CPI Talks: Interview With Judge Chuang Wang[1]

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Since the Anti-Monopoly Law (hereinafter "AML") of China took effect in August 2008, private litigation has become one of the most important areas attracting scholars and practitioners' attention. This November 2015, we were honored to have an interview with Judge Chuang Wang, Deputy Presiding Judge of the Third Civil Tribunal (Intellectual Tribunal) at the Supreme People's Court of the People's Republic of China. The full interview is below.

Zhang: Thank you very much for sharing your insights with our readers. China's AML took effect on August 1, 2008. In the past eight years, legislation and enforcement of the AML have greatly matured. What is the current situation of private antitrust cases handled by China's court system since the AML was enforced?

Wang: Along with the growing awareness of private enforcement of the AML in society, the number of antitrust civil cases that were accepted and handled by the People's Court has increased dramatically in recent years. The People's Court processed 10 cases of First Instance and 6 adjudicated cases between August 1, 2008 and the end of 2009; 33 cases of first instance and 23 adjudicated cases in 2010; 18 cases of first instance and 24 adjudicated cases (including backlogged cases) in 2011; 55 cases of first instance and 49 adjudicated cases in 2012; 72 cases of first instance and 69 adjudicated cases (including backlogged cases) in 2013; 86 cases of first instance and 79 adjudicated cases (including the backlogged cases) in 2014; and, 141 cases of first instance and 98 adjudicated cases (including the backlogged cases) in 2015 (January through October).

The trend and characteristics of civil litigation cases accepted by the People's Court can be summarized as follows:

1. **Increased Case Filings.** The trend shows an acceleration in the filing number after 2012 in particular, and the number of cases accepted by the Court increases yearly.

2. **Decreasing Exploratory Cases and Increasing Rights Protection Litigation.** From the perspective of plaintiff's body, business operators and consumers have filed more rights protection cases. In the early stage of civil anti-monopoly filings, most cases were brought by legal professionals to explore and

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examine the applicability of specific rules within the AML. In recent years, however, there were more rights protection cases brought to the Court by the victims of monopolistic conduct. It reveals that implementation of the AML has now become standard.

3. **A Wide Range of Involved Industries.** The case filings arose from both traditional and modern technology industries, showing a growing trend across such sectors as transportation, pharmaceutical, food, household appliances, and information networks.

4. **Diversity in Filings.** One manifestation of diversity is the mix of abuse of dominance cases and monopoly agreement cases, with more cases concerning from the former. Another fact is that cases involving foreign entities coexist with cases involving domestic entities, with the former having brought more abuse of dominance cases. This indicates the domestic parties' growing awareness of the possibility of taking legal action against foreign entities with market dominance.

5. **Increasing Case Influence and Public Attention:** Many cases have become headline news in social and industry circles, and have even attracted some international attention. The People's Court has accepted several cases that have had a large impact on domestic and international audiences, with abuse of dominance cases such as Tangshan *Renren v. Baidu*, *Qihoo 360 v. Tencent,* and *Huawei v. InterDigital*, etc. These cases have had notable impact in their respective industries.

6. **Increasing Adjudications Favoring Plaintiff:** Of those cases in which the plaintiffs lose, the reasons can be categorized into two. One is the difficulty of presenting evidence to support the plaintiff's filing. Almost all losing cases were due to insufficient evidence. This reveals the most crucial aspect to the private execution of the AML: that a major portion of the evidence needed to prove monopolistic behavior is held by the defendant; and as there is a lack of evidence discovery powers under the current legal framework, it is inevitable that the plaintiffs will suffer a higher loss rate. The other reason is the incompetence of plaintiffs themselves, who often have inadequate understanding of the AML and misinterpret the applicability of specific articles of the Law. Winning cases, on the other hand, tend to have plaintiffs and solicitors with a better understanding of the AML, compatible with that of the presiding judges.

Zhang: In the civil cases accepted by the Court, which industries matter the most? What are the issues and challenges faced by China's judges in dealing with antitrust cases in those industries?

Wang: As I mentioned before, the People's Court currently has civil antitrust cases scattered across many industries. It is hard to identify a particularly dominant industry. When dealing with private antitrust, judges face the problems and challenges of applying economic theories to specific cases, and in particular, to Internet-related cases. Obviously, due to its unique characteristics and differences from traditional industries, (generally featuring free services, platform effects, network effects, consumer stickiness, and rapid innovation etc.) internet cases require a certain degree of innovation, adjustment and development instead of just the application of traditional analytic methods and rules. Moreover, in the Internet-related cases, one should not overestimate the informative role of market shares when evaluating an operator's market power. It would be better to assess each situation case by case rather than using market share as a deterministic factor.

Zhang: How do Chinese judges deal with cases of Intellectual Property Rights (IPRs) and antitrust? Could you please provide an example of some representative case?

Wang: This is a complicated problem. Article 55 of the AML prescribes a principle-based provision, "[t]his Law shall not govern the conduct of business operators to exercise their intellectual property rights under the laws and relevant administrative regulations on intellectual property rights; however, the

conduct of business operators to eliminate or restrict market competition by abusing their intellectual property rights shall be governed by this Law." At present, the People's Court has only accepted a few such cases, among which the most typical one was *Huawei v. InterDigital* (IDC), an antitrust dispute involving abuse of market dominance. In this case, IDC holds a large amount of standard essential patents (SEPs) and pending patents for 2G, 3G, and 4G technological standards of wireless communications, including patent rights and pending applications in both U.S. and China. The two parties held multiple negotiations on patent licensing fees. IDC's tentative licensing agreement to Huawei consists of licenses of IDC's global, non-exclusive, and royalty-bearing patents at issue, including the SEPs of 2G, 3G, and 4G standards, and Huawei's free grant-backs of all its patents to IDC. The licensing fees requested by IDC to Huawei were unfairly higher than those asked of Apple and Samsung. IDC filed lawsuits for SEPs infringement in a U.S. court and with the International Trade Commission (ITC) against Huawei, and asked the court for an injunction, Section *337* investigations and a complete ban on imports, as well as cease and desist orders. As a countermeasure, Huawei filed complaints against IDC for excessive pricing, discriminatory pricing, tying, and refusal to deal. After reviewing the case, the Shenzhen Intermediate People's Court determined that each of IDC's SEP license of 3G wireless communications technology standards in China and U.S. should be considered as an independent relevant market, and IDC having market power over each 3G SEP licensing market. Excessive and discriminatory pricing practices and the tying of SEPs with non-SEPs were considered an abuse of its market power. The Court ordered IDC to stop such monopolistic behavior of excessive pricing and tying, with damages of RMB 20 million payable to Huawei for its economic loss. The case was later submitted to the Guangdong Higher Court that upheld the decision of the first instance. The case is China's first antitrust litigation involving SEPs. Its ruling explored the market definition issue of SEP licensing market and considered each SEP licensing as an independent relevant market.

After the decision of the second instance, the defendant brought the case to the Supreme People's Court for a retrial, and it is still under examination. It is anticipated that the decision of the Supreme People's Court will provide more clarifications into the ruling criteria of similar cases.

Zhang: What is the role of expert witnesses during the court's proceedings in civil antitrust cases?

Wang: The determination of monopolistic behavior often requires sophisticated economic analysis beyond the expertise of a judge. Therefore, the participation of experts with profound knowledge of economics in antitrust proceedings is essential. This is explicitly stipulated in "*Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Involving Monopolistic Conducts"* to encourage the parties to request the presence of one or two experts in economics to explain to the court the nature of the economic issue, so as to give guidance to the involved parties and advise them on technical issues. This will assist the People's Court in clearly discovering the facts and to accurately determine the alleged monopolistic conduct. During court proceedings, the adjudicatory personnel may proceed with questions to the expert advisors to further comprehension and investigate the technical details, and allow them to raise questions to the adversary party, to cross-examine the expert advisors, and request clarifications from the professionals who elaborated the market survey or economic analysis for better understanding and clarification of technical issues.

Zhang: What are your views on the prospect of civil antitrust litigation cases? What should we pay attention to in the future of antitrust litigation in China?

Wang: After recent years of judicial practice, the idea of private enforcement of the AML is well accepted in China. Private and public enforcement have become important mechanisms for the implementation of the AML, giving the judicial system a significant opportunity to expand and improve its functionality. Through trial proceedings, Chinese courts have accumulated preliminary experiences in dealing with civil antitrust cases and boosted their trial capacity by broadening their influence. At the same time, judges are still unfamiliar with basic principles of economic analysis in handling antitrust cases. With more and more monopoly cases arising from the emerging technologies and financial sectors, the traditional analytical framework and methodology for antitrust proceedings begins to face challenges. The task now faced by the People's Court becomes even more formidable. More effort should be focused on the following points in handling civil antitrust cases:

First, improve judicial proceedings and evidence rules to reduce the plaintiff's burden of proof. From the practice of civil antitrust cases, we have learned that the bottleneck in civil antitrust cases is the plaintiff's difficulty in collecting evidence and proving monopolistic behavior. The People's Court must be observant of the general provisions of the Civil Procedural Law and the special needs of antitrust trials as they try to accomplish this goal. The simple application of the principle — "the burden of proof shall be upon the claimant" — to divide responsibility must be moderated to relieve the plaintiff's burden.

Second, improve the use, procurement and examination of experts' opinions, economic analysis, and market survey reports to fully take advantage of the experts' function in evaluating professional and technical facts. Experts' opinions, economic analysis and market survey reports collectively play a crucial role in adjudicating antitrust cases. Judges, although often not economists themselves, are able to learn the technical facts of a case through expert witnesses during the proceedings. Pursuant to the requirements of the new Civil Procedure Law, they can also enforce the presence at court hearings of expert witnesses and the makers of the economic analyses and market survey reports under examination by the opposite party and the judge. It is encouraged to conduct cross-examination and to debate the expert witnesses of both parties to clear doubts, identify problems, and find the truth. The judges should also possess sufficient basic knowledge of economics to have a good understanding and allow for the examination and assessment of the competence of experts' opinions, economic analyses and market survey reports.

Third, provide guidance to the parties to ascertain their economic analysis on market definition, market power, and damages calculation, and improve the scientific nature of economic analysis. When identifying market power, the parties must fully understand that market share is just one of the many aspects used determine market dominance, not the only one. Other methods should be given equal weight to avoid unjustifiable reliance on market share. When performing damage calculations, parties should be guided to make the pertinent causality analysis of the facts, whether it resulted from monopolistic behavior, and evaluate reasonable amounts for compensations.

Fourth, encourage the applicability of the articles prescribed in the AML, and standardize the ruling criteria at an appropriate time. For example, by improving the methods for analyzing vertical monopoly agreements, antitrust enforcement against the abuse of IPRs, and studies on the analytical framework of two-sided market, etc.