The First Antitrust Decision by the Chinese Supreme People's Court
Qihoo 360 VS. Tencent

中国最高人民法院的首例反垄断判决：奇虎360诉腾讯

Daniel Sokol, David Evans, Vanessa Zhang, Antonio Bavasso & Will Tom

The Chinese Supreme People's Court issued its first antitrust judgment in *Qihoo 360 v. Tencent* on October 16, 2014. In affirming a lower court ruling in favor of defendant Tencent, the Court addressed the question of market definition and market power in the context of dynamic platform-based businesses in which products are provided for "free". It is one of the most influential cases in the 65-year history of the Supreme Court according to the People's Court Daily.

2014年10月16日，中国最高人民法院宣布了对奇虎360起诉腾讯一案的判决，这是它的第一个反垄断判决书。 它维持了下级法院原判，支持被告腾讯。法院判决书中讨论了在提供"免费"产品的动态平台型企业的背景下，市场界定及市场支配力的问题。根据《人民法院报》，这是最高法院成立65年来最有影响力的案件之一。

CPI gathered leading antitrust lawyers and economists to discuss the implications of the Tencent judgment for antitrust in China and for Internet-based cases in other jurisdictions. The webinar was held on **16 December 2014.**

《国际竞争政策》（CPI）杂志邀请了在反垄断领域著名的律师和经济学家，一起讨论腾讯案的判决对中国反垄断事业及其它司法管辖区有互联网背景案件的意义。这个网络研讨会在2014年12月16日举行。

Professor D. Daniel Sokol moderated a discussion with Antonio Bavasso, Dr. David S. Evans, Willard Tom, and

Dr. Vanessa Yanhua Zhang. Evans and Zhang, with Global Economics Group, advised Tencent and submitted testimony to the Chinese Supreme People's Court. Bavasso is a partner at Allen & Overy in London and Will Tom is a partner at Morgan Lewis in Washington D.C. and former General Counsel of the US Federal Trade Commission. Danny Sokol teaches at University of Florida Law School and is Senior Of Counsel to Wilson Sonsini Goodrich & Rosati.

丹尼尔・索科尔教授主持了由安东尼奥・巴瓦索，大卫・S・埃文斯博士，威拉德・汤姆，张艳华博士参加的讨论。全球经济集团的埃文斯教授和张博士是腾讯的顾问，并向中国最高法院提交了证词。 巴瓦索是在伦敦的安理国际律师事务所的合伙人。 威拉德・汤姆是摩根路易斯律师事务所在华盛顿特区的合伙人，他也是美国联邦贸易委员会前首席法律顾问。 丹尼尔・索科尔教授任教于佛罗里达州立大学法学院，他也是威尔逊・桑西尼・古奇・罗沙迪律师事务所的资深大律师。

The following is a transcript of the webinar.

以下是这个网络研讨会的会议记录。

Daniel Sokol: Welcome to the CPI webinar, "The First Antitrust Decision by the Chinese Supreme People's Court, Qihoo 360 versus Tencent." I am Professor Daniel Sokol. With me are a number of excellent panelists who are going to provide analytical insights into this historic

decision.

丹尼尔·索科尔： 欢迎来到CPI的网络研讨会，我们的题目是“奇虎360诉腾讯 ——中国最高人民法院第一个反垄断判决”。我是丹尼尔·索科尔教授。和我在一起的，是一批优秀的小组成员，他们将对这个历史性的判决提供分析见解。

First we have David Evans, Chairman of the Global Economics Group. David has provided economic advice on a wide range of industries but has special expertise on platform based businesses, which some of us know of as two-sided markets. David currently teaches economics and antitrust at the University of Chicago Law School where he is a lecturer and at University College London where he is a visiting professor and is co-founder and co-director of the Jevons Institute.

首先我们欢迎全球经济集团的主席，大卫·埃文斯博士。埃文斯博士在众多的行业领域提供经济建议，不过他的专长在于平台型企业，也就是有些人所说的双边市场。埃文斯先生现在在芝加哥大学法学院任职讲师，教授经济学及反垄断课程，并在伦敦大学学院当客座教授，同时他是杰文斯研究所的共同创始人及共同理事。

Let me also add, David contributed a brilliant chapter to the Oxford Handbook of International Antitrust Economics, Volume 1 which is out as of this month which I edited. I encourage people to take a look at it for what was really a wonderful piece of scholarship and background.

我还要补充一下，埃文斯教授还为牛津国际反垄断经济学手册第一卷撰写了很精彩的一章。这份手册是我编辑的，将在这个月出版。它是一本拥有丰富学识和背景知识的手册，我鼓励大家有机会阅读一下。

Dr. Vanessa Yanhua Zhang specializes in economic analysis and competition policy at Global Economics Group, where she heads the China practice. Dr. Zhang has taught regulation and antitrust economics to graduate students at Renmin University of China. She also serves as the editor of the Asia Antitrust Column at Competition Policy International. Together, David and Vanessa worked as the economic consultants in this case for Tencent. Their insights as a result are highly appreciated.

张艳华博士在全球经济咨询集团专门负责经济分析和竞争政策，她也是该集团中国业务

的负责人。张博士曾在中国人民大学教授研究生规制和反垄断经济学课程。她还在《国际竞争政策》杂志“亚洲反垄断专栏”担任主编。埃文斯先生和张博士在本案中共同担当腾讯的经济顾问，他们的真知灼见受到了高度赞赏。

Also joining us on the law side are two distinguished lawyers. The first is Antonio Bavasso. Antonio is co-head of the Global Antitrust Practice in Allen & Overy. He advises clients on all aspects of competition law, practicing primarily in London and Brussels. In addition to his work at the law firm, Antonio also teaches the EU competition law course at UCL, and along with David, is the co-founder and co-director of the Jevons Institute.

在法律方面，我们邀请了两位杰出的律师。一位是安东尼奥·巴瓦索先生。巴瓦索先生是安理国际律师事务所全球反垄断业务的联席主管。他向客户提供各个方面与竞争法相关的建议，他的业务主要在伦敦和布鲁塞尔。他在律师事务所的工作之外，还在伦敦大学学院（UCL）教授欧盟竞争法课程， 并与埃文斯教授一起，共同创建并管理杰文斯研究所。

Joining us from the United States is Will Tom. Will is a partner in Morgan Lewis' antitrust practice in Washington, DC, and former General Counsel of the Federal Trade Commission. This is one of a number of senior positions that Will has held at both the Federal Trade Commission and the Department of Justice Antitrust Division. Over his career, Will has been very active on antitrust IP matters. Specific to China, Will was very active in the development of outreach efforts to China while at the FTC.

在美国方面，我们邀请到威尔•汤姆先生。汤姆先生是在摩根路易斯律师事务所华盛顿特区的反垄断业务的合伙人，也是美国联邦贸易委员会前首席法律顾问，他还在联邦贸易委员会和司法部反垄断部门中担任过其它高级职位。在他的职业生涯中，汤姆先生一直在反垄断知识产权问题上非常活跃。具体到中国，汤姆先生在联邦贸易委员会任职时积极推广其在中国的发展和交流。

With those introductions, let me just note we have a historic case. There are a number of issues that we're going to discuss about abuse of dominance in China. We'll discuss platforms, high tech industries, economic analysis and reasoning by the

court.

有了这些介绍，让我们开始讨论这个历史性的案件。在这里，我们将讨论一系列的问题，包括在中国滥用市场支配地位的问题，还有平台型企业，高新技术产业，经济分析和法院判决的论证。

I think that maybe what we could do is start with Vanessa. Who are these companies?

我想我们可以先由张博士开始：这些公司是谁？

Vanessa Zhang: Thank you, Danny. So let me give you a brief introduction of those two companies in this case. Tencent is the largest instant messaging software producer or provider and offers various free services. Those free services include the instant messaging platform, which also called QQ, Weibo, which is a micro-blogging platform, online games, online security software, social network services, search engine and e-commerce.

张艳华：谢谢，丹尼尔。我先来简单介绍一下本案中的这两个公司。腾讯是中国最大的即时通讯软件的供应商，它提供各种免费服务。这些免费服务包括：即时通讯平台QQ；微博平台，；网络游戏，网络安全软件，社交网络服务，搜索引擎和电子商务。

Tencent makes profits from selling advertising to companies that want to reach Tencent users, selling virtual products or items for its online gaming services, charging its users for the bundled SMS packages, providing mobile games and charging for other mobile value-added service such as the mobile books.

腾讯获得盈利的方式是：向以腾讯用户为潜在客户群的公司收取广告费，为它的在线游戏出售虚拟产品或虚拟物，向需要捆绑短信套餐的用户收取费用，提供手机游戏并对其它移动增值服务收费，比如移动图书。

As its main product, QQ has 340 million monthly users in November 2010 and 452 million monthly users as of April 2013 according to iRresearch.

根据艾瑞咨询公司所做的调查报告，作为其主打产品，在2010年11月，QQ拥有3.4亿用户，而在2013年4月，QQ用户达到4.52亿。

Let's turn to the other company, Qihoo 360. Qihoo is the largest Internet security software provider. And it also provides free services such as online and mobile security software, a web browser and a

game platform with the games developed by third-party game developers.

现在我们来看一下另一家公司：奇虎360。它是中国最大的网络安全软件供应商。它也提供免费服务，比如网络和手机安全软件，网络浏览器，游戏平台和由第三方游戏开发商开发的游戏软件。

Qihoo 360 makes profit from selling advertising and providing web game services. Its main product is called 360 Safeguard. It had 275 million monthly users in November 2010 and 444 million monthly users as of April 2013. So that's the basic background of the two companies. Danny.

奇虎360的盈利来自销售广告和提供网络游戏服务。它的主要产品是360安全卫士。它在2010年11月拥有2.75亿用户，在2013年4月拥有4.44亿用户。这就是这两家公司的基本背景。

Daniel Sokol: Thank you. Well, ultimately in order to have a decision we need to have a legal claim. Will, I wonder if you might walk us through what is the legal issue here? What's the allegation?

丹尼尔·索科尔：谢谢。为了得到判决，我们需要有一个法律请求。汤姆先生，能不能

麻烦你给我们介绍一下这里的法律问题是什么？是在指控什么？

Will Tom: Put very simply, the war started when Qihoo publicly claimed that Tencent QQ instant messenger invaded users' privacy and configured its security software to block QQ. In response, Tencent called on users to make an either/or choice between QQ and Qihoo's 360 software, and announced that it would block users who have installed 360 from using QQ. It also bundled the default installation of its own security software with QQ upgrades.

威尔·汤姆：简单来说，这场大战开始于奇虎公开宣称腾讯QQ即时通讯软件侵犯用户隐私，并修改其安全软件针对并阻止QQ。 对此，腾讯要求用户在QQ和奇虎360之间二选一，并宣布在装有360软件的电脑上将不能运行QQ软件。它还在升级QQ 时捆绑了自己的安全软件进行默认安装。

Through governmental intervention, compatibility was quickly restored, but Qihoo sued Tencent under Article 17 of the Anti-Monopoly Law, claiming that the either/or choice made to users was an abuse of a dominant market position.

通过政府的介入，二者的兼容性问题被很快恢复。

不过奇虎起诉腾讯违反《反垄断法》第17条，声称其让用户只能“二选一”的行为是滥用市场支配地位。

Daniel Sokol: We're going to get into the details in just a little bit. The question for those listening is as follows - what are the key ramifications for the decision for Chinese antitrust? David, I wonder if you could take a first stab at this?

丹尼尔·索科尔：我们等一下会具体讨论。现在我们听众的问题是：这个中国反垄断的判决的关键的后果是什么？大卫，你可不可以先来谈谈呢？

David Evans: Thanks, Danny and thanks Will and Vanessa for that introduction. I think there are three important ramifications. None of them really have to do with the abuse of dominance claim, which I don't think anyone really took very seriously. The court probably could have just bounced the case based on just looking at some of the details of the claim and the effects.

大卫·埃文斯： 谢谢，丹尼尔，也谢谢威尔和张博士的介绍。我认为它有三个重要的影响。 这三个后果都和滥用市场支配地位的指控无关。我不认为有任何人认真对待过这个指控。法庭可能只要看

一下指控的细节和影响就可以推翻这个案件。

So the importance of the decision is really on market definition and market power analysis and how the courts are approaching that. There are really three things.

因此，这个判决的重要性实际上在于市场界定，市场力量的分析，和法庭是如何达到这个结论的。它有三方面内容。

First, the court adopted what I think is a very modern approach to market definition and the analysis of market power. It said that market definition, and I'm using my own words here, but I think it characterizes it pretty well, that the market definition is really a guide and that it isn't necessary to establish rigid boundaries in doing a market definition analysis. So it didn't get stuck in the rigid market definition approach that is still used in the European Union and it used to be pretty common in the US as well.

首先，法院采用了我认为是非常现代的方法来界定相关市场和进行市场力量的分析。我来用我自己的话讲，法院认为市场界定只是一个指导，在做市场界定分析时，并不需要划分严格的相关市场边

界。所以，法院没有局限于仍然在欧盟国家使用的，以前在美国也很普遍的强制性市场界定方法。

It also found related to that that market share is really just one metric for assessing monopoly power and a metric that actually ought to be used with considerable care. So the Chinese Supreme Court isn't going to obsess about market share statistics. And that makes the Chinese approach similar to the approach that many economists and antitrust scholars have advocated and that got incorporated into the 2010 DOJ/FTC merger guidelines. So that's the first point.

和它相关的是，市场份额只是判断市场支配地位的一项指标，并且这项指标应当被小心使用。所以中国最高法院没有纠缠在市场份额统计数据上。中国法院的该做法是和许多经济学家和反垄断学者所倡导的做法类似的，这种做法也被写进了2010年美国司法部和联邦贸易委员会合并准则中。这是第一方面。

A second point is that the Chinese Supreme Court and the intermediate court recognized the importance of two-sided platforms, two-sided markets, in conducting a sound antitrust analysis. Interestingly they followed the approach that the ECJ more

or less took in the recent Cartes Bancaires decision, and that's really that the two-sided platform issues should be dealt with in the analysis of market power and effects rather than in market definition. But nonetheless, they took two-sided platforms seriously and made it clear that that needed to be part of the analysis.

第二方面是，中国最高法院和广东高院都认识到了双边平台和双边市场对进行合理的反垄断分析的重要性。有意思的是，它们或多或少的遵循了欧洲法院最近对 Cartes Bancaires 一案的途径， 也就是双边平台的问题应该在市场支配力和影响分析时被考虑，而不是在相关市场界定时。不管怎样，它们认真对待了双边平台的问题，并明确表示它要成为分析的一部分。

Here’s third thing. You know you always like decisions where you won better than those where you didn't win and I obviously come from that bias. But if you read the decision, it's clear that in their very first case the Chinese Supreme Court is very comfortable dealing with advanced topics in antitrust. You know you can quibble with various things that they do, but I think overall the decision reflects a highly nuanced understanding of antitrust concepts. They were able to get into

SSNIP test and hypothetical monopoly tests and all sorts of relatively advanced topics in antitrust. And, again, whether you agree with them or not, it does seem to be an impressive first showing for the court.

现在是第三方面。大家都知道当你赢了官司时，你会喜欢那个判决，当你输掉官司时，就没那么喜欢了。很显然，我现在就是有偏见的。不过如果你读了判决书，你可以明显感觉到，作为有史以来第一个此类案件，中国最高法院在处理反垄断的高深议题时还是游刃有余的。你可以对他们做的事有各种评价，不过我认为这个判决书从总体上反映出他们对反垄断概念的细致入微的理解。他们能够运用“SSNIP测试法”、“假定垄断者测试”和其他各种在反垄断领域中较为高深的话题。不管你同意与否，这是确实是中国法院令人印象深刻的处女作。

Daniel Sokol: Thank you, David. First of all, let me start by saying I agree with you entirely that this is not an easy first case. I think the Supreme People's Court really did a fine job. But we have legal experts from two other important jurisdictions and I thought maybe to get their thoughts. Antonio, you haven't had a chance to chime in yet. And I thought especially

since David did bring up Commission cases and EC law more broadly, and given that you teach exactly these things in addition to practice it, I thought we would start with you.

丹尼尔·索科尔：谢谢你，大卫。首先，请允许我说一下，我完全同意你的看法，这不是一件简单的“首例案件”。我认为中国最高人民法院确实做的很好。不过我们这里还有来自另外两个重要的司法管辖区的法律专家，我也想听听他们的看法。安东尼奥，你还没有机会讲话呢。我觉得既然刚才大卫提起了委员会的案例并大致提到了欧盟的法律，你既处理相关案件，又在教这些课程，就请你先讲讲吧。

Antonio Bavasso: Thanks, Danny. Yes. I think this judgment is extremely interesting. First of all, my high level reaction is that the Supreme Court went very deep, as David said, into the facts. I don't know if this is a function of the legal test of the Supreme Court is applying. Perhaps they have more leeway to do so under the standard that is applied in China. But it is impressive how detailed their analysis is about the economic evidence and how comfortable they seem to be to analyze and come to a view on advanced topics of antitrust economics.

安东尼奥·巴瓦索：谢谢，丹尼尔。是的，我认为这个判决是非常有意思的。首先，我的反应是，就像大卫说的，最高法院对证据挖的非常深。我不确定这是不是最高法院正在采用的法律测试功能。也许在中国当前的标准下，他们有更多的余地去这样做。不管怎样，他们对经济证据的分析是如此细致，它们对于反垄断经济学的高深话题的分析和总结是如此自如，这是令人称赞的。

Four high-level points that jump off at me about this judgment.

关于这个判决，我有四点重要的看法。

The first one is when you read the judgment and compare to the intermediate decision, they do appear to do market definition analysis which is fairly focused on a functional distinction between the products. And they explicitly say that the markets that business people refer to may provide clues, but cannot replace a rigorous relevant market analysis. I'm obviously looking at an English translation of the judgment.

第一点是，当你读这个判决书，并和广东高院的判决相比较，可以看出，它们在集中于

产品之间的功能区别上作市场界定分析。而且，它们明确指出业内人士所指的市场可以提供线索，但不能取代严格的相关市场分析。需要说明的是，我读的是判决书的英文翻译版本。

But then, and this is my second point, having defined the market rather narrowly, they don't get stuck in that narrow market definition. Rather they do look at the question of dominance in a much more economically-minded way than what we are used to in many other jurisdictions. Therefore, as David said, they don't attribute an excessive importance to market shares, notwithstanding what appear to be some fairly constraining limits coming from the Chinese legislation about market shares. Effectively even though they look at dominance starting from a fairly narrow market definition they look also at the effect of the behavior and, most interestingly, they infer from the lack of effect that there is probably not a dominant position at play here. So the effects analysis loops back into whether there is a dominant position in the first place.

现在是我的第二点。在把市场界定的相对狭窄后，他们并没有局限在狭小的市场界定中。在对支配地位的认定时，他们运用

了非常有经济头脑的方式，比我们在其它司法管辖区运用的方式要宽广很多。 因此，正像大卫说的，他们没有过分重视市场份额指标，相反，中国的法律对于市场份额的应用有许多限制。尽管他们在进行支配地位认定分析初期采用相对较窄的市场界定，他们也很有效地考虑了市场行为的影响。最有意思的事，由于观察不到市场影响，他们因此推断没有市场支配地位的一方存在。所以这一影响分析又回到了开头的关于是否有市场支配地位的存在的问题。

The third that struck me is that The Supreme Court venture quite confidently into an analysis of entry and consider what are the effects of entry onto the behavior in question. Perhaps we can explore that later on during this seminar.

第三点，令我印象深刻的是，最高法院很有信心地进行了市场进入的分析，并考虑市场进入对行为的影响。我们等一下可以详细谈这个问题。

Fourthly, the last interesting point here, which differs from the practice that is developing (particularly in Europe), is that they stress very clearly that the burden of proving an abuse of dominance rests with the party

alleging the abuse of dominance and not with the party that is alleged to have breached the relevant legislation through an abuse of dominance. And that is, again, procedurally very important point.

第四点，也是最后一点有兴趣的现象是，和其它地方特别是欧洲的做法不同，它们明确强调，提供滥用市场支配地位的证据的责任在于指控滥用支配地位的一方，而不是被指控通过滥用支配地位而违反了相关法律的一方。这在程序上也是非常重要的一点。

Daniel Sokol: Thank you, Antonio. So to recap, there are three major findings that David brought up. Number one, market definition is a guide but is not necessary to establish rigid boundaries. Number two, market share is just one metric for assessing monopoly power and should be used with care. And number three, while two-sided platform issues might not be relevant at the market definition stage, they can be considered in analysis of dominance.

丹尼尔·索科尔： 谢谢你，安东尼奥。我们回顾一下，大卫提出了三个主要的研究结果。第一，市场界定是一个指导，而并不需要建立严格的市场界限。第二，市场份额只是判断市场支配地位的一

项指标，并要小心运用这项指标。第三，在市场界定阶段，双边平台问题可以不与考虑，但在进行市场支配地位分析时，应关注这一特性。

Antonio then added a number of additional points to add clarity to the decision from a European perspective. Will, we would turn to you. It's been a while since a high-tech issue has come before the US Supreme Court. Since Actavis last year. What are your thoughts from the US perspective on this case?

安东尼奥从欧洲的视角了谈了他的看法，使我们更清晰地了解这个判决。威尔，我们现在来问你，自从去年的Actavis一案后，美国最高法院已经有一阵子没有收到高科技公司的案例了。你从美国的角度怎么看这个案件呢？

Will Tom: Well, like the other speakers on this panel, I was really quite impressed. I did think that the opinion displayed quite a lot of sophistication both about the purpose and the techniques of the market definition. It understood that a hypothetical monopolist test was not a mechanical exercise but rather a means to assess the ability of the defendant to exercise market power. And it really, as Antonio said, delved pretty deeply into the facts specific to each

proposed substitute in the course of its market definition, and went beyond market share to consider factors such as ease of entry and the impact of innovation.

威尔·汤姆：像其他嘉宾一样，这个判决给我的印象很深刻。我认为这个决定充分表现出市场界定的目的和技巧的复杂性。它明白“假定垄断者测试”不是一个机械操作，而是以评估被告行使市场支配力的一种手段。而且，就像安东尼奥说的，它在研究市场界定时，非常深入地研究了每一个可能的替代品。它不但考虑市场份额问题，更考虑了其它因素，比如，进入市场的难易程度，和创新的影响。

I'm not sure it would be quite right to call its approach a functional analysis in the sense that if you delved into the old US Supreme Court law, it had talked about whether to define markets on the basis of what products are functionally substitutable, and rejected that approach because the mere fact of offering the same function doesn't really tell you very much about what would happen in the event that a party or parties actually tried to exercise market power. And I think this opinion really did focus on the right issue, which is the thought experiment that the hypothetical

monopolist test is supposed to offer. If a hypothetical monopolist in the proposed market tried to exercise market power, what would happen? And so the court went beyond functional substitutes and looked at, for example, whether single function IM services would actually constrain the behavior of suppliers of comprehensive services. And I'm not sure it would have included those companies as participants in the market had it not been for its conclusion that such companies were rapid entrants into providing full function services.

我不能确定是否能将这种方法称作功能分析。你如果深入研究旧的美国最高法院法律，它提到了是否以产品的功能替代性来界定市场，不过由于仅仅提供相同功能这一事实并不能告诉你当一方或多方在行使它们的市场支配力时，会发生什么事，所以这种方法被否决了。我认为这个决定确实专注于正确的问题，那就是“假定垄断者测试”应该提供的思维实验。如果一个假定垄断者在假定的市场上行使市场力量，会发生什么事？于是法庭超越了对功能性替代品的考量，而去研究，例如，单一功能的即时通信服务会不会实际上限制综合服务供应商的行为。 如果不是为了得出这些公司能够快速进入

全功能服务市场的结论，我不能确定是否应该把这些公司作为市场参与者。

Similarly, in looking at whether mobile instant messaging services should be included in the market, it really looked not just at the functional characteristics or whether they were functional substitutes, but it also to what barriers, such as equipment acquisition costs, would inhibit rapid substitution in the event of an exercise of market power. So from a US perspective, this is very close to how we would think about market definition and market power. Maybe for the same reason that David being on the winning side of the case says, boy, this is great, being an American lawyer and having an American approach to what market definition and market power is all about it strikes me that this is a really good decision because it's so close to the way we think about things.

同样的，关于移动即时通信服务是否应该包括到相关市场的问题，法庭不只考虑了功能特性，或是它们是否可以功能性替代， 还考虑了在行使市场力量时，有没有障碍，比如购置设备的成本，会抑制快速替代。所以从美国的角度来看，这和我们对于市场界定和市场力量

的认知是很接近的。可能和大卫作为胜诉方很高兴一样，作为一个美国律师，看到用美国的方法来考虑什么是市场界定和市场力量，让我觉得这是一个很好的判决，因为这和我们思考事情的方式非常接近。

Daniel Sokol: Will, that's incredibly helpful and particularly if you talk about different frameworks for thinking this through as an American. I'm actually going to try a different framework here. David and Vanessa, you were the economic experts for Tencent. How did that work in a Chinese context? You've had significant experience as experts in Europe, in the United States, in Latin America. What's it like working as economic experts in the Chinese context?

丹尼尔·索科尔：威尔，这是很有用的介绍，特别是你从一个美国人的角度提到了不同的思考框架。我这里也要试一种不同的框架。大卫和张博士，你们曾经都是腾讯的经济顾问。请问在中国背景下工作是怎样的？你们在欧洲，美国，拉丁美洲都有丰富的专家经验。那么，这一次又是如何在中国当经济专家的？

David Evans: Well, let me start, Danny, by taking that and then turn it over to Vanessa, who

obviously was closer to the Chinese teams we were working just because the language of the case was obviously Chinese. Let me answer that just to give a flavor of this for both the US and European audience. While the Supreme Court and the Intermediate Court were willing to take oral testimony, my involvement in this was on the paper. So the submission of expert evidence in this by both parties and the interplay was really by the submission of reports. And if you looked at the English version of those reports, they would look very much like a US expert report or a white paper that you would submit to the European Commission laying out arguments and evidence. In that sense what we did was very similar to what we do in the US and Europe with the exception that unlike the US there wasn't necessarily the kind of cross examination that you have here.

大卫·埃文斯：好，让我先开始，然后再由张博士来谈，由于本案的语言是中文的缘故，很自然的，她和中国的团队工作联系更密切。我来先给美国和欧洲的听众介绍一下。中国最高法院和中级法院都可以接受口头证词，不过我的主要工作是在纸上。所以在本案中，两方提供专家证据和互动实际上都是在提交报告。如果你看这些报告的英文

版，你会觉得它们就像是一份美国专家报告，或者是你给欧盟委员会提交的阐述论点和证据的白皮书。所以从这个意义上说，我们所做的和在美国欧洲没什么两样，除了一点和美国不同的是，这里不一定要对专家证人做当庭质询。

For an American, for an English speaker, it was obviously an interesting experience because eventually everything needed to be done in Chinese. Just in terms of how we ended up doing the case, we initially worked in English, but then as things got far enough along and I was kind of comfortable with the arguments from my perspective, we switched to Chinese and I relied on Vanessa to tell me where changes were being made and so forth.

作为一个美国人和讲英语的人，这显然是一次很有意思的经历，因为最终所有的一切都要用中文。说到我们如何处理本案，我们是先以英文工作，到我们写得差不多，当我们觉得从我们的角度看来那个论证比较合适的时候，就把它翻译成中文。这时需要张博士来告诉我进而在哪里做了改动等等。

So that's the perspective from my standpoint. I think Vanessa can give you probably a closer perspective from the standpoint of

Chinese national acting as an expert in China before the courts there.

所以这是从我的角度的看法。我想张博士能够以中国专家身份，向你更细致地展现如何在中国法庭前工作。

Vanessa Zhang: Yes. Working on the antitrust litigation case in China has been very challenging. And it demands seamless integration of the international experts and a global team with the local counsels. Often time we have to work closely with the litigation team on the ground and with full understanding of the specificities of internet industry in China, market characteristics and modern industrial organization theory as well as the litigation strategy. So it doesn't just demand the interpretation of culture and language differences, but also demands full experience of products and services involved and the related theory that has been applied in the case.

张艳华：的确如此，在中国处理一件反垄断诉讼案是非常具有挑战性的。它需要由国际专家和当地律师组成的全球团队共同无缝协作。很多时候，我们要和本地的诉讼团队密切联系，并且充分了解中国互联网产业的特殊性、市场特点、现代产业组织理论和诉讼策略。所

以，它不但需要对文化和语言差异的阐释，更需要对所涉及的产品和服务，和与本案相关的理论的全面理解。

So if we take a bigger picture of the court system in China, academic credentials have been highly regarded. And academic publications are one of the most important criteria for economic experts in antitrust cases in China. Chinese judges, especially the judges from the Supreme Court and the provincial courts such as high courts in Beijing, Shanghai and Guangdong, have various training programs throughout the year. And they have the opportunity to interact with international scholars and the practitioners on the development of modern economic theory and anti-trust practice. Therefore they dare to take further steps into the analysis and carry out rigorous reasoning before making a decision. Yeah, that's basically our understanding on how the case has been worked out in China.

纵观中国法院系统，我们可以看到学术成果一直受到高度重视。在中国反垄断案件中，发表的学术论文是衡量经济专家的最重要的标准之一。中国的法官，特别是最高法院，和北京，上海，广东等省级法院的法官，每年都有各种培训

课程。他们也有机会与国际学者和从业者就现代经济理论和反垄断实践的发展互相交流。所以，他们敢于进行更深刻的分析，作出严格的论证，最后得出结论。基本上这就是我们对本案如何在中国处理的了解。

David Evans: The other thing I would just add to that, Danny, and the thing that may surprise some people, is the Chinese Supreme Court, unlike – well, some would argue our Supreme Court and certainly unlike the European Court of Justice, the Supreme Court is interested in basically rehearing or hearing additional factual evidence. So at the Supreme Court level it was possible to submit not only new reports but also new arguments. And that's a feature of the Chinese system that's certainly unlike my experience in the US and Europe.

大卫•埃文斯： 我想补充的另外一点可能会让有些人觉得意外。有人会说，中国最高法院肯定不像欧洲法院。不过我想说的是，和欧洲法院不同的是，中国最高法院对复审和审理新的证据感兴趣。所以在最高法院这一层面，你不但可以提供新的报告，也可以提供新的论证。在这一点上，中国的制度和我在美国和欧洲的经验完全不同。

Daniel Sokol: Thank you both. Just as an aside, Vanessa, I've participated in one of those training programs for Chinese judges. I thought that the judges were incredibly sophisticated, asked great questions and really cared about getting things right. I wish in other jurisdictions, including my own home jurisdiction, judges were nearly that eager to learn.

丹尼尔·索科尔：谢谢两位。张博士，说句题外话，我曾经参与过一届对中国法官的培训课程。我觉得这些法官都非常的精益求精， 他们提的问题非常有见地，也真正关心把事情做对。我希望在其它的司法管辖区，包括我自己所在的司法管辖区的法官们，也能这样好学。

I do want to move on to a substantive question, Vanessa, maybe that you could answer. The security software was free. This is sometimes a very difficult concept for judges to understand. The fact that the software was free, did that pose any complication for the court and how did the Court handle it?

现在我想问一个实质性的问题。张博士，也许你可以回答。这个安全软件是免费的，这很难让法官们理解。所以这个软件是免费的事实，有没有增加本案的复杂

性，法庭又是如何处理的呢？

Vanessa Zhang: Yeah, you are right, Danny. It indeed posed complication for the court. First of all, the court acknowledged the “free” nature of the two companies' business models. They found that Internet service providers use free basic services to attract mass users, then leverage those users in value-added services and advertising to make profits. In turn, Internet companies promote their free services by those profits. That's a prevailing business model of the Internet industry. That's also why Internet service providers compete on quality, services and innovation, etc.

张艳华：你说的很对，丹尼尔。它确实使本案更加复杂。首先，法院承认了这两家公司商业模式的“免费”特性：互联网服务经营者先以其作为核心业务的免费服务来吸引大量用户，再基于这些用户资源提供收费的增值服务和广告服务，从中获得盈利。反过来，互联网公司通过这些利润来促进它们的免费服务。这是在互联网行业普遍的经验模式。这也是为什么互联网服务经营者在质量、服务和创新上相互竞争。

Therefore, when defining the relevant market, the court realized there is a limit of using the traditional Hypothetical Monopoly Test

(HMT) into the Internet-based instant messaging (IM) service. So the court didn't fully take into account the price increase, but suggested a modified version by accepting a significant change over quality. In other words, it didn't use SSNIP test (small but significant and non-transitory increase in price) but accepted the test with small but significant and non-transitory decrease in quality. It is also called SSNDQ test by the court. Being aware that quality decrease could not be easily assessed and the quality data is not available, the court suggested qualitative but not quantitative hypothetical monopoly test with decrease of quality.

所以，在界定相关市场时，法院意识到在以互联网为基础的即时通信服务上采用传统的“假定垄断者测试”是有局限性的。因此，法院没有完全考虑价格上涨的影响，而是变通为考虑质量显著变化的影响。换句话说，法院没有采用“SSNIP测试法”，而是采用的“数量不大但显著且非短暂的质量下降”的方法。法院把它称做SSNDQ测试法。 考虑到质量下降难以评估，并且质量数据难以获取，法院建议在运用质量下降的“假定垄断者测试”时，进行定性，而不是定量分析。

In the analysis the Court actually relied on product characteristics, function, quality, how difficult to acquire such a product, and other relevant factors to assess the demands substitution. And they also realized that, when it is necessary, supply substitution should also be applied. Therefore, the Court analyzed substitution between instant messaging and Weibo, SNS, mobile text messaging and email. At the end, the Court made a conclusion that relevant market is IM service market in China.

法院实际上是根据产品特点、功能、质量、获得产品的难易程度和其它相关因素进行需求替代的评估。同时他们也意识到，在需要的时候，也要考虑供应替代。因称，法院分析了即时通信和微博，社交网络服务，手机短信和电子邮件之间的替代性。最后，法院将本案的相关市场界定为中国即时通信服务市场。

Daniel Sokol: Thank you. I guess now that we've heard about how things worked in China, Will, any reactions that you might have based on your experiences?

丹尼尔·索科尔：谢谢你。我们已经了解了在中国是如何处理本案的。威尔，基于你的经验，你有什么反应呢？

Will Tom: Well, I guess the first reaction is looking at the difference between generalist courts and specialist courts. It is interesting to see how much in tune this court and this decision was with standard international antitrust thinking which in some sense shouldn't be surprising because unlike our judges, by and large, these judges go to training programs at which Professor Sokol will teach them how to think about these issues. And he's obviously a very good teacher.

威尔·汤姆：嗯，我想第一反应是区分普通法庭和专门法庭。看到该法院的处理方式和判决书非常符合标准国际反垄断思维，是很有意思的事。不过从某种程度上讲，这也不是什么奇怪的事。因为，和我们的法官不同，总的来说，他们的法官接受了索科尔教授的培训，他教他们如何看待这些问题。很明显，索科尔教授是很好的老师。

So that's –

所以，. . .

Daniel Sokol: Let me add, by the way, that Will, and for that matter David, have both been gets lecturers in my class. So I outsource the teaching to the more effective teachers.

丹尼尔·索科尔：让我补充一下，威尔，和大卫，都在我的教室里教过课。所以我把我的教学外包给更有效率的老师。

David Evans: Thanks, Danny.

大卫·埃文斯：谢谢，丹尼尔。

Will Tom: Yeah. And unlike in the Internet market, the advertising is free and the service is expensive. So you've had your free advertising, Danny. So that's reaction number one. And, you know we all know that there are advantages and disadvantages to specialist courts. But here I think it was a clear advantage. Secondly, I think the point about dealing with the fact that the services were free; it was interesting to see how seamlessly the court handled that. Again, by focusing on what is the purpose of this exercise. The SSNIP test isn't some set of commandments handed down on stone tablets, but rather it is a tool to understand whether this defendant could really do something bad in the marketplace. Is there really a capability to illegitimately exercise power? And so it didn't get hung up on, you know what are the mechanics of modeling a 5 percent increase in price when 5 percent of 0 is still 0? But rather it did the kind of thought experiment that

a hypothetical monopolist test was invented to do. Namely if this defendant, which was accused of handing consumers an all-or-nothing choice or if you will, exclusive dealing or tying, however you want to characterize it, is it really capable of implementing a harm to the marketplace by so going? And if you think about the required bundling or tie-out if you want to call it that, as a kind of decrease in quality, the court asked itself whether the facts made it plausible for market power to be exercised that way. And when it went through the possible constraints on that behavior, it pretty readily concluded that market power could not be exercised despite high market share. So, again, I thought it handled the issues pretty well.

威尔·汤姆：是。不像互联网市场，我们的广告是免费的，服务是昂贵的。所以丹尼尔，你刚刚做了一个免费广告。言归正传。那是我的第一反应。我们都知道专门法庭有优点也有缺点。不过我认为在这里是一个明显的优势。第二点，我在想关于服务是免费的这个事实，法院处理得非常清晰。还有，他们专注于行为的目的。“数量不大但有意义且并非短暂的价格上涨”的方法不是刻板不变的诫律，而只是一个帮助我们理解被告是否真的可以对市场

有负面影响的工具。是否真的存在以非法手段行使支配力？他们没有停留在考虑当价格提高5%的模式机制，因为0的5%还是0啊。他们而是做了一个思维实验，这也是“假定垄断者测试”方法设计的初衷。也就是说，被告被指控让客户在全有或全无之间选择，或把它叫做独家经营，搭售，但这样做真的能给市场带来消极影响吗？而且如果你觉得捆绑，或叫搭售， 代表了质量下降，但事实表明这是否能成为行使支配力量是似是而非的。在考虑了所有的对该行为的可能约束后，很自然地得出结论，尽管拥有高市场份额，市场支配力量是不存在的。所以说，我认为法院处理的非常好。

Daniel Sokol: Thank you Will. Antonio, does this look similar or different based on your European perspective?

丹尼尔·索科尔：谢谢你，威尔。安东尼奥，以你的欧洲视角来看，这是一样的还是不同的？

Antonio Bavasso: A bit of both: in the sense that on the one hand the Court had to grapple with the question on market definition and the analysis of impact of decreases in quality. Interested in David and Vanessa's view, but I thought that analytically the Court

got a little stuck in not following what the intermediate court had done, i.e. drawing an analogy between the decrease in quality and the potential increase in price (given that conceptually the way to estimate the decrease in quality could be done by assuming increase in price).

安东尼奥·巴瓦索：两方面都有。一方面，法院不得不应对市场界定的问题和质量下降的影响的分析。大卫和张博士的观点都很有意义，不过我觉得最高法院没有完全遵循下一级法院的路径，也就是说，对质量下降和潜在价格上升进行类比。因为从概念上讲，对质量下降的假设可以通过假设价格上升来完成。

On the other hand – and so in common with many courts - they had to come to terms with market definition. Where the approach is very different is that The Supreme Court then goes to the effects analysis and uses its findings on the effects to conclude that the behavior in question does not constitute an abuse of dominant position. And in fact is on that basis, to conclude that they alleged infringer does not hold a dominant position in the first place.

另一方面，和其它许多法庭一样，他们要界定市场。和其它法庭的做法很不同的是，中

国最高法院继续运用影响分析，并用分析结论得出结果，就是被告的行为不构成滥用支配地位。也正是在此基础上，用以佐证前面的被指控侵权者不具备市场支配地位的论断。

That is a very different from analysis that would typically be carried out by – a European Court. A European Court would not typically call into question the finding of a dominant position based on the effects of the behavior of the allegedly dominant firm. In Europe there is much more of a two-stage approach. We define the market to determine where is the dominant position; we then look at the alleged abuses. We never go back to call into question the dominant position, which is probably one of the reasons why some judgments – not all of them do not make an awful lot of economic sense.

这是和欧洲法院的分析方法很不同的地方。欧洲法院通常不会因被告的行为的影响来决定是否具有支配地位。在欧洲，我们运用两阶段的方法：首先，我们先进行市场界定，来决定是否存在市场支配地位。然后，我们再来看是否有滥用行为。我们从来不会回过头去再质疑市场支配地位问题。这也是为什么有一些判决是在经济学上讲不通的。

Daniel Sokol: Thank you for your honesty about your perceptions of some of the decisions. I actually want to take a step back, because I think it would be helpful for those in the audience to understand. Vanessa, what was Tencent's share in what the court defined as the relevant market?

丹尼尔·索科尔：感谢你表达自己的真实看法。其实我想回过去问个问题，因为我觉得这将有助于我们的听众更好的理解。张博士，在法庭界定相关市场中，腾讯的市场份额是多少？

Vanessa Zhang: Yes. It depends on the calibration of the market share. And the Court has noticed in the decision that it would be effective usage time, effective usage frequency and active users. The data that has been used in the case is from iResearch. But iResearch only provides the PC-based data, which does not include the mobile-based data. So if we take monthly effective usage time as an example, Tencent's share exceeds 80 percent among the PC-based instant messaging service providers. That's also shown in the decision.

张艳华：这取决于对市场份额的测度指标。 在法院的判决书中，提到有效使用时间、有效使用频率、和活跃用户。在本案中

使用的数据是由艾瑞咨询公司提供的。不过艾瑞咨询公司只能提供个人电脑端的数据，而不包括移动端的数据。如果我们以每月有效使用时间为例，腾讯在个人电脑端即时通信服务市场的份额超过80%。 这在判决书中也写明了。

Daniel Sokol: I'm glad you raised that. Because then it leads to a much more important question. If the answer is around 80 percent, maybe, David, I could throw this in your direction. The court agreed that Tencent was not dominant. So why is it that the court dismisses this market share evidence that looks quite significant on its face at least?

丹尼尔·索科尔：我很高兴你提到这一点，因为这将带出一个更重要的问题。大卫，我要问你这个问题了。既然答案是80%，可是法院仍然认定腾讯不具有市场支配地位。为什么对这个至少从表面上看起来是非常明显的市场份额的证据，法院却置之不理？

David Evans: Yeah. No, it's very interesting. So they – part of it is what Antonio described, which is sort of the backward looking from the effects. But there's also what I would characterize as kind of a forward-looking analysis as to whether Tencent

was capable of doing bad stuff. And there it really came down to their view of dynamic competition in this sector in China. So they recognized what we would call leapfrog competition--not their term—but essentially leapfrog competition where firms are constantly introducing new features to create products that are better than the other guy's products. And where are firms that are basically forced to do that if they want to keep their position. And that Tencent in fact is forced to do that if it wants to keep anything like the share that it has. My recollection is they gave the example of Microsoft's instant messaging service, which, of course, is very successful out of China, collapsing in China because of the perception that its quality was not only not that good but also that it had declined.

大卫·埃文斯：的确，这是非常有意思的一个问题。一部分原因，就像安东尼奥所说的，他们以影响分析从后向前推论。同时在对腾讯是否有做负面影响的能力的分析中， 我把它形容为前瞻性的分析。这都是由他们怎样看待中国互联网行业的动态竞争决定的。他们认可我们所说的跨跃式竞争（他们的说法不同）。基本上，跨跃式竞争是指公司不断推出比竞争对手功能更好的产品。公司如果想保持它们的地位，就

必须不停地这样做。所以，腾讯如果想维持它的市场份额，它也不得不这样做。在我的记忆中，他们提到了微软的例子。微软的即时通信服务在中国以外是非常成功的，但在中国却在崩溃，这是因为客户觉得微软的产品质量不但不好，还更在下降。

The court also, as Antonio and Will pointed out, placed a lot of weight on the fact of entry and the possibility that entry could discipline the large players. Then finally, they recognized this the broad competition between the platforms, the internet platforms in China, and that what these companies are really trying to do is to acquire people's attention in order to monetize it in some other way. That was kind of a driving force between the competition that was taking place. So it was that kind of analysis of the realities of market competition, at least in my reading, that led them to not place a lot of weight on the static share statistic.

就像安东尼奥和威尔指出的，法庭下了很大力气去研究市场进入的事实，和它可以约束大量参与者的可能性。最终，它们确认了这是对平台，对中国互联网平台之间的广泛竞争，这些公司在做的是引起公众的注意，以便从其它方式获得盈利。这是发生竞争的真正动力。

至少在我读起来，这是对市场竞争现实的分析，所以他们对于市场份额的统计数据没有很在意。

Daniel Sokol: So this leads to a broader question. How much of the analysis is really dependent on the fact that this was an internet industry? And maybe with this question I'll return to Antonio and Will. Antonio, do you want to maybe walk us through whether or not this is highly dependent on the particular industry?

丹尼尔·索科尔：这就引出了一个更广的问题。有多大比重的分析是基于这是个互联网行业的事实？也许这个问题我回来问一下安东尼奥和威尔。安东尼奥，你可不可以给我们解释一下这个判决是不是十分依赖于特定的行业？

Antonio Bavasso: Well, I don't know if it's dependent on the internet industry. I think it is generally dependent on what the court perceives to be the characteristics of this industry. And the importance that innovation plays in this sector and in these markets generally. But I wouldn't infer from that that the impact of this precedent is limited. I think that a similar analysis is equally applicable as a matter of principle in all sectors where innovation can lead to what David called leapfrog entry and development. It

seems to me that the court thinks that that type of analysis is central to any finding of dominance and rightly so. So that approach is rooted in the characteristics of the particular market, but is equally applicable to those markets which display similar characteristics.

安东尼奥·巴瓦索：我不确定这是否依赖于互联网行业。我认为这通常取决于法庭对这个行业特点的认知，还有创新对于这个行业和市场的重要性。但是，我不会就此推断这个先例的影响是有限的。我觉得，在由创新导致像大卫提到的跨越式发展的行业中，作为原理，类似的分析也是同样可行的。在我看来，法庭这种分析是判断是否存在支配地位的核心，也是正确的。所以，这种方法植根于特定市场的特性，但同样适用于显示出类似特征的市场。

Daniel Sokol: Will? Any additional thoughts?

丹尼尔·索科尔：威尔，你有没有补充？

Will Tom: I very much agree with Antonio that this is not unique to internet industries but rather is a function of the specific market being analyzed and that the broad principles would apply to any markets. You can imagine lots of internet markets in which there really is the kind of degree of lock-

in and barriers to entry that would make it possible to exercise market power. Just as you can imagine lots of brick and mortar industries in which rapid entry is possible. And we've had lots of cases in highly traditional markets in which high market shares were not deemed to confer market power because entry was easy.

威尔·汤姆：我非常同意安东尼奥的看法，这不是互联网行业所独有的，而是在特定市场中分析的功能，而广泛的原理则适用于任何市场。你可以想象有许多互联网市场有不同程度的封锁和壁垒，在这种情况下，行使市场力量是有可能的。又比如你也可以想象，在许多制砖和砂浆行业里，快速进入市场是可行的。我们也看到过许多在高度传统行业中，高市场份额不能认定赋予市场权力的案例，因为进入市场比较容易。

So I think it is very fact-specific at the level of the individual market. But principles are broadly applicable. I guess the other thing I would add here is I do think that the court was reasonably disciplined in treating the issues of market definition, market power, and anticompetitive effect or abuse separately. And so I may disagree slightly with Antonio on this point. The emphasis on lack of market

power despite the high market share was really based more on the ease of entry I think than on the lack of effect. And while there was certainly a section of the opinion that dealt with whether one could infer market power from the ability of defendant to engage in this conduct, and the court rejected that possibility, it was focused on whether one could make that inference and not the other direction of rebutting the existence of market power simply from the fact that this particular conduct didn't have an effect.

所以我认为在个别市场的层面，要看具体的事实，但它的原则有普遍的适用性。另外我要补充的是，我认为法庭把市场界定、市场支配力、反竞争效果和滥用行为的问题分别进行处理， 是合理的。在这点上我和安东尼奥的看法略有不同。我认为，拥有高市场份额却缺乏市场支配力量的判定的重点在于市场的容易进入，而不是缺乏影响。在判决书中有很大篇幅在讨论被告从事这一行为的能力，能否推断存在市场力量。法庭否决了这个可能性。它聚焦在考虑能否得出这个推断，而不是仅仅因为这个特定行为没有影响就驳斥市场势力的存在。

Daniel Sokol: Thank you, Will. You raise a number of important points that there have

potentially broader implications. So I thought as the last question, in fact, I'd focus on that. What is the relevance of this decision in cases in other jurisdictions? If, in fact, there is any relevance. I don't know. David, why don't I start with you?

丹尼尔·索科尔：谢谢你，威尔。你提到了许多重要的观点，它们可能有更广泛的影响。所以我想我的最后一个问题就针对这一点。这个判决对于其它司法管辖区的案例有什么关联？如果有的话，我也不是很清楚。大卫，你要不要先谈一谈？

David Evans: Yeah. I think there are three things. Obviously I don't know all the decisions out there, but at least from what I've seen, this appears to me to be one of the most important decisions concerning the analysis of fast moving internet markets. You know the other one that comes to mind is the European Commissions decision approving Microsoft's acquisition of Skype. So even though the precedential value isn't necessarily just about the internet industries, I think it is a particularly good analysis of those kinds of markets.

大卫·埃文斯：好的，我觉得有三件事情。很显然，我并不了解所有的判决，不过至少

从我所看到的，在我看来，这是对快速发展的互联网市场分析的最重要决定之一。另外一个我想到的案例是欧洲委员会批准微软收购Skype的决定。因此，尽管它可以不只作为互联网行业的先例，我觉得它对于这些类型市场提供了特别有价值的分析框架。

Second, it confirms the importance to the analysis of multi-sided platforms in antitrust. And it really is one of the two high court decisions now that recognized the concept and uses it in the analysis. The other one, of course, is the European Court of Justices decision, in September 2014, in Cartes Baincaires. That's two high courts now – one in Europe and one interestingly in China-- that has adopted the multi-sided platform approach explicitly in a decision.

其次，它印证了在反垄断案例中对多边平台分析的重要性。它是承认该理念并应用于分析中的两个高等法院判决之一。当然，另一个是2014年9月在Cartes Baincaires欧洲法院的判决。现在有两个高等法院明确地采取了多边平台的分析方法，一个在欧洲，有趣的是，另一个在中国。

And third, since we're all doing advertising here, my personal favorite, it recognizes the

importance of the work I've done on attention markets--where firms compete in a variety of ways to capture scarce attention from consumers and then monetize that attention through advertising or other means. And that's the framework that I brought to the expert opinion in the case. They seemed to have picked up on that in the analysis.

第三，既然我们都在这里做广告，我就说说我个人最喜欢的一点。它承认了我提出的注意力市场的重要性，也就是公司之间用各种手段互相竞争，来吸引稀缺的消费者注意力，以达到通过广告和其它方式获得经济利益的目的。这是我以专家观点在本案提出的框架。看起来，最高法院在分析过程中运用了这个框架。

Those are the three things that I would mention. The one other point that I guess I'll make if I have some liberty on this, Danny, just to respond to – maybe to respond to Will and to Antonio and to raise a question. It does occur to me that, you know one of the interesting aspects of what happens to courts is sort of a path dependence issue. The fact that the Chinese courts are beginning their development of cases by having two cases that focus on Internet industries is interesting. You wonder whether the dynamics of antitrust law

would be different if like the Europeans had started with a dynamic industry rather than bananas. I think it is interesting that the Chinese are starting their analysis of antitrust with these dynamic industries. That may itself have some impact on how antitrust evolves over there. Anyway, just kind of a random thought.

这是我想说的三点。如果允许的话，我还想提另外一点，也是回答威尔和安东尼奥，并提出一个问题。让我觉得有意思的一个方面，是法庭的路径依赖问题。中国法院在一起步就有两个互联网行业的案例来开始它们的发展。 你不禁会问，如果欧洲也是从动态行业，而不是香蕉行业起步，现在的反垄断法律的动力是不是会不同。我觉得中国由这些充满活力的行业来试水它们的反垄断分析是非常有意思的。它将对未来反垄断的发展有一定影响。好，这就是我随便想到的。

Daniel Sokol: That's all very helpful. Vanessa, you've spent a lot of time working in China, but you were trained at Toulouse. You live in the United States primarily. You also are truly a world citizen and understand a number of different jurisdictions. What do you think the impact might have on any of these other jurisdictions?

丹尼尔·索科尔：这是非常有帮助的。张博士，你在中国工作了很长时间，不过你是在法国图卢兹受训，并主要在美国生活。你是个真正的世界公民，对不同的司法管辖区有所了解。那你如何看待它可能对其它司法管辖区的影响呢？

Vanessa Zhang: Yeah. We have seen, and probably the other panelists have already raised this comment, this is the first antitrust case ruled by the Supreme Court of China. And it's also the most significant antitrust case which has set up the standard for analyzing the abuse of dominant cases in China.

张女士：的确，我们已经看到了，另外其他嘉宾可能也提到了，这是中国最高法院裁定的首例反垄断案件。它在中国建立了滥用市场支配地位的分析的标准，是最重要的反垄断案例。

Given the fast growing Chinese internet market, there might be more and more competition issues which might not have taken place in the other jurisdictions. So it would be a good example for a national supreme court to take into account rigorous economic analysis and to apply the modern industrial organization concepts into the decision. On one hand, China is trying to learn experience and

lessons from its peers and trying to get in line with the international best practice in antitrust enforcement. On the other hand, China is also contributing to the international antitrust community with its own experience and dares to adopt the cutting-edge economic theory such as two-sided market theory into the antitrust analysis, which also improves our understanding of competition issues in innovation-driven industries. That's a couple of my thoughts.

鉴于中国互联网市场的迅速增长，可能会有越来越多的在其它司法管辖区不会出现的竞争问题。所以，作为国家最高法院，运用严格的经济分析，采用现代产业组织理论，继而做出判决，这树立了一个很好的榜样。一方面，中国正试图借鉴同行的经验和教训，并试图和国际反垄断执法的最佳实践接轨。另一方面，中国也向国际反垄断社会贡献了自己的经验，并在反垄断分析中，敢于采用前沿的经济理论，比如双边市场理论。这也促进了我们对以创新驱动的行业的竞争问题的了解。这是我的两点看法。

Daniel Sokol: Will?

丹尼尔·索科尔：威尔，你要说说吗？

Will Tom: I guess I'm going to step away from the importance of this decision in terms of the economics of it and the antitrust analysis and step back to the question of institutions and the interplay of different voices on the international stage. I think one of the most significant impacts is that China will have to be taken seriously as a major contributor and thinker in this area. It is assuming a place among equals. So I think that's one thing to think about and the implications of that.

威尔·汤姆：我想我就不从经济学和发垄断分析角度来讨论这个判决的重要性，而谈谈机构问题和国际舞台上不同声音的互相影响。我认为最显著的影响之一是，我们将把中国当作这个领域的重要贡献者和思想者。这是个假设平等的地方。所以，我认为这是一件值得思考和有影响的事情。

A second point is that, of course the courts in China, at least so far, have spoken only in the context of private disputes. So it will be interesting to watch the other governmental institutions in China and see whether you see a similar degree of care and sophistication. Because the executive branch, if you will, is also assuming a place among equals in the international enforcement community, and because you do not, at least as yet,

see the kind of unification of those institutions that flow from the fact that in the US, for example, the agencies have to prove their cases in court. I think the dynamic in China may be somewhat more complex.

第二点是，至少到目前为止，中国的法庭只是提到了侵犯隐私的背景。因此，观察中国其它政府机构是否会有类似的关怀和复杂程度是一件有意思的事。因为如果你愿意，在国际执法社区，行政部门也是假设平等的地方。因为至少到现在，我们还没有看到这些机构的统一化，比如在美国，机构还需要在法庭证明它们的案件。我觉得在中国情况可能要更复杂些。

But I think that, regardless, you're seeing a tremendous globalization of antitrust and it really underscores the importance of dialogue among both the enforcers and the courts to achieve some degree of consensus about how to approach these issues.

不过，不管怎样，反垄断正在进行巨大的全球化进程，这强调了执法者和法院之间对话的重要性，以实现关于如何处理这些问题达成某种程度的共识。

Daniel Sokol: Antonio, I leave the last word with you.

丹尼尔·索科尔：安东尼奥，最后请你讲几句。

Antonio Bavasso: I think the point that David made about what he calls path dependency, which lawyers would probably call the value of precedents, is one of the most interesting ones to my mind. It's true that we perhaps need to distinguish the judicial setting, the judgment which represents a fine example of decision making from the administrative enforcement.

安东尼奥·巴瓦索：大卫刚才提到的路径依赖，律师可能会把它称作先例的价值，是在我心中最有趣的概念之一。我们的确可能需要区分司法环境，这个判决代表了从行政执法来作出决定的很好的例子。

The point that I find fascinating is that when China adopted an antitrust regime, it looked at European rules. Inevitably, as a result, it inherited a certain degree of "path dependency" is the presumption relating to market shares that found their root in cases such as United Brands and so on. So they've inherited a little bit of that baggage. But with this judgment the Supreme Court makes the most of being as a new kid on the block of judicial enforcement, the Supreme Court raises

the stakes by adopting a very interesting judgment which does away and doesn't absorb into their judicial system all the fallacies and rigidities that have developed over the years; the rigidities coming from precedents that judges in Europe need to deal with. This is a new start with a very interesting and in many respect I would say innovative approach to those issues. So I think that the Judgment it's to be saluted as a great achievement judicially.

有一点是让我觉得很有趣的，在中国采纳反垄断系统时，参考了欧洲的规则。这样，不可避免的，它在一定程度上继承了“路径依赖”，从United Brands等案例总结出的市场份额的假定。所以他们从那里继承了一些。不过从最高法院的这个判决可以看出，它充分利用了这个司法执行机构的新人的身份。在他们的司法系统中，他们大胆地采用了非常有意义的推理，这样就破除并摈弃了沿用多年的谬论和僵化性。这些遵循先例的僵化性是欧洲的法官需要解决的问题。从许多方面来看，我认为这是一个非常有意义的新起点，对这些问题有创新的方法。所以我认为，这个判决是一个伟大的司法成就，应当向它致敬。

Daniel Sokol: Excellent. Again, this is Daniel Sokol,

Professor of Law at the University of Florida and Senior Of Counsel at Wilson Sonsini. I want to thank all of our participants: David Evans of Global Economics Group, University of Chicago and University College London; Vanessa Yanhua Zhang of Global Economic Group and Renmin University; Antonio Bavasso of Allen & Overy and University College London; and Will Tom of Morgan Lewis. Thank you all very much for your participation.

丹尼尔·索科尔：非常好。再次说明，我是丹尼尔·索科尔，佛罗里达大学法学院教授，威尔逊桑斯尼律师事务所的资深大律师。我要感谢我们所有的嘉宾：全球经济咨询集团、芝加哥大学和伦敦大学学院教授大卫·埃文斯先生；全球经济咨询集团和曾在人民大学执教的张艳华博士；安理国际律师事务所和伦敦大学学院的安东尼奥·巴瓦索；和摩根路易斯律师事务所的威尔·汤姆。非常感谢你们的参与。