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## China

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## China

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## China

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This article summarizes selected international legal developments during 2016 in China.

### I. Trademark Law Development<sup>1</sup>

2016 witnessed remarkable progress in Chinese trademark law enforcement, including strengthened protection of well-known trademarks, reduced burden of proof for well-known trademarks, application of the anti-dilution principle, fact-specific determination of similarity and relatedness of goods, prohibition of bad faith registration, protection for famous movie and character names, and courts' emphasis on consistent trials and adjudication standards.

#### A. PROTECTION OF WELL-KNOWN TRADEMARKS

To provide better protection to well-known trademarks, the China Trademark Office ("CTMO"), the Trademark Review and Adjudication Board ("TRAB"), and courts have reduced the burden of proof necessary to prove that a trademark is well-known, and applied the anti-dilution principle.

##### 1. *Burden of Proof for Well-Known Trademarks*

Trademark Law<sup>2</sup> identifies several factors for determination of well-known trademarks, including trademark reputation; the duration of trademark use; the duration, extent, and geographical scope of trademark promotion; and trademark protection efforts.<sup>3</sup> Foreign companies had experienced substantial evidentiary difficulty in proving their trademarks are well-known in China; they were often required to submit audited economic

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\* Athena Jiangxiao Hou, General Counsel of Fuyao Glass America Inc., and Rong Zhou, attorney with Podo Legal LLC, edited this article.

1. Jingbing Li and Yanling Zheng, senior partner and partner of ZY Partners respectively, authored this section.

2. See *Zhonghua Renmin Gongheguo Shangbiao Fa* (中华人民共和国商标法) [Trademark Law of the People's Republic of China] (promulgated by Standing Committee of Nat'l People's Congress, Aug. 23, 1982, effective Mar. 1, 1983), art. 14, 1983 Standing Comm. Nat'l People's Cong. Gaz. [hereinafter Trademark Law].

3. *Id.*

data, tax certificates, and industry rankings. In 2016, the CTMO, the TRAB, and courts provided relief to well-known trademarks that have acquired high brand awareness through long-term use in China.

For instance, the CTMO recognized “耐克” (Nai Ke, the Chinese equivalent of NIKE) as a well-known trademark for clothing and shoes in a trademark opposition case.<sup>4</sup> The Beijing Intellectual Property Court (“Beijing IP Court”) recognized Nike’s swoosh logo as a well-known trademark for clothing, shoes, and hats in a trademark invalidation case.<sup>5</sup> That decision was upheld on appeal.<sup>6</sup>

In trademark invalidation lawsuits filed by Procter & Gamble Company (“P&G”) against a Chinese cosmetics company<sup>7</sup>, the Supreme People’s Court (“SPC”) recognized P&G’s trademarks “玉兰” (Yu Lan, the Chinese equivalent of OLAY) and “玉兰油” (Yu Lan You, the Chinese equivalent of OLAY Oil) as a well-known trademarks of cosmetics. Significantly, the SPC instructed courts to conduct a comprehensive evidentiary evaluation in determining the well-known status. Information including sales volume, sales contracts, advertising contracts, invoices, profits, and tax payment certificates was not requisite evidence to prove the well-known status of a trademark.

## 2. *The Anti-Dilution Doctrine*

A well-known trademark in China is entitled to anti-dilution protection, and thus identical or similar trademarks may be prohibited from being used or registered for dissimilar goods and services.<sup>8</sup> A “well-known trademark” is one that is well-known in the relevant public sector, which includes the consumers of relevant goods and services, and other business operators that are closely related to the sales and marketing of such goods and services.<sup>9</sup>

In 2016, courts granted anti-dilution protection to well-known trademarks in several cases. The SPC affirmed a decision granting the well-known status to “宝马” (Bao Ma, the Chinese equivalent of BMW), and extended

4. Nike Innovate C.V. v. Taiwan Nailuo Screw Industry Co., Ltd., (2016) Shang Biao Yi Zi No. 0000031588 Decision (Sept. 6, 2016) (China).

5. Nike Innovate C.V. v. TRAB & Quanzhou City Luo Jiang Chao Sheng Shoes Co., Ltd., (2015) Jing Zhi Xing Chu Zi No. 4577 Administrative Judgment (Dec. 7, 2015) (China).

6. Nike Innovate C.V. v. TRAB & Quanzhou City Luo Jiang Chao Sheng Shoes Co., Ltd., (2016) Jing Xing Zhong No. 4133 Administrative Judgment (Oct. 25, 2016) (China).

7. The Procter & Gamble Company v. TRAB & Shantou City Weishida Cosmetics Co., Ltd., (2016) Zui Gao Fa Xing Zai Nos. 12 and 13 Administrative Judgments (May 19, 2016) (China).

8. See Trademark Law *supra* note 2, art. 13; Interpretation of the Supreme People’s Court on Several Issues Concerning the Application of Law to the Trial of Cases of Civil Disputes over the Protection of Well-Known Trademarks, art. 9.

9. Interpretation of Supreme People’s Court on Several Issues Concerning the Application of Laws in Trying Civil Cases Involving Trademark Disputes No.32 Judicial Interpretation of 2002, (promulgated Oct. 12, 2009, effective Oct. 16, 2002), St Council Gaz, art. 8. (China).

anti-dilution protection to the trademark for garments.<sup>10</sup> In another case, the SPC affirmed a decision granting the well-known status to “法拉利” (Falali, the Chinese equivalent of Ferrari), and extended protection to the trademark for eyeglasses.<sup>11</sup>

To determine whether to extend protection to a trademark for goods in different fields, the SPC directs courts to consider the degree of association of goods covered by the trademark at issue. In practice, the TRAB and courts generally will not provide unlimited cross-classification protection to well-known trademarks. Before they decide whether a trademark will dilute the distinctiveness of a well-known trademark, the TRAB and courts consider whether the goods covered by the competing trademarks are related, and whether the respective public sectors overlap.

In an opposition appeal case involving the “PHOTOSHOP” trademark for computer software products and the competing mark “PHOTOSHOP” for cosmetics, the Beijing Higher People’s Court considered the overlap of the respective public sectors of the competing marks, the similarity of the trademarks, and the distinctiveness and fame of Adobe Systems Incorporated’s trademark “PHOTOSHOP.” The court concluded that the registration and use of the opposed mark for cosmetics would damage the close relationship between Adobe’s “PHOTOSHOP” trademark and computer software products, and thus dilute the distinctiveness of this well-known trademark.<sup>12</sup>

In another opposition appeal case where the opposed mark was “星巴克” (Xing Ba Ke, the Chinese equivalent of Starbucks) for computerized carving machines, the Beijing Higher People’s Court recognized the well-known status of Starbucks’s trademark “星巴克” for coffee products and café services. However, the court refused to extend anti-dilution protection to Starbucks because the respective goods and services covered by the trademarks were not related, and therefore misleading the relevant public to associate the opposed mark with Starbucks was unlikely.<sup>13</sup>

In practice, it is challenging to show the likelihood of confusion and dilution. The TRAB and courts may reach different conclusions on these issues.

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10. Bayerische Motoren Werke Aktiengesellschaft v. TRAB, PAN Guanghua, & U.S.A. Treasured Horse Dress Limited, (2016) Zui Gao Fa Xing Shen No. 336 Administrative Ruling (March 24, 2016) (China).

11. FERRARI S.P.A. v. TRAB & Beijing Bailihao Glasses Co., Ltd., (2016) Zui Gao Fa Xing Shen No. 305 Administrative Ruling (Mar. 31, 2016) (China).

12. Adobe Systems Incorporated v. TRAB & Beijing Lian Tuo Chuang Xiang Technology Development Co., Ltd., (2016) Jing Xing Zhong No. 1377 Administrative Judgment (Aug. 29, 2016) (China).

13. Starbucks Corp. v. TRAB & MENG Xiangzeng, (2016) Jing Xing Zhong No. 1920 Administrative Judgment (August 24, 2016) (China).

## B. SIMILAR GOODS AND SERVICES

Until recent years, the CTMO, TRAB, and courts have relied on the CTMO Similar Goods and Services Classification Form (the “Classification Form”) to determine the similarity of goods and services. In recent years, the TRAB and courts have included in their similarity determination other factors including functions, manufacturers, sales channels, and consumers related to the goods and services.

In 2016, the SPC published two exemplar cases applying a more flexible and reasonable standard to determine similarity. In *Blancpain*,<sup>14</sup> the SPC held, “Under the circumstances where the cited trademark bears [a] relatively high degree of distinctiveness[,] and enjoys [a] certain reputation or where the opposition petitioner has shown apparent bad faith of free-riding, the Court shall adopt [a] more flexible standard in determining similarity of goods.” There, the opposed mark “Blancpain” and registered mark “BLANCPAIN” cover goods in different classes as stated in the Classification Form—clothing, shoes, and leather belts versus clocks and watches respectively. However, the SPC held there was similarity, because the goods involved are closely associated in terms of functions, sales channels, and consumers.

In another case involving a registered mark “益达” (YiDa, the Chinese equivalent of EXTRA) for chewing gum and an opposed mark “益达” (the Chinese equivalent of EXTRA & its Pinyin formation) for toothpaste, the SPC found similarity in goods because the functions, sales modes, and consumption characteristics of these goods were closely related, and consumers cannot distinguish the source of goods under these marks.<sup>15</sup>

## C. PROHIBITION OF BAD FAITH REGISTRATIONS

In 2016, the CTMO, TRAB, and courts became more active in prohibiting bad faith registrations. The CTMO applies Article 7 and Article 10.1 (7) of Trademark Law to preclude bad faith registrations. To determine the existence of bad faith, the CTMO examines several factors including similarity of marks, the registered trademark’s fame and influence, the overlap of goods or services, and the bad faith conduct of copying or plagiarizing the original trademark. Where the opposed trademark is a copy or imitation of the more influential trademark and the trademark similarity causes consumer confusion, the CTMO typically finds bad faith.

The TRAB and courts apply a different article—Article 44.1 of Trademark Law—to strike down bad-faith filings, especially in cases where a later-filed trademark applicant commits rampant squatting activities, and

14. BLANCPAIN SA v. TRAB & CHEN Weixiong, (2016) Zui Gao Fa Xing Zai No. 10 (June 24, 2016) (China).

15. Wm. Wrigley Jr. Co. v. TRAB & Guangzhou Qian Cai Cosmetics Co., Ltd., (2016) Zui Gao Fa Xing Zai No. 71 (Sept. 26, 2016) (China).

files several challenges.<sup>16</sup> The TRAB and courts hold that such bad faith acts disturb normal trademark administration order, injure public interests, and constitute “registration acquired by any other illicit means” under Article 44.1.

Most significantly, in a trademark opposition case filed by an individual to challenge the trademark 飘柔 (Piao Rou, the Chinese equivalent of Rejoice),<sup>17</sup> the Beijing IP Court affirmed the application of Article 44.1, and detailed how to determine attempts to obtain a trademark registration “with any other illicit means” under Article 44.1. The three-judge panel, led by The Honorable Su Chi, the president of Beijing IP Court, expressed the court’s commitment of “no-tolerance” towards bad faith filings. The decision was affirmed on appeal.<sup>18</sup>

#### D. FAMOUS MOVIE AND CHARACTER NAMES

Trademark protection of merchandising rights is not expressly provided in Chinese law. Nevertheless, in a series of opposition appeals in connection with “驯龙高手 HOW TO TRAIN YOUR DRAGON” and “功夫熊猫 KUNG FU PANDA” in 2015, the Beijing First Intermediate People’s Court and the Beijing Higher People’s Court have explicitly held that merchandising rights to the name of famous movies and characters are protectable as prior rights to a trademark registration.<sup>19</sup>

However, in subsequent opposition appeals related to “功夫熊猫 KUNG FU PANDA” filed by the same applicant,<sup>20</sup> the same trial court dismissed DreamWorks Animation L.L.C.’s claim related to merchandising rights on the ground that such rights are not explicitly set out in Chinese law. The court held such famous movie and character names are protectable legal property rights because the intellectual input and labor investments created commercial value and business opportunities.

In recent final judgments in the four opposition appeals related to “功夫熊猫 KUNG FU PANDA,” the Beijing Higher People’s Court did not address merchandising rights. Rather, it held “功夫熊猫 KUNG FU PANDA” is a famous movie name to be protected under the Anti- Unfair

16. Trademark Law, *supra* note 2, art. 44.1.

17. HE Dun v. TRAB and The Procter & Gamble Company, (2015) Jing Zhi Xing Chu Zi No. 2474 Administrative Judgment (Dec. 30, 2015) (China).

18. HE Dun v. TRAB and The Procter & Gamble Company, (2016) Jing Xing Zhong No. 1606 (June 30, 2016) (China).

19. DreamWorks Animation L.L.C. v. TRAB and Suzhou Snail Digital Technology Co., Ltd., (2014) Yi Zhong Xing (Zhi) Chu Zi No. 8924 Administrative Judgment (Jan. 19, 2015) (China). DreamWorks Animation L.L.C. v. TRAB and HU Xiaozhong, (2015) Gao Xing (Zhi) Zhong Zi Nos. 1968, 1969 and 1973 Administrative Judgments (Aug. 20, 2015).

20. DreamWorks Animation L.L.C. v. TRAB, Shanghai Weipu Apparel Co., Ltd., (2014) Yi Zhong Xing (Zhi) Chu Zi Nos. 4270, 4272, 4273, 4274, 4275, 4276 and 4277 Administrative Judgments (Sept. 20, 2015). DreamWorks Animation L.L.C. v. TRAB, Shanghai Weipu Apparel Co., Ltd., (2014) Yi Zhong Xing (Zhi) Chu Zi No. 7986 Administrative Judgment (Nov. 20, 2015).

Competition Law.<sup>21</sup> The court directed two factors be considered in defining the scope of protection: name popularity and social influence, and the likelihood of confusion.<sup>22</sup>

### E. CONSISTENT TRIAL AND ADJUDICATION STANDARDS

Chinese court opinions are not binding precedents. In cases involving similar fact scenarios and statutes, the TRAB and courts often render inconsistent decisions. In order to apply consistent adjudication standards in intellectual property cases, the SPC established the Research Base of Intellectual Property Case Guidance within the Beijing IP Court. In 2016, the Beijing IP Court emphasized the following precedent set by cases with similar facts in trademark disputes, and identified in its opinions the precedent upon which it relied.

In *Gap (ITM) Inc. v. the TRAB*,<sup>23</sup> which involved Gap's trademark application of 盖璞内衣 (Gai Pu Nei Yi, the Chinese equivalent of GAP BODY), the SPC criticized the TRAB for inconsistent decisions in cases involving similar facts under the pretext of case-by-case review. The SPC encouraged courts to apply principles of fairness through adjudication consistency and predictability.

## II. Draft Amendments to Anti-Unfair Competition Law<sup>24</sup>

In February 2016, the Legislative Affairs Office of the State Council released the Draft Amendments to Anti-Unfair Competition Law for public comments.<sup>25</sup> The Anti-Unfair Competition Law has not been amended since it was promulgated in 1993. Set forth below are highlights of the proposed amendments relating to intellectual property.

### A. THE CURRENT LAW

The current thirty-three-article Anti-Unfair Competition Law is supplemented by several regulations and judicial interpretations, including

21. See Anti-Unfair Competition Law of the People's Republic of China (promulgated by the Third Sess. Of the Standing Comm. Of the Eighth National People's Congress, Sept. 2, 1993) art. 5 (lawinfochina) (China).

22. *DreamWorks Animation L.L.C. v. TRAB and Beijing Wei Bo Intellectual Property Agent Co., Ltd.*, (2016) Jing Xing Zhong Nos. 2012 and 3808 Administrative Judgment (November 3, 2016). *DreamWorks Animation L.L.C. v. TRAB and Shanghai Weipu Apparel Co., Ltd.*, (2016) Jing Xing Zhong No. 3508 Administrative Judgment (Nov. 3, 2016). *DreamWorks Animation L.L.C. v. TRAB and Shanghai Tobacco Group Co., Ltd.*, (2016) Jing Xing Zhong No. 2307 Administrative Judgment (Nov. 3, 2016).

23. *Gap (ITM) Inc. v. TRAB*, (2016) Zui Gao Fa Xing Zai No. 7 Administrative Judgment (Mar. 22, 2016).

24. This section is authored by Helen Xiaoqin Xu, partner of Allbright Law Offices.

25. See Notice of The Legislative Affairs Office of The State Council on Publication of the Anti-Unfair Competition Law (Draft Amendments) for Public Comments (Feb. 25, 2016) (China) [hereinafter Draft Amendments].

*Several Regulations on the Prohibition of Acts of Unfair Competition Involving the Passing-off of a Name, Packaging or Trade Dress Peculiar to Well-Known Merchandise*,<sup>26</sup> and the *Interpretations of the Supreme People's Court on Some Issues Concerning the Application of Law in the Trial of Civil Cases Involving Unfair Competition*.<sup>27</sup> These supplementary regulations and rules provide administrative enforcement authority, definitions of key terms, and practical guidance for handling related civil actions.

The Anti-Unfair Competition Law intersects with several other laws. The Anti-Unfair Competition Law and Trademark Law both prohibit counterfeiting of registered trademarks. The Anti-Unfair Competition Law specifically refers to the Trademark Law concerning enforcement against counterfeiting registered trademarks. Where the act of unfair competition is passing-off of a registered trademark, the statutory damages provision in the Trademark Law applies. The Anti-Unfair Competition Law provides alternative relief to brand owners when no remedy is available under intellectual property laws.

## B. HIGHLIGHTS OF THE DRAFT AMENDMENTS

The Draft Amendments contain thirty-five articles, including revisions of thirty articles, the addition of nine new articles, and the removal of seven articles.

The Draft Amendments expand the current list of unfair competition conduct by introducing a broadly defined concept “business identifier.” A business identifier is “a sign used to distinguish a commodity producer or business operator, including but not limited to a well-known commodity’s name, packaging, decoration and shape, as well as a company name, abbreviation, trade name, main body of domain names, webpage.”<sup>28</sup>

Abuse of business identifiers to create “market confusion” is prohibited. The concept of market confusion, or confusion as to the source of goods, refers to “the misunderstanding by the relevant public as to the producer or marketer of a commodity, or to the existence of certain link between the producers or marketers of commodities.”<sup>29</sup> This amendment signifies a shift of focus from regulating businesses and the market to protecting consumers.

To be consistent with other laws, the Draft Amendments also remove existing paragraphs which address registered trademarks, indications of

26. Zhonghua Renmin Gongheguo Gongdhang Xingxheng Guanlijiu Ling (中华人民共和国国家工商行政管理局令) [Order Of The State Administration For Industry And Commerce Of The People's Republic Of China] (promulgated by St. Industry & Commerce Admin., July 6, 1995, effective July 6, 1995), <http://www.chinacourt.org/law/detail/1995/07/id/23002.shtml>.

27. Interpretation Of The Supreme People 's Court On Several Issues Concerning The Application Of Law In Civil Cases Of Unfair Competition (promulgated by Supreme People's Court, Jan.12, 2007, effective Feb.1, 2007), <http://www.chinacourt.org/law/detail/2007/01/id/114671.shtml>.

28. Draft Amendments, *supra* note 25, art.5.

29. *Id.*

product quality, and misleading advertising, which are each respectively addressed by the Trademark Law, Product Quality Law, and Advertising Law.

The Draft Amendments provide new and reinforced enforcement measures. Enforcement authorities previously had no means to regulate modifications or variations of a company name. Under the Draft Amendments, the enforcement authorities shall have the power to impose penalties where a company uses a third party's registered or unregistered well-known trademark in its company name and creates market confusion. The authorities are empowered to order the company to file a company name registration modification within one month. In serious circumstances, the offending party's business license can be revoked.

The Draft Amendments are currently pending for public comments. The State Council will, after having adopted the Draft Amendments, submit them to the Standing Committee of the National People's Congress for review.

### **III. China Adopts a Record-Filing System For Foreign Direct Investments in Industry Sectors Not on the "Negative List"<sup>30</sup>**

All foreign direct investments into China and subsequent changes were previously subject to case-by-case review, and prior approval by the Ministry of Commerce or its local branches (the "MOFCOM"). No joint venture contracts and articles of associations of foreign investment enterprises ("FIE") could take effect until approval was granted by MOFCOM. Such an extensive MOFCOM approval system caused substantial delays and uncertainty to the closing of foreign direct investment ("FDI") transactions. Various MOFCOM branches and officials also exercised frequent and inconsistent discretion to direct changes to the substantive terms of the joint venture contracts and articles of association.

To facilitate FDI, and streamline regulatory approval process, a "negative list" based record-filing system has been initially tested in Shanghai free trade zones since 2014. Under the pilot record-filing system, FDI in industry sectors not restricted or prohibited by the Catalogue of Industries for Guiding Foreign Investment, as amended in 2015 and to be updated from time to time (the "Catalogue"), or those in encouraged sectors but subject to limitations on foreign ownership or management control ("negative list") were subject to the record filing system, while those on the "negative list" subject to special entry administrative measures, continue to be subject to the MOFCOM approval requirements. Following successful implementation of the record-filing process in three additional free trade zones in Tianjin, Guangdong, and Fujian, MOFCOM decided to roll out a nationwide record-filing system, and grant foreign investors "pre-establishment national treatment" subject to a "negative list."

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30. This section is authored by Wenxiong Hunter Qiu, partner of Zhong Lun Law Firm.

On September 3, 2016, related FIE Laws were amended to the effect that the establishment of any FIE in any industry sector not subject to special entry administrative measures (*i.e.* not on the “negative list”) will no longer be subject to the approval requirements of MOFCOM.<sup>31</sup> Effective October 1, 2016, FDI in industry sectors not on the “negative list” shall follow the record-filing requirement. This is a significant change in China’s FDI regulatory regime.<sup>32</sup>

To implement amendments to the FIE related laws, on October 8, 2016, MOFCOM enacted the Provisional Administrative Measures for the Record-filing of the Incorporation and Change of Foreign-invested Enterprises, the Order of the Ministry of Commerce of the People’s Republic of China [2016] No. 3 (the “Provisional Measures”). The Provisional Measures set forth its scope of application; the timing, process, and filing requirements; and the authorities in charge of the filing. The key provisions concerning the “negative list” based record-filing system in the Provisional Measures are in the draft Foreign Investment Law which MOFCOM published on January 19, 2015 for public comments.

#### A. NATURE OF THE RECORD-FILING SYSTEM

Under the new record-filing system, completion of filing with MOFCOM is not a prerequisite for registration with the State Administration of Industry and Commerce (“SAIC”) and other government agencies. In contrast, an applicant in the previous approval system was required to obtain an FIE approval certificate before it could register with the SAIC to obtain a business license. Furthermore, the effective date of the shareholders’ agreement and articles of association will no longer be conditional upon the completion of the record-filing; it can start from the date the agreements are executed and approved by their respective board or shareholders’ resolutions.

#### B. DETAILS OF THE RECORD-FILING SYSTEM

Filings of incorporation and change of FIEs are submitted to MOFCOM’s provincial branches in the respective jurisdictions.<sup>33</sup> Under the Provisional Measures, to establish a new FIE, the record-filing can be completed either before, or within 30 days after, issuance of a business license by the SAIC.<sup>34</sup> To change an existing FIE, record-filing can be completed within 30 days. An FIE or its investor can fill out required

31. MAYER BROWN JSM, *China Revises Inbound Foreign Investment Laws* (Sep. 9, 2016).

32. *Id.*

33. Waishang Touzi Qiye Sheli Ji Biangeng Beian Guanli Zhanxing Banfa (外商投资企业设立及变更备案管理暂行办法) [Interim Administrative Measures for the Record-filing of the Incorporation and Change of Foreign-invested Enterprises] (promulgated by Ministry of Commerce of the People’s Republic of China, effective Oct. 8, 2016), <https://hk.lexiscn.com/law/law-english-1-2951857-T.html> [hereinafter Provisional Measures].

34. *Id.*

information, and submit required documents in a record-filing system established by MOFCOM.<sup>35</sup> MOFCOM only makes a prima facie review of the filed information, and determines whether the record-filing applies.<sup>36</sup> Upon submission of all required information, MOFCOM has three working days to complete the record-filing, and to notify applicants of its decision.<sup>37</sup> An FIE or its investor can obtain a filing receipt from MOFCOM, which is not required for registration with the SAIC, and other government agencies.<sup>38</sup> Therefore, record-filing is for informational purpose. This is fundamentally different from the previous approval system of MOFCOM.

### C. APPLICATION SCOPE

The Provisional Measures apply to incorporation and change of FIEs in industries not subject to special administrative measures for foreign direct investments (*i.e.* not on the “negative list”).<sup>39</sup> Industry sectors subject to special administrative measures include sectors prohibited or restricted for foreign investment and sectors encouraged for foreign investments but subject to ownership restrictions or management control restrictions under the Catalogue for the Guidance of Foreign Investment Industries (the “Catalogue”) — the so-called negative list.<sup>40</sup> FIEs in industries on the “negative list” remain subject to MOFCOM review and approval. The Catalogue includes over 300 industries where foreign investment is encouraged and merely thirty-eight industries where foreign investment is restricted. The transition to the record-filing system is expected to eliminate the need to seek MOFCOM approval for most FDI transactions.

### D. UNRESOLVED ISSUES

The record-filing system represents a modest but practical and effective approach to improve China’s FDI regulatory regime. Certain conflicts between the FIE related laws and the Company Law remain to be resolved. Regulation of FDI into restricted industry sectors through variable interest entities needs to be addressed. These issues will likely be addressed in the forthcoming Foreign Investment Law currently under deliberation by the legislature. Successful implementation of the record-filing system will lay a solid foundation for the enactment of the Foreign Investment Law.

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35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. Catalogue for the Guidance of Foreign Inv. Indus, Announcement No.22 of the Nat’l Dev. & Reform Comm’n & the Ministry of Commerce, (effective Apr. 10, 2015). (China).

#### IV. Foreign Investment in the Chinese Real Estate Market<sup>41</sup>

The real estate industry is a pillar industry in China, and is essential to the development of its national economy. Changes in the regulation of foreign investment in the real estate industry reflect changes of China's macroeconomic policy. Since 2006, Chinese economy has been on a track of rapid growth, then became slow running, and then increased to steady growth. Accordingly, Chinese policy on foreign investment in the real estate industry evolved from close scrutiny to gradual liberalization.

China's booming real estate industry has attracted tremendous interest of FDI since 2000. Foreign-invested real estate companies, with funding from offshore banks and shareholders, caused a dramatic increase in the total volume of the foreign loans in China's real estate industry.<sup>42</sup> During 2006 through 2013, MOFCOM and other government authorities issued a number of polices and regulations to restrict foreign investment in the real estate market. Since 2014, the real estate industry experienced intensive readjustment, and government authorities formulated a series of policies aiming to lessen administrative intervention, and to loosen foreign investment restrictions.

As explained more fully in section III, on October 8, 2016, the MOFCOM promulgated the Provisional Measures, permitting certain FIEs to use a record-filing system. For those FIEs, prior approval of MOFCOM and/or its local branches is no longer required in most instances.<sup>43</sup> If a proposed FIE is in a restricted industry sector or an "encouraged" industry (which entails equity and senior management related requirements), prior approval by MOFCOM and/or its local branches is required. If a proposed FIE does not fall within the aforesaid categories, then the online record-filing procedure applies. Pursuant to the 2015 Catalogue, foreign investment for construction of golf courses and villas is prohibited, while foreign investment for development, construction, and operation of all other types of real estate projects is not restricted or prohibited.

After the promulgation of the Provisional Measures, real estate FIEs, which engage in development, construction, and operation of real estate projects other than golf course or villa projects follow the online record filing procedure, rather than MOFCOM's prior approval procedure. According to the Provisional Measures,<sup>44</sup> incorporation filings can be completed either before, or after the issuance of the business license by SAIC.

41. This section is authored by Nancy Liping Zhang and Cindy Yusu Wu, partner and attorney of Junhe Law Offices respectively.

42. During the first half of 2006, the newly borrowed foreign debt by foreign invested real estate was \$1.735 billion, a year-on-year growth of 203.32%; by the end of June 2006, the foreign debt by foreign invested real estate accounted for 92.23% of the foreign debt by the whole real estate industry in China.

43. See Provisional Measures, *supra* note 33, art 2.

44. *Id.* arts. 5, 6.

Although the Provisional Measures of record-filing system dramatically simplifies the process under which MOFCOM and its local branches administer the incorporation of real estate FIEs, other regulations applicable to real estate FIEs are not automatically revoked. The completion of the foreign exchange registration is a prerequisite step for real estate FIEs to open a capital account, to inject the capital funds, and to convert foreign currency into Chinese currency. Real estate FIEs may be subject to certain operational requirements, including the thresholds for obtaining loans or converting foreign currency loans into Chinese currency; the requirement of a “principal of self-use” for purchasing real estates by foreign companies and individuals; and the requirement of a “principal of commercial presence” for purchasing not-for-self-use real estates in China.<sup>45</sup> Before MOFCOM and other government authorities issue clear guidance on these issues, there may be variation in local practices. Companies are advised to closely monitor legislation and policy developments in these areas.

## V. Carbon Emission Trading System<sup>46</sup>

To reduce greenhouse gas emissions, China announced it will roll out a nationwide market-based carbon emission-trading system (“ETS”) in early 2017.<sup>47</sup> Because China is the world’s largest carbon emitter and a key player in global trade, the establishment of an ETS in China is a milestone for international carbon trading.

A standard ETS, or “cap and trade” system is a market-based mechanism in which a regulating body establishes an upper limit (“cap”) on the total amount of emissions for a limited compliance period from the regulated entities.<sup>48</sup> Initially, a number of “allowances” equal to the cap will be distributed to the regulated entities through auction and allocation.<sup>49</sup> Regulated entities are required to report their emissions and submit equivalent allowances at the end of the compliance period. When there is a deficit in allowances, the entities generally are permitted to buy extra allowances on the market to meet their emission reduction obligation. Alternatively, they can purchase carbon offsets, which are generated by emission reducing activities not regulated by the cap. The design of such a scheme is expected to leverage private sector forces to reduce future growth

45. See Circular on the Standardization of Access to and Administration of Foreign Investment in the Real Estate Market (Jian Zhu Fang [2006] No.171).

46. This section is authored by Rong Zhou.

47. John Chen Liu, *Assembling China’s Carbon Markets: The Carbons, the Business and the Marginalized*, ASH CENTER FOR DEMOCRATIC AND INNOVATION, HARVARD KENNEDY SCHOOL (Jun. 2016), [http://ash.harvard.edu/files/ash/files/assembling\\_chinas\\_carbon\\_markets.pdf?m=1466106853](http://ash.harvard.edu/files/ash/files/assembling_chinas_carbon_markets.pdf?m=1466106853).

48. Virgilio, N. & S. Marshall, *Foreign Carbon Strategies in Climate Change Mitigation: Confronting Challenges Through on-the-Ground Experience*, THE NATURE CONSERVANCY, Arlington, Virginia, 11 (2009), <https://www.forestcarbonpartnership.org/sites/forestcarbonpartnership.org/files/Documents/PDF/Feb2010/MCFC-medressingle1.pdf>.

49. *Id.*

in carbon dioxide (“CO<sub>2</sub>”) emissions from the regulated sectors such as power, industry, and manufacturing.

China’s Twelfth Five-Year Plan (2011-2015) (“12th FYP”), approved by the National People’s Congress, provides that China will establish statistical and verification systems for greenhouse gas emissions, and gradually establish a carbon emissions trading system.<sup>50</sup> The 12th FYP sets forth a target to reduce the CO<sub>2</sub> emissions per unit of gross domestic product by 17%.<sup>51</sup> Since 2014, pilot emission trading projects have been launched across the provinces of Guangdong and Hubei, and in the cities of Beijing, Shanghai, Shenzhen, Chongqing and Tianjin.<sup>52</sup>

These trading projects account for almost 4 million tons of carbon emission quotas, making China the world’s second largest carbon trading market, following the European Union’s ETS.<sup>53</sup> According to the *Environmist China Carbon Market Research Report 2016*, “carbon emissions trading in China, while still facing significant challenges, is exceeding performance expectations. The pilots have achieved 95% compliance rates, there is growing interest and attention from non-pilot areas, and capacity for businesses to engage in ETS is increasing.”<sup>54</sup>

In early 2016, the National Development and Reform Commission issued a notice on earnestly implementing the key work of the national carbon ETS. It outlined a three-stage plan for developing a national ETS: 1) the preparatory stage during which the ETS infrastructure be completed by the end 2016; 2) the second stage during which a national ETS be introduced and perfected to achieve stable operation from 2017 to 2020; and 3) the third stage for ETS expansion and exploring integration in the international carbon market.<sup>55</sup>

While there are still many factors to evaluate in the development of the ETS, a major concern appears to be the determination of a balance between administrative regulation of carbon prices and the free rein of market economy principles. Furthermore, a most critical area for ETS building is legal infrastructure. Effective implementation of a nationwide scheme will require a strong legal framework to ensure compliance and enforcement. It

50. Fei Teng, *Status of China’s Regional Trading Programs: Progress and challenge*, Institute of Energy, ENVIRONMENT AND ECONOMY OF TSINGHUA UNIVERSITY (Aug. 13, 2013), [http://unfccc.int/files/focus/mitigation/application/pdf/status\\_of\\_chinas\\_regional\\_trading\\_programs.pdf](http://unfccc.int/files/focus/mitigation/application/pdf/status_of_chinas_regional_trading_programs.pdf).

51. *Id.*

52. Han Guoyi et al., *China’s Carbon Emission Trading: An Overview of Current Development* pg 23, STOCKHOLM ENVIRONMENT INSTITUTE (2012).

53. Ilario D’Amato, *China Will Launch World’s Biggest Carbon Market In 2016* (Sept. 2014), <https://www.theclimategroup.org/news/china-will-launch-worlds-biggest-carbon-market-2016>.

54. U.N.DEV.PROGRAMME, *Launch of China Carbon Market Research Report* (Feb. 23 2016), <http://www.cn.undp.org/content/china/en/home/presscenter/articles/2016/02/23/launch-of-china-carbon-market-research-report-2016.html>.

55. *Environmist China Carbon Market Research Report 2016*, pg 24, ENVIRONMIST (2015), [http://carbonpulse.com/wpcontent/uploads/2016/02/2016nvironmist\\_China\\_Carbon\\_Market\\_Research\\_Report\\_En\\_20160217\\_CW.pdf](http://carbonpulse.com/wpcontent/uploads/2016/02/2016nvironmist_China_Carbon_Market_Research_Report_En_20160217_CW.pdf).

is important to have uniform rules on monitoring, reporting, and verification nationwide. Given the economic inequality within China, balancing the interests of the highly developed regions against those in the low-income western regions is an important consideration in building a nation-wide carbon market.

The establishment of a national carbon market in 2017 will be just a beginning of China's efforts in moving forward to a market-based approach in regulating carbon emissions. The Chinese government is determined to establish an effective national ETS. It hopes to develop the largest carbon-trading scheme and expects it to connect to the other ETSs to make the impact worldwide. While uncertainties remain, the effectiveness of China's national ETS is likely to mark a new era post the Paris Climate Conference, and would be crucial in mitigating the effects of carbon emissions for the earth.

## VI. Maritime Law<sup>56</sup>

In December 2015, the SPC issued two judicial interpretations on the Maritime Law. The two judicial interpretations, effective on March 1, 2016, are the Provisions on Jurisdiction in Maritime Proceedings (“Provisions on Jurisdiction”)<sup>57</sup> and the Provisions on Scope of Cases in Maritime Proceedings (“Provisions on Scope of Cases”).<sup>58</sup> In addition, on February 28, 2015, the SPC issued a judicial interpretation on ship arrest and judicial sale (“Provisions on Ship Arrest and Judicial Sale”), which became effective on March 1, 2015.<sup>59</sup>

### A. JURISDICTION

The Provisions on Jurisdiction change the geographical jurisdiction of Dalian Maritime Court and Wuhan Maritime Court in accordance with the needs of maritime economic development and maritime adjudication work.<sup>60</sup> Most notably, the Provisions on Jurisdictions extend the jurisdiction of Dalian Maritime Court to the Tumen River of Jilin Province and the Songhua River of Heilongjiang Province.<sup>61</sup>

56. This section is authored by Qian Xie, attorney with Wong Fleming, P.C.

57. Zui Gao Ren Min Fa Yuan Guan Yu Hai Shi Su Song Guan Xia Wen Ti De Gui Ding (最高人民法院关于海事诉讼管辖问题的规定) Provisions of the Supreme Peoples Court on Jurisdiction in Maritime Proceedings] (promulgated by the Supreme People's Court, Dec. 28, 2015, effective Mar. 1, 2016) (China). [hereinafter Provisions on Jurisdiction].

58. Provisions of the Supreme Peoples Court on Scope of Cases in Maritime Proceedings] (promulgated by the Supreme People's Court, Dec. 28, 2015, effective Mar. 1, 2016) (China). [Hereinafter Provisions on Scope of Cases].

59. Zui Gao Ren Min Fa Yuan Guan Yu Kou Ya Yu Chuan Bo Shi Yong Fa Lv Ruo Gan Wen Ti De Gui Ding (最高人民法院关于扣押与拍卖船舶使用法律若干问题的规定) [Provisions of the Supreme People's Court on Ship Arrest and Judicial Sale] (promulgated by the Supreme People's Court, Dec. 8, 2014, effective Mar. 1, 2015).

60. Provisions on Jurisdiction, *supra* note 57, art. 1.

61. *Id.*

The Provisions on Jurisdiction specify the principles for determining jurisdiction in maritime administrative cases.<sup>62</sup> Local maritime courts shall be the trial courts in administrative cases. The Higher People's Court where a maritime court is located shall review appeals of judgments and rulings made by a local maritime court.<sup>63</sup>

The Provisions on Jurisdiction clarify the rules on jurisdictional challenges to prevent forum shopping.<sup>64</sup> Rulings on jurisdiction can be appealed to the local Higher People's Court. The new rule will ensure that all maritime-related cases are heard by maritime courts whose expertise in maritime and admiralty law makes them better candidates to adjudicate such cases, thereby enhancing the consistency and quality of court decisions in maritime cases.<sup>65</sup>

## B. SCOPE OF CASES

The Provisions on Scope of Cases expand the scope of cases that can be heard by the maritime courts, setting out a total of 112 types of cases that can be brought.<sup>66</sup> The cases are divided into the following categories: maritime tort disputes, maritime contract disputes, ocean and sea navigable waters exploitation and environmental protection related disputes, maritime administrative cases, and maritime procedural matters.<sup>67</sup> Article 3 of the Provisions on Scope of Cases specifically includes disputes concerning underwater dredging construction, land reclamation, and artificial islands, which are particularly notable in light of the recent territorial disputes in the South China Sea.<sup>68</sup>

## C. SHIP ARREST AND JUDICIAL SALE

### 1. *Judicial Sale of an Arrested Ship under Bareboat Charter*

The Maritime Law does not address whether a petitioner is entitled to petition for a judicial sale of a ship when the ship is arrested in connection with claims against the bareboat charterer. Article 3 of the Provisions on Ship Arrest and Judicial Sale clarifies that an arrested ship may be sold through a judicial sale in connection with claims against the bareboat charterer, even if the ship is on bareboat charter and the owners are not liable for the claims.<sup>69</sup> To better protect their interests, ship owners must ensure that a bareboat charter contract contains express language requiring

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62. *Id.* at art. 2.

63. *Id.*

64. *Id.* at art. 3.

65. *Id.*

66. Provisions on Scope of Cases, *supra* note 58.

67. *Id.*

68. *Id.* at art. 3.

69. Provisions of the Supreme People's Court on Ship Arrest and Judicial Sale, *supra* note 59, art. 3.

the bareboat charterer to indemnify the owner if the ship is arrested for claims resulting from the charterer's operation of the ship.

## 2. *Amount of Security*

Under Article 73 and Article 74 of the Special Maritime Procedural Law, the petitioner for ship arrest shall provide security to the court in the form of a cash deposit, guarantee, or collateral, which will be paid to the respondent as compensation in the event that the arrest is later determined to be wrongful.<sup>70</sup> The Special Maritime Procedural Law does not provide clear guidance for calculating the amount of security. The Provisions on Ship Arrest and Judicial Sale clarify that the amount of security shall be assessed so as to reflect the costs and expenses of ship maintenance during the arrest; the loss of earnings during the arrest; and the cost incurred by the respondent in providing security for the release of the ship.<sup>71</sup> If the security subsequently proves to be insufficient to cover the respondent's potential loss, the court may order the petitioner to provide additional security.<sup>72</sup>

## 3. *Maintenance Costs of an Arrested Ship*

The Provisions on Ship Arrest and Judicial Sale clarifies that either the ship owner or the bareboat charterer is responsible for all costs of the maintenance of the arrested ship.<sup>73</sup> If the ship owner or bareboat charterer fails to maintain the ship, the court may appoint a third party or the petitioner who applies for ship arrest to maintain the ship. The costs incurred will be deducted from the proceeds of the judicial sale.<sup>74</sup>

## 4. *Judicial Sale*

The Provisions on Ship Arrest and Judicial Sale provides the sale of an arrested ship be conducted by an auction committee of a maritime court. The court will conduct an appraisal and set a reserve price for the ship before the public auction.<sup>75</sup> At the first attempt of the public auction, the reserve price must be no less than eighty percent of the appraisal value.<sup>76</sup> If the public auction fails after two attempts, the court may arrange for a private sale of the ship at no less than fifty percent of the appraisal value.<sup>77</sup>

70. Zhong Hua Ren Min Gong He Guo Hai Shi Su Song Te Bie Cheng Xu Fa (中华人民共和国海事诉讼特别程序法) [Special Maritime Procedural Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Congress, Dec. 25, 1999, effective Jul. 1, 2000), art. 73 and art. 74.

71. Provisions of the Supreme People's Court on Ship Arrest and Judicial Sale, *supra* note 59, art.5.

72. *Id.*

73. *Id.* art.7.

74. *Id.*

75. *Id.* art. 12.

76. *Id.*

77. *Id.* art. 13.

Finally, the court can sell the ship at less than fifty percent of the appraisal value, provided that over two thirds of registered creditors give their consent.<sup>78</sup> If all the above attempts failed, the court may release the ship from arrest.<sup>79</sup>

##### 5. *Order of Priority for Distribution of Sale Proceeds*

After deduction of the legal expenses incurred in connection with the arrest and sale of the ship as well as expenses incurred for the common interests of all claimants, the remaining sale proceeds shall be distributed in the following order:<sup>80</sup>

1. Claims secured by maritime lien resulting from claims for crew wages, crew personal injury, port dues, salvage remuneration, and tort liability for collision and other damage;
2. Claims secured by possessory lien;
3. Claims secured by mortgage;
4. Other claims in connection with the sale of the ship.

In addition, the Provisions on Ship Arrest and Judicial Sale relax the registration requirement for judicial sale. Under the new Provisions, petitioners who apply for a judicial sale of the ship are permitted to directly participate in the distribution of the sale proceeds without having to register their claims with the court.<sup>81</sup>

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78. *Id.* art. 14.

79. *Id.*

80. *Id.* art. 22.

81. Provisions of the Supreme People's Court on Ship Arrest and Judicial Sale, *supra* note 59, art.18.

