I. Introduction: China's Successful Journey Toward A Modern Judicial System

A. China's Socio-Economic Progress

Since the launch of the economic reform policy in 1978, China has experienced a period of more than thirty years of successful economic development. During the transitional period from a planned economy to a market-based economy, China has designed a series of industrial policies to encourage the fast development of its economy by promoting foreign direct investment, importing advanced foreign technologies and promoting exports. Meanwhile, China has become the second biggest economic power in the world in terms of GDP, just after the United States.

Even if it is debatable in the international community that China is a market economy, what should not be ignored, however, is the vital role private companies play in the Chinese national economy. According to the statistics released by the State Administration of Taxation (SAT) that Chinese private sector generated almost 70 percent of the GDP in 2016. In the same year more than 50 percent of tax revenue was contributed by privately-owned enterprises, which also provided more than 80 percent of employment opportunities in the country.[1]

Nowadays, legislative framework makes Chinese state-owned enterprises (SOEs) directly exposed to competition with newly emerged private companies from home and abroad. This is especially true after China joined WTO in 2001. Thanks to the economic transformation, China has lifted 800 million people out of poverty since 1978. Today, the government has a new, ambitious goal of lifting all 55 million extremely poor citizens out of poverty by 2020.[2] All these achievements are due to, among others, efficient market economy through the introduction of a series competition laws in China: Price law, Anti-Unfair Competition Law,

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1 Press release from *Daily Economic News* (每日经济新闻), April 6, 2017, available at http://www.sohu.com/a/132323997_701102?_f=v 2-index-feeds.

2 The world Bank: *Understanding China's Poverty Reduction Success to Benefit the Global South,* available at http://www.worldbank.org/en/news/feature/2016/05/17/understanding-chinas-poverty-reduction-success-to-benefit-the-global-south

Consumer Protection Law, and preeminently, the introduction of Anti-Monopoly Law (AML). As stated in Art. 1 of the AML, the purpose of the law is "raising economic efficiency, safeguarding the interests of consumers."

B. Origins of China's Anti-Monopoly Law

Competition policy and relevant guidelines in China are not entirely new, although they were "closely integrated with industrial policies and deviate from modern antitrust laws adopted in other advanced economies"[3]. However, only as late as 2007 was the first Chinese Anti-Monopoly Law (AML) promulgated, after going through thirteen years of debate and three revisions. It finally came into effect on August 1, 2008.[4] The long delay of the adoption of the AML was no secret: The Chinese government needed to implement strategic plans to encourage the development of its domestic industry in several key sectors which stood in conflict with some of the goals set by the AML.[5] To a large extent, various foreign multinational investors as well as large Chinese SOEs exploited the *legislative vacuum* during that period of time by forming conglomerates.[6]

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3 Huyue Zhang, *An Economic Analysis of China's Anti-Monopoly Law,* (ProQuest LLC, 2011) 20.

4 Guangjie Li, *Interface between International Property Rights and Competition Law - Implications of the Chinese Qualcomm Decision (2015),* Seminar Paper submitted to Prof. Josef Drexl on April 15, 2017.

5 *Id*.

6 Precisely due to the fear of potential damages the AML law may cause to foreign investors and also to Chinese SOEs alike, the AML of China underwent such a long period of debate. However, examples of acquisition of Chinese leading companies in various industries by large multi-national corporations demonstrated evident harm caused to Chinese national industries as well consumer sectors, which was often caused by insufficient control or inefficient approval procedures on mergers & acquisition (M&A) deals. For instance, the French company Danone has actively acquired majority shares of Chinese dairy food companies since 1987 (e.g. Wuhan Brewery with 54.2% shares, Shenzhen Yili Food Company with 54.2% shares). In 2000 Danone acquired 92% shares of Lebaishi Group (Information available at http://www.360doc.com/content/16/0522/20/8536324_561406743.shtml). Participation of foreign players brought factually higher quality of products. However, dominant positions in relevant product markets also led to excessively high prices that Chinese consumers had to bear.

Since the adoption of the AML the international community has been observing closely how the Chinese anti-monopoly enforcement agencies (AMEAs) as well as the judiciary system put the legislation into practice. Some commentators expressed their concerns about possible biased attitude of the AMEAs against foreign companies. Very often each decision regarding foreign players tends to be taken with a second guess. However, it turned out that the AMEAs have been active at issuing decisions against both Chinese and foreign companies for their anticompetitive conduct. The quality of AMEAs' decisions and court judgements keeps improving. Though a newcomer in this field, China has established itself as one of the major jurisdictions for competition issues in the world through a series of landmark decisions issued by both administrative and judicial bodies in recent years.

In 2011, the National Development and Reform Commission (NDRC) commenced investigations into two Chinese telecom giants, *China Telecom* and *China Unicom* for abuse of dominant market position. The investigations focused on refusal to deal and price discrimination, which resulted in many internet service providers being forced out of the market. The two telecom giants had to undertake rectifications, including increasing internet speeds and decreasing internet fees. In 2015 the NDRC issued a landmark decision on *Qualcomm* with the highest penalty (almost USD 1 billion) ever imposed on a single company based on *Qualcomm's* abuse of its dominant market position and charging excessive royalty fees for its standard essential patents (SEPs). This decision attracted great attention in the world. In November 2016, against the Swiss company *Tetra Pak* the State Administration of Industry and Commerce (SAIC) issued the lengthiest administrative decision ever released by a Chinese competition enforcement agency. The decision analysed in detail the market definition, identification of a dominant position and also provided detailed assessment of the abusive conduct of *Tetra Pak*.

Apart from administrative decisions, private actions filed at competent courts based on Art. 50[7] of the AML have also increased steadily in recent years, particularly after release of the *Provision on the Application of Laws in Civil Disputes Cases Arising from Monopoly Activities* by the Supreme People's Court (SPC) in May 2012. The trend shows that more

7 Art. 50 stipulates "Business operators which implement monopoly acts and causing other to suffer losses therefrom shall bear civil liability pursuant to the law".

undertakings and individuals are confident to let courts decide on their claims for losses suffered from violation of competitive law. In June 2016, *Qualcomm* filed law suits against Chinese mobile phone manufacturer *Meizu* for infringing its SEPs, and claiming damages in the amount of RMB 520 million.[8]

The desire to introduce a modern competition law came from within the country in the midst of economic reforms, when the private sector was playing an increasingly important role in the economy. However, the formulation and adoption of the AML is to a certain extent an international "product". During the drafting process of the AML, Chinese government consulted numerous foreign legal and economic experts from the European Union (EU) and the United States (US). Many foreign competition law experts were even directly involved in the drafting of the AML. Leading scholars for competition law from Germany such as Professor Jürgen Basedow of the Max Planck Institute for Comparative and International Private Law and Professor Josef Drexl of the Max Planck Institute for Intellectual Property and Competition Law, and experts from other countries were invited by the State Council Legislative Affairs Office to discuss the draft of the AML.[9]

The AML, enacted in 2008 adopted the modern "three pillar" system and prohibits monopolistic conduct in the following areas:

– Monopoly agreements between business operators (Chapter II)
– Abuse of dominant market position by business operators (Chapter III)
– Concentration of business operators which may have the effect of eliminating competition (Chapter IV).

Owing to China's legacy of a planned economy and its state-owned enterprises (SOEs), Chapter V of the AML prohibits the abuse of administrative powers for elimination or restriction of competition.[10]

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8 *Qualcomm Sued Meizu, Claiming Damages of RMB 520 Million* (高通起诉魅族侵权案详情：索赔 5.2 亿元) Available at http://news.mydrivers.com/1/488/488454.htm.

9 Xiaoye Wang, "*China's Competition Law in the Global Competition*" in Nicolas Charbit, Elisa Ramundo (eds.), *Competition Law on the Global Stage: David Gerber's Global Competition Law in Perspective*, Institute of Competition Law (2014).

10 Chapter V of the AML addresses the role of Chinese administrative authorities, given the history of planned economy and specific characteristic of the Chinese socialist market economy.

The adoption of the AML will definitely make China more committed to the mechanism of a market economy. And free competition will, in turn, make Chinese companies more performing. The aggregate efficiency will greatly benefit consumer interests. After epochal above-average growth China is in many cases not a cheap production site any more. In our knowledge-based world, innovation and advanced technology are powerful weapons to make companies superior to their competitors. The emergence of numerous high-tech companies and national champions such as *Huawei, ZTE, Haier, Alibaba, Tencent* and other start-up companies in various industrial sectors makes legal protection of intellectual property (IP) essential, also in the context of a globalized world economy.[11]

C. Origins of China's Patent Law

In 1984 the first Patent Law of the People's Republic China was promulgated; it entered into force on April 1, 1985. With the help of European, mainly German IP experts, the first draft of the China Patent Law was more or less an "imported" legislation in consideration of the Chinese social, political and economic environment at that time. Since then Chinese Patent Law has gone through three revisions; the fourth amendment of the patent law is currently under consultation.

Similar to the competition regime, the IPR system in China has experienced a process of improvement and adaptations to international standards. The process of adopting global norms was, to a certain extent, driven by international political and economic pressure. The first revision of the Chinese Patent Law in 1992 was more or less an exchange for better trading terms with the US government during the Sino-US trade negotiations. The US government demanded China to amend its patent law by adding protection of chemical and pharmaceutical products. Further commitment from the Chinese government was to revise its Copyright Law and to promulgate laws to protect trade secrets.[12]

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11 *Supra* note 4.

12 Bonan Lin, Jon Wood, Soonhee Jang, *Overview of Chinese Patent Law*, 35th International Congress of the PIPA in Japan, 2004. The Sino-US Trade negotiations started in 1989 and dragged on for two years without real breakthrough, until the US government threatened to put China on the Special 301 blacklist with trade sanctions.

The second amendment of Chinese Patent Law was being carried out during the rounds of negations to become a member of the World Trade Organisation (WTO). Before it successfully joined the WTO, China had to commit itself to reviewing and revising its patent law in order to comply with the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS Agreement). Prior to the amendment, Art. 62 of the Chinese Patent Law provided a "non-infringement" exemption, which stipulated that the act of use or sale of a patented product *without knowing the fact* that the product was produced and sold without the permission of the patent proprietor was not an act of infringement. This made it almost impossible for the patentee to effectively stop infringement acts in China. In the revised Patent Law this exemption of "use or sale" without knowledge was deleted from the non-infringing acts[13]. Furthermore, preliminary injunction was for the very first time introduced into the revised Chinese Patent Law. Other amendments such as permissibility to appeal decisions to the court on the validity of utility models and designs from Patent Re-Examination Board (PRB), methods for calculating damages were also adopted in compliance with the requirements of the TRIPS Agreement.[14]

The first two revisions of the Chinese Patent Law illustrated how the intellectual property right (IPR) policy in developing economies can be shaped by developed countries and international treaties. With the Chinese Trademark Law, Copyright Law, and Regulation on the Protection of New Varieties of Plants, and other regulations on the protection of layout-designs of integrated circuits, and for computer software, China has adopted international norms and harmonised its legal system with rest of the world in the area of IPRs.

China is a very young jurisdiction comparing with the IPR system in the EU, the US and some other countries. Yet, due to its global economic power and numerous national champions China has become one of the most important countries for IP matters in the world.[15] In 2017 the China State Intellectual Property Office (SIPO) received more than 1.38 million patent applications; it ranked No. 1 in the world in the seventh consecutive year. [16]

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13 *Id.*
14 *Id.*
15 *Supra* note 4.
16 Information is available at http://www.sipo.gov.cn/zscqgz/1123516.htm.

The Chinese government realized that quantity of applications is not sufficient. In its 13th Five-Year Plan (2016 – 2020) China put that *innovation* should be the driving force for economic development.[17] Pertinent policy is to move up in the value chain by abandoning old heavy industry and building up high-tech industries.

In the same year when the AML was promulgated, China announced the "Outline of National IP Strategy" *(IP Strategy*), which set a roadmap for China to become a country of advanced IP creation, utilization and protection by 2020. In its *IP Strategy* China committed itself to carrying out a number of judicial reforms to strengthen the protection of IP rights. One of the major issues was to establish specialized IP Courts in Beijing, Shanghai and Guangzhou, which were officially opened in late 2014. These IP Courts are designed to try cases involving patents, technical secrets, computer software, integrated circuit layout designs, new plant varieties, and cases regarding recognition of well-known trademarks and antitrust issues. As commentators noted, the establishment of specialized IP courts is a milestone of China's recent efforts in improving the IP protection. Early 2017 four new specialized IP Tribunals were established in other four cities in China: Nanjing, Suzhou, Chengdu and Wuhan. By March 1, 2018 the number of IP tribunals had increased to totally 15 in China.[18]

Furthermore, it is noteworthy that damages awarded by the specialized IP Courts have grown continuously in the past years. According to statistics from the Beijing IP Court in 2016, the average amount of damages granted by the Beijing IP Court is RMB 1.41 million (approximately USD 210 000) for patent infringement, comparing with the average damages of RMB 450 000 (USD 68 000) for patent infringement in 2015. On December 6, 2016, the Beijing IP Court issued an unprecedented damage award of RMB 49 million (approx. USD 7.1 million) in favor of the patent holder[19]. This is another signal to demonstrate that Chinese government is de-

17 In each of its Five-Year Plan Chinese government outlines its major national strategy, clarifying focusing area of its work, mapping strategies for economic development, setting growth targets.

18 Information is available at http://www.360doc.com/content/18/0505/23/52632151_751462422.shtml.

19 *Watchdata System v. Hengbao Company, Ltd.* (2015) Jing Zhi Min Chu Zi No.441 （2015）(京知民初字第 441 号, 握奇公司诉恒宝公司侵犯发明专利权纠纷案判决书), available at http://www.ciplawyer.cn/article1.asp?articleid=20552&page=3.

termined to punish IPR infringers and further strengthen IP protection in China.

D. Interaction between Competition Policy and Intellectual Property Law

1. Coherent goals of the two systems

As we can see from the above, IPR regime and competition law have evolved as two different systems. However, both systems possess coherent goals. Competition policy seeks to guarantee healthy rivalry among competitors by limiting all kinds of monopolistic behavior at the market. Competition law is the foundation of market economy so that all market participants could benefit an open and level playing field. Free competition can maximize allocative efficiency in society for the benefit of consumers.

The objective of the IPR system is to protect intellectual creations and incentivize inventions and innovations in the society. It grants IPR holders exclusive rights for their innovation for a limited period of time. During this limited period of time the IPR holder has the exclusive power to control the market price, which is usually much higher than his marginal costs. The deadweight loss caused by monopolistic pricing is a distortion of free market competition. However, this will give creators the opportunity to recoup their investment on innovation. The IPR regime is meant to promote innovation for the diffusion of knowledge, for better varieties of products at a cheaper price due to more efficient production methods, thereby enhancing consumer welfare. Notwithstanding, the IPR regime limits competition and it could be regarded as a sort of compromise to balance public and private interests.

2. Possible conflicts between the two systems

Competition law and the IPR regime pursue the same goals but through completely different mechanism. The former is to guarantee fair market competition by prohibiting monopolistic conduct, while the latter grants IPR owners exclusive rights in order to ensure competition at a higher level. There is a general perception that these two policies have inherent conflicts. It should be stated that monopoly is not *per se* anti-competitive; on-

ly the abuse of monopolistic market power is regarded as anti-competitive. This principle also applies to IPR holders.

In theory, the general principle between the two regimes is readily understandable. But in practice it is not easy to apply competition law to intellectual property rights. Competition agencies and judiciary bodies have a difficult task to strike the right balance between these two regimes. Overly extensive competition enforcement on IPR holders may hamper innovation; while abuse of IP rights will hinder healthy competition and thus consumer interests. For instance, to balance *ex ante* and *ex post* efficiencies for dynamic economic sectors such as telecommunication and Internet is an extraordinarily difficult task, because many unpredictable factors need to be taken into consideration. This requires, *inter alia*, involvement of sound economic analytical appraisal. In case the negative effect of exercise of exclusive IPR is much bigger than the benefit of overall public interest, compulsory license needs to be imposed on the IPR holders.

Besides complex technologies, the globalized economy keeps on influencing national competition decisions. Above all, competition law systems can never be regarded as an isolated legal instrument. Depending on the socio-economic conditions and different stages of economic development, administrative and judicial decisions also tend to evolve. This phenomenon does not only apply to developing countries, but also to more "mature" jurisdictions such as EU and US. Reconciliation of these two legal systems represents a formidable task for competition agencies and jurisprudence alike.

Since the enactment of China's AML in 2008, almost ten years have passed. Chinese competition agencies have been absorbing experience and knowhow from older jurisdictions, and making efforts to develop guidelines for defining the boundaries between competition law and the intellectual property regime. On March 23, 2017, the very first comprehensive draft IP guidelines "*Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights"* under the auspice of Anti-Monopoly Commission (AMC) of the State Council was published. The international community is watching closely the forthcoming release of the final IP Guidelines on distinguishing legitimate exercise of IP and abuse of IP under the AML. Clear definitions and consistent application of the IP Guidelines is essential to give market participants more legal certainty and predictability.

E. Main Themes Covered in This Thesis

This thesis consists of six parts. Following this introduction the author will provide - in the second part – an overview of the Anti-Monopoly Law (AML) of the People's Republic of China (PRC) and its enforcement mechanisms. This part will also elaborate on certain constraints regarding effective enforcement of the law considering current socio-economic development. A comparative study of the Chinese anti-monopoly law and the European competition regime will follow in Part III. Part IV will cover the latest IP Guidelines (2017) under the auspice of the Anti-Monopoly Commission operating under the State Council. These are the very first comprehensive Guidelines that apply competition law to IPRs. Part V will review one of the most important landmark decisions (*Huawei v. InterDigital*) taken by the Chinese courts regarding interaction between competition law and IPR.

On the basis of her analysis, the author will come to the conclusion that each competition system evolves based on its own socio-economic context while at the same time providing a fresh look for other countries which may also at times need to improve their competition policies and judicial regimes.