的风险方面发挥关键性作用。在诸如此类的平台上分享积累的知识将使法律服务提供者能够阐明各个项目在遵守相关法律要求的同时，如何实现其商业目标。

培训项目。为加强法律协作，提供支持“一带一路”的相关培训，中国在2018年“一带一路”法治论坛上决定出资实施“‘一带一路’法治合作研修项目”。[18] 虽然该项目具体细节尚不明朗，但该倡议有可能提供与现有的项目（例如中华全国律师协会针对寻求成为“一带一路”法律问题权威的涉外律师提供的培训项目）类似的益处。[19] 中华全国律师协会的培训项目自2013年起已先后举办了四期，培训了500多名涉外律师，并组织了164名律师出国学习。[20]

“‘一带一路’法治合作研修项目”将在其课程的基础上对“一带一路”倡议产生很大影响。除了突出相关的国际和国家的法律外，该项目所组织的培训的整体框架是否会考虑中国在法治上的特殊理念，例如“

吴胤、全嘉
斯坦福法学院中国指导性案例项目编辑

吴胤于2016年以“优秀毕业生”的荣誉毕业于北京大学法学院。之后，他加入美国达维律师事务所北京办公室，从事法律工作超过两年。吴先生长期致力于中国社会及法律体系的发展。还是一名法学生的时候，他就担任北京大学法律援助协会的理事长，带领一支志愿队伍参与了中国政府的公益项目，教授超过5,000名中、小学生基础法律课程。

全嘉是金杜律师事务所香港办公室的一名法律助理。她专注于私募股权基金的设立、基金重组和共同投资安排。她曾代表十多家知名资产管理公司、大型主权财富基金、顶级国际机构投资者、中国保险公司和银行设立基金，并协助管理其向全球和亚洲私募基金的投资。全女士于南京大学获得法学本科学位，并于英国伦敦政治经济学院获得法学硕士学位。

2018年7月由中国外交部和中国法学会举办的"一带一路"法治合作国际论坛

中国特色社会主义法治", [21] 对此一些评论者认为更类似"法制"？[22] 又或者，"国际法治"的概念是否有另一层含义，即国际法治的新目标是以合作共赢的国际关系为核心？[23] "一带一路"培训项目如能包括对不仅适用于中国的国际法治问题的普遍观点，将使培训项目有更大的合理性，并培养出能够处理其他司法辖区复杂跨境问题的律师。

法律专业网络。另一个发展是中华全国律师协会和中国司法部联合建立了能够支持"一带一路"的高层次法律职业人才库。该人才库在2017年6月北京举办的《"一带一路"沿线国家法律环境国别报告》的发布会上宣布建立。人才库包括来自不同国家、拥有不同领域的专业知识的律所、法律专业人士，而他们可以被推荐处理"一带一路"的相关仲裁，或者代表那些在"一带一路"倡议沿线国家和地区作投资的中国公司。据报道，目前人才库中已有143家中外律所，以及205名中外律师。[24] 随着"一带一路"的发展和相关争议的出现，这将为寻求能够处理"一带一路"倡议带来的特殊、复杂问题的代理的各方提供良好的资源。为了使人才库在"一带一路"建设中被视为有用和公正，人才库引入的律师和律所，不仅需要具备必要的专业技能以提供"一带一路"相关的法律意见，而且相当一部分还需要与不同的国家和地区建立真正的联系。

交流"一带一路"相关信息

近年来，中国开发了多种官方资源，让法律界在提供与倡议有关的事项咨询时可以利用。

官方网站。中国一带一路网（"一带一路网"）是作为中国和海外读者阅读关于"一带一路"的最新新闻、政策和故事的权威来源的中文官方网站。[25] 一带一路网以六种国际语言（即中文、英文、法文、俄文、西班牙文和阿拉伯文）提供内容，并突出了与"一带一路"相关的官方优先事项和政策，迈出了在"一带一路"下促进跨境法治交流的第一步。该资源提供了中国与"一带一路"参与国之间的一些双边条约，这直接符合建立中国与参与"一带一路"的其他国家之间相关条约的公共数据库的目标。然而，该网站的中英文版本包含更多的资源和信息，因此应该更多致力于完善其他语言版本，以向不会英语或中文的人士提供更多重要的"一带一路"相关法律资料。

年度刊物。中国商务部还每年发行两份用于支持"一带一路"的重要报告。首先，其年度《对外投资合作国别（地区）指南》介绍了中国企业正考虑投资、建立合同项目和劳务合作的172个国家和地区相关的法

律法规以及商机和运营风险。[26] 此外，《2017年中国对外投资合作发展报告》还写到中国企业在上一年度对外投资与合作方面的经验。[27] 这两种资源都凸显了近期中国投资的法律格局，并可以在法治交流的目标下进行共享，从而最终支持“一带一路”。

法律数据库。最高法也一直积极推动法律交流，并于2017年9月推出了中英双语法律信息数据库“法信国际版”。[28] “法信国际版” 同时针对国内国外用户，并呈现了自1949年以来中国中央和地方政府颁布的重要法律、法规和司法解释，以及最高法和各级法院发布的指导和参考案例。这些案例通过反映中国法院的司法实践以及中国法官的推理和意见，呈现出中国法律制度的总体情况，并展示出在实践中如何解释和运用中国法律，从而促进来自参与“一带一路”的不同国家的法律专业人士对中国立法体系和司法实践更深入的理解。此外，该数据库还介绍了中国法律制度从古代到现代的演变，并介绍了中国目前的司法制度。该平台可以作为参与“一带一路”的其他国家的一个范例，并且也许可以激励他们建立类似的平台，而这些平台最终可能被整合到一个单一的综合平台中，以支持“一带一路”倡议。

具有双赢潜力的更清晰的蓝图

2018年“一带一路”法治论坛更清晰地阐述了中国的“一带一路”蓝图。通过追求上述目标，中国有可能实现“双赢合作”，尤其是与那些通过参与“一带一路”进入国际市场和获得可贵的基础设施发展的国家的“双赢合作”。然而，合作的细节（例如，与“一带一路”相关的培训项目的课程设置、国际商事专家委员会可以产生的实际影响、法律交流的质与量）最终将指导“一带一路”下各个争议的解决，并将决定“一带一路”全球倡议的最大赢家。

中国和其他参与国必须更加致力于培养更多涉外律师，增进他们对国际范围以及国内和地区法规的相关法律方面的认识。此外，很重要的一点，就是中国和其它参与“一带一路”的国家必须在各个领域谈判和签署新的协议和更新现有协议，以减少“一带一路”倡议下争议的总体数量和严重程度。法律合作协议将在未来显得尤其重要，其能澄清如何解决无法避免的争议。[29]

在2018年“一带一路”法治论坛上，中国国务委员兼外交部长王毅说：“我们深信，规则和法治既是‘一带一路’走向世界的通行证，也是应对各种不确定性风险和挑战的安全阀。”[30] 参与该倡议的各方所享有的保护程度及利益，将在具体国家和案例中明确。因此，虽然中国在实现上述目标方面取得了重大进展，且似乎与为东道国带来互惠互利的目标一致，但重要的是在该倡议将获得更多的进展并影响中国和世界各地的法律发展的同时，继续监测各项目标发展的情况。只有这样才能确定“一带一路”是否符合《共同声明》等文件中列出的目标，以及该倡议是否促进了中国单方面的雄心还是真正允许多边利益。■

* 此中法连*聚焦*™的引用是：英珍妮、吴胤、全嘉，中国的“一带一路”蓝图：促进单边的雄心还是多边的利益？，《中国法律连接》，第2期，第69页（2018年9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9月，http://cgc.law.stanford.edu/zh-hans/clc-spotlight/clc-2-201809-bandr-2-ingram-wu-quan。
英文原文由Dimitri Phillips和Mei Gechlik博士编辑。本中文版本由黄莉莎、全嘉和朱琳翻译，并由全嘉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] *见，例如*，*Malaysia Has Axed $22 Billion of Chinese-Backed Projects, in a Blow to China's Grand Plan to Dominate World Trade*，Business Insider，2018年8月21日，https://www.businessinsider.com/malaysia-axes-22-billion-of-belt-and-road-projects-blow-to-china-2018-8；Douglas Bullock，*After A Brief Silence, Skeptics of China's Belt and Road Initiative Are Speaking Up Again*，Forbes，2018年4月18日，https://www.forbes.com/sites/douglasbulloch/2018/04/18/china-belt-road-initiative-obor-silk-road/#2e4d1eb54daa。

[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] “一带一路”法治合作国际论坛共同主席声明，2018年7月3日，https://www.mfa.gov.cn/web/wjbxw_673019/t1573634.shtml [“《共同声明》”]。

[4] *同上*，第18段。

[5] *同上*，第20–22段。

[6] 《关于建立“一带一路”国际商事争端解决机制和机构的意见》，2018年6月27日由 中共中央办公厅、国务院办公厅印发，http://www.gov.cn/zhengce/2018-06/27/content_5301657.htm。

[7] *同上*。

[8] 《最高人民法院关于设立国际商事法庭若干问题的规定》，2018年6月25日由最高人民法院审判委员会通过，2018年6月27日公布，2018年7月1日起施行，《中国法律连接》，第2期，第87页（2018年9月），*亦见于*斯坦福法学院中国指导性案例项目，一带一路*案文*™，2018年9月，http://cgc.law.stanford.edu/zh-hans/belt-and-road/b-and-r-texts/20180701-provisions-re-intl-commercial-courts [“《规定》”]。

[9] 《最高人民法院关于成立国际商事专家委员会的决定》，2018年8月24日由最高人民法院发布，http://cicc.court.gov.cn/html/1/218/149/192/947.html。

[10] 《规定》，注释8，第八、十二条。

[11] 《最高人民法院关于聘任国际商事专家委员会首批专家委员的决定》，2018年8月24日由最高人民法院发布，http://cicc.court.gov.cn/html/1/218/149/192/949.html。

[12] 《共同声明》，注释3，第21段。

[13] 21家“一带一路”沿线城市法院在连云港签署司法协作框架协议，《最高人民法院网》，2018年7月17日，www.court.gov.cn/zixun-xiangqing-107961.html。

[14] *同上*。

[15] 《共同声明》，注释3，第5–8段。

[16] *同上*，第23–28段。

[17] 《“一带一路”法律服务协作体成立》，新华网，2017年7月30日，http://www.xinhuanet.com/2017-07/30/c_1121403198.htm。

[18] 加强国际法治合作推动"一带一路"建设行稳致远——王毅国务委员兼外长在"一带一路"法治合作国际论坛开幕式上的演讲，2018年7月2日，htttps://www.fmprc.gov.cn/web/wjbz_673089/zyjh_673099/t1573308.shtml。

[19] 《司法部全国律协发布"一带一路"沿线国家法律环境国别报告》https://www.yidaiyilu.gov.cn/info/iList.jsp?tm_id=126&cat_id=10122&info_id=17071。

[20] 同上。

[21] 《中共中央关于全面推进依法治国若干重大问题的决定》，2014年10月23日中国共产党第十八届中央委员会第四次全体会议通过，http://www.gov.cn/xinwen/2014-10/28/content_2771714.htm（文件提到这句话）。

[22] 见Josh Chin，*'Rule of Law' or 'Rule by Law'? In China, a Preposition Makes All the Difference*，The Wall Street Journal，2014年10月20日，https://blogs.wsj.com/chinarealtime/2014/10/20/rule-of-law-or-rule-by-law-in-china-a-preposition-makes-all-the-difference。

[23] 见维护《宪章》权威，共促合作共赢——刘振民副部长在"《联合国宪章》与战后国际秩序"国际研讨会上的主旨演讲，2015年4月14日，http://www.mfa.gov.cn/web/ziliao_674904/zyjh_674906/t1255141.shtml。

[24] 《中国律协与"一带一路"沿线多国搭建法律服务合作网》，新华网，2017年6月24日，http://www.xinhuanet.com/silkroad/2017-06/24/c_1121203227.htm。

[25] 有关官方一带一路门户网站的中文版，请访问https://www.yidaiyilu.gov.cn。如需英文版本，请访问https://eng.yidaiyilu.gov.cn。

[26] 《对外投资合作国别（地区）指南》，http://fec.mofcom.gov.cn/article/gbdqzn。

[27] 《《中国对外投资合作发展报告》，https://www.yidaiyilu.gov.cn/wcm.files/upload/CMSydylgw/201705/201705240923004.pdf。

[28] 见最高法周强院长在2017年9月26日举行的法信国际版启动仪式上的主题演讲，http://www.court.gov.cn/zixun-xiangqing-62022.html。可通过https://www.globalchinalaw.com访问法信国际版。

[29] CGCP编制了构成"一带一路"法律框架的主要资源库，包括中国与一带一路*国家*™之间目前有效的法律合作协议，并在其网站上发布为一带一路*案文*™。

[30] 王毅国务委员兼外长的演讲，注释18。

CLC SPOTLIGHT 中法连聚焦

CGCP's Call for Experts *Connect*™ Submissions: Implications of China's New International Commercial Courts

On July 1, 2018, the ***Provisions of the Supreme People's Court on Several Issues Concerning the Establishment of the International Commercial Courts*** (the "*Provisions*") came into effect.[1] Two international commercial courts have been established, in Shenzhen and Xi'an. The *Provisions* specifically state that a primary aim of these courts is to "serve and safeguard" the development of the Belt and Road Initiative (the "BRI") by providing an efficient and impartial platform for the resolution of international commercial disputes.

The *Provisions* contain several articles that have attracted significant attention. Chief among them is Article 11, providing for the establishment of an International Commercial Expert Committee, members of which may act as mediators of certain disputes and are expected to play significant roles in the development of China's new dispute resolution system where mediation, arbitration, and litigation are seamlessly linked together. A group of 32 experts were appointed in August 2018.

Given the significance of these international commercial courts, the CGCP welcomes submissions (ranging from 1,000 to 2,500 words, in English or Chinese, plus, if necessary, approximately 250 to 500 words for well-formatted footnotes) from practitioners and other experts inside and outside the United States on the implications of these newly-established international commercial courts. 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 Experts *Connect*™ series. Among the 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: October 31, 2018**.

***

中国指导性案例项目专家*连接*™诚挚邀稿：中国新国际商事法庭的含义、影响

2018年7月1日，**《最高人民法院关于设立国际商事法庭若干问题的规定》**（“《规定》”）生效。[2] 两所国际商事法庭在深圳与西安相继设立。该《规定》明确指出这些法庭的主要目标之一是，通过为解决国际商事纠纷提供一个便捷和公平的平台，服务和保障“一带一路”倡议的发展。

该《规定》包括了数项受重视的条款。其中最主要的是第十一条，该条涉及组建国际商事专家委员会。该委员会成员可以担任某些纠纷的调解人，并会在中国构建调解、仲裁、诉讼有机衔接的新纠纷解决平台的过程中发挥关键作用。32名专家委员在2018年8月获委任。

鉴于这些国际商事法庭的重要性，CGCP欢迎来自美国国内外的法律执业者与专家提交稿件（1,000至2,500字，中英文皆可；如有必要，也可附上格式良好、约250至500字的脚注），探讨这些新成立的国际商事法庭的含义、影响。CGCP将为获选稿件的作者提供编辑支持，编辑后并经作者同意的稿件版本将以中英双语形式发表在我们的专家*连接*™系列专栏。作为《中国法律连接》中评论性文章的一部分，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10月31日。**

[1] 《最高人民法院关于设立国际商事法庭若干问题的规定》 (*Provisions of the Supreme People's Court on Several Issues Concerning the Establishment of the International Commercial Courts*), passed by the Adjudication Committee of the Supreme People's Court on June 25, 2018, issued on June 27, 2018, effective as of July 1, 2018, 2 China Law Connect 83 (Sept. 2018), *also available at* Stanford Law School China Guiding Cases Project, B&R *Texts*™, Sept. 2018, http://cgc.law.stanford.edu/belt-and-road/b-and-r-texts/20180701-provisions-re-intl-commercial-courts.

[2] 《最高人民法院关于设立国际商事法庭若干问题的规定》，2018年6月25日由最高人民法院审判委员会通过，2018年6月27日公布，2018年7月1日起施行，《中国法律连接》，第2期，第87页（2018年9月），*亦见于*斯坦福法学院中国指导性案例项目，一带一路*案文*™，2018年9月，http://cgc.law.stanford.edu/zh-hans/belt-and-road/b-and-r-texts/20180701-provisions-re-intl-commercial-courts。

Submit your answers to the questionnaire online at https://bit.ly/2Cs6Ry4.

Questionnaire: Rules on China's International Commercial Courts*

Zihao Zhou & Nathan Harpainter
Assistant Managing Editors, China Guiding Cases Project

Dear Friends of the China Guiding Cases Project,

On June 27, 2018, the Supreme People's Court of China issued the milestone *Provisions of the Supreme People's Court on Several Issues Concerning the Establishment of the International Commercial Courts* (the "*Provisions*"),[1] and in quick succession established the First International Commercial Court in Shenzhen and the Second International Commercial Court in Xi'an. The international commercial courts are an important component of the international commercial dispute resolution mechanisms for China's Belt and Road Initiative.

The CGCP has continuously followed the development of the Belt and Road Initiative and is currently undertaking academic research into the international commercial courts. We have excerpted below ten key articles of the *Provisions* and are soliciting your evaluation and comments on each of these articles. Your valuable opinions will be incorporated into our research, and through our worldwide publication of the results, this research should be able to further promote the development of the international commercial courts.

Thank you for your participation,

The China Guiding Cases Project

***

Please rate your evaluation of each Article listed below (the values range from 1 to 5, with "1" being highly negative and "5" being highly positive), and provide any comments you have.

Question 1

Article 2

The international commercial courts shall accept the following cases:

(1) first-instance international commercial cases where the parties have, in accordance with Article 34 of the *Civil Procedure Law*, agreed to select the jurisdiction of the Supreme People's Court and where the subject amount is at least RMB 300 million;
(2) first-instance international commercial cases where a high people's court has jurisdiction but believes that it is necessary for the Supreme People's Court to handle the case and obtains permission [to transfer the case];
(3) first-instance international commercial cases that have a significant impact on the country as a whole;
(4) [cases] where preservation [of evidence, property, etc. before or during] arbitration is applied for in accordance with Article 14 of these Provisions, or where revocation or enforcement of an international commercial arbitral award is applied for [in accordance with the same provision]; and
(5) other international commercial cases that the Supreme People's Court believes should be handled by an international commercial court.

☐1	☐2	☐3	☐4	☐5
Highly Negative				**Highly Positive**

Additional Comments (if any):

____

____

Question 2

Article 3

A commercial case with one of the following circumstances may be determined to be an international commercial case as referred to in these Provisions:

(1) one or both party/-ies is/are (a) foreigner(s), stateless person(s), or foreign enterprise(s) or organization(s);
(2) the habitual residence(s) of one or both party/-ies is/are outside the territory of the People's Republic of China;
(3) the subject property is outside the territory of the People's Republic of China;
(4) the legal facts that generated, changed, or eliminated the commercial relationship occurred outside the territory of the People's Republic of China.

Zihao Zhou and Nathan Harpainter, Assistant Managing Editors of the CGCP

Zihao Zhou is a legal professional at the Beijing and Hong Kong offices of Skadden, Arps, Slate, Meagher & Flom LLP, where he focuses on capital market transactions, mergers and acquisitions, and SEC compliance matters of China-based "new economy" companies, and has been involved in several of the globally largest initial public offerings of technology companies in 2018. Previously, he also worked as an intern at the Beijing office of Norton Rose Fulbright LLP and the Legal Working Group of the European Union Chamber of Commerce in China. Mr. Zhou received his Bachelor of Laws (Distinction) degree from Shandong University and his fully-funded Master of Common Law degree from the University of Hong Kong. He was also a visiting scholar at Columbia Law School in the summer of 2016.

Nathan Harpainter is a member of the California State Bar, currently in private practice focusing on civil and probate litigation. Mr. Harpainter has a J.D. from Santa Clara University School of Law and a B.A. and M.A. in International Policy from the Monterey Institute of International Studies. Prior to attending law school, he also worked as a research associate focusing on China and East Asian politics at the Center for Strategic and International Studies in Washington D.C., and as a research intern at the Beijing Office of International Crisis Group.

☐1 ☐2 ☐3 ☐4 ☐5

Highly Negative ... **Highly Positive**

Additional Comments (if any):

____

____

Question 3

Article 5

To handle a case, an international commercial court forms a collegial panel with three or more judges.

In deliberating a case, the collegial panel implements the principle of having the minority follow the majority. Minority opinions may be stated clearly in the adjudication documents.

☐1 ☐2 ☐3 ☐4 ☐5

Highly Negative ... **Highly Positive**

Additional Comments (if any):

____

____

Question 4

Article 8

When a law outside the territory should be applied to a case handled by an international commercial court, [the law] may be ascertained through the following channels:

(1) provided by the parties;
(2) provided by Chinese or foreign legal experts;
(3) provided by institutions [offering] services for ascertaining the law;
(4) provided by members of the International Commercial Expert Committee;[2]
(5) provided by the central organs of counterpart countries that have entered into judicial assistance agreements with China;[3]
(6) provided by the Chinese embassy or consulate in the [relevant] country;
(7) provided by the embassy of the [relevant] country in China;
(8) other reasonable channels.

Materials about the law outside the territory provided through the above-mentioned channels and expert opinions should be presented, in accordance with legal provisions, to the [international commercial] court, and the opinions of each party should be fully heard.

☐1 ☐2 ☐3 ☐4 ☐5

Highly Negative ... **Highly Positive**

Additional Comments (if any):

____

____

Question 5

Article 9

Where evidentiary materials submitted by a party to an international commercial court are formed outside the

territory of the People's Republic of China, they should be cross-examined in court, regardless of whether they have been notarized, certified, or [processed through] other certification procedures.

Where evidentiary materials submitted by a party are in English and [the English-only submission is made] with the consent of the other party, [the party] is allowed not to submit Chinese translations.

☐1 ☐2 ☐3 ☐4 ☐5

Highly Negative **Highly Positive**

Additional Comments (if any):

___

___

Question 6

Article 11

The Supreme People's Court shall establish the International Commercial Expert Committee and select qualified international commercial mediation institutions and international commercial arbitration institutions to jointly establish, together with the international commercial courts, a dispute resolution platform where mediation, arbitration, and litigation are seamlessly linked together, creating a "one stop" international commercial dispute resolution mechanism.

The international commercial courts support the parties' selection, through [the use of] a dispute resolution platform where mediation, arbitration, and litigation are seamlessly linked together, of a method that they believe to be suitable for resolving [their] international commercial dispute.

☐1 ☐2 ☐3 ☐4 ☐5

Highly Negative **Highly Positive**

Additional Comments (if any):

___

___

Question 7

Article 12

Within seven days of its accepting a case, an international commercial court may, with the consent of the parties, entrust a member of the International Commercial Expert Committee or an international commercial mediation institution to mediate [the case].

☐1 ☐2 ☐3 ☐4 ☐5

Highly Negative **Highly Positive**

Additional Comments (if any):

___

___

Question 8

Article 14

Where the parties agree to select arbitration by an international commercial arbitration institution as provided for in Article 11 Paragraph 1 of these Provisions, they may, prior to applying for arbitration or after the commencement of the arbitration proceedings, apply to an international commercial court for the preservation of evidence, property, or an act.

Where a party applies to an international commercial court for the revocation or enforcement of an arbitral award made by an international commercial arbitration institution as provided for in Article 11 Paragraph 1 of these Provisions, the international commercial court shall review [the application] in accordance with relevant legal provisions, including those of the *Civil Procedure Law*.

☐1 ☐2 ☐3 ☐4 ☐5

Highly Negative **Highly Positive**

Additional Comments (if any):

___

___

Question 9

Article 16

With respect to a judgment, ruling, or mediation statement that has been rendered by an international commercial court and that has already come into legal effect, a party may, in accordance with the provisions of the *Civil Procedure Law*, apply to the headquarters of the Supreme People's Court for a retrial [of the case].

[Where] the headquarters of the Supreme People's Court accepts an application for a retrial case as provided for in the preceding paragraph and has a retrial of the case, it should form a separate collegial panel [to handle the case].

☐1 ☐2 ☐3 ☐4 ☐5

Highly Negative **Highly Positive**

Additional Comments (if any):

____

____

Question 10

Article 18

The international commercial courts shall, through electronic litigation service platforms, trial process information platforms, and other litigation service platforms, provide litigation convenience to litigation participants, and shall support the use of online methods in the registration of cases, payment of fees, review of files, exchange of evidence, service of process, initiation of courtroom proceedings, etc.

☐1 ☐2 ☐3 ☐4 ☐5

Highly Negative **Highly Positive**

Additional Comments (if any):

____

____

******Thank you for your participation******

* The citation of this CLC *Spotlight*™ is: Zihao Zhou & Nathan Harpainter, *Questionnaire: Rules on China's International Commercial Courts*, 2 China Law Connect 75 (Sept. 2018), *also available at* Stanford Law School China Guiding Cases Project, CLC *Spotlight*™, Sept. 2018, http://cgc.law.stanford.edu/clc-spotlight/clc-2-201809-bandr-3-zhou-harpainter. The original, English version of this piece was edited by Sean Webb, Dimitri Phillips, and Dr. Mei Gechlik.

[1] 《最高人民法院关于设立国际商事法庭若干问题的规定》 (*Provisions of the Supreme People's Court on Several Issues Concerning the Establishment of the International Commercial Courts*), passed by the Adjudication Committee of the Supreme People's Court on June 25, 2018, issued on June 27, 2018, effective as of July 1, 2018, 2 China Law Connect 83 (Sept. 2018), *also available at* Stanford Law School China Guiding Cases Project, B&R *Texts*™, Sept. 2018, http://cgc.law.stanford.edu/belt-and-road/b-and-r-texts/20180701-provisions-re-intl-commercial-courts.

[2] A total of 32 experts were appointed in August 2018 as the first group of members of the International Commercial Expert Committee. *See, e.g.*, 《最高人民法院关于聘任国际商事专家委员会首批专家委员的决定》 (*Decision of the Supreme People's Court on the Appointment of the First Group of Members of the International Commercial Expert Committee*), issued by the Supreme People's Court on Aug. 24, 2018, http://cicc.court.gov.cn/html/1/219/235/245/index.html.

[3] The original text reads "我国" ("my country") and is translated herein as "China".

通过https://bit.ly/2Cs6Ry4
在线提交问卷答案。

问卷调查：
中国国际商事法庭规则*

周子皓、韩霖森
中国指导性案例项目助理执行编辑

尊敬的中国指导性案例项目（CGCP）朋友们：

2018年6月27日，中国最高人民法院公布了里程碑性的《最高人民法院关于设立国际商事法庭若干问题的规定》（“《规定》”），并在中国深圳与西安相继成立了第一国际商事法庭与第二国际商事法庭。国际商事法庭是中国“一带一路”国际商事纠纷解决机制的重要组成部分。

CGCP一直关注“一带一路”发展，并正在开展对国际商事法庭的学术研究。现将《规定》中的十项关键条款摘录如下，邀请您对每一条款进行打分与评论。您的宝贵意见将纳入我们的分析，通过我们全球性的发布，这些分析应能进一步推动国际商事法庭的发展。

感谢您的参与。

中国指导性案例项目

***

请您对每一条款进行打分（分值1至5代表“最低评价”至“最高评价”）与评论。

第一题

第二条

国际商事法庭受理下列案件：

（一）当事人依照民事诉讼法第三十四条的规定协议选择最高人民法院管辖且标的额为人民币3亿元以上的第一审国际商事案件；
（二）高级人民法院对其所管辖的第一审国际商事案件，认为需要由最高人民法院审理并获准许的；
（三）在全国有重大影响的第一审国际商事案件；
（四）依照本规定第十四条申请仲裁保全、申请撤销或者执行国际商事仲裁裁决的；
（五）最高人民法院认为应当由国际商事法庭审理的其他国际商事案件。

☐1 ☐2 ☐3 ☐4 ☐5

最低评价 **最高评价**

其他评论（如有）：

____

____

第二题

第三条

具有下列情形之一的商事案件，可以认定为本规定所称的国际商事案件：

（一）当事人一方或者双方是外国人、无国籍人、外国企业或者组织的；
（二）当事人一方或者双方的经常居所地在中华人民共和国领域外的；
（三）标的物在中华人民共和国领域外的；
（四）产生、变更或者消灭商事关系的法律事实发生在中华人民共和国领域外的。

☐1 ☐2 ☐3 ☐4 ☐5

最低评价 **最高评价**

其他评论（如有）：

____

____

第三题

第五条

国际商事法庭审理案件，由三名或者三名以上法官组成合议庭。

合议庭评议案件，实行少数服从多数的原则。少数意见可以在裁判文书中载明。

☐1 ☐2 ☐3 ☐4 ☐5

最低评价 **最高评价**

其他评论（如有）：

____

____

周子皓、韩霖森（Nathan Harpainter）
中国指导性案例项目助理执行编辑

周子皓是世达国际律师事务所北京与香港办公室的一名法律专业人士。在世达，他专注于中国“新经济”公司的资本市场交易、并购以及与美国证监会相关的合规事宜，并参与了2018年全球范围内其中几个最大的科技公司上市项目。此前，他曾分别于诺顿罗氏国际律师事务所北京代表处及中国欧盟商会法律工作组担任实习生。周先生于山东大学获得法学学士学位（优秀毕业生），并于香港大学获全额奖学金完成普通法法学硕士学位。他亦曾于2016年暑期在美国哥伦比亚大学法学院担任访问学者。

韩霖森是美国加州的律师，专门从事民事案件、继承案件的诉讼工作。韩先生获得了加州圣塔克拉拉大学法学院的法学博士学位和美国蒙特瑞国际研究学院的国际政策研究学士、硕士学位。获得法学博士学位之前，他曾在美国首都的国际战略研究中心和国际危机组织北京办事处当过实习生和研究员，主要研究中国、东亚的国际政策与外交关系。

第四题

第八条

国际商事法庭审理案件应当适用域外法律时，可以通过下列途径查明：

（一）由当事人提供；
（二）由中外法律专家提供；
（三）由法律查明服务机构提供；
（四）由国际商事专家委员提供；
（五）由与我国订立司法协助协定的缔约对方的中央机关提供；
（六）由我国驻该国使领馆提供；
（七）由该国驻我国使馆提供；
（八）其他合理途径。

通过上述途径提供的域外法律资料以及专家意见，应当依照法律规定在法庭上出示，并充分听取各方当事人的意见。

☐1 ☐2 ☐3 ☐4 ☐5
最低评价 **最高评价**

其他评论（如有）：

____
____

第五题

第九条

当事人向国际商事法庭提交的证据材料系在中华人民共和国领域外形成的，不论是否已办理公证、认证或者其他证明手续，均应当在法庭上质证。

当事人提交的证据材料系英文且经对方当事人同意的，可以不提交中文翻译件。

☐1 ☐2 ☐3 ☐4 ☐5
最低评价 **最高评价**

其他评论（如有）：

____
____

第六题

第十一条

最高人民法院组建国际商事专家委员会，并选定符合条件的国际商事调解机构、国际商事仲裁机构与国际商事法庭共同构建调解、仲裁、诉讼有机衔接的纠纷解决平台，形成“一站式”国际商事纠纷解决机制。

国际商事法庭支持当事人通过调解、仲裁、诉讼有机衔接的纠纷解决平台，选择其认为适宜的方式解决国际商事纠纷。

☐1 ☐2 ☐3 ☐4 ☐5
最低评价 **最高评价**

其他评论（如有）：

____
____

第七题

第十二条

国际商事法庭在受理案件后七日内，经当事人同意，可以委托国际商事专家委员会成员或者国际商事调解机构调解。

☐1 ☐2 ☐3 ☐4 ☐5
最低评价 **最高评价**

其他评论（如有）：

____

____

第八题

第十四条

当事人协议选择本规定第十一条第一款规定的国际商事仲裁机构仲裁的，可以在申请仲裁前或者仲裁程序开始后，向国际商事法庭申请证据、财产或者行为保全。

当事人向国际商事法庭申请撤销或者执行本规定第十一条第一款规定的国际商事仲裁机构作出的仲裁裁决的，国际商事法庭依照民事诉讼法等相关法律规定进行审查。

☐1 ☐2 ☐3 ☐4 ☐5

最低评价 **最高评价**

其他评论（如有）：

____

____

第九题

第十六条

当事人对国际商事法庭作出的已经发生法律效力的判决、裁定和调解书，可以依照民事诉讼法的规定向最高人民法院本部申请再审。

最高人民法院本部受理前款规定的申请再审案件以及再审案件，均应当另行组成合议庭。

☐1 ☐2 ☐3 ☐4 ☐5

最低评价 **最高评价**

其他评论（如有）：

____

____

第十题

第十八条

国际商事法庭通过电子诉讼服务平台、审判流程信息公开平台以及其他诉讼服务平台为诉讼参与人提供诉讼便利，并支持通过网络方式立案、缴费、阅卷、证据交换、送达、开庭等。

☐1 ☐2 ☐3 ☐4 ☐5

最低评价 **最高评价**

其他评论（如有）：

____

____

****感谢参与****

* 此中法连*聚焦*™的引用是：周子皓、韩霖森，问卷调查：中国国际商事法庭规则，《中国法律连接》，第2期，第79页（2018年9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9月，http://cgc.law.stanford.edu/zh-hans/clc-spotlight/clc-2-201806-bandr-3-zhou-harpainter。中文原文由熊美英博士编辑。

Do you like the design of *China Law Connect*?

Is your company or organization looking for a flexible and creative graphic designer?

For over 20 years, **Bojan Ostojic** has been supporting clients around the world to produce professional publications, websites, and advertising materials in different languages (including English and Chinese).

If you have a project you need help on, contact Bojan at **quantumsomnium@gmail.com**.

China Law Connect welcomes sponsored content from law firms, businesses, or other organizations around the world that are interested in reaching our global readership.

Want to advertise open positions with your firm, business, or organization; recent news and accomplishments; or upcoming events?

If you are interested in sponsoring content to appear in future issues of the journal, please contact **Shuohan Fu**, Associate Managing Editor of the CGCP, at **shuohanf@stanford.edu**.

您喜欢《中国法律连接》的设计吗？

您的公司或组织是否正在寻找灵活而富有创意的平面设计师？

20年来，**安博阳**一直用不同的语言（包括英语、中文），为全球客户提供支持，制作专业出版物、网站和广告材料。

如果您有一个项目需要帮助，可以联系博阳，其电子邮件是：**quantumsomnium@gmail.com**。

全世界律所、企业和其他有意面向我们的全球读者的组织，《中国法律连接》欢迎你们的赞助内容。

想宣传您的律所、企业或者组织的招聘职位、新闻和成就、或最近的活动？

如果您有兴趣在本刊上刊登赞助内容，请联系中国指导性案例项目副执行编辑
傅铄涵：shuohanf@stanford.edu。

Provisions of the Supreme People's Court on Several Issues Concerning the Establishment of the International Commercial Courts*

In order to impartially and promptly handle international commercial cases in accordance with law, equally protect the legal rights and interests of Chinese and foreign parties, create a stable, fair, transparent, and convenient international business environment governed by the rule of law, and serve and safeguard the construction of the "Belt and Road", [the Supreme People's Court,] in accordance with the *Organic Law of the People's Courts of the People's Republic of China*, the *Civil Procedure Law of the People's Republic of China*, and other laws, and in combination with actual adjudication work, [formulates] the following provisions on issues related to the establishment of the international commercial courts[1] of the Supreme People's Court.

Article 1

The Supreme People's Court establishes international commercial courts.[2] The international commercial courts are permanent adjudicatory bodies of the Supreme People's Court.

Article 2

The international commercial courts shall accept the following cases:

(1) first-instance international commercial cases where the parties have, in accordance with Article 34 of the *Civil Procedure Law*, agreed to select the jurisdiction of the Supreme People's Court and where the subject amount is at least RMB 300 million;
(2) first-instance international commercial cases where a high people's court has jurisdiction but believes that it is necessary for the Supreme People's Court to handle the case and obtains permission [to transfer the case];
(3) first-instance international commercial cases that have a significant impact on the country as a whole;
(4) [cases] where preservation [of evidence, property, etc., before or during] arbitration is applied for in accordance with Article 14 of these Provisions, or where revocation or enforcement of an international commercial arbitral award is applied for [in accordance with the same provision]; and
(5) other international commercial cases that the Supreme People's Court believes should be handled by an international commercial court.

Article 3

A commercial case with one of the following circumstances may be determined to be an international commercial case as referred to in these Provisions:

(1) one or both party/-ies is/are (a) foreigner(s), stateless person(s), or foreign enterprise(s) or organization(s);
(2) the habitual residence(s) of one or both party/-ies is/are outside the territory of the People's Republic of China;
(3) the subject property is outside the territory of the People's Republic of China;
(4) the legal facts that generated, changed, or eliminated the commercial relationship occurred outside the territory of the People's Republic of China.

Article 4

Judges of the international commercial courts are selected by the Supreme People's Court from among senior judges who have extensive experience in adjudication, are familiar with international treaties, international conventions, and international trade investment practices, and are able to proficiently use at the same time Chinese and English as working languages.

Article 5

To handle a case, an international commercial court forms a collegial panel with three or more judges.

In deliberating a case, the collegial panel implements the principle of having the minority follow the majority. Minority opinions may be stated clearly in the adjudication documents.

Article 6

A preservation ruling rendered by an international commercial court may be designated for enforcement by a lower-level people's court.

Article 7

In handling a case, an international commercial court determines, in accordance with the *Law of the People's*

Republic of China on the Application of Laws to Foreign-Related Civil Relations, the substantive law applicable to the dispute.

Where the parties choose, in accordance with legal provisions, the applicable law, the law chosen by the parties should be applied.

Article 8

When a law outside the territory should be applied to a case handled by an international commercial court, [the law] may be ascertained through the following channels:
(1) provided by the parties;
(2) provided by Chinese or foreign legal experts;
(3) provided by institutions [offering] services for ascertaining the law;
(4) provided by members of the International Commercial Expert Committee;[3]
(5) provided by the central organs of counterpart countries that have entered into judicial assistance agreements with China;[4]
(6) provided by the Chinese embassy or consulate in the [relevant] country;
(7) provided by the embassy of the [relevant] country in China;
(8) other reasonable channels.

Materials about the law outside the territory provided through the above-mentioned channels and expert opinions should be presented, in accordance with legal provisions, to the [international commercial] court, and the opinions of each party should be fully heard.

Article 9

Where evidentiary materials submitted by a party to an international commercial court are formed outside the territory of the People's Republic of China, they should be cross-examined in court, regardless of whether they have been notarized, certified, or [processed through] other certification procedures.

Where evidentiary materials submitted by a party are in English and [the English-only submission is made] with the consent of the other party, [the party] is allowed not to submit the Chinese translations.

Article 10

An international commercial court may use audiovisual transmission technology and other information networking methods to investigate and collect evidence and organize cross-examination.

Article 11

The Supreme People's Court shall establish the International Commercial Expert Committee and select qualified international commercial mediation institutions and international commercial arbitration institutions to jointly establish, together with the international commercial courts, a dispute resolution platform where mediation, arbitration, and litigation are seamlessly linked together, creating a "one stop" international commercial dispute resolution mechanism.

The international commercial courts support the parties' selection, through [the use of] a dispute resolution platform where mediation, arbitration, and litigation are seamlessly linked together, of a method that they believe to be suitable for resolving [their] international commercial dispute.

Article 12

Within seven days of its accepting a case, an international commercial court may, with the consent of the parties, entrust a member of the International Commercial Expert Committee or an international commercial mediation institution to mediate [the case].

Article 13

Where the parties reach a mediation agreement following a mediation presided over by a member of the International Commercial Expert Committee or an international commercial mediation institution, an international commercial court may prepare and issue a mediation statement in accordance with legal provisions; where the parties request that a judgment be issued, [the international commercial court] may prepare, based on the content of the [mediation] agreement, a written judgment and deliver it to the parties.

Article 14

Where the parties agree to select arbitration by an international commercial arbitration institution as provided for in Article 11 Paragraph 1 of these Provisions, they may, prior to applying for arbitration or after the commencement of the arbitration proceedings, apply to an international commercial court for the preservation of evidence, property, or an act.

Where a party applies to an international commercial court for the revocation or enforcement of an arbitral award made by an international commercial arbitration institution as provided for in Article 11 Paragraph 1 of these Provisions, the international commercial court shall

review [the application] in accordance with relevant legal provisions, including those of the *Civil Procedure Law*.

Article 15

The judgments and rulings rendered by the international commercial courts are judgments and rulings with legal effect.

The mediation statements rendered by the international commercial courts shall have the same legal effect as judgments upon the statements' being signed by both parties.

Article 16

With respect to a judgment, ruling, or mediation statement that has been rendered by an international commercial court and that has already come into legal effect, a party may, in accordance with the provisions of the *Civil Procedure Law*, apply to the headquarters of the Supreme People's Court for a retrial [of the case].

[Where] the headquarters of the Supreme People's Court accepts an application for a retrial case as provided for in the preceding paragraph and has a retrial of the case, it should form a separate collegial panel [to handle the case].

Article 17

A party may apply to an international commercial court to enforce a judgment, ruling, or mediation statement that has been rendered by an international commercial court and that has already come into legal effect.

Article 18

The international commercial courts shall, through electronic litigation service platforms, trial process information platforms, and other litigation service platforms, provide litigation convenience to litigation participants, and shall support the use of online methods in the registration of cases, payment of fees, review of files, exchange of evidence, service of process, initiation of courtroom proceedings, etc.

Article 19

These Provisions shall be effective as of July 1, 2018. ■

---

* The citation of this B&R *Text*™ is:《最高人民法院关于设立国际商事法庭若干问题的规定》(*Provisions of the Supreme People's Court on Several Issues Concerning the Establishment of the International Commercial Courts*), passed by the Adjudication Committee of the Supreme People's Court on June 25, 2018, issued on June 27, 2018, effective as of July 1, 2018, 2 CHINA LAW CONNECT 83 (Sept. 2018), *also available at* STANFORD LAW SCHOOL CHINA GUIDING CASES PROJECT, B&R *Texts*™, Sept. 2018, http://cgc.law.stanford.edu/belt-and-road/b-and-r-texts/20180701-provisions-re-intl-commercial-courts. An English version of the text is available for reference only at the official website of the international commercial courts, at http://cicc.court.gov.cn/html/1/219/199/201/817.html.

This document was primarily prepared by Nathan Harpainter and Zihao Zhou; it was finalized by Sean Webb, Dimitri Phillips, and Dr. Mei Gechlik. Minor editing, such as adding a few words included in square brackets and boldfacing the numbers of the provisions, was done to make the piece more comprehensible to readers; all explanatory notes have been added by the China Guiding Cases Project. The following text is otherwise a direct translation of the original text released by the Supreme People's Court.

[1] The text reads "国际商事法庭", which would have been translated as "international commercial tribunal(s)" had the term "international commercial court" not been widely used by the Chinese authorities (e.g., http://cicc.court.gov.cn). The use of "tribunal" can better indicate that this adjudicatory body is not a "法院" ("court") as understood in the context of the Chinese legal system.

China has (1) basic people's courts, (2) intermediate people's courts, (3) high people's courts, (4) the Supreme People's Court, and (5) special courts. According to Article 29 of the *Organic Law of the People's Courts*, the establishment of special courts (e.g., the three intellectual property courts in Beijing, Shanghai, and Guangzhou) needs to be provided for by the Standing Committee of the National People's Congress. The international commercial "courts" referred to herein were established by the Supreme People's Court by virtue of Article 31 of the *Organic Law of the People's Courts*, which provides: "The Supreme People's Court shall set up criminal tribunal(s), civil tribunal(s), economic tribunal(s), and such other tribuanls as deemed necessary". *See*《中华人民共和国人民法院组织法》(*Organic Law of the People's Courts of the People's Republic of China*), passed on July 1, 1979, issued on July 5, 1979, effective as of Jan. 1, 1980, revised or amended three times, most recently on Oct. 31, 2006, effective as of Jan. 1, 2007, http://www.npc.gov.cn/wxzl/gongbao/2006-12/05/content_5354938.htm.

[2] The first two international commercial courts were established in late June 2018. *See, e.g.*, *China Inaugurates Two Int'l Commercial Courts*, XINHUA, June 29, 2018, http://www.xinhuanet.com/english/2018-06/29/c_137290628.htm.

[3] A total of 32 experts were appointed in August 2018 as the first group of members of the International Commercial Expert Committee. *See, e.g.*,《最高人民法院关于聘任国际商事专家委员会首批专家委员的决定》(*Decision of the Supreme People's Court on the Appointment of the First Group of Members of the International Commercial Expert Committee*), issued by the Supreme People's Court on Aug. 24, 2018, http://cicc.court.gov.cn/html/1/219/235/245/index.html.

[4] The original text reads "我国" ("my country") and is translated herein as "China".

CGCP's Call for Experts *Connect*™ Submissions:
Implications of China's New International Commercial Courts

On July 1, 2018, the ***Provisions of the Supreme People's Court on Several Issues Concerning the Establishment of the International Commercial Courts*** (the "*Provisions*") came into effect.[1] Two international commercial courts have been established, in Shenzhen and Xi'an. The *Provisions* specifically state that a primary aim of these courts is to "serve and safeguard" the development of the Belt and Road Initiative (the "BRI") by providing an efficient and impartial platform for the resolution of international commercial disputes.

The *Provisions* contain several articles that have attracted significant attention. Chief among them is Article 11, providing for the establishment of an International Commercial Expert Committee, members of which may act as mediators of certain disputes and are expected to play significant roles in the development of China's new dispute resolution system where mediation, arbitration, and litigation are seamlessly linked together. A group of 32 experts were appointed in August 2018.

Given the significance of these international commercial courts, the CGCP welcomes submissions (ranging from 1,000 to 2,500 words, in English or Chinese, plus, if necessary, approximately 250 to 500 words for well-formatted footnotes) from practitioners and other experts inside and outside the United States on the implications of these newly-established international commercial courts. 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 Experts *Connect*™ series. Among the 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: October 31, 2018.**

***

中国指导性案例项目专家*连接*™诚挚邀稿：
中国新国际商事法庭的含义、影响

2018年7月1日，**《最高人民法院关于设立国际商事法庭若干问题的规定》**（"《规定》"）生效。[2] 两所国际商事法庭在深圳与西安相继设立。该《规定》明确指出这些法庭的主要目标之一是，通过为解决国际商事纠纷提供一个便捷和公平的平台，服务和保障"一带一路"倡议的发展。

该《规定》包括了数项受重视的条款。其中最主要的是第十一条，该条涉及组建国际商事专家委员会。该委员会成员可以担任某些纠纷的调解人，并会在中国构建调解、仲裁、诉讼有机衔接的新纠纷解决平台的过程中发挥关键作用。32名专家委员在2018年8月获委任。

鉴于这些国际商事法庭的重要性，CGCP欢迎来自美国国内外的法律执业者与专家提交稿件（1,000至2,500字，中英文皆可；如有必要，也可附上格式良好、约250至500字的脚注），探讨这些新成立的国际商事法庭的含义、影响。CGCP将为获选稿件的作者提供编辑支持，编辑后并经作者同意的稿件版本将以中英双语形式发表在我们的专家*连接*™系列专栏。作为《中国法律连接》中评论性文章的一部分，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10月31日。**

---

[1] 《最高人民法院关于设立国际商事法庭若干问题的规定》(*Provisions of the Supreme People's Court on Several Issues Concerning the Establishment of the International Commercial Courts*), passed by the Adjudication Committee of the Supreme People's Court on June 25, 2018, issued on June 27, 2018, effective as of July 1, 2018, 2 China Law Connect 83 (Sept. 2018), *also available at* Stanford Law School China Guiding Cases Project, B&R *Texts*™, Sept. 2018, http://cgc.law.stanford.edu/belt-and-road/b-and-r-texts/20180701-provisions-re-intl-commercial-courts.

[2] 《最高人民法院关于设立国际商事法庭若干问题的规定》，2018年6月25日由最高人民法院审判委员会通过，2018年6月27日公布，2018年7月1日起施行，《中国法律连接》，第2期，第87页（2018年9月），*亦见于*斯坦福法学院中国指导性案例项目，一带一路*案文*™，2018年9月，http://cgc.law.stanford.edu/zh-hans/belt-and-road/b-and-r-texts/20180701-provisions-re-intl-commercial-courts。

《最高人民法院关于设立国际商事法庭若干问题的规定》*

为依法公正及时审理国际商事案件，平等保护中外当事人合法权益，营造稳定、公平、透明、便捷的法治化国际营商环境，服务和保障“一带一路”建设，依据《中华人民共和国人民法院组织法》《中华人民共和国民事诉讼法》等法律，结合审判工作实际，就设立最高人民法院国际商事法庭相关问题规定如下。

第一条

最高人民法院设立国际商事法庭。国际商事法庭是最高人民法院的常设审判机构。

第二条

国际商事法庭受理下列案件：
（一）当事人依照民事诉讼法第三十四条的规定协议选择最高人民法院管辖且标的额为人民币3亿元以上的第一审国际商事案件；
（二）高级人民法院对其所管辖的第一审国际商事案件，认为需要由最高人民法院审理并获准许的；
（三）在全国有重大影响的第一审国际商事案件；
（四）依照本规定第十四条申请仲裁保全、申请撤销或者执行国际商事仲裁裁决的；
（五）最高人民法院认为应当由国际商事法庭审理的其他国际商事案件。

第三条

具有下列情形之一的商事案件，可以认定为本规定所称的国际商事案件：
（一）当事人一方或者双方是外国人、无国籍人、外国企业或者组织的；
（二）当事人一方或者双方的经常居所地在中华人民共和国领域外的；
（三）标的物在中华人民共和国领域外的；
（四）产生、变更或者消灭商事关系的法律事实发生在中华人民共和国领域外的。

第四条

国际商事法庭法官由最高人民法院在具有丰富审判工作经验，熟悉国际条约、国际惯例以及国际贸易投资实务，能够同时熟练运用中文和英文作为工作语言的资深法官中选任。

第五条

国际商事法庭审理案件，由三名或者三名以上法官组成合议庭。

合议庭评议案件，实行少数服从多数的原则。少数意见可以在裁判文书中载明。

第六条

国际商事法庭作出的保全裁定，可以指定下级人民法院执行。

第七条

国际商事法庭审理案件，依照《中华人民共和国涉外民事关系法律适用法》的规定确定争议适用的实体法律。

当事人依照法律规定选择适用法律的，应当适用当事人选择的法律。

第八条

国际商事法庭审理案件应当适用域外法律时，可以通过下列途径查明：
（一）由当事人提供；
（二）由中外法律专家提供；
（三）由法律查明服务机构提供；
（四）由国际商事专家委员提供；
（五）由与我国订立司法协助协定的缔约对方的中央机关提供；
（六）由我国驻该国使领馆提供；
（七）由该国驻我国使馆提供；
（八）其他合理途径。

通过上述途径提供的域外法律资料以及专家意见，应当依照法律规定在法庭上出示，并充分听取各方当事人的意见。

第九条

当事人向国际商事法庭提交的证据材料系在中华人民共和国领域外形成的，不论是否已办理公证、认证或者其他证明手续，均应当在法庭上质证。

当事人提交的证据材料系英文且经对方当事人同意的，可以不提交中文翻译件。

第十条

国际商事法庭调查收集证据以及组织质证，可以采用视听传输技术及其他信息网络方式。

第十一条

最高人民法院组建国际商事专家委员会，并选定符合条件的国际商事调解机构、国际商事仲裁机构与国际商事法庭共同构建调解、仲裁、诉讼有机衔接的纠纷解决平台，形成"一站式"国际商事纠纷解决机制。

国际商事法庭支持当事人通过调解、仲裁、诉讼有机衔接的纠纷解决平台，选择其认为适宜的方式解决国际商事纠纷。

第十二条

国际商事法庭在受理案件后七日内，经当事人同意，可以委托国际商事专家委员会成员或者国际商事调解机构调解。

第十三条

经国际商事专家委员会成员或者国际商事调解机构主持调解，当事人达成调解协议的，国际商事法庭可以依照法律规定制发调解书；当事人要求发给判决书的，可以依协议的内容制作判决书送达当事人。

第十四条

当事人协议选择本规定第十一条第一款规定的国际商事仲裁机构仲裁的，可以在申请仲裁前或者仲裁程序开始后，向国际商事法庭申请证据、财产或者行为保全。

当事人向国际商事法庭申请撤销或者执行本规定第十一条第一款规定的国际商事仲裁机构作出的仲裁裁决的，国际商事法庭依照民事诉讼法等相关法律规定进行审查。

第十五条

国际商事法庭作出的判决、裁定，是发生法律效力的判决、裁定。

国际商事法庭作出的调解书，经双方当事人签收后，即具有与判决同等的法律效力。

第十六条

当事人对国际商事法庭作出的已经发生法律效力的判决、裁定和调解书，可以依照民事诉讼法的规定向最高人民法院本部申请再审。

最高人民法院本部受理前款规定的申请再审案件以及再审案件，均应当另行组成合议庭。

第十七条

国际商事法庭作出的发生法律效力的判决、裁定和调解书，当事人可以向国际商事法庭申请执行。

第十八条

国际商事法庭通过电子诉讼服务平台、审判流程信息公开平台以及其他诉讼服务平台为诉讼参与人提供诉讼便利，并支持通过网络方式立案、缴费、阅卷、证据交换、送达、开庭等。

第十九条

本规定自2018年7月1日起施行。

---

* 此一带一路*案文*™的引用是：《最高人民法院关于设立国际商事法庭若干问题的规定》，2018年6月25日由最高人民法院审判委员会通过，2018年6月27日公布，2018年7月1日起施行，《中国法律连接》，第2期，第87页（2018年9月），*亦见于*斯坦福法学院中国指导性案例项目，一带一路*案文*™，2018年9月，http://cgc.law.stanford.edu/zh-hans/belt-and-road/b-and-r-texts/20180701-provisions-re-intl-commercial-courts。案文原文载于：《最高人民法院网》，2018年6月29日，http://www.court.gov.cn/zixun-xiangqing-104602.html。

News and Events

July 2018 | Forum on the Belt and Road Legal Cooperation

From July 2 to 3, 2018, Dr. Mei Gechlik, Founder and Director of the China Guiding Cases Project ("CGCP") of Stanford Law School, participated in the Forum on the Belt and Road Legal Cooperation, which was jointly organized by the Ministry of Foreign Affairs of China and the China Law Society. More than 300 high-level officials and legal practitioners representing over 40 countries and ten global organizations attended the forum. H.E. WANG Yi, State Councilor and Minister of Foreign Affairs of China gave the keynote speech. Distinguished speakers included, among others, the Minister of Justice of Serbia, Minister of Justice of Jamaica, and the Former Deputy Prime Minister of Thailand, as well as representatives from the United Nations, Asian Infrastructure Investment Bank, and the Ministry of Foreign Affairs of Turkey. Dr. Gechlik explained to the audience how the CGCP has facilitated legal exchange and cooperation related to the Belt and Road Initiative. The full text of Dr. Gechlik's speech will be published as part of the Collected Papers of the Forum by the China Law Society. ●

July 2018 | CGCP Presentation at European Union Chamber of Commerce in Beijing

Following the Forum on the Belt and Road Legal Cooperation, Dr. Gechlik was invited to speak at the European Union Chamber of Commerce to discuss, among other topics, the establishment of China's international commercial courts. The rigorous discussion prompted the CGCP to design a questionnaire on the ***Provisions of the Supreme People's Court on Several Issues Concerning the Establishment of the International Commercial Courts*** and release a Call for Experts *Connect*™ Submissions on the implications of these new international commercial courts. For the questionnaire, see page 75 and visit https://bit.ly/2Cs6Ry4 to submit your responses. For more information about how to contribute a piece on this topic to be published in the next issue of *CLC*, see page 34 and visit https://cgc.law.stanford.edu/event/clc-2-201809-call-for-submissions. ●

China Cases *Insights*™ 2018 Writing Contest (Deadline: November 15, 2018)

In June 2018, the CGCP announced the 2018 China Cases *Insights*™ Writing Contest, which invites students and professionals both inside and outside China to submit concise, original pieces highlighting the key takeaways from the most important recent cases related to China. The CGCP has received many submissions so far and looks forward to receiving more before the **new, November 15, 2018, deadline**.

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**.

For more information about the writing contest, including all of the requirements for a complete submission, please visit: https://cgc.law.stanford.edu/event/china-cases-insights-writing-contest-2018. ●

September 2018 | Meeting with High-Level Delegation from the Ministry of Commerce of China

On September 18, 2018, the CGCP met with a high-level delegation from China's Ministry of Commerce ("MOFCOM") to have an informal discussion at Stanford Law School. Organized by the international law firm Perkins Coie LLP, the delegation of 22 MOFCOM and regional department officials was headed by Mr. LIU Danyang, Deputy Director General of MOFCOM's Trade Remedy and Investigations Bureau. CGCP Founder and Director Dr. Mei Gechlik discussed U.S. trade laws and policies and their impact on U.S.–China relations as well as the important work that the CGCP has been doing to illuminate China's Case Guidance System for those seeking to do business in or related to China. ●

Attendees of the meeting with the delegation from the Chinese Ministry of Commerce: Dr. Mei Gechlik (center), Mr. LIU Danyang (right), Mr. Michael House (Managing Partner, Perkins Coie LLP, Beijing) (left).

Upcoming Release of Post-Beijing Conference Book

By the end of 2018, the CGCP will publish a book presenting highlights of a large-scale conference titled "China Case Guidance System and Belt and Road Initiative: Practical Insights and Prospects", which the CGCP hosted at the Stanford Center at Peking University in Beijing. More than 160 participants attended the conference, including judges, lawyers, academics, and students from across China. Book chapters will include summaries of each of the conference sessions as well as new and more detailed chapters contributed by approximately ten conference speakers. For more information about the conference, please visit the CGCP website at: https://cgc.law.stanford.edu/event/20180330-conference-in-beijing. ●

新闻和活动

2018年7月 | "一带一路"法治合作国际论坛

2018年7月2-3日，斯坦福法学院中国指导性案例项目（"CGCP"）的创办人和总监熊美英博士参加了由中国外交部和中国法学会联合主办的"一带一路"法治合作国际论坛。来自40多个国家和10多个国际组织的300多名官员以及法律从业人员出席了论坛。国务院委员兼外交部长王毅发表了主题演讲。塞尔维亚司法部长、牙买加司法部长、泰国前副总理、以及联合国、亚洲基础建设投资银行、土耳其外交部的代表等杰出嘉宾分别在论坛上致辞。熊博士向与会人士讲解了CGCP如何促进有关"一带一路"倡议的法律交流与合作。熊博士演讲的全文将被编入由中国法学会出版的论坛文选集。●

2018年7月 | CGCP在北京欧盟商会的演讲

继"一带一路"法治合作国际论坛后，熊博士应邀在欧盟商会发表演讲，讨论了中国建立国际商事法庭等议题。会上严谨的讨论促使CGCP在这一期《中国法律连接》中设计了一个关于**《最高人民法院关于设立国际商事法庭若干问题的规定》**的问卷调查和探讨这些商事法庭意义的专家*连接*™邀稿。关于问卷调查的更多信息，请参阅第79页和访问https://bit.ly/2Cs6Ry4在线提交问卷。欲了解如何回应此次邀稿并在下一期的《中国法律连接》中发表，请参阅第34页和访问https://cgc.law.stanford.edu/zh-hans/event/clc-2-201809-call-for-submissions。●

2018中国案例*见解*™写作比赛（截止日期：2018年11月15日）

2018年6月，CGCP宣布开展了2018中国案例*见解*™写作比赛，诚邀中国国内外的学生和专业人事参与并提交简明扼要的原创文章，分析近期与中国相关的重要案例。CGCP目前为止已经收到了许多投稿并期待在新的截止日期**2018年11月15日**前收到更多稿件。

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。请于2018年11月15日前将作品提交至**contactcgcp@law.stanford.edu**。

有关比赛的详细信息，请访问https://cgc.law.stanford.edu/zh-hans/event/china-cases-insights-writing-contest-2018。●

2018年9月|与中国商务部高层代表团的会面

2018年9月18日，CGCP在斯坦福法学院会见了中国商务部的高层代表团并与其进行了非正式讨论。此次访问由博钦国际律师事务所组织。代表团一行22人由商务部贸易救济调查局副局长刘丹阳先生带领，其中包括商务部和地区商务厅的代表。CGCP创办人和总监熊美英博士讨论了美国贸易法律和政策及其对中美关系的影响。熊博士还介绍了CGCP所做的重要工作，如何为那些寻求在中国开展业务或与中国开展业务的人阐明中国的案例指导制度。●

与中国商务部代表团会晤的与会者：熊美英博士（中），刘丹阳先生（右），Michael House 先生（博钦律师事务所北京办公室合伙人）（左）

北京会议书籍即将出版

2018年底， CGCP将出版一本书，内容涵盖于北京斯坦福中心举行的题为《中国案例指导制度和“一带一路”倡议：实务见解与前景》的大型会议。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，共160余人。书籍章节包括每个会议环节的摘要以及由约10个会议演讲人撰写的新的和更详细的评论。有关会议的更多信息，请访问CGCP网站：https://cgc.law.stanford.edu/zh-hans/event/20180330-conference-in-beijing。●