

环球法律评论 Global Law Bulletin

二〇一四年七月第二期 | July 2014 (Second Issue)

- 01 中国公司及并购法律动向——年度综述（2013-2014）
PRC Corporate and M&A Legal Development – Yearly Roundup
(2013-2014)
- 08 2014 年新版中国（上海）自由贸易试验区负面清单亮点简析
Major Highlights for Special Administrative Measures (Negative
List) on Foreign Investment Access to the China (Shanghai)
Pilot Free Trade Zone (2014)
- 13 最高院典型案例介绍——《舌尖上的中国》信息网络传播权纠纷
案评析
Introduction to a Representative Case from the Supreme
People's Court: Right of Dissemination via Information Network
in A Bite of China Dispute Case Analysis



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中国公司及并购法律动向— 年度综述（2013-2014）

作者：郭林军

继三十年的迅速增长之后，就 GDP 而言中国已成为第二大经济体。但经济发展代价巨大，中国目前面临着一些社会和经济问题，如贫富分化、出口减缓、缺乏新经济驱动力、基础设施投资过度等。新一届中央政府推出了一系列重大社会经济措施以解决核心问题，推动经济持续发展。我们在本文中总结了中国在过去一年中并购领域及外商直接投资领域的部分重大法律动向。

A. 国务院设立上海自由贸易试验区

2013 年 9 月 29 日，中国政府正式在上海设立中国（上海）自由贸易试验区（“自贸区”）。根据全国人大常委会、国务院、国家工商总局发布的一系列规章制度，自贸区将

PRC Corporate and M&A Legal Development – Yearly Roundup (2013-2014)

By: Linjun (Lawrence) GUO

After three decades of rapid growth, China has become the second largest economy in terms of GDP. However, economic development has come at a heavy price, with China facing certain structural problems, and serious social and economic issues such as an ever widening gap between the rich and the poor, a need for new economic driving forces in the wake of a major export slowdown, and excessive infrastructure investments. The new central government has launched some important social and economic measures to tackle many of these key issues, and to push the economy forward towards a more sustainable development. We summarize in this short essay several significant legal developments in mergers and acquisitions and foreign direct investment in China.

A. LAUNCH OF SHANGHAI (PILOT) FREE TRADE ZONE BY THE STATE COUNCIL

On 29 September 2013, the Chinese government formally established the China (Shanghai) Pilot Free Trade Zone (the “FTZ”) in Shanghai. Pursuant to a collection of rules and regulations issued by the Standing Committee of the National People's Congress, the State Council and the State

实行如下政策：

- 上海市人民政府于 2013 年 9 月 29 日发布了外商投资负面清单。该负面清单所列行业之外的外商投资项目不再需要进行外商投资审批，而只需到自贸区相关政府部门备案。

- 更多投资领域向外国投资者开放。自贸区内服务领域享受更为宽松的政策。如允许设立外资专业健康医疗保险机构、外商投资资信调查公司、中外合资人才中介机构、中外合作经营性教育培训机构和其他服务行业。外国投资者还可以设立外商独资国际船舶管理企业、娱乐场所和医疗机构。

自贸区设立背后体现出国务院的政策导向：尝试对监管制度进行重大改革，寻求简化、放宽监管审批要求。传统上这种审批要求过于繁杂，企业负担较重。如果这次尝试取得成功，国务院将来很可能在其他省份和地区进行相同的监管制度改革（包括负面清单制度），但这仍有很长一段路要走。

Administration of Industry and Commerce, the following policies have been implemented in the FTZ:

- Shanghai Municipal People's Government issued the Negative List for foreign investment on September 29, 2013. With the exception of industries listed in the Negative List, examination and approval for foreign investment projects involving any otherwise permitted industries are exempt from foreign investment approval, requiring instead to be filed for record with the relevant governmental authorities.

- Additional investment fields have been opened up for foreign investors. In the FTZ, foreign investment in service sectors enjoy liberalized policies. For instance, foreign-funded professional health and medical insurance institutions, foreign-funded credit investigation companies, Sino-foreign equity joint ventures for talent intermediary services, Sino-foreign contractual education and training institutions and other service industries may now be established by foreign investors. Foreign investors may also establish wholly foreign-owned enterprises engaged in international ship management, entertainment venues and medical institutions.

A policy drive of the State Council behind the backdrop of the FTZ is to test a drastic regulatory reform of streamlining and liberalizing regulatory approval requirements in China. Traditionally, such approval requirements have been numerous and burdensome on enterprises. If this experiment proves successful, it is possible that the State Council may adopt the regulatory reform (including the Negative List rule) in other provinces and localities in the future. However, this pilot program is still in its infancy, and there is a long way to go before we will know the result.

B. 公司设立的出资制度改革

中国大幅度放宽公司法中的公司注册资本出资制度。2013年12月28日，全国人大常委会颁布了修改后的《中华人民共和国公司法》。国务院及主管公司登记机关已对上述改革进一步贯彻落实。

公司法的主要修改如下：

- 取消了对公司注册资本最低限额的限制；
- 实收资本不再作为工商登记机关的登记项目；
- 不再限制货币出资比例；
- 不再限制缴足出资的期限。股东可自行约定认缴出资额、出资方式、出资期限等并记载于公司章程。

2014年6月17日商务部发布了《关于改进外资审核管理工作的通知》，该通知取消了对外商投资的公司首次出资比例、货币出资比例、出资期限及最低注册资本的限制，不再审核注册资本的缴付情况。但外商投资企业仍需符合注册资本和投资总额的最低比

B. REFORM OF EQUITY CAPITAL CONTRIBUTION RULES FOR COMPANY INCORPORATION

The equity capital contribution rules under the Company Law have been extensively liberalized by the top Chinese legislative branch. On December 28, 2013, the Standing Committee of the National People's Congress issued the amended Company Law of the People's Republic of China (the "Company Law"). These changes have been further implemented by the State Council and the competent company registration authority.

The main changes of the Company Law are as follows:

- Minimum company equity capital contribution requirements for incorporation of a company have been removed;
- Actual subscribed capital contributions into the company no longer need to be registered with the registration authority;
- The stipulation about the percentage of the equity capital of a company to be made in cash has been removed;
- The time period during which the shareholders shall fully pay in their equity capital has been removed. Now, the shareholders may record in the company's articles of association their independently agreed respective amounts of subscribed capital contributions, the method and period of contribution, etc.

Additionally, these changes now also apply to foreign-invested enterprises in China through a Notice issued by the Ministry of Commerce dated June 17, 2014. Pursuant to that Notice, Chinese legal requirements or restrictions applied to foreign-invested companies in respect of initial capital contribution, the percentage of the equity capital which must be contributed in cash, the contribution period and the minimum amount of the equity capital

例。

但是，原先的注册资本实缴登记制将仍在 27 个特殊行业适用，包括商业银行、证券公司、保险公司、保险经纪、金融资产管理公司、信托公司、金融租赁、汽车金融、消费者金融、采取募集方式设立的股份有限公司等。

此外，国务院决定取消长期适用于中国企业的企业年检制度，以年报公示制度取而代之。这将大幅减轻企业信息收集及披露的负担。

C. 中国证券法规改革

中国证券监管部门——中国证券监督管理委员会于 2012 年 10 月暂停新股发行。证监会于 2013 年 11 月 30 日颁布了《关于进一步推进新股发行体制改革的意见》，旨在改革新股发行制度。这些改革包括承销商及控股股东应就招股说明书中的虚假记载承担责任。在新股发行暂停一年多之后，证监会于 2014 年初重启新股发行市场。

国务院就证券市场颁布了多项重大指导政策，这有待证监会贯彻落实：

- 将取消上市公司重大资产购买、出售或重

have also been removed. It's no longer necessary to examine the actual contribution of the subscribed registered capital. However, the limit on the ratio between the registered capital and the total investment of a foreign-invested enterprise still applies.

However, there are still 27 special industries in which the previous registration capital contribution and verification requirements still apply. These include, for instances, commercial banks, securities houses, insurance, insurance brokerage, financial assets management companies, trust companies, finance lease, auto finance, consumer finance companies, and joint stock companies incorporated by public placements.

In addition, the State Council also decided to abolish the annual "enterprise inspection system" previously applied to all enterprises in China for many years, and instead has adopted an annual report disclosure system. This will greatly reduce the information collection and disclosure burden of PRC enterprises.

C. REFORM OF CHINESE SECURITIES LAW

The Chinese securities regulatory authority, China Securities Regulatory Commission (the "CSRC"), imposed a moratorium on initial public offerings (the "IPOs") in October 2012 subject to further reforms by the Chinese authorities. The CSRC issued the Opinions on Further Promoting the Reform of the System of Initial Public Offerings on November 30, 2013, aiming at reforming the system of the IPOs. The reforms include making underwriters and controlling shareholders responsible for false statements in a prospectus. After a suspension of more than a year, CSRC reopened the IPO market at the beginning of 2014.

The State Council has initiated several important guiding policies in the securities market which are yet to be implemented by the CSRC:

- The approval requirement for a significant assets

组的审批要求，证监会将放宽对此类交易的事先审查标准。估计证监会将在 2014 年下半年实施这些改革。但是，借壳上市项目将和新股发些项目一样仍受较严格审查。

- 已实行近 20 年的新股发行核准制度将被废止，由新股发行注册制度取代。证监会很可能在未来数年缓步实施此项根本性改革。

D. 中国政府加强行政法规执法

从 2012 起，中国政府开始加强查处商业腐败、贿赂和垄断性行为。去年，葛兰素史克（“GSK”）在中国因涉嫌接受现金回扣和贿赂官员、医生来提高其药品销量和价格而被调查。GSK 的一些高管因涉嫌贿赂和违反税收等相关规定而被调查。

2013 年 1 月，国家发展和改革委员会（“国家发改委”）就三星、LG 和四家台湾公司：奇美光电、友达光电、中华映管和瀚宇彩晶从 2001 年到 2006 年固定液晶显示屏价格行为处以总额达人民币 3.5 亿元的罚款。

这表明中国所有市场参与者，无论外商投资企业或国内企业，都应当更加重视合规业务，以减少企业运营风险，尤其是外国投资者。公司可以采取如加强内部培训、加强内

purchase, disposal or restructuring by a listed company will be removed, and such transactions will be subject to less stringent advance vetting by the CSRC. It is foreseen that the CSRC will implement these changes in the second half of 2014. However, a backdoor listing in the form of assets restructuring will be still examined by the CSRC as rigorously as a normal IPO project.

- The IPO approval system which has been enforced for two decades is to be abolished and replaced by an IPO registration system in the next few years. The CSRC will likely take a gradual approach in implementing this fundamental reform over the next few years.

D. CHINESE GOVERNMENT STRENGTHENED ENFORCEMENT OF ADMINISTRATIVE REGULATIONS

Chinese authorities strengthened investigation and punishment of commercial corruption, giving and receiving bribes, and monopolistic behaviour starting from 2012. Last year, GlaxoSmithKline (the “GSK”), a UK based drug maker was put under investigation in China for suspicion of accepting cash rake-offs and paying bribes to officials and doctors to boost sales and prices of its drugs in China. Some senior executives from GlaxoSmithKline (China) Investment Co., Ltd. were investigated for suspected bribery and tax-related violations.

Additionally, in January 2013, National Development and Reform Commission (the “NDRC”) penalized Samsung, LG and four Taiwanese firms, Chi Mei Optoelectronics, AU Optronics, Chunghwa Picture Tubes and HannStar Display, with fines totalling RMB 350 million for fixing the prices of LCD screens during the period from 2001 to 2006.

This indicates that all market players in China, regardless of foreign invested companies or domestic enterprises, must pay closer attention to compliance to reduce risks, especially for foreign investors. Companies may take actions such as enhancing internal training, strengthening internal

部报告制度、采用内部合规审计和调查等方式，有效应对合规风险。

因此，一个收购方在并购交易中应该更加谨慎小心地调查和评估合规风险和或有债务风险。收购方应尽可能发现目标企业过往的不合规经营活动，采取诸如调整收购价格或交割之前或之后的其他补救措施。在某些情况下，如果违规行为过于严重，收购方可能需要考虑放弃交易。

E. 对外投资审批有关政策和法规的主要变化

中国中央政府在近期放宽了对境外投资核准要求。国务院于 2013 年 11 月发布《政府核准的投资项目目录（2013 年本）》（“目录”）。根据该目录，境外投资中方投资 10 亿美元及以上项目或涉及敏感国家和地区、敏感行业的项目，由国家发改委核准。除此之外的中央管理企业境外投资项目和地方企业投资 3 亿美元以上、10 亿美元以下项目报国家发改委备案。

2014 年 4 月，国家发改委已颁布相关规章以实施上述改变。商务部很可能在 2014 年内也修改境外投资核准的有关规章。

reporting systems, and adopting internal compliance audits and investigations to effectively cope with compliance risks.

This also means that a purchaser in an M&A transaction must investigate and assess the compliance-related risks and contingent liabilities with much more prudence and care. A purchaser should aim to learn to the greatest extent possible any historical non-compliance business activities in the target before seeking price adjustment or other pre- or post-closing remedial measures. In some cases if a non-compliance activity is severe enough, the purchaser may need to consider abandoning the deal.

E. SIGNIFICANT CHANGES OF POLICIES AND REGULATIONS REGARDING OUTBOUND INVESTMENT APPROVAL

The Chinese central government has also liberalized the outbound investment approval requirement in the recent past. The State Council issued the Catalogue of Investment Projects Subject to Government Verification and Approval (2013 Version) (the “Catalogue”) in November 2013. Pursuant to the Catalogue, outbound investment projects in which the amount of Chinese investment reaches or exceeds USD one billion, or which involves sensitive countries and regions or sensitive industries, shall be subject to additional verification and approval by the NDRC. Other than the foregoing projects, overseas investment projects by an enterprise directly administered under the Chinese central government, and projects invested by a provincial-level or local enterprise with a proposed investment amount of more than USD 300 million but less than USD one billion must be reported to NDRC to complete a record-filing procedure.

NDRC has already issued rules to implement the foregoing change in April 2014. The Ministry of Commerce of China (MOFCOM) is likely to amend its rules with respect to outbound investment approval later in 2014.

这些政策和法律变化将极大地减少中国投资者“走出去”的审批障碍，促进中国境外投资。（完）

郭林军为环球律师事务所常驻北京的合伙人，其拥有中国和美国纽约州律师执业资格，执业领域主要涵盖境内外并购、外国直接投资、私募、资本市场、合规及一般公司业务。

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This policy and legal change will greatly reduce approval barriers for Chinese investors going abroad, and facilitate Chinese outbound investment transactions. <End>

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2014 年新版中国（上海）自由贸易试验区负面清单亮点简析

作者：环球公司法部门

作为中国加大对外开放和深化行政管理体制改革的风向标，《中国（上海）自由贸易试验区（以下简称“自贸区”）外商投资准入特别管理措施（负面清单）（2013 年）》（“2013 年负面清单”）随着自贸区的批准成立于去年 9 月 29 日开始实施。根据负面清单的管理模式，对于负面清单之外的领域，政府按照内外资一致的管理原则，将外商投资项目核准制以及外商投资企业设立及变更审批制均改为备案制。2014 年 6 月 30 日，上海市人民政府颁布了《自贸区外商投资准入特别管理措施（负面清单）（2014 年修订）》（“2014 年负面清单”）。对比两份负面清单，2014 年负面清单将 2013 年负面清单中 190 条特别管理措施缩减至 139 条，在保留涉及自然资源、民生、国家安全以及传统产业限制措施的前提下，进一步对外商放

Major Highlights for Special Administrative Measures (Negative List) on Foreign Investment Access to the China (Shanghai) Pilot Free Trade Zone (2014)

By: Corporate Law Department of Global Law Office

Following the establishment of the China (Shanghai) Pilot Free Trade Zone (“PFTZ”), which has been regarded as a bellwether for China’s policy of furthering opening-up and deepening the reform of the administrative review and approval procedures, the Shanghai Municipal Government further clarified the goals and procedures for how this dynamic new investment zone may be implemented by promulgating the PFTZ Special Administrative Measures on Foreign Investment Access (2013) (the “2013 Negative List”) on September 29, 2013. Generally, it grants both foreign and domestic investors equal access to dramatically simplified establishment and registration procedures available to enterprises established in the PFTZ by replacing the approval procedure with record filing. However, it carves out and restricts foreign investors from accessing 190 specific business sectors which are otherwise available to most domestic investors. On June 30, 2014, this carve out was reduced to 139 restricted areas upon promulgation of the PFTZ Special Administrative Measures on Foreign Investment Access (2014) (the “2014 Negative

宽了部分投资行业。

相较 2013 年负面清单，2014 年负面清单中的主要修订亮点包括：

1. 加大开放度

对比 2013 年负面清单，2014 年负面清单实质性取消 14 条管理措施，放宽了 19 条管理措施，涉及制造业、房地产、基础设施、商贸、航运、社会服务等多个领域。

在取消的管理措施中，涉及制造业和服务业等领域。例如，取消对进出口商品认证公司的限制；取消对认证机构外方投资者的资质要求；取消投资国际海运货物装卸、国际海运集装箱站和堆场业务的合资和合作限制；取消投资航空运输销售代理业务的合资和合作限制等；取消对投资 400 吨及以上轮式、履带式起重机械制造的合资或合作限制；取消对投资各类普通级（PO）轴承及零件（钢球、保持架）、毛坯制造、一般涤纶长丝、短纤维设备制造的限制等。

在放宽的管理措施中，涉及制造业领域 9 条，基础设施领域 1 条，房地产领域 1 条，

List”) issued by Shanghai Municipal Government. Although the government continues to maintain restrictions against foreign investment over some sectors such as natural resources, people’s livelihood, national security, and Chinese traditional industries, the 2014 Negative List does generally provide access to a wider range of investment opportunities for foreign investors.

We now summarize below the major highlights in the 2014 Negative List for you reference:

1. Strengthen Openness

Compared with the 2013 Negative List, the 2014 Negative List completely removes 14 restrictions, and loosens 19 other restrictions in the business sectors of manufacturing, real estate, infrastructure, commerce and trade services, shipping, social services, etc.

The 2014 Negative List cancels certain restrictions in manufacturing, services, and other business sectors, for example: restrictions on investment in companies engaged in certification services for import/export goods; and the qualification requirement for foreign investors in the certification institutions. It also removes the requirement of equity or cooperative joint ventures for foreign investors entering into the industries such as: (i) cargo handling for international maritime freight transport, container freight station and container yard business; (ii) the air transport agency business; and (iii) manufacturing of wheeled or crawler cranes (400 tons and above). It also removes restrictions against investment in the manufacturing of all types of ordinary level (PO) bearings and parts (steel balls, retainers) and blanks; and the restriction against manufacturing of equipment in respect of general polyester filament and staple fibre.

Meanwhile, among the loosened restrictions, the 2014 Negative List loosens nine restrictions in manufacturing, one in infrastructure, one in real

商贸服务领域 4 条，航运服务领域 2 条，专业服务领域 1 条，社会服务领域 1 条。例如原“限制投资原油、化肥、农药、农膜、成品油（含保税油）的批发、配送”放宽为“限制投资农药、农膜、保税油的批发、配送”；原“限制投资船舶代理（中方控股）”放宽为“除从事公共国际船舶代理业务的，外资比例不超过 51% 外，限制投资船舶代理（中方控股）”等。

2. 提高透明度

2014 年负面清单对部分模糊的限制管理措施进行了澄清。2013 年负面清单对部分限制行业没有列明具体限制管理措施，但是在实际操作中，审批机关对未列明具体限制管理措施的行业比列明具体限制管理措施的行业有更大的自由裁量权，加大了通过审批的难度，而且审批结果和程序具有更多不确定性。2014 年负面清单对之前缺少明确具体管理措施的行业在最大程度上进行了明确。例如，原有“限制外资投资直销”已进一步明确为“限制外资投资直销，投资者须具有 3 年以上在中国境外从事直销活动的经验，且公司实缴注册资本不低于 8000 万元人民币”；原有“限制投资的电信、广播电视和卫星传输服务业”也已经被修改为“限制投资基础电信业务，外资比例不得超过 49%”。

estate, four in commerce and trade services, two in shipping services, one in professional services, and one in social services. For example, an original restriction in the 2013 Negative List stated, “restriction for wholesale and distribution of crude oil, chemical fertilizer, pesticide, agricultural film and refined oil products (including bonded oil).” This has been revised to state, “restriction for wholesale and distribution of pesticide, agricultural film and bonded oil.” In another case, a previous restriction in shipping stating, “shipping agency (restricted, equity controlled by Chinese party),” has now been revised to state, “except for the public international shipping agency, the foreign equity ratio shall not exceed 51%, shipping agency (restricted, equity controlled by Chinese party).”

2. Increase Transparency

Several cumbersome ambiguities have been resolved with the 2014 Negative List. The 2013 Negative List did not expressly clarify restrictions for certain restricted businesses, which made it more difficult to get needed approvals by the relevant authorities because the vague language gave the approval authorities more discretion to interpret the restrictions, causing uncertainty on what would actually get approved. Therefore, in order to give investors more predictable results, the 2014 Negative List clarifies some of these ambiguities, for example, the original 2013 phrasing of “direct selling (restricted)” has been changed to “direct selling (restricted), the investor shall have over three-years direct selling experience in foreign countries and the PRC companies’ paid-in capital shall not be less than RMB80 million; and the original 2013 phrasing of “telecommunication; radio and TV and satellite transmission (restricted)” has been changed to “basic telecommunication service (restricted), the foreign equity ratio shall not exceed 49%.”

3. 标准化

2014 年负面清单在内容方面，2014 年负面清单删除了包括限制投资联苯胺、颜料、涂料生产，限制投资电解铝、铜、铅、锌等有色金属冶炼，禁止投资色情业以及博彩业等敏感行业的相关条款。但是，请注意该等删除并不意味着外商可以在自贸区参与投资这些行业，根据自贸区主页的解释，其删除的主要原因在于，2014 年负面清单本身是针对外商所投资的领域进行限制或禁止的清单，而这些行业属于对内外资均有限制或禁止要求的管理措施，所以这些行业不宜列入负面清单。同时根据 2014 年负面清单，虽然 2014 年负面清单中部分未列明是否禁止外商投资的领域，但是国家规定以及中国缔结或者参加的国际条约规定禁止或限制外商投资的产业，涉及危害国家和社会安全或损害社会公共利益的经营行为，外商均不得投资。此外，2014 年负面清单在体例方面也进行了调整，例如，将行业分类代码调整到管理措施之后；将涉及到不同代码的同一行业的相关措施进行适当归并；以及在管理措施前面还统一加注了序号，以方便投资者阅读和理解。

结语

正如 2014 年负面清单中提到的，“根据有关法律法规和自贸区发展需要，负面清单将适时调整。”自贸区进一步开放的趋势和程度从 2014 年负面清单对 2013 年负面清单的修改可见一斑。值得一提的是，2014 年 6 月 28

3. Standardization

The 2014 Negative List removes some restrictions in some sensitive industries, such as the limitation of production of benzidine, dyes and coatings, the limitation on investment in smelting of non-ferrous metals (e.g. electrolytic aluminum, copper, lead and zinc), and prohibitions on gambling and business working with adult/erotic materials. However, that is not to say the 2014 Negative List has actually granted foreign investors freedom to engage in these business sectors in the PFTZ. Actually, as explained in the official website of the PFTZ, the major reason for removing these restrictions from the Negative List 2014, which is really meant to outline those areas in which *foreign investment is restricted or prohibited*, is to give fair treatment to all parties restricted from these business sectors and neither foreign nor domestic investors are allowed to engage in such sectors. Also, the catch-all clause in the 2014 Negative List provides that foreign investors are prohibited (or restricted) from investment in industries which are prohibited (or restricted) by China or by international treaties China concluded with other jurisdictions, from investment in projects which compromise China's national or social security, and from business operations which compromise the public interest. The format of the 2014 Negative List has also been reorganized a bit to make it easier to apply. For example, the industry codes have been moved to the column after the restrictions, restrictions with different industry codes but in the same industry have been combined, and serial number have been added to each restriction for easier reference.

Conclusion

As explained in the 2014 Negative List, further adjustments will be made according to the laws and regulations on foreign investment and development needs of the PFTZ. Viewing the changes made between 2013 and 2014, we are beginning to see a general picture of the trend and the degree to which PFTZ is opening-up so far. Taken in context with the

日国务院批准了《中国（上海）自由贸易试验区进一步扩大开放的措施》（“31 条”），涉及进一步开放措施共 31 条。就该 31 条，上海市府下一步将会同相关政府部门就在自贸区内实施的相关行政法规文件的调整报请国务院审批，令人期待。（完）

环球公司法业务简介：我们在公司法领域具有 30 多年的执业经验。自我们承办了中国第一个中美合资项目以来，我们已经在众多的领域内帮助大量的国内外客户完成了直接投资项目。我们的经验已经涵盖了一个企业从设立到清算的所有事项。我们的主要服务内容包

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- 进行法律尽职调查
- 参与谈判并起草、审查和修改公司设立相关文件
- 协助客户办理各类政府审批、许可和登记等手续
- 在税务筹划、知识产权保护、劳动和人力资源管理、外汇、海关以及退出策略等方面提供全面的法律意见
- 起草、审查和磋商日常经营过程中的各类业务合同
- 协助处理诉讼和仲裁事项
- 协助处理重组、结算和清算等事项

Measures for Furthering Opening-up in the PFTZ involving thirty-one measures for furthering opening-up, which was approved by the State Council on June 28, 2014, we anticipate that we will have more insight into this trend since these 31 further opening-up measures are to be formulated by the Shanghai Municipal Government in cooperation with other relevant authorities in near future. <The End>

Corporate Law Department of Global Law Office:

We have more than 30-year experience in the area of corporate law, and since China's first Sino-USA joint-venture project, we have assisted a large number of domestic and foreign clients with their day-to-day business operation in a wide range of industries and sectors across China, and our legal services cover every aspect of business concerns, from inception to liquidation, including:

- Design of investment structures and corporate governance structures
- Conducting legal due diligence
- Drafting, reviewing and negotiating relevant formation documents
- Assisting in the process of obtaining government approvals, permits and registrations
- Providing legal and compliance advice on product quality, industrial safety, tax planning, IP protection, labour and human resources, foreign exchange and customs issues, exit strategies, etc.
- Drafting, reviewing and negotiating various business agreements within the course of day-to-day business
- Assisting in litigation and arbitration
- Assisting in restructuring, dissolution and liquidation, and bankruptcy



最高院典型案例介绍—— 《舌尖上的中国》信息网络 传播权纠纷案评析

作者：桂佳

2014年6月23日上午，最高人民法院召开新闻通报会，发布了包括央视国际与上海全土豆公司作品信息网络传播权纠纷案在内的5个典型案例。全土豆公司侵害作品信息网络传播权一案是非常有代表性的互联网作品信息网络传播权纠纷的案例，涉案作品和双方均具有较高的社会知名度。下面我们将对案情进行介绍，并对案件的重点内容作以简要评论，供您了解该案的基本情况。

案情介绍：

《舌尖上的中国》是由中央电视台制作的大型美食纪录片，播出后引起社会广泛关注，享有较高知名度。中央电视台将该节目的信息网络传播权授予原告央视国际网络有限公司（下称“央视国际”）独占行使。在节目播出

Introduction to a Representative Case from the Supreme People's Court: Right of Dissemination via Information Network in A Bite of China Dispute Case Analysis

By: Meph Jia Gui

On the morning of June 23, 2014, the Supreme Court held a news conference in coordination with publication of the outcome of five representative cases, including a right of dissemination via information network dispute case involving CCTV International and Quantudou Company. The case is a quintessential dispute case on rights of dissemination via information network of internet works. The work and the parties involved all enjoy a high reputational status. The following article introduces the case and briefly comments on the main content of the case.

Case Introduction:

A Bite of China, a large food documentary produced by CCTV, was highly regarded and caused a widespread social interest after the broadcast. CCTV authorized the plaintiff CCTV international network co., LTD. (hereinafter referred to as "CCTV International") to have an exclusive right of dissemination via information network over the

后，原告发现被告上海全土豆文化传播有限公司（下称“全土豆公司”）未经许可，在其网站上提供涉案节目的在线点播服务。原告提起诉讼，请求判令被告停止侵权并赔偿经济损失人民币 80 万元及合理费用人民币 5 万元。

上海市闵行区人民法院（下称“闵行法院”）经审理认为：纪录片《舌尖上的中国》受著作权法保护。原告央视国际经中央电视台授权，独占享有该作品的信息网络传播权。被告全土豆公司未经授权于作品热播期内，在其网站上提供涉案作品的在线点播服务，是侵犯权利人对作品享有的信息网络传播权的行为，应该承担相应的侵权责任。闵行法院还认为，被告虽然辩称涉案作品系网友上传，但未就该主张提供实际上传者的信息等证据予以证明，其自行删除原始数据的行为导致该事实无法查明，应对此承担不利后果。闵行法院在一审中判决，被告全土豆公司应赔偿原告央视国际经济损失及合理费用共计人民币 24.8 万元。一审判决后，被告不服，上诉至上海市第一中级人民法院（下称“上海一中院”）。上海一中院经审理认为，原审判决合理，并作出判决，驳回上诉，维持原判。

documentary. After the broadcast, the plaintiff discovered that the defendant Shanghai Quantudou Culture Communication co., LTD. (hereinafter referred to as "Quantudou Company") was also providing an online on-demand service on Tudou website which broadcasted the documentary without permission. The plaintiff filed a lawsuit and requested the defendant to stop the infringement and to compensate for economic losses of RMB 800,000 Yuan and reasonable expenses of RMB 50,000 Yuan.

Shanghai Minhang District People's Court (hereinafter referred to as "Minhang Court") held that the documentary *A Bite of China* is protected by copyright law. Accordingly, it was held that the plaintiff had an exclusive right of dissemination via information network to the documentary authorized by CCTV. Further, it was held that the defendant had provided online on-demand service of the involved documentary in its prime-time period without authorization, which infringed the rights of the right owner, and that the defendant must fulfill the corresponding responsibilities. Minhang Court also held that the defendant had not adequately proved with actual uploading information and other evidence that the involved work was uploaded by an internet user. Meanwhile, the Minhang Court held that the defendant's behaviour of deleting the original data made it impossible to find out the actual truth, so the defendant should bear the adverse consequences. On October 22, 2013, Minhang Court announced its judgment that the defendant Quantudou Company must compensate the plaintiff CCTV International for economic losses and reasonable costs totalling RMB 248,000 Yuan. After Minhang Court made the judgment, the defendant appealed to the Shanghai No.1 Intermediate People's Court (hereinafter referred to as "Shanghai First Intermediate Court"). On December 23, 2013, through the trial, Shanghai First Intermediate Court concluded that the original sentence was reasonable, and made a decision to reject the appeal and upheld the conviction.

简评:

根据《信息网络传播权保护条例》的规定,信息网络传播权是指以有线或者无线方式向公众提供作品、表演或者录音录像制品,使公众可以在其个人选定的时间和地点获得作品、表演或者录音录像制品的权利。立法者对于保护信息网络传播权的初衷是规制非权利人未经许可通过网络传播著作权人作品的行为。随着互联网在经济和生活中扮演着越来越重要的角色,信息网络传播权纠纷案件也呈逐年增加趋势。

本案的争议焦点有以下两点:第一,关于原告是否享有涉案作品的信息网络传播权;第二,关于被告是否侵害了涉案作品的信息网络传播权及应否承担相应的民事责任。对于第一点,被告土豆公司辩称,原告举证的由中央电视台出具的《授权书》中未明确具体作品名称,因此,原告获得的授权是不完整的。闵行法院经审理认为,纪录片《舌尖上的中国》的著作权归中央电视台享有,其《授权书》中虽未明确具体作品名称,但该授权书表明中央电视台将其制作的包括纪录片在内的全部电视节目的信息网络传播权授权给原告,而涉案作品系纪录片,属于相关授权范围内的作品,故原告享有涉案作品的信息网络传播权。

对于第二点,闵行法院认为,根据原告提交的证据表明,被告未经许可,擅自在其网站上直接向公众提供涉案作品的在线播放的情

Brief Comment:

According to "Regulations on the Protection of Right of Dissemination via Information Network," a right of dissemination via information network means the right to make a work, performance, or sound or visual recording available to the public by wire or wireless means, through which the public may access the work, performance, or sound or visual recording at times and places of their respective choices. The purpose of the legislators for the protection of this right regulates transmissions of works through the network without authorization of the right owner. As the Internet plays a more and more important role in the economic and social life, there has been a trend towards an increase of disputes over rights of dissemination via information network year by year.

The case involves two focal points on the dispute: first, on whether the plaintiff should have right of dissemination via information network of the involved work; and second, whether the defendant infringed the right of dissemination via information network of the involved work and whether they must fulfill the corresponding responsibilities. To the first point, the defendant argued that the plaintiff's proof, the "authorization letter" issued by CCTV did not explicitly specify the work's name, as a result, the plaintiff's authorization was incomplete. Minhang Court concluded that the copyright of the documentary *A Bite of China* was owned by CCTV. The "authorization letter" of the CCTV did not name specific works, but the letter showed that CCTV had authorized all TV programs, including documentaries' right of dissemination via information network to the plaintiff. Since the involved work was a documentary, which belongs to the related work within the scope of authorization, therefore the plaintiff should have the right of dissemination via information network of the involved work.

On the second point, Minhang Court held that according to the plaintiff's evidence, the defendant had provided online broadcasts of the involved work directly to the public on its web site without

属实，该行为侵犯了原告对该作品享有的信息网络传播权，损害了原告作为权利人的合法权益，应当依法承担相应的民事责任。闵行法院还认为，被告虽辩称其网站仅提供存储空间服务，涉案作品为网友上传，但被告并未对此提供相应证据加以证明，故对被告的辩称意见不予采信。闵行法院在一审中判决，全土豆公司应赔偿央视国际经济损失及合理费用共计人民币 24.8 万元。

被告全土豆公司对一审判决不服，上诉至上海一中院。全土豆公司辩称其网站无事先审查义务，不明知也不应知涉案视频的存在。对此，上海一中院经审理认为，有关实际上传者的信息属于被告掌控和管理的范围，理应由其举证，但全土豆公司在涉诉后删除了涉案视频以及原始数据，导致事实无法查明，应承担举证不力的后果。最终，上海一中院作出判决，维持原判。

但是，闵行法院认为，原告对其主张的经济损失，未能提供有效的证据证明。在法院确定赔偿金额时，充分考虑了涉案作品的类型、社会知名度、侵权行为的性质以及侵权网站的经营规模、经营模式、影响力等因素，作出共计人民币 24.8 万元的赔偿金额之判决。

authorization. This behaviour violated the plaintiffs' right of dissemination via information network of the involved work, and also damaged the plaintiffs' legitimate interests as owner of the right. The Minhang Court then concluded that the defendant must fulfill the corresponding responsibilities according to the law.

Quantudou Company was dissatisfied with the decision and appealed to Shanghai First Intermediate Court. Quantudou Company argued that its website neither did nor ought to have known of the existence of the video because the defendant did not have any prior review obligations to the broadcasted content. To this point, Shanghai First Intermediate Court held that the actually uploaded information was within the sphere of the defendant's scope of the control and management, and burden was with the defendant to demonstrate that Quantudou's activities were actually conducted beyond that scope. But Quantudou Company deleted the video as well as the original data after litigation had been commenced, which made it impossible to learn the actual facts which could prove their case. The defendant must therefore bear the consequences of the lack of evidence. In the end, Shanghai First Intermediate Court upheld the conviction.

However, Minhang Court held that the plaintiff failed to provide effective evidence to prove their economic losses. The court determined the amount of compensation by considering those factors such as the type of involved work, social awareness, the nature of the infringing behaviour, the infringing website's business scale, business model and other influencing factors, to make a total of RMB 248,000 Yuan in compensation.

目前，我国各大网络视频提供者与作品权利人之间关于信息网络传播权的纠纷时有发生。本案中涉案作品《舌尖上的中国》具有较强独创性和较高知名度。同时，侵权网站土豆网是目前我国规模较大的网络视频平台，具有较强的行业和社会影响力。法院作出的判决考虑到了多方面的客观因素，确定了合理的赔偿，不仅弥补了权利人的经济损失，也有利于促进网络从业者加强对互联网知识产权的保护意识。最高人民法院的相关负责人介绍，该案将促进各互联网视频提供者的自律和行业管理，对日益多发的互联网视频侵权案件有警示作用。

桂佳为环球律师事务所常驻北京的合伙人，主要从事纠纷类和非纠纷类知识产权法律业务，涵盖著作权、专利、商标、网络域名、商业秘密、反不正当竞争和反垄断等诸多方面。

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At present, rights of dissemination via information network disputes have occurred between large network video providers and the holders of the work. The work involved in this case, *A Bite of China*, has strong originality and higher visibility. Meanwhile, the infringing website Tudou is currently one of the largest network video platforms in China, with strong industries and social influence. The Court's decision took various objective factors into account, and awarded reasonable compensation, which not only would make up for the obligee's economic losses, but also would encourage network practitioners to strengthen their consciousness to protect Internet intellectual property. A senior official of the Supreme Court concluded that the case will promote the Internet video providers' self-discipline and industry management, and also will act as a warning about the increased risk of internet video infringement cases.

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GLOBAL LAW OFFICE

THE FIRST CHINESE LAW FIRM

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自成立伊始，我们即确立了“以国际化的视野、国际化的团队、国际化的质量服务于国内外客户”的宗旨，这使我们虽置身于多变的全球经济形势之中，却始终能够保持不变的业界领先地位。我们的律师均毕业于中国一流的法学院，其中绝大多数律师拥有法学硕士以上的学历，多数律师还曾学习或工作于北美、欧洲、澳洲和亚洲等地一流的法学院和国际性律师事务所，多数合伙人还拥有美国、英国、德国、瑞士、澳大利亚和韩国等地的律师执业资格。

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三十多年来，我们凭借精湛的法律知识、丰富的执业经验、高度的敬业精神以及优秀的职业道德，向国内外客户展示和证明了我们的价值，同时也赢得了国内外客户的信赖。在未来的日子里，我们将继续凭借我们独到的优势帮助国内外客户在中国取得更为持久和长远的成功。

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The history of Global Law Office dates back to 1984, when it became the first law firm in the People's Republic of China (the “PRC”) to take an international perspective on its business, fully embracing the outside world.

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