

## China Specialized IP Courts: Substance Or Theater? Part II

By Jieru Jiang

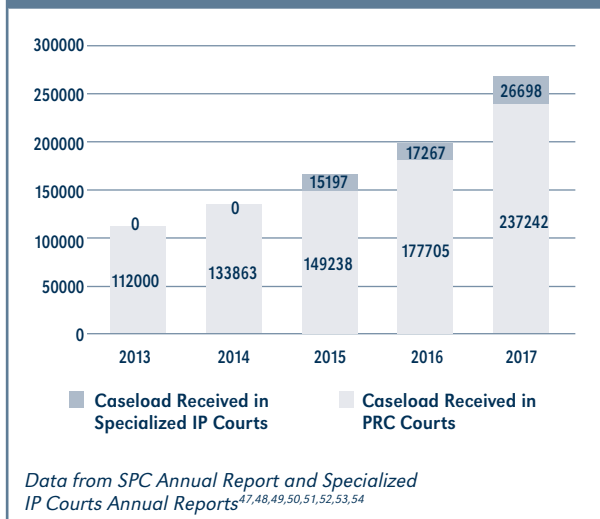
### Introduction

As stated in Part I, the China Specialized IP Courts have been running for more than three years. According to the report from SPC, these newly established IP courts work well and can be the models for other traditional IP tribunals in intermediate people's courts or the any regional IP courts established in the near future. However, the foreign government and private companies still view the judicial protection of IPR Intellectual Property Rights in China negatively these years.

Therefore, Part II conducts a statistical study to find out whether the Specialized IP Courts, as reported by the SPC, work well. Part II does so by analyzing the statistical trend of IP caseloads filed in the Specialized IP Courts, the length of trial proceedings in each court, the trend of damages granted by the courts, and the situation of case citation conducted by courts.

Part II then addresses the three biggest obstacles emerging from the Specialized IP Courts, including divergent decisions caused by special jurisdictions, the failure of applying the "Three-In-One" trial model to the courts, and inefficiency caused by the bifurcated system. Part II finally builds on the above analysis by considering the impact the Chinese IPR system has on foreign IPR holders.

**Figure 4.1: The IP Caseloads Received In PRC Courts And Specialized IP Courts**



### IV. How are the Specialized IP Courts Working So Far?

#### A. The Growing Caseloads Filed to the Courts

The statistics on total caseloads received in

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47. SPC, supra note 3.

48. Su Chi (宿迟), Beijing Zhishichanquan Fayuan Liangzhounian Gongzuo Qingkuang Tongbao (北京知识产权法院两年工作情况通报) [The Report On Two-Year's Work Of BIPC By Chief Judhe Su Chi] (January 10, 2017), <http://www.cpahktd.com/CN/info.aspx?n=20170119084747040064>.

49. IPHOUSE Judicial Data Research Center, Beijing Intellectual property court judicial protection data analysis report (2015), (December 2016), at 31, [https://chinaipr2.files.wordpress.com/2016/12/bjipc\\_judicial-protection-data-analysis-report-20151.pdf](https://chinaipr2.files.wordpress.com/2016/12/bjipc_judicial-protection-data-analysis-report-20151.pdf).

50. Shanghai IP Court (上海知识产权法院), Shanghai Zhishichanquan Fayuan Fabu 2017 Niandu Zhishichanquan Sifabaohu Baipishu (上海知识产权法院发布2017年度知识产权司法保护状况白皮书) [SIPC issued Report On The Judicial Protection of Intellectual Property Rights by SIPC in 2017], [sohu.com](http://www.sohu.com/a/229524399_221481), (April 25, 2018, 19:04PM), [http://www.sohu.com/a/229524399\\_221481](http://www.sohu.com/a/229524399_221481).

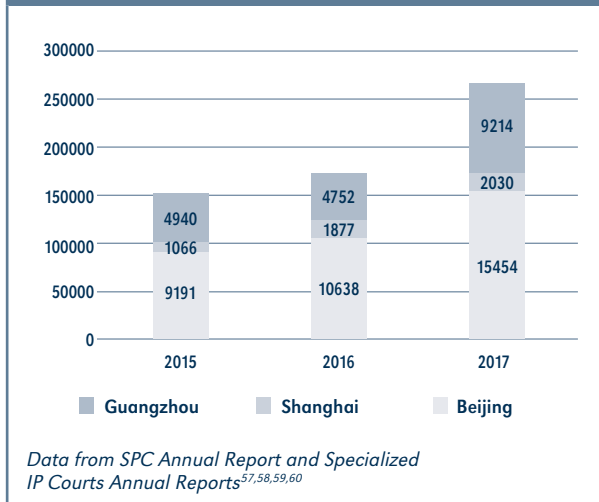
51. Shanghai IP Court (上海知识产权法院), Shanghai Zhishichanquan Fayuan Fabu 2016 Nian Zhishichanquan Shenpan Baipishu (上海知识产权法院发布2016年知识产权审判白皮书) [SIPC issued Report On The Adjudication of Intellectual Property Rights by SIPC in 2016], [shfy.chinacourt.org](http://shfy.chinacourt.org/article/detail/2017/06/id/2895976.shtml), (June 14, 2017, 15:36PM), <http://shfy.chinacourt.org/article/detail/2017/06/id/2895976.shtml>.

52. Guangzhou IP Court (广州知识产权法院), Guangzhou Zhishi Chanquan Fayuan Sifa Baohu Zhuangukuang (2017) (广州知识产权法院司法保护状况 (2017年度)) [Report On Judicial Protection In GIPC In 2017], (April 25, 2018, 11:03AM), [http://www.fzgd.org/fzyw/201804/t20180425\\_937751.htm](http://www.fzgd.org/fzyw/201804/t20180425_937751.htm).

53. Guangzhou IP Court (广州知识产权法院), Guangzhou Zhishi Chanquan Fayuan Sifa Baohu Zhuangukuang (2016) (广州知识产权法院司法保护状况 (2016年度)) [Report On Judicial Protection In GIPC In 2016], (April 24, 2017, 14:30PM), [http://www.gdzf.org.cn/index/zfyw/201704/t20170424\\_834477.htm](http://www.gdzf.org.cn/index/zfyw/201704/t20170424_834477.htm).

54. Guangzhou IP Court (广州知识产权法院), Guangzhou Zhishi Chanquan Fayuan Sifa Baohu Zhuangukuang (2015) (广州知识产权法院司法保护状况 (2015年度)) [Report On Judicial Protection In GIPC In 2015], (April 25, 2016), [http://www.gipc.gov.cn/showu/big\\_content.jsp?id=5352eb2a5ba8441a9e31fd13fd34655f&prevArticle=34c2db020a164bd6a3ae14050432b02c](http://www.gipc.gov.cn/showu/big_content.jsp?id=5352eb2a5ba8441a9e31fd13fd34655f&prevArticle=34c2db020a164bd6a3ae14050432b02c).

**Figure 4.2: Caseloads Received In Specialized IP Courts**



three Specialized IP Courts show a significant increase from 2015 to 2017, which increased by 13.62 percent in 2016 and by 54.35 percent in 2017. This is consistent with the growth of the IP caseload received in PRC courts. The total number of cases received in the PRC courts increased by 19.52 percent in 2014, 11.49 percent in 2015, 19.07 percent in 2016 and 33.50 percent in 2017. Although the growth rate dropped slightly right after the Specialized IP Courts were established, it rose after 2015 and reached the highest in 2017 within the five years. See Figure 4.1.

Furthermore, the caseloads in each Specialized IP Court also increased by years. The BIPC has the largest caseloads each year due to its exclusive jurisdiction on administrative cases over the declaration of intellectual property rights, over the verdict of compulsory license and royalty measures and over other administrative acts by the IP administration department under the State Council. The GIPC has the second largest caseloads due to its cross geographical jurisdiction on the first instance civil or administrative cases involving high-tech issues such as patents, technical know-how, software and on the cases involving the certification of well-known marks within the Guangdong Province. The caseloads received in GIPC increased by 93.9

55. Guangzhou IP Court (广州知识产权法院), Guangzhou Zhishi Chanquan Fayuan Xinshou Anjian Tongbi Zengzhang 93.9 percent Wei Zhishichanquan Baohu Tigong Youli Sifabaozhang (广州知识产权法院新收案件同比增长93.9%为知识产权保护提供有力的司法保障) [The caseloads received in GIPC increased by 93.9 percent in 2017 with the strong judicial protection in GIPC], (April 25, 2018), [http://www.gipc.gov.cn/showu/big\\_content.jsp?sessionId=FD01A50EF4BCC2BF20749671B00A6402?id=54a1b6255c2847649797466d548e790b](http://www.gipc.gov.cn/showu/big_content.jsp?sessionId=FD01A50EF4BCC2BF20749671B00A6402?id=54a1b6255c2847649797466d548e790b).

percent in 2017, which is the highest annual rate of growth. The patent civil disputes constitute the main part of the caseloads (GIPC received 4,421 patent cases, 3,784 copyright cases and 480 trademark and unfair competition cases in 2017).<sup>55</sup> The reason for the large proportion of patent cases is that a large number of high-tech companies are incorporated in Guangdong Province especially in Shenzhen, the so-called China's Silicon Valley. The constituents of the caseloads in SIPC in 2017 are mainly software and patent. According to the annual report by SIPC, the sum of both type take up 96.06 percent of the total.<sup>56</sup> See Figure 4.2.

From the above statistics, we can conclude that people are more willing to solve IP disputes in the courts after Specialized IP Courts are established. Besides, the proportion of patent, trademark or copyright disputes in each Specialized IP Court are different due to the exclusive jurisdiction and the regional features. For example, GIPC deals with large number of patent cases every year because this court has the jurisdiction on the IP disputes within Guangdong Province, the area which encompasses China's Silicon Valley—Shenzhen. Accordingly, GIPC has become an ideal venue for patent disputes and high-tech companies tend to choose cities in Guangdong Province as domicile.

As a result, the increasing caseloads in the Specialized IP Courts increase the burden on judges. The courts are trying to appoint more judges to solve this problem. The number of main judges hired by BIPC has increased from 25 to 51 since 2015, the main judges in GIPC has increased from 13 to 24 since 2015. However, the average number of cases adjudicated by one judge is still large. Each judge in BIPC has to handle over 100 cases from 2014 to 2015, the same with each judge in the SIPC.<sup>61</sup> Each judge in the GIPC adjudicated 261 cases from 2014 to 2015, which is 2.36 times the average caseload within the whole province. And the average number of the adjudicated cases reached to 289 per judge in 2017.<sup>62</sup> These numbers are large when compared to the workload of federal judges in CAFC. There is a

56. SIPC, *supra* note 50.

57. Su Chi (宿迟), *supra* note 48.

58. IPHOUSE Judicial Data Research Center, *supra* note 49.

59. SIPC, *supra* note 50-51.

60. GIPC, *supra* note 52-54.

61. Chen Jinchuan, *supra* note 38, at 15.

62. Guangzhou IP Court (广州知识产权法院), Guangzhou Zhishichanquan Fayuan Sifabaohu Zhuangkuang (广州知识产权法院司法保护状况(2015年度)) [Report On The Judicial Protection of Intellectual Property Rights by GIPC in 2015], gipc.gov.cn, (April 25, 2016), [http://www.gipc.gov.cn/showu/big\\_content.jsp?id=5352eb2a5ba8441a9e31fd13fd34655f&prevArticle=34c2db020a164bd6a3ae14050432b02c](http://www.gipc.gov.cn/showu/big_content.jsp?id=5352eb2a5ba8441a9e31fd13fd34655f&prevArticle=34c2db020a164bd6a3ae14050432b02c).

statistic which shows that the 12 active judges in CAFC worked on 83.3 cases each year.<sup>63</sup> Although it clarifies that the number should triple since the judges work as a three-judge panels and each is assigned to three times as many cases, the actual workloads on IP cases would be smaller. This is because the federal judges in CAFC not only adjudicate patent cases but other IP unrelated disputes. All in all, the judges in Specialized IP Courts have been faced with large workloads and pressure since the courts were established.

## B. The Efficient Trial Proceedings in the Courts

Nevertheless, statistics also show the efficiency of the trial proceedings in Specialized IP Courts regardless of the large workloads on each judge. A report from CNIPA shows that from 2015 to 2016, the average trial period in PRC courts on IP infringement cases is 105 days.<sup>64</sup> The BIPC established four judge teams in order to speed up the trial proceedings in 2016. Each team concentrates on patent, trademark and unfair competition, copyright or trademark administrative disputes separately. The judges are assigned to each team based on their trial experiences on certain type of IP disputes. In 2016, four teams tried 1,609 IP cases in total. The teams concluded the cases with 32.27 days shorter than the trial period in 2015.<sup>65</sup> The statistics also show that the average trial period of BIPC from 2015 to 2017 is 125 days,<sup>66</sup> the average trial period of SIPC in 2017 is 113.07 days,<sup>67</sup> and the average trial period of GIPC on patent cases in 2018 is even shorter, which is less than 50 days.<sup>68</sup> The trial proceedings in the China Specialized IP Courts are speedy compared to the 18 months in Europe and 2.4 years of pre-trial for patent litigation in U.S.<sup>69</sup>

63. Daniel Harris Brean, *Pro se* patent appeals at federal circuit, 21 Stan. Tech. L. Rev. 1, 8 (2017).

64. Sifa Dashuju Yanjiuyuan, Sifa Anli Yanjiuyuan (司法大数据研究院, 司法案例研究院), Sifa Dashuju Zhuanti Baogao Zhishichanquan Qinquan 2015-2016(司法大数据专题报告知识产权侵权 2015-2016) [Data On The Judicial Protection of Intellectual Property Rights 2015-2016 by SPC], court.gov.cn, (July 05, 2017, 11:53 a.m.), [http://www.court.gov.cn/upload/file/2017/07/05/11/53/20170705115359\\_40080.pdf](http://www.court.gov.cn/upload/file/2017/07/05/11/53/20170705115359_40080.pdf).

65. Su Chi, *supra* note 48.

66. IPHOUSE Judicial Data Research Center, *supra* note 49.

67. SIPC, *supra* note 50.

68. People's Court Daily, Guangzhou Zhishichanquan Fayuan 4 Nian Shenjie Anjian 2.3 Wan Yu Jian (广州知产法院4年审结案件2.3万余件) [The GIPC Concluded IP Cases In The Number Of Around 23,000 Within four Years], [http://rmfby.chinacourt.org/paper/html/2018-12/20/content\\_147146.htm?div=-1](http://rmfby.chinacourt.org/paper/html/2018-12/20/content_147146.htm?div=-1).

69. SPC (最高人民法院), Guanyu Zhaokai Zhishichanquan Sifa Baohu Xuanchuanzhou Xinwen Fabuhui (关于召开知识产权司法保护宣传周新闻发布会) [Press Conference By SPC On National Judicial Protection Of IPR], chinacourt.org, (April 19, 2018, 10:00 a.m.), <https://www.chinacourt.org/article/subjectdetail/id/MzAwNmhmMNIABAA==.shtml>.

Although the cases filed to the Specialized IP Courts boomed these years, the courts still are able to conclude the cases in a relatively short trial period. Two reasons could possibly explain the efficiency of the proceedings. On one hand, the assistance of technical investigators will help to speed up the trial proceeding. The technical investigators can help to deal with the technical issues especially and leave judges more time to deal with legal aspects of the cases. Under the cooperation, the technical issues and the legal issues of the cases will be handled by two parties at the same time. As a result, the cases will be handled in a more efficient way and the outcome of the cases will be more accurate. On the other hand, the assistant judges also help to increase the efficiency. Except for the main judges, three courts also appoint a number of assistant judges. Each main judge is assisted with one assistant judge and one law clerk.<sup>70</sup> These assistant judges support the main judges with tasks such as drafting written decisions and to some extent ease the workloads on the main judges.

## C. The Increasing Damages Granted by the Courts

Prior to the establishment of Specialized IP Courts, the low damages granted by the traditional IP tribunals were widely complained about by the foreign parties. The courts granted the low damages because the burden of proof was previously on plaintiff. Usually it was difficult for the plaintiff to prove the loss caused by the infringement or the infringer's profit. When there was lack of sufficient evidences, the courts intended to grant the statutory damages. The statutory damages varied from RMB10K to RMB 1M based on the judges' discretions. Early in 2008, over 90 percent of the patent infringement cases claiming for damages were finally granted by statutory damages.<sup>71</sup> Prior to 2014, the average damages granted by IP tribunals on patent infringement cases was only RMB 80K.<sup>72</sup>

70. Su Chi (宿迟), Beijing Zhishichanquan Fayuan Yuanzhang Su Chi Fabu Beijing Zhishichanquan Fayuan Gongzuo Yunxing Qingkuang (北京知识产权法院院长宿迟发布北京知识产权法院工作运行情况) [The Report On The Work Of BIPC By Chief Judge Su Chi] *court.gov.cn* (September 9, 2015, 12:41 p.m.), <http://www.court.gov.cn/zixun-xiangqing-15367.html>.

71. Xu Qinghong(徐擎红)隆天知识产权, Jinqi Zhongguozhuanli Qinquan Sunhaipeichang Qushi(近期中国专利侵权损害赔偿的趋势) [The Current Trend Of Damages Granted In Patent Infringement Cases], Lunh Tin IP Attorneys, (December 7, 2017, 14:10 p.m.), at 1, [http://www.lungtinlaw.com/upload/img/file/20171207/20171207141002\\_81015.pdf](http://www.lungtinlaw.com/upload/img/file/20171207/20171207141002_81015.pdf).

72. Sanyou IP Group, Zhishichanquan Sifa Baohu Lidu Zengda Qinquan Peichangedu Tigao (知识产权司法保护力度增大侵权赔偿额度提高) [The Enhanced Judicial Protection On IP And The Rising Damages Granted For IPR Holders In Infringement Cases], <https://s3.amazonaws.com/documents.lexology.com/6e3a9d1d-387d-4911-b96c-5f8429597366.pdf>.

However, the damages granted in the patent infringement cases are rising since Specialized IP Courts were established. The average amount of damages of the patent infringement cases granted by BIPC increased from RMB 0.45M in 2015 to RMB 1.10M in 2016 and to RMB 1.41M in the first half year of 2017.<sup>73</sup> In December 2016, BIPC issued an unprecedented damages which was in amount of RMB 49M plus RMB 1M of attorney fees to the plaintiff in the patent infringement disputes. This case was filed by Beijing WatchData Corp. (Hereinafter “WatchData”) against Beijing Hengbao Corp. (Hereinafter “Hengbao”). WatchData claims patent infringement and asks for injunction and damages, as well as the attorney’s fees.<sup>74</sup> The infringing patent was in respect of a physical authentication method and an electronic device used for online banking transactions. The defendant was manufacturing and selling the accused products which are smart password key products covered by this patent. The court finally affirmed the infringement and granted the damages. The court first determined the amount of damages based on the evidences provided by the plaintiff. The court affirmed the evidences on the actual sales of the accused products by defendant and the reasonable profit per product. The court then multiplied the sales by the profits per product and supported the plaintiff’s claim on the amount of damages. Besides, the court also supported the plaintiff’s claim on the attorney’s fees based on the reasonable billable hours. The court in this case applied the standard of infringer’s profits other than the statutory damages due to the sufficient evidences provided by the plaintiff and the court’s presumption that the plaintiff’s claims are supportive when the defendant refused to provide the adverse evidences asked by the plaintiff.

When the plaintiff failed to provide sufficient evidence to prove damages, the BIPC also tended to grant higher statutory damages as long as it was reasonable even it broke the upper limit of the statutory damages in the Patent Law. The BIPC in another patent infringement case on “Dynamic Balance Valve” product granted statutory damages in amount of RMB 0.15 M considering the factors such as business scale, the bad faith and industry profit.<sup>75</sup>

#### D. The Increasing Case Citations in BIPC

As stated in Part I, the BIPC is a pioneer exploring the case guidance system. In 2015, it launched its own IP case guidance database, and the database has

collected over 500 prior cases to date. Although the judges have no responsibility to cite the prior cases, they are encouraged to consider legal precedents as de facto binding and cite legal precedents in their decisions. The judges in BIPC have already done a number of case citations. According to the report by Judge Chi Su in BIPC, the BIPC cited 279 legal precedents in 168 cases until October, 2016. One hundred and seventeen out of the 168 cases followed the precedents while the remaining 51 cases were distinguished from the precedents.<sup>76</sup> The number of cases citing the legal precedents is minimum to the large number of cases concluded by BIPC during the same period, but the number significantly increased at the end of 2016. A study by Stanford University shows that 763 cases in BIPC cited the legal precedents, wherein over 200 cases followed the precedents and 80 cases were distinguished from the precedents.<sup>77</sup>

There are no statistics indicating whether SIPC or GIPC also follow the case guidance mechanism. The case guidance system in Specialized IP Courts is still at starting level and needs time to develop. Introducing the case guidance mechanism to the courts can prevent the judges from determining ambiguous issues largely based on discretion. Therefore, the growing trends of case citation in the decision conveyed positive signal to the litigation parties since it will improve the consistency and predictability of the determination.

## V. The Problems of the Specialized IP Courts

### A. Divergent Decisions Caused by Jurisdiction

As stated above, the BIPC has the exclusive jurisdiction on administrative cases over the declaration of IPR, over the verdict of compulsory license and royalty measures and over other administrative acts by the IP administration department under the State Council. In other words, the case will only go to the BIPC no matter where the plaintiff or defendant domiciles as long as it is an administrative dispute where the department of the State Council is involved. However, a single IP dispute may have both infringement and administrative litigations. For example, a plaintiff sues the defendant for patent infringement and the defendant petitions to PRB for trademark invalidation. If the defendant disagrees with the decision by the PRB and then appeals to the court, the problem caused by jurisdiction would occur. This is because the patent infringement cases are adjudicated by regional People’s Intermediate Court if the defendant does not domicile

73. Su Chi (宿迟), *supra*, note 48.

74. Beijing Woqi Gongsi Su Beijing Hengbao Gongsi (北京握奇公司诉北京恒宝公司) [*Beijing Watchdata Corp. v. Beijing Hengbao Corp.*], December 15, 2016, (Beijing IP People’s Ct. June 14, 2016).

75. Xu Qinghong, *supra* note 71, at 2.

76. Susan Finder, *supra* note 44, at 252.

77. Stanford Law School, China’s Case Guidance System: Application and Lessons Learned (Part 1), China Guiding Cases Project (May 3, 2018), <https://cgc.law.stanford.edu/guiding-cases-surveys/issue-3/>.

in Beijing, Shanghai or Guangdong Province, while the patent administrative cases are only adjudicated in BIPC. As a result, two different courts adjudicate the issues on the same matter. It is possible that two courts adopt different ruling standards over the same issue that will impair the consistency and accuracy of the adjudication.

## B. “Three-In-One” Trial Mode Fails to Apply

The “Three-In-One” adjudication for civil, administrative and criminal IP cases under a single tribunal is emphasized in the China Program for Judicial Protection of IPR (2016-2020).<sup>78</sup> In 2016, this new model started to be adopted by nationwide IP tribunals except for the three Specialized IP Courts. This new model was designed to solve the divergent decisions caused by different jurisdiction on the IP civil, administrative and criminal disputes. This is because previously the civil issues of the IP cases are adjudicated by the IP tribunal, while the administrative and criminal issues are adjudicated by administrative and criminal tribunals respectively. The decisions on the same IP issues varies by different tribunals. Under the new model, all of the civil, administrative and criminal IP cases will be adjudicated together by IP tribunal. Therefore, the ruling standard over the IP issues will be unified, and the outcome of cases will be more fair and accurate.

However, the three Specialized IP Courts do not adopt the “Three-In-One” model.<sup>79</sup> The courts can only adjudicate IP civil and administrative cases in one tribunal but have no jurisdiction on the IP criminal issues. One possible reason is that no coordination has been established between the Specialized IP Courts and the procuratorate system. So far no procuratorate has been authorized by law to file the IP criminal cases to the Specialized IP Courts. Apparently this inconsistency need to be solved in the future.

## C. The Inefficiency Caused by the Bifurcated Litigation System

As stated above, in China the infringement and invalidity of the patent at issue are adjudicated in two separate proceedings. The defendant cannot assert the patent invalidation defense in the patent infringement lawsuit but filing petition to PRB in CNIPA to invalidate the patent. The courts can only try the infringement issues. If the defendant files the petition to the PRB, the courts have to stay until the patent

was held invalid or valid through administrative decisions made by PRB.<sup>80</sup>

It should be noted that China is not the only country which has adopted the bifurcated litigation system. Japan was also following the bifurcated litigation system until the decisions by supreme court in the Fujitsu Semiconductor case in 2000 came out. Since then, a court in an infringement suit has the authority to decide the invalidity of patent and to disallow any claim made upon as an abuse of right.<sup>81</sup> Unlike Japan, the bifurcated system in Germany remains unchanged. In Germany, the district courts have no jurisdiction over the validity of the patent. Therefore, if a defensive party wants to invalidate the patent in the infringement dispute, the party should counterclaim patent invalidity before EPO or Federal Patent Court other than the district court. The infringement proceedings will stay until the pending invalidity issues are solved.

The question on whether the Chinese IP judicial branch should follow Japan to introduce the validity defense into the infringement trial has been debated for years. This paper supports introducing the patent validity defense into the infringement trial. It is true that the bifurcated system increases the reliability and accuracy on the technical issues of the cases since such issues are adjudicated by administrative law judges who have expertise in legal issues and technical issues respectively. However, this bifurcated litigation system can cause some negative effects. First, it generates higher cost not only for the litigation parties but also for the whole system other than the non-bifurcated system, according to a comparative study on bifurcated litigation system in Germany with non-bifurcated litigation system in UK.<sup>82</sup> Second, the infringement litigation under a bifurcated system is always time consuming. Specifically, the courts in China have to stay until the decision on patent validity is made by the PRB. It would even further extend the proceedings if the defendant appeals to the BIPC against the PRB’s decision. The infringement issues cannot be solved until the administrative dispute is finally solved by BIPC. As a result, it usually takes several years to solve the infringement dispute. Third, the bifurcated system causes possibility of divergent outcomes of infringement

78. Zuigao Renmin Fayuan Guanyu Yingfa “Zhongguo Zhishichaquan Sifa Baohu Gangyao (2016-2020) Tongzhi (最高人民法院关于印发《中国知识产权司法保护纲要（2016-2020）》的通知) [China Program for Judicial Protection of Intellectual Property Rights (2016—2020)] (Promulgated by Sup. People’s Ct. April 20th, 2017, Effective April 20th, 2017) CLI.3.293510 (Lawinfochina).

79. SPC, *supra* note 3, §2.

80. 郭禾 (Guo He), Zhuanliquan Wuxiao Xuangao Zhidu Gaizao Zhishichaquan Fayuan Jianshe Xietiao (专利权无效宣告制度的改造与知识产权法院建设的协调) [Reforms on the Patent Invalidation System and the Establishment of the Intellectual Property Courts], 3 Journal of Intellectual Property. 14, 15 (2016).

81. USPTO, IPII, *supra* note 28, at 62.

82. Katrin Cremers *et al*, Invalid But Infringed? An Analysis of The Bifurcated Patent Litigation System, 131 Journal of Economic Behavior & Organization. 218, 241 (2016).

proceedings with invalidation proceedings. Fourth, the bifurcated system might also cause inconsistent claim interpretation between infringement proceeding and invalidation proceeding.

It is also true that the bifurcated litigation system in Germany has been running well so far. However, the situation in China is different from the situation in Germany. China receives the largest number of patent applications in the world. Meanwhile, the number of IP lawsuits filed in PRC courts has been increasing year by year and historically reached 0.2 M in 2017. The number of patent lawsuits also doubled within four years. As a result, the caseloads in the PRC courts have been increasing dramatically these years. Therefore, the IP trial proceeding need to be speed up but the bifurcated litigation system will slow down the whole proceeding.

Besides, unlike German courts, the China Specialized IP Courts adopt technical investigators who assist with technical issues on patent infringement cases. Being equipped with the technical investigators, the judicial branch has full capacity to deal with the technical issues which are the key to the patent validity. Therefore, the bifurcated litigation system is no longer necessary to be applied to the Specialized IP Courts. The judges from the courts should have the authority to decide whether the patent is invalid in patent infringement cases.

## VI. The Impact to the Foreign Party: Good or Bad News?

The foreign parties doubted the independence of China IP judicial branch for a long time. In their experience, the policy influence imposed by the government has made the outcome of the litigation ambiguous, uncertain and unpredictable. The U.S. government even initiated a §301 investigation last year on acts, policies, and practices of the Chinese government related to technology transfer, IP, and innovation and announced to retaliate on certain products imported from China.

The negative view is reflected in the statistics. The caseloads of foreign party-involved IP civil cases filed to the PRC courts increased smoothly prior 2014. Then in 2015 right after the Specialized IP Courts established, the number fell from 2,142 down to 1,714. After 2015, the number rose back to 2,797, the highest number ever since 2010. Although the number is increasing in general, the proportion of the foreign party-involved caseload to the total IP civil caseload was relatively small. From 2014 to 2016, the proportion remained around two percent. See Figure 6.1. Besides, the caseloads of foreign party-involved IP administrative cases were increasing by small growth rate and rose to the climax in 2015 but then dropped to 2,394 in 2016. Meanwhile, the proportion of the caseloads to the total caseloads remained 45.1 percent from

2014 to 2015 and slightly dropped to 38.3 percent in 2016. See Figure 6.2.

Nevertheless, there is a growth of the foreign party-involved IP cases in BIPC. The IP cases involving at least one foreign party constituted 26.5 percent by March, 2015.<sup>83</sup> The proportion then reached to 39.4 percent by September, 2015.<sup>84</sup> The average proportion in 2017 was 30 percent according to the report from SPC.<sup>85</sup> Further, a sample study shows that the average amount of damages granted by BIPC to the foreign parties was RMB1.02 M, much higher than the damages granted to the domestic party which was in the amount of RMB 0.75 M.<sup>86</sup> Meanwhile, the study also concludes that the foreign IPR holders in 10 out of 13 cases win and the proportion is a little smaller compared to the proportion of domestic IPR holder winner cases.<sup>87</sup>

Although the foreign party involved IP litigation filed to the PRC courts nationwide is still small after the establishment of Specialized IP Courts, the proportion of foreign party involved IP cases filed to BIPC has experienced a significant growth from 2015 to 2016. Although a study also reveals that the proportion of foreign IPR holder winner cases is smaller to the domestic IPR holder winner cases, the study sample is too small to prove that the foreign IPR holders were not treated fairly by the Courts. Meanwhile, considering the study which shows a higher damages granted to the foreign parties than domestic parties, one cannot say that the foreign parties are not treated amicably by the courts. Besides, it seems that the foreign parties are willing to solve the IP disputes in BIPC when looking into the statistics on growing proportion of foreign party involved IP cases in BIPC.

There is a lack of data showing the situation of foreign party-involved cases in SIPC and GIPC. However, based on the above research and analysis, we can make a conclusion that the IPR judicial protection environment in general after the establishment of Specialized IP Courts is getting better. This is good news to foreign IPR holders because better IPR judicial protection

83. Chen Jinchuan, *supra* note 38, at 14.

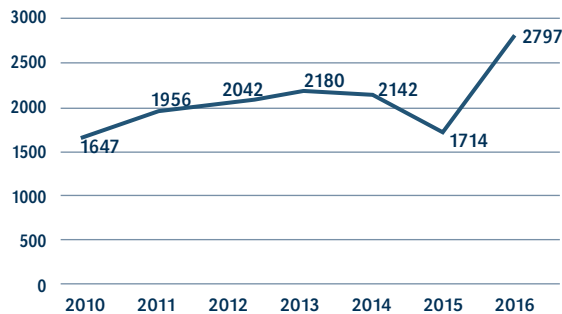
84. Su Chi (宿迟), *supra* note 69.

85. SPC (最高人民法院), Guanyu Zhaokai Zhishichanquan Sifa Baohu Xuanchuanzhou Xinwen Fabuhui (关于召开知识产权司法保护宣传周新闻发布会) [Press Conference By SPC On National Judicial Protection Of IPR], chinacourt.org, (April 19, 2018, 10:00 a.m.), <https://www.chinacourt.org/article/subjectdetail/id/MzAwNMhMNIABAA==.shtml>.

86. SANYOU IP GROUP, Beijing Zhishichanquan Fayuan Zhuanli Shenpan Dashuju (北京知识产权法院专利审判大数据) [Data Report On Patent Adjudication In BIPC By June 30th, 2017] (October 26, 2017), <https://www.lexology.com/library/detail.aspx?g=433ef816-a78b-45b0-a027-b6c38a962ba1>.

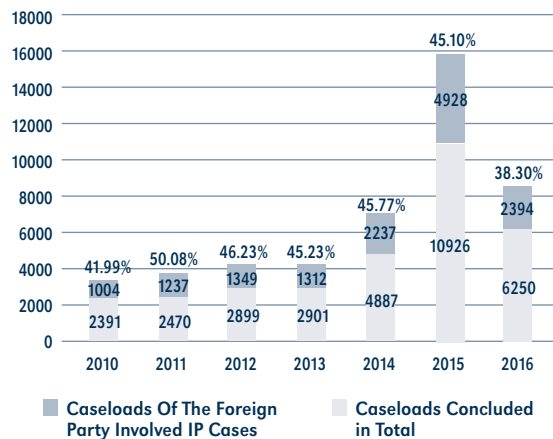
87. See *id.*

**Figure 6.1: The Caseloads Of Foreign Party-Involved IPR Civil Cases In PRC Courts**



Data from SPC Annual Report<sup>88,89,90,91,92</sup>

**Figure 6.2: The Caseloads Of Foreign Party-Involved IPR Administrative Cases In PRC Courts**



Data from SPC Annual Report<sup>93</sup>

environment means IPR will be better protected.

The reasons are as follows:

1. The courts established the technical investigation mechanism. With the assistance of technical investigators on the complex technical issues of the IP cases, judges will have more time concentrating on the legal issues of cases. The outcome of the litigation would be more accurate than before.
2. The Specialized IP Courts have less administrative influence over the judges' decisions. The presiding judges rather than the Judicial Committee make the final decisions on their cases. Without the Judicial Committee's intervention over the

cases, the outcome of the litigation will be more fair and the judicial independence will be further protected. This change is positive to foreign parties because what they are most concerned about is the policy influence on the judicial decisions.

3. At least BIPC started to adopt the case guidance system in order to improve the consistency and predictability of the decisions. Although the proportion of the cases citing the legal precedents is still small, the increasing trend of the citation indicates that such mechanism is not a failure and would be further implemented. This new mechanism is also good news to foreign parties, especially the parties from common law countries. They can look into the legal precedents to evaluate the possibility to win and also can submit the prior cases to the courts to make their argument more persuasive.
4. The efficient trial proceeding in the Specialized IP Courts is also a benefit to the litigation parties for the sake of cost savings.
5. The increasing damages granted by the courts can also attract the litigation parties to bring lawsuits to the court. The damages granted by the courts is growing due to the improving expertise of the judges in the Specialize IP Courts. The judges are able to measure the damages under various factors rather than simply granting the statutory damages with discretion. Consider all the above reasons, the foreign parties can possibly receive a more fair IPR judicial protection in China than before though there is not sufficient data to show the situation of IPR judicial protection on foreign parties.

88. SPC, *supra* note 17-20.

89. Zhongguo Fayuan Zhishichanquan Sifabaohu Zhuangkuang (2013) ( 中国法院知识产权司法保护状况 (2013) ) [Report On Judicial Protection In PRC Courts (2013)] (Promulgated by Sup. People's Ct. April 2014, Effective April 2014) CLI.3.224184 (Lawinfochina).

90. Zhongguo Fayuan Zhishichanquan Sifabaohu Zhuangkuang (2012) ( 中国法院知识产权司法保护状况 (2012) ) [Report On Judicial Protection In PRC Courts (2012)] (Promulgated by Sup. People's Ct. April 2013, Effective April 2013) CLI.3.224187 (Lawinfochina).

91. Zhongguo Fayuan Zhishichanquan Sifabaohu Zhuangkuang (2011) ( 中国法院知识产权司法保护状况 (2011) ) [Report On Judicial Protection In PRC Courts (2011)] (Promulgated by Sup. People's Ct. April 2012, Effective April 2012) CLI.3.224185 (Lawinfochina).

92. Zhongguo Fayuan Zhishichanquan Sifabaohu Zhuangkuang (2010) ( 中国法院知识产权司法保护状况 (2010) ) [Report On Judicial Protection In PRC Courts (2010)] (Promulgated by Sup. People's Ct. April 2011, Effective April 2011) CLI.3.150042 (Lawinfochina).

93. SPC, *supra* note 89-93

## Conclusion

It is undoubtable that the Chinese government is making reforms to enhance the judicial protection of IPR in the context of series of national pro-innovation policies and the “*Deepening Judicial Reform in China*” policy. These policies serve the goal to transform the economic growth trajectory from investment/export driven economy to consumption/innovation economy. The economic transformation is to mitigate the conflicts between its increasing demand for resources and resulting environmental problems. The enhanced IPR judicial protection will nurture the indigenous innovation as fertile soil and so advance the economic transformation.

Three Specialized IP Courts were established as one part of the reforms to strengthen the IPR judicial protection. Within three years, the courts have taken several actions to achieve this goal. The courts eliminated the judicial committee’s intervention on judges’ decisions in order to improve the judicial independence. The courts appointed technical investigators to assist with the technical issues in the IP cases in order to improve the accuracy of the adjudications. The courts established the team of “one main judge-one assistant judge-one law clerk” to tackle with the growing caseloads. The courts follow case guidance mechanism and the BIPC established its own case guidance database to improve the consistency and predictability of the adjudications.

The changes in the IP judicial protection system are not formalistic. The statistics show that the reforms indeed have positive effects. The trial period is shortened. A number of cases cite the legal precedents. The damages granted to the IPR holders is rising. As a result, the annual growth rate of caseloads filed to

the Specialized IP Courts is increasing. Therefore, it seems litigation parties are willing to solve disputes in The courts.

The establishment of Specialized IP Courts and the reforms made by The courts should provide a good IPR protection environment to IPR holders including the foreign IPR holders, though the proportion of the foreign party-involved IP cases is still extremely small. This is because new features of the Specialized IP Courts can improve the uniformity, accuracy and predictability of the outcomes. Besides, the damages granted by the courts is growing and the average damages granted to the foreign IPR holders by BIPC is even higher than the domestic IPR holders. Further, the speedy trial proceeding is also beneficial to the IPR holders.

Furthermore, 15 Specialized IP Tribunals were newly established throughout several developed cities in China in 2017 including Shenzhen, Nanjing, Hangzhou, Chengdu and Wuhan. These tribunals are authorized cross-regional jurisdictions over certain IP cases.<sup>94</sup> Meanwhile, a Specialized IP Court of Appeals in SPC (also referred as SPC Specialized IP Tribunal) starts running on January 1, 2019. This appellate court is authorized to review the appeals of certain types of IP cases including patent civil or administrative cases from People’s High Court, Specialized IP Courts or nationwide Intermediate People’s Courts.<sup>95</sup>

Overall, the benefits for foreign IPR holders are not yet noticeable at present, though it is certain that in the near future either the foreign or the domestic foreign IPR holders will receive stronger IPR judicial protection under the judicial alliance of the three Specialized IP Courts, fifteen regional Specialized IP Tribunals plus one Specialized IP Court of Appeals. ■

Available at Social Science Research Network (SSRN): <https://ssrn.com/abstract=3317011>.

94. Zhang Lingling, *supra* note 42, at 27.

95. Zuigao Renmin Fayuan Guanyu Zhishichanquan Fating Ruogan Wenti Guiding (最高人民法院关于知识产权法庭若干问题的规定) [Provisions of the Supreme People’s Court’s on Several Issues Concerning the Specialized IP Court of Appeals] (Promulgated by Sup. People’s Ct. December 27, 2018, Effective January 1, 2019) CLI.3.328075 (Lawinfochina).