CHINA LAW CONNECT 中国法律连接

CGCP

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China Guiding Cases Project
Stanford Law School

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中国指导性案例项目
斯坦福法学院

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China Guiding Cases Project
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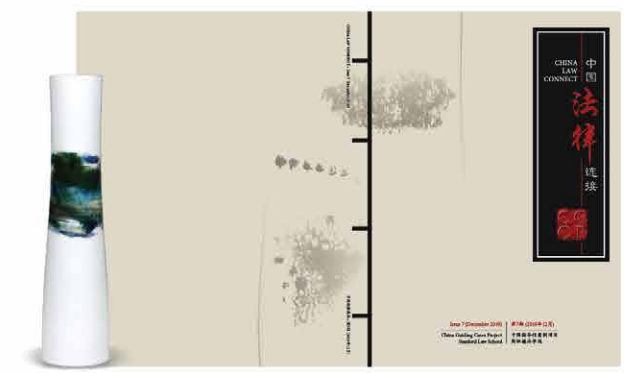

The CGCP thanks master ceramicist Mr. CHEN Xuncheng for allowing us to design the 2019 covers, based on his art pieces.

CGCP感谢陶瓷大师陈训成先生允许我们根据他的作品设计2019年出版的期刊封面。

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Editor's Note*

Dr. Mei Gechlik

Dear Readers,

China's Adjudication Essentials of Intellectual Property Cases

The ongoing pandemic and economic crisis have captured so much attention that a significant development in China's protection of intellectual property ("IP") rights may have gone unnoticed.

On April 16, 2020, just over a year after the establishment of the Intellectual Property Tribunal of the Supreme People's Court (the "SPC"), China issued the *Adjudication Essentials of the Intellectual Property Tribunal of the Supreme People's Court (2019)* (the "*Adjudication Essentials*") to highlight 40 adjudication rules extracted from 36 technical IP cases, in the hope of harmonizing adjudication standards across the country.

Given the document's importance, the China Guiding Cases Project (the "CGCP") is honored to feature in this issue of *China Law Connect* ("*CLC*") a commentary contributed by **Mr. CUI Yadong, President of the Shanghai Law Society and Former President of the Shanghai High People's Court**. In the commentary titled *Adjudication Essentials of Intellectual Property Cases: Highlighting the Progress of Judicial Protection of Intellectual Property Rights in China*, Mr. Cui discusses the characteristics and significance of the *Adjudication Essentials* and offers suggestions for promoting the effective implementation of the adjudication rules in litigation. Mr. Cui particularly notes that "*Zhi Ji*" ("知己"), a high-tech online database of adjudication rules, has been launched alongside the publication of the *Adjudication Essentials*.

Squatting on Foreign Trademarks and Guiding Case No. 114

The progress being made in China with the judicial protection of IP rights is also reflected in the growing emphasis on judicial cases. In another commentary titled *Squatting on Foreign Trademarks: China's Trademark Law and Related Judicial Cases*, **Dr. YANG Jing, Judge of the Beijing Intellectual Property Court**, discusses relevant Chinese legal provisions and cases (e.g., the *IPHONE Case*, *Hermès Case*, *MUJI Case*, *AESOP Case*, and *TOPPIK Case*) and then analyzes how Chinese courts would handle a hypothetical case involving preemptive registration of a foreign trademark. For those who are concerned about legal issues of this type, especially business executives of foreign companies and their legal advisers, this article is of great referential value.

Among all judicial cases in China, Guiding Cases are the most important because the SPC has specifically instructed Chinese courts at different levels to cite applicable Guiding Cases in the adjudication of similar subsequent cases. This issue features the CGCP's meticulous translation of Guiding Case No. 114 (*Parfums Christian Dior S.A. v. The Trademark Review and Adjudication Board of the State Administration for Industry and Commerce, An Administrative Case Concerning a Re-examination to Reject a Trademark Application*). In the retrial of this case, the SPC revoked decisions made by the first-instance and second-instance courts and laid out important legal principles regarding the need to adhere to the *Madrid Agreement Concerning the International Registration of Marks* and its protocol. Specifically, the court decided:

> [Where] an applicant for an international registration of a trademark [subsequently] applying for [territorial extension protection in China] has completed the procedures for the trademark's international registration as provided for in the *Madrid Agreement Concerning the International Registration of Marks* and its protocol, and the international registration information about the applied-for trademark records that the applied-for trademark has been specified to be a type of three-dimensional trademark, this should be regarded as the applicant's declaration that the applied-for trademark is a three-dimensional trademark.
>
> Because an applicant for an international registration of a trademark does not need to apply for registration again in a designated country, the information about an applied-for trademark transferred by the International Bureau of the World Intellectual Property Organization to the Trademark Office of China should be the factual basis for the Trademark Office of China to examine and decide whether the application for the territorial extension protection of the applied-for trademark in China, as designated, can be supported.

Japan and China's Belt and Road Initiative

The post-pandemic economy is likely to be less globalized, as countries may be driven by the pandemic to seek greater self-sufficiency. Does this mean the end of the Belt and Road Initiative (the "BRI"), China's plan to expand the country's presence in the world?

In an Experts *Connect*™ piece titled *Japan and China's Belt and Road Initiative*, **Mr. Kentaro Ikeda, a Japanese scholar who worked for the Ministry of Economy, Trade and Industry of Japan** prior to his current studies at Harvard Law School, explains why Japan, despite some concerns, has interests in the BRI. In addition, Mr. Ikeda describes the approach that Japan has taken to balance its interests in and concerns about the BRI. At the end of the article, he also briefly analyzes the impact that the pandemic might have on Japan's approach to the BRI.

People-to-People Connectivity Amid Governmental Tensions

Wisdom from Two Cross-Cultural Professionals

During these difficult times when distancing is emphasized and tensions are growing, it is important to recall what people were able to achieve when they were connected more closely. The CGCP's interviews with two distinguished professionals reveal their remarkable achievements.

In her interview, **Ms. Jie Lin, Chairperson and Head of Government Relations at Akamai China**, describes how she conceived of pursuing content delivery networks ("CDN") standardization to promote the CDN sector in China and how she shared this idea with a leader from the China Academy of Telecommunications Research, a research institute under China's Ministry of Industry and Information Technology. In the end, with support from various technical contributors, including the Akamai global team, China completed the standardization project in 2010, achieving an important milestone for the CDN sector in the country that led to clearer policies formulated specifically for the CDN sector.

In his interview, **Mr. Josh Cheng** explains his role as the **Executive Director of the Stanford Center at Peking University ("SCPKU")** and how the center provides a unique platform to support academic exchange activities for all of Stanford University's seven schools, including the Stanford Graduate School of Business, School of Medicine, School of Engineering, and others. He highlights the success of various key programs at SCPKU. For example, the Asian Liver Center (the "ALC") led by Professor Samuel So (Stanford School of Medicine) focuses on communicating best practices for preventing and treating Hepatitis B. The ALC has won widespread recognition and, more importantly, benefited hundreds of thousands of people in the inner provinces of China.

Writing Contest

Amid the growing conflicts between the governments of the United States and China, the CGCP strongly believes that it is even more important for us to help bring people, especially future leaders, together to advance mutual understanding.

To this end, we organized the Second Stanford CGCP Student Writing Contest over the past several months. A large number of students participated, representing more than 300 colleges and high schools from 12 countries around the world. Despite the lockdowns implemented by different countries due to the pandemic, friendships were forged and online collaborations were strengthened among many contestants. In the News and Events section, a list of awardees is provided. The English and Chinese versions of the Golden Award winner's essay titled *Makeup, Men, and Gender Inequality* are published in this issue of *CLC*.


College Group | 大学组

Silver Awards | 银奖

Jiadan Li
Sun Yat-sen University,
People's Republic of China
The Plight of Migrant Children: A Quest for Equity in High School Education

Meiping Qin & Jia Tang
University of Chinese Academy of Social Sciences,
People's Republic of China
Innovation in Video Games and Intellectual Property Rights: The Minecraft Example

Honorable Mentions | 荣誉提名

Qirui He
Peking University,
People's Republic of China

Hanwen Dong & Ka Ying Ling
Hong Kong University of Science and Technology,
People's Republic of China
The Involvement of Business in Social Affairs Through the ESG Community: The Exemplification of Social Innovation in the Context of 2019-nCOV

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Xiao Xiao
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People's Republic of China

Peihong Li & Zia Reigh Calptie
University of California, Berkeley,
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China University of Political Science and Law,
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Lack of Credibility in Chinese Charity Organizations and Countermeasures

Xuelian Xiao, Xue Zhao, & Zhangyan Pei
Guangxi Normal University,
People's Republic of China


High School Group | 高中组

Golden Award | 金奖

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Ruiyan Huang
Pearson College UWC,
Canada
From Ebola to Coronavirus: A Discussion of the Limitations and Flexibility of the Current Intellectual Property System

Mirae Kang
Wuxi United International School,
People's Republic of China
Hallyu, the Global Cultural Sensation: How Does Culture Affect Consumer Decisions?

Wendi Yang
American Heritage School Boca Delray,
United States of America
U.S. Welfare Reform: Adopting Universal Basic Income as an Alternative to U.S. Welfare Programs

Xiaotong Yang
Hio Tong Yeung
Majestic International College,
People's Republic of China
To What Extent Does the College Entrance Examination in China Promote Equity in Education

Wanran Zhou
Chongqing Foreign Language School,
People's Republic of China
Discovering Lifelong Learning: the Gateway from the Past to the Future

We hope you enjoy the insights and information shared in this issue of *CLC*! Stay healthy!

Sincerely,

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

* Dr. Mei Gechlik, *Editor's Note*, 9 China Law Connect v (June 2020), http://cgc.law.stanford.edu/clc-9-202006.

编辑短笺*

熊美英博士

尊敬的读者：

中国知识产权案例裁判要旨

持续的大流行和经济危机引起了人们的极大关注，以至于中国知识产权保护的重大发展可能没有引起注意。

2020年4月16日，最高人民法院（“最高法”）知识产权法庭成立才一年多，中国便发布了《最高人民法院知识产权法庭裁判要旨（2019）》（“《裁判要旨》”），从36起技术类知识产权案件中，提炼出40条裁判规则，希望在全国范围内统一相关审判标准。

鉴于该文件的重要性，中国指导性案例项目（CGCP）很荣幸在本期《中国法律连接》（“《中法连》”）刊登一篇由**上海市法学会会长、前上海市高级人民法院院长崔亚东先生**撰写的评论。该评论题为《知识产权案例裁判要旨：彰显中国知识产权司法保护的进步》。作者讨论《裁判要旨》的特性和意义，并且提供能促进裁判规则在诉讼中有效实施的建议。作者特别指出一个名为“知己”的高科技的裁判规则库，已在发布《裁判要旨》的同时上线运行。

抢注外国商标与指导案例114号

中国在知识产权司法保护方面所取得的进展也反映于司法案件日益受重视的事实。在题为《抢注外国商标：中国商标法与相关司法案例》的另一篇评论中，**北京知识产权法院法官杨静博士**先讨论相关的中国法律规定和案例（例如：《IPHONE案》、《Hermès案》、《MUJI案》、《AESOP案》和《TOPPIK案》），然后分析中国法院会如何处理涉及抢先注册外国商标的一起虚拟案件。对于那些关注此类法律问题的人士，尤其是外国公司的业务主管及其法律顾问，本文具有重要参考价值。

在中国所有司法案例中，指导性案例最为重要，因为最高法特别指示中国各级法院在类似后续案件的裁判中引用适用的指导性案例。本期《中法连》出版了CGCP精心准备的指导案例114号（《克里斯蒂昂迪奥尔香料公司诉国家工商行政管理总局商标评审委员会商标申请驳回复审行政纠纷案》）双语版。在再审此案时，最高法撤销一审、二审判决，并就遵守《商标国际注册马德里协定》及其议定书的必要性提出了重要的法律原则。具体而言，最高法指出：

> 商标国际注册申请人完成了《商标国际注册马德里协定》及其议定书规定的申请商标的国际注册程序，申请商标国际注册信息中记载了申请商标指定的商标类型为三维立体商标的，应当视为申请人提出了申请商标为三维立体商标的声明。因国际注册商标的申请人无需在指定国家再次提出注册申请，故由世界知识产权组织国际局向中国商标局转送的申请商标信息，应当是中国商标局据以审查、决定申请商标指定中国的领土延伸保护申请能否获得支持的事实依据。

日本与中国“一带一路”倡议

大流行后的经济的全球化程度很可能会减少，这是由于各国可能因此而想做到更自给自足。这是否意味着“一带一路”倡议——一项中国为扩大其全球影响力的计划——的终结？

在题为《日本与中国“一带一路”倡议》的一篇专家*连接*™文章中，**曾在日本经济产业省工作、现于哈佛大学法学院从事研究的日本学者池田健太郎先生**解释为什么日本尽管对“一带一路”倡议表示关切，却对该倡议感兴趣。此外，池田先生介绍了日本为平衡其对“一带一路”倡议的兴趣和关切而采取的做法。在文章末，他还简要分析了大流行可能对日本处理“一带一路”倡议的做法的影响。

政府之间的紧张局势中人与人之间的联系

两位跨文化专业人士的智慧

在目前强调距离和紧张局势加剧的困难时期，很重要的一点是要记住过去人们更紧密地联系时所取得的成就。CGCP对两位杰出专业人士的专访展示了他们的杰出成就。

在**阿卡迈中国董事会主席兼政府事务负责人凌洁女士**的专访中，凌女士介绍了她如何意识到通过实现标准化来推广内容分发网络在中国的发展，并且如何与中国工业和信息化部辖下的中国电信研究院的一位领导分享了她的想法。最后，在阿卡迈全球团队和其他关键技术贡献者的支持下，中国于2010年完成了标准化项目，为中国内容分发网络行业达到了一个重要的里程碑，促成了专为内容分发网络行业制定的更清晰的政策。

在**北京大学斯坦福中心执行主任程嘉树先生**的专访中，程先生解释了他在中心的角色，以及该中心如何提供独特的平台，以支持斯坦福大学内全部七所学院（包括商学院、医学院、工程学院等）的学术交流活动。他特别提及该中心各种重要项目的成就。例如，由斯坦福大学医学院的苏启深教授领导的亚裔肝脏中心（Asian Liver Center）致力于交流预防和治疗B型肝炎的最佳实践。亚裔肝脏中心赢得了中国的认可，而更重要的是，惠及了中国内陆省份几十万人。

写作竞赛

在中美两国政府之间的冲突日益加剧的情况下，CGCP坚信我们更需要帮助人们尤其是未来的领导精英团结起来，增进相互了解。

为此，在过去的几个月中，我们组织了第二届斯坦福CGCP学生写作竞赛。来自12个国家的300余所大学和高中的许多学生参与了此次竞赛。尽管不同国家因大流行而实施了封锁措施，很多参赛者依然建立了友谊、加强了线上合作。获奖者名单刊登于“新闻和活动”一文内。题为《化妆品、男性与性别不平等》的金奖得主作品的英文和中文版本亦发表于本期《中法连》。

我们希望您喜欢本期《中法连》所分享的见解和信息！保持健康！

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

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Guangxi Normal University,
People's Republic of China
服装成衣的著作权法保护路径探究

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* 熊美英博士，编辑短笺，《中国法律连接》，第9期，第vii页（2020年6月），http://cgc.law.stanford.edu/zh-hans/clc-9-202006。

About the CGCP

Mission

The China Guiding Cases Project (the "CGCP") of Stanford Law School aims to advance the understanding of China and 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 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. In February 2011, Dr. Mei Gechlik founded the CGCP to carry out its historic mission. Within this short period of time, the CGCP has developed a website that has over 150,000 global users, published a bilingual quarterly journal, *China Law Connect*, provided training programs to more than 5,000 Chinese judges and lawyers, and hosted multiple international conferences featuring U.S. and Chinese judges and other distinguished speakers.

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.

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，提升对中国和中国法律的理解，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"）建立了开创性的制度，把中国各级人民法院的案例经过遴选并提炼成为具有事实约束力的指导性案例，以指导类似的后续案件的审判工作，确保法律的统一适用。2011年2月，熊美英博士创立了CGCP，展开该项目的历史性使命。CGCP在这段短时间内，建立了一个拥有超过15万全球用户的网站，出版了双语季刊《中国法律连接》，为5,000多名中国法官和律师提供了培训，并主办了多次国际会议，其中有美国和中国的法官以及其他杰出的演讲者。

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，并有包括美国联邦最高法院和中国最高人民法院法官在内的50多位杰出的专家顾问。

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Dr. Mei Gechlik

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

Dr. Mei Gechlik is the Founder and Director of the China Guiding Cases Project (the "CGCP"). Formerly a tenured professor in Hong Kong, she began teaching Chinese 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 June 2018, the CGCP began publishing its quarterly journal, *China Law Connect*, to help deepen the understanding of China and Chinese law. To date, the journal has already brought more than 60,000 new users to the CGCP website.

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, 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 July 2018, Dr. Gechlik spoke on legal exchange and collaboration at the Belt and Road Forum organized by China's Ministry of Foreign Affairs. In July 2019, with support from the High People's Court of Guangdong Province, Dr. Gechlik's talk on Guiding Cases and related subsequent cases was broadcast across the province to bring the CGCP's insights to more than 2,000 judges. Other events organized by the CGCP include Continuing Legal Education programs, student summits, and international conferences featuring U.S. and Chinese judges as well as other experts from different parts of the world.

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博士，于2007年开始在斯坦福法学院教授中国法律和商务，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已迅速成为具有事实约束力的指导性案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/zh-hans）。2018年6月，CGCP开始出版其季刊《中国法律连接》，帮助深化对中国和中国法律的理解。目前，该季刊已为CGCP网站带来了60,000名新用户。

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和熊博士也主办或参加了许多活动以提升项目的影响。2017年10月，CGCP组织了会议，让北京知识产权法院法官介绍了该法院的独特案例制度是如何提高司法一致性和透明度。2018年7月，熊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。2019年7月，在广东省高级人民法院的支持下，熊博士关于指导性案例和相关后续案件的演讲在全省视频广播，2000多名法官从而深入理解CGCP的分析。CGCP还组织了其他活动，包括持续法律教育项目、学生峰会和汇聚了美国和中国法官以及来自世界各地的其他专家的国际会议。

在加入斯坦福法学院之前，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。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学位（MBA）和斯坦福法学院法律科学博士学位（JSD）。

Adjudication Essentials of Intellectual Property Cases: Highlighting the Progress of Judicial Protection of Intellectual Property Rights in China*

CUI Yadong
President of the Shanghai Law Society
Second-Grade Judge of the People's Republic of China

Abstract

On April 16, 2020, just over a year after its establishment, the Intellectual Property Tribunal of the Supreme People's Court of China issued the *Adjudication Essentials of the Intellectual Property Tribunal of the Supreme People's Court (2019)* (the "*Adjudication Essentials*") to promptly summarize China's experience in intellectual property adjudication and to demonstrate the characteristics of intellectual property adjudication in the country. The *Adjudication Essentials* not only sets forth some adjudication rules and harmonizes related adjudication standards, but also provides market participants with clear, stable, and predictable rules for guiding behavior. All of this helps create an excellent business environment for encouraging innovations in society. The document is of great significance to judicial protection of intellectual property rights and highlights China's determination to strengthen the protection of intellectual property rights in its court system.

In order to promote the effective implementation of the *Adjudication Essentials* in litigation activities, the author believes that it is necessary to set and improve the rules for applying the *Adjudication Essentials*, to define the functions and status of the *Adjudication Essentials*, to increase the enthusiasm of lawyers and other legal professionals for applying the *Adjudication Essentials*, and to emphasize training on how to apply the *Adjudication Essentials*. In addition, the author asserts the necessity of making full use of new technologies such as big data and artificial intelligence and integrating them into the judicial system so that the application of the *Adjudication Essentials* can be supported by science and technology so as to better serve judicial protection of intellectual property rights.

Introduction

Intellectual property is one of the core elements of international competitiveness. Major countries around the world have treated intellectual property as a necessary tool to reach the highest summits of the global economy and technological innovation, implemented high-level mechanisms for protecting intellectual property rights, and strengthened the most important means for such protection—judicial protection of intellectual property rights.

In recent years, China has paid increasingly more attention to the judicial protection of intellectual property rights and treated "exploring the establishment of intellectual property courts" as a major part of its goal to comprehensively deepen the country's reforms.[1] In August 2014, the Standing Committee of the National People's Congress passed a decision that established intellectual property courts in Beijing, Shanghai, and Guangzhou.[2] In January 2019, the Supreme People's Court established within the court an intellectual property tribunal (the "Intellectual Property Tribunal"), which uniformly adjudicates patent and other highly technical intellectual property appeal cases from across the country.[3]

Following these two important developments, China has formed a new intellectual property adjudication structure that is composed of the Intellectual Property Division of the Supreme People's Court, the Intellectual Property Tribunal,[4] 32 high courts, the three aforementioned intellectual property courts, and some intermediate and basic courts. With this structure, China has established a specialized system that suits the specific characteristics of intellectual property adjudication. This system is of great importance to ensuring the full protection of intellectual property rights in the Chinese court system and building an innovative country. It also demonstrates China's unprecedented level of confidence and determination to strengthen judicial protection of intellectual property rights.

On April 16, 2020, just over a year after the establishment of the Intellectual Property Tribunal, the Supreme People's Court selected 36 typical cases from the technical intellectual property cases that the court had decided in 2019 and then extracted from these 36 typical cases 40 adjudication rules. Based on these rules, the *Adjudication Essentials of the Intellectual Property Tribunal of the Supreme People's Court (2019)* (the "*Adjudication Essentials*") was prepared for release.[5] The *Adjudication Essentials* has received extensive attention from scholars of legal theory and judicial practice. Given the document's importance, the author, based on his previous work experience, discusses in this article the characteristics and significance of the *Adjudication Essentials*

CUI Yadong
President of the Shanghai Law Society
Second-Grade Judge of the People's Republic of China

From April 2013 to January 2018, CUI Yadong was president of the Shanghai High People's Court, serving as acting president from April 2013 to January 2014. Prior to that, President Cui was director of the Public Security Bureau of Hefei Municipality in Anhui Province and director of the Public Security Department of Anhui Province. In addition, in Guizhou Province, he was a member of the Standing Committee of the Provincial Party Committee, general secretary of the Political and Legal Committee, general director (i.e., deputy general police commissioner) of the Public Security Department, and president of the Guizhou Law Society. After leaving the court system, President Cui was elected in October 2018 as president of the Shanghai Law Society.

During the time when the Shanghai High People's Court was under President Cui's leadership, the court made significant achievements. In 2014, the court was designated as the first high court to pilot reforms being made in China's judicial system. President Cui led the entire court to push forward reforms and innovate judicial mechanisms, which led to a historic breakthrough in the creation of the "Shanghai experience" that could be replicated and promoted throughout the country. In addition, he actively promoted the building of smart courts, using new technology to solve judicial problems and implement reforms.

President Cui played a particularly important role when, in February 2017, the Shanghai High People's Court undertook the task of researching and developing the "Reform Software for Promoting the Trial-Centered Litigation System" as mandated by the Central Political and Legal Committee. Serving as leader of the project's research and development leadership group (he is currently still in charge of this work), he led the research and development team to meet the challenge and successfully develop the "Shanghai Intelligent Case-Handling Assistance System for Criminal Cases". By the end of 2019, this system had been fully applied throughout Shanghai's public security offices, prosecutorial offices, and courts. Thus, the goal of applying the system to all of the different stages of a criminal case—case acceptance, investigation, arrest, prosecution, and trial—has been realized. The system helps prevent unjust, false, and wrongful cases, improve the quality and efficiency of handling criminal cases, and safeguard judicial impartiality. The development of the system is a milestone because it represents an unprecedented step towards the in-depth application of artificial intelligence in the judicial field. The system has been introduced to and applied in some provinces and municipalities outside Shanghai.

President Cui is also a prolific writer. His book *Artificial Intelligence and Judicial Modernization—Practice and Thinking of "Shanghai Intelligent Case-Handling Assistance System for Criminal Cases"* was designated by the National Office for Classic Projects as the 2019 "Classic China International Publishing Project" and was translated by the German Springer Press into English for international publication. His other works include *Artificial Intelligence and Judicial Modernization* (Shanghai People's Publishing House), *A Rule of Law Country* (People's Publishing House), and *Emergency Management and Social Governance of Group Incidents* (CPC Central Party School Press). In addition, President Cui has served as editor of a variety of books, including *Exploration and Practice of the Reform of the Judicial System in Shanghai Courts* (People's Court Press), *The Shanghai Sample of the Construction of the 12368 Litigation Service Platform* (Law Press · China), and *Sunlight Illuminating the Return Road* (National Academy of Governance Press).

as well as specific suggestions, in the hope of making some contributions to promote the development of the new guiding document.

The Guidance of the *Adjudication Essentials* is Effective, Pertinent, and Operable

The duty and mission of intellectual property rights is to protect innovations. In judicial practice, intellectual property adjudication often encounters many major, difficult, and complex cases, especially those concerning new categories of intellectual property claims, and often involves new technological innovations. Therefore, relevant adjudication experiences are highly valuable and must be accumulated. The *Adjudication Essentials* is the first document of this type prepared by the Supreme People's Court since the establishment of the Intellectual Property Tribunal, summarizing China's intellectual property adjudication experiences and demonstrating the characteristics of intellectual property adjudication in the country. To ensure the effectiveness, pertinence, and operability of the guidance provided by the *Adjudication Essentials*, the Supreme People's Court prepared the *Adjudication Essentials* with three characteristics discussed below.

1. *The* Adjudication Essentials *Originates from the Highest Adjudication Organ in China—Ensuring the Effectiveness of Its Guidance*

In China, according to arrangements related to the hierarchical structure of the adjudication system, the higher the level of a court issuing a typical case or preparing the adjudication essentials of a typical case, the higher the authority of the case and the higher the acceptability of the adjudication essentials.[6]

The cases on which the Intellectual Property Tribunal of the Supreme People's Court relied to prepare the *Adjudication Essentials* were not selected from lower-level courts, but were, instead, carefully selected from the second-instance cases adjudicated by the tribunal itself in 2019. These cases reflect the judicial philosophy, lines of reasoning, and adjudication methods used by China's highest adjudication organ charged with handling new, difficult, and complex cases in the technical intellectual property field. Therefore, to some extent, the *Adjudication Essentials* collectively displays the views and opinions of the highest adjudication organ of China on particular types of disputes and certain issues concerning the application of a specific area of law. This ensures the effectiveness of the guidance provided in the *Adjudication Essentials*.

2. *The* Adjudication Essentials *is Extracted from Technical Intellectual Property Cases—Ensuring the Pertinence of Its Guidance*

The *Adjudication Essentials* covers seven major categories of cases, including patent civil cases, patent administrative cases, new plant variety cases, technical secret cases, computer software cases, monopoly cases, as well as jurisdictional and other procedural cases. The *Adjudication Essentials* focuses not only on hot topics involved in technical intellectual property cases, but also on key and difficult issues encountered during the adjudication of these cases. Revolving around these typical cases and hot topics, the *Adjudication Essentials* grasps the most important issues that arise in practice. This not only helps promote the unification of standards used to adjudicate the issues mentioned above and regulate the exercise of judges' discretionary power, but also effectively responds to judicial needs in practice. All of this strengthens the pertinence of the guidance provided in the *Adjudication Essentials*.

3. *The* Adjudication Essentials *Compiles Intellectual Property Judicial Practices in China—Ensuring the Operability of Its Guidance*

At present, China is comprehensively deepening the reform of its judicial system, focusing on building a socialist judicial system with Chinese characteristics. At the same time, it also attaches great importance to learning from and drawing on beneficial foreign judicial achievements and applying useful experiences for judicial practice in China. For example, as part of the reform of China's judicial system, the Supreme People's Court has established a case guidance system and issued Guiding Cases, which have guiding significance for unifying the application of law and regulating the exercise of adjudication power.[7]

Prepared and issued by the Intellectual Property Tribunal of the Supreme People's Court, the *Adjudication Essentials* compiles cases that are particularly typical and provides specific and clear content. Additionally, in the document, the Supreme People's Court offers detailed instructions on how to determine facts and apply laws in different cases under different circumstances, increasing the guiding effect and operability of the *Adjudication Essentials* when it is applied.

> ***"The* Adjudication Essentials *[…] summariz[es] China's intellectual property adjudication experiences and demonstrat[es] the characteristics of intellectual property adjudication in the country."***

The Great Significance of the *Adjudication Essentials*

In judicial practice, it is important to give full rein to the guiding function of typical cases. The core content of each typical case is its adjudication essentials. The release of the *Adjudication Essentials*, which focuses on intellectual property, is of great significance for unifying adjudication standards across technical intellectual property cases and for strengthening judicial protection of intellectual property rights. Specifically, the great significance of the *Adjudication Essentials* is reflected in three aspects discussed below.

1. *The* Adjudication Essentials *Sets Adjudication Rules, Helping to Increase the Capacity and Standards of Intellectual Property Adjudication in China*

Inside the *Adjudication Essentials* are exemplary adjudication rules that are summarized, inferred, and generalized from typical cases, and these rules provide significant guidance for adjudication. Focusing on intellectual property, the *Adjudication Essentials* reflects the rules-based thinking of judges of China's highest adjudication organ and their logical lines of legal reasoning—both are based on these judges' understanding of law—in handling technical intellectual property cases. This provides judges who handle similar cases with clear adjudication rules that they can use, which helps improve the level of adjudicative reasoning and legal argumentation in those similar cases. This all, in turn, improves the capacity of adjudication proceedings related to intellectual property rights.

2. The Adjudication Essentials *Harmonizes Adjudication Standards, Helping to Increase the Impartiality and Efficiency of Intellectual Property Adjudication in China*

In practice, the lack of uniform application of law has always been a difficult issue affecting adjudication in China. This issue has been prominent since reforms of the country's judicial accountability system began in 2014. On the one hand, based on the principle of "letting those who adjudicate render judgments and rulings and letting those who render judgments and rulings be accountable", presiding judges and collegial panels are given adjudication power that is to be exercised, in accordance with law, independently and impartially.[8] On the other hand, courts at all levels are facing an important question: how can the uniformity of adjudication standards applied by presiding judges and collegial panels be ensured so as to guarantee that each adjudication division inside a court and each court as a whole apply uniform legal standards?

This problem is even more pronounced in intellectual property adjudication. Many intellectual property disputes face difficulties in both the application of law and ascertainment of facts. In addressing these issues, the *Adjudication Essentials* can play its own, specific functional role. The *Adjudication Essentials* provides judges adjudicating certain types of cases with specific examples that are informative and easy to follow, which helps achieve—to the greatest extent possible—uniform application of law, eliminates the phenomenon of "similar cases being adjudicated differently", and safeguards the impartiality of adjudication. In addition, the *Adjudication Essentials* helps shorten the time needed for handling a case and the length of dispute resolution cycles, effectively mitigating issues related to the long dispute resolution cycles common in technical intellectual property rights disputes. This helps promote the achievement of social equity and justice in each intellectual property case.

> ***"In order to promote the effective implementation of the* Adjudication Essentials*, four measures need to be taken to improve and perfect the application of the* Adjudication Essentials *in litigation activities."***

3. The Adjudication Essentials *Provides Clear, Stable, and Predictable Rules for Guiding Behavior, Creating an Excellent Business Environment for Innovations in Society*

After many years of effort, China has built a relatively complete system of intellectual property laws. However, some standards applied in the intellectual property protection system still need clarification and improvement. This will have a great impact on market participants' ability to predict behavioral consequences and promote technological innovations. The release of the *Adjudication Essentials* allows typical cases to play a bigger guiding role in judicial adjudication, unifies standards for adjudicating technical intellectual property cases, and increases the quality and efficiency of adjudication. This helps regulate and guide the managerial integrity of market participants, maintain a market economy order for fair competition, and stimulate and protect innovations. All of these contribute to the creation of an excellent business environment.

Improving and Perfecting the Application of the *Adjudication Essentials* in Litigation Activities

In practice, the issue regarding how to fully use the guiding function of intellectual property typical cases, especially the intellectual property-focused *Adjudication Essentials*, is one about how to bring a system "on paper to action". In order to promote the effective implementation of the *Adjudication Essentials*, four measures need to be taken to improve and perfect the application of the *Adjudication Essentials* in litigation activities.

1. Defining the Functions and Status of the Adjudication Essentials

China is a country that uses statutory law and, unlike countries with Anglo-American legal systems, does not have the tradition of using binding precedents. Cases released by the Supreme People's Court, be they typical cases or Guiding Cases, are fundamentally different from binding precedents. These cases are not considered a source of law (as binding precedents are in legal systems that recognize case law), nor do they have any mandatory binding effect on judicial organs charged with applying the law.[9]

In practice, some judges still do not know how to use, or dare not use, the adjudication essentials of typical cases. Thus, it is necessary to clarify the rules for applying the *Adjudication Essentials* in judicial practice. On the one hand, it is necessary to make it clear that judges who adjudicate similar cases may refer to the *Adjudication Essentials*, which are based on some typical cases, and cite the *Adjudication Essentials* to support their reasoning so as to enhance the acceptability and reasonableness of their judgments or rulings. On the other hand, it is necessary to make it clear that the *Adjudication Essentials* is not a type of judicial interpretation and cannot be used as the basis of a judgment or ruling.[10]

2. Motivating Lawyers and Judges to Apply the Adjudication Essentials

In judicial practice, lawyers and judges are an important force driving the application of typical cases. During litigation activities, lawyers should be encouraged to cite

the *Adjudication Essentials* to support their legal arguments. This will not only help them demonstrate the legality and reasonableness of their claims, but also help convince judges to accept their claims. Additionally, when a lawyer asks the court to refer to the *Adjudication Essentials* of a typical case, the court should respond during litigation and in the written judgment or ruling with an explanation of the reasons regarding whether the *Adjudication Essentials* is referenced.[11]

3. *Strengthening Training on the Application of the* Adjudication Essentials

In order to accurately understand the contents of the *Adjudication Essentials*, know the thought processes of the judges who rendered the judgments or rulings that the *Adjudication Essentials* summarizes, and master related adjudication concepts and adjudication methods, it is necessary to strengthen training and learning.

First, specialized training on typical cases, especially the *Adjudication Essentials*, needs to be organized. Detailed explanations of the history and preparation of the *Adjudication Essentials* should be provided to encourage members of the legal community to have a deeper understanding of the adjudication rules, adjudication methods, judicial concepts, and arguments of the typical cases highlighted. Through understanding the spirit of the *Adjudication Essentials* and coherently applying the *Adjudication Essentials*, judges and lawyers will be able to increase their competence and standards in adjudication and lawyering, respectively.

Secondly, there is a need to compile a series of books to explain the content and application of the *Adjudication Essentials*. Through this series of books, judges, lawyers, and other members of the legal community will better understand the preparatory background and scope of application of the adjudication rules. This will allow them to, within a short time, accurately and thoroughly search for the adjudication essentials of related typical cases when they encounter similar cases in practice.

4. *Using Big Data, Artificial Intelligence, and Other New Technologies to Promote the Application of the* Adjudication Essentials

The integration of technology and the judiciary is a necessary step in modernizing the judicial system. Judicial protection of intellectual property rights is no exception. In this regard, the Intellectual Property Tribunal of the Supreme People's Court has taken a positive step. The author has noticed that "*Zhi Ji*" ("知己"), an online database of adjudication rules, has been launched alongside the publication of the *Adjudication Essentials*. Based on various characteristics, such as case types and areas of law, the database is built in accordance with legal logic to present a systematic knowledge structure. The database uses new technologies, such as big data and artificial intelligence, allowing users to enter some keywords into the system and then immediately obtain relevant adjudication rules displayed in two different forms: "mind maps of rules" and "lists of rules". These two forms of presentation can guide users to actively learn and master relevant rules and, thereby, enhance the users' reasoning and adjudication skills. Needless to say, this database is still new, and the data are relatively one-dimensional and limited. The next step is to make the database bigger and stronger by relying on the establishment of smart courts, to draw more support from the more comprehensive use of big data, artificial intelligence, and other new technologies.

Moreover, the author believes that a more comprehensive database of cases should be built by using big data, artificial intelligence, and other new technologies. This database should include not only the typical cases adjudicated by the Intellectual Property Tribunal, but also the Guiding Cases released by the Supreme People's Court, the cases published in the *Gazette of the Supreme People's Court*, and other exemplary cases with guiding value for adjudication practices. The case database should focus on scientific classification and convenient retrieval of case data. Specifically, the case database may scientifically and reasonably classify cases in accordance with their adjudication essentials, legal divisions, legal rules, causes of action, chronological order, geographic regions, focuses of dispute, and keywords, allowing judges on the front lines to promptly find, retrieve, and use the information. In addition, the case database should be equipped with the function of having smart case comparisons. By making full use of artificial intelligence and other new technologies, this function can identify and categorize cases as "same cases", "similar cases", and "related cases", providing technical support for judges to better use the database.

Concluding Remarks

Strengthening the guidance of typical cases and intensifying the judicial protection of intellectual property rights are both important measures to improve the intellectual property protection system. By unifying adjudication standards, increasing judicial credibility, and giving equal judicial protection to technology innovators, China's courts have provided powerful judicial services and judicial safeguards for promoting innovation-driven development and creating an excellent business environment.

As awareness of intellectual property protection continues to increase across Chinese society and China's judicial protection of intellectual property rights continues to gain credibility and international influence, it is believed that China will provide even more "Chinese wisdom" and "Chinese experience" in the judicial protection of intellectual property rights around the world. ■

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[1] 《中共中央关于全面深化改革若干重大问题的决定》 (*Decision of the Central Committee of the Communist Party of China on Several Major Issues Concerning Comprehensively Deepening Reforms*), passed by the Third Plenary Session of the Eighteenth Central Committee of the Communist Party of China on Nov. 12, 2013, issued on and effective as of Nov. 12, 2013, http://www.gov.cn/jrzg/2013-11/15/content_2528179.htm. The decision clearly states: "exploring the establishment of intellectual property courts".

[2] 《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/c12489/201409/9d38b14721f44b35817082f371afb76a.shtml.

[3] 《最高人民法院关于知识产权法庭若干问题的规定》 (*Provisions of the Supreme People's Court on Several Issues Concerning the Intellectual Property Tribunal*), passed by the Adjudication Committee of the Supreme People's Court on Dec. 3, 2018, issued on Dec. 27, 2018, effective as of Jan. 1, 2019, http://www.court.gov.cn/zixun-xiangqing-137481.html.

[4] The main difference between the Intellectual Property Division and the Intellectual Property Tribunal of the Supreme People's Court lies in the different scopes of cases adjudicated by them. The former is one of the adjudication divisions inside the Supreme People's Court, while the latter is a permanent adjudication institution dispatched by the court to mainly adjudicate patents and other highly technical intellectual property appeal cases from across the country.

[5] 《最高人民法院知识产权法庭裁判要旨（2019）》 (*Adjudication Essentials of the Intellectual Property Tribunal of the Supreme People's Court (2019)*), issued on and effective as of Apr. 16, 2020, https://www.chinacourt.org/article/detail/2020/04/id/4966189.shtml.

[6] The adjudication essentials of a judgment or a ruling in China are usually one or two paragraphs summarizing the legal principles upon which the court relied to render the judgment or ruling. The adjudication essentials are not part of the judgment or ruling. Usually, a court prepares the adjudication essentials of select judgments or rulings for internal reference only.

[7] 《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. The goals of case guidance are stated in the Preamble: "to summarize adjudication experiences, unify the application of law, enhance adjudication quality, and safeguard judicial impartiality".

[8] 《最高人民法院关于完善人民法院司法责任制的若干意见》 (*Several Opinions of the Supreme People's Court on Improving the Judicial Accountability System of People's Courts*), issued on and effective as of Sept. 21, 2015, http://gongbao.court.gov.cn/Details/58f02f7ad96f8dcb0e75b8c7e08999.html. The document states: "letting those who adjudicate render judgments and rulings and letting those who render judgments and rulings be accountable". The purpose is to "ensure that people's courts exercise, in accordance with law, their adjudication power independently and impartially".

[9] It is worth noting that Judge GUO Feng, who oversees the Supreme People's Court's work on Guiding Cases, emphasized that Guiding Cases are still important because they are *de facto* binding. *See* Judge GUO Feng, *On the Issue of the Application of the Supreme Court's Guiding Cases*, 1 China Law Connect 19 (June 2018), *also available at* Stanford Law School China Guiding Cases Project, June 2018, http://cgc.law.stanford.edu/commentaries/clc-1-201806-23-guo-feng. In the article, Judge Guo Feng explains:

> […] the Case Guidance System would exist in name only if Guiding Cases were not granted a certain effect. Because Guiding Cases are granted ***de facto* binding effect**, if a judgment or ruling that differs [with a Guiding Case] is rendered in a similar case, the judgment or ruling is subject to the risk of being amended when the upper-level court adjudicates the appeal of the case. (emphasis added).

[10] Similar restrictions are imposed on the use of Guiding Cases. *See* 《〈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. Article 10 provides:

> Where a people's court at any level refers to a Guiding Case when adjudicating a similar case, [it] should quote the Guiding Case as a reason for its adjudication, **but not cite [the Guiding Case] as the basis of its adjudication.** (emphasis added).

[11] The Supreme People's Court has similar requirements for the use of Guiding Cases. *See id.*, Article 11. Article 11 Paragraph 1 provides:

> In the process of handling a case, the personnel handling the case should inquire about relevant Guiding Cases. Where a relevant Guiding Case is quoted in the adjudication document, [the personnel] should, in the part [of the document where they provide] reasons for their adjudication, quote the serial number and the "Main Points of the Adjudication" of the Guiding Case.

Article 11 Paragraph 2 provides:

> Where a public prosecution organ, a party to a case and his defender, or a litigation agent quotes a Guiding Case as a ground [for the] prosecution (litigation) or defense, the personnel handling the case **should**, in [providing] the reasons for the adjudication, **respond [as to] whether [they] referred to the Guiding Case [in the course of their adjudication] and explain their reasons [for doing so].** (emphasis added).

知识产权案例裁判要旨：彰显中国知识产权司法保护的进步*

崔亚东
上海市法学会会长、中华人民共和国二级大法官

摘要

2020年4月16日，中国最高人民法院知识产权法庭成立才一年多，便编写发布了《最高人民法院知识产权法庭裁判要旨（2019）》（“《裁判要旨》”），及时总结了中国知识产权审判经验，展现了中国知识产权审判工作的特色。《裁判要旨》不仅确立了裁判规则，协调了裁判尺度，也为市场主体提供了明确、稳定、可预期的行为规则指引，为社会创新营造优良的营商环境，对知识产权司法保护意义重大，凸显了中国对知识产权司法保护的决心和力度。作者认为，在诉讼活动中推动《裁判要旨》落地见效，还需要进一步健全完善《裁判要旨》的适用规则，明确《裁判要旨》功能定位，提高律师等适用《裁判要旨》的积极性，注重《裁判要旨》适用培训工作等。同时，要充分运用大数据、人工智能等新科技与司法深度融合应用，让《裁判要旨》的适用插上科技的翅膀，更好地服务于知识产权司法保护。

引言

知识产权是国际竞争力核心要素之一。世界主要国家纷纷将知识产权作为攀登全球经济和科技创新高峰的必要装备，实行高水平的知识产权保护机制，并加强其中最重要的方式——知识产权司法保护。

近年来，中国对知识产权司法保护越来越重视，将“探索建立知识产权法院”作为全面深化改革的重大措施。[1] 2014年8月，全国人民代表大会常务委员会通过决定，在北京、上海、广州设立知识产权法院（“知识产权法院”）。[2] 2019年1月，最高人民法院在该院内成立了知识产权法庭（“知识产权法庭”），统一审理全国范围内的专利等专业技术性较强的知识产权上诉案件。[3] 经过这两项重要发展，中国形成了由最高人民法院知识产权审判庭、知识产权法庭，[4] 32家高级法院、上述的3家知识产权法院，以及部分中级、基层法院所组成的知识产权审判新格局，建立了符合知识产权审判特点的专业化体系。这一体系对于充分发挥知识产权司法保护的作用、建设创新型国家具有重要意义。由此可见，中国加强知识产权司法保护的信心、决心是空前的。

2020年4月16日，知识产权法庭成立才一年多，最高人民法院便从2019年该法庭审结的技术类知识产权案件中精选36起典型案件，提炼出40条裁判规则，并以此为基础，编写发布了《最高人民法院知识产权法庭裁判要旨（2019）》（“《裁判要旨》”）。[5] 《裁判要旨》受到法学理论界和司法实务界的广泛关注。因此，笔者基于过去工作的经验，在本文讨论《裁判要旨》的特性、意义和具体完善措施，希望在推动《裁判要旨》的发展方面，作出一点贡献。

《裁判要旨》的指导具备有效性、针对性和可操作性

保护创新是知识产权的职责使命。司法实践中，知识产权审判经常面临许多重大、疑难、复杂案件尤其是新类型案件，且时常涉及新的技术创新，故相关审判经验非常宝贵、需要积累。此次发布的《裁判要旨》，是知识产权法庭成立后，最高人民法院首次组织编写的，总结了中国知识产权审判经验，展现了中国知识产权审判工作的特色。通过以下讨论的三大特点，最高人民法院保证了《裁判要旨》指导的有效性、针对性和可操作性。

1.《裁判要旨》来自中国最高审判机关，保证了其指导的有效性

在中国，根据审级制度的安排，发布典型案例或者编写裁判要旨的法院层级越高，案例的权威性就越高，裁判要旨的可接受度也就越强。[6] 此次知识产权法庭编写裁判要旨所依托的案例，不是从下级法院遴选产生的，而是最高人民法院知识产权法庭从2019年审理的二审案件中精选出来的。这些案件本身就体现了中国最高审判机关在技术类知识产权领域处理新型、疑难、复杂案件的司法理念、审理思路和裁判方法。因此，从一定程度上《裁判要旨》集中展示了中国最高审判机关对某一类纠纷、某一类法律适用问题的观点和意见，保证了《裁判要旨》指导的有效性。

2.《裁判要旨》从技术类知识产权案件提炼而成，保证了其指导的针对性

《裁判要旨》涵盖了专利民事案件、专利行政案件、植物新品种案件、技术秘密案件、计算机软件案件、垄断案件，以及管辖等程序性案件七大类；不仅集中于技术类知识产权案件涉及的热点领域，而且还针对这些案件在审理中出现的重点和难点问题。《裁判要旨》围绕这些典型案例、热点问题，抓住了实践中的突出问题，不仅有助于推动上述问题裁判尺度的统一，规范法官自由

崔亚东
上海市法学会会长、中华人民共和国二级大法官

2013年4月至2018年1月，崔亚东担任上海市高级人民法院院长（2013年4月至2014年1月为代院长）。此前，崔院长曾任安徽省合肥市公安局局长、安徽省公安厅厅长，贵州省委常委、政法委书记、公安厅厅长（副总警监），以及贵州省法学会会长。离开法院系统后，崔院长于2018年10月当选成为上海市法学会会长。

崔院长领导上海市高级人民法院期间，该院取得了很大的成就。2014年，该院被确定为中国司法体制改革首个试点高级法院。崔院长带领全院致力推进改革，创新体制机制，取得了历史性突破，为全国创造了可复制、可推广的“上海经验”。此外，他积极推进“智慧法院”建设，运用新科技破解司法难题、推动改革。

尤为值得注意的是，2017年2月，上海市高级人民法院承担了中央政法委交办的研发“推进以审判为中心的诉讼制度改革软件”的任务。崔院长担任项目研发领导小组组长（目前仍在负责此项工作），他带领研发团队不畏艰难，敢为人先，成功地研发出“上海刑事案件智能辅助办案系统”。至2019年底，该系统已在上海公安、检察、法院全面应用，实现了从立案、侦查、报捕、起诉、审判均在该系统内运行，防范了冤假错案，提升了办案质量和效率，维护了司法公正。该系统开创了人工智能在司法领域深度应用的先河，具有里程碑意义，并已在中国部分省、市推广应用。

崔院长著作丰富。其著作的《人工智能与司法现代化——“上海刑事案件智能辅助办案系统”的实践与思考》被国家经典工程办公室确定为2019“经典中国国际出版工程项目”，并由德国Springer出版社翻译成英文，已向全世界公开发行。其他著作包括：《人工智能与司法现代化》（上海人民出版社）、《法治国家》（人民出版社）、《群体性事件应急管理与社会治理》（中共中央党校出版社）等专著。此外，崔院长主编了不同书籍，包括：《上海法院司法体制改革的探索与实践》（人民法院出版社）、《12368诉讼服务平台建设的上海样本》（法律出版社）、《阳光照亮回归路》（国家行政学院出版社）等。

裁量权的行使，也有效回应了实践中的司法需求，有助于增强《裁判要旨》指导的针对性。

3.《裁判要旨》结合中国知识产权的司法实践，保证了其指导的可操作性

当前，中国正在全面深化司法体制改革，着力构建具有中国特色社会主义的司法体系。同时也很注重学习借鉴国外有益的司法成果，运用于司法实践中。例如，在司法体制改革中，最高人民法院建立了案例指导制度，发布指导性案例，对统一法律适用，规范行使审判权具有指导意义。[7] 这次最高人民法院知识产权法庭编写发布的《裁判要旨》，不仅选择的案件较为典型，而且裁判要旨内容具体、明确，针对不同案件在不同情况下如何认定事实、适用法律都提出了较为详细的方案，使《裁判要旨》在适用上具有较强的指导性和可操作性。

“《裁判要旨》[...]总结了中国知识产权审判经验，展现了中国知识产权审判工作的特色。”

《裁判要旨》的重大意义

司法实践中，发挥典型案例的指引功能很重要。而在典型案例中，裁判要旨又是其核心内容。此次知识产权《裁判要旨》的发布，对于统一技术类知识产权案件的裁判尺度，加强知识产权司法保护具有重大意义。具体而言，当中的重大意义反映于三方面：

1.《裁判要旨》确立了裁判规则，有助于提高中国知识产权审判的能力与水平

裁判要旨是从典型案件中总结、归纳、概括出来的具有示范性的裁判规则，对指导审判工作具有重要意义。此次发布的知识产权《裁判要旨》，体现了中国最高审判机关法官基于对法律的理解，在处理技术类知识产权案件时的规则性思维和法律推理的逻辑思维，为广大法官审理类似案件时提供了裁判规则，有助于提升类似案件的裁判说理和法律论证水平，继而提升相关知识产权案件的审判能力。

2.《裁判要旨》协调了裁判尺度，有助于提升中国知识产权审判的公正性、高效性

实践中，法律适用不统一一直是困扰审判工作的难题。尤其自司法责任制于2014年开始改革以来，一方面根据“让审理者裁判、由裁判者负责”的原则，赋予主审法官和合议庭依法独立公正行使审判权，[8] 但同时各级法院亦面对一个重要课题：如何确保主审法官和合议庭裁判尺度的统一性，进而保证审判庭乃至整个法院适用统一的法律标准？

这困局在知识产权审判领域中更为明显。许多知识产权纠纷不仅涉及法律适用难题，还会面临事实查明上的困难。针对这些问题，《裁判要旨》可以发挥其特有的功能作用。《裁判要旨》不仅为法官审理某类案件提供易于操作、翔实可鉴的具体样板，最大程度地实现法律适用统一，消解“同案不同判”的现象，保障案件审理的公正性。《裁判要旨》还有助于缩短办

案时间和纠纷解决周期，使技术类知识产权维权周期长等问题得到有效改善，推动在每一个知识产权案件中实现社会公平正义。

3.《裁判要旨》提供了明确、稳定、可预期的行为规则指引，为社会创新营造优良的营商环境

经过多年努力，中国已经建成较为完备的知识产权法律体系。但是，个别知识产权保护制度的适用标准仍有待清晰完善，这对市场主体预测行为后果、推进技术创新影响较大。而《裁判要旨》的发布，可以较好地发挥典型案例对司法裁判的指导作用，统一技术类知识产权案件的审判标准，提高审判质效，有助于规范和指导市场主体诚信经营，维护公平竞争的市场经济秩序，亦能激励和保护创新，营造优良的营商环境。

健全完善《裁判要旨》在诉讼活动中的适用

司法实践中，如何发挥好知识产权典型案例尤其是知识产权《裁判要旨》的指导作用，仍将面临从“纸面上到行动中”的问题。为了推动《裁判要旨》真正落地见效，需要采取四项措施来健全完善《裁判要旨》在诉讼活动中的适用。

1. 明确《裁判要旨》的功能定位

中国是成文法国家，没有英美法系国家的判例法传统。最高人民法院发布的案例，无论是典型案例还是指导性案例，都与判例有着本质上的区别，不具备判例的法律渊源地位和对司法机关法律适用的强制约束力。[9]

在实践中，对于典型案例的裁判要旨，个别法官还存在不会用、不敢用等问题，需要明确《裁判要旨》在司法实践中的适用规则。一方面，需要明确法官在审判类似案件时可以参照典型案例的《裁判要旨》，援引其作为说理论证的理由，以此增强裁判的可接受性和合理性。另一方面，需要明确《裁判要旨》不是司法解释，不能将其作为裁判依据引用。[10]

2. 提高律师、法官等适用《裁判要旨》的积极性

在司法实践中，律师和法官是适用典型案例的重要力量。在诉讼活动中，应当鼓励律师援引典型案例的《裁判要旨》作为法庭辩论的理由，这不仅有利于论证诉讼主张的合法性与合理性，还可以说服法官采纳其诉讼主张。同时，当律师等提出要求法院参照某个典型案例中的《裁判要旨》时，法院在诉讼活动和裁判文书中应予以回应，并说明是否参照的理由。[11]

3. 加强适用《裁判要旨》的培训工作

要准确理解《裁判要旨》的内涵、知悉法官的思维过程、掌握裁判理念或裁判方法，需要加强培训学习。一是要组织典型案例尤其是《裁判要旨》的专题培训。详细讲解《裁判要旨》的生成过程，推动法律职业共同体成员了解典型案例的裁判规则、裁判方法、司法理念和说理论证。通过对其精神的领会和贯彻应用来提升法官裁判以及律师从业的能力和水平。二是要编纂《裁判要旨》理解与适用丛书。通过编纂系列丛书，帮助法官、律师以及其他法律职业共同体成员领会裁判规则的创设背景以及适用范围，以便遇到类似案件时，能够短时间内准确和周全地搜索相关典型案例的裁判要旨。

4. 运用大数据、人工智能新科技来促进《裁判要旨》的适用

科技与司法的融合应用是实现司法现代化的必要之路。知识产权司法保护也不例外。在这一方面，最高人民法院知识产权法庭迈出了积极的一步。笔者注意到，在发布《裁判要旨》的同时，“知己”裁判规则库已上线运行。该裁判规则库根据案件类型、领域等特点，按照法律逻辑构建，呈现出系统性的知识结构。该裁判规则库运用了大数据、人工智能等新技术，让使用者在数据库中输入关键词后，即可获得以“规则脑图”和“规则列表”两种形式展现的相关裁判规则。此两种展现形式可以引导使用者主动学习并掌握相关规则，以提升其推理和审判能力。当然，这一建设刚起步，数据主体还较为单一，信息仍较为有限，下一步需要依托智慧法院建设，借助更全面的大数据、人工智能等新科技，将裁判规则库做大、做强。

> ***“为了推动《裁判要旨》真正落地见效，需要采取四项措施来健全完善《裁判要旨》在诉讼活动中的适用。”***

此外，笔者认为更全面的案例信息库亦需要通过大数据、人工智能新科技来健全完善。案例信息库不仅包括知识产权法庭自行审理的典型案例，还应包括最高人民法院指导性案例、最高人民法院公报案例，以及其他对审判实践具有指导价值的示范案例。案例信息库应该注重案例数据科学分类、便捷检索。具体而言，案例信息库可按照裁判要旨、法律部门、法条、案由、时间先后、不同地域、争议焦点及关键词等，对案例进行科学合理分类，便于一线法官及时查找、检索与利用。同时，案例信息库应增设案例的智能比对，充分运用人工智能等新技术，开发“同案、类案、关联案”等识别，为法官更好地运用案例信息库提供技术支撑。

结语

加强典型案例指导，强化知识产权司法保护，是完善知识产权保护制度的重要举措。中国法院通过统一裁判标准，提高司法公信力，给予科技创新者以

平等的司法保护，为推动创新驱动发展、创造优良的营商环境提供了有力的司法服务和司法保障。相信随着中国全社会知识产权保护意识的不断加强，中国知识产权司法保护公信力和国际影响力的不断提升，将会为国际知识产权司法保护领域提供更多的“中国智慧”、“中国经验”。■

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* 此评论的引用是：崔亚东，知识产权案例裁判要旨：彰显中国知识产权司法保护的进步，《中国法律连接》，第9期，第7页（2020年6月），*亦见于*斯坦福法学院中国指导性案例项目，2020年6月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-9-202006-31-cui-yadong。中文原文由熊美英博士编辑。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]《中共中央关于全面深化改革若干重大问题的决定》，2013年11月12日由中国共产党第十八届中央委员会第三次全体会议通过，2013年11月12日公布，同日起施行，http://www.gov.cn/jrzg/2013-11/15/content_2528179.htm。该决定明确提出“探索建立知识产权法院”。

[2]《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/c12489/201409/9d38b14721f44b35817082f371afb76a.shtml。

[3]《最高人民法院关于知识产权法庭若干问题的规定》，2018年12月3日由最高人民法院审判委员会通过，2018年12月27日公布，2019年1月1日起施行，http://www.court.gov.cn/zixun-xiangqing-137481.html。

[4] 最高人民法院的知识产权审判庭与知识产权法庭的主要区别在于案件审理范围不同。前者是最高人民法院内的其中一个审判庭，而后者是该法院派出的常设审判机构，主要审理全国范围内的专利等专业技术性较强的知识产权上诉案件。

[5]《最高人民法院知识产权法庭裁判要旨（2019）》，2020年4月16日公布，同日起施行，https://www.chinacourt.org/article/detail/2020/04/id/4966189.shtml。

[6] 中国裁判的裁判要旨通常是一两个段落，以概括法院作出裁判所依据的法律原则。裁判要旨不是裁判的一部分。法院往往对精选的裁判编写裁判要旨，供内部参考。

[7]《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。序言提到案例指导工作的目的：“总结审判经验，统一法律适用，提高审判质量，维护司法公正”。

[8]《最高人民法院关于完善人民法院司法责任制的若干意见》，2015年9月21日公布，同日起施行，http://gongbao.court.gov.cn/Details/58f02f7ad96f8dcb0e75b8c7e08999.html。该意见提出：“让审理者裁判、由裁判者负责”，其目标在于“确保人民法院依法独立公正行使审判权”。

[9] 值得注意的是，主管最高人民法院指导性案例工作的郭锋法官强调指导性案例仍然有其重要性，因为它们具备事实上的约束力。*见*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。在文中，郭锋法官写道：“如果不赋予指导性案例以一定的效力，案例指导制度就形同虚设。赋予指导性案例以**事实拘束力**，类似案件如果作出了不同的裁判，上级法院在审理该案件的上诉时，原判将面临改判风险。”（强调后加）。

[10] 指导性案例亦有类似的限制。*见*《〈最高人民法院关于案例指导工作的规定〉实施细则》，2015年4月27日由最高人民法院审判委员会通过，2015年5月13日公布，同日起施行，斯坦福法学院中国指导性案例项目，中文指导性案例规则，2015年6月12日（最终版本），https://cgc.law.stanford.edu/zh-hans/guiding-cases-rules/20150513-chinese。第十条规定：“各级人民法院审理类似案件参照指导性案例的，应当将指导性案例作为裁判理由引述，但**不作为裁判依据引用**”（强调后加）。

[11] 对于指导性案例的使用，最高人民法院亦有类似的要求。*见同上*，第十一条。该条第一款规定：“在办理案件过程中，案件承办人员应当查询相关指导性案例。在裁判文书中引述相关指导性案例的，应在裁判理由部分引述指导性案例的编号和裁判要点。”该条第二款规定：“公诉机关、案件当事人及其辩护人、诉讼代理人引述指导性案例作为控（诉）辩理由的，案件承办人员应当在裁判理由中**回应是否参照了该指导性案例并说明理由**”（强调后加）。

Squatting on Foreign Trademarks: China's Trademark Law and Related Judicial Cases*

Dr. YANG Jing
Judge of the Beijing Intellectual Property Court

Abstract

Foreign enterprises often intend to enter the Chinese market to expand their business after their trademarks have become quite renowned in their own countries. If the trademarks of foreign enterprises have been registered by others in China, can these enterprises obtain remedies and how can they do so? These are issues of concern to these enterprises. Through a hypothetical trademark case, the author, who is an experienced judge of the Beijing Intellectual Property Court, explains, in detailed but simple terms, relevant Chinese legal provisions and cases and then analyzes how the Chinese court would handle the hypothetical case. For those who care about the development of Chinese law, especially executives of foreign enterprises and practicing lawyers, this article is of great referential value.

Introduction

In March 2018, the author was invited to comment on a moot court held at Peking University by the China Guiding Cases Project. Through a trademark dispute between Huahao Roast Duck Restaurant Co., Ltd. (花好烤鸭饭店有限公司; "Huahao"), a well-known restaurant in Beijing, and Bloom Restaurant LLC ("Bloom"), a San Francisco-based restaurant management company, the moot court demonstrated how U.S. courts handle similar cases concerning squatting of foreign trademarks.

In adjudicating this hypothetical case, three judges from the United States and Japan[1] unanimously held that plaintiff Huahao's well-known trademark in China had become familiar to the relevant public in the United States. Defendant Bloom's acts—securing a U.S. registration for the trademark "Huahao" and running a roast duck restaurant named Huahao Beijing Cuisine in San Francisco—constituted misrepresentation of the source of services, and, thus, Bloom's registration of the trademark "Huahao" should be cancelled. During the adjudication, the three judges fully considered relevant precedents.[2]

If a similar case occurred in China, how would a Chinese court adjudicate the case? Through a hypothetical case named the *Saturday Steak House Case*, this article provides an in-depth analysis of relevant legal provisions and cases and discusses how a Chinese court would adjudicate the *Saturday Steak House Case*. With the analysis of this case, readers will be able to deeply understand the relevant regulatory system in China and understand the important role of cases in the country's adjudication.

Facts of the *Saturday Steak House Case*

Saturday Steak House ("SSH"; Chinese translation is "星期六牛排餐厅") is a century-old steakhouse located in New York City. This restaurant is famous across the United States and has won international awards, such as those from the Michelin Guide. Trip Advisor lists SSH as one of the ten best steakhouses in New York City. The English website of SSH is aimed at the global audience and promotes the restaurant in multiple languages, including Chinese. In recent years, SSH has been negotiating with Chinese investors, with the intent to enter the Chinese market.

> ***"[…] the* Paris Convention for the Protection of Industrial Property *[…] and […] the* Agreement on Trade-Related Aspects of Intellectual Property Rights *[…]. China is a signatory country to the above international treaties and Article 13 Paragraph 2 of the* Trademark Law *is basically consistent with the content provided in the above treaties."***

Tony is a Chinese American who resided in Los Angeles for many years. He invited a winning contestant from 2018's Iron Chef America, a famous American cooking show, to jointly open a restaurant named "星期六牛排餐厅", with a sign board showing the words "Saturday Steak House". The restaurant became wildly popular in Beijing, ranking among the top ten steakhouses in the city, according to Dianping.com (a Chinese online travel review website). In 2019, this restaurant received approval from China's Trademark Office to register the "Saturday" and "星期六" trademarks, with the designated service items being "cafeterias, cafés, catering of food and drinks, restaurant services" in Class 43. Tony's restaurant did not apply for any other trademarks aside from the two aforementioned ones.

Dr. YANG Jing
Judge of the Beijing Intellectual Property Court

Dr. YANG Jing is a judge of the Beijing Intellectual Property Court. Judge Yang has more than 10 years of experience in the adjudication of intellectual property cases and was responsible for the specific work carried out by the Intellectual Property Case Guidance (Beijing) Base of the Supreme People's Court. Judge Yang has adjudicated many important cases, including the case regarding the auction of QIAN Zhongshu's letters and manuscripts, the *Sogou v. Qihu* unfair competition case, and the *Qualcomm v. Meizu* standard essential patent case. In addition, she has published various articles, including *The Intellectual Property Case Guidance System: Obstacles and their Clearance*, and has edited for publication a book titled *New Exploration of the Intellectual Property Case Guidance*.

In early 2020, SSH submitted an application, requesting that the registration of the "Saturday" and "星期六" trademarks by Tony's restaurant on all designated service items in Class 43 be declared invalid. Can SSH's claim be supported? To answer this question, it is necessary to proceed from the body of legal rules in China's *Trademark Law* regarding the protection of foreign trademarks and then explore possible adjudication results.

Line of Thought for Adjudicating the *Saturday Steak House Case*

The question as to whether SSH's claim can be supported depends on the analysis of the following legal issues. First, did SSH obtain the exclusive right to use a registered trademark? If the answer is in the negative, two other legal issues need to be considered: can SSH claim that its unregistered trademark in China is a "well-known trademark" and be protected accordingly? Alternatively, can SSH claim that its unregistered trademark in China is a "trademark that has a certain impact" and that the defendant had malice in preemptively registering the trademark? In the following sections, the author will analyze these three legal issues one by one by discussing relevant provisions of the *Trademark Law* and cases. It should be noted here that any provision of the *Trademark Law* concerning trademarks of goods, as discussed below, applies to service trademarks (see **Sidebar 1**, Article 4 Paragraph 2 of the *Trademark Law*).

Sidebar 1:

Trademark Law of the People's Republic of China

Article 4

[Any] natural person, legal person, or other organization who, during his/its production and operation activities, needs to obtain the exclusive right to use a trademark for his/its goods or services should apply to the Trademark Office for trademark registration. Malicious applications for registration of trademarks that are not intended for use should be rejected.

The provisions of this Law concerning trademarks of goods apply to service trademarks.

Article 7

The principle of good faith should be followed in the application for registration and use of a trademark.

Trademark users should be responsible for the quality of goods for which the trademark is used. Industrial and commercial administrative departments at all levels should, through trademark administration, stop acts of deceiving consumers.

1. Did SSH Obtain the Exclusive Right to Use a Registered Trademark?

Article 30 of the *Trademark Law of the People's Republic of China*[3] (the "*Trademark Law*") provides:

> Where a trademark for which registration is applied does not conform to relevant provisions of this Law, or is identical with or similar to another person's registered or preliminarily approved trademark for goods that are of the same type as [the applicant's goods] or similar to them, the Trademark Office shall reject the application without announcement.

In other words, the owner of a trademark that has already been registered or preliminarily approved in China has the legal right to exclude others from registering the identical or similar trademark, regardless of whether the owner is a Chinese or foreign citizen, or whether the trademark has been registered or used in a foreign country. Article 30 reflects that the *Trademark Law* adopts the principle of obtaining the exclusive right to use a trademark by registration. After obtaining the exclusive right to use a registered trademark, the holder of the registered trademark can obtain legal rights across China and can exclude others from using or applying for registration of an identical or similar trademark.

In addition, it is worth noting that holders of foreign trademarks do not need to make actual, extensive use of their trademarks in China prior to registering them in the country. According to the principle of voluntary application

and the principle of good faith prescribed by Article 4 and Article 7 of the *Trademark Law*, respectively, any persons with actual intention to use such trademarks can apply for their registration (see **Sidebar 1**).

Based on the provisions above (which also apply to service trademarks), in the *Saturday Steak House Case*, if SSH had registered the "Saturday" or "星期六" trademark in China for services relevant to "cafeterias, cafés, catering of food and drinks, restaurant services" in Class 43 prior to Tony's registration of these trademarks, SSH could, in accordance with Article 30 of the *Trademark Law*, seek protection of its exclusive right to use the registered trademark and prohibit later applicants (Tony, in this case) from using or applying for registration the identical or similar trademark for services that are of the same type as SSH's services or similar to them.

Obviously, SSH did not apply to register these trademarks in China, thus it cannot enjoy the exclusive right to use a registered trademark or priority to a preliminarily approved trademark. As a result, SSH cannot rely on Article 30 of the *Trademark Law* to stop Tony from registering or using the "Saturday" and "星期六" trademarks on services relevant to those in Class 43.

2. Can SSH Claim that Its Unregistered Trademark in China is a "Well-Known Trademark" and be Protected Accordingly?

In 2001, China revised the *Trademark Law*. While adhering to the principle of "obtaining the exclusive right to use [a trademark] *by registration*", China adopted reasonable components from the system of "obtaining the exclusive right to use [a trademark] *by use*". Since that revision, the *Trademark Law* has contained provisions that protect trademarks that are not registered in China but have actually been used in the country.[4] Protection for these trademarks is based on the degree to which they are actually known. The specific content regarding this protection is mainly reflected in the "provision for protecting an unregistered well-known trademark" (i.e., Article 13 Paragraph 2 of the *Trademark Law*) (see **paragraphs below**) and the "provision for protecting an unregistered trademark that has a certain impact" (i.e., Article 32 of the *Trademark Law*) (see **next section**).

Article 13 Paragraph 2 of the *Trademark Law* provides the following to protect unregistered well-known trademarks:

> Where a trademark for which registration is applied—[for use] on goods that are of the same type as [goods bearing] another person's well-known trademark that is unregistered in China or similar to [those goods]—is a reproduction, an imitation, or a translation of the well-known trademark, and is prone to cause confusion, [the trademark] shall not be registered and shall be prohibited from being used.

According to Article 6*bis* of the *Paris Convention for the Protection of Industrial Property*[5] (the "*Paris Convention*") and Article 16 Paragraph 2 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights*[6] (the "*TRIPS*"), an owner of a well-known trademark may request that the registration of a trademark which is used on goods that are of the same type as [goods with the well-known trademark] or similar to them and which constitutes a reproduction, an imitation, or a translation of the well-known trademark and is prone to cause confusion, be refused or cancelled, and the use of the trademark be prohibited. China is a signatory country to the above international treaties and Article 13 Paragraph 2 of the *Trademark Law* is basically consistent with the content provided in the above treaties. Therefore, if the owner of a foreign trademark does not apply for registration of his[7] well-known trademark in China, he can claim, in accordance with Article 13 Paragraph 2 of the *Trademark Law*, that others be prohibited from registering or using the identical or similar trademark.

According to Article 13 Paragraph 2 of the *Trademark Law*, in order to obtain protection for an unregistered well-known trademark, one needs to satisfy three elements: (1) the trademark requested to receive protection is a well-known trademark; (2) the trademark in dispute constitutes a reproduction, an imitation, or a translation of the well-known

Sidebar 2:

Provisions of the Supreme People's Court on Several Issues Concerning the Adjudication of Administrative Cases Involving Authorization or Confirmation of Trademark Rights

Article 12

Where a party claims, in accordance with Article 13 Paragraph 2 of the *Trademark Law*, that the trademark in dispute constitutes a reproduction, an imitation, or a translation of his unregistered well-known trademark and should not be registered or should be invalidated, a people's court should **comprehensively consider the following factors and influences among them to determine whether [the trademark in dispute] is prone to cause confusion:**

(1) the similarity of the trademark signs;
(2) the similarity of the goods;
(3) the distinctiveness of the trademark requested for protection and the degree to which it is known;
(4) the degree of attention paid by the relevant public [to the trademark requested for protection];
(5) other relevant factors.

A trademark applicant's subjective intent and evidence of actual confusion can be used as reference factors to determine the possibility of confusion.

(emphasis added)

trademark; (3) the registration or use of the trademark in dispute is prone to cause confusion and the interests of the owner of the well-known trademark may be harmed.

Element (1) is the prerequisite to and basis for applying Article 13 Paragraph 2. The plaintiff must first prove that his trademark constitutes a well-known trademark in China (see below). Afterwards, the court will determine whether Elements (2) and (3) are established. When determining Element (3) (i.e., whether the registration or use of the trademark in dispute is prone to cause confusion), the court will, based on Article 12 of the *Provisions of the Supreme People's Court on Several Issues Concerning the Adjudication of Administrative Cases Involving Authorization or Confirmation of Trademark Rights*, comprehensively consider five major factors and influences among them (see **Sidebar 2**).[8] Article 12 further clearly provides: "[a] trademark applicant's subjective intent and evidence of actual confusion can be used as reference factors to determine the possibility of confusion".

It must be emphasized that when the plaintiff's trademark does not constitute a well-known trademark in China, there is no need to discuss whether the defendant (i.e., the applicant for the trademark in dispute) has the malice to imitate the trademark. This is because the relief granted to unregistered well-known trademarks prohibiting others from imitating them is a unique protection that the registration system provides to such well-known trademarks; unregistered trademarks that are ordinary, instead of being well-known, cannot rely on this provision to enjoy the protection for a well-known trademark.

For example, in the *IPHONE Trademark Case*, the Supreme People's Court (the "SPC") decided that because the "IPHONE" trademark that Apple Inc. used on its mobile phones had not become well-known in China, the court did not need to adjudicate Apple Inc.'s claim that was based on Article 13 Paragraph 2 of the *Trademark Law*. As a result, the court rejected Apple Inc.'s litigation requests.[9]

As for how to specifically prove that Element (1) is satisfied, in the *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Laws in Adjudicating Civil Cases Involving Disputes Over the Protection of Well-Known Trademarks*, the SPC interprets "well-known trademark" as "a trademark that is well known to the relevant public within the territory of China".[10] According to Article 18 Paragraph 2 of *Opinions of the Supreme People's Court on Several Issues Concerning the Adjudication of Administrative Cases Involving Authorization or Confirmation of Trademark Rights*,[11] the expression "within the territory of China" modifies both "actually used" and "known to the relevant public of a certain range". Therefore, this is generally referred to as the "used domestically + known domestically" dual geographical restrictions (see **Sidebar 3**).

Specifically, in order to meet the "used domestically + known domestically" conditions for a foreign well-known trademark, the plaintiff must prove that the three points listed below are all established.

(1) The Plaintiff's Trademark Is Known to the Relevant Public Within the Territory of China

The relevant public within the territory of China usually refers to people who reside or mainly reside within the territory of China and does not include people who work or live overseas on a long-term basis, overseas Chinese, or foreigners who are staying within the territory of China for a short period of time. In addition, the relevant public within the territory of China usually includes consumers of goods or services, as well as other business operators closely related to the marketing of those goods or services.

Knowledge of the relevant public can usually be proved by questionnaires, online comments, media reports and reviews, records of awards, etc. The most important and effective evidence is that the plaintiff's trademark has been used in the Chinese market continuously and extensively, and through this use the trademark has accumulated reputation and recognition.

(2) The Territory Within Which the Plaintiff's Trademark is Well-Known is Limited to the Region of Mainland China

With respect to the geographical scope of well-known trademarks, regulations differ from country to country. Some countries protect a trademark that is well-known in a foreign country. Some other countries require that a trademark must be well-known locally before protection is granted, with the rationale that local consumers are often not familiar with well-known foreign trademarks. This regional limitation reflects the independence of the trademark laws of individual

Sidebar 3:

Opinions of the Supreme People's Court on Several Issues Concerning the Adjudication of Administrative Cases Involving Authorization or Confirmation of Trademark Rights

Article 18

[…]

A trademark that is **actually used** and **known to the relevant public of a certain range** within the territory of China should be determined to be a trademark that has been used and has a certain impact. If there is evidence to prove that a prior trademark has been used for a certain period of time and in a certain area, and has a certain sales volume or advertising, etc., [the trademark] may be determined to have a certain impact.

[…]

(emphasis added)

countries. In the actual application of the *Trademark Law*, Chinese courts and other relevant authorities require that the plaintiff's commercial use of his trademark have taken place in the territorial jurisdiction of China, that is, within mainland China.

(3) The Plaintiff's Trademark Must Have Been in Extensive and Continuous Use Within China

Article 14 Paragraph 1 Items (1) to (4) of the *Trademark Law* prescribe the legal circumstances concerning the determination of a well-known trademark. The determination of a well-known trademark may be based on a comprehensive judgment of multiple factors, including the degree to which the relevant public knows the trademark, the duration of use of the trademark within the territory of China, the duration, degree, and geographical scope of the publicity of the trademark, and the record of protecting the trademark as a well-known trademark (see **Sidebar 4**). As far as these factors are concerned, not every factor must be met, but the most important and basic factor is the continuous use and publicity of the trademark within the territory of China.

According to Article 48 of the *Trademark Law*, "use" refers to "acts—the use of trademarks on goods, packaging or containers for goods, and documents for transacting goods, or the use of trademarks in advertising, exhibitions, and other commercial activities—taken to identify the source of goods" (see **Sidebar 4**). In judicial practice, the courts also generally follow Article 48 of the *Trademark Law* to understand "publicity" as "the use of trademarks on goods, packaging or containers for goods, and documents for transacting goods, or the use of trademarks in" "advertising, exhibitions, and other commercial activities" for goods or services.

For a trademark lacking actual use, even if the owner of the trademark has conducted promotional activity, it is still difficult for the relevant public to determine that the mark is a type that can identify the source of goods or services. This is due to the fact that, where the relevant public is unable to obtain the related goods or services, the quality assurance function of the trademark cannot be realized, and therefore it is difficult to establish truly credible brand recognition among the relevant public.

According to the above analysis of Article 13 Paragraph 2 of the *Trademark Law*, in the *Saturday Steak House Case*, if SSH intends to claim that the disputed trademarks "Saturday" and "星期六" that Tony applied to register constitute a reproduction, an imitation, or a translation of its unregistered well-known trademark, SSH must prove, in accordance with Article 13 Paragraph 2 of the *Trademark Law*, that its trademark has become a well-known trademark that is known to the relevant public within the territory of China. Because SSH does not actually operate or advertise in China, nor does it cooperate with or authorize others to operate in China, the relevant public within the territory of China cannot purchase its goods or services. Objectively, only Chinese consumers who return from the United States can know of SSH's brand. Even if a small portion of the relevant public can, through the Internet, learn about the well-known nature of SSH in the United States, the degree to which SSH is known still cannot reach the level required by the well-known trademark provision of Article 13 Paragraph 2 of the *Trademark Law*.

Therefore, if there is insufficient evidence of the actual use and publicity of SSH within the territory of China, it will likely not be possible to obtain relief from Article 13 Paragraph 2 of the *Trademark Law* because the requirements for proving the existence of a "well-known trademark" are not met. Since neither "Saturday" nor "星期六" is a well-known trademark, the court will not need to consider whether defendant Tony and his partner have maliciously used and registered the trademarks.

A large number of judicial cases support this point: it is difficult to obtain the support of Article 13 Paragraph 2 of the *Trademark Law* based solely on the use of a trademark in a foreign country and the degree to which it is known in that country. For example, in the 2016 *Hermès Case*,[12] the SPC decided that Hermès International, a company in France, should prove the use of its trademark in mainland China. However, the reporting activity in publications such as *Ta Kung Pao*, as submitted by the company, all occurred in Hong Kong; this was not enough to prove that the company's trademarks

Sidebar 4:

Trademark Law of the People's Republic of China

Article 14

A well-known trademark should, based on requests of the parties, be determined as a fact that needs to be determined in the handling of a trademark case.

The following factors should be considered in the determination of a well-known trademark:

(1) the degree to which the relevant public knows the trademark;
(2) the duration of use of the trademark;
(3) the duration, degree, and geographical scope of any publicity of the trademark;
(4) the record of protecting the trademark as a well-known trademark;
(5) other factors that make the trademark well-known.

[…]

Article 48

The use of trademarks referred to in this Law refers to acts—the use of trademarks on goods, packaging or containers for goods, and documents for transacting goods, or the use of trademarks in advertising, exhibitions, and other commercial activities—taken to identify the source of goods.

"愛馬仕" and "HERMES", which were unregistered in China, were known to the relevant public in mainland China.

In addition, although domestic newspapers and magazines, such as *Information Times*, also reported on Hermès International and its products, Hermès International could not prove the circulation and scope of these newspapers and magazines at that time, nor could the company prove the duration of these reports. Other evidence could not prove the "愛馬仕" trademark was widely known to the relevant public in mainland China. Therefore, the disputed "愛馬仕" trademark did not constitute an unregistered well-known trademark in China and Hermès International's request that the disputed trademark be revoked, in accordance with Article 13 Paragraph 2 of the *Trademark Law*, could not be supported.

3. *Can SSH Claim that Its Unregistered Trademark in China is a "Trademark that Has a Certain Impact" and the Defendant had Malice in Preemptively Registering the Trademark?*

The analysis in the preceding section clearly demonstrates that before becoming well-known, trademarks not registered in China can hardly obtain the same level of protection as that for registered trademarks. However, this does not mean that the *Trademark Law* condones the malicious snatching of another person's business interests. An unregistered trademark that has obtained, through use, a certain impact, does have some benefits that should be legally protected and that guard against preemptive registration. To this end, Article 32 of the *Trademark Law* provides:

> ***"[…] before becoming well-known, trademarks not registered in China can hardly obtain the same level of protection as that for registered trademarks. However, this does not mean that the* Trademark Law *condones the malicious snatching of another person's business interests."***

> An application for trademark registration must not harm the existing prior right of another, or preemptively register by improper means a trademark that has been used by another and that has a certain impact.

This is called the "provision for protecting an unregistered trademark that has a certain impact". On paper, the protection obtained by an unregistered trademark that has a certain impact can prohibit others from registering an identical or similar trademark and this protection affords almost the same scope of exclusion as an unregistered well-known trademark. However, the "provision for protecting an unregistered trademark that has a certain impact" and the "provision for protecting an unregistered well-known trademark" are innately different, and each of the two clearly applies a different logic. The legislative basis of the former is to safeguard the principle of good faith in the registration of trademarks as prescribed by Article 7 of the *Trademark Law*; protecting a trademark that has been used and has a certain impact to curb malicious preemptive registration of the trademark is an effective supplement to the trademark registration system.

The *Trademark Law* does not specify to what degree an unregistered trademark of the plaintiff needs to be known before it is determined to be a trademark that "has a certain impact", nor does it specify how the defendant's malice to preemptively register the trademark must be manifested. However, based on Article 23 of the *Provisions of the Supreme People's Court on Several Issues Concerning the Adjudication of Administrative Cases Involving Authorization or Confirmation of Trademark Rights*[13] (see **Sidebar 5**), Chinese courts, in adjudicating cases regarding trademark oppositions, reviews of non-registration of trademarks, and invalidation of trademarks, consider four important elements when applying the "provision for protecting an unregistered trademark that has a certain impact": (1) before the date when the disputed trademark is applied for registration, the other party's trademark has already been used and has had a certain impact; (2) the disputed trademark is identical with or similar to the other party's trademark; (3) the goods or services for which the disputed trademark is used are, in principle, identical with or similar to the goods or services for

Sidebar 5:

Provisions of the Supreme People's Court on Several Issues Concerning the Adjudication of Administrative Cases Involving Authorization or Confirmation of Trademark Rights

Article 23

Where a prior user claims that a trademark applicant preemptively registered by improper means a trademark that the prior user has used and that has a certain impact, if the trademark in prior use has [indeed] a certain impact and the trademark applicant knows or should know of the trademark, it can be presumed that [the registration] constitutes "preemptive registration by improper means". **However, an exception exists when the trademark applicant adduces evidence to prove that he does not have the malice to use the goodwill of the trademark in prior use.**

Where a prior user adduces evidence to prove that his prior trademark has been used for a certain period of time and in a certain area, and has a certain sales volume or advertising, etc., a people's court may determine that [the trademark] has a certain impact.

Where a prior user claims that a trademark applicant has—for a type of goods that is not similar [to those of the prior user]—applied for the registration of a trademark that the [prior user] has used prior to [the applicant] and that has a certain impact, [and consequently] violated Article 32 of the *Trademark Law*, the people's court shall not support [the claim].

(emphasis added)

which the other party's trademark is used; and (4) the applicant for the disputed trademark has malice.

Elements (2) and (3) are prerequisites. Afterwards, the judge may, at the same time, comprehensively consider Elements (1) and (4)—the state of use of the unregistered trademark for which the plaintiff seeks protection and the degree to which the unregistered trademark is known, and the extent of the defendant's subjective malice—and ultimately determine whether to prohibit the defendant's trademark registration application. In other words, this is different from the "provision for protecting an unregistered well-known trademark", the application of which requires that the plaintiff's trademark be first determined to be a well-known trademark in China before examining whether the defendant has reproduced, imitated, or translated the plaintiff's trademark. This distinction reflects that the jurisprudential underpinnings of the two protection provisions are different.

Early judicial cases show that when applying Article 32 of the *Trademark Law*, a court usually required that the plaintiff have actually used his trademark "within the territory of China", or the trademark could hardly be found to "have a certain impact" in China. For example, in the *MUJI Case* adjudicated in 2012, the SPC decided that:

> This array of evidence [...] can only prove [...] the publicity and use of the "MUJI" trademark in Japan, Hong Kong (China), and other regions, as well as the degree to which the trademark is known in these regions. The evidence cannot prove that the "MUJI" trademark is actually used in mainland China for towels and similar products within Class 24 and that it has a certain impact.[14]

However, recent judicial cases show that the courts have increasingly relaxed the requirements regarding the use of the plaintiff's trademark within the territory of China. This is closely related to the development of international cross-border e-commerce and the Internet in recent years. For some enterprises, prior to their entering mainland China to begin actual operations there, their trademarks, due to the enterprises' reputation in foreign markets and their promotion focused on the Chinese public, have already had a certain impact on the relevant public in China.

If a person has the malice to preemptively register an unregistered trademark that has a certain impact in China, the trademark owner may file an objection with the National Intellectual Property Administration, or apply for an invalidation, in case the preemptive registration has already occurred. In such cases, the National Intellectual Property Administration and judicial authorities will comprehensively consider the actual use and publicity of the plaintiff's trademark "within and without the territory of China", and then, in combination with the defendant's malice, make a final judgment of the case. The following two cases are prime examples of cases of this type.

(1) *Australia's AESOP Trademark Case*[15]

Beginning in 1994, Emeis Cosmetics Pty. Ltd. ("Emeis Company"), an Australian company, applied for and received approval to register the "AESOP" trademark in various countries and regions, including Australia, Canada, the United Kingdom, the United States, France, South Korea, Singapore, Switzerland, and Hong Kong.

Since 2003, Emeis Company has opened multiple "AESOP" brand stores in different places, including Australia (Melbourne), Taiwan, Paris, and Hong Kong. Although, at the time of this case, it had not opened any stores within the territory of China, consumers in mainland China were very aware of Emeis Company's products and the "AESOP" trademark through extensive advertising and coverage in the Chinese media and through overseas, surrogate purchasing platforms and other methods used by mainland Chinese consumers.

On January 25, 2006, defendant WANG Zhongwei, who was in China, applied for the registration of the No. 5140243 "AESOP'S" trademark under Class 3, which includes "soaps, bath salts, stain removers, shining preparations and polishes, essential oils, cosmetics, perfumes, incenses" and other goods. Emeis Company requested that the trademark administrative organs prohibit the registration. The National Intellectual Property Administration, the first-instance court, and the second-instance court did not support Emeis Company's claim. Emeis Company then applied to the SPC for a retrial. In 2018, the judgment rendered by the SPC supported Emeis Company's claim. The SPC decided that:

> Article 31 of the *Trademark Law* [i.e., Article 32 of the *Trademark Law*, as amended in 2019] provides that an application for trademark registration must not preemptively register by improper means a trademark that has been used by another and that has a certain impact. In this case, [...] in combination with the additional evidence submitted by Emeis Company [...], it can be proved that before the date of the disputed trademark application, Emeis Company's cosmetics with the AESOP brand have been reported on websites including *People.cn* [...] and newspapers such as *Nan Guo Morning Post* [...]. In addition, *Tianya* [...] and other domestic large-scale BBS forums that are quite well-known and have many registered users have publicized Emeis Company's products and purchasing channels. Consumers in China are also purchasing Emeis Company's AESOP

cosmetic products through surrogate purchasing platforms, online shopping, and other channels.

Based on the media reports submitted by the retrial applicant, the professional nature of the media involved, and the knowledge of the brand's cosmetics expressed by the relevant public on relevant forums, it can be determined that the "AESOP" trademark has already had a certain impact in cosmetics-related fields before the date of the disputed trademark application. **Of course, these news reports or review articles do not indicate that the retrial applicant took the initiative to carry out this type of commercial marketing. But it is undeniable that, through media reports and other means, the relevant public has already formed an awareness that "AESOP" is a product of the retrial applicant.** Therefore, the existing evidence can prove that before the date of the disputed trademark application, […] "AESOP" has, through publicity, become, to a certain degree, known among cosmetics-related goods. The [retrial] respondent's application for the "AESOP'S" trademark for cosmetics-related goods violates Article 31 of the *Trademark Law* and should not be approved.

(emphasis added)

(2) *TOPPIK Trademark Case*[16]

Spencer Forrest, Inc. has been using the "TOPPIK" trademark on its hair growth products since 1996 and received approval to register the trademark in the United States in 2002. The company subsequently registered the trademark in many countries and regions across the globe. Since 1999, the company has also introduced and publicized TOPPIK products in Hong Kong and Taiwan through newspapers and magazines. Furthermore, in 1999, the company's official website began to promote hair growth products using the TOPPIK logo and packaging. With the development of e-commerce, the company's products can be sold directly through various channels, including the Internet and surrogate purchasing platforms. Currently in China, the relevant public can directly purchase the company's products from online shopping platforms such as Taobao. Based on these facts, the Beijing Intellectual Property Court decided that:

> Although [the plaintiff], Church & Dwight Co., Inc. (which acquired Spencer Forrest, Inc.), cannot provide evidence of direct sales in mainland China before the date of the disputed trademark application, [this court], having considered that the company's products have been continuously produced since 1999 and have gained recognition among the relevant public as a result of publicity and sales, can determine that the cited trademark has been used within the territory of China and has been known to the public.

The court ascertained that Shenzhen Lejian Company, which was registered and controlled by defendant LI Jialin (i.e., the applicant of the disputed "TOPPIK" trademark), was primarily engaged in producing wig adhesives and similar products. Thus, Shenzhen Lejian Company was basically operating in the same business field as that of plaintiff Church & Dwight Co., Inc. Given that the plaintiff had a long history of operating in this field and that its trademark has been registered in many countries and regions, defendant LI Jialin should have known of the plaintiff and its prior trademark. The Beijing Intellectual Property Court further pointed out:

> The court notices that the text of the cited trademark [i.e., the "TOPPIK" trademark that Spencer Forrest, Inc. has used prior to the defendant] is a combination of English characters and the name created is highly distinctive. The characters used are exactly the same as those used in the disputed trademark. When used in Hong Kong and Taiwan, the cited trademark includes both the English mark and Chinese characters "Ding Feng".
>
> LI Jialin also registered the Chinese characters "Ding Feng" as a trademark and has used these characters and the disputed trademark at the same time. In the sales of his products, LI Jialin has also used such promotional language as "Ding Feng's hair-building fibers have been approved by the FDA". These facts are sufficient to show that LI Jialin actually knows of Spencer Forrest, Inc. and its prior trademark; he had clear malice to preemptively register the trademark, violating the principle of good faith.
>
> […] based on the above facts, [it is clear that] prior to the date of the disputed trademark application, the relevant public in China have had various means, including promotional coverage and sales through surrogate purchasing platforms, to understand the prior trademark. The disputed trademark in this case completely imitates the characters of the cited trademark, and, without reasonable grounds, LI Jialin had also registered other renowned trademarks in the hair restoration sector, such as "Mao Bo Shi" [literally "Dr. Hair"] and "Bao Kang Si" ["Propecia"]. **Upon comprehensive consideration of various circumstances, including the clear malice in the registration of the disputed trademark,**

> **the originality of the cited trademark, the distinctiveness of the trademark, the history of use, and the degree to which the trademark is known,** this court opines that the disputed trademark has violated the provision of Article 31 of the *Trademark Law* regarding "preemptive[] regist[ration] by improper means a trademark that has been used by another and that has a certain impact".
>
> (emphasis added)

In light of the above analysis, in the *Saturday Steak House Case,* SSH can raise a claim based on Article 32 of the *Trademark Law* to prohibit Tony from preemptively registering its trademark. To do so, SSH must prove that its trademark, for which it is requesting protection, has a certain impact in China and that Tony's trademark registration constitutes malicious preemptive registration of SSH's trademark. As mentioned above, unlike the "provision for protecting an unregistered well-known trademark", the court will have to comprehensively consider whether SSH's trademark has a certain impact and whether Tony had the malice to preemptively register SSH's trademark. When determining whether SSH's trademark has a certain impact, the evidence considered by the court is similar to that considered in the determination of a well-known trademark. Hence, SSH must submit evidence showing the actual use and publicity of its trademark in China and related circumstances.

Notwithstanding that SSH has no actual operations in mainland China, if it has carried out a large amount of advertising in China or has allowed the Chinese public to have access to its goods or services through e-commerce sales, SSH can refer to the *Australia's AESOP Trademark Case* and the *TOPPIK Trademark Case* to advocate that the court comprehensively consider the actual use and publicity of SSH's trademark "within and without the territory of China", and, in combination with the defendant's malice, make a judgment of the case.

Conclusion

Drawing on the above discussion, it is clear that foreign enterprises that own trademarks can seek protection through three systems provided by the *Trademark Law* in China.

The first system protects registered trademarks. China implements a system of acquisition-through-registration. Registration is the most effective evidence for obtaining the exclusive right to use a trademark. No one is allowed to register a trademark that is identical with or similar to an already-registered trademark for the same or similar type of goods. Therefore, foreign right holders intending to enter the Chinese market should first register their trademarks for the corresponding goods or services.

The second system protects well-known trademarks. As a member country of the *Paris Convention* and *TRIPS*, China fulfills its obligations on the protection of well-known trademarks in accordance with the international conventions. Well-known trademarks that are not registered in China but are widely known to the relevant public in China are given protection that is similar to that for registered trademarks. Other parties are prohibited from making a reproduction, an imitation, or a translation of a well-known trademark. To exclude others from registering his well-known trademark, the right holder must provide evidence of continuous production, operation, and publicity within the territory of China, making the trademark widely known to the relevant public. Otherwise, it will be difficult to obtain relief excluding others from registering the trademark based on the provision for protecting unregistered well-known trademarks.

The third system protects trademarks that have a certain impact. In response to malicious trademark squatting behavior, the *Trademark Law* has established the fundamental principle of good faith, prohibiting any preemptive registration of another's trademark by improper means. A holder of a trademark that has been used but is not registered in China should submit evidence showing the period of time during which and the area in which the trademark has been used, along with related sales volume or advertising information, etc. This is to prove that the trademark is known to the relevant public of a certain range and can be determined to be a trademark that "has a certain impact". Recent judicial cases show that Chinese courts have increasingly considered the use of trademarks in foreign countries. Thus, if a trademark owner can provide evidence to show that his trademark is registered and has been used in a foreign country, or that the trademark has an impact in a foreign country, the requirements for him to prove actual use of the trademark in China will be less stringent. This approach increases the protection for renowned foreign trademarks.

In summary, in the *Saturday Steak House Case*, if SSH can prove that its trademark has a certain impact in China, and that Tony and other defendants used improper means to preemptively register a trademark that has been used by SSH and that has a certain impact, then SSH can seek relief based on Article 32 of the *Trademark Law* to prohibit Tony from preemptively registering and using its trademark. ■

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Huang, Nathan Harpainter, and Dr. Mei Gechlik. The information and views set out in this Commentary are the responsibility of the author and do not necessarily reflect the work or views of the China Guiding Cases Project.

[1] The three judges were Judge William A. Fletcher (Judge of the U.S. Court of Appeals for the Ninth Circuit), Judge Toshiaki Iimura (former Chief Judge of the Intellectual Property High Court of Japan), and Chief Judge Diane P. Wood (Chief Judge of the U.S. Court of Appeals for the Seventh Circuit).

[2] The China Guiding Cases Project, *Moot Court:* Huahao Roast Duck Restaurant Co., Ltd. v. Bloom Restaurant LLC, 5 China Law Connect 21 (June 2019), *also available at* Stanford Law School China Guiding Cases Project, CLC *Spotlight*™, June 2019, http://cgc.law.stanford.edu/clc-spotlight/clc-5-201906-others-4-cgcp.

[3]《中华人民共和国商标法》 (*Trademark Law of the People's Republic of China*), passed and issued on Aug. 23, 1982, effective as of Mar. 1, 1983, amended four times, most recently on Apr. 23, 2019, effective as of Nov. 1, 2019, http://www.sipo.gov.cn/zcfg/zcfgflfg/flfgsb/fl_sb/1140931.htm.

[4] The *Trademark Law* (amended in 2013) retained this content, which was included in Article 13, Article 31, and Article 41.

[5] *Paris Convention for the Protection of Industrial Property*, signed in Paris on Mar. 20, 1883, as amended on September 28, 1979, https://wipolex.wipo.int/zh/text/288514. Article 6*bis* includes the following content:

> (1) The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith.

[6] *Agreement on Trade-Related Aspects of Intellectual Property Rights*, signed in Marrakesh, Morocco on Apr. 15, 1994, https://www.wipo.int/treaties/en/text.jsp?file_id=305907. Article 16 Paragraph 2 provides:

> Article 6*bis* of the Paris Convention (1967) shall apply, *mutatis mutandis*, to services. In determining whether a trademark is well-known, Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark.

[7] The terms "he", "him", and "his" as used herein are, unless the context indicates otherwise, gender-neutral terms that may refer to "she", "her", "it", and "its".

[8]《最高人民法院关于审理商标授权确权行政案件若干问题的规定》 (*Provisions of the Supreme People's Court on Several Issues Concerning the Adjudication of Administrative Cases Involving Authorization or Confirmation of Trademark Rights*), passed by the Adjudication Committee of the Supreme People's Court on Dec. 12, 2016, issued on Jan. 10, 2017, effective as of Mar. 1, 2017, http://www.court.gov.cn/zixun-xiangqing-34732.html.

[9] (2016) 最高法行申3386号行政裁定 ((2016) Zui Gao Fa Xing Shen No. 3386 Administrative Ruling), rendered by the Supreme People's Court on Dec. 27, 2016, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/spc-2016-zui-gao-fa-xing-shen-3386-administrative-ruling.

[10]《最高人民法院关于审理涉及驰名商标保护的民事纠纷案件应用法律若干问题的解释》 (*Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Laws in Adjudicating Civil Cases Involving Disputes Over the Protection of Well-Known Trademarks*), Article 1, passed by the Adjudication Committee of the Supreme People's Court on Apr. 22, 2009, issued on Apr. 23, 2009, effective as of May 1, 2009, http://www.npc.gov.cn/zgrdw/npc/xinwen/fztd/sfjs/2009-04/27/content_1499993.htm.

The China National Intellectual Property Administration has provided a similar definition. *See*《驰名商标认定和保护规定》 (*Regulation on the Determination and Protection of Well-Known Trademarks*), issued by the State Administration for Industry and Commerce on Apr. 17, 2003, effective as of June 1, 2003, revised on July 3, 2014, effective as of Aug. 3, 2014, http://spw.sbj.cnipa.gov.cn/zcfg/201407/t20140714_226601.html. Article 2 of the *Regulation* states, "a well-known trademark is a trademark that is well known to the relevant public in China".

[11]《最高人民法院关于审理商标授权确权行政案件若干问题的意见》 (*Opinions of the Supreme People's Court on Several Issues Concerning the Adjudication of Administrative Cases Involving Authorization or Confirmation of Trademark Rights*), issued on and effective as of Apr. 20, 2010, http://zscq.court.gov.cn/sfjs/201004/t20100426_4532.html.

[12] (2016) 最高法行申2088号行政裁定 ((2016) Zui Gao Fa Xing Shen No. 2088 Administrative Ruling), rendered by the Supreme People's Court on Sept. 23, 2016, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/spc-2016-zui-gao-fa-xing-shen-2088-administrative-ruling.

[13]《最高人民法院关于审理商标授权确权行政案件若干问题的规定》 (*Provisions of the Supreme People's Court on Several Issues Concerning the Adjudication of Administrative Cases Involving Authorization or Confirmation of Trademark Rights*), *supra* note 8.

[14] (2012) 行提字第2号行政判决 ((2012) Xing Ti Zi No. 2 Administrative Judgment), rendered by the Supreme People's Court on June 29, 2012, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/spc-2012-xing-ti-zi-2-administrative-judgment.

[15] (2018) 最高法行再18号行政判决 ((2018) Zui Gao Fa Xing Zai No. 18 Administrative Judgment), rendered by the Supreme People's Court on May 14, 2018, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/spc-2018-zui-gao-fa-xing-zai-18-administrative-judgment.

[16] (2016) 京73行初3127号行政判决 ((2016) Jing 73 Xing Chu No. 3127 Administrative Judgment), rendered by the Beijing Intellectual Property Court on Feb. 28, 2017, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/beijing-2016-jing-73-xing-chu-3127-administrative-judgment.

抢注外国商标：中国商标法与相关司法案例*

杨静博士
北京知识产权法院法官

摘要

外国企业在其商标已在本身的国家取得较高知名度后，往往有意进入中国市场以开拓业务。如果外国企业的商标已在中国被他人注册，它们能否得到救济并如何得到救济都是这些企业关心的问题。本文作者是一位经验丰富的北京知识产权法院法官。通过一起虚拟商标案件，作者深入浅出地说明相关的中国法律条文、案例来分析中国法院会如何处理该虚拟案件。对于关心中国法律发展的人士，尤其是外国企业行政人员和执业律师，此文章极具参考价值。

引言

2018年3月，笔者获邀对中国指导性案例项目在北京大学举办的一个模拟审判作出评论。通过一起涉及北京著名餐馆花好烤鸭饭店有限公司（“花好”）和一家位于旧金山的餐厅管理公司Bloom Restaurant LLC（“Bloom”）之间的商标纠纷，该模拟法庭演示了美国法院如何处理类似的抢注外国商标案件。在对该案的模拟审判中，来自美国和日本的三名法官[1]一致认为，原告花好在中国驰名的商标已被美国的相关公众所熟知，被告Bloom的行为——在美国注册“Huahao”商标并在旧金山经营一家名为“花好北京菜”（Huahao Beijing Cuisine）的烤鸭餐厅——构成对服务来源的失实陈述，其“Huahao”商标注册应予撤销。三位法官在裁判时充分考虑了相关判例。[2]

如果类似的案件发生在中国，中国法院会如何审判？通过一起名为《星期六牛排餐厅案》的虚拟案件，本文深入分析相关法律条文和案例，并讨论中国法院会如何审判《星期六牛排餐厅案》。通过这案例分析，读者可以深入理解相关规制，并明白案例对中国审判工作的重要作用。

《星期六牛排餐厅案》的案情

Saturday Steak House（“SSH”；中文译名为“星期六牛排餐厅”）是位于美国纽约的一家百年牛排老店。该餐厅闻名全美，曾获得米其林餐厅等国际殊荣，被猫途鹰（Trip Advisor）评为纽约十大最佳牛排餐厅之一。SSH的英文网站面向全球进行包括中文在内的多语种宣传。近年，SSH一直在与中国投资者洽商，意图进军中国市场。Tony是一位曾在美国洛杉矶生活多年的美籍华人，他邀请了一位曾在2018年著名烹饪节目“美国料理铁人”中获胜的美国名厨，共同到北京开设“星期六牛排餐厅”，英文招牌为“Saturday Steak House”。这餐厅在北京大受欢迎，并于2019年被大众点评网评为北京十大最佳牛排餐厅之一。2019年，这餐厅被中国商标局核准注册“Saturday”和“星期六”商标，指定服务项目为第43类的“咖啡厅、简餐厅、提供食物和饮品、餐厅服务”。除以上两个商标外，Tony的餐厅无其他商标申请。

SSH于2020年初提交申请，请求宣告Tony的餐厅的“Saturday”和“星期六”商标在第43类全部指定服务上的注册为无效。SSH的主张是否能够得到支持？对于上述问题，需要从中国商标法对于外国商标保护的规则体系出发，探寻可能的裁判结果。

《星期六牛排餐厅案》的审判思路

SSH的主张是否能够得到支持取决于对以下法律问题的分析。首先，SSH是否在中国取得注册商标专用权？如果答案是否定的，还需要考虑两个法律问题：SSH是否可以主张其未在中国注册的商标为“驰名商标”并得到相关保护？又或者，SSH是否可以主张其未在中国注册的商标为“具有一定影响的商标”且被告具有抢注的恶意？在以下各节中，笔者将通过讨论《商标法》相关规定和案例逐一分析这三个法律问题。应当在此先指出，以下讨论的《商标法》中有关商品商标的规定，均适用于服务商标（见**侧边栏1**，《商标法》第四条第二款）。

1. SSH是否在中国取得注册商标专用权？

《中华人民共和国商标法》[3]（“《商标法》”）第三十条规定：

> 申请注册的商标，凡不符合本法有关规定或者同他人在同一种商品或者类似商品上已经注册的或者初步审定的商标相同或者近似的，由商标局驳回申请，不予公告。

也就是说，在中国已经注册的或者初步审定的商标，其所有人具有排斥他人注册相同或近似的商标的法定权利，不论所有人是中国还是外国公民，也不论该商标在外国是否曾经注册或使用。第三十条的规定反映了《商标法》采取注册取得专用权的原则。取得注册商标专用权后，注册商标持有人可以获得在中国全国

杨静博士
北京知识产权法院法官

杨静博士是北京知识产权法院法官。杨法官具有10多年知识产权审判工作经验，曾经负责最高人民法院知识产权案例指导（北京）基地的具体工作。杨法官曾经审理《钱钟书书信手稿拍卖案》、《搜狗诉奇虎不正当竞争案》、《高通诉魅族标准必要专利案》等重大案件。她亦发表了《知识产权案例指导制度的障碍与克服》等文章，并编辑出版了《知识产权案例指导新探索》一书。

范围内的法定权利，并排斥他人在后使用和申请注册相同或近似的商标。

此外，值得注意的是，外国商标持有人不需要在中国实际大量使用其商标后才去注册该商标。根据《商标法》第四条自愿申请原则和第七条诚实信用原则的规定，只要具有实际使用意图的人均可申请注册商标（见**侧边栏1**）。

"《保护工业产权巴黎公约》[...]和《与贸易有关的知识产权协定》[...]中国是上述国际条约的签约国，《商标法》第十三条第二款与上述公约所规定的内容基本一致。"

基于以上规定（其亦适用于服务商标），在《星期六牛排餐厅案》中，如果SSH在Tony之前已经在中国就第43类的"咖啡厅、简餐厅、提供食物和饮品、餐厅服务"等相关服务上申请注册了"Saturday"或"星期六"商标，就可以依据《商标法》第三十条，寻求对注册商标专用权的保护，禁止在后的申请人（即Tony）在同一种服务或者类似服务上申请或使用相同或者近似的商标。

显然，SSH并未在中国提起商标注册申请，因而不享有注册商标专用权或初步审定商标的优先权，无法依据《商标法》第三十条的规定阻止Tony在第43类服务上注册或使用"Saturday"和"星期六"商标。

2. SSH是否可以主张其未在中国注册的商标为"驰名商标"并得到相关保护?

侧边栏1：

《中华人民共和国商标法》

第四条

自然人、法人或者其他组织在生产经营活动中，对其商品或者服务需要取得商标专用权的，应当向商标局申请商标注册。不以使用为目的的恶意商标注册申请，应当予以驳回。

本法有关商品商标的规定，适用于服务商标。

第七条

申请注册和使用商标，应当遵循诚实信用原则。

商标使用人应当对其使用商标的商品质量负责。各级工商行政管理部门应当通过商标管理，制止欺骗消费者的行为。

中国在坚持"注册取得专用权"的原则下，2001年修订《商标法》时，吸收了"使用取得专用权"制度的合理成分，增加了对未在中国注册但在中国已经实际使用的商标的保护内容。[4] 对这些商标的保护是根据其实际取得的知名度情况而定，具体内容主要体现于"未注册驰名商标的保护条款"（即《商标法》第十三条第二款）（见**以下段落**）及"有一定影响的未注册商标的保护条款"（即《商标法》第三十二条）（见**下一节**）中。

对未注册驰名商标的保护，《商标法》第十三条第二款有如下规定：

> 就相同或者类似商品申请注册的商标是复制、摹仿或者翻译他人未在中国注册的驰名商标，容易导致混淆的，不予注册并禁止使用。

根据《保护工业产权巴黎公约》（"《巴黎公约》"）第六条之二[5]和《与贸易有关的知识产权协定》（"《TRIPS》"）第十六条第二款[6]的规定，驰名商标所有人可以请求对相同或类似商品的商标构成复制、仿制或翻译，易于产生混淆的商标，拒绝或撤消注册，并禁止使用。中国是上述国际条约的签约国，《商标法》第十三条第二款与上述公约所规定的内容基本一致。因此，外国商标权人如果没有在中国申请注册其驰名商标，则可以依据《商标法》第十三条第二款，主张禁止他人注册或使用相同或近似的商标。

根据《商标法》第十三条第二款，要取得未注册驰名商标的保护需满足三个要件：（1）请求保护的商标为驰名商标；（2）诉争商标构成对驰名商标的复制、摹仿或者翻译；（3）诉争商标的注册或者使用容易导致混淆，致使驰名商标所有人的利益可能受到损害。

要件（1）是适用该条款的前提和基础，原告必须先证明自己的商标在中国构成驰名商标（见**下文**）。之后，法院会判断要件（2）与（3）是否成立。在判断要件（3）（即诉争商标的注册或者使用是否容易导致混淆）时，法院会根据《最高人民法院关于审理商标授权确权行政案件若干问题的规定》第十二条的规定，综合考量五大因素以及这些因素之间的相互影响（见**侧边栏2**）。[7] 第十二条进一步明确规定："商标申请人的主观意图以及实际混淆的证据可以作为判断混淆可能性的参考因素。"

要强调的是，当原告的商标并不构成中国境内的驰名商标时，根本不需要讨论被告（即诉争商标的申请人）是否具有模仿该商标的恶意。这是因为对未注册驰名商标仍给予禁止他人模仿的救济，本身是在注册制度下对驰名商标的特殊保护，对未达到驰名程度的普通未注册商标，并不能适用本条款享受到驰名商标的保护。

如在《IPHONE商标案》中，最高人民法院（“最高法”）判决，由于苹果公司在手机上的“IPHONE”商标并未在中国驰名，因而不再审理其援引《商标法》第十三条第二款的主张，因此法院驳回了其诉讼请求。[8]

关于如何具体证明要件（1）成立，在《最高人民法院关于审理涉及驰名商标保护的民事纠纷案件应用法律若干问题的解释》中，最高法将“驰名商标”解释为“在中国境内为相关公众广为知晓的商标”。[9]根据《最高人民法院关于审理商标授权确权行政案件若干问题的意见》第十八条第二款的规定，[10]“在中国境内”这一表述既修饰“实际使用”，又修饰“为一定范围的相关公众所知晓”，故普遍称之为“国内使用+国内知名”双重地域限定（见**侧边栏3**）。

具体来说，要满足外国驰名商标“国内使用+国内知名”的条件，原告必须证明以下三点都成立。

（1）原告商标被中国境内相关公众所知晓

中国境内的相关公众通常是指居住或主要居住在中国境内的人，并不包括长期在海外工作、生活的人以及华侨、到中国短期逗留的外国人等。此外，中国境内的相关公众通常包括商品或服务的消费者和与其营销有密切关系的其他经营者。相关公众的认知通常可通过调查问卷、网友评论、媒体报道和评论、获奖记录等予以证明，而最为主要和有效的证据，是原告商标在中国市场中进行了大量持续、大范围的实际使用，进而积累的声誉和知名度。

（2）原告商标驰名的地域仅限于中国大陆地区

对于驰名商标的地域范围，各国规定不同。有些国家保护在外国驰名的商标，有些国家则要求必须在本国驰名才能获得保护，其原因是本国的消费者对外国驰名商标往往难以熟知。此地域性的限定体现了各国商标法的独立性。在实际适用《商标法》中，中国法院和其他相关机关要求原告对商标的商业性使用活动必须发生在中国法域内，即中国大陆地区。

（3）原告商标需在中国进行了大量持续的使用

《商标法》第十四条第一款第（一）到第（四）项分别规定了驰名商标认定的法定情形。驰名商标的认定，可以根据相关公众对该商标的知晓程度，该商标在中国境内持续使用的时间，商标宣传工作的持续时间、程度和地理范围及作为驰名商标受保护的记录等多种因素综合判断（见**侧边栏4**）。就这些因素而言，并非样样都必须全部具备，但其中最重要、最基础的因素是该商标在中国境内持续使用和宣传。

根据《商标法》第四十八条，“使用”是指“将商标用于商品、商品包装或者容器以及商品交易文书上，或者将商标用于广告宣传、展览以及其他商业活动中，用于识别商品来源的行为”（见**侧边栏4**）。在司法实践中，法院一般也根据《商标法》第四十八条而将“宣传”理解为“将商标用于商品、商品包装或者容器以及商品交易文书上，或者将商标用于”商品或者服务的“广告宣传、展览以及其他商业活动中”。

脱离了实际使用的商标，即使该商标所有人进行了宣传报道，仍很难使相关公众认定其属于区别商品或者服务来源的标志。这是由于公众在没有获得相关的商品或服务的情况下，商标无法实现其品质保障功能，难以建立真正可信的品牌认知。

根据以上对《商标法》第十三条第二款的分析，在《星期六牛排餐厅案》中，SSH如果意图主张Tony申请注册的诉争商标“Saturday”和“星期六”构成对其未注册的驰名商标的复制、摹仿或者翻译，依据

侧边栏2：

《最高人民法院关于审理商标授权确权行政案件若干问题的规定》

第十二条

当事人依据商标法第十三条第二款主张诉争商标构成对其未注册的驰名商标的复制、摹仿或者翻译而不应予以注册或者应予无效的，人民法院应当**综合考量如下因素以及因素之间的相互影响，认定是否容易导致混淆：**

（一）商标标志的近似程度；
（二）商品的类似程度；
（三）请求保护商标的显著性和知名程度；
（四）相关公众的注意程度；
（五）其他相关因素。

商标申请人的主观意图以及实际混淆的证据可以作为判断混淆可能性的参考因素。

（强调后加）

侧边栏3：

《最高人民法院关于审理商标授权确权行政案件若干问题的意见》

第十八条

[…]

在中国境内**实际使用**并**为一定范围的相关公众所知晓**的商标，即应认定属于已经使用并有一定影响的商标。有证据证明在先商标有一定的持续使用时间、区域、销售量或者广告宣传等的，可以认定其有一定影响。

[…]

（强调后加）

> ***"[...]未在中国注册的商标在达到驰名程度前，难以获得等同于注册商标水平的保护。但是，这不意味着《商标法》纵容恶意抢夺他人商业利益的行为。"***

《商标法》第十三条第二款的规定，SSH必须证明自己的商标已经成为在中国境内为相关公众所知晓的驰名商标。由于SSH并未在中国进行实际经营或进行广告宣传，也没有与他人合作或授权他人在中国经营，中国境内的相关公众无法购买到其商品或服务，客观上只有从美国回来的中国消费者才可能知晓其品牌。即使少量相关公众通过互联网络可以了解到其在美国知名的情况，仍然达不到《商标法》第十三条第二款驰名商标条款所要求的知名程度。

侧边栏4：

《中华人民共和国商标法》

第十四条

驰名商标应当根据当事人的请求，作为处理涉及商标案件需要认定的事实进行认定。认定驰名商标应当考虑下列因素：

（一）相关公众对该商标的知晓程度；
（二）该商标使用的持续时间；
（三）该商标的任何宣传工作的持续时间、程度和地理范围；
（四）该商标作为驰名商标受保护的记录；
（五）该商标驰名的其他因素。

[...]

第四十八条

本法所称商标的使用，是指将商标用于商品、商品包装或者容器以及商品交易文书上，或者将商标用于广告宣传、展览以及其他商业活动中，用于识别商品来源的行为。

侧边栏5：

《最高人民法院关于审理商标授权确权行政案件若干问题的规定》

第二十三条

在先使用人主张商标申请人以不正当手段抢先注册其在先使用并有一定影响的商标的，如果在先使用商标已经有一定影响，而商标申请人明知或者应知该商标，即可推定其构成"以不正当手段抢先注册"。**但商标申请人举证证明其没有利用在先使用商标商誉的恶意的除外。**

在先使用人举证证明其在先商标有一定的持续使用时间、区域、销售量或者广告宣传的，人民法院可以认定为有一定影响。

在先使用人主张商标申请人**在与其不相类似的商品上申请注册**其在先使用并有一定影响的商标，违反商标法第三十二条规定的，人民法院不予支持。

（强调后加）

因此，如果SSH在中国境内实际使用和宣传的证据不足，往往会因为不符合"驰名商标"这一要件而不能得到《商标法》第十三条第二款的救济。由于诉争商标"Saturday"和"星期六"根本不是驰名商标，法院不需要考虑被告Tony及其伙伴是否对诉争商标作出恶意使用和注册的问题。

大量的司法案例佐证了这点：仅凭商标在外国的使用行为和知名事实，很难获得《商标法》第十三条第二款的支持。例如，在2016年《爱马仕案》中，[11] 最高法认为，法国的爱马仕国际应当证明其商标在中国大陆地区的使用。但是，该公司提交的《大公报》等报道行为均发生在香港地区，尚不足以证明其未于中国注册商标"愛馬仕"、"HERMES"已为中国内地的相关公众知悉。此外，国内的《信息时报》等报刊杂志虽然也有报道爱马仕国际及其产品，但爱马仕国际无法证明这些报刊杂志当时的发行量、发行范围及持续宣传的时间；其他证据也不能证明其"愛馬仕"商标在中国内地为相关公众广为知晓。因此，争议的"愛馬仕"商标未构成未注册驰名商标，对爱马仕国际请求依据《商标法》第十三条第二款撤销争议商标的主张不予支持。

3. SSH是否可以主张其未在中国注册的商标为"具有一定影响的商标"且被告具有抢注的恶意？

上一节的分析清楚表明，未在中国注册的商标在达到驰名程度前，难以获得等同于注册商标水平的保护。但是，这不意味着《商标法》纵容恶意抢夺他人商业利益的行为。未注册的商标，如果经过使用取得了一定的影响，就具有某种应受法律保护的、反抢注的利益。为此，《商标法》第三十二条规定：

> 申请商标注册不得损害他人现有的在先权利，也不得以不正当手段抢先注册他人已经使用并有一定影响的商标。

该条款被称为"有一定影响的未注册商标的保护条款"。虽然从字面上，有一定影响的未注册商标得到的保护可以禁止他人注册相同或近似商标，与未注册驰名商标的排斥范围几乎相同，然而，"有一定影响的未注册商标的保护条款"与"未注册驰名商标的保护条款"具有本质的区别，二者在适用逻辑上明显不同。前者的立法依据在于维护《商标法》第七条所规定的商标注册诚实信用原则，对已经使用并有一定影响的商标予以保护，以制止恶意抢注的行为，是对商标注册制度的有效补充。

《商标法》并未明确规定原告的未注册商标需要达到何种知名程度才算是"有一定影响"，也没有明确规定被告的抢注恶意是如何体现的。但是，通过《最高人民法院关于审理商标授权确权行政案件若干问题的规定》第二十三条[12]（见**侧边栏5**）的规定，中国法院在审理商标异议、不予注册复审及无效宣告案件中，适用"有一定影响的未注册商标的保护条款"时会考

量以下四个要件：（1）他人商标在系争商标申请注册日前已经使用并有一定影响；（2）系争商标与他人商标相同或者近似；（3）系争商标所使用的商品或服务与他人商标所使用的商品或服务原则上相同或者类似；（4）系争商标申请人具有恶意。

要件（2）与（3）是前提条件。之后，法官可以同时综合考虑要件（1）与（4），即原告请求保护的未注册商标的使用情况和知名度，以及被告主观恶意程度，而最终决定是否对被告申请注册的商标予以禁止。换言之，不像“未注册驰名商标的保护条款”那样，一定要先认定原告商标构成在中国的驰名商标后，才审查被告是否实施了复制、模仿、翻译原告商标的行为。当中分别反映了两个保护条款的法理基础是不同的。

在适用《商标法》第三十二条时，早期的司法案例显示，法院通常要求原告必须“在中国境内”实际使用了其商标，否则很难承认其商标在中国“有一定影响”。如2012年《無印良品案》中，最高法判决认为：

> 一系列证据[…]只能证明[…]“無印良品”商标在日本、中国香港地区等地宣传使用的情况以及在这些地区的知名度情况，并不能证明“無印良品”商标在中国大陆境内实际使用在第24类毛巾等商品上并具有一定影响的事实。[13]

但是，近期的司法案例展现出法院对于原告商标在中国境内的使用要求越来越宽松。这与近年来国际跨境电子商务和互联网的发展息息相关。一些企业在进入中国大陆开展实际经营前，基于其在外国市场已经具有的知名度和面向中国公众所作的宣传报道，其商标对中国境内的相关公众已经产生一定的影响力。在这种情况下，如果他人意图恶意抢注这种尚未注册但在中国具有一定影响的商标，商标所有人可以向国家知识产权局提出异议，或对已经注册商标申请无效。在此类案件中，国家知识产权局和司法机关会综合考虑原告的商标的“在中国境内外”的实际使用和宣传情况，并结合被告恶意进行判断。以下两个案例都是此类案件的表表者。

（1）《澳大利亚AESOP商标案》[14]

自1994年起，澳大利亚的伊美斯公司先后在澳大利亚、加拿大、英国、美国、法国、韩国、新加坡、瑞士、香港等国家和地区申请并获准注册了“AESOP”商标。

自2003年起，伊美斯公司分别在澳大利亚墨尔本和台湾、巴黎、香港等地开设了多家“AESOP”品牌专卖店。其虽然没有在中国境内开设店铺，但通过在中国媒体的大量广告宣传和报道，以及中国大陆消费者在海外代购平台等方式，这些消费者对伊美斯公司产品和“AESOP”商标有了深入认知。

2006年1月25日，来自中国的被告王忠为在第3类“肥皂、浴盐、去渍剂、擦亮用剂、香精油、化妆品、香水、香”等商品上申请注册第5140243号“AESOP'S”商标。伊美斯公司请求商标行政机关禁止该注册。国家知识产权局、一审法院和二审法院都不支持伊美斯公司主张。伊美斯公司进而向最高法提起再审。2018年，最高法判决支持了伊美斯公司主张，认为：

> 商标法第三十一条[即2019年修正的《商标法》第三十二条]规定，申请商标注册不得以不正当手段抢先注册他人已经使用并有一定影响的商标。本案中，[…]结合伊美斯公司[…]补充提交的证据，可以证明在诉争商标申请日前，其AESOP品牌化妆品被包括人民网[…]等网站进行了报道，在南国早报[…]等报刊上刊文报道；另有天涯[…]等知名度较高、注册用户众多的国内大型BBS论坛上对其产品及购买渠道进行了宣传。中国的消费者亦已经通过代购、网购等渠道购买伊美斯公司的AESOP化妆产品。根据再审申请人提交的媒体报道以及所涉媒体的专业性及相关公众在相关论坛发表的对该品牌化妆品的认知，可以认定在诉争商标申请日前，“AESOP”商标在化妆品相关的领域已经具有一定的影响。**当然，这些新闻报道或评论文章并未表明是由再审申请人所主动进行的商业宣传，但不可否认的是，相关公众通过媒体报道等方式，已经形成“AESOP”为再审申请人的产品的认知。**因此，在案证据可以证明在诉争商标申请日前，[…]“AESOP”在化妆品相关商品上经过宣传具有了一定的知名度，被申请人在化妆品相关商品上申请注册“AESOP'S”商标，违反了商标法第三十一条的规定，不应予以核准注册。
>
> （强调后加）

（2）《TOPPIK商标案》[15]

斯宾塞·福雷斯特公司自1996年即开始在生发产品上使用TOPPIK商标，2002年在美国获准注册。此后陆续在世界多国或地区获得商标注册。且自1999年开始，在香港和台湾地区杂志及报纸上进行产品介绍及宣传。此外，该公司官方网站自1999年即开始推出使用TOPPIK标识及包装的生发类产品，随着电子商务的发展，其产品通过互联网、代购等方式进行直接销售。目前在中国境内，相关公众通过淘宝等网站直接购买相关产品。基于以上事实，北京知识产权法院认为：

> 虽然[原告]切迟-杜威公司[（斯宾塞·福雷斯特公司的继承人）]未能提供在争议商标申请日前在中国大陆地区直接销售的证据，但考虑到其产品于1999年开始即持续生产，并通过宣传及销售为相关公众知晓，可以认定引证商标在中国境内已经使用并为公众所知。

法院经审理查明，被告李嘉霖（即争议TOPPIK商标申请人）注册并控制的深圳乐健公司主要经营的亦为假发粘合剂类产品，与原告切迟-杜威公司经营的业务领域基本相同。由于原告在该领域有着长期经营的历史和其商标在多国和地区的注册情况，李嘉霖应当知晓原告公司及在先商标。北京知识产权法院还指出：

> 本院注意到，引证商标[即斯宾塞•福雷斯特公司在先使用的“TOPPIK”商标]的文字为臆造的英文文字组合，具有较强的显著性，而本案争议商标的文字与其完全相同。引证商标在香港及台湾地区将英文标识与中文“顶丰”同时使用，而李嘉霖亦同时注册了“顶丰”中文商标，将争议商标与“顶丰”同时使用，并且在产品销售中使用“顶丰增发纤维，获得美国FDA认证”等宣传用语，上述事实足以表明李嘉霖切实知晓斯宾塞•福雷斯特公司及其在先商标，**存在抢注商标的明显恶意，违反诚实信用原则**。
>
> [...]根据上述事实，在争议商标申请日前，我国相关公众即可通过宣传报道或者代购销售等途径了解到在先商标的情况，本案争议商标完全模仿了引证商标的文字，并且在没有正当理由的情况下，李嘉霖还注册了脱发生发领域的“毛博士”、“保康丝”等其他知名商标。**综合考虑争议商标注册中存在明显恶意以及引证商标的独创性、商标的显著性，使用历史及知名度等情况**，本院认为，争议商标违反了《商标法》第三十一条关于“以不正当手段抢先注册他人已经使用并有一定影响的商标”的规定。
>
> （强调后加）

根据以上分析，在《星期六牛排餐厅案》中，SSH可以主张适用《商标法》第三十二条来禁止Tony抢注其商标。对此，SSH必须证明其请求保护的商标在中国具有一定影响，而Tony的商标注册构成对其商标的恶意抢注。如上所述，与“未注册驰名商标的保护条款”不同，法院会综合考虑原告SSH的商标是否具有一定影响、及被告Tony是否具有抢注的恶意。在考虑SSH的商标是否具有一定影响时，法院所考虑的证据与驰名商标认定时类似，因此，SSH需提交其商标在中国境内实际使用的情况、其商标宣传的情况等。

此外，对于SSH而言，其完全没有在中国大陆境内进行实际经营，但是如果其在中国进行了大量广告宣传，或通过互联网销售的方式使得广大中国公众能够获取到其商品或服务，SSH也可以参考《澳大利亚AESOP商标案》和《TOPPIK商标案》，主张法院综合考虑SSH商标的“在中国境内外”的实际使用和宣传情况，并结合被告恶意进行判断。

结论

从以上的讨论，可以清楚知道，外国企业的商标权人可以从中国《商标法》的三项制度中获得保护。

第一项制度是对注册商标的保护。中国实行商标注册取得制度，注册是获得专用权的最有效证据。任何人不得在相同或类似商品上，注册与他人已经注册商标相同或近似的商标。因此，外国权利人如果意图进入中国市场，应当首先在相应的商品或服务上注册自己的商标。

第二项制度是对驰名商标的保护。中国作为《巴黎公约》及《TRIPS》成员国，依据国际公约履行对驰名商标的保护义务。对于未在中国注册、但被相关公众广为知晓的驰名商标，给予类似于注册商标同等的保护，禁止他人复制、摹仿或者翻译其驰名商标。对于驰名商标权利人而言，要想排除他人的注册，必须提供证据证明在中国境内进行了持续的生产、经营和宣传行为，使其商标被相关公众广为知晓。否则，难以获得“未注册驰名商标”排斥他人注册的救济。

第三项制度是对有一定影响的商标的保护。针对恶意抢注他人商业标识的行为，中国《商标法》确立了诚实信用的基本原则，任何以不正当手段抢注他人商标的行为，都受到禁止。持有已经在中国使用但尚未注册的商标的人士，应当提交该商标在中国的持续使用时间、区域、销售量或者广告宣传等证据，证明该商标为一定范围的相关公众所知晓，可以认定其为“有一定影响”。近期的司法案例表明，中国法院已加大对商标在外国使用的考量。所以如果商标权人提供的证据能够证明其在其他国家注册、使用该商标或该商标在外国有影响，对其证明在中国境内使用该商标的要求便有所降低，加大了对外国知名商标的保护。

综上，在《星期六牛排餐厅案》中，SSH如果能够证明其商标在中国境内具有一定的影响，而被告Tony等人采取了不正当手段抢先注册了其经使用并有一定影响的商标，则可以根据《商标法》第三十二条而取得禁止Tony抢注和使用的救济。■

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* 此评论的引用是：杨静博士，抢注外国商标：中国商标法与相关司法案例，《中国法律连接》，第9期，第21页（2020年6月），*亦见于*斯坦福法学院中国指导性案例项目，2020年6月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-9-202006-32-yang-jing。中文原文由沈馨、于雯竹和熊美英博士编辑。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] 三位法官是William A. Fletcher法官（美国联邦第九巡回上诉法院法官）、饭村敏明法官（日本知识产权高等法院前首席法官）和Diane P. Wood法官（美国联邦第七巡回上诉法院首席法官）。

[2] 中国指导性案例项目，模拟法庭：《花好烤鸭饭店有限公司诉Bloom饭店有限公司》，《中国法律连接》，第5期，第35页（2019年6月），*亦见于*斯坦福法学院中国指导性案例项目，中法连*聚焦*™，2019年6月，http://cgc.law.stanford.edu/zh-hans/clc-spotlight/clc-5-201906-others-4-cgcp。

[3]《中华人民共和国商标法》，1982年8月23日通过和公布，1983年3月1日起施行，经四次修正，最新修正于2019年4月23日，2019年11月1日起施行，http://www.sipo.gov.cn/zcfg/zcfgflfg/flfgsb/fl_sb/1140931.htm。

[4] 2013年修订的《商标法》传承了这些内容，包括在第十三条、第三十一条和第四十一条。

[5]《保护工业产权巴黎公约》（1979年9月28日修正），https://wipolex.wipo.int/zh/text/288518。第六条之二涵盖以下内容：

> （1）本联盟各国承诺，如本国法律允许，应依职权，或依利害关系人的请求，对商标注册国或使用国主管机关认为在该国已经驰名，属于有权享受本公约利益的人所有、并且用于相同或类似商品的商标构成复制、仿制或翻译，易于产生混淆的商标，拒绝或撤销注册，并禁止使用。这些规定，在商标的主要部分构成对上述驰名商标的复制或仿制，易于产生混淆时，也应适用。

[6]《与贸易有关的知识产权协定》，http://ipr.mofcom.gov.cn/zhuanti/law/conventions/wto/trips.html。第十六条第二款规定：

> 《巴黎公约》（1967）第六条之二在细节上作必要修改后应适用于服务。在确定一商标是否驰名时，各成员应考虑相关部门公众对该商标的了解程度，包括在该成员中因促销该商标而获得的了解程度。

[7]《最高人民法院关于审理商标授权确权行政案件若干问题的规定》，2016年12月12日由最高人民法院审判委员会通过，2017年1月10日公布，2017年3月1日起施行，http://www.court.gov.cn/zixun-xiangqing-34732.html。

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Founded in February 2011, the China Guiding Cases Project has shared its knowledge-base via its bilingual website (https://cgc.law.stanford.edu). As of early 2020, the website has benefited more than 150,000 global users residing in different continents.

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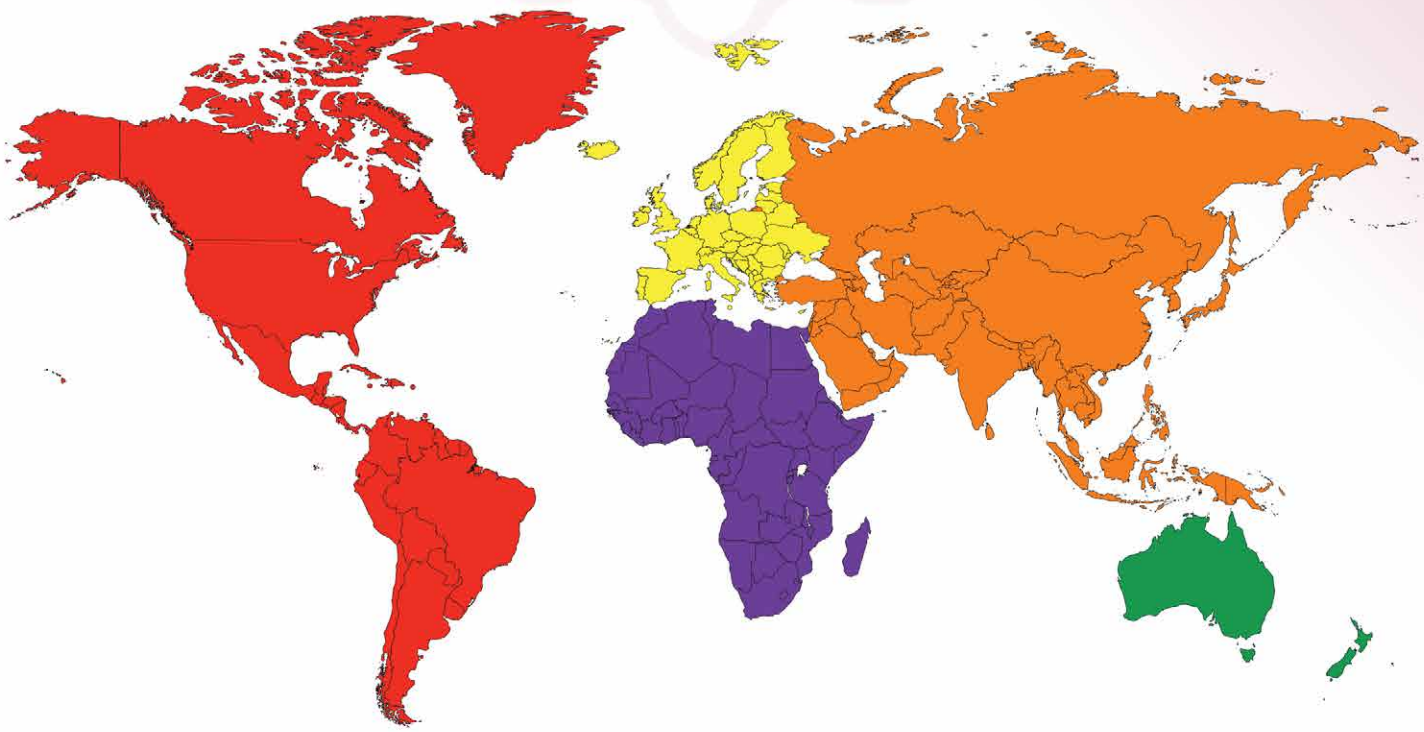

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Japan and China's Belt and Road Initiative*

Kentaro Ikeda

Abstract

In 2019, Italy joined the Belt and Road Initiative (the "BRI") by signing a memorandum of understanding with China, thereby becoming the first Group of Seven ("G7") country to participate in this initiative. Japan, another G7 country, has kept a prudent distance from the BRI. Will Italy's memorandum of understanding work as a model for Japan's engagement with the BRI? To answer this question, the author explains, from economic and strategic perspectives, interests that Japan has in relation to the BRI and analyzes their differences as compared with Italy. The author then explains various concerns that hinder Japan's involvement in the BRI and describes the approach that Japan has taken to balance its interests and concerns. At the end of the article, the author briefly analyzes the impact that COVID-19 might have on Japan's approach to the BRI.

Introduction

In 2019, Italy signed a memorandum of understanding with China ("MOU")[1] to become the first Group of Seven ("G7") country to join the Belt and Road Initiative (the "BRI"). Since the BRI was formally announced in 2015,[2] Japan, which is also a member of the G7, has kept a prudent distance. As China has provided neither a fixed template to join the BRI nor a clear membership protocol explaining how to "join" the initiative,[3] one might wonder whether the path followed by fellow G7 country Italy in its MOU may work as a good model for Japan's engagement with the BRI. This article answers this question by first examining Japan's interests related to the BRI and comparing them with those of Italy. It then explains Japan's concerns about the initiative and the approach it has taken in light of its concerns and interests. Finally, the article briefly discusses how COVID-19 could affect Japan's approach to the BRI.

Japan's Interests in the BRI

Japan's interests in its engagement with the BRI span both economic and strategic considerations.

1. Economic Considerations

From an economic standpoint, Japan can benefit from its engagement with the BRI in two major ways, as explained below.

(1) As China's Partner in Developing Infrastructure Projects

The first major way is to be a partner of China in building infrastructure in developing countries. China and Japan have been competitors in the export and development of infrastructure for foreign countries, especially Asian countries. The two countries have competed during the bidding process for projects such as a high-speed railway project in Indonesia and a deep sea port in Bangladesh.[4] This competition has hurt both Japan and China. For example, China won the high-speed railway project in Indonesia but struggled to secure the generous funding it promised during the bidding process, and the construction has not proceeded as planned.[5]

Cooperation, on the other hand, will likely lead to gains for both countries. It is important to recognize that Japan and China have different strengths in building infrastructure. Japan's strengths include technology (e.g., energy efficient technologies and compact infrastructure),[6] project management, and finance. In contrast, China has strong cost competitiveness, in addition to funds and experience with specific types of infrastructure.[7] Therefore, collaboration between the two countries will likely lead to more efficient infrastructure.

(2) As a User of BRI-Related Infrastructure

The second major way for Japan to benefit from its engagement with the BRI is as a user of infrastructure. Japan is a prominent investor in some countries that will be home to BRI-related projects. For example, in 2017, Japan and China were the No. 1 and No. 2 outside investors, respectively, in members countries of the Association of Southeast Asian Nations (ASEAN),[8] which are targeted by the initiative. The development of better infrastructure through BRI projects will positively contribute to the operation and long-term success of Japanese companies in these countries.

In addition to the two major ways discussed above, Japan may also economically benefit from collaborating with

Kentaro Ikeda

Kentaro Ikeda is a Japanese scholar currently conducting research at Harvard Law School under a study abroad program organized by the Japanese government. Prior to his studies in the United States, he has worked for the Ministry of Economy, Trade and Industry of Japan for five years. His work experience at the ministry includes the handling of economic cooperation projects between Japan and other Asian countries, trade remedy investigations (in his World Trade Organization (WTO) law practice), and free trade agreement (FTA) negotiations. Mr. Ikeda received his LL.B. degree from University of Tokyo Faculty of Law and obtained an LL.M. degree from Harvard Law School.

China to jointly establish international standards, which is an important area of focus of the BRI.[9] A memorandum of understanding between Japanese and Chinese organizations on setting standards for new-energy vehicles might be an example supporting this view. Based on the memorandum that was signed on the occasion of the Japanese prime minister's visit to China in 2018, the CHAdeMO Association, a Japan-based industrial association for electric-vehicle charging technology, and the Chinese Electricity Council have been jointly developing a next generation ultra-high-power charging protocol for electric vehicles.[10]

2. Strategic Considerations

Japan's engagement with the BRI will also likely produce two strategic results.

(1) Achievement of Japan's Goals to Help Developing Countries

To help developing countries, the Japanese government has been promoting infrastructure development in the context of economic cooperation. To this end, Japan has set various goals such as "solving the problem of poverty in a sustainable manner" and "leading to improvements in the lives of people, including the socially vulnerable" through self-reliant economic development.[11]

Joint efforts by Japan and China to help developing countries will make it more likely that these countries can acquire the infrastructure that they need to achieve growth. This step taken in developing countries will be in line with the Japanese government's goals stated in the preceding paragraph.[12]

(2) Better Japan–China Relations

Japan's relationship with China, its neighboring country across the sea, is "one of Japan's most important bilateral relationships".[13] The two countries have close economic relations as well as people-to-people and cultural exchanges.[14] Thus, Japan always has an interest in improving its bilateral relationship with China. Cooperation between Japan and China on infrastructure development has the potential to deepen Japan–China relations, which have seen ups and downs during the course of history.[15]

The Japan–China relationship was in quite good shape around 2008, when Chinese President HU Jintao visited Japan and signed with Japanese Prime Minister Yasuo Fukuda the Japan–China Joint Statement on "Comprehensive Promotion of a 'Mutually Beneficial Relationship Based on Common Strategic Interests'".[16] However, the Japan–China relationship turned sour around 2010 and still showed no improvements after Chinese President XI Jinping and Japanese Prime Minister Shinzo Abe had their first meeting in 2014.[17] The years 2017 and 2018 provided good opportunities for the two countries to mend their relationship, as 2017 marked the 45th anniversary of the normalization of diplomatic ties between the two countries, while 2018 marked the 40th anniversary of the Treaty of Peace and Friendship Between Japan and the People's Republic of China.

The two countries took advantage of these two years to overcome their differences. For example, in July 2017, immediately after Japanese Prime Minister Abe mentioned, for the first time, the possibility of having BRI-related cooperation,[18] a meeting between him and Chinese President Xi was held when the two leaders attended the G20 Hamburg Summit. Both leaders agreed during their meeting that "Japan and China will discuss how to contribute to the stability and prosperity of the region and the world, including the One Belt, One Road initiative".[19] Japan–China relations continued to improve after the meeting[20] and, in late 2018, the two countries finally announced that their relationship had improved, to the extent that it could be deemed to be on a "normal track".[21] This positive development confirms observations made by many experts that the relationship between Japan and China is often improved by greater and smoother economic cooperation. Consequently, this reinforces the belief that Japan's involvement in BRI projects—a type of economic cooperation—will be conducive to better Japan–China relations.[22]

Japan's BRI Engagement: Italy's Model Is Not Suitable

Although Japan has economic and strategic interests in its engagement with the BRI, the MOU used by Italy to

structure its participation in the BRI is not suitable for Japan. This is because, as analyzed below, the MOU was structured to address Italy's needs, which are quite different from those of Japan.

As explained in another article published in this journal,[23] prior to its participation in the BRI, Italy had experienced a severe economic downturn and fiscal deficit. To address needs arising from these economic and fiscal challenges, it was decided that Italy's major areas of BRI cooperation would be the following:

- *Transport, logistics, and infrastructure*. Italy's shortages in the government budget and low investment led to concerns about the quality of infrastructure in the country, as exemplified by the tragic collapse of the Genoa bridge.

- *Unimpeded trade and investment*. Italy had long suffered low growth and a high unemployment rate. Expanded investment from and trade with China through the BRI framework were expected to help the Italian economy improve.

- *Financial cooperation*. According to the MOU, Italy and China are to collaborate on the setting of "fiscal, financial, and structural reform policies". This commitment was made in the hope of helping improve Italy's fiscal situation. In the same month when the MOU was signed, an Italian investment bank announced a plan to issue "Panda Bonds" (i.e., bonds issued in Chinese renminbi by non-Chinese issuers in China) to support Italian companies in China. A few months later, more deals were made to promote cooperation between the two countries' export credit agencies and financial institutions targeting third-party markets.

"[…] because of various concerns Japan has about the BRI, the country must continue adopting a prudent approach—one based on a set of conditions aimed at ensuring conformity with international standards—to balance its interests and concerns."

In the following paragraphs, the author explains why Japan's needs for such BRI cooperation are not as strong as those of Italy.

1. Transport, Logistics, and Infrastructure

Compared with Italy, Japanese infrastructure is of better quality. Italy was ranked 27th in the World Economic Forum Global Competitiveness Report 2017–18 Index for Infrastructure, in contrast to Japan's being ranked 4th.[24] In addition, Japan's budget is sufficient to maintain its domestic infrastructure, with the Japanese government having announced its own plans to renovate the country's infrastructure. For example, it announced the Fundamental Plan for National Resilience in 2014[25] and decided to secure a budget of JPY 7 trillion (USD 64 billion) over three years for this purpose.[26]

2. Unimpeded Trade and Investment

Japan does not need to attract investment as urgently or at such high levels as Italy. Although Japan has recently welcomed foreign investment under its INVEST JAPAN Foreign Direct Investment Promotion policy,[27] it still keeps a sufficient level of domestic money supply. Moreover, from a macroeconomic perspective, Japan has a net foreign asset surplus of about USD 2.7 trillion, whereas Italy owes a net foreign debt of USD 150 billion.[28]

In terms of trade, Japan and China already have a strong trade relationship. In 2019, Japan–China trade amounted to about USD 300 billion, whereas the size of Italy–China trade was about USD 50 billion.[29] The economies of Japan and China are also closely connected through private transactions. While Japan may desire to expand trade with China, strong policy intervention will be required to expand trade beyond this sizeable amount. It would be more appropriate for Japan to go beyond a memorandum of understanding and establish a free trade agreement like the *Regional Comprehensive Economic Partnership* or the *Japan–China–Korea Free Trade Agreement*. Both of these free trade agreements were introduced in different forums before the BRI, with the former being negotiated as early as 2012 and the latter being jointly studied since 2003 and formally discussed for the first time in 2013.[30]

3. Financial Cooperation

In terms of financial cooperation, Japanese financial institutions have already been authorized to issue Panda Bonds under collaboration between the monetary authorities of China and Japan.[31] Two of the three major banks in Japan have already issued Panda Bonds, with the remaining bank reportedly planning to do the same.[32] Like Italy, Japan could benefit from promoting cooperation between export credit agencies and financial institutions regarding the BRI. Such cooperation could lead to business matching and the creation of new business opportunities beneficial to both countries. However, this alone is not a strong enough reason for Japan to officially "join" the BRI in the same manner as Italy.

Japan's Concerns and Prudent Approach to the BRI

As Japan's interests in the BRI are different from those of Italy, Japan needs to explore a model beyond Italy's MOU when it seeks to engage with the BRI. In this section,

"Although Japan has economic and strategic interests in its engagement with the BRI, the MOU used by Italy to structure its participation in the BRI is not suitable for Japan."

the author argues that because of various concerns Japan has about the BRI, the country must continue adopting a prudent approach—one based on a set of conditions aimed at ensuring conformity with international standards—to balance its interests and concerns.

1. Japan's Concerns About the BRI

Although there is no official document that comprehensively addresses Japan's concerns about the BRI, it is possible to highlight the country's main concerns based on general Japanese discourse.

(1) "Debt Traps"

Japan shares the concerns of the international community about "debt traps" related to the BRI. According to some analyses, China has not sufficiently considered the ability of borrower countries to pay back loans for BRI projects.[33] For example, a think tank report found that eight BRI recipient countries are "at a high risk of debt distress due to BRI loans".[34] An editorial in *Nikkei*, a Japanese economic newspaper, commented that BRI projects should be transparently operated in accordance with the rules of the Organization for Economic Cooperation and Development (OECD).[35] The concerns about "debt traps" were also discussed in a special committee on official development assistance in the Diet, the national legislature of Japan.[36]

(2) Security

Security concerns related to the BRI are also discussed by Japanese media and experts, just as they are by the international community. There is growing concern about projects that are thought to be linked to the expansion of China's military activities, especially maritime ones.[37] One Japanese government-related defense think tank argues that one of China's BRI aims is to make advancements on the security front by taking a leading role in regional economic affairs.[38]

(3) Promotion of Authoritarianism

Some Japanese scholars, along with institutions in other countries, point out concerns that the BRI might promote authoritarian regimes and curtail individual rights.[39] They argue that China is exporting an authoritarian model of governance when it provides infrastructure loans to relatively underdeveloped economies.[40] Japan has prioritized sustainable development cooperation that promotes human security,[41] thus it would be difficult for the country to cooperate in projects that lead to human rights violations.

(4) China–U.S. Tensions

Japan has strong ties with the United States, especially in the area of national security.[42] The BRI is considered to be not just an economic plan but part of China's strategic plan, which has caused the United States to be concerned about the global initiative from a security perspective.[43] A spokesman for the White House's national security team publicly criticized Italy's decision to join the BRI, saying, "[there is] no need for the Italian government to lend legitimacy to China's infrastructure vanity project".[44] Deep commitment to the BRI may make it difficult for Japan to steer its relations with the United States amid escalating China–U.S. tensions.

2. Japan's Prudent Approach

As a balance between Japan's interests and concerns discussed above, Japan has taken a prudent approach to the BRI by organizing the country's BRI engagement around specific conditions and concrete projects in third-country markets.

(1) Conditions and Principles

The Japanese government has repeatedly announced its intention to collaborate with China in regional economic development, including the BRI. Japan has consistently indicated its stance of cooperating with BRI-related projects that meet certain conditions.[45] Specifically, in 2019, Prime Minister Abe stated in the Diet that the following four conditions must be met before Japan can collaborate on a BRI-related project:

- openness,
- transparency,
- economic feasibility, and
- fiscal sustainability of recipient countries.[46]

Prime Minister Abe emphasized, "We will cooperate if a project matches the four conditions. I don't mean that we unconditionally agree with [the BRI], but we will create a better region for each other".[47] Japan recognizes the importance of collaboration, however, as Prime Minister Abe further noted, "If Japan and China cooperate in responding to this robust demand for infrastructure in Asia, they will not only contribute to the economic development of both countries, but also greatly contribute to the prosperity of the people of Asia".[48]

In addition to the four conditions, when Japan considers a BRI project, it also values adherence to international principles that the country has helped develop. For instance, the G20 Principles for Quality Infrastructure Investment was agreed upon by G20 participants, including China, at the G20 Osaka Summit held in Japan in 2019.[49] The document sets out principles aimed at realizing "strong, sustainable, balanced and inclusive growth" through infrastructure development, such as promotion of sustainable development, social considerations, infrastructure governance (openness and transparency, financial sustainability), and economic efficiency throughout the life cycle of infrastructure.[50] Japan has promoted quality infrastructure development based on these principles,[51] and so the country will have these principles in mind when collaborating with China on BRI-related projects.

(2) Concrete Projects in Third-Country Markets

In May 2018, Japan and China signed a *Memorandum on Business Cooperation in Third Countries*, which is a more concrete framework for cooperation between the two countries in projects implemented in third-country markets. This memorandum of understanding notes that such cooperation is beneficial to the development of third countries and to the expansion of Japan–China bilateral economic cooperation.[52] This approach allows Japan to maintain its adherence to the above-mentioned conditions and principles that it values, while focusing on realizing concrete projects that are beneficial to itself, China, and third countries.[53]

Progress in third-country market cooperation was made when Prime Minister Abe visited China in 2018, which was the first official visit to China by a Japanese prime minister in seven years. During the visit, the governments of the two countries held the First Japan–China Forum on Third Country Business Cooperation.[54] In front of the leaders of the two countries, 52 memoranda of understanding were signed between enterprises and public institutions of both countries concerning third-country market cooperation, with deals amounting to a total of USD 18 billion.[55] Two of these memoranda of understanding led to two major public events:

- the April 2019 Japan–China Workshop on Business Cooperation in Thailand, jointly organized by the Japan External Trade Organization and the China International Trade Promotion Committee, with the cooperation of the Thai Eastern Economic Corridor Secretariat;[56] and
- the May 2019 Japan–China Third Country Market Financial Cooperation Forum, jointly organized by the Japan Bank for International Cooperation and China Development Bank.[57]

The second Japan–China Forum on Third Country Business Cooperation was scheduled to take place during Chinese President Xi's planned visit to Japan in the spring of 2020,[58] but it was postponed due to the COVID-19 outbreak.

Japan's prudent approach to the BRI, as described above, not only allows the country to balance its interests in and concerns about the BRI, but also aligns with the country's vision for a Free and Open Indo-Pacific ("FOIP"), which is a core strategy of Japan concerning its relations with countries in the Indo-Pacific region.

Since it was first announced by Japanese Prime Minister Abe at the Tokyo International Conference on African Development held in Kenya in August 2016, FOIP has sometimes been viewed as a rival to the BRI.[59] However, the concept is not meant to exclude China, as clearly affirmed by Prime Minister Abe himself. In the same address to the Diet in which he stated the four conditions for Japan's cooperation with China on BRI-related projects, he said:

> I would like to say that the concept of Free and Open Indo-Pacific is not being pursued in order to counter the policies of other countries […]. Once again, the idea is to make the vast ocean of the Indo-Pacific Ocean free and open, and to make it an international public asset for the prosperity of the region and the world. We will cooperate with any country, including China, if the country agrees with this idea.[60]

Impact of COVID-19 on Japan's Approach to the BRI

The unexpected outbreak of COVID-19 has had a significant impact on the world. As the domestic and international situations regarding COVID-19 are still evolving, it is too early to make any conclusive analysis of how COVID-19 will affect Japan's approach to the BRI. However, several factors might be relevant to the country's policy considerations after the pandemic.

1. Factors that May Support Japan's Engagement with the BRI

First, as a positive factor, Japanese people's sentiments toward China concerning COVID-19 seem better than those expressed by some Western countries. Japanese private and public entities sent masks and medical equipment to China at the beginning of the COVID-19 outbreak, and Chinese entities sent similar aid to Japan when COVID-19 was spreading to Japan.[61] The Japanese public is not demanding that China pay compensation (if any demands for compensation have been made, such calls are very weak) as compared with the demands expressed in the United States or other countries.

Also, the Japanese economy experienced a downturn during the first quarter of 2020.[62] To avoid long-term recession,

Japan may need to engage in economic cooperation with other countries more than ever, as was the case for Italy when it signed its MOU on the BRI with China.

2. Factors that May Work Against Japan's Engagement with the BRI

At the same time, several factors might play a negative role in Japan's policy considerations concerning its engagement in the BRI. First, COVID-19 will slow down the progress of current and potential infrastructure projects. The domestic and international travel restrictions make it impossible for construction workers and technical experts to travel to the sites of these infrastructure projects. It remains unclear when normal travel schedules will resume. The COVID-19 outbreak has also worsened the financial situations of developing countries.[63] This situation might make it harder to promote new infrastructure projects, at least in the short term. In addition, the COVID-19 crisis made it clear that Japanese companies rely too heavily on supplies from China, making them vulnerable to shocks like the pandemic. In response, the Japanese government has established a subsidy program to encourage Japanese companies to reduce their dependence on supplies from a single country, including China.[64]

Another significant factor is the worsening U.S.–China relationship. Amid the crisis caused by COVID-19, China and the United States have severely criticized each other, and the tension between the two countries is continuing to intensify.[65] As noted above, U.S.–China conflicts affect Japan's foreign policy. The ever-growing tension between the two countries will make Japanese policy decisions related to the BRI more complicated.

The final factor that may negatively impact Japan's engagement with the BRI is security. While other countries have been fully occupied with dealing with the COVID-19 pandemic, China has been increasing its military activities in the surrounding seas, including areas near Japan.[66] Some media are concerned that China is taking such actions and other measures to lay the groundwork for the expansion of its maritime hegemony after COVID-19.[67]

As mentioned at the beginning of this section, situations related to these factors are still not settled. No one knows for certain whether and when the "second wave" of COVID-19 will come, how badly the Japanese economy will be damaged, how grave the financial situation of developing countries will be, or how the China–U.S. relationship will transform. Thus, it is too early to make any conclusive analysis of how COVID-19 will affect Japan's engagement with the BRI. Chinese President Xi's next visit to Japan will be a good time to learn whether and how Japan will modify its stance concerning its engagement with the BRI. Originally planned for the spring of 2020, the visit was postponed due to the COVID-19 outbreak.[68] No specific details have been announced about when the visit will be rescheduled.[69] When the visit finally occurs, the two countries will likely announce in some way, explicitly or implicitly, their stance regarding the current cooperation framework, i.e., third-country market cooperation.

"Chinese President Xi's next visit to Japan will be a good time to learn whether and how Japan will modify its stance concerning its engagement with the BRI."

Conclusion

As shown in the above analysis, Japan and Italy have different considerations about and approaches to the BRI. Therefore, Italy's participation in the BRI will not necessarily lead to Japan's decision to follow a path similar to the one taken by Italy. Also, the China–Italy MOU on the BRI, which focused on announcing the two countries' general cooperation framework, does not seem to fit Japan's approach that focuses more on concrete progress.

Nonetheless, if structured carefully, BRI-related cooperation between Japan and China has the potential to bring economic gains for both countries. It can also bring benefits to host countries with infrastructure projects, despite the concerns that Japan has about possible "debt traps", security, or the potential negative impact on Japan–U.S. relations.

The prudent approach that Japan has adopted should allow the country to strike a balance between its concerns about the BRI and potential benefits that it can generate from its engagement with the initiative. Collaboration based on concrete projects is more practical and beneficial to both countries. This is how China and Japan have begun to collaborate under third-country market cooperation, which is in line with the conditions and principles prioritized by Japan. As *People's Daily* put it, "practical cooperation is the 'ballast' and 'screw' of China–Japan relations".[70] Although the impact of COVID-19 on Japan's approach towards the BRI is uncertain, it is likely that both countries will continue to prefer concrete collaborations over the generally formatted commitment written in the China–Italy MOU. ■

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[47] *Id.* (original language is "一帯一路につきましては、先ほど申し上げましたように、あの四つの条件、この考え方を取り入れていくべきだと、これを取り入れているのであれば我々も協力をしていこうと、こういうことでありまして、全面的に賛成ということではなくて、こういうことをやっていくことによってお互いより良い地域をつくっていこうと、こういうことでございます。").

[48] *Id.* (original language is "アジアは世界の成長センターであり、膨大なインフラ需要が存在をします。このアジアの旺盛なインフラ需要に日本と中国が協力をして応えていくことは、両国の経済発展にとどまらず、アジアの人々の繁栄に大きく貢献をしていくことになるわけであります。").

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[61] *See, e.g.*, *Masks from China to Hirakata, International Students Interceded*, Asahi Shimbun, Apr. 29, 2020, https://www.asahi.com/articles/ASN4Q73F3N4QPPTB001.html.

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日本与中国“一带一路”倡议*

池田健太郎

摘要

2019年，意大利与中国签署谅解备忘录，加入“一带一路”倡议（“一带一路”），成为第一个参加该倡议的七国集团国家。日本是另一个七国集团国家，其一直与“一带一路”保持“谨慎”距离。意大利的谅解备忘录是否可以作为日本与“一带一路”接触的模式？为了回答此问题，作者先从经济和战略角度解释日本为何会对“一带一路”感兴趣，并分析其与意大利的差异。然后，作者说明阻碍日本参与“一带一路”的种种关切，且讨论日本为平衡其对“一带一路”的兴趣和关切所采取的做法。最后，作者简要分析新冠疫情对日本处理“一带一路”的做法可能会产生的影响。

引言

2019年，意大利与中国签署谅解备忘录，[1] 成为加入“一带一路”倡议（“一带一路”）的首个七国集团（“G7”）国家。自2015年中国正式宣布“一带一路”以来，[2] 日本（另一个G7国家）一直保持“谨慎”距离。由于中国既未提供加入“一带一路”的固定范本，也未提供明确的成员协议说明如何“加入”该倡议，[3] 人们可能会问G7成员国意大利在谅解备忘录中所用的方法是否能成为日本与“一带一路”接触的良好模式？为回答此问题，本文首先讨论日本为何对“一带一路”感兴趣，并与意大利作出比较。然后，本文阐述日本对这一倡议的关切，以及日本基于其关切和兴趣所采取的做法。最后，本文简要讨论了新冠疫情可能会如何影响日本对“一带一路”的做法。

日本对“一带一路”的兴趣

日本有兴趣与“一带一路”接触是基于经济和战略方面的考虑。

1. 经济考虑

从经济角度来看，日本与“一带一路”接触，可以通过以下两个主要方式获益。

（1）作为中国发展基础设施项目的合作伙伴

第一个主要方式是成为中国在发展中国家基础设施建设方面的合作伙伴。中国和日本在外国尤其是亚洲国家的基础设施出口和发展中一直是竞争对手。两国曾在像印度尼西亚的一项高速铁路工程和孟加拉国的一项深水港工程等多个工程项目中竞标。[4] 此类竞争均有损日本和中国的利益。举例而言，中国赢得了印度尼西亚的高速铁路工程，但未能顺利筹措招标过程中承诺的巨额资金，最终该建设未能按计划而进行。[5]

相反，合作可能会为两国带来收益。重要的是，要认识到日本和中国在基础设施建设中各有所长。日本的长项包括技术（例如节能技术和简洁的基础设施）、[6] 项目管理和财务。而中国除了有资金和特定类型基础设施的经验外，还有很强的成本竞争力。[7] 因此，两国之间的合作将很有可能带来更高效的基础设施建设。

（2）作为“一带一路”相关基础设施的使用者

日本与“一带一路”接触，从中得益的第二个主要方式是作为基础设施的使用者。日本是一些将要建设“一带一路”相关项目的国家的重要投资方。例如，2017年，日本和中国分别为东南亚国家联盟（“东盟”）成员国中的第一大和第二大外部投资国，[8] 而东盟国家是“一带一路”的重要目标。“一带一路”项目带来的更好的基础设施有助于日本公司在这些国家的运营和长期发展。

除了以上讨论的两个主要方式外，日本也可通过和中国共同制定国际标准而在经济上受益，这是“一带一路”的一个重点领域。[9] 一份日本和中国组织之间为新能源车设定标准而签订的谅解备忘录应可用以佐证该观点。基于这份于2018年日本首相访华期间签署的备忘录，CHAdeMO协会（一家日本电动车充电技术的行业协会）与中国电力企业联合会共同发展下一代电动车超高能充电协议。[10]

2. 战略考虑

日本与“一带一路”接触也可能会产生两项战略成果。

（1）日本帮助发展中国家的目标得以完成

为帮助发展中国家，日本政府一直在经济合作的框架下推动基础设施建设。为此，日本设定了各种目标，包括“以可持续的方式解决贫困问题”和通过自力更生的经济发展来“改善包括社会弱势群体在内的人民的生活”。[11]

池田健太郎

池田健太郎是一名日本学者，现正通过日本政府组织的海外学习项目于哈佛大学法学院从事研究。赴美学习前，他在日本经济产业省工作了五年，其经验包括处理日本与其他亚洲国家间的经济合作项目、贸易救济调查（在其从事世界贸易组织法律实务中进行）和自由贸易协定谈判。池田先生获得东京大学法律系法学学士学位，以及哈佛大学法学院法学硕士学位。

日本和中国为支援发展中国家所付出的共同努力，将使这些国家更有可能获得实现增长所需的基础设施。在发展中国家采取这一步与上述日本政府的目标相符。[12]

（2）更好的日中关系

日本与隔海相望的中国的关系是“日本最重要的双边关系之一”。[13] 两国有着密切的经济关系和人与人之间的文化交流。[14] 因此，日本始终对改善与中国的双边关系感兴趣。日中两国在基础设施发展方面的合作具有加深日中关系（这关系在历史进程中一直起伏不定）的潜力。[15]

日中两国关系在2008年左右发展良好，当时中国国家主席胡锦涛访日并与日本首相福田康夫签署了《中日关于全面推进战略互惠关系的联合声明》。[16] 然而，在2010年左右，日中关系开始有变，中国国家主席习近平和日本首相安倍晋三在2014年举行首次会晤之后，关系仍然没有改善。[17] 到了2017年和2018年，两国关系改善出现良机，因为2017年是两国邦交正常化45周年，而2018年是《中日和平友好条约》签订40周年。

两国利用这两年的契机来克服分歧。例如，2017年7月，当日本首相安倍首次提到有可能作出与“一带一路”相关的合作后，[18] 他与中国国家主席习近平旋即在出席G20汉堡峰会期间举行了会议。两国领导人在会中一致认为，“日本和中国将讨论如何为地区和世界的稳定与繁荣做出贡献，包括‘一带一路’倡议”。[19] 会晤后，日中关系继续改善。[20] 2018年末，两国最终宣布其关系已改善至重回“正常轨道”的程度。[21] 此正面的发展证实了许多专家的观察，即日中两国之间的关系通常会通过扩大和促进经济合作而得到改善。因此，这让人们进一步相信，日本通过参与“一带一路”项目的这一种经济合作会有助于改善日中关系。[22]

日本与“一带一路”的接触：意大利模式并不适合

尽管日本出于经济和战略的考虑，有兴趣与“一带一路”接触，但意大利参与“一带一路”所用的谅解备忘录并不适合日本。这是因为该谅解备忘录的框架旨在解决意大利的需求，而其与日本的需求大不相同。下文将会就此分析。

正如本期刊早前发表的另一篇文章所述，[23] 在加入“一带一路”之前，意大利经历了严重的经济下滑和财政赤字。为了解决这些经济和财政挑战所带来的需求，意大利与“一带一路”的合作的主要领域如下：

- *运输、物流和基础设施*。意大利政府预算短缺和投资不足导致人们对该国基础设施质量的担忧。热那亚大桥不幸垮塌就是一个例子。

- *畅通无阻的贸易和投资*。意大利长期受困于低增长和高失业率。通过“一带一路”扩大中国对其投资和贸易有望帮助意大利改善经济。

- *金融合作*。根据谅解备忘录，意大利和中国将在制定“财政、金融和结构改革政策”方面进行合作。做出这一承诺是希望有助于改善意大利的财政状况。在签署谅解备忘录的同一个月，一家意大利投资银行宣布了一项发行“熊猫债券”（即由非中国发行人在中国发行的人民币债券）的计划，以支持在中国的意大利公司。几个月后，双方达成了更多交易，以促进两国出口信贷机构和针对第三国市场的金融机构之间的合作。

“尽管日本出于经济和战略的考虑，有兴趣与‘一带一路’接触，但意大利参与‘一带一路’所用的谅解备忘录并不适合日本。”

在以下段落中，作者解释为什么日本对这种“一带一路”合作的需求没有意大利那么强烈。

1. 运输、物流和基础设施

与意大利相比，日本的基础设施质量更高。在世界经济论坛出版的《2017–18全球竞争力报告》中，意大利排名第27位，而日本则排在第4位。[24] 此外，日本的预算足以维持其国内的基础设施，而事实上日本政府已宣布了翻新国家基础设施的计划。例如，日本在2014年宣布了国土强韧化基本计划，[25] 并决定为此在三年内准备7万亿日元（640亿美元）的预算。[26]

2. 畅通无阻的贸易和投资

日本不需要像意大利那样紧急地吸引大量的投资。尽管日本最近通过其“INVEST JAPAN”外国直接投资促进政策欢迎外国投资，[27] 但日本仍保持足够的国内货币供应。此外，从宏观经济角度看，日本的净外国资产盈余约为2.7万亿美元，而意大利的净外债则为1500亿美元。[28]

在贸易方面，日本和中国已有牢固的贸易关系。2019年，日中贸易额约为3000亿美元，而意中贸易额约为

500亿美元。[29] 日本和中国的经济也通过私人交易紧密相连。诚然，日本可能希望扩大与中国的贸易，但要在既有的庞大规模上进一步扩大贸易规模，需要强有力的政策介入。对于日本而言，以超越谅解备忘录的方式，建立自由贸易协定将更为合适。《区域全面经济伙伴关系协定》和《日中韩自由贸易协定》都是很好的例子。这两项自由贸易协定在“一带一路”提出前，已在不同的论坛上得到介绍。前者早于2012年进行谈判，而后者自2003年以来为大家所共同研究，并于2013年首次正式讨论。[30]

3. 金融合作

在金融合作方面，基于中日两国货币当局的合作，日本金融机构已获授权发行熊猫债券。[31] 日本三大银行中的两家已经发行了熊猫债券，余下的一家据报道也计划跟随。[32] 与意大利一样，日本可以通过促成“一带一路”相关的出口信贷机构与金融机构的合作，从中受益。这种合作可以媒合商业业务，创造对两国都有利的新商机。然而，仅凭这一点，还不足以使日本以意大利的方式，正式“加入”“一带一路”。

日本的关切和对“一带一路”的谨慎做法

因为日本对“一带一路”感兴趣的原因与意大利不同，所以日本在寻求与“一带一路”接触时，需要探索一种超越意大利谅解备忘录的模式。在本节中，作者提出，由于日本对“一带一路”的种种关切，日本必须继续采取谨慎的做法——基于一些旨在确保符合国际标准的条件——来平衡其对该倡议的兴趣和关切。

1. 日本对“一带一路”的关切

虽然没有正式文件全面指出日本对“一带一路”的关切，但从一些日本的讨论中可以点出该国的主要关切。

（1）“债务陷阱”

日本与国际社会同样关注有关“一带一路”“债务陷阱”的问题。根据一些分析，中国并未充分考虑借款国偿还“一带一路”项目贷款的能力。[33] 例如，一份智库报告指出，八个“一带一路”受援国“因‘一带一路’贷款而面临债务困扰的高风险”。[34] 日本经济报纸《日经》的一篇社论评论说，“一带一路”项目应按照经济合作与发展组织（OECD）的规则透明地运作。[35] 日本国会的一个官方发展援助特别委员会也讨论了对“债务陷阱”的担忧。[36]

（2）安全

与国际社会一样，日本媒体和专家也表示了对“一带一路”相关安全问题的担忧。人们越来越担心那些他们相信与中国军事扩张有关的项目，特别是海上的军事扩张。[37] 一所与日本政府有关的国防智库认为，中国“一带一路”目标之一是通过在地区经济事务中发挥领导作用，从而在国防安全方面有所突破。[38]

（3）威权主义的推广

一些日本学者和其他国家的机构均担心“一带一路”可能会助长威权主义兼限制个人权利。[39] 他们认为，中国向不发达经济体提供基础设施建设贷款时，会同时输出威权主义的治理模式。[40] 日本一直将能促进人类安全的可持续发展合作列为优先事项，[41] 因此日本很难会对导致侵犯人权的项目开展合作。

（4）中美紧张局势

日本与美国关系密切，尤其是在国家安全领域方面。[42] “一带一路”被视为不只是一项经济计划，而同时也是中国战略计划的一部分，这使美国从安全角度关注此全球倡议。[43] 白宫国家安全团队发言人公开批评了意大利加入“一带一路”的决定，称：“意大利政府没有必要为中国的基础设施虚荣项目提供合理性”。[44] 对“一带一路”作出坚定承诺可能会使日本在中美关系紧张局势升级的情况下难以控制其与美国的关系。

2. 日本的谨慎做法

为了在上述讨论的兴趣和关切之间取得平衡，日本对“一带一路”采取了谨慎做法。通过围绕特定条件和第三国市场的具体项目，日本保持与“一带一路”的接触。

（1）条件和原则

日本政府多次宣布打算与中国在包括“一带一路”在内的区域经济发展中进行合作。日本一贯表示愿意与符合某些条件的“一带一路”相关项目合作。[45] 具体来说，2019年，安倍首相在国会中表示，“一带一路”相关项目必须满足以下四个条件，日本才会考虑展开合作：

- 开放性
- 透明性
- 经济可行性，以及
- 受援国的财政可持续性[46]

> ***“[...]由于日本对‘一带一路’的种种关切，日本必须继续采取谨慎的做法——基于一些旨在确保符合国际标准的条件——来平衡其对该倡议的兴趣和关切。”***

安倍首相强调：“如果一个项目符合这四个条件，我们会展开合作。我并不是说我们无条件地同意[“一带一路”倡议]，但是我们将为彼此创造一个更好的区域”。[47] 日本认识到合作的重要性，正如安倍首相进一步指出：“如果日本和中国为应对亚洲对基础设施的强劲需求共同合作，这将不仅为两国的经济发展作出贡献，还会为亚洲人民的繁荣作出巨大的贡献”。[48]

除了上述四个条件外，日本在考虑“一带一路”项目时，还重视该项目能否遵守日本帮助发展的国际原则。例如，在2019年于日本举行的二十国集团（G20）大阪峰会上，包括中国在内的G20与会者达成了《G20高质量基础设施投资原则》。[49] 该文件列出了旨在通过基础设施发展来实现“强劲、可持续、平衡、包容增长”的原则，例如：促进可持续发展、社会考虑、基础设施治理（公开透明、财务可持续性）、基础设施全生命周期的经济效率等。[50] 日本基于这些原则促进了高质量的基础设施建设，[51] 因此，在与中国就“一带一路”相关项目进行合作时，日本会考量这些因素。

（2）第三国市场的具体项目

2018年5月，日中两国签署了《关于中日第三方市场合作的备忘录》，为两国在第三国市场开展项目合作提供了更为具体的框架内容。谅解备忘录指出，这种合作有利于第三国的发展和日中双边经济合作的扩展。[52] 此做法使日本能坚持其重视的上述条件和原则，同时专注于实现对自身、中国和第三国有利的具体项目。[53]

安倍首相于2018年访华时，日中两国在第三国市场合作取得了进展。安倍首相这次访华是日本首相7年来首次正式访华。在访问期间，两国政府举办了首届“中日第三方市场合作论坛”。[54] 在两国领导人的见证下，两国企业和公共机构就第三国市场合作签署了52项谅解备忘录，交易总额达180亿美元。[55] 其中两份谅解备忘录促成了两大活动：

- 2019年4月，通过泰国东部经济走廊办公室提供的合作，日本贸易振兴机构和中国国际贸易促进委员会联合举办了日中在泰国展开的市场合作研讨会；[56]
- 2019年5月，日本国际协力银行和中国国家开发银行联合举办了“中日第三方市场金融合作论坛”。[57]

第二届“中日第三方市场合作论坛”原定于习近平主席2020年春季访问日本期间举行，[58] 但由于新冠疫情的原因而被推迟。

日本对“一带一路”采取上述的谨慎做法，不仅能使日本平衡其对“一带一路”的兴趣和关切，而且还与日本“自由开放的印度太平洋”的愿景保持一致。该愿景是日本与印度太平洋地区国家的关系的一项核心战略。

自从日本首相安倍晋三在2016年8月于肯尼亚举行的东京非洲发展国际会议首次宣布“自由开放的印度太平洋”的愿景以来，该愿景有时被视为“一带一路”的竞争对手。[59] 但是，安倍首相本人也明确表示，此概念并不意味着将中国排除在外。在其说明日本与中国在“一带一路”相关项目上进行合作所需的四个条件的国会演说中，安倍首相也表示：

> 我要说的是，推行“自由开放的印度太平洋”概念并不为了抵制其他国家的政策[...]。再次说清楚，此想法是使印度太平洋的广阔海洋自由开放，并使之成为该地区和世界繁荣的国际公共资产。包括中国在内的任何国家只要同意这一想法，我们都愿意与之合作。[60]

新冠疫情对日本处理“一带一路”的做法的影响

新冠疫情的意外爆发对全世界都产生了重大影响。由于有关新冠疫情的国内外局势仍在发展中，现在就对新冠疫情将如何影响日本处理“一带一路”的做法作出结论性的分析还为时过早。不过，疫情过后，有几个因素可能与日本的政策考虑有关。

1. 可能会支持日本与“一带一路”接触的因素

首先，一个正面的因素是，相对于一些西方国家的民众而言，日本民众在新冠疫情的问题上对中国的态度似乎较友善。在中国疫情爆发初期，日本公共与私人团体都向中国捐赠了口罩等医疗设备；而当疫情传到日本时，中国也对日本提供了类似的援助。[61] 与美国或其他国家所表达的要求相比，日本民众并不要求中国支付赔偿（如果有出现这样的要求，其声势也非常微弱）。

另外，日本经济在2020年第一季度出现了下滑。[62] 为了避免长期衰退，日本可能比以往任何时候都更需要与其他国家进行经济合作。这与意大利在与中国签署“一带一路”谅解备忘录时所面对的情况有相似之处。

2. 可能不利于日本与“一带一路”接触的因素

同时，当日本作出与“一带一路”接触相关的政策考虑时，有些因素可能会起到负面作用。首先，新冠疫情将减慢当前和潜在基础设施项目的进度。国内和国际旅行限制使建筑工人和技术专家无法前往这些基础设施项目的现场。而且，何时能恢复正常通行还是未知数。新冠疫情的爆发也使发展中国家的财政状况恶化。[63] 这情况至少在短期内可能会使推进新的基础设施项目更加困难。此外，新冠疫情危机清楚地表明，日本公司过于依赖中国的供应，因此容易受到大流行等冲击的影响。对此，日本政府制定了补贴计划，鼓励日本公司减少对包括中国在内的单一国家供应的依赖。[64]

另一个重要因素是美中关系恶化。在新冠疫情危机中，中美两国互相严厉指责，且两国的紧张局势也正在加剧。[65] 正如前文所言，中美冲突会影响日本的外交政策。两国之间日益紧张的局势将使日本就“一带一路”相关的政策决定更为复杂。

最后一个可能对日本与“一带一路”接触产生负面影响的因素是安全。当其他国家在全力应对新冠疫情时，中国在包括日本附近地区在内的周边海域加强了军事活动。[66] 一些媒体担心，中国正在采取这样的行动和其他措施，为新冠疫情后扩大其海上霸权奠定基础。[67]

如本节开头所述，与这些因素有关的情况仍未成定局。无人知晓新冠病毒二次爆发是否会发生和何时会发生，将对日本经济造成多严重的损害，发展中国家的财务状况将有多坏，或者中美关系将如何改变。因此，对新冠疫情将如何影响日本与“一带一路”的接触做出结论性的分析还为时过早。中国国家主席习近平下次访问日本，将是了解日本是否会改变和如何改变其与“一带一路”接触的立场的好时机。该次访问原计划在2020年春季进行，但因为新冠疫情的原因被推迟。[68] 至于何时重新安排访问时间，目前还有待公布具体细节。[69] 当访问最终发生时，两国可能会以明确或隐含的方式，宣布其对当前合作框架（即第三国市场合作）的立场。

结论

以上分析表明，日本和意大利对“一带一路”有不同的考虑和处理方法。因此，意大利参与“一带一路”不一定会促使日本仿效，采取类似于意大利的做法。此外，中国与意大利的“一带一路”谅解备忘录专注于宣布两国总体合作框架，这似乎与日本更侧重于具体进展的做法不符。

“中国国家主席习近平下次访问日本，将是了解日本是否会改变和如何改变其与‘一带一路’接触的立场的好时机。”

然而，如果组织得当，日本和中国之间在“一带一路”方面的合作有可能为两国带来经济利益。尽管日本担心可能存在的“债务陷阱”、安全问题或对日美关系的潜在负面影响，但“一带一路”亦能给基础设施项目的东道国带来好处。

日本采取的谨慎做法应能使日本平衡其对“一带一路”的关注和通过与该倡议接触可产生的潜在利益。基于具体项目的合作更加实际，对两国都有利。这是日中在第三国市场合作的框架下展开合作的方式，其符合日本一直优先考虑的条件和原则。正如《人民日报》所说，“务实合作是中日关系的‘压舱石’和‘推进器’”。[70] 尽管新冠疫情对日本处理“一带一路”的做法的影响尚不明确，但两国很可能还是会继续倾向于具体性的合作，而非如中意谅解备忘录中所写的概括式承诺。■

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作者感谢李雪皎对英文初稿的评论。所有日语资料来源均由作者翻译为英文。载于本文的信息和意见作者对其负责，它们不反映日本政府的意见，也不反映中国指导性案例项目的工作或意见。

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CGCP Interview: Josh Cheng*

Enshia Li
Editor, China Guiding Cases Project

"The road towards a brighter and more prosperous future for this planet can only be paved through cooperation, mutual understanding, and trust."

——Josh Cheng

- ***You currently serve as the Executive Director of the Stanford Center at Peking University ("SCPKU"), which is a pioneer in the U.S.–China academic space. SCPKU offers such a wide array of professional and scholarly opportunities, including diverse anchor programs operated by Stanford units. How would you broadly articulate the mission of SCPKU? What factors were taken into consideration when SCPKU was established?***

SCPKU is a platform that promotes exchanges between Stanford University and its counterparts in China. In other words, SCPKU exists in Beijing to facilitate collaborations between Stanford students and faculty and their various counterparts in Chinese universities, with a particular focus on affiliates of Peking University.

From my point of view, three key factors were considered when SCPKU was conceived and established:

(1) **Pre-existing desire from the Stanford community across almost all academic disciplines to work together in China**. It was stunning to see the overwhelming level of interest expressed by Stanford faculty members and students to have a platform like SCPKU to facilitate and meet their research and education needs in China.

(2) **Strong support from Hong Kong, Mainland China, and other localities, as well as a favorable policy framework in China at the time of conception**. Since our establishment, SCPKU has received very generous support from Stanford alums and local communities. All of them have been very delighted to see a Stanford platform in China that can play an instrumental role in bringing Stanford and China closer. It is also important to note that U.S.–China relations and China's domestic policy framework at the time of SCKPU's conception were very favorable.

(3) **Stanford's value proposition to engage in cutting-edge research so as to advance understanding of nature and humanity, and the university's commitment to training and nurturing future leaders**. These were well-received by the Chinese side.

I believe the third factor is particularly important and should be kept in mind.

- ***Given your extensive experience at SCPKU, what, in your opinion, are the major factors that determine whether a Stanford–China program has a good chance of success? Could you please give us some examples of successful programs?***

I would say that the following two factors must be present to ensure the long-term sustainability of a Stanford–China program:

(1) **Strong anchor program leadership**. To illustrate this point, consider the Asian Liver Center ("ALC"), which is a program initiated by Professor Samuel So of the Stanford School of Medicine to communicate best practices for preventing and treating Hepatitis B. Due to Sam's dedication, leadership, and vision, ALC is one of SCPKU's most successful programs. It has won national recognition and, more importantly, benefited hundreds of thousands of people in the inner provinces of China.

(2) **Excellent local team support**. Again, the ALC is a perfect example to illustrate the importance of local teams' support for and dedication to the smooth execution of our programs on the ground.

In short, the proven winning formula is: long-term sustainability = strong leadership at Stanford + excellent execution by the local team.

> ***"[…] three key factors were considered when SCPKU was conceived and established: […] (3) Stanford's value proposition to engage in cutting-edge research so as to advance understanding of nature and humanity, and the university's commitment to training and nurturing future leaders."***

Two other successful initiatives should also be noted. First, the China engagement activities carried out by the Stanford Graduate School of Business (the "GSB"). Over the past few years, the GSB has organized many successful programs at SCPKU to engage the local business community. Stanford Ignite is one of these programs; it has proven to be very popular and has generated high demand in China. Through

Josh Cheng
Executive Director
Stanford Center at Peking University

Josh Cheng serves as the Executive Director of the Stanford Center at Peking University ("SCPKU"), a base of operations for research, teaching, training, and outreach activities in China for Stanford faculty and students across all disciplines. Since 2015, he has overseen the management of this unique platform to support academic exchange activities for all of the university's seven schools, including the Stanford Graduate School of Business, School of Medicine, School of Engineering, and others.

Prior to playing this important role at SCPKU, Mr. Cheng held numerous leadership positions in various North American enterprises in China. He has served as the chief representative to China for Kamsky Associates; as a senior consultant and chief deputy representative for McKinsey & Company in China; and, most recently, as the President of China Operations for Celanese Corporation, a global technology and specialty materials firm. At Celanese, he represented the company on joint venture boards with China National Tobacco Corporation and grew Celanese's China portfolio from its beginning to the point where it was generating USD 1 billion in revenue per year. Mr. Cheng is also the author of the book titled *Corporate Finance: A Primer*, which was published by CITIC Publishing House in 2004.

Mr. Cheng graduated from the Economics Department of Hebei University in 1976. He went on to enroll in a graduate management program at the Chinese Academy of Social Sciences in 1979, and also obtained two Master's degrees (in Economics and Economic Development) from Stanford University in 1986.

Professor Samuel So (center) of the Stanford School of Medicine, with participants of the Asian Liver Center and Chinese provincial officials

Stanford Ignite, GSB faculty members have been able to interact directly with young and promising entrepreneurs in China and share with them Stanford's methodologies and experiences in building startups in Silicon Valley.

Second, the SCPKU's "Seminar at Peking University" summer program. This summer program adopts a blueprint similar to that of Stanford Ignite, but adapts it to better suit the needs of our faculty and community. Through this program, a Stanford

Josh Cheng delivers a speech at a concert organized to celebrate the 100-year anniversary of the founding of Yenching University and inaugurate the John Leighton Stuart Room at SCPKU. Dr. Stuart was the founding president of Yenching University and U.S. Ambassador to China from 1946–1949. A special classroom is named after Dr. Stuart for his lifetime dedication to facilitating understanding between the United States and China.

faculty member is able to bring his or her seminar students to China and engage them in interactions with local faculty and students. At the end of the day, both sides are able to benefit from the facilitated discussions and research processes that take place on the Peking University campus through this program.

- ***The CGCP has produced a great deal of scholarship on the Belt and Road Initiative (the "BRI"), and we know that SCPKU very recently gathered an all-star group of professors and scholars to discuss research on the same topic.[1] Could you tell us about how the BRI has provided new opportunities for research in international relations and, as far as you know, legal studies?***

The BRI is an extensive economic initiative launched by the Chinese government. Its sheer size and ambition offer a perfect opportunity for the academic community to better understand and evaluate the potential impacts the BRI could bring to the host economies as well as to the Chinese economy. Furthermore, many complex issues in politics, law, environmental protection, and culture are intertwined in the BRI. This presents a great challenge for academic thinkers and policymakers to analyze these issues and come up with recommendations to overcome all of the obstacles.

As far as legal studies is concerned, I would argue that this is perhaps one of the most complicated legal case studies you can find in the world today: citizens and leaders who are from countries with vastly different political systems, contrasting legal frameworks, and sometimes clashing cultures, are trying to accomplish this enormous project whose financial, economic, cultural, political, and, of course, legal impacts are likely to be substantial. It must be fascinating to be involved in a project like this!

- ***Chinese and American institutions interested in collaboration opportunities are currently facing serious challenges related to various difficult issues, such as academic freedom and national security. What does SCPKU see as its future role and what strategies does it have for U.S.–China academic exchanges during this period of uncertainty?***

Upper: Students and Stanford faculty use cutting-edge video-conferencing technology available at SCPKU to interact with speakers and other participants in other parts of the world. Lower: Attracting entrepreneurs not only from China but also from other Asian countries, Stanford Ignite, a special program offered by the Stanford Graduate School of Business at SCPKU, allows people from different backgrounds to meet, learn, and share their experiences and perspectives with each other.

Obviously, we have to face the reality that U.S.–China relations are probably at their lowest point since the two countries formally normalized their relationship in 1979.[2] Most issues, such as academic freedom and national security, as you have mentioned, are not new issues. These have been in existence since the two countries began establishing ties. As you pointed out, the critical issue at hand is what roles organizations like ours (i.e., SCPKU) should play in the coming weeks, months, and years, and how we ought to play these roles. I would say we ought to be more aggressive in promoting future exchanges and engagements precisely because U.S.–China relations are in a trough. But, at the same time, we should, as we always do, stand up firmly for our operating principles. The platform that SCPKU provides is the perfect place to demonstrate that despite differences among people and institutions, we can always find ways to work together and achieve our mutual objectives.

"The platform that SCPKU provides is the perfect place to demonstrate that despite differences among people and institutions, we can always find ways to work together and achieve our mutual objectives."

- ***Now, let's switch gears and talk about your experience working in the U.S.–China space. From almost the very beginning of your career, you have served as a key representative for various North American firms in China. Did you envision early on that you would be working in such a transnational space? How did the diversity of corporate environments in which you worked shape your career incentives and ultimately prompt you to serve as the executive director of SCPKU?***

Not at all! I became involved in the U.S.–China space by sheer coincidence. In the mid 80s, I was asked to serve as a translator for a few senior Chinese leaders who came to San Francisco to participate in a trade symposium. It was during that session in San Francisco that I realized that I might have a role to play to help facilitate understanding on both sides. Interestingly, I was asked by the Chinese side to help out and

eventually I was offered a job by an American executive of Xerox at the meeting!

I never dreamt that my entire career would revolve around the facilitation of U.S.–China exchanges (in a variety of ways). In retrospect, it all came rather naturally. I have always felt very comfortable in both cultures and am very open to new things. I guess it helps that I can speak both languages quite fluently.

However, throughout my career trajectory so far, I have realized that I have a lot more to contribute by serving as a bridge between the United States and China. I was very excited when the Stanford opportunity came up, as I knew that I had (and still have) a lot more to contribute in the U.S.–China space. I have always been extremely grateful for the education that I was able to receive at Stanford—I've always said Stanford changed my life—and I am both proud and honored to have this opportunity to serve as the executive director of SCPKU and to further the academic and cultural exchanges between our faculty and students and the Chinese community.

- ***As the president of China Operations at Celanese Corporation, you had significant experience interacting directly with government branches on both the local and national levels. How did you optimize coordination between lawmakers and production teams? What was considered a win-win strategy for you at that time? How did this successful experience prepare you well for what you are doing now at SCPKU?***

It is my understanding that China's economy, unlike the economies of many other countries, is not centered around legal frameworks but on a combination of market forces and government aspirations in certain sectors. As a result of China's rapid growth as well as its political system, one may often experience instances where laws linger a few steps behind the market. It is only through effective communication with the government about various market trends and needs, combined with the aspirations of the local and national Chinese government branches, that one can optimize their investment and production strategies.

I would say that a win-win strategy is often when you are able to align your investment and production strategies with the government's (local or national) initiatives—at least this has always been my experience. My years at Celanese, as well as my previous experiences, have all helped me enormously in allowing me to better represent Stanford in front of various stakeholders in China.

- ***An increasingly important challenge faced by manufacturers in China is environmental regulation. China's stricter environmental regulations have already had profound impacts on its economy.[3] As Celanese Corporation exceled in environmental protection and social responsibility[4] under your management, what advice can you share about constructing greener supply chains?***

Mr. Dave Weidman, the CEO of Celanese when I was there, told me once that "environmental protection requirements are actually good business". Honestly, at the time I was a bit surprised. However, very soon I was able to realize that tighter environmental regulations force firms to adopt newer processes and newer technologies with higher productivity and output. Eventually, the gains made from the newer processes cover the initial investment. A greener supply chain forces you to move up the value chain and can bring back better financial returns if you learn to play it right.

- ***We cannot end the interview without discussing an issue that is on everyone's mind: the current outbreak of Coronavirus Disease 2019 ("COVID-19"). A year after you started at SCPKU, Stanford School of Medicine Professor Randall Stafford visited the center. Discussing the impact of epidemics on the Chinese economy, he said that a growing segment of the Chinese workforce is slated for reduced productivity and are more likely to leave the economy earlier than before because of increasing rates of non-communicable diseases. Given the impact that COVID-19 is already having and is expected to have on the global economy, is SCPKU planning to organize more activities to discuss this and related issues once we come out of the pandemic?***

Yes! We hope to kick off a few powerful webinars with participation from the likes of Professor Stafford and other Stanford faculty members to exchange our perspectives and to also learn from the experiences of our Chinese guests.

- ***Given your experience, how do you believe the United States and China should cooperate to combat the new global challenges brought on by the pandemic? Given the recent worsening of relations between the two countries, do you see that Stanford, especially SCPKU, can play a unique role to help bridge the gap and make a difference?***

I sincerely believe that the United States and China must find a way to cooperate and address the challenges caused by the COVID-19 pandemic. Moreover, the United States and China have an obligation to their own citizens and to humanity as a whole to continue finding ways to work together and to collaborate with each other. The road towards a brighter and more prosperous future for this planet can only be paved through cooperation, mutual understanding, and trust. With our long history of success in advancing understanding across nations and cultures, Stanford University, through the platform of SCPKU, is uniquely positioned to bridge the gap and make a huge difference. Our role here is more paramount than ever. ■

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CGCP专访：程嘉树*

李音希
中国指导性案例项目编辑

"要搭建一条让这个星球通向更光明和繁荣的未来之路，唯有依靠合作、相互理解和信任。"

——程嘉树

- ***您目前担任北京大学斯坦福中心的执行主任。该中心是美国、中国学术界的一名开拓者，提供了丰富的专业与学术机会，其中包括由斯坦福各单位于该中心运营的多种锚地项目（anchor programs）。您会如何概括地表述北京大学斯坦福中心的宗旨？该中心在创建时考量了哪些因素？***

北京大学斯坦福中心是一个促进斯坦福大学与中国大学交流的平台。换言之，本中心设在北京，旨在促进斯坦福学生、教员与其中国大学同侪间的合作，特别是与北京大学及附属机构的合作。

我个人认为，北京大学斯坦福中心的构思与建立考量了三个关键因素：

(1) **斯坦福社区内几乎所有学科在当时都希望在中国开展合作。**斯坦福教员和学生对于北京大学斯坦福中心这样一个能够促进并满足他们在中国研究与学习需要的平台表现出巨大热情。这令人惊叹不已。

(2) **在提出本中心构想时，得到来自香港、中国大陆及其它地方的大力支持，同时还得益于中国有利的政策框架。**自中心创建以来，得到来自斯坦福校友和本地社区的慷慨支持。大家都乐见在中国能有一个斯坦福平台，发挥重要作用把斯坦福与中国的距离拉近。还需要指出的是，在提出本中心的构想时，美中关系和中国国内政策框架是十分有利于落实这构想的。

(3) **斯坦福通过尖端研究以增进对自然和人类理解的价值主张，和对培养与孕育未来领袖的承诺。**这些都深得中方认同。

我认为，第三点是尤为重要并应谨记于心。

- ***根据您在北京大学斯坦福中心丰富的经验，您认为决定一个斯坦福-中国项目能否成功的主要因素有哪些？您能给我们举几个成功项目的例子吗？***

我认为，要确保斯坦福-中国项目的长期可持续性，必须具备以下两个因素：

(1) **强大的锚地项目领导力。**要说明这点，可以参考亚裔肝脏中心（Asian Liver Center）。这是斯坦福大学医学院的苏启深教授发起的项目，旨在交流预防和治疗B型肝炎的最佳实践。因为有苏教授的专注投入、领导才能和远见，亚裔肝脏中心成为北京大学斯坦福中心最成功的项目之一。它赢得了中国的认可，而更重要的是，惠及了中国内陆省份几十万人。

(2) **优秀的本地团队支持。**同样，亚裔肝脏中心是最佳范例，体现本地团队支持和专注对于我们项目在当地顺利执行的重要性。

简言之，经验证的成功公式是：长期可持续性 = 斯坦福强大的领导力 + 本地团队的出色执行。

另外两个成功的举措亦应受到注意。其一，斯坦福商学院（Stanford Graduate School of Business）在中国进行的拓展参与活动。在过去的几年中，斯坦福商学院在北京大学斯坦福中心组织了许多成功的项目，吸引本地企业界参与。斯坦福"点燃"（Stanford Ignite）项目是其中之一，现已非常受欢迎，在中国创造了很高的需求。通过斯坦福"点燃"项目，斯坦福商学院的教员能够直接与中国年轻有潜力的企业家互动，与他们分享斯坦福在硅谷建立创业公司的方法和经验。

> ***"[...] 北京大学斯坦福中心的构思与建立考量了三个关键因素：[...] (3) 斯坦福通过尖端研究以增进对自然和人类理解的价值主张，和对培养与孕育未来领袖的承诺。"***

其二，北京大学斯坦福中心的"北京大学研讨会"（Seminar at Peking University）暑期项目。这个暑期课程采用了类似斯坦福"点燃"项目的蓝图，但有所调整，以更好地满足我们教员和社区的需求。通过这暑期课程，斯坦福大学的教授可以把自己的研讨班学生带到中国，让他们能和当地教授和学生进行交流。最后，通过这暑期课程，双方都能在北京校园所促进的讨论和研究中受益。

- ***中国指导性案例项目就"一带一路"倡议做了许多学术研究。我们也知道北京大学斯坦福中***

程嘉树
北京大学斯坦福中心执行主任

程嘉树先生是北京大学斯坦福中心的执行主任。该中心是斯坦福各学科师生在中国进行研究、教学、培训和外展活动的运营基地。自2015年起，程先生负责管理该独特的平台，以支持斯坦福大学内全部七所学院（包括商学院、医学院、工程学院等）的学术交流活动。

在北京大学斯坦福中心担此重任之前，程先生在多家北美企业驻华办事处担任领导职务。他曾担任甘维珍公司（Kamsky Associates）中国首席代表、麦肯锡公司（McKinsey & Company）中国高级顾问和副首席代表，接着担任塞拉尼斯公司（Celanese Corporation）中国区运营总裁。塞拉尼斯是一家全球技术和特种材料公司。在塞拉尼斯任职期间，他代表公司出席与中国烟草总公司（China National Tobacco Corporation）共同成立的合资企业董事会，并助塞拉尼斯的中国业务从开始发展到每年10亿美元的营收。程先生还著有《企业金融：职业经理教程演示》，该书于2004年由中信出版集团出版。

程先生于1976年毕业于河北大学经济学系。1979年，他进入中国社会科学院攻读研究生管理课程，随后于1986年在斯坦福大学取得经济学和经济发展学两个硕士学位。

斯坦福大学医学院的苏启深教授（中间）、亚裔肝脏中心（Asian Liver Center）参与者和中国省级官员。

心最近聚集了一批明星级的教授与学者来讨论这方面的研究。[1]您能否谈谈，据您了解，“一带一路”倡议是如何为国际关系研究，以及法律研究带来新的机会？

“一带一路”倡议是中国政府发起的一项广泛的经济倡议。其庞大的规模和雄心为学术界提供了一个绝佳的机会，更好地了解和评估“一带一路”倡议对东道国和中国的经济带来的潜在影响。此外，在“一带一路”倡议中，许多复杂的政治、法律、环境保护和文化问题交织在一起。这给学术思想家和政策制定者在分析这些问题和建议如何克服相关障碍时带来巨大挑战。

就法律研究而言，我认为这可能是当今世界上最复杂的法律案例研究之一：来自不同国家的公民和领导，其国家政治体系、法律框架迥异，有时甚至存在文化冲突，大家共同努力完成这一宏大的项目，而这一项目很可能带来重大的金融、经济、文化、政治，当然还有法律的影响。能参与其中，定必其乐无穷！

- ***有兴趣合作的中国和美国机构目前正面临涉及学术自由和国家安全等各种难题的严峻挑战。北京大学斯坦福中心如何看待自身在未来的角色，在这样充满不确定的时期内，对美中学术交流又有什么策略呢？***

在燕京大学百年校庆暨北京大学斯坦福中心司徒雷登厅（John Leighton Stuart Room）揭幕仪式的音乐会上，程嘉树发表演讲。司徒博士（Dr. Stuart）是燕京大学创校校长及1946-1949年间的美国驻华大使。为了纪念司徒博士终身致力于促进美国和中国之间的理解，北京大学斯坦福中心特别以其名字为一间教室命名。

诚然，我们必须面对现实，美中关系很可能正处于自1979年两国正式实现外交正常化以来的最低点。[2] 大多数问题，例如你所提到的学术自由和国家安全，都不是新问题。自两国开始建立联系以来，这些问题就一直存在。如你所说，眼下的关键问题是像我们这样的组织（即北京大学斯坦福中心）在未来几周、几个月和几年内应该扮演什么角色，以及我们应该如何扮演这些角色。我认为，正是由于美中关系陷入低谷，我们更应该积极地促进未来的交流和沟通。但与此同时，我们也应该一如既往地坚持我们的运营原则。北京大学斯坦福中心提供的平台，恰恰最能证明即便人与人、机构与机构之间存在分歧，我们始终可以找到合作的方式并实现我们共同的目标。

- ***现在，让我们转换一下话题，谈谈您在美中领域工作的经验。从您职业生涯的初期，您就已经为多家北美公司在中国担任其重要的代表。您是否早已预见到将在这样的跨国环境中工作呢？您工作过的公司环境的多样性是如何塑造您职业上的推动力，并最终促使您担任北京大学斯坦福中心的执行主任？***

完全不是！我进入美中领域纯属机缘巧合。80年代中期，我受邀为几位来旧金山参加贸易研讨会的中国高级领导人担任翻译。正是在旧金山的那次会议上，我意识到自己或许可以扮演一个促进双方相互理解的角色。有趣的是，当时我应中方之请去帮忙，可最后是美方施乐（Xerox）公司的高管给了我一份工作！

我做梦也没有想过我的整个职业生涯会是围绕着（以不同的方式）促进美中交流而发展的。回想起来，一切都是自然而然的。我一直都对两种文化感到很适应，并且对新事物保持开放心态。我想能流利说这两种语言也是挺有帮助的。

然而，统观迄今为止我的职业生涯发展轨迹，我认识到自己通过作为美国和中国之间的桥梁，还可以做出更多贡献。当斯坦福的机会来临时，我非常兴奋，因为当时（现在也是）我就清楚我能够在美中领域做出更多贡献。我一直感恩有幸在斯坦福大学接受教育——我总说斯坦福改变了我的人生。能有机会担任北京大学斯坦福中心的执行主任，深化我们教师、学生和中国社区之间的学术和文化交流，我既感自豪又感荣幸。

上图：学生与斯坦福教员使用北京大学斯坦福中心顶尖的视频会议技术和来自世界各地的发言人和与会人士交流。下图：由斯坦福商学院在北京大学斯坦福中心主办的斯坦福“点燃”（Stanford Ignite）项目，吸引了众多中国和亚洲其它国家的企业家们，让背景各不相同的人能聚首一堂、互相学习与分享各自的经验与看法。

- ***作为塞拉尼斯中国业务总裁，您与地方和国家级政府部门沟通往来上经验丰富。请问您如何做到优化立法者与生产团队之间的协调配合？当时，对您而言的双赢策略是怎样的？这些成功的经验如何为您在北京大学斯坦福中心的工作做好准备？***

> ***“北京大学斯坦福中心提供的平台，恰恰最能证明即便人与人、机构与机构之间存在分歧，我们始终可以找到合作的方式并实现我们共同的目标。”***

依我的理解，中国经济与很多其它国家的经济不同，并不以法律框架为中心运行，而是围绕着市场力量和政府对一些行业的愿景而发展。由于中国经济快速发展及其政治体制的原因，人们可能经常会感觉法律滞后于市场几步。只有通过与政府就不同市场趋势和需求进行有效沟通，再结合中国地方和国家政府部门的愿景，才能优化投资和生产策略。

我认为，双赢策略往往是做到把你的投资和生产策略与政府（地方或国家性的）举措协同。至少，我一直以来的经验是如此。我在塞拉尼斯公司工作的经验，和以往的工作经验，都给了我极大的帮助，使我能够在中国的不同利益相关者面前更好地代表斯坦福。

- ***中国制造商面临的一个日益重要的挑战是环境规管。中国更严格的环境规定已经对其经济产生了深刻影响。[3] 在您的管理下，塞拉尼斯公司在环境保护和社会责任方面表现出色，[4] 对于建立更加绿色的供应链您有什么建议可以分享？***

戴夫·韦德曼（Dave Weidman）先生是我在塞拉尼斯公司工作时的首席执行官。他曾告诉我说：“环保要求实际上是一门好生意”。老实说，当时我有点惊讶。然而，我很快就认识到更严格的环境规定迫使企业采用新的流程和技术，由此提高生产率和产量。最终，从新的流程获得的收益能覆盖初期投资。如果能把握好，更加绿色的供应链会迫使你向价值链上游移动，并带来更好的财务收益。

- ***在结束这专访前，我们必须讨论一个大家都关心的问题：当前爆发的2019冠状病毒病（“COVID-19”）。在您加入北京大学斯坦福中心工作后一年，斯坦福医学院的Randall Stafford教授到访了贵中心。在谈到流行病对中国经济的影响时，他说，越来越多的中国劳动力将出现生产力下降，而且由于非传染性疾病的发病率上升，劳动力提早退出经济活动的可能性会增加。考虑到COVID-19已经和将对全球经济产生的影响，待大流行病过去后，贵中心是否计划组织更多活动来讨论与此相关的议题？***

会的！我们希望举办一些有影响力的网络研讨会，邀请诸如Stafford教授和其他斯坦福教员参与，交流我们的观点，并从中国嘉宾的经验中学习。

- ***根据您的经验，您认为美国和中国应如何合作应对大流行病所带来的新的全球挑战？鉴于近来两国关系恶化，您认为斯坦福，特别是北京大学斯坦福中心，是否能在弥合两国间隙上发挥独特的作用，带来影响？***

我由衷认为，美国和中国必须找到一种方式，合作应对COVID-19大流行病所带来的挑战。进一步说，美国和中国对本国公民乃至全人类都负有义务，应继续寻找协同合作的方式。要搭建一条让这个星球通向更光明和繁荣的未来之路，唯有依靠合作、相互理解和信任。在增进不同国家和文化之间了解方面，斯坦福大学拥有悠久的成功历史。凭借这一点，再通过北京大学斯坦福中心的平台，斯坦福独具优势，可以弥合间隙和带来巨大的改变。此时，我们的角色比以往任何时候都更为重要。■

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* 此中法连*聚焦*™的引用是：李音希，CGCP专访：程嘉树，《中国法律连接》，第9期，第51页（2020年6月），*亦见于*斯坦福法学院中国指导性案例项目，中法连*聚焦*™，2020年6月，http://cgc.law.stanford.edu/zh-hans/clc-spotlight/clc-9-202006-interview-8-enshia-li。此专访的英文原文由Enshia Li、Kate Ann Lisa Bradley、Liyan Chen和Peter Songchen Yao撰写，并由Jennifer Ingram、Nathan Harpainter和熊美英博士最后审阅。中文版本由陈李妍、程浩轩、孔晶晶、李恺祺和李音希翻译，并由黄莉莎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。

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1 Callista Wells、Jennifer Choo，*Experts Gather to Share Findings, Brainstorm Approaches and Spur Further Research on China's Belt and Road Initiative*，SCPKU News，2020年3月18日，https://scpku.fsi.stanford.edu/news/experts-gather-share-findings-brainstorm-approaches-and-spur-further-research-china%E2%80%99s-belt-and。

2 *见，例如*，David R. Stilwell，*U.S.–China Bilateral Relations: The Lessons of History*，U.S. Department of State，2019年12月12日，https://www.state.gov/u-s-china-bilateral-relations-the-lessons-of-history；*Chronology of U.S.–China Relations, 1784–2000*，Office of the Historian，U.S. Department of State，https://history.state.gov/countries/issues/china-us-relations。

3 *见，例如*，*China's War on Pollution Leaves Small-Scale Pig Farmers Squealing*，Reuters，2017年11月7日，https://www.scmp.com/news/china/society/article/2118454/chinas-war-pollution-leaves-small-scale-pig-farmers-squealing。

4 王先知、高宇宏，塞拉尼斯中国区总裁程嘉树：做好社会责任就是做好业务，《WTO经济导刊》，第10期（2010），http://www.cnki.com.cn/Article/CJFDTotal-WTOK201010015.htm。

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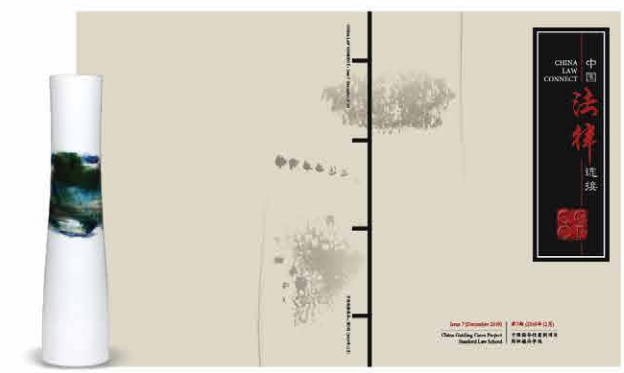

The CGCP thanks master ceramicist Mr. CHEN Xuncheng for allowing us to design the 2019 covers, based on his art pieces.

CGCP感谢陶瓷大师陈训成先生允许我们根据他的作品设计2019年出版的期刊封面。

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CGCP Interview: Jie Lin*

James Young Jin Noh
Editor, China Guiding Cases Project

"[…] I have learned that open communication, mutual understanding, mutual respect, mutual trust, and keeping promises and commitments are the cornerstones of healthy professional relationships."
——*Jie Lin*

- ***It is truly a pleasure to be able to interview you to learn about your experience, background, and unique perspective on not only business development but also how the law can be applied in business. First, can you tell us a little bit about Akamai Technologies, Inc. ("Akamai"), as some readers may not be familiar with the company?***

Thank you for having me!

Akamai is a global company specializing in content delivery networks, cybersecurity, and cloud services. With one of the world's largest distributed computing platforms, Akamai serves around 20% of all web traffic. Enterprise customers who want their websites to work faster come to us because we can distribute their content from locations close to their users. When a user clicks on an Akamai customer's URL, the user's browser is redirected to one of Akamai's copies of the customer's website.

Akamai's story began with a challenge posed by World Wide Web inventor Sir Timothy Berners-Lee when he was a professor at the Massachusetts Institute of Technology ("MIT") in 1995.[1] Sir Berners-Lee foresaw that Internet congestion would become a major obstacle in the development of the Internet industry and challenged his colleagues to invent a better way to deliver Internet content. His challenge captured the attention of MIT Professor of Applied Mathematics Dr. Tom Leighton, a renowned expert on parallel algorithms and architecture. Working with a team of researchers, Dr. Leighton and Danny Lewin, Co-Founder and long-time CTO of Akamai, developed mathematical algorithms that could intelligently route and replicate content over a large network of distributed servers and thereby solved the problem of Internet congestion.

Dr. Leighton and Mr. Lewin incorporated Akamai in 1998 and launched commercial services in 1999. Yahoo!, one of the world's most visited websites, was Akamai's first customer.

All the work that Akamai has done, beginning in the 1990s and leading up to today, is making it possible for the world's population to work remotely, participate in teleconferencing, telemedicine, e-learning, ecommerce, and stay connected to one another. All of us at Akamai feel proud that we are making a tremendous difference in helping the world get through the Coronavirus Disease 2019 ("COVID-19") pandemic.

- ***As the Head of Government Relations for Akamai China, you have acted as the liaison between Akamai and various government agencies in China for almost 15 years. What were the major achievements made during this period? What lessons have you learned from these achievements about forging and maintaining successful relationships with the Chinese government so as to foster healthy professional relationships between businesses and China?***

The major achievements we have made during this period have been maintaining a healthy business environment and providing uninterrupted quality service to customers, especially for important global events like the 2007 Shanghai Special Olympics, the 2008 Beijing Olympics, and the 2009 Shanghai Expo.

In the early days of working at Akamai China, I was running a small, startup-like office in Beijing and had my hands full conducting all China-related activities you can think of, including attending meetings with government officials, giving speeches at various meetings and conferences, hosting executive and government delegation visits, arranging sales calls, and attending marketing and corporate social responsibility events.

The first big project I had was to broadcast the 2007 Shanghai Special Olympics online. This project enabled the world, for the first time, to see the amazing performances of every single one of the Special Olympics athletes. In addition, it allowed the athletes to share their great moments with their parents and relatives who were far away from Shanghai. This was extremely important to these athletes who had special needs. In the end, I received a "Special Spirit in China" award from the president of the Special Olympics in recognition of my contributions.

During that time, I had very close interactions with many special needs athletes and was impressed and touched by their "you can, I can" spirit. I still often draw strength from my experiences with them during my own ups and downs.

Jie Lin
Chairperson and Head of Government Relations at Akamai China
Akamai Technologies, Inc.

Since 2006, Ms. Jie Lin has been the Chairperson and Head of Government Relations of Akamai China. In this role, she acts as the liaison between Akamai Technologies, Inc. and various government agencies in China to help foster the company's healthy professional relationships with stakeholders in China.

Before joining Akamai Technologies, Inc., Ms. Lin served as Senior Vice President of BeXcom and CEO of BeXcom Taiji, a joint venture between a Chinese state-owned enterprise and a U.S. enterprise. From 1988 to 2000, Ms. Lin worked for National Cash Register (NCR) AT&T Global Information Solutions, where her major responsibilities included engineering, sales, marketing, and management.

Ms. Lin's excellent work in promoting innovation and leading important business development in the technology industry has been widely recognized. For example, she has been commended for introducing the use of open systems to the financial industry in China in the 1990s. In 2015, the *China Economic Herald* presented the China Economic New Leader Character award to Ms. Lin to recognize her contributions.

From 2013 to 2015, Ms. Lin was a Governor of the American Chamber of Commerce China board and actively engaged senior U.S. and Chinese government officials to improve communication between American companies, especially those in the information communication and technologies sector, and the Chinese government. Ms. Lin graduated from Tsinghua University and subsequently received her Master's Degree in Engineering Science from the University of California, San Diego.

Ms. Jie Lin with participants of the 2007 Shanghai Special Olympics

Winners of the 7th Girls' Mathematics Olympiad that took place in Zhongshan, Guangdong Province, China, in August 2008

Another interesting event that Akamai China supported was the 7th Girls' Mathematics Olympiad in Zhongshan, Guangdong Province in August 2008. Zhongshan is the hometown of Sun Yat-sen, who is widely considered "the father of modern China" because of his efforts in overthrowing the Qing Dynasty. The U.S. team received many medals (see photo) and each individual winner received Akamai scholarships.

Throughout the years, I have learned that open communication, mutual understanding, mutual respect, mutual trust, and keeping promises and commitments are the cornerstones of healthy professional relationships.

- ***As we all know, regulatory policies have a significant influence on enterprises. Since you joined Akamai, what major regulatory changes have you witnessed that help shape the current information communication and technologies ("ICT") sector in China? What implications have these changes posed for foreign companies like Akamai?***

From personal experience, China has made great progress on regulations, especially those in the Internet industry, over the last 15 years. Various ministries have released or updated approximately 20 laws, regulations, and measures to reflect the rapid development of the ICT sector between 2006 and 2019. When I joined Akamai in early 2006, content delivery networks ("CDN") were very new to people in China. Due to the lack of understanding of the technology and its applications, CDN services were grouped under the internet data center ("IDC") category and this made it subject to the same set of regulations as IDC service. This regulatory ambiguity caused much confusion in the interpretation of government policies and really hindered the growth of the CDN sector. So, my initial focus was acting as a campaigner, promoting CDN and raising awareness among policymakers.

After much effort, I felt that CDN standardization could be a great angle through which to promote the CDN sector in China. In early November 2008, during the Second Annual U.S.–China Internet Industry Forum in Shanghai, I shared my thoughts with a leader from the China Academy of Telecommunications Research (the "CATR"), a research institute under China's Ministry of Industry and Information Technology (the "MIIT"). The leader immediately told me that he had the same idea. After a number of subsequent discussions between his team and the Akamai technical team, in 2009, we jointly invited industry leaders and kicked off the first CDN

standardization workshop on the campus of the CATR. At the end of the meeting, all participants agreed that drafting a document setting CDN standards was very important and that we had made the first step toward achieving this together.

Afterwards, the CATR formed a working group to draft the CDN standards. The Akamai global team was one of the key technical contributors to the early drafts. The project was completed in 2010. Five years later, in 2015, the MIIT revised the Classification Catalog of Telecommunications, marking CDN as a new type of value-added telecom service. On December 12, 2016, the MIIT granted the first three CDN licenses to providers in China.

Looking back, this standardization project was an important milestone for the CDN sector in China, as it led to clearer policies formulated specifically for the CDN sector, which heralded a rapid growth phase in the sector. I am proud to have been part of the standardization project and was very fortunate to have the opportunity to work with a group of researchers from the CATR and help make this regulatory breakthrough in the CDN sector in China.

- ***It is widely known that any foreign company looking to expand into China faces difficult regulatory challenges, from establishing joint ventures to obtaining an Internet content provider license to deliver content online to users in China. How can these challenges facing international companies be overcome?***

China's regulations and policies governing the Internet industry are different from those in Western countries—that's a reality. This was particularly true in the early days when the industry was just starting to take shape but already growing exponentially. At that time, regulations and policies really lagged behind.

However, for any foreign company doing business in China, complying with local laws and regulations is a basic requirement. Over the years, the Chinese government has made much progress in making these regulations more business-friendly. In recent years, China rolled out policies that relaxed certain regulatory restrictions in free trade zones like the one in Shanghai. These have given foreign companies more options to conduct business. Despite this, having an experienced government affairs team is essential to help foreign companies navigate through the complex regulatory waters in China. This is well understood by multinational corporations doing business in China. All of these companies have strong government affairs teams to help them develop sound business strategies. A good understanding of local regulations as well as effective communication with government agencies and other stakeholders inside and outside China to maintain mutual understanding are critical in normal times and, especially, in turbulent times. In addition, it is important to have good local partners who can provide additional resources and help share some of the regulatory burden.

- ***Given your interests and experience,* China Law Connect ("CLC") *readers may be interested in knowing why and how you became interested in the China Guiding Cases Project (the "CGCP") of Stanford Law School.***

I learned about this project during the 20th U.S.–China Legal Exchange Conference hosted at Stanford on February 29, 2016. Dr. Mei Gechlik presented the CGCP to myself and the other participants, and, given my working experience in China, I immediately realized that the CGCP provides great value to companies operating in China, especially those in Internet-related sectors. Those companies can leverage the Guiding Cases to gain insight into their particular sector to come up with an appropriate approach or strategy for their own situation. Since then, I have been a fan of the CGCP and have participated in many CGCP events hosted at Stanford and at the Stanford Center at Peking University.

- ***In the last issue of* CLC, *the CGCP published a high-quality English translation of the* Foreign Investment Law of the People's Republic of China (the "Foreign Investment Law") *prepared by Dr. Mei Gechlik and Dimitri Phillips.[2] The law came into effect on January 1, 2020 and people expect it to provide a framework for putting foreign investors on a more level playing field with domestic investors on the Chinese market. Based on your experience and expertise, how do you think the new* Foreign Investment Law *will change foreign investment practices in China? What challenges might arise in its implementation?***

> ***"A good understanding of local regulations as well as effective communication with government agencies and other stakeholders inside and outside China to maintain mutual understanding are critical in normal times and, especially, in turbulent times."***

Currently, relevant ministries and regulators are in the process of drafting measures to assist the implementation of the *Foreign Investment Law*. The American Chamber of Commerce in China has been collecting comments from its member companies on the draft measures being issued from different government agencies, such as the State Administration for Market Regulation, the China National Intellectual Property Administration, the Ministry of Civil Affairs, and the China Banking and Insurance Regulatory Commission. Once the measures come into

effect, foreign companies should be able to follow respective working mechanisms to address their business needs in the implementation phase. For example, because Article 26 of the *Foreign Investment Law* provides for the establishment of complaint mechanisms for foreign-invested enterprises,[3] China's Ministry of Commerce ("MOFCOM") issued measures to allow foreign companies to file complaints through such mechanisms. MOFCOM emphasized the importance of improving the foreign investment environment and promised the establishment of a service system for foreign investment and the improvement of a working mechanism for foreign investment companies to file complaints in order to attract, reassure, and keep business.[4]

There is no doubt that the *Foreign Investment Law* is a welcome step forward. However, not all industry sectors will see the same opportunities. For example, the Internet sector-related policies saw few substantive changes. We will likely learn more details once the COVID-19 situation is over.

- ***Now let's shift our discussion to what lies beyond law and policy. Before Akamai, you served as the CEO of BeXcom Taiji, a joint venture between a Chinese state-owned enterprise and an American enterprise. At some point, we imagine, the two parties' visions might have differed. How did you effectively align their different visions? Could you please give us an example or two to illustrate how you brought them together?***

Although the two parties had some differences in their visions, as investors, both parties paid great attention to business growth and returns. As the CEO, I was primarily focused on business objectives, sales, marketing, research and development, customer support, and team building. I had very strong teams supporting me on the business side and company strategy. The board members from both sides were highly supportive of me and my team because we were able to deliver our commitments consistently. We had differences, but none were fundamental. I was able to bring both sides together and reach an agreement by maintaining sufficient communications and making necessary compromises without giving in on fundamental principles. I must admit, however, that the joint venture experience was a tough one because both sides had almost equal say on any decision and obvious differences associated with their respective business cultures. Nevertheless, the experience was also a very rewarding one, from which I learned a lot, including how to improve my golfing skills!

- ***You obviously have had a remarkable career spanning multiple sectors (e.g., technology, marketing, management, and government). Do you think your native Chinese cultural and educational background has helped your career in the United States? Do you feel like it will continue to be an asset going forward?***

Yes, an understanding of both cultures is extremely important, especially for the type of work I do where communication and cooperation are essential. Also, being in the technology industry, my engineering background also affords me invaluable insights when dealing with technology-related subjects and issues. In addition, I had two great mentors during my time at National Cash Register (NCR) AT&T Global Information Solutions. They recognized my strengths and encouraged me to step out of my comfort zone to embrace a great career transition and new challenges while always cheering me on along the way. Actually, one of them recommended me to Akamai, and I have now worked here for more than 14 years.

Akamai is an amazing, cutting-edge company that is full of energy and has an awesome culture and many talented people. Through all these years, I have received great support from my peers, my direct managers, and even C-level executives. Their trust and consistent support have really empowered me to grow and improve. I am truly inspired by the company's spirit. One of our mottos is "we can move mountains, wherein no challenge seems overwhelming and no obstacle is too difficult to overcome".

In the end, I do believe that my culture and educational background have benefited me tremendously, and I will continue to draw strength from them going forward.

> ***"One of [Akamai's] mottos is 'we can move mountains, wherein no challenge seems overwhelming and no obstacle is too difficult to overcome'."***

- ***Since your career has focused on the intersection of technology, business, and government between China and the United States, your perspective on U.S.–China trade relations is valuable. What do you think U.S.–China trade relations will look like in the post-COVID-19 world? Are there any solutions to minimizing the conflicts between the two countries?***

The American Chamber of Commerce in China has been conducting monthly surveys among its member companies since the COVID-19 outbreak. The feedback we have been receiving is in constant flux; given the rapid changes in both countries, it is too early to tell. However, I agree that the impact of COVID-19 is profound and will accelerate the trend of deglobalization. The trade war looked scary, but it pales in comparison to COVID-19. I believe that a normal and stable U.S.–China relationship is good for the world, so I'm very worried about the way things are moving at this time, but remain hopeful as past experiences convince me that the two countries have wise counselors. ■

* The citation of this CLC *Spotlight*™ is: James Young Jin Noh, *CGCP Interview: Jie Lin*, 9 China Law Connect 57 (June 2020), *also available at* Stanford Law School China Guiding Cases Project, CLC *Spotlight*™, June 2020, http://cgc.law.stanford.edu/clc-spotlight/clc-9-202006-interview-9-james-noh. The original, English version of this CGCP Interview was prepared by James Young Jin Noh, Liyan Chen, Enshia Li, and Jennifer Ingram; it was finalized by Jennifer Ingram, Nathan Harpainter, 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] *See* "Company History", Akamai, https://www.akamai.com/us/en/about/company-history.jsp.

[2] Dr. Mei Gechlik & Dimitri Phillips, Foreign Investment Law of the People's Republic of China, *Its Implementing Regulation and Judicial Interpretation, and Related Annotations*, 8 China Law Connect 43 (Mar. 2020), *also available at* Stanford Law School China Guiding Cases Project, CLC *Spotlight*™, Mar. 2020, http://cgc.law.stanford.edu/clc-spotlight/clc-8-202003-others-7-gechlik-phillips.

[3] Article 26 of the *Foreign Investment Law* provides: "The State establishes complaint mechanisms for foreign-invested enterprises to handle, in a timely manner, issues reported by foreign-invested enterprises or their investors, and to coordinate and improve relevant policies and measures". *See id.*

[4] 《商务部关于应对疫情进一步改革开放做好稳外资工作的通知》(*Notice of the Ministry of Commerce on Furthering Reforms and Opening Up as well as Stabilizing Foreign Investment in Response to the Epidemic Situation*), issued by the Ministry of Commerce on Apr. 1, 2020, effective as of Apr. 1, 2020, http://www.mofcom.gov.cn/article/b/f/202004/20200402951657.shtml.

CGCP 专访：凌洁*

卢映真
中国指导性案例项目编辑

"[...]我认识到，坦率沟通、相互理解、相互尊重、相互信任及遵守承诺是建立健康专业关系的基石。"
——凌洁

- ***非常高兴您能接受我的采访，让我们了解您的经验、背景，以及您对业务发展和法律如何在业务中应用的独特见解。首先，您能否简单向我们介绍一下阿卡迈技术有限公司（Akamai Technologies, Inc.；"阿卡迈"）？这是因为一些读者可能不熟悉这家公司。***

感谢你的邀请！

阿卡迈是一家专注于内容分发网络、网络安全和云服务的全球性的公司。阿卡迈拥有世界上最大的分布式计算平台之一，因特网所有网络流量的20%是由阿卡迈提供服务的。那些想让其网站运行更快的企业客户会使用阿卡迈，因为阿卡迈可以在靠近其用户的地方分发网站内容。当用户点击阿卡迈客户的网址时，该用户的浏览器立刻被重新定位到阿卡迈为该客户网站所制作的其中一个副本。

阿卡迈的故事始于万维网发明者Timothy Berners-Lee爵士在1995年提出的一项挑战。[1] 当时，他是麻省理工学院（MIT）教授，并预见到互联网拥塞将成为互联网行业发展的一大障碍。因此，他向同事们发起一项挑战：能否发明一种更好的方式来传输互联网内容。他的挑战引起了麻省理工学院应用数学教授、著名并行算法和体系结构专家Tom Leighton博士的注意。Leighton博士、阿卡迈的联合创始人兼长期首席技术官Danny Lewin与一组研究人员合作，开发了能够在分布式服务器的大型网络上智能传输和复制内容的数学算法，从而解决了互联网拥塞的问题。

Leighton博士和Lewin先生于1998年成立了阿卡迈，并于1999年推出了商业服务。当时全球访问量最大的网站之一的雅虎，是阿卡迈的第一个客户。

从1990年代开始到今天，阿卡迈所做的所有工作使世界各地的人们能够实现远程工作，参与远程会议、远程医疗、电子学习、电子商务，并保持与他人的联系。阿卡迈的所有工作人员都为我们在帮助全世界度过2019年冠状病毒病（"COVID-19"）大流行而做出的贡献感到自豪。

- ***作为阿卡迈中国的政府事务负责人，您在阿卡迈与中国各政府机构之间担任联络人近15年。在此期间有哪些主要成就？从这些成就中，您获得了哪些有助于与中国政府建立并保持成功关系的经验，从而促进企业与中国间建立健康专业的关系？***

我们在这期间取得的主要成就是保持健康的商业环境，并为客户提供不间断的优质服务，特别是在全球重要活动中的服务，例如2007年上海特殊奥林匹克运动会（"特奥会"）、2008年北京奥运会和2009年上海世博会等。

在阿卡迈中国工作的初期，北京办公室犹如一家小型初创企业，我需要做你可以想到的所有与中国相关的活动，包括出席与政府官员的会议、在各种会议上发表演讲、接待高管和政府代表团的访问、安排销售电话、参加市场推广和企业社会责任活动。

我的第一个大项目是在网上广播2007年上海特奥会。这个项目使世界第一次看到每一位特奥运动员的精彩表演。此外，它还使得运动员们能够在上海与千里之外的父母和亲戚们分享他们美好的一刻。对于这些有特殊需要的运动员来说，这是极其重要的。项目结束后，我获得了特奥会主席颁发的"中国特殊精神"奖，以表彰我的贡献。

在那段时间里，我和许多特殊运动员有非常密切的交流，他们那种"你可以，我也可以"精神，让我印象深刻并深受感动。在我遇到人生起伏时，我仍时常从与他们的交往经历中汲取力量。

阿卡迈中国还支持了另一项有趣的活动，就是2008年8月在广东省中山市举行的第七届女子数学奥林匹克竞赛。中山市是孙中山的故乡。由于孙中山致力推翻清朝，他被广泛认为是"革命先行者"。美国团队在这项赛事中获得了许多奖牌（见照片），每位获奖者都获得了阿卡迈奖学金。

经过这些年我认识到，坦率沟通、相互理解、相互尊重、相互信任及遵守承诺是建立健康专业关系的基石。

- ***众所周知，规管政策对企业影响重大。自您加入阿卡迈以来，您见证了哪些有助于塑造当前中国信息通信和技术行业的重大规管变化？这些变化对像阿卡迈这样的外国公司带来什么影响？***

从我个人的经验来说，过去的15年，中国在法律规定方面取得了长足进步，尤其是互联网行业的法律规

凌洁
阿卡迈（Akamai）中国董事会主席兼政府事务负责人
阿卡迈技术有限公司（Akamai Technologies, Inc.）

2006年起，凌洁女士一直担任阿卡迈中国董事会主席兼政府事务负责人。在此职位上，她负责阿卡迈技术有限公司（Akamai Technologies, Inc.）与中国相关政府机构之间的联络，帮助促进该公司与中国利益相关者之间的专业关系。

加入阿卡迈技术有限公司前，凌女士曾担任新加坡仲讯寰宇（BeXcom）公司的高级副总裁，以及北京太极仲讯信息技术有限公司（BeXcom Taiji）的首席执行官。后者是一家中国国有企业与美国企业的合资企业。1988年至2000年，凌女士在美国NCR公司和AT&T旗下的全球信息方案公司工作，主要职责包括软件研发、销售、市场推广和管理。

凌女士在推动创新和引领科技行业重大业务发展方面的出色工作得到了广泛认可。例如，她于1990年代把开放性系统的使用引进中国金融业的举措就受到了赞扬。2015年，《中国经济导报》向凌女士颁发“中国经济新领导人物奖”，以表彰她的贡献。

2013年至2015年，凌女士担任中国美国商会董事，并积极与美国和中国政府高级官员接触，以增进美国企业和中国政府的沟通，尤其是信息通信和技术领域的沟通。凌女士毕业于清华大学，后又获得美国加州大学科学工程的硕士学位。

凌洁女士与2007年上海特奥会参赛者

2008年8月在中国广东省中山市举行的第七届女子数学奥林匹克竞赛的获奖者

定。各部委已发布或更新了近20部法律、法规和措施，以回应信息通信和技术行业在2006年至2019年间的快速发展。

2006年初我加入阿卡迈时，对于国内业界而言，内容分发网络还是很新的。由于对技术及其应用缺乏了解，内容分发网络服务被置于互联网数据中心服务门类下，这使其受到与互联网数据中心服务相同的法规约束。这种规管上的模糊性在政府政策解释上造成了不少偏差，切实阻碍了内容分发网络行业的发展。因此，我最初致力于以推动者角色，推广内容分发网络，以及提升决策者的认知。

经过大量努力后，我意识到通过实现标准化来推广内容分发网络会是一个好的方向。2008年11月上旬，在上海举行的第二届中美互联网产业年度论坛上，我与中国工业和信息化部辖下的中国电信研究院的一位领导分享了我的想法。这位领导立刻表示，他也有同样的想法。经过他的团队与阿卡迈技术团队一系列后续讨论后，两方于2009年联合邀请了业界领袖，并在中国电信研究院举办了首个内容分发网络标准化研讨会。会议结束时，所有与会者都同意起草设定内容分发网络的标准的文件是非常重要的，并认为我们已经朝着共同实现这一目标迈出了第一步。

此后，中国电信研究院成立了一个工作组来起草内容分发网络的标准。阿卡迈全球团队是该标准早期草案的关键技术贡献者之一。该项目于2010年底完成。五年后的2015年，工业和信息化部修订了《电信业务分类目录》，将内容分发网络定性为一种新型增值电信服务。2016年12月12日，工业和信息化部向国内的服务提供商授予了首三个内容分发网络许可证。

回顾过去，这项标准化项目是中国内容分发网络行业的一个重要里程碑，因为它促成了专为内容分发网络行业制定的更清晰的政策，而这些政策预示了该行业的快速发展。我为参与了这标准化项目而感到自豪。我很幸运有机会与中国电信研究院的研究人员合作，并在中国内容分发网络行业的规管改进上提供了协助。

- ***众所周知，任何希望进军中国的外国公司都面临很多规管的挑战，当中包括从建立合资企业，到获得互联网内容提供商的许可证来为中国用户提供线上内容等各方面。那么跨国公司可以如何克服这些挑战呢？***

中国规管互联网行业的规定和政策与西方国家不同，这是事实。尤其在互联网行业刚刚起步但已呈指数增长的早期更是如此。那时的规定和政策确实有些滞后。

然而，对在中国开展业务的任何一家外国公司而言，遵守当地法律和法规都是基本要求。多年来，在促使法律法规更利于营商方面，中国政府取得了长足进步。近年来，中国在像上海自贸区这样的自由贸易区推出政策，放宽某些规管限制。这为外国公司提供了更多开展业务的选择。尽管如此，拥有一支经验丰富的政府事务团队，协助外国公司处理中国复杂的规管要求，是十分必要的。在中国开展业务的跨国公司都明白这一点。所有这些公司都拥有强大的政府事务团队来帮助他们拟定合理的业务策略。理解好当地的规定，保持与政府机构和其他国内外利益相关者的有效沟通，从而增进相互理解，在风平浪静的时期非常重要，在时局多变时更是不可或缺。此外，在当地有良好的合作伙伴也是重要的，他们可以提供更多资源并帮助分担一些规管方面的负担。

- ***鉴于您的兴趣和经验，《中国法律连接》（“《中法连》”）的读者可能会想了解您为什么和如何开始对斯坦福法学院的“中国指导性案例项目”（“CGCP”）感兴趣。***

2016年2月29日，我在斯坦福大学举行的第20届中美法律交流会上了解到这个项目。熊美英博士向我和其他与会者介绍了CGCP。基于我在中国的工作经验，我很快意识到CGCP会为在中国运营的公司，尤其是与互联网行业相关的公司，提供巨大帮助。这些公司能够利用指导性案例来加深对特定行业的了解，从而针对自身情况提出适当的方法或策略。自那以后，我一直是CGCP的“粉丝”，并参加了CGCP在斯坦福大学和北京大学斯坦福中心举办的许多活动。

- ***在上一期《中法连》中，CGCP出版了由熊美英博士和Dimitri Phillips撰写的《中华人民共和国外商投资法》（“《外商投资法》”）的高水平的英文译本。[2]该法于2020年1月1日生效，大家期待它能提供一个框架，让外国投资者与国内投资者在中国市场上公平竞争。根据您的经验和专业知识，您认为新的《外商投资法》将如何改变在中国的外商投资实践？在实施该法律时，可能会遇到哪些挑战？***

目前，为更好地落实《外商投资法》，有关部门和规管机构正在起草相应的措施。中国美国商会一直向其会员公司收集他们对各政府部门起草的措施的意见。这些政府部门有国家市场监督管理总局、国家知识产权局、民政部和中国银行保险监督管理委员会。当这些措施生效时，外国公司应能在实施阶段中遵循各措施的工作机制，以解决业务上的需求。例如，因为《外商投资法》第二十六条规定了外商投资企业投诉机制的建立，[3]中国商务部发布了允许外国公司通过此类机制进行投诉的措施。商务部强调改善外商投资环境的重要性，并承诺建立外商投资服务系统，改善工作机制让外资企业作出投诉，从而吸引企业、留住企业。[4]

毫无疑问，《外商投资法》的出台是可喜的进步。然而，并不是所有行业都会拥有同样的机会。例如，与互联网行业相关的政策没有太多变化。当COVID-19疫情结束时，我们可能会获得更多具体的信息。

- ***现在，让我们把讨论的重点转移到法律和政策以外的话题上。在阿卡迈前，您曾担任太极仲讯首席执行官，这是一家中国国企和美国企业共同建立的合资企业。可以想见，在某些时候，双方的愿景可能会存在分歧。您是如何有效地协调双方的不同愿景的？能否请您举一两个例子来说明一下，您如何使双方达成一致？***

虽然双方在愿景上有一些分歧，但作为投资者，双方都非常重视业务的成长和回报。作为首席执行官，我主要负责业务目标、销售、市场推广、研发、客户支持和团队建设等方面的工作。在业务和公司策略方面，公司有非常强大的团队支持我。双方的董事会成员都非常支持我和我的团队，因为我们能够始终如一地履行承诺。我们有分歧，但都不是根本性的。通过保持充分的沟通和在不违背基本原则的前提下做出必要的妥协，我能够使双方达成一致。然而我必须承认，这段合资公司的经历是艰难的，因为双方在任何决定上几乎都有同等的发言权，而且各自的商业文化也有明显的差异。但是，这段经历也是非常有收获的，我从中学到了很多东西，包括如何提高自己打高尔夫球的技巧！

- ***很明显，您有跨越了多个领域（如技术、市场推广、管理和政府事务）的出色的职业生涯。您认为您地道的中国文化和教育背景对您在美国的职业有帮助吗？您觉得在未来这是否仍继续是一项资产？***

> ***“理解好当地的规定，保持与政府机构和其他国内外利益相关者的有效沟通，从而增进相互理解，在风平浪静的时期非常重要，在时局多变时更是不可或缺。”***

是的，对这两种文化的理解是非常重要的，特别是对于我所从事的工作来说，沟通与合作至关重要。此外，由于我从事的是技术行业，我的工程背景也为我在处理与技术相关的题目和问题时提供了宝贵知识。此外，我在美国NCR公司和AT&T旗下的全球信息方案公司工作期间，有两位出色的导师。他们肯定了我的长处，鼓励我走出舒适区，迎接很好的职业转型和新的挑战，而同时也一直鼓励我。实际上，正是他们中的一位向阿卡迈推荐了我，现在我已经在这里工作了14年多。

阿卡迈是一家了不起的尖端公司，它充满了活力，拥有令人敬佩的企业文化和众多的人才。这些年来，我

从我的同事、我的直属经理，甚至是C级高管那里得到了很多支持。他们对我的信任和一贯的支持，让我真正获得了成长和进步。我真的被公司的精神所启发。我们的座右铭之一是“我们可以移动山脉，在这里，没有任何挑战无法克服的，也没有任何障碍是难以逾越的”。

最后，我坚信我的文化和教育背景让我受益匪浅，今后我将继续从中汲取力量。

> ***“[阿卡迈]的座右铭之一是‘我们可以移动山脉，在这里，没有任何挑战是无法克服的，也没有任何障碍是难以逾越的’。”***

- ***您的职业生涯一直专注于中美之间科技、商业和政府的交汇，因此您对中美贸易关系的看法很有价值。您认为在后疫情时代中，中美贸易关系会是什么样？有没有什么办法可以尽量减少两国之间的矛盾？***

自COVID-19疫情爆发以来，中国美国商会每月都会在会员企业中进行调查。我们所收到的反馈信息一直在不断变化。考虑到两国的快速变化，现在下结论还为时过早。但我同意COVID-19造成了深远影响，并将加速去全球化的趋势。之前，中美贸易战看起来难以置信，但与COVID-19相比，它就相形见绌了。我相信，正常稳定的中美关系对世界是有好处的。所以，我对目前的事态发展很担心，但仍抱有希望，因为过去的经验让我相信两国都应有足够的智慧找到一条双方都认可的出路。■

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此专访的英文原文由James Young Jin Noh、Liyan Chen、Enshia Li和Jennifer Ingram撰写，并由Jennifer Ingram、Nathan Harpainter和熊美英博士最后审阅。中文版本由李恺祺、温乐书、杨可欣和朱新玥翻译，并由程浩轩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] *见*“Company History”，Akamai，https://www.akamai.com/us/en/about/company-history.jsp。

[2] 熊美英博士、费德明，《中华人民共和国外商投资法》与其实施条例、司法解释和相关注解，《中国法律连接》，第8期，第43页（2020年3月），*亦见于*斯坦福法学院中国指导性案例项目，中法连*聚焦*™，2020年3月，http://cgc.law.stanford.edu/zh-hans/clc-spotlight/clc-8-202003-others-7-gechlik-phillips。

[3]《外商投资法》第二十六条规定：“国家建立外商投资企业投诉工作机制，及时处理外商投资企业或者其投资者反映的问题，协调完善相关政策措施”。*见同上*。

[4]《商务部关于应对疫情进一步改革开放做好稳外资工作的通知》，2020年4月1日由商务部公布，同日起施行，http://www.mofcom.gov.cn/article/b/f/202004/20200402951657.shtml。

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克里斯蒂昂迪奥尔香料公司诉国家工商行政管理总局商标评审委员会商标申请驳回复审行政纠纷案

Parfums Christian Dior S.A. v. The Trademark Review and Adjudication Board of the State Administration for Industry and Commerce, An Administrative Case Concerning a Re-examination to Reject a Trademark Application

指导案例114号
（最高人民法院审判委员会讨论通过
2019年12月24日发布）*

Guiding Case No. 114
(Discussed and Passed by the Adjudication Committee of the Supreme People's Court
Released on December 24, 2019)**

关键词

行政
商标申请驳回
国际注册
领土延伸保护

Keywords

Administrative
Reject a Trademark Application
International Registration
Territorial Extension Protection

裁判要点

1. 商标国际注册申请人完成了《商标国际注册马德里协定》及其议定书规定的申请商标的国际注册程序，申请商标国际注册信息中记载了申请商标指定的商标类型为三维立体商标的，应当视为申请人提出了申请商标为三维立体商标的声明。因国际注册商标的申请人无需在指定国家再次提出注册申请，故由世界知识产权组织国际局向中国商标局转送的申请商标信息，应当是中国商标局据以审查、决定申请商标指定中国的领土延伸保护申请能否获得支持的事实依据。

2. 在申请商标国际注册信息仅欠缺商标法实施条例规定的部分视图等形式要件的情况下，商标行政机关应当秉承积极履行国际公约义务的精神，给予申请人合理的补正机会。

Main Points of the Adjudication

1. [Where] an applicant for an international registration of a trademark [subsequently] applying for [territorial extension protection in China] has completed the procedures for the trademark's international registration as provided for in the *Madrid Agreement Concerning the International Registration of Marks*[1] and its protocol, and the international registration information about the applied-for trademark records that the applied-for trademark has been specified to be a type of three-dimensional trademark, this should be regarded as the applicant's declaration that the applied-for trademark is a three-dimensional trademark.

Because an applicant for an international registration of a trademark does not need to apply for registration again in a designated country, the information about an applied-for trademark transferred by the International Bureau of the World Intellectual Property Organization to the Trademark Office of China[2] should be the factual basis for the Trademark Office of China to examine and decide whether the application for the territorial extension protection of the applied-for trademark in China, as designated, can be supported.

2. In a situation where the international registration information about an applied-for trademark lacks only some views [of the trademark] and other formal and important documents as prescribed by the *Implementing Regulation of the Trademark Law*, trademark administrative organs should uphold the spirit of actively performing obligations under international treaties and give the applicant reasonable opportunities to provide supplements and make corrections.

相关法条

《中华人民共和国商标法实施条例》第13条、第52条[3]

基本案情

涉案申请商标为国际注册第1221382号商标（见下图），申请人为克里斯蒂昂迪奥尔香料公司（以下简称迪奥尔公司）。申请商标的原属国为法国，核准注册时间为2014年4月16日，国际注册日期为2014年8月8日，国际注册所有人为迪奥尔公司，指定使用商品为香水、浓香水等。

申请商标

申请商标经国际注册后，根据《商标国际注册马德里协定》《商标国际注册马德里协定有关议定书》的相关规定，迪奥尔公司通过世界知识产权组织国际局（以下简称国际局），向澳大利亚、丹麦、芬兰、英国、中国等提出领土延伸保护申请。2015年7月13日，国家工商行政管理总局商标局向国际局发出申请商标的驳回通知书，以申请商标缺乏显著性为由，驳回全部指定商品在中国的领土延伸保护申请。在法定期限内，迪奥尔公司向国家工商行政管理总局商标评审委员会（以下简称商标评审委员会）提出复审申请。商标评审委员会认为，申请商标难以起到区别商品来源的作用，缺乏商标应有的显著性，遂以第13584号决定，驳回申请商标在中国的领土延伸保护申请。迪奥尔公司不服，提起行政诉讼。迪奥尔公司认为，首先，申请商标为指定颜色的三维立体商标，迪奥尔公司已经向商标评审委员会提交了申请商标的三面视图，但商标评审委员会却将申请商标作为普通商标进行审查，决定作出的事实基础有误。其次，申请商标设计独特，并通过迪奥尔公司长期的宣传推广，具有了较强的显著性，其领土延伸保护申请应当获得支持。

Related Legal Rule(s)

Articles 13 and 52 of the *Implementing Regulation of the Trademark Law of the People's Republic of China*[4]

Basic Facts of the Case

The trademark applied for [in China (hereinafter referred to as the "applied-for trademark")] involved in this case was a trademark with the International Registration No. 1221382 (see image below). The applicant was Parfums Christian Dior S.A.[5] (hereinafter referred to as "Dior Company"). The country of origin of the applied-for trademark is France, where it was approved for registration on April 16, 2014. The date of the international registration is August 8, 2014, the holder of the international registration is Dior Company, and the goods specified for using [the trademark] are perfumes, eau de parfum, etc.[6]

The Applied-For Trademark

After the international registration of the applied-for trademark, Dior Company applied, in accordance with relevant provisions of the *Madrid Agreement Concerning the International Registration of Marks* and the *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks*,[7] to various countries, including Australia, Denmark, Finland, the United Kingdom, and China, through the International Bureau of the World Intellectual Property Organization[8] (hereinafter referred to as the "International Bureau") for protection [of the applied-for trademark] by territorial extension.

On July 13, 2015, the Trademark Office of the State Administration for Industry and Commerce[9] issued to the International Bureau a notification of rejection regarding the applied-for trademark, rejecting the application for protection of all specified goods in China by territorial extension on the grounds that the applied-for trademark lacked distinctiveness. Within the statutory period, Dior Company applied to the Trademark Review and Adjudication Board of the State Administration for Industry and Commerce[10] (hereinafter referred to as "the Trademark Review and Adjudication Board") for re-examination.

The Trademark Review and Adjudication Board argued that the applied-for trademark hardly had any function in distinguishing sources of goods and it lacked the distinctiveness that a trademark should have. Therefore, by the [Shang Ping Zi〔2016〕] No. 13584 Decision,[11] [the Board] rejected the application for the territorial extension protection of the applied-for trademark in China.

Unconvinced, Dior Company initiated administrative litigation. Dior Company argued that, first, the applied-for trademark is a three-dimensional

trademark with specified colors. Dior Company had already submitted to the Trademark Review and Adjudication Board a three-sided view of the applied-for trademark [as required by Chinese law].[12] However, the Trademark Review and Adjudication Board examined the applied-for trademark as an ordinary trademark. The factual basis for making the decision was wrong. Second, the design of the applied-for trademark is unique and, through Dior Company's long-term publicity and promotion, has a relatively strong distinctiveness. The application for the territorial extension protection [of this trademark] should be supported.

裁判结果

北京知识产权法院于2016年9月29日作出（2016）京73行初3047号行政判决，[13] 判决：驳回克里斯蒂昂迪奥尔香料公司的诉讼请求。克里斯蒂昂迪奥尔香料公司不服一审判决，提起上诉。北京市高级人民法院于2017年5月23日作出（2017）京行终744号行政判决，[14] 判决：驳回上诉，维持原判。克里斯蒂昂迪奥尔香料公司不服二审判决，向最高人民法院提出再审申请。最高人民法院于2017年12月29日作出（2017）最高法行申7969号行政裁定，[15] 提审本案，并于2018年4月26日作出（2018）最高法行再26号判决，[16] 撤销一审、二审判决及被诉决定，并判令国家工商行政管理总局商标评审委员会重新作出复审决定。

Results of the Adjudication

On September 29, 2016, the Beijing Intellectual Property Court rendered the (2016) Jing 73 Xing Chu No. 3047 Administrative Judgment,[17] holding: [the court] rejects the litigation requests of Parfums Christian Dior S.A. Unconvinced by the first-instance judgment, Parfums Christian Dior S.A. appealed. On May 23, 2017, the High People's Court of Beijing Municipality rendered the (2017) Jing Xing Zhong No. 744 Administrative Judgment,[18] holding: [the court] rejects the appeal and upholds the original judgment.

Unconvinced by the second-instance judgment, Parfums Christian Dior S.A. applied to the Supreme People's Court for a retrial.[19] On December 29, 2017, the Supreme People's Court rendered the (2017) Zui Gao Fa Xing Shen No. 7969 Administrative Ruling[20] to bring this case up [to the Supreme People's Court] for adjudication[21] and, on April 26, 2018, rendered the (2018) Zui Gao Fa Xing Zai No. 26 [Administrative] Judgment,[22] revoking the first-instance and second-instance judgments as well as the challenged decision, and ordering the Trademark Review and Adjudication Board of the State Administration for Industry and Commerce to render a new re-examination decision.

裁判理由[23]

最高人民法院认为，[25]申请商标国际注册信息中明确记载，申请商标指定的商标类型为“三维立体商标”，且对三维形式进行了具体描述。在无相反证据的情况下，申请商标国际注册信息中关于商标具体类型的记载，应当视为迪奥尔公司关于申请商标为三维标志的声明形式。也可合理推定，在申请商标指定中国进行领土延伸保护的过程中，国际局向商标局转送的申请信息与之相符，商标局应知晓上述信息。因国际注册商标的申请人无需在指定国家再次提出注册申请，故由国际局向商标局转送的申请商标信息，应当是商标局据以审查、决定申请商标指定中国的领土延伸保护申请能否获得支持的事实依据。根据现有证据，申请商标请求在中国获得注册的商标类型为“三维立体商标”，而非记载于商标局档案并作为商标局、商标评审委员会审查基础的“普通商标”。迪奥尔公司已经在评审程序中明确了申请商标的具体类型为三维立体商标，并通过补充三面视图的方式提出了补正要求。对此，

Reasons for the Adjudication[24]

The Supreme People's Court opined:[26] the international registration information about the applied-for trademark clearly recorded that the applied-for trademark had been specified to be a type of "three-dimensional trademark", and the three-dimensional form had been described in detail. In the absence of evidence to the contrary, the record concerning the specific trademark type that was included in the international registration information about the applied-for trademark should be regarded as a form of declaration by Dior Company that the applied-for trademark is a three-dimensional symbol. It can also be reasonably presumed that the application information transferred, in the course [of handling the application] for protection of the applied-for trademark in China, as specified, by territorial extension, by the International Bureau to the Trademark Office was consistent with the aforementioned information and the Trademark Office should be aware of it.

Because an applicant for an international registration of a trademark does not need to apply for registration again in a designated country, the information about an applied-for trademark transferred by the International Bureau to the Trademark Office should be the factual basis for the Trademark Office to examine and decide whether the application for the territorial extension protection of the applied-for trademark in China, as designated, can be supported.

商标评审委员会既未在第13584号决定中予以如实记载，也未针对迪奥尔公司提出的上述主张，对商标局驳回决定依据的相关事实是否有误予以核实，而仍将申请商标作为“图形商标”进行审查并迳行驳回迪奥尔公司复审申请的作法，违反法定程序，并可能损及行政相对人的合法利益，应当予以纠正。商标局、商标评审委员会应当根据复审程序的规定，以三维立体商标为基础，重新对申请商标是否具备显著特征等问题予以审查。

Based on the existing evidence, a request was made to register the applied-for trademark in China as a type of “three-dimensional trademark”, rather than as an “ordinary trademark” as recorded in the Trademark Office’s file and used as the basis for examination by the Trademark Office and the Trademark Review and Adjudication Board.

During the review process, Dior Company had clarified that the specific type of the applied-for trademark is a three-dimensional trademark and requested that corrections [to the Board’s record showing that the applied-for trademark is an ordinary trademark] be made by supplementing a three-sided view [of the trademark]. The Trademark Review and Adjudication Board did not truthfully record this in the No. 13584 Decision, nor did it verify, based on Dior Company’s aforementioned claim [that the applied-for trademark is a three-dimensional trademark], whether relevant facts that the Trademark Office relied on in its rejection decision were correct. Instead, [the Board] still examined the applied-for trademark as a “figurative trademark” and directly rejected Dior Company’s application for re-examination. These practices violated statutory procedures and could harm legal interests of an administrative counterparty;[27] [the practices] should be corrected.

The Trademark Office as well as the Trademark Review and Adjudication Board should, in accordance with the provisions of re-examination procedures and on the basis of [the applied-for trademark being] a three-dimensional trademark, examine again various issues, including whether the applied-for trademark has distinctive features.

《商标国际注册马德里协定》《商标国际注册马德里协定有关议定书》制定的主要目的是通过建立国际合作机制，确立和完善商标国际注册程序，减少和简化注册手续，便利申请人以最低成本在所需国家获得商标保护。结合本案事实，申请商标作为指定中国的马德里商标国际注册申请，有关申请材料应当以国际局向商标局转送的内容为准。现有证据可以合理推定，迪奥尔公司已经在商标国际注册程序中对申请商标为三维立体商标这一事实作出声明，说明了申请商标的具体使用方式并提供了申请商标的一面视图。在申请材料仅欠缺《中华人民共和国商标法实施条例》规定的部分视图等形式要件的情况下，商标行政机关应当秉承积极履行国际公约义务的精神，给予申请人合理的补正机会。本案中，商标局并未如实记载迪奥尔公司在国际注册程序中对商标类型作出的声明，且在未给予迪奥尔公司合理补正机会，并欠缺当事人请求与事实依据的情况下，迳行将申请商标类型变更为普通商标并作出不利于迪奥尔公司的审查结论，商标评审委员会对此未予纠正的作法，均缺乏事实与法律依据，且可能损害行政相对人合理的期待利益，对此应予纠正。

The main purpose of formulating the *Madrid Agreement Concerning the International Registration of Marks* and the *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks* is, through the establishment of an international cooperation mechanism, to set up and improve the procedures for international registration of trademarks, to reduce and simplify registration procedures, and to provide convenience to applicants by [enabling] them to obtain, at the lowest cost, trademark protection in countries where [protection] is needed.

Combining the facts of this case, [this court opines that] as an application designating China [made through] the *Madrid* international registration of trademarks, this application [should be considered] by basing on relevant materials about the applied-for trademark transferred by the International Bureau to the Trademark Office. It can be reasonably presumed from the existing evidence that, in going through the procedures for the international registration of trademarks, Dior Company had already made a declaration about the fact that the applied-for trademark is a three-dimensional trademark, explained the specific ways of using the applied-for trademark, and provided a one-sided view of the applied-for trademark.

In a situation where the application materials lack only some views [of an applied-for trademark] and other formal and important documents as prescribed by the *Implementing Regulation of the Trademark Law of the People’s Republic of China*, trademark administrative organs should uphold the spirit of actively performing obligations under international treaties and give the applicant reasonable opportunities to provide supplements and make corrections.

In this case, the Trademark Office did not truthfully record that Dior Company had made a declaration about the type of trademark [involved] during the international registration process. In addition, without giving Dior Company a reasonable opportunity to provide supplements and make corrections and in the absence of requests [made by] the party and of factual bases, [the Office] directly changed the type of the applied-for trademark to an ordinary trademark and drew an examination conclusion that was unfavorable to Dior Company. The Trademark Review and Adjudication Board's practices of not correcting [the Trademark Office's actions] lacked both factual and legal bases and could harm reasonably expected interests of an administrative counterparty; [the practices] should be corrected.

综上，商标评审委员会应当基于迪奥尔公司在复审程序中提出的与商标类型有关的复审理由，纠正商标局的不当认定，并根据三维标志是否具备显著特征的评判标准，对申请商标指定中国的领土延伸保护申请是否应予准许的问题重新进行审查。商标局、商标评审委员会在重新审查认定时应重点考量如下因素：一是申请商标的显著性与经过使用取得的显著性，特别是申请商标进入中国市场的时间，在案证据能够证明的实际使用与宣传推广的情况，以及申请商标因此而产生识别商品来源功能的可能性；二是审查标准一致性的原则。商标评审及司法审查程序虽然要考虑个案情况，但审查的基本依据均为商标法及其相关行政法规规定，不能以个案审查为由忽视执法标准的统一性问题。

In summary, the Trademark Review and Adjudication Board should, based on the re-examination grounds related to the type of trademark that Dior Company put forward during the re-examination process, correct the Trademark Office's improper determination. Also, [the Board should,] based on the standards for determining whether the three-dimensional symbol has distinctive features, examine again the issue as to whether the application for the territorial extension protection of the applied-for trademark in China, a designated [country], should be approved.

When making the examination determination anew, the Trademark Office and the Trademark Review and Adjudication Board should focus on the following factors. First, the distinctiveness of the applied-for trademark and the distinctiveness acquired through use (especially the time when the applied-for trademark entered the Chinese market, the actual use as well as publicity and promotion that can be proved by the evidence on file, and the possibility for the applied-for trademark to consequently develop a function of identifying sources of goods).

Second, the principle of having consistent examination standards. Although it is necessary to consider the situations in individual cases when going through trademark review and judicial review procedures, the basic bases for [both] reviews are the provisions of the *Trademark Law* and its related administrative regulations. The uniformity of law enforcement standards cannot be ignored on the grounds of [the need of] reviewing individual cases.

（生效裁判审判人员：陶凯元、王闯、佟姝）

(Adjudication personnel of the effective judgment: TAO Kaiyuan, WANG Chuang, and TONG Shu)

CGCP 备注

备注1:

CGCP Notes

Note 1:

《中华人民共和国商标法实施条例》[28]

***Implementing Regulation of the Trademark Law of the People's Republic of China*[29]**

第十三条

申请商标注册，应当按照公布的商品和服务分类表填报。每一件商标注册申请应当

Article 13

An application for trademark registration should be filled out in accordance with published tables of classification of goods and services.

向商标局提交《商标注册申请书》1份、商标图样1份；以颜色组合或者着色图样申请商标注册的，应当提交着色图样，并提交黑白稿1份；不指定颜色的，应当提交黑白图样。

For each application for trademark registration, [the applicant] should submit to the Trademark Office one copy of the *Application for Trademark Registration* and one copy of the trademark drawing. [An applicant] who applies for trademark registration of a combination of colors or a colored drawing should submit the colored drawing and one black and white copy [of the drawing]. If no color is specified, [the applicant] should submit a black and white drawing.

[…]

[…]

以三维标志申请商标注册的，应当在申请书中予以声明，说明商标的使用方式，并提交能够确定三维形状的图样，提交的商标图样应当至少包含三面视图。

[An applicant] who applies for trademark registration of a three-dimensional symbol should declare this in the application, explain the ways of using the trademark, and submit a drawing from which the three-dimensional shape can be determined. The trademark drawing for submission should at least include a three-sided view.

第五十二条

商标评审委员会审理不服商标局驳回商标注册申请决定的复审案件，应当针对商标局的驳回决定和申请人申请复审的事实、理由、请求及评审时的事实状态进行审理。

Article 52

In adjudicating a re-examination case [brought by a party] unconvinced by the Trademark Office's decision to reject [his][30] application for trademark registration, the Trademark Review and Adjudication Board should carry out the adjudication by focusing on the Trademark Office's rejection decision, the facts of the applicant's application for re-examination and his reasons and requests [for the application], and the state of facts at the time of the review.

商标评审委员会审理不服商标局驳回商标注册申请决定的复审案件，发现申请注册的商标有违反商标法第十条、第十一条、第十二条和第十六条第一款规定情形，商标局并未依据上述条款作出驳回决定的，可以依据上述条款作出驳回申请的复审决定。商标评审委员会作出复审决定前应当听取申请人的意见。

Where, in adjudicating a re-examination case [brought by a party] unconvinced by the Trademark Office's decision to reject [his] application for trademark registration, the Trademark Review and Adjudication Board discovers that the trademark for which registration is applied violates Article 10, Article 11, Article 12, or Article 16 Paragraph 1 of the *Trademark Law* and that the Trademark Office did not make a rejection decision in accordance with the aforementioned provisions, [the Board] may render, in accordance with the aforementioned provisions, a re-examination decision to reject the application. The applicant's opinions should be heard before the Trademark Review and Adjudication Board renders its re-examination decision.

备注2:

Note 2:

《中华人民共和国商标法》[31]

***Trademark Law of the People's Republic of China*[32]**

第十二条

Article 12

以三维标志申请注册商标的，仅由商品自身的性质产生的形状、为获得技术效果而需有的商品形状或者使商品具有实质性价值的形状，不得注册。■

Where [a person] applies for a registered trademark for a three-dimensional symbol, a shape that is merely created by the nature of the goods, a shape of the goods that is necessary to obtain technical effects, or a shape that gives the goods substantive value must not be registered. ■

* 此案例的中文引用是：《克里斯蒂昂迪奥尔香料公司诉国家工商行政管理总局商标评审委员会商标申请驳回复审行政纠纷案》，《中国法律连接》，第9期，第69页（2020年6月），*亦见于*斯坦福法学院中国指导性案例项目，中文指导性案例（CGC114），2020年6月，https://cgc.law.stanford.edu/zh-hans/guiding-cases/guiding-case-114。
案例原文载于：《最高人民法院网》，http://www.court.gov.cn/fabu-xiangqing-216761.html。*亦见*《最高人民法院关于发布第22批指导性案例的通知》，2019年12月24日公布，同日起施行，http://rmfyb.chinacourt.org/paper/images/2020-01/15/03/2020011503_pdf.pdf。除非另有说明，否则所有注释和"CGCP备注"均由中国指导性案例项目添加。

** The citation of this translation of this Guiding Case is: 《克里斯蒂昂迪奥尔香料公司诉国家工商行政管理总局商标评审委员会商标申请驳回复审行政纠纷案》(*Parfums Christian Dior S.A. v. The Trademark Review and Adjudication Board of the State Administration for Industry and Commerce, An Administrative Case Concerning a Re-examination to Reject a Trademark Application*), 9 China Law Connect 69 (June 2020), *also available at* Stanford Law School China Guiding Cases Project, English Guiding Case (EGC114), June 2020, http://cgc.law.stanford.edu/guiding-cases/guiding-case-114.

The original, Chinese version of this case is available at《最高人民法院网》(www.china.gov.cn), http://www.court.gov.cn/fabu-xiangqing-216761.html. *See also* 《最高人民法院关于发布第22批指导性案例的通知》(*Notice of the Supreme People's Court on the Release of the 22nd Batch of Guiding Cases*), issued on and effective as of Dec. 24, 2019, http://rmfyb.chinacourt.org/paper/images/2020-01/15/03/2020011503_pdf.pdf.

This document was prepared by CHEN Yi, Audrey Xin Shen, Nathan Harpainter, Dimitri Phillips, and Dr. Mei Gechlik. Minor editing, such as splitting long paragraphs, adding a few words included in square brackets, and boldfacing the headings, was done to make the piece more comprehensible to readers. Any "CGCP Notes" and any footnotes and endnotes, unless otherwise stated, 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 title of the document "《商标国际注册马德里协定》" is translated herein as "*Madrid Agreement Concerning the International Registration of Marks*" in accordance with the title of the English version of the document appearing on the website of the World Intellectual Property Organization, at https://wipolex.wipo.int/en/treaties/textdetails/12599.

[2] For more information about this office, see *infra* note 9.

[3] 此指导性案例所依据的最终判决（即：《再审判决》，注释16）明确引用"2014年5月1日施行"的《商标法实施条例》。见《中华人民共和国商标法实施条例》，2002年8月3日由国务院通过和公布，2002年9月15日起施行，并于2014年4月29日修订，2014年5月1日起施行，http://www.sipo.gov.cn/zcfg/zcfgflfg/flfgsb/xzfg_sb/1063526.htm。

[4] The final judgment upon which this Guiding Case is based (i.e., *Retrial Judgment*, *infra* note 22) explicitly cites the *Implementing Regulation of the Trademark Law* that is "effective as of May 1, 2014". *See* 《中华人民共和国商标法实施条例》(*Implementing Regulation of the Trademark Law of the People's Republic of China*), passed and issued by the State Council on Aug. 3, 2002, effective as of Sept. 15, 2002, revised on Apr. 29, 2014, effective as of May 1, 2014, http://www.sipo.gov.cn/zcfg/zcfgflfg/flfgsb/xzfg_sb/1063526.htm.

[5] The name "克里斯蒂昂迪奥尔香料公司" is translated herein as "Parfums Christian Dior S.A." in accordance with the English name appearing on the company's facebook page, at https://www.facebook.com/pages/Parfums-Christian-Dior-SA/110042332403865.

[6] For more information about the international registration of this trademark, see the record in a database of the World Intellectual Property Organization, at https://www3.wipo.int/branddb/en/showData.jsp?ID=MAD.1221382.

[7] The title of the document "《商标国际注册马德里协定有关议定书》" is translated herein as "*Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks*" in accordance with the title of the English version of the document appearing on the website of the World Intellectual Property Organization, at https://wipolex.wipo.int/zh/treaties/textdetails/12603.

[8] The name "世界知识产权组织国际局" is translated herein as "the International Bureau of the World Intellectual Property Organization" in accordance with the English name appearing in the *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks* (*see id*).

[9] The name "国家工商行政管理总局商标局" is translated herein as "the Trademark Office of the State Administration for Industry and Commerce" in accordance with the English name appearing on the website of the Ministry of Commerce of the People's Republic of China, at http://english.mofcom.gov.cn/article/lawsdata/chineselaw/200211/20021100050683.shtml. Due to government restructuring in late 2018, the office is now named "国家知识产权局商标局" ("the Trademark Office of the China National Intellectual Property Administration"). For more information, see the description available at http://sbj.cnipa.gov.cn/sjjs.

[10] The name "国家工商行政管理总局商标评审委员会" is translated herein as "the Trademark Review and Adjudication Board of the State Administration for Industry and Commerce" in accordance with the English name appearing on the website of the Ministry of Commerce of the People's Republic of China, at http://english.mofcom.gov.cn/article/lawsdata/chineselaw/200211/20021100050683.shtml. Due to government restructuring in late 2018, the Board no longer exists and its responsibilities are now covered by the Trademark Office of the China National Intellectual Property Administration. For more information, see the description available at http://sbj.cnipa.gov.cn/sjjs.

[11] The decision is "商评字〔2016〕第13584号决定书". *See Retrial Judgment*, *infra* note 22.

[12] According to Article 3 Paragraph 3 of the *Implementing Regulation of the Trademark Law of the People's Republic of China*, "[an applicant] who applies for trademark registration of a three-dimensional symbol should […] submit a drawing from which the three-dimensional shape can be determined. The trademark drawing for submission should at least include a three-sided view".

Dior Company's application was not submitted with a three-sided view of the applied-for trademark. Later, in order to emphasize that it was applying for a three-dimensional trademark, the company supplemented a three-sided view of the applied-for trademark to meet the requirement stated in the aforementioned provision.

[13] 一审判决书尚未找到，有可能已被排除在公布之外。

[14] 二审判决书尚未找到，有可能已被排除在公布之外。

[15] 该裁定书尚未找到，有可能已被排除在公布之外。

[16] （2018）最高法行再26号行政判决，2018年4月26日由最高人民法院作出，全文载于斯坦福法学院中国指导性案例项目网站，http://cgc.law.stanford.edu/zh-hans/judgments/spc-2018-zui-gao-fa-xing-zai-26-administrative-judgment（以下简称"《再审判决》"）。

[17] The first-instance judgment has not been found and may have been excluded from publication.

[18] The second-instance judgment has not been found and may have been excluded from publication.

[19] The text reads "提出再审申请" ("applied [...] for a retrial"). Article 199 of the *Civil Procedure Law of the People's Republic of China* provides, *inter alia*, that a party who considers an effective judgment or ruling to be erroneous may apply to the court at the next higher level for a retrial. *See*《中华人民共和国民事诉讼法》(*Civil Procedure Law of the People's Republic of China*), passed on, issued on, and effective as of Apr. 9, 1991, amended three times, most recently on June 27, 2017, effective as of July 1, 2017, http://www.moj.gov.cn/Department/content/2018-12/25/357_182594.html.

[20] This ruling has not been found and may have been excluded from publication.

[21] The text reads "提审" ("bring [a case] up [to an upper-level court] for adjudication"). Article 198 Paragraph 2 of the *Civil Procedure Law of the People's Republic of China* provides, *inter alia*, that if the Supreme People's Court finds an error in a judgment or ruling rendered by a lower-level court and the judgment or ruling has already come into effect, the Supreme People's Court has the authority to adjudicate the case itself or to direct the lower-level court to conduct a retrial. *See* 《中华人民共和国民事诉讼法》(*Civil Procedure Law of the People's Republic of China*), *supra* note 19.

[22] (2018) 最高法行再26号行政判决 ((2018) Zui Gao Fa Xing Zai No. 26 Administrative Judgment), rendered by the Supreme People's Court on Apr. 26, 2018, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/spc-2018-zui-gao-fa-xing-zai-26-administrative-judgment (hereinafter "*Retrial Judgment*").

[23] 本部分的内容完全基于《再审判决》（见注释16）。通常指导性案例与其所依据的最终判决之间存在一些差异，这反映了最高人民法院在指导性案例制作过程中所作出的编写（见本期刊之前出版的双语指导性案例），但在此指导性案例中没有这样显而易见的差异。

[24] The content of this section is completely based on the *Retrial Judgment* (*see supra* note 22). Usually, there are some differences between a Guiding Case and the final judgment upon which the Guiding Case is based, reflecting the Supreme People's Court's editorial input during the preparation of the Guiding Case (*see* all bilingual Guiding Cases published in earlier issues of this journal), but no such differences are readily apparent in this Guiding Case.

[25] 《再审判决》，注释16。

[26] *Retrial Judgment*, *supra* note 22.

[27] In China's administrative law, the term "administrative counterparty" ("行政相对人") refers to any individual or organization whose rights and interests are affected by an administrative act. *See, e.g.*, 方世荣 (FANG Shirong), 《论行政相对人》 (On Administrative Counterparties), (中国政法大学出版社 2000年版) (China University of Law and Political Science Press, 2000).

[28] 见注释3。

[29] *See supra* note 4.

[30] The terms "he", "him", and "his" as used herein are, unless the context indicates otherwise, gender-neutral terms that may refer to "she", "her", "it", and "its".

[31] 此指导性案例所依据的最终判决（即：《再审判决》，注释16）明确引用2013年修正的商标法。在当前《商标法》有效版本中第十二条维持不变。见《中华人民共和国商标法》，1982年8月23日通过和公布，1983年3月1日起施行，经四次修正，最新修正于2019年4月23日，2019年11月1日起施行，http://www.sipo.gov.cn/zcfg/zcfgflfg/flfgsb/fl_sb/1140931.htm。

[32] The final judgment upon which this Guiding Case is based (i.e., *Retrial Judgment*, *supra* note 22) explicitly cites the *Trademark Law* as amended in 2013. Article 12 remains the same in the currently effective version of the law. *See* 《中华人民共和国商标法》 (*Trademark Law of the People's Republic of China*), passed and issued on Aug. 23, 1982, effective as of Mar. 1, 1983, amended four times, most recently on Apr. 23, 2019, effective as of Nov. 1, 2019, http://www.sipo.gov.cn/zcfg/zcfgflfg/flfgsb/fl_sb/1140931.htm.

News and Events* | 新闻和活动*

February 2020 | Dr. Mei Gechlik Participates in a Conference Table Discussion Hosted by the Chief Intellectual Property Officers Council of The Conference Board

On February 18, 2020, Dr. Mei Gechlik gave a presentation to the Chief Intellectual Property Officers Council of the Conference Board. She first gave a brief introduction to the use of Guiding Cases ("GCs") in China, placing particular emphasis on the role of GCs in IP disputes and the implications of these cases for the implementation of the *U.S.–China Economic and Trade (Phase One) Agreement*. Following this introduction, Dr. Gechlik addressed questions from the attendees regarding the future development of GCs in China and important strategic considerations for U.S. companies.

Founded in 1916, the Conference Board is a global, independent business membership and research association working in the public interest. The Chief Intellectual Property Officers Council of the Conference Board includes Chief Intellectual Property Officers and senior leaders in the IP field, many of whom represent well-known multinational corporations, such as Boeing and Intel.

2020年2月 | 熊美英博士出席世界大型企业联合会首席知识产权官委员会举办的圆桌讨论会

2020年2月18日，熊美英博士向世界大型企业联合会首席知识产权官委员会作出演讲。她首先简要介绍了指导性案例在中国的使用情况，特别强调了这些案例在解决知识产权纠纷中的作用，以及这些案例对执行《中美第一阶段经贸协议》的含义。之后，熊博士解答了与会者有关指导性案例在中国未来的发展，以及美国公司应具有的战略考虑的问题。

世界大型企业联合会成立于1916年，是一个致力于公众利益的全球性、独立企业会员制和研究的组织。世界大型企业联合会首席知识产权官委员会的成员包括首席知识产权官和知识产权领域的高层领导，其中许多人代表着诸如波音和英特尔等知名跨国公司。■

February 2020 | Dr. Mei Gechlik Talks with Student Members of the Society of International Affairs at Stanford

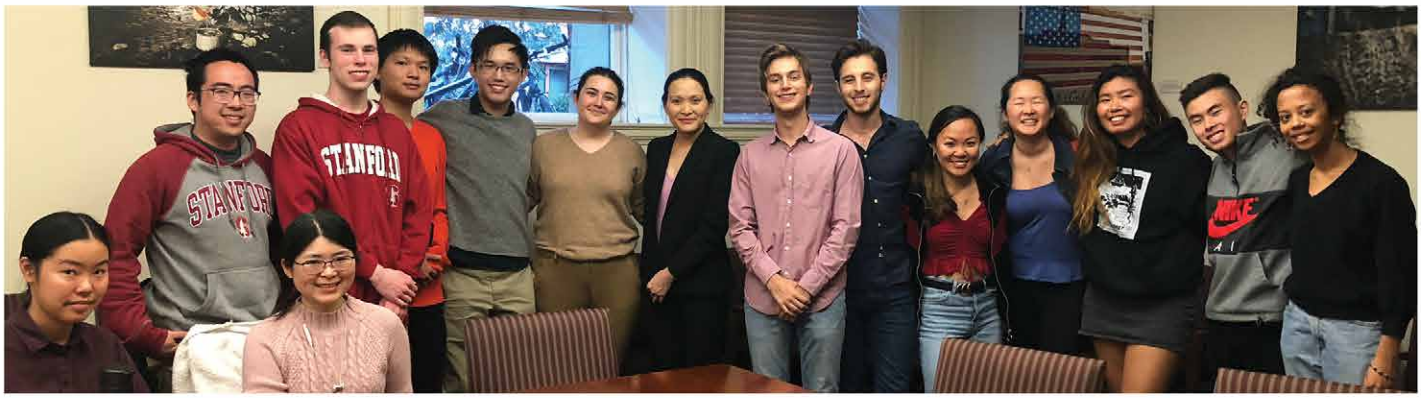
On February 19, 2020, Dr. Mei Gechlik participated in a discussion on recent political developments in Hong Kong hosted by the Society of International Affairs at Stanford ("SIAS"). SIAS is a decades-old student organization that seeks to inspire conversations about global affairs and engagement in international politics on campus.

Dr. Gechlik gave a brief overview of key legal and political events that have occurred over the past four decades to explain current affairs affecting both Hong Kong and Mainland China. Following this overview, attendees asked many questions and generally found the event helped deepen their understanding of the current situation in Hong Kong.

2020年2月 | 熊美英博士与斯坦福国际事务学会学生成员进行交谈

2020年2月19日，熊美英博士参与了由斯坦福国际事务学会（"SIAS"）主办的香港近期政治发展的讨论。SIAS是一个有着数十年历史的学生组织，旨在激发校内有关全球事务的讨论和对国际政治的参与。

熊博士简要概述了过去四十年发生的主要法律和政治事件，以解释影响着香港和中国大陆的时事。概述之后，与会学生提出了许多问题，并普遍认为此次活动有助于加深他们对香港当前状况的了解。■



Drawing on her experience in teaching constitutional law in Hong Kong before and after the handover in 1997, Dr. Gechlik explains to Stanford students the historical and legal contexts of the city's current situation

熊博士借鉴她在1997年回归前后在香港教授宪法的经验，向斯坦福大学的学生讲解了香港当前状况的历史和法律背景

June 2020 | Results of the Fall 2019 Student Writing Contest Announced

In June 2020, the China Guiding Cases Project (the "CGCP") team announced the winning pieces for the Second Stanford CGCP Student Writing Contest. A significant number of students participated, representing more than 300 colleges and high schools from 12 countries around the world.

The Second Stanford CGCP Student Writing Contest started accepting submissions in the Fall of 2019 and closed in early Feburary, amid the COVID-19 pandemic. We were touched by the fact that, despite the lockdown, friendships were forged and online collaborations were strengthened among many contestants.

After careful consideration, the CGCP selected one submission as a Golden Award winner, four submissions as Silver Award winners, and ten as Honorable Mentions (see the list below, with individuals or teams listed in alphabetical order of the author's (or the first co-author's) family name). All of the submissions demonstrated great efforts on the part of the authors. We have noticed an overall improvement in the quality of submissions. Although no contestants in the college group reached the high standards of the Golden Award, we strongly believe that future submissions will continue to improve.

See below the full text of the Golden Award winner's essay. To read the summaries of the Silver Award winners' submissions and/or to learn more about the next Stanford CGCP Student Writing Contest, please visit https://cgc.law.stanford.edu/student-writing-contest.

2020年6月 | 2019年秋季学生写作竞赛结果公布

2020年6月，中国指导性案例项目（China Guding Cases Project；"CGCP"）团队宣布了第二届斯坦福CGCP学生写作竞赛的获奖作品。来自12个国家的300余所大学和高中的许多学生参与了此次竞赛。

第二届斯坦福CGCP学生写作竞赛于2019年秋季开始接受作品提交，并于2020年2月初结束，正值"2019冠状病毒病"期间。尽管受到封锁影响，很多参赛者依然建立了友谊、加强了线上合作，我们深受感动。

经过仔细考虑，CGCP评选出一篇金奖作品、四篇银奖作品和十篇荣誉提名作品（见下表，得奖个人或团队按照作者或第一位合著者的姓氏首字母顺序排列）。所有提交的作品都展示了作者们的努力。我们注意到本届作品整体水平有所提高。尽管大学组中没有任何参赛者达到金奖的高标准，我们坚信未来提交的作品会越来越优秀。

请参阅下方金奖得主的作品。欲阅读银奖得主作品的摘要及/或了解更多关于下一届斯坦福CGCP学生写作竞赛，请访问：https://cgc.law.stanford.edu/student-writing-contest。■

* The China Guiding Cases Project, *News and Events*, 9 China Law Connect 77 (June 2020), http://cgc.law.stanford.edu/clc-9-202006. The original, English version of this piece was prepared by Liyi Ye and Jennifer Ingram; it was finalized by Nathan Harpainter and Dr. Mei Gechlik.

* 中国指导性案例项目，新闻和活动，《中国法律连接》，第9期，第77页（2020年6月），http://cgc.law.stanford.edu/zh-hans/clc-9-202006。英文原文由Liyi Ye和Jennifer Ingram撰写，并由Nathan Harpainter和Mei Gechlik博士最后审阅。本中文版本由李恺祺、叶里依和赵炜翻译，并由熊美英博士最后审阅。

College Group | 大学组

Silver Awards | 银奖

Junlan Lü
Sun Yat-sen University,
People's Republic of China

The Plight of Migrant Children:
A Quest for Equity in High School Education

Meiping Qin & Jia Tang
University of Chinese Academy of Social Sciences,
People's Republic of China

Innovation in Video Games and Intellectual Property Rights:
The Minecraft *Example*

Honorable Mentions | 荣誉提名

Qirui He
Peking University,
People's Republic of China

Hanwen Deng & Jia-Ying Ling
Hong Kong University of Science and Technology,
People's Republic of China

The Involvement of Business in Social Affairs Through the ESG Community:
The Exemplification of Social Innovation in the Context of 2019-nCOV

Yufeng He
Capital Normal University,
People's Republic of China

Lingjing Kong
Beijing University of Technology,
People's Republic of China

Xiao Xiao
Beihang University,
People's Republic of China

现代性为新型冠状病毒肺炎防治带来的困局

Peihang Li & Zia Reigh Calpito
University of California, Berkeley,
United States of America

Shadows of Coronavirus: Memes, Fears, and Xenophobia

Zixin Ling
Xiamen University Malaysia,
Malaysia

Yue Peng
China University of Political Science and Law,
People's Republic of China

Lack of Credibility in Chinese Charity Organizations and Countermeasures

Xuelian Xiao, Xue Zhao, & Zhangyan Pei
Guangxi Normal University,
People's Republic of China

服装成衣的著作权法保护路径探究

High School Group | 高中组

Golden Award | 金奖

Sihan Luo
Dulwich College Shanghai Pudong,
People's Republic of China
Makeup, Men, and Gender Inequality

Silver Awards | 银奖

Siyan Chen & Luwei Liang
No. 2 High School of East China Normal University,
People's Republic of China
Why Do We Need Universal Basic Income?

Tianxin Yin
Dulwich International High School Suzhou,
People's Republic of China
Regional Educational Inequity in China: Causes and Solutions

Honorable Mentions | 荣誉提名

Chenji Gu
Suzhou Foreign Language School,
People's Republic of China

Ruiyan Huang
Pearson College UWC,
Canada
From Ebola to Coronavirus: A Discussion of the Limitations and Flexibility of the Current Intellectual Property System

Mirae Kang
Wuxi United International School,
People's Republic of China
Hallyu, the Global Cultural Sensation: How Does Culture Affect Consumer Decisions?

Wendi Yang
American Heritage School Boca Delray,
United States of America
U.S. Welfare Reform: Adopting Universal Basic Income as an Alternative to U.S. Welfare Programs

Xiaotong Yang
Hio Tong Yeung
Majestic International College,
People's Republic of China
To What Extent Does the College Entrance Examination in China Promote Equity in Education

Wanran Zhou
Chongqing Foreign Language School,
People's Republic of China
Discovering Lifelong Learning: The Gateway from the Past to the Future

Sihan Luo

Makeup, Men, and Gender Inequality*

Sihan Luo
Dulwich College Shanghai Pudong,
People's Republic of China

For a long period of time, it has been considered taboo for men to wear makeup. The stigma surrounding this act has only begun to recede in recent years with transformations in pop culture. However, makeup use was not always limited to women. Men in ancient Egypt and Elizabethan England both used cosmetics for various reasons. In fact, makeup was only deemed "feminine" in the mid-1800s when Queen Victoria associated it with vanity. Affected by the views of the Church, people soon began to categorize makeup as something "for women only" while narrowing the definition of masculinity so that by the 20th century, makeup had become a strictly feminine product.[1]

This essay looks at the complex relationship men currently have with makeup, with a focus on heated debates in China over "soft masculinity". When new forms of masculinity arise, do they represent expanding concepts of gender? Or do new expressions (like men wearing makeup) simply reflect an increase in vanity among more members of society?

"Soft Masculinity" and Korean Pop Culture

Cosmetics like eyebrow pencils and lip tints are commonly used by South Korean males. Channel News Asia has reported that as of 2019, South Korean men are the world's biggest spenders on male beauty products.[2] This may be due to the popularity of *Kkonminam* ("Flower Boys") in South Korean pop culture. Along with makeup, the pop culture also promotes the idea of "soft masculinity", which Dr. Sun Jung of the Asia Research Institute defines as a "[hybridized] contemporary South Korean masculinity", constructed through the amalgamation of South Korea's "traditional Confucian *seonbi* masculinity", and "non-Korean global masculinities, such as metrosexual, kawaii […] and cool masculinities".[3]

Men who embody soft masculinity can effectively market themselves to certain female audiences, as they are considered "gentle, not aggressive […] and view women as equals".[4] Some men find that incorporating certain feminine traits into their identity allows many young women to identify with them more. The popularity of this "new" form of masculinity may further increase as hypermasculinity is deemed less attractive due to the widespread adoption of feminist principles.[5] In fact, the popularity of South Korean pop culture has already carried these "Flower Boys" abroad to neighboring countries like China.

Heated Debates in China

Korean pop culture has influenced the Chinese entertainment industry for quite some time. To continue appealing to Chinese audiences, new stars encompassing qualities of "soft masculinity" began appearing and eventually earned the name *xiaoxianrou* (literally "young fresh meat").

While some Chinese have responded positively to the appearance of the *xiaoxianrou* phenomenon, many have become concerned about the image of Chinese pop culture and angered by the fact that these "effeminate figures" are becoming role models for the younger generation in China. Some people in China are responding with opposition to this "masculinity crisis", such as a former teacher who started a camp in Beijing to train boys to become "alpha males".[6] A researcher on Chinese masculinity stated that redefining masculinity would affect "the reproduction of the nation and [the proper cultivation of] the next generation".[7]

The issue of "sissies" versus "macho men" burst into a widespread debate on social media when a boy band called New F4 was featured in Chinese Central Television's annual back-to-school special, which is mandatory viewing for over 100 million Chinese students and their parents. Many parents were frustrated by New F4's "effeminate" appearance, arguing that it made them bad role models for the nation's youth.[8] Several state-run media also condemned the stars, branding them "sissy pants" while also criticizing the taste of their supporters. An author for Xinhua News Agency even attempted to persuade people to "boycott this harmful culture".[9]

In contrast, *People's Daily* took a different stance on the matter, criticizing Xinhua's crude word choice while stating that modern society has "broadened the arena of aesthetic standards" and that there are "more facets to masculinity".[10] *China Women's Daily* agreed, emphasizing, "No matter what […] style or quality he or she chooses to present […] [it] doesn't stop [the individual] from being an excellent person".[11] Many also argue that the development of this new masculinity is tied to increases in the social and economic standing of women, as the emergence of

soft masculinity is heavily fueled by women's purchasing power. Men now feel more pressured to look after their appearance, something many women have had to do for generations. These debates highlight the reduction in gender inequality in China, as men are now more open to wearing makeup. However, the large amount of backlash that men wearing makeup and "soft masculinity" have received also shows how far out of reach gender equality still is.

What the Future Holds

China's debates over makeup and soft masculinity illustrate the strong impact gender socialization has on gender inequality. The term "gender socialization" generally refers to a process through which individuals are taught how they "should" behave in society based on the sex they were assigned at birth. In 2014, a survey conducted in India revealed that more male youth reportedly experience "gender socialization".[12] This can be seen from the findings that 47.2% of boys over the age of 12 and only 18% of girls of the same age were beaten by their parents, possibly indicating that the parents more readily assumed that boys are "tougher" and could better stand corporal punishment.

The gradual adoption of feminist ideals has eased the effects of gender socialization on females, but the effects of gender socialization on males remain strong. Thus, while females can more easily break gender norms to free themselves from gender socialization, their counterparts still face much difficulty. For example, when girls veer away from gender norms, they are considered tomboys, while boys are called "sissies" and labelled gay if they are not "masculine" enough.

Against the backdrop described above, it is encouraging to see that males are gradually breaking traditional norms in mainstream society. Chanel and Tom Ford both launched male cosmetics lines back in 2018, and male makeup gurus like Jeffree Star and James Charles have seen incredible success, with the latter named the first-ever male CoverGirl. According to CNN, the growth rates of sales of beauty and fashion products for men have been higher than those of women's products since 2010, and television shows like "Queer Eye" have helped introduce men to cosmetics.[13] David Yi, the founder of a men's beauty site, has expressed his hopes for Generation Z, saying, "They're now rethinking what masculinity means […] and painting your face […] doesn't make you any less [masculine]".[14] Yi also says redefining masculinity reduces "toxic masculinity" so that more men feel comfortable expressing their problems. This leads to less oppression of women in society, increasing their chances for equality.

These developments, in a way, reveal improvements in gender equality, as more people are having the courage to break traditional gender norms and are warming up to the idea of men using makeup as part of their daily routine.

Gender distinctions and gender ideals have seeped deep into the roots of society. While making it acceptable for all genders to wear makeup may reduce prejudice and corresponding poor treatment, it will not be enough to eradicate gender inequality completely. ■

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* This essay was written by Sihan Luo, the author of the original piece recognized for a Golden Award in the Second Stanford CGCP Student Writing Contest (Fall 2019), with editorial support provided by the China Guiding Cases Project (the "CGCP"). The focus of the editing process is to produce some necessary editing so as to improve the organization and delivery of the content, while keeping the author's main ideas and/or arguments.
The information and views set out in this essay are the responsibility of the author and do not necessarily reflect the work or views of the CGCP.

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骆思涵

化妆品、男性与性别不平等*

骆思涵
上海德威外籍人员子女学校（浦东）
中华人民共和国

长久以来，男士化妆一直被视为禁忌。近年，随着流行文化的转变，这种偏见才开始消退。然而，化妆品并不一直是女士专用。古埃及和英国伊丽莎白时期的男士都为了各种原因而使用化妆品。事实上，是到了十九世纪中叶，维多利亚女王将化妆与虚荣联系起来时，化妆品才被视为“女性化”。此外，受当时教会观点的影响，人们很快开始将化妆品归类为“仅限女士”专用，并将阳刚之气的定义逐渐限缩，而到了二十世纪，化妆品已完全成为女性用品。[1]

本文探讨目前男士与化妆品之间的复杂关系，并重点讨论中国国内对“软阳刚之气”的热议。当阳刚之气以新的形式出现，这是否代表了性别概念正在扩展？还是新的表达方式（如男士化妆）只反映了虚荣心理已在更多社会成员中出现？

“软阳刚之气”与韩国流行文化

韩国男性常常使用眉笔和唇彩等化妆品。据亚洲新闻频道报道，截至2019年，韩国男士购买男性美容产品所耗的费用是全球最高的。[2] 这可能是由于*Kkonminam*（“花美男”）在韩国流行文化中受欢迎所致。除化妆外，韩国流行文化还推广“软阳刚之气”的理念。亚洲研究学院Sun Jung博士把这一理念定义为融合了韩国“传统儒家先柔阳刚之气”和“非韩国的全球性阳刚之气，例如都市潮男、日本卡哇伊[...]和酷阳刚之气”而成的“[混合型]现代韩国阳刚之气”。[3]

表现出软阳刚之气的男士可以有效地向某些女士推销自己，因为他们被认为是“温柔、不具攻击性[…]，且平等看待女士”。[4] 一些男士发现，将某些女性特质融入自己的身份中，可以让许多年轻女士更加认同自己。由于女权主义原则被广泛接受，超阳刚之气被认为吸引力不大，因此这种新形式的阳刚之气可能会更加流行。[5] 事实证明，韩国流行文化的普及已将这些“花美男”带到了中国等邻国。

在中国的热议

韩国流行文化对中国娱乐业的影响已维持了一段时间。为了继续吸引中国观众，具备“软阳刚之气”的新星开始出现，并最终获得了“小鲜肉”的称号。

尽管一些中国人对“小鲜肉”现象的出现反应正面，但许多人关注中国流行文化的形象，并对这些“女人气的男人”正在成为中国年轻一代的榜样感到愤怒。一些中国人正对这种“阳刚之气危机”表示反对。例如，一位前任老师在北京开了一个训练营来训练男孩成为拥有强烈男子气概的“阿尔法男性”。[6] 一位专门研究中国阳刚之气的研究员表示，重新定义阳刚之气会影响“国家的繁衍生息和对下一代的[适当栽培]”。[7]

当中国中央电视台的年度返校特别节目（该节目强制要求全国超过一亿的学生和家长观看）中出现了一个名为“新F4”的男子乐队时，“娘娘腔”与“男子气概的男人”的问题在社交媒体上引起了广泛争议。许多家长对“新F4”“女性般”的外貌感到沮丧，认为这会给整个国家的青年树立一个坏榜样。[8] 一些官方媒体也谴责了这些明星，称他们为“娘炮”并批评了这些明星的支持者的品味。新华社的一位作者甚至曾试图说服人们去“抵制这种有害的文化”。[9]

相反，《人民日报》在此问题上却持有不同的立场。它批评了新华社的粗俗用词，同时指出现代社会已经“拓宽了审美标准”且“阳刚之气是多方面”的。[10] 《中国妇女日报》对此表示同意并强调：“无论他或她选择展现哪一种[...]风格或特质[...]，都不会妨碍其成为一个优秀的人”。[11] 许多人还认为，这种新型“阳刚之气”的发展也体现了妇女在社会和经济地位上的提高，这是由于妇女购买力大大推动了软阳刚之气的出现。现在，男士感到更有压力需要好好照顾自己的外表，而这正是许多女士几代人都必须做的事。以上争论也说明了，随着男性对化妆越来越接受，中国性别不平等的问题正在缓和。但是，对男性化妆和软阳刚之气的强烈反对也表明，性别平等仍然遥不可及。

未来的走向

中国有关化妆品和软阳刚之气的热议表明，性别社会化对性别不平等产生了很大影响。“性别社会化”指的是一个过程，而通过该过程人们被教导，根据其出生时被分配的性别他们在社会中“应”有什么行为。2014年，在印度进行的一项调查显示，相对于女性而言，更多男性青年经历了“性别社会化”。[12] 这从调查结果中可以看出：12岁以上的男孩中有47.2%的男孩曾被父母殴打，而同龄女孩中只有18%曾被父母殴打。这可能表明父母更容易认为男孩“更坚强”并更能忍受体罚。

女权理想主义的逐渐被接受减轻了性别社会化对女性的影响，但性别社会化对男性的影响仍然很强。

因此，尽管女性可以更轻松地打破性别规范并摆脱性别社会化，男性仍面临着许多困难。例如，当女孩偏离性别规范时，他们被视为假小子，而当男孩不够阳刚时，他们则会被称为“娘娘腔”或被标记为同性恋。

在上述背景下，令人欣喜的是，男性也逐渐打破主流社会的传统规范。香奈儿（Chanel）和汤姆•福特（Tom Ford）都于2018年推出了男性化妆品系列，而男性化妆大师如Jeffery Star和James Charles也都取得了令人难以置信的成功，后者也成为了首位登上女性时尚杂志《Cover Girl》的男性。根据美国有线电视新闻网（CNN），自2010年以来，男士美容和时尚产品的销量增长一直超过女士同类产品的销量增长，而像《Queer Eye》这样的电视节目有助于向男士介绍化妆品。[13] 一家男士美容网站的创始人David Yi对“Z世代”青年人寄予厚望。他说：“他们正在重新思考阳刚之气的含义[…]。为自己的脸部涂抹[…]并不会减少[阳刚味]”。[14] Yi也提到重新为阳刚之气作出定义可以减少“毒性阳刚之气”，使更多男士在表达自己的问题时感到自在。同时，这也会减少社会对女性的压迫，使她们有更多的平等机会。

这些发展在某程度上揭示了性别平等的改善，因为越来越多人有勇气打破传统的性别规范，并逐渐接受了男人在日常生活中使用化妆品的观念。

性别差异和性别理想在社会已根深蒂固。虽然让大众接受所有性别都可化妆会有助于减少偏见和相应的不良对待，但是这不足以完全消除性别不平等。■

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Watching in Silence
《静观》

CHEN Xuncheng

CHEN Xuncheng is a master of ceramic art in Guangdong Province, China. He was awarded the honorary title of "Young and Middle-aged Ceramic Artists Influencing China's Media in 2012" by the Chinese Business and Media Leaders Annual Conference. His different works have won numerous provincial and national awards, including "Gold Award in the 2012 China Collection of Top Ten Artistic Ceramics", "Gold Award in the 15th China Contemporary Ceramic Art Exhibition (Strongest Performance Category)", and "Gold Award in the 15th China Contemporary Ceramic Art Exhibition (Competition Category)".

Mr. Chen's works have been exhibited at various art exhibitions, festivals, and cultural exchange activities at home and abroad, including the 26th Asian Art Exhibition held in Korea, ST.ART International Exhibition of Chinese Contemporary Ceramic Art held at the Today Art Museum in Beijing, the Chinese and American Ceramic Art Exhibition held at the University Art Museum of Guangzhou Academy of Fine Arts, and the 2017 Chinese New Year Arts and Culture Festival held at the Carreau du Temple in Paris. Mr. Chen's works have been collected by famous art galleries in China, including the China Arts and Crafts Museum, the China Ceramics Museum, the Guangdong Museum of Art, and the Jiangxi Arts and Crafts Museum, as well as by many private organizations in mainland China, Hong Kong, and Japan. Mr. Chen has organized many individual exhibitions and has been conducting academic research on ceramic culture. He has published more than ten collections of his works, including *CHEN Xuncheng's Ink* and *Zen of Life*.

Mr. Chen is a member of the China Arts and Crafts Association and the China Ceramics Industry Association. He plays important leadership roles, serving as the deputy director of the Ceramic Art Committee of the Art Committee of Guangdong Artists Association, the director of the Guangdong Ceramics Association, the director of the Chinese Painting Institute of Guangdong Province, and the director of the Guangdong–Hong Kong–Macao Greater Bay Area Artist Union. At the same time, Mr. Chen is also a distinguished research fellow at the Guangzhou Painting Academy, an expert for the "National Cultivation Program for Young Painters in Guangzhou", and an adjunct professor at Guangdong Polytechnic Normal University.

陈训成

陈训成是中国广东省陶瓷艺术大师，曾获得由中国企业领袖与媒体领袖年会颁发的“影响中国2012年度媒体关注的中青年陶艺家”荣誉称号。他的不同作品获得广东省省级和中国国家级奖项，包括“中国收藏2012年十大艺术陶瓷名品金奖”、“第十五届中国当代陶瓷艺术展实力派类别金奖”、“第十五届中国当代陶瓷艺术展竞赛类别金奖”等。

陈训成的作品曾在海内外多项艺术展、艺术节和文化交流活动中展出，包括韩国举行的第26届亚洲艺术展、北京今日美术馆“就地出发”中国当代陶瓷艺术国际大展、广州美术学院大学城美术馆“中美陶艺家作品展”和法国巴黎三区圣殿礼堂2017巴黎新春中法文化艺术节等。他的作品被中国工艺美术馆、中国陶瓷博物馆、广东美术馆、江西省工艺美术馆等国内著名艺术馆，以及日本、香港及国内多家私人机构所收藏。陈训成多次举办个人展览并不断探索陶瓷文化学术高度，并出版了《陈训成水墨》、《生活的禅》等十来册作品集。

陈训成是中国工艺美术家协会、中国陶瓷工业协会的会员，并担任广东省美术家协会艺术委员会陶艺委员会副主任、广东省陶瓷协会理事、广东省中国画学会理事、粤港澳大湾区美术家联盟理事等要职。同时，他还是广州画院特聘研究员、“广州国家青苗画家培育计划”课题组专家，以及广东技术师范大学客座教授。