

# Inside the creation of China's Federal Circuit

China has had a long journey towards the creation of a specialist IP appellate body, but what does its arrival mean for the world's largest patent market?

By Randall R Rader

**O**n 1 January 2019 a new specialised IP tribunal was created within China's Supreme People's Court. The new body is the realisation of years of both national and international advocacy to create a unified appellate body to standardise China's IP law. It remains to be seen whether the tribunal's creation is a watershed moment – like that which occurred when the US Court of Appeals for the Federal Circuit (CAFC) was created in 1982.

The advent of the CAFC triggered a marked increase in US innovation-based industries. Major technology companies such as Google, Apple and Intel flourished or sprang to life in the era of dependable IP protection introduced by the court, often relying on that protection for their market progress. Even the Trade-Related Aspects of Intellectual Property Rights Agreement 1995 acknowledged the value of courts with expertise in IP law.

In this new legal and economic environment, countries such as South Korea, Thailand and Taiwan were all keen to establish courts with IP expertise (having served on the CAFC and in the US Senate during enactment of the CAFC, I frequently received invitations to advise on the creation of these). However, for China, one country most influenced its decision to implement a specialised and unified IP court – Japan.

## An example to follow

Japan created the Tokyo IP High Court in 2005. This important institutional innovation was the culmination of many vigorous internal debates, with the major issue being how to build the expertise of the new court's judges. One camp advocated for a permanent cadre of judges, as this would enable them to acquire expertise through experience. However, this proposal was vastly different to the traditional Japanese approach of shifting a judge's assignment every three years. Ultimately, Japan reached a compromise that honoured its tradition while also building expertise. Under this system, judges are sent away for a period and then brought back to the IP court in a predictable pattern.

The new Japanese court stirred a response in China. At that time, Mark Cohen was the new IP attaché at the US Embassy in China (another important advance for global intellectual property), and we frequently met with representatives from the Supreme People's Court, the National People's Congress, the State Intellectual Property Office (now the National Intellectual Property Administration), the Ministry of Commerce and

numerous other agencies (many now reorganised under the new State Administration for Market Regulation) to advocate for the creation of a single appellate court with IP jurisdiction. We would consistently invoke Japan as a challenging model, and this form of competitive persuasion was rarely met with direct resistance.

We also noted that China's IP law is too complex – with decisions and policies being issued by administrative and judicial bodies in different municipalities and provinces, as well as the national government. The system often pitted provincial offices and courts against national offices and courts for more IP investment and business. In the early 2000s, China went from a country reliant on acquiring foreign technology (often without paying royalties) to a nation which produced and exported (with royalties) its own domestic technology. President Xi would regularly offer addresses on the need to replace “made in China” with “created in China”. As another aside, much of the current Trump administration's criticism of China's IP piracy comes from the era before it began to focus on IP enforcement.

In any event, as Attaché Cohen and I met with various Chinese entities, we generally encountered the same objection: China's Constitution does not permit the creation of a nationwide appeals court other than the Supreme People's Court. I would always answer that China arguably had a single party with the power to accomplish any desirable public policy.

The efforts to advocate for a Chinese equivalent of the CAFC reached their apex with the 2012 Joint Judicial Conference between the Supreme People's Court and the US court at Renmin University in Beijing. With more than 1,000 people in attendance, including hundreds of Chinese judges, speaker after speaker advocated the virtues of a single judicial voice to elevate intellectual property and enhance uniformity. Nonetheless, nothing appeared to happen in China – general courts continued to handle the vast number of IP cases that had already outpaced every other nation. As time passed, enthusiasm for the initiative seemed to wane. For that reason, the next step in the process came as a surprise to most outside observers.

## A plan comes together

In 2013 the Third Plenum (the third general session in the five-year planning cycle for China's national goals) announced the creation of new specialised IP



The author, Judge Randall R Rader, addresses an IP conference in China

courts. The Third Plenum likely needed a surprise major announcement to preserve the tradition started by Deng Xiaoping in 1978 when he announced an open, competitive economy with businesses owned and managed outside the government. Shenzhen was founded at that time as a special economic zone and has now grown into an international megacity fuelled by a free market and innovative technologies.

Since 1978, each Third Plenum has had to unveil a new direction for China. As the 2013 plenum approached, Chinese leaders found that new direction in the creation of specialised IP courts in Beijing, Shanghai and Guangzhou. This explanation receives

*“By placing the national IP appellate authority within the Supreme People’s Court, the National People’s Congress avoided any constitutional impediment to the creation of a new specialised court”*



Luo Dongchuan, vice president of the Supreme People’s Court and head of the new IP tribunal



Wang Chuang, deputy chief judge of the new IP tribunal and former deputy chief judge of the Supreme People’s Court IP Division



Zhou Xiang, deputy chief judge of the new IP tribunal and former deputy director general of the Supreme People’s Court Enforcement Bureau

some circumstantial support from the fact that the announcement of the new central IP tribunal within the Supreme People’s Court came in 2018 – the year of the next Third Plenum in the five-year cycle.

Numerous developments shaped the environment for the new court. China has always been willing to experiment with intellectual property; consequently, openness and reforms that would be ignored in other settings are encouraged for the purpose of advancing Chinese technology. This experimental approach has encouraged swift and innovative change in this technology-focused sector of the law.

With the emphasis on intellectual property fuelling incentives for change, the three new IP courts attracted many of China’s most talented judges. Still, the announcement of the new IP courts in 2013 was greeted with some disappointment. Prominent Chinese scholars said that they had hoped for a single judicial voice to guide IP decisions nationwide. In response, China’s national leaders advised that the three courts were just the next step in an ongoing experiment – one which soon produced impressive results. China’s IP and case filings have continued to grow and now outpace those of the rest of the world put together. Over the same period, US patent filings and the nation’s IP prominence within the global legal community have fallen each year.

In practice, the new courts exhibit exemplary transparency, with all cases being broadcast almost simultaneously on the Internet. They also boast a successful neutrality in the application of the law. In 2016 Beijing IP Court Deputy Chief Judge Chen Jinchuan announced that all of the more than 50 cases involving foreign parties in that court had been decided in favour of the foreign litigant. To some extent, that record likely reflects a self-selection bias, as foreign litigants usually elect to pursue only slam-dunk cases in the Chinese courts. Still, the new courts have received near-universal praise. With the caseload expanding to over 22,000 cases a year and straining the capabilities of even the three new IP courts, the Supreme People’s Court began to create new specialised IP tribunals in various other cities. By the 2018 Third Plenum, 16 of these tribunals were flourishing, each hoping to be recognised as a court by the National People’s Congress. Again, this presented the potential for a new disruptive local competition for IP pre-eminence.

### Finding a solution

With China embarking on a new era of IP enforcement, Xi and Trump met to discuss a tense trade relationship soon after the latter took office. Trump’s criticism of China’s past IP policies increased China’s resolve to move beyond the 2013 first step of its IP enforcement experiment. In this context, in 2018 the National People’s Congress approved a new appellate IP tribunal within the Supreme People’s Court. By placing the national IP appellate authority within the Supreme People’s Court, the National People’s Congress avoided any constitutional impediment to the creation of a new specialised court. At the same time, the new tribunal can unify IP enforcement and develop the expertise necessary to accept the challenge of high-tech and biotech cases.

On 1 January 2019 the new entity commenced operations. Now, litigants that disagree with a decision

from the lower IP courts or tribunals may appeal to the new body. In the spirit of the ongoing experiment, the tribunal will operate for three years, after which the National People's Congress will evaluate its success.

The new IP tribunal may accept an appeal on any matter within the jurisdiction of the lower level courts and tribunals, including invention and utility model patents, plant varieties, technical trade secrets and antitrust matters.

The principal justification for the IP tribunal mirrors that of the CAFC (ie, to correct and unify inconsistent rulings from lower courts and tribunals, thus minimising local protectionism in the growing IP market). At the second annual China-United States IP Summit in Shenzhen, one of the new deputies of the IP tribunal, Wang Chuang, emphasised this role. To ensure this result, the tribunal will be able to order a lower court to conduct a retrial.

With the IP tribunal handling appeals arising from both court infringement proceedings and Patent Review Board validity proceedings, it will be able to dispose of cases featuring both infringement and validity issues for the same inventions in a single proceeding. In effect, this new entity may minimise (and perhaps replace) the strategy of pursuing a bifurcated procedure with infringement matters heard by the courts and validity issues heard by the administrative board.

The success of this experimental new entity may hinge on the selection of qualified judges – but this seems to be under control. The new chief judge of the tribunal, Luo Dongchuan, has long served in a series of leadership positions within the Beijing appellate courts and the Supreme People's Court, and is well respected by his colleagues and the litigation community. Dongchuan's deputy, Wang Chuang (educated at Duke University), is a highly respected former member of the Supreme People's Court's economic division. Chuang also presided over the court's *Qiaodan* (Michael Jordan) decision a few years ago, which provided a remedy against abusive cybersquatting by prohibiting bad-faith trademark filings. His appointment bodes well for fidelity to IP law in difficult cases.

Similarly, Deputy Zhou Xiang (educated at Temple University) served with distinction in the Civil Division of the Supreme People's Court. Deputy Li Jian (educated at the Max Planck IP Centre) has also forged a respected record in the Supreme People's Court Civil Division and has extensive IP experience and training. Together, these judges are impressive leaders for the new institution.

Also among the 27 judges first appointed to the new court are Zhu Li (educated at George Mason University), who was an instrumental influence when the Beijing Intermediate People's Court recently remanded a Guangzhou decision on SEPs because it set the royalty level too low. Incidentally, the Supreme People's Court has recently agreed to re-hear that judgment. Further, Ren Xiaolan, a former director of the Patent Review Board, has extensive experience in patent and antitrust doctrines.

Many of the judges on the new IP tribunal are well trained in IP law and policy, including complex doctrines of enablement or inventive step.

With judges of talent and training, this experiment is set to be a success. Further, the judicial selection process is incomplete. The Supreme People's Court will conduct

## Action plan

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On 1 January 2019 the Supreme People's Court specialised IP tribunal opened for business, giving China its first unified appellate body for IP-related litigation. Here is what patent owners need to know about the new top patent forum in the world's biggest patent market:

- Foreign stakeholders, including the US government, have long advocated for the creation of an IP appellate body. However, the creation of intermediate-level IP courts in 2013 came as a surprise, as the idea seemed to have lost momentum.
- The new IP tribunal has been created within the structure of the Supreme People's Court. This has addressed a longstanding constitutional objection to the creation of a court of final appeal for IP matters in China.
- Like the IP courts which were established in 2013 in Beijing, Shanghai and Guangzhou, the Supreme People's Court IP tribunal has technically been opened for a three-year trial period, after which the National People's Congress will assess its performance.
- With jurisdiction over both validity and infringement issues, the IP tribunal could affect litigation strategies premised on a bifurcated proceeding.
- The top judges appointed to the new body have significant IP expertise. Many have studied at top IP institutions overseas and some are notable for having handed down pro-rights holder decisions in high-profile cases.



Li Jian, deputy chief judge of the new IP tribunal and former presiding judge of the Supreme People's Court IP division



Zhu Li, judge of the new IP tribunal and former senior judge of the Supreme People's Court IP division



Ren Xiaolan, judge of the new IP tribunal and former director of the Number 1 Chemical Appeal Division of the Patent Re-examination Board

a second and third round of judge selection and even open its judgeship positions beyond the current judicial community to scholars and practitioners of distinction.

The new IP tribunal shows that China is accepting its responsibilities as a world leader in IP policy. In China, intellectual property is not a fading beauty, but rather a flourishing future star. As often occurs with a new and significant major public policy, many events have influenced this development, such as:

- the successes of similar courts in other nations;
- counsel from international businesses (Chinese and otherwise);
- a significant increase in technology cases;
- cooperation among world judges;
- Third Plenum catalysts for change; and
- the encouragement of Chinese and foreign scholars.

The real test for this new judicial body will no doubt be its willingness to combat local favouritism and exalt the law over protectionism. However, the early signs show that China is – after years of preparation – ready to take the lead in world IP enforcement. **iam**

**Judge Randall R Rader** is a former US circuit judge and former chief judge of the CAFC