

为了促进加工贸易发展，国务院印发《国务院
关于促进加工贸易创新发展的若干意见》（以下简
称“《促进加工贸易若干意见》”）。

商务部公布《关于〈服务外包产业重点发展领
域指导目录〉公示的通知》，公示《服务外包产业重
点发展领域指导目录》（以下简称“《服务外包指
导目录》”），公示期于1月27日届满。

2016年1月25日，新加坡国际仲裁中心（以
下简称“SIAC”）宣布在上海自贸区设立的代表处
成立。

一、国务院印发《促进加工贸易若干意见》

加工贸易是我国对外贸易重要的组成部分。近
年来，我国加工贸易企业生产成本上升，传统的粗
放型发展模式难以为继，我国的竞争优势也逐渐削
弱。为此，2016年1月4日，国务院印发了《促进
加工贸易若干意见》，推动加工贸易创新发展。

（一）背景

为了促进加工贸易转型升级，2011年8月2日，
商务部、人力资源社会保障部、海关总署决定会同
广东省人民政府共同建设珠江三角洲地区全国加
工贸易转型升级示范区，为全国加工贸易转型升级
积累经验。

2011年11月29日，商务部等印发《关于促进
加工贸易转型升级的指导意见》，提出19条意见促
进加工贸易转型升级，其中包括推动来料加工工厂
转型为法人企业。

《促进加工贸易若干意见》延续了推动加工贸

《促进加工贸易若干意见》延续了推动加工贸
易转型升级的意见，还首次提出创新发展的意见。

（二）法律点评

国务院提出的创新发展意见中值得关注的内容有：

1. 进一步扩大服务业开放，鼓励外资企业设
立采购中心、分拨中心和结算中心，发展
总部经济。
2. 推动加工贸易企业由单纯的贴牌生产
（OEM），向委托设计（ODM）、自有品牌
（OBM）方式发展。

我们注意到，目前“加工贸易”的定义不适合
委托设计（ODM）、自有品牌（OBM）方式。“加
工贸易”是指经营企业进口全部或者部分原辅材
料、零部件、元器件、包装物料，经过加工或者装
配后，将制成品复出口的经营活动，包括来料加工
和进料加工。而委托设计（ODM）一般理解为生产
厂商受定作方委托，运用其自身生产技术或产品设
计，使用定作方的商标生产产品的生产模式。自有
品牌（OBM）一般理解为生产商生产贴有自己商
标的产品。委托设计（ODM）、自有品牌（OBM）的
内涵已经超过“加工贸易”的定义。为了推动加
工贸易企业由单纯的贴牌生产（OEM）向委托设计
（ODM）、自有品牌（OBM）方式发展，需要修改

“加工贸易”的定义。

3. 促进加工贸易与服务贸易融合，鼓励加工贸易企业承接研发设计、检测维修、物流配送、财务结算、分销仓储等服务外包业务。
4. 全面推进加工贸易行政审批改革进程，加强事中、事后监管，优化监管方式。

我们注意到，经全国人民代表大会常务委员会授权，国务院 2013 年在广东省暂时停止加工贸易业务审批和加工贸易保税进口料件或者制成品转内销审批，试行期三年。国务院要求总结广东省取消加工贸易业务审批和内销审批试点工作经验，全面推进加工贸易行政审批改革进程。据此，我们理解将来有望在全国范围内取消加工贸易业务审批和加工贸易保税进口料件或者制成品转内销审批。

5. 积极参加多双边规则谈判，推动引领多边、区域、双边国际经贸规则制订，为加工贸易创造公平竞争的国际经贸环境等。

（三）关注要点

《促进加工贸易若干意见》是指导未来加工贸易发展的纲领性文件，国务院、商务、海关、质检、税务、外汇等部门需根据该意见对加工贸易有关的法律法规进行梳理、修订。加工贸易立法的修订及行政审批的改革进程值得关注。

二、商务部公示《服务外包指导目录》

为贯彻落实《国务院关于促进服务外包产业加快发展的意见》，商务部于 2016 年 1 月 20 日公示《服务外包指导目录》，公示期为 2016 年 1 月 21 日至 1 月 27 日。

（一）背景

2014 年 12 月 24 日，国务院公布《国务院关于促进服务外包产业加快发展的意见》，提出 16 条促进服务外包产业的意见，其中包括定期发布《服务外包指导目录》，加强对服务外包产业发展指导。国务院要求商务部牵头，财政部、海关总署参加定期发布《服务外包指导目录》。

商务部会同有关部门研究提出了第一份《服务外包指导目录》，并于 2016 年 1 月 20 日公示。

（二）法律点评

《服务外包指导目录》共涉及 23 个重点发展领域，其中 10 个领域属于信息技术外包（ITO）范畴（具体为：云计算服务、集成电路和电子电路设计服务、软件技术服务、软件研发及开发服务、信息系统运营和维护服务、基础信息技术运营和维护服务、电子商务平台服务、信息技术解决方案服务、新能源技术解决方案服务、信息技术咨询服务）；5 个领域属于业务流程外包（BPO）范畴（具体为：专业业务服务、数据处理服务、互联网营销推广服务、供应链管理服务、人力资源管理服务）；8 个领域属于知识流程外包（KPO）范畴（具体为：工业设计服务、数据分析服务、医药和生物技术研发服务、检验检测服务、新能源技术研发服务、文化创意服务、工程技术服务、管理咨询服务）。

《服务外包指导目录》对每个领域的定义和范围、类别、主要业务类型、主要应用领域作出了详细规定。

2015 年修订的《外商投资产业指导目录》，将以承接服务外包方式从事系统应用管理和维护、信息技术支持管理、银行后台服务、财务结算、软件开发、离岸呼叫中心、数据处理等信息技术和业务流程外包服务列为鼓励类外商投资项目。《服务外包指导目录》实施后将更有利于外商投资服务外包

业务。

（三）关注要点

在《服务外包指导目录》公示前，商务部及其他部委于 2014 年 10 月 8 日公布了《技术先进型服务业务认定范围（试行）》，作为认定北京、上海、广州等 21 个中国服务外包示范城市的服务企业能否享有企业所得税优惠的一项标准。由于国务院、商务部均未对《服务外包指导目录》作出明确规定，该目录将来是否会取代《技术先进型服务业务认定范围（试行）》；企业从事目录内的业务是否会降低准入门槛、得到国际服务外包产业引导基金等市场化支持、融资、通关、外汇管理方面便利等等，这些都有待进一步关注。

三、SIAC 于上海自贸区设立代表处

2016 年 1 月 25 日，SIAC 宣布在上海自由贸易试验区（以下简称“上海自贸区”）设立的代表处成立。SIAC 上海代表处于 2016 年 1 月 19 日以外国（地区）企业常驻代表机构的企业类型在上海市工商局进行了登记。

SIAC 上海代表处的成立巩固了其在中国稳步增长的知名度，为 SIAC 与中国公司和律师在国际仲裁领域建立更加紧密的合作关系奠定了基础。SIAC 上海代表处将与中国仲裁机构合作，通过为内地仲裁员和律师提供专业培训和举办交流活动，促进国际仲裁在中国内地的发展，推广国际仲裁的最佳实践。

（一）背景

2015 年 4 月 8 日，国务院发布《关于印发进一步深化中国（上海）自由贸易试验区改革开放方案》（以下简称“《开放方案》”），支持国际知名商事争议解决机构入驻上海自贸区。SIAC 顺应《开

放方案》，继香港国际仲裁中心（以下简称“HKIAC”），成为入驻上海自贸区的第二家境外仲裁机构。

（二）法律点评

《开放方案》的出台和 SIAC、HKIAC 于上海代表处的设立，是中国进一步对境外仲裁机构开放仲裁业务市场的重要信号。境外知名仲裁机构因其专业性和中立地位成为中国客户解决涉华争议的佳选；然而，境外仲裁机构能否在中国内地从事商业仲裁服务，以及所做仲裁裁决能否在国内得到执行存在不确定性。

我国在加入世界贸易组织时并未承诺开放境外仲裁机构在中国内地从事商事仲裁服务贸易，且《仲裁法》第十条中仲裁委员会的设立范围也并未包括境外。值得注意的是，2013 年 3 月 25 日，最高人民法院公布的《关于申请人安徽省龙利得包装印刷有限公司与被申请人 BP Agnati S. R. L 申请确认仲裁协议效力案的请示的复函》规定，若仲裁协议具有请求仲裁的意思表示、仲裁事项、选定的仲裁委员会的内容，当事人约定由境外仲裁机构进行仲裁，管辖地为中国内地的仲裁条款是有效的。该案例仅明确了境外仲裁机构在内地仲裁的仲裁协议的有效性，并未解决对据此作出的仲裁裁决的国籍问题及执行问题。

（三）关注要点

根据 SIAC 仲裁规则，SIAC 管理的仲裁案件可以在新加坡以外的地点进行仲裁。但是，SIAC 上海代表处以外国企业常驻代表机构的企业类型登记，按照中国法律规定并不具有法人资格，只能从事业务推广和信息收集的活动，并不能直接提供服务，若中国公司希望选择 SIAC 作为仲裁机构，则案件仍将由 SIAC 设在新加坡的秘书处管理。因此

中国客户若选择 SIAC 作为仲裁机构，其能否在上海进行仲裁存在不确定性。根据我们的咨询，HKIAC 也表明若当事人欲选择 HKIAC 管理仲裁地为内地的案件，应寻求相关的法律意见，且建议当

事人选择香港作为仲裁地。根据该信息，我们理解 SIAC、HKIAC 等境外仲裁机构对于其是否能在中国内地从事商业仲裁服务，以及相关仲裁裁决能否得到执行亦并不确定，仍在观望之中。

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In an effort to promote the development of processing trade, the State Council issued the Certain Opinions on Promoting the Innovative Development of Processing Trade (“**Opinions on Promoting Processing Trade**”).

The Ministry of Commerce (“**MOFCOM**”) issued the Circular on Notification of Catalogue for the Guidance of Major Development Areas of Service Outsourcing Industry, to notify the public of the Catalogue for the Guidance of Major Development Areas of Service Outsourcing Industry (“**SOI Catalogue**”) with a notification period ending January 27.

On January 25, 2016, Singapore International Arbitration Centre (“**SIAC**”) announced the opening of a representative office in the China (Shanghai) Pilot Free Trade Zone (“**Shanghai FTZ**”).

1. State Council issued the Opinions on Promoting Processing Trade

Processing trade is an integral part of China’s foreign trade, however, as production costs have increased, the traditional development model has become more difficult to sustain, threatening China’s competitiveness. Under such circumstances, the State Council issued the

Opinions on Promoting Processing Trade to promote innovative development of processing trade on January 4, 2016.

1.1 Background

On August 2, 2011, the MOFCOM, the Ministry of Human Resources and Social Security and the General Administration of Customs, in cooperation with the People’s Government of Guangdong Province, decided to develop national processing trade transformation and upgrading demonstration areas in Pearl River Delta region, with the goal of accumulating experience for transforming and upgrading processing trade.

Later, the MOFCOM together with other authorities issued the Opinions for Guidance of Promoting the Transformation and Upgrading of Processing Trade on November 29, 2011, in which 19 opinions were highlighted to promote the transformation and upgrading of processing trade, including one opinion urging processing factories to register as enterprises with legal person status.

The Opinions on Promoting Processing Trade follows previous opinions on the matter to promote the transformation and upgrading of processing trade, and brings up the opinion of

innovative development for the first time.

1.2 Legal Review

Highlights of the Opinions on Promoting Processing Trade include:

- a. Further open the services sector, encourage foreign-invested enterprises to establish procurement centers, allocation centers and settlement centers in order to develop “headquarter economy”.
- b. Promote processing enterprises’ production model of Original Equipment Manufacturing (“**OEM**”) to be transformed into production models of Original Design Manufacturing (“**ODM**”) and Own Branding and Manufacturing (“**OBM**”).

The current definition of “processing trade” does not cover ODM and OBM. Processing trade refers to the business activity of importing all or part of the raw and auxiliary materials, parts and components, and packaging materials from abroad, processing or assembling the finished products in China, and exporting these products. It includes processing with supplied materials and processing with imported materials. ODM generally refers to the production arrangement under which the manufacturers are engaged by the purchaser to provide product design services, as well as manufacture the products under the purchaser’s label. OBM generally means the manufacturers manufacture products under their own labels. The meaning of ODM and

OBM have exceeded the current definition of “processing trade”. To promote the transformation of a production model of OEM into ODM and OBM, the definition of “processing trade” needs to be adjusted.

- c. Facilitate the integration of processing trade and service trade, encourage processing enterprises to engage in research and design, inspection and maintenance, logistics and delivery, financing and settlement, distribution and warehousing, and other outsourcing services.
- d. Comprehensively promote administrative approval system reform for processing trade, reinforce supervision during and after the processing trade business activities, and improve the supervision model.

With authorization by the Standing Committee of the National People’s Congress, the State Council has suspended granting approvals for processing trade services, and bonded imported materials for processing trade or domestic sale of finished products within Guangdong Province since 2013, with a suspension period of 3 years. The State Council has demanded that Guangdong Province summarize their experiences of abolishing granting approvals for processing trade services and the domestic sale of finished products in order to comprehensively promote the process of administrative approval system reform for processing trade. We expect the approval requirements on processing trade services

and bonded imported materials for processing trade or domestic sale of finished products will be abolished nationwide.

- e. Actively participate in negotiation of bilateral rules, promote and lead the formulation of regional, bilateral and multilateral international economic and trade rules, and create a fair international economic and trade environment for processing trade.

1.3 Next Step

The Opinions on Promoting Processing Trade establishes development guidelines for processing trade. The State Council and government authorities of commerce, customs, inspection, tax and foreign exchange will review and amend current processing trade legislation based on the Opinions. The future legislation amendments on processing trade and the reform of administrative approval system will be monitored.

2. MOFCOM's Notification of SOI Catalogue

To carry out the Opinions of the State Council on Promoting Further Development of Service Outsourcing Industry, the MOFCOM notified the public of the SOI Catalogue on January 20, 2016, with a notification period from January 21 to January 27 of 2016.

2.1 Background

On December 24, 2014, the State Council issued the Opinions of the State Council on Promoting Further Development of Service Outsourcing Industry and put forward 16 opinions regarding

promotion of the service outsourcing industry, including regular issuance of the SOI Catalogue, to strengthen the guidance to the service outsourcing industry. The State Council instructs that the MOFCOM shall take the lead, and Ministry of Finance and General Administration of Customs shall participate in issuing the SOI Catalogue at a regular intervals.

The MOFCOM, along with with other relevant authorities, conducted research and issued the first version of the SOI Catalogue, notifying the public on January 20, 2016.

2.2 Legal Review

The SOI Catalogue covers 23 key development areas, among which, 10 areas are related to information technology outsourcing (“**ITO**”) (this includes services such as cloud computing, integrated circuit and electronic circuit design, software technology, software research and development, information system operation and maintenance, basic information technology operation and maintenance, e-commerce platform, information technology solutions, new energy technology solutions, and information technology consulting); 5 areas are related to business process outsourcing (“**BPO**”) (including such services as professional business services, data processing, internet marketing and promotion, supply chain management, and human resources management); and 8 areas are related to knowledge process outsourcing (“**KPO**”) (including industrial design, data analysis, medical and biotechnology research and

development, inspection and testing, new energy technology research and development, cultural and creative services, engineering technology, and management consulting services).

The SOI Catalogue contains detailed rules on the definition, scope, classification, major business types and major application of each area.

According to the Catalogue for the Guidance on Foreign-invested Industries (Revised in 2015), provision of outsourcing services in conducting management and maintenance of system application, information technology supporting management, banking back office services, financial settlement, software development, offshore call center, data processing and other information technology and business process outsourcing services are classified as “encouraged” foreign-invested services. Foreign investment in outsourcing industry will further benefit from the Implementation of the SOI Catalogue.

2.3 Next Step

Before notification of the SOI Catalogue, the MOFCOM and other relevant authorities issued the Standards for Recognition of Technologically Advanced Services (Trial) on October 8, 2014 which sets out the standards in determining whether enterprises located in Beijing, Shanghai, Guangzhou and 18 other service outsourcing demonstration cities in China are eligible for enterprise income tax incentives. Since neither the State Council nor the MOFCOM has clarified

the application of the SOI Catalogue, it is worth noting whether this Catalogue will replace the Standards for Recognition of Technologically Advanced Services (Trial), the entry requirements for enterprises to provide services specified in this Catalogue will be relaxed, and enterprises providing the previously mentioned services will be eligible for preferential treatment including international service outsourcing industry guidance fund, financing, customs clearance, and foreign exchange administration.

3. Launch of SIAC’s representative office in the Shanghai FTZ

On January 25, 2016, the SIAC announced the opening of a representative office in the Shanghai FTZ. On January 19, 2016, SIAC’s Shanghai representative office was registered with Shanghai Administration of Industry and Commerce as a resident representative office of a foreign enterprise.

The launch of SIAC’s Shanghai representative office underpins SIAC’s steadily growing popularity among various Chinese parties and shows its continuous efforts to forge closer ties with Chinese companies and lawyers in the international arbitration community throughout Mainland China. SIAC’s Shanghai representative office will work with mainland Chinese arbitration commissions to promote the development of international arbitration in the Mainland and global best practices, by organizing training workshops and networking events for arbitrators and legal practitioners.

3.1 Background

On April 8, 2015, the State Council issued the Circular on Issuing the Plan for Further Promoting the Reform and Opening-up of the China (Shanghai) Pilot Free Trade Zone (“**Opening-up Circular**”), supporting the introduction of internationally renowned commercial dispute resolution institutes to the Shanghai FTZ. Following the Opening-up Circular, SIAC becomes the second international arbitration institution to launch its representative office in the Shanghai FTZ, after Hong Kong International Arbitration Centre (“**HKIAC**”).

3.2 Legal Review

The issuance of the Opening-up Circular and the Launch of representative offices of SIAC and HKIAC are important signs of further opening-up of Chinese arbitration services to foreign arbitration institutes. Due to their professionalism and neutral position, renowned foreign arbitration institutes have become Chinese parties’ preferred choice in resolving China-related disputes. However, there are uncertainties as to whether SIAC can administer arbitral proceedings held in the Mainland and whether awards from such proceedings are enforceable in China.

China did not commit to open the market of commercial arbitration services in Mainland China to foreign arbitration institutes in the Protocol on the Accession of China; and in Article 10 of the Arbitration Law, places eligible for the establishment for arbitration commissions do not

include areas outside China. It is noteworthy that on March 25, 2013, the Supreme People’s Court issued the “Reply on Request Regarding Validity of Arbitration Agreement following the Application Made by Anhui Longlide Packaging Printing Co., Ltd. and BP Aganti S.R.L”, in which the court took the view that where the arbitration agreement contains representation made for arbitration, scope of arbitration and appointed arbitration institutes, it is legally valid for parties to agree that the disputes shall be heard at a venue in Mainland China and be administered by foreign arbitration institutes. This Reply clarifies the validity of arbitration agreements by foreign arbitration institutes administering arbitration proceedings held in the Mainland, while leaving out the issues of nationality of awards from such proceedings and enforcement unsolved.

3.3 Next step

According to arbitration rules of SIAC, hearings in SIAC-administered arbitrations do not have to be held in Singapore. However, SIAC’s Shanghai representative office as a resident representative office of a foreign enterprise, does not have an independent legal personality under Chinese law, is only allowed to conduct services promotion and information collection activities and cannot provide direct case administration services. If Chinese companies wish to choose SIAC as their arbitration institute, the case will still be administered by SIAC’s Secretariat in Singapore. Therefore, if Chinese companies wish to choose SIAC as their arbitration institute, it is uncertain whether the hearings for arbitration are allowed to

be carried out in Shanghai. Based on our inquiries, HKIAC indicated that parties should seek legal advice before requesting HKIAC to administer arbitral proceedings held in the Mainland and advised that Hong Kong is a preferable venue for China-related disputes. Based on this information, we understand that

SIAC, HKIAC and other foreign arbitration institutes are uncertain as to whether they can administer arbitral proceedings held in the Mainland and whether awards from such proceedings are enforceable, with a wait-and-see attitude.

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