

A Federal Circuit with Chinese Characteristics? – The Launch of China’s New National Appellate IP Court 中国特色的联邦巡回上诉法院？

<https://chinaipr.com/2019/01/04/a-federal-circuit-with-chinese-characteristics-the-launch-of-chinas-new-national-appellate-ip-court-%E4%B8%AD%E5%9B%BD%E7%89%B9%E8%89%B2%E7%9A%84%E8%81%94%E9%82%A6%E5%B7%A1/>

On December 27, 2018, the Supreme People’s Court released the [Provisions on Certain Issues of the IP Court](#) (the “Provisions”), and the Standing Committee of the NPC [announced](#) a first round name list of judges of the new IP court. These decisions follow an earlier announcement by [the NPC Standing Committee on October 26, 2018](#) authorizing the establishing of this new division of the SPC (officially translated as IP Court of the Supreme Court of SPCIP, with the Chinese name 最高人民法院知识产权法庭). There were also indications that such a court was in the works that were previously reported in this [blog](#) in 2017. The newly established IP Court is intended to function very similarly to the US Court of Appeals for the Federal Circuit, with a national jurisdiction over technical IP cases as well as appeals of patent and trademark validity decisions.

This is a much awaited, historic and potentially disruptive breakthrough in the China IP litigation system, that has been a focus of much discussion between US and Chinese experts over 20 or more years, notably between the SPC and former CAFC Chief Judge Rader, former USPTO Director Kappos, and others (including the author/owner of this blog). The [historic 2012 conference](#) between the SPC and the CAFC at Renmin University was [one such milestone event](#) in these efforts. China’s successful experiments in [specialized IP courts in Beijing, Shanghai and Guangzhou](#) was another such milestone, as well as [the language in the third plenum](#) that facilitated their establishment. However, the engagement preceded this decade. For example, [an important conference on specialized IP courts](#) was held with former Chief Judge Jiang Zhipei, and other Chinese IP judges in Washington, DC on Specialized IP courts in 2002, [which involved over 130 judicial experts](#). SIPO also exerted an important leadership role as well, through the National IP Strategy and various studies and conferences over the years.

The Provisions came into effect January 1, and the new Court held a kick-off ceremony on that same day. Almost like clockwork, Judge Wang Chuang, the new deputy chief judge of this new tribunal was at the [second US-China IP Summit in Shenzhen on December 3, 2019](#) (the “Summit”) presenting a bilingual PowerPoint (picture above) explaining the role of the Court, along with several other current and former judges, including Judges Jin Kesheng, former Beijing IP Court President Su Chi, former Guangdong IP Tribunal judge Ou Xiuping, former Beijing High Court Judge Cheng Yongshun, and others. Considering the high-stakes trade dispute and interaction between China and the US right now, it is fair to say that the setup of the SPC’s IP Court is part of the bona fide effort to enhance IP protection in China which in fact predates the trade dispute.

What will be the impact of this court on foreign-related litigation? We believe that the impact is likely to be positive. [US academics have suggested that the CAFC has had a modest effect of correcting any anti-foreign bias](#) and the elevation of patent appeals to the SPC level is certain to similarly help direct national attention to important cases and defuse local pressure. Moreover, the jurisdictional

mandate of this court includes appeals from the Beijing IP Court of administrative cases, where foreigners constitute nearly 50% of appeals from China’s patent and trademark offices and nearly half of the national foreign-related IP docket. The Court also includes at least one judge from the foreign civil (no. 4) division of the SPC. The recent decision by the SPC to rehear the [Huawei v Interdigital case](#), where Zhu Li was a judge, may also be another signal. Judge Zhu has since transferred to this new IP Tribunal, and the court has also sent a clear signal that it will be seeking a consistent and fair determinations of cases independent of local influence. Many of the judges on the roster are well known to the foreign IP and antitrust communities, have met with foreign visitors or traveled overseas, and enjoy the respect of the foreign and Chinese bar.

Here are some of the most significant things that we know about this new Court.

Status of the SPC’s IP Court: It is part of the SPC, which generates some confusion. Given that the judgments, rulings, mediations and decisions made by the SPC’s IP Court are in the name of the Supreme Court, it enjoys a similar status to that of CAFC, whose job is to function as a national appellate court and whose decisions are typically final. But there has been and still will be an IP Tribunal (also known as 3rd Civil Tribunal) of the SPC, and a decision made by the SPC’s IP Court, which in normal practice should be final, is capable of been filed for retrial before the said IP Tribunal of the SPC. In addition, non-technical IP cases will still be appealed according to pre-existing procedures ultimately to the 3d Civil Tribunal.

The head of the new SPC’s IP Court, Mr. Luo Dongchuan, will at the same time continue to service Deputy Chief Justice of the Supreme Court, a rank higher than the head of the 3rd Civil Tribunal, which previously heard all IP cases. Justice Luo effectively oversees IP litigation in China with Justice Tao Kaiyuan, which is a further elevation of the importance of IP to China’s judicial system.

Staffing the Court: IP tribunal judges are typically amongst the best educated judges in China’s court system. Many young judges made their name in IP related trials. The judicial personnel list of the court suggests that the court has been viewed as career enhancing for SPC judges, judges from regional courts, and former patent office examiners who have been selected as judges (see the list below). However, due to the rapid establishment and staffing of this new Court, many of the judges are likely on detail from their prior jobs to the new Court, pending permanent transfer

Staffing of the Court

Name	Position	Former position
Luo Dongchuan 罗东川	Vice-president of SPC, Head of the Intellectual Property Court of SPC	Vice-president of SPC, member of the Adjudication Committee of SPC,
Wang Chuang 王闯	Deputy Chief Judge	Deputy Chief Judge of the Civil Division No.3 (IP Division) of SPC
Zhou Xiang 周翔	Deputy Chief Judge	Deputy Director General of the Enforcement Bureau of SPC

Li Jian 李剑	Deputy Chief Judge	Presiding Judge of the Civil Division No. 3 (IP Division) of SPC
Zhu Li 朱理	Judge	Senior Judge of the Civil Division No.3 (IP Division) of SPC
Shen Hongyu 沈红雨	Judge	Judge of the Civil Division No.4 of SPC (for foreign-related cases)
Luo Xia 罗霞	Judge	Judge of the Administrative Division of SPC
Fu Lei 傅蕾	Judge	Judge of the Civil Division No.3 (IP Division) of SPC
Wei Lei 魏磊	Judge	Assistant Judge of the Civil Division No.3 (IP Division) of SPC
He Peng 何鹏	Judge	Judge of the Civil Division No.3 (IP Division) of SPC
Jiao Yan 焦彦	Judge	Deputy Chief Judge of the Civil Division No.3 (IP Division) of Beijing High People's Court
Cen Hongyu 岑宏宇	Judge	Assistant Judge and the Judge of the Civil Division No. 3 (IP Division) of BHPC
Liu Xiaojun 刘晓军	Judge	Judge of the Civil Division No. 3 (IP Division) of Beijing High People's Court
Cui Ning 崔宁	Judge	Judge of Beijing Intellectual Property Court
Deng Zhuo 邓卓	Judge	Judge of Beijing Intellectual Property Court
Ren Xiaolan 任晓兰	Judge	Director of the No.1 Chemical Appeal Division of the Patent Reexamination Board of CNIPA

Gao Xue 高雪	Judge	Deputy Director of the Mobile Communicating Technology Appeal Department of the Patent Reexamination Board of CNIPA
Zhan Jing kang 詹靖康	Judge	Deputy Director of the Examination Guide Department of the Examination Management Division of the CNIPA
Xu Yan ru 徐燕如	Judge	Deputy Chief Judge of the Civil Division No.3 (IP Division) of ZHPC
Xu Zhuo bin 徐卓斌	Judge	Judge of the Civil Division No.3 (IP Division) of Shanghai High People's Court
Ling Zong liang 凌宗亮	Judge	Judge of the Intellectual Property Division No. 2 of Shanghai Intellectual Property Court
Zhang Xiao yang 张晓阳	Judge	Judge of the Civil Division No. 3 (IP Division) of Jiangsu High People's Court
Zhang Hong wei 张宏伟	Judge	Judge of the Civil Division No. 3 (IP Division) of Fujian High People's court
Liu Xiao mei 刘晓梅	Judge	Judge of the Civil Division No. 3 (IP Division) of Shandong High People's Court
Tong Hai chao 童海超	Judge	Deputy Chief Judge of the Civil Division No.3 (IP Division) of Hubei High People's Court
Tang Xiao mei 唐小妹	Judge	Judge of the Civil Division No.3 (IP Division) of HHPC
She Zhao yang 佘朝阳	Judge	Judge of Guangzhou Intellectual Property Court

Internet Courts, Circuit Courts, Specialized IP Courts: The types of courts in China has expanded and is potentially confusing to those unfamiliar with the new experiments. The SPC had already established Circuit Courts, which are arms of the Supreme Court itself, except that they are in cities other than Beijing. An example of such a court is the Shenzhen Circuit court which hears retrial cases from Guangdong, Guangxi, Hunan, and Hainan as well as cases relating to Hong Kong, Macau and Taiwan. The [Specialized IP Courts](#), which will remain the same as before, are intermediate courts in Beijing, Shanghai and Jurisdiction, vested with jurisdiction over certain IP lawsuits. They will function all the same as before, but their decision will now be appealable to the SPC's IP Court, rather than to High Court of the province where the Specialized Courts reside. These IP Courts are in addition to [other local IP tribunals and courts which localities have set up with the support of the SPC](#) and have been experimenting in cross-district jurisdiction, and in combining civil, criminal and administrative adjudication.

The three Internet Courts, located in Beijing, Guangzhou and Hangzhou, will function as before. Their decisions are not likely to be appealed to the SPC's IP Court given that the latter only hear patent, mask works, variety of plants, computer software and anti-trust cases.

Standardization of Trial Rules: A mission of the SPC's IP Court is to formulate judicial standards and trial rules based on their investigation and research of relevant practices, and such standards and rules shall be followed by the lower courts. This may suggest that the SPC's IP Court will take over the responsibility of formulating certain judicial interpretations and selecting guiding cases. Wang Chuang noted at the Summit that the Court is considering judicial interpretations on such topics as technology assessors and trade secret protection. Thus, we could expect a more consistent guidance, both procedural and substantive, from the Supreme Court over IP cases, especially when involving technical matters. Judge Su Chi (retired) of the Beijing IP Court, also noted at the Summit that he expected that some of his work on development of a case law system would likely be taken over by this Court as well.

Extended Jurisdictional Scope of the Court: The SPC's IP Court is empowered to hear major and complicated cases of first instance on a national scale. This implies that some plaintiffs may bring high-profile lawsuits to the Supreme Court directly. This kind of arrangement is very rare in China's judicial system. The only case we are aware of before this time is the trial of the Gang of Four in 1980. This could be good news for patentees facing difficult issues of local protectionism. It may also have profound impacts on society, and thereby raise the IP awareness of the public. The Federal Circuit had a similar impact on US society when it decided major cases such as *Polaroid v Kodakearly* in its tenure, which in the US signaled ["a new period in which patents regained their importance as intellectual property protection for technology companies."](#) The SPC's IP Court will likely have discretion to determine whether a case belongs to a major and complicated one. There are various factors to be taken into consideration, such as the damages claimed, the nature of the subject matter, the parties concerned, the relevant technicality, the social impacts, and so on. In addition to this area, the court will also retrial cases arising from application by any party of interest and protest by the Supreme Procuratorate as mentioned (Article 2(5) and Article 11 of the Provisions).

For Chinese IP practitioners and regional IP judges this is also a major game changer. Chinese patent firms that were once focusing on establishing offices throughout China may now need to think about reinforcing their staff in Beijing. Chinese judges from various localities may also wonder why certain appellate jurisdiction was removed from their courts. The answer to that last issue likely lies in the desire of the SPC to establish greater uniformity and predictability throughout China in important technology-related IP cases, as was explained at the Summit.

At the Summit, Judge Wang Chuang noted that four goals of this new court are: boosting technological innovation; testing fields of judicial reform; being a bellwether for patent trials and becoming a preferred court for international patent litigation. These goals are laudable, not surprising, consistent with the current directions of judicial reform and can help inspire confidence of the foreign business community. In view of the goal of increasing China's role as a center for international IP litigation, it is not surprising that so many judges attended the Summit.

In all, the establishment of the SPC's IP Court is exciting news in Chinese IP community.

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Please write in with your observations on this important development!