

Review

On the legal system construction of China's administrative monopoly proceedings

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The implementation of China's "anti-monopoly law" in 2008 was no doubt a powerful needle for China's market economy, but it was just a gesture of the Chinese Government. Between the top-down model which was advanced by the Government, and the bottom-up model which was pushed by social forces, which one was the better choice as the leading force in the implementation of law enforcement? Perhaps, the combination of private and public implementation was the best model. However, in the process of regulating administrative monopoly, no matter how sophisticated the government decentralized design of the system of checks and balances, it seemed so feeble to solve the contradiction which the actor of monopolistic behavior was the one being regulated at the same time. The absence of litigation system which regulated administrative monopoly behavior in "anti-monopoly law" made this law a simple piece of declaration which was so-called the constitution of market economy. It cannot protect the rights of subjects in the market economy, and it also had no practical significance. The right without relief procedure was not the real right. Therefore, it had positive meaning to put administrative monopoly behaviors into the scope of regulatory proceedings and construct the dual model of anti-administrative monopoly.

Key words: Administrative monopoly, suability, dual regulation, the mode of litigation, triple compensation for damage.

INTRODUCTION

Legislative limitations of China's "anti-monopoly law" on regulation of administrative monopoly

The most serious issue of monopoly we have suffered in the process of economic restructuring and developing market economic is neither the monopoly of foreign companies nor monopoly of private corporations, but the issue of universal administrative monopoly. Powers of the government are distorted and abused by some unhealthy companies (mainly medium-sized enterprises) to lessen competition and pursue monopoly profits.

Administrative monopoly has impeded the establishment of a unified market system, damaged the social welfare and increased social costs, and has also made the interests of operators and consumers to deteriorate. So it needs to be regulated by "anti-monopoly law", which

can not only demonstrate China's firm opposition to administrative monopoly, but also further prevent administrative monopoly (Zhang, 2007). China's "Anti-monopoly Law" initially established the system of administrative monopoly regulation. It remained lots of shortcomings, however, which had a direct impact on the realization of function of anti-monopoly. They are mainly as follows: Firstly, flaws on regulations of jurisdiction and executive power made it impossible for private enforcement and litigation.

According to Article 51 of Anti-monopoly Law: "Where an administrative organ or organization empowered by a law or administrative regulation to administer public affairs abuses its administrative power to eliminate or restrict competition, the superior authority thereof shall order it to make correction and impose punishments on

the directly responsible persons in charge and other directly liable persons.

The Anti-monopoly Law Enforcement Agency may offer suggestions on legal handling to the relevant superior authority.” It actually excludes the jurisdiction of anti-monopoly committee and anti-monopoly law enforcement agencies on such organizations. And this article limits the legal responsibility of administrative monopoly to administrative punishment, which leads to the lack of litigation basis for market main players. There are no specific regulations on the choice of subject qualification, scope and implementation ways or modes of private enforcement and the nature and calculation of damages, which substantially results private person not be able to start private enforcement procedures (Wang and Zhu, 2008). It also lacks clear regulation on the compensation caused by administrative monopoly.

Secondly, Legal liabilities are too vague and narrow and civil liabilities are too simple and difficult to operate, which makes it difficult to hold back administrative behaviors, effectively (Sun, 2009). There are total 9 articles in Chapter 9 of Anti-monopoly Law of China to regulate legal liabilities. Most of the provisions are of a fine as the main mode of administrative responsibilities.

Compared to the high profit of administrative monopoly, fine cannot play the role to overawe the operators of the behavior of administrative monopoly. For economy monopoly behaviors, Anti-monopoly Law provides both civil liabilities and administrative responsibilities. While for administrative monopoly, there are only administrative liabilities.

On the other hand, the administrative liabilities which they cause have different contents. The administrative sanctions of economy monopoly behaviors are mainly administrative penalties while sanctions of administrative monopoly are mainly administrative punishment to persons directly (Wang, 2008). While regulation of Article 51 on “punishments on the directly responsible persons in charge and other directly liable persons” is not clear, it is therefore difficult to operate which regulation needs to be further defined.

The protection of partial enterprises, which administrative monopoly provides, is bound to damage civil rights of some other related enterprises and consumers. Based on the principle of “there is fault and damage, then there is compensation”, any subjects should take responsibilities of compensation when they damage other person’s rights because of their faults.

However, there is no clear regulation on compensation liability of administrative monopoly both in the “Anti-monopoly law” and “State Compensation Law”. The regulations on civil liability is very simple, only regulated in the Article 50 as “the business operators that implement the monopolistic conduct and cause damages to others shall bear the civil liability according to law.”

The lack of standards for civil damages makes China’s Anti-monopoly only play the role of evaluation of legal

conduct’s effect and cannot really achieve the effect of relief. Besides, the laws also lack regulations on criminal liabilities. In accordance with international practice and common sense, monopoly, administrative monopoly especially, have triple illegality of administrative, civil and criminal, which determine that the responsibility must be a kind of comprehensive responsibility of administrative, civil and criminal (Wang, 2004). And civil liabilities are undoubtedly the core of the responsibility system.

Deficiencies of regulatory of administrative monopoly reflect the limitations of regulations of China’s current Anti-monopoly Law on administrative monopoly. Then, is the leading force of law implementation and enforcement government’s top-down or the bottom-up by strength of civil society? In the sight of the author, the integration of private and public implementation is undoubtedly the best mode. So, the introduction of litigation mechanism to regulate administrative monopoly is a necessity to make up the current legal regulations.

THE NECESSITY OF INTRODUCTION OF LITIGATION SYSTEM TO REGULATE ADMINISTRATIVE MONOPOLY

In terms of regulatory of administrative monopoly, it is unrealistic to fully expect the same level of the executive branch of government anti-monopoly law enforcement agencies. It is believed that base on current system, we should regulate administrative monopoly by the means of private lawsuits. It is the key to solve the problem that mobilizing the power of the society against administrative monopoly and using judicial mechanism to regulate administrative monopoly. Reasons are explained subsequently.

First, the courts’ review of administrative monopoly is more conducive to make up deficiencies of regulatory mode of public implementation and improve efficiencies of sanctions against administrative monopoly behaviors. So far as the “anti-monopoly law” has been published, the status and authorities of implementation authorities of China’s Anti-monopoly Law remain to rely on the game of subjects with different interests in the process of legislation, which is of great uncertainty. Meanwhile, it will probably make the enforcement agencies, that is, both “referees” and “players” to use one kind of administrative power to regulate another kind of administrative power. We should, based on the current judicial mechanism, improve lawsuits against administrative monopoly and regulate administrative monopoly by judicial mechanism.

For administrative and civil tort caused by administrative monopoly, China’s current judicial review mechanism was already very mature. Such kind of system is of great certainty. Therefore, it makes more practical significance for the model of competent authority. Besides, judicial review against administrative monopoly by the courts actually increased the sanction

efficiency of administrative monopoly.

There are two kinds of methods that are able to increase the sanction efficiency of administrative monopoly: First, increasing the government's enforcement resources; second, expanding the scope of enforcement agencies. In the case of certain tax, there are great limitations on the expansion of enforcement resources.

It is practical compared with competent model to give the litigants the rights to bring private lawsuits against administrative monopoly to regulate administrative monopoly. This can not only make up the limitation of government enforcement resources effectively, but also greatly increase the amount of enforcement agencies so as to achieve the purpose of preventing illegal behaviors. At the same time, relying on the litigation, impartial and independent judiciaries review the administrative authorities implementing administrative monopoly. This is more authoritative and credible compared with administrative enforcement model which is more vulnerable to the impact of interest groups.

Second, it is more conducive to achieve social justice by using litigation mechanism to regulate administrative monopoly. Compared with economy monopoly, the behavior pattern of administrative monopoly is more mandatory. It is often completely deprived of the interest and rights of operators in the relevant market.

If the Anti-monopoly Law turned a deaf ear to the damage and achieved economic policy aims with single mind, then it would degenerate into a vassal of economic policies and run the opposite direction of the fairness and justice of law. Therefore, it is an intrinsic requirement to achieve legal justice by giving compensation to the victims.

According to the analysis on the limitations of "Anti-monopoly Law" in the foregoing, what the enforcement agencies focused on is the achievement of the role of deterrence and intimidation of Anti-monopoly law through fine and administrative punishment preventing the illegal behaviors of other market participants.

However, the role of deterrence and intimidation played by those methods is very limited. Otherwise, they do not give the injured parties economic compensate so as to recover the damage. While private direct litigation can better provide compensate to the victims and achieve corrective justice than public implementation.

The private can directly apply to the courts to make orders to stop the illegal behaviors so as to avoid further damage and apply for compensate to make up the damage caused by the illegal behaviors. Therefore, Anti-monopoly Law could provide direct justice to the litigants so as to make the competition rules closely related to ordinary citizens.

Thirdly, it is more conducive to discourage the offenders from acting administrative monopoly behaviors. Some brilliant scholars, such as Easterbrook, Posner, had explicitly claimed more than once, deterrence was the most preferred and main goal which the anti-monopoly

law should achieve.

In our current legal regulations, however, the relief system which the anti-monopoly law provides cannot play such a role of deterrence, for the lack of private lawsuits. After all, the function of administrative and criminal sanctions has limitations, so the civil sanctions would become an important way to enhance the deterrence of the anti-monopoly law.

The private lawsuits will make the offenders trapped into the lengthy and hugely costly litigation; therefore the actors must weigh the pros and cons before starting illegal behaviors when they realize the possibility of being suited was very large. Otherwise, the introduction of litigation system would cut off the cost which the enforcement agencies had to pay during the investigation and other procedures, because the subjects whose rights have been damaged would behave more actively to get civil compensations.

ACTIONABLE OR NON-ACTIONABLE DEBATE OF ADMINISTRATIVE MONOPOLY

There are various problems from the perspective of discussion of actionable or non-actionable administrative monopoly. Scholars' views from different points of the problems: First, due to differences in the understanding of different administrative monopoly implementers, different implementers would take different liabilities; second, there was no unified understanding on what kind of legal benefits was infringed by administrative monopoly as a kind of illegal behavior; third, most of administrative monopoly appeared in an abstract form. Under China's current legal framework, the non-actionable abstract administrative behaviors resulted that administrative monopoly can not be resolved by litigation.

Controversy caused by administrative monopoly subjects

Some scholars held monistic point on administrative monopoly subjects. Some scholars believed that the subjects of administrative monopoly were governments and their agencies (departments), such as "administrative monopoly refers to the government and its agencies abuse their power to restrict and disrupt the market order". Some other scholars supposed that the subjects of administrative monopoly were those enterprises engaged in production and business, such as "in the administrative monopoly, the administrative authorities are not market players and they do not gain the dominant position of market (Chen, 2000). They are those enterprises engaged in production and operation who really get the dominant position of market".

Problems on relief when the rights have been infringed arise because of two different opinions. According to the

first opinion, the administrative monopoly subjects are the administrative authorities such as the government and then the infringements of rights should be solved by administrative litigation and the loss of economic benefits are solved by state compensate. While the state compensate compared to the loss of economic benefits caused by administrative monopoly is just a drop in a bucket. Even more serious consequences are that, the implementers of administrative monopoly which are the market subjects gained asylum of administrative power, escaped from the legal liability.

Consequently, the interest bond between administrative authorities and the market players protected by them cannot be cut off and it is unable to meet the purpose of curbing administrative monopoly. According to the second opinion, the administrative monopoly subjects are those market subjects engaged in operation and business, there is a blind spot in the investigation of their responsibilities.

Through the insight into administrative monopoly, we can see that monopoly behaviors often with a nature of administrative order, so there is a certain geographical area of "universal binding". Some scholars summed it up as "abstract administrative monopoly" so as to meet the classification of specific monopoly and abstract monopoly in the administrative theory and they pointed that a number of specific administrative monopoly was based on the abstract monopoly to implement (Zheng, 2002). Then, market players who are protected by administrative authorities put on the cloak of legitimacy when they implement administrative monopoly behaviors; although, immune from legal liability, they fall into an embarrassing situation of non-actionable administrative monopoly. The difference of the previous two opinions in fact declares the controversy of who should be the undertaker of the responsibilities caused by administrative monopoly.

Controversy caused by legal rights infringed by administrative monopoly

There is little controversy on damage of rights caused by illegal exercise of administrative power, while there is no consensus on what kind of rights is infringed. Some scholars believed that what administrative monopoly infringed was a kind of fair competition right.

In the "anti-monopoly law", various monopoly behaviors restrict the freedom of competition. Due to the lack of competition freedom of market players, there are unfair competition results between the monopolists and infringed operators, between the monopolists and consumers. And also the fair competition right of infringed operators is infringed (Liu and Yin, 2008).

However, the legal right represented by fairness competition is just a kind of expecting right. Thus, it triggers off two aspects of problems: Can the expected profits become the object protected by the judicial process?

When the interest cannot be calculated accurately, does it mean that, it can be away from the protection of the judicial process?

The expecting benefits of market players represented by fairness competition right perform as a kind of chance; a chance into a certain relevant market. In the purpose of "Anti-monopoly Law", we found that giving the market players the rights of anti-monopoly was to protect players to enjoy fair competition and human progress and development rights and the right of the pursuit to happiness. Different from monopoly regulation as public power, this kind of right belongs to market players rather than government. It has dual properties of right of civil and economic law.

Through the analysis in the foregoing, we can see that the direct manifestation of the harm of administrative monopoly is that the market players protected by administrative power make use of their advantaged position and implement administrative monopoly whose nature is economic monopoly.

In Article 50 of Anti-monopoly Law regulates clearly "the business operators that implement the monopolistic conduct and cause damages to others shall bear the civil liability are according to law." It means the certainty of legal protection against administrative monopoly which infringed the market players.

So, this paper argues that there is no difference between the legal rights infringed by administrative monopoly and legal monopoly infringed by general economic monopoly, which should be including the scope of protection of judicial proceedings.

Controversy caused by non-actionable abstract administrative monopoly

There are many gap areas in the protection of interests and rights of administrative counterpart of China's "Administrative Procedure Law" and "Administrative Reconsideration Law". In terms of exclusion and limitations of reconsideration and acts of abstract administrative monopoly, the "Administrative Reconsideration Law" reserves the review rights on part of abstract administrative behaviors. While Paragraph 2 Article 12 of "Administrative Procedure Law" expressed as "The people's courts shall not accept the suits on administrative rules and regulations, regulations or decisions and orders with general binding force formulated and announced by administrative organs." These institutional constraints make the administrative monopoly in the form of abstract administrative behaviors unable to be included in the scope of proceedings. But in practice, legal loopholes make the relevant subjects' profit damaged by the administrative monopoly in the form of abstract administrative behaviors unable to be relieved, which violates the basic principle that "if there is damage, there must be compensate".

However, taking an insight into the relevant provisions of "Anti-monopoly Law", its administrative remedies focused on sanction of administrative monopoly behaviors and investigation of relevant responsible person. And it does not involve compensate claims of victims' damage. It is not conducive to protect the legal rights of victims, either.

Through the analysis in the foregoing, we can see that China's Anti-monopoly law only provides administrative avenues of relief of administrative monopoly. The enterprises and consumers infringed by administrative monopoly are neither given the rights to bring a civil action, nor to bring an administrative action. The infringed enterprises and consumers can only initiate supervisory procedures by charges and petition to higher administrative organs or expose and disclose by the news media reports.

However, such methods are indirect and weak and far from protecting their legal rights (Shang, 2008). And the threshold of these procedures is high and the steps are so trouble-some that some victims assert their rights passively if their rights have not been damages so much. So there is necessity and feasibility to introduce legal mechanism to regulate administrative monopoly.

The loss of other market players caused by administrative monopoly of the market player protected by administrative power should be integrated into the judicial relief proceedings, so as to ensure that the interests of other market players and consumers could be protected effectively.

The image of litigation pattern of china's administrative monopoly

The disputes arising from administrative monopoly need to be settled by judicial methods, but it does not mean that another independent litigation system should be established beyond the traditional "three major litigation".

The disputes arising from administrative monopoly should be solved by current litigation system. We need to establish a comprehensive litigation system and the point is to make use of civil and administrative litigation system to solve economic law disputes.

To meet the need of civil and administrative litigation system to adapt to the settlement of disputes caused by administrative monopoly, the first is to establish the administrative pre-procedure. Second is to prove China's representative litigation system in civil litigation.

Establishment of administrative pre-procedure in the action of administrative monopoly

Diversity of administrative subjects and duality of behavior structure and compound of infringed rights make up the intertexture of administrative and civil litigation of

administrative monopoly litigation. The implementation subjects of administrative monopoly behavior include administrative body who illegally exercise of administrative power to implement administrative behavior and market players who gain the advantaged market position by administrative power.

The operators in the relevant market whose rights are damaged by the two actors could not gain adequate relief under the current legal framework in China, at the same time in the real economic life, the relative separation of cause-behavior and result-behavior of the structure of administrative monopoly behavior increases the difficulty of litigation for victims.

The essence of administrative monopoly lawsuit is composed of two lawsuits: One is the lawsuit of the operators in relevant markets whose rights are damaged and the implementation of administrative behavior, the other is the proceeding of the operators in relevant markets whose rights are damaged and the market players who restrict competition by the dominant market position by administrative power. The first one is administrative proceeding and the second is civil proceeding. There are seldom procedures such as regulations of hearing together the two proceedings in China's current legal provisions.

In Article 136 of "Civil Procedure Law" there is a very general provision "the legal proceeding should be suspended in the circumstances of that the adjudication of the case pending is dependent on the results of the trial of another case that has not yet been concluded."

There is no clear regulation in China's Civil Procedure law. Only in the Article 61 and "A number of issues on the implementation of interpretation of the Administrative Procedure Law" (hereinafter referred to interpretation) promulgated by Supreme People's Court on March 8, 2004 provides that when the decisions of disputes between equal entities made by the defendants are illegal, the civil dispute parties may ask the court to resolve them jointly and the court could hear together.

Though there are some regulations on hearing together the civil and administrative lawsuits in the "interpretation", the scope of hearing together is limited to the decisions on civil disputes made by administrative bodies.

There is not so much significance of reference for administrative litigation. So, the administrative monopoly litigation mode is the article which advocates that we should abandon the trail together with the chosen litigation mode of administrative litigation and civil litigation.

The formation of administrative monopoly is often due to the interest link between administrative bodies and market players. In order to ensure stability and growth of financial revenue and economic development and other performance targets, the administrative bodies take advantage of regional monopoly market structure instead of some measures of market competition.

In order to maintain the stability of supply in the product

market and prevent the goods out of the region from entering, they must ensure the types and quantity of locally manufactured products of alternative supplies, which caused regional protectionisms and market segmentation behaviors and other behaviors of limiting market competition. At the same time, some industries or some market players in certain regions spare no effort to gain excess profits, not by reducing production costs or improving operational efficiency to cope with the competition of other existing or potential market players, but seeking the protection of administrative power of industry department or local governments to avoid competition.

To meet the need of one's own interests, the industry department of the local government authorities would obviously like to provide administrative protection to the operators within the discretion of their powers and build the entry barriers of administrative monopoly instead of the system of market competition. Therefore, whether or not the interest link is cut-off effectively will determine the success of administrative monopoly.

So the regulatory of administrative monopoly is not only to control the illegal or unlawful administrative power, what is more important is to punish those market players who seek and obtain the protection of administrative power and impose restrictions on competitive behaviors so as to effectively cut-off the two bond interest.

The analysis reveals that the administrative litigation or the review of abstract administrative behaviors could achieve the aims of eliminating the prejudice caused by limiting competition behaviors and deny the legitimacy of the power resources of market players' advantage position in the market and provide basis for the damage claim of infringed market players.

Article 9 of "Supreme People's Court on a number of provisions of civil procedure evidence" provides: "The facts which are identified by the effective decisions of People's Court, parties do not need to prove." It means that in the administrative procedures the decisions of effectiveness of administrative bodies' behavior can be used as evidences in subsequent civil proceedings. In this sense, it is necessary to establish administrative pre-procedure in the action of administrative monopoly.

Administrative pre-procedure in this article refers to use the administrative proceedings or the review of abstract administrative monopoly behavior to deny the effectiveness of administrative monopoly behavior implemented by administrative bodies.

Through negating the cause-behavior of administrative monopoly and thus to deny the limiting competition behaviors did by market players, that is, effectiveness of result-behavior. In fact, in the practice of China's Civil Procedure Law, there are some precedents of administrative pre-procedure. Early in 2000, Supreme People's Court in "Notice of some related issued on accepting civil tort dispute cases caused by false statement of security market" specified that accepting civil compensation cases on false statement is based on effective punishment

decisions made by security authority.

The main reasons are: First, administrative pre-procedure as a shield measure to prevent the quantity of the civil tort dispute cases caused by false statement of security market growing too fast, which is more than the courts' ability of withstanding; second, adopting administrative pre-procedure could solve the evidence problems which is difficult for the plaintiff to gain; third, security regulatory authority is a government agency on behalf of the state to supervise the security market and judge whether the strong professional market behavior is illegal, then make a more objective conclusion. Administrative pre-procedure could effectively avoid the "indiscriminate lawsuit" issues in administrative monopoly litigation and resolving the problem of difficulty of gaining evidence in the subsequent civil proceedings. This program design is similar to the French court proceedings when the solution of a subsidiary is essential for the decision of accepted cases. The administrative court asks the ordinary court under the principle of preliminary to expand their jurisdiction of administrative affairs.

Any matter concerning the judge of legality of administrative acts as a premise must be ruled by administrative court. The legal effect of issues on the premise of the trail is that the accepting courts must stop the proceedings and the interested parties must bring the lawsuit to the court that had jurisdiction on the subsidiary issues. The initial court should make judgments on the cases according to the decisions on the subsidiary issues ruled by other courts.

According to French Supreme Court's Jurisprudence, it is divided into 3 kinds based on the nature of the subsidiary issues. First, involving the interpretation of administrative behavior, the ordinary courts have the power to interpret because they have the right to interpret law and administrative regulations which belong to law. Second, with regard to the legality of administrative action, for all administrative behaviors civil courts must be trailed as a premise ruled by administrative courts. If the civil courts judge in the trail of specific cases, and the decisions of the cases depend on the legality and meaning of a certain administrative action, in most occasions, they have to apply for the review and interpretation of legality and meaning of the administrative decisions by the judges of administrative court and the administrative court judges can not initially and directly make a decision on the legal effect of administrative decision.

In addition to review and interpretation of legality and meaning of administrative action, they had no other powers. They cannot alter or revoke the action nor declare the liability of compensation of administrative bodies (Wang, 1997).

Specific to the pre-procedure of administrative monopoly litigation varies because of different types of administrative behaviors. For illegal specific administrative action, infringed administrative counterparts could bring it to the courts directly and ask the courts to judge

the administrative action illegal through proceedings. While for the unlawful specific administrative action, if the unlawful specific administrative action cause legal consequences of limiting market competition or damaging the rights of operators or there are definite evidences to prove the possibility of the previous-mentioned consequences, then the administrative counterparts could bring it to the courts directly.

According to the principle of executive power in administrative law "there is no explicit provision in law, which is prohibited", the court make judgments on legality through the review of exercise of administrative power without legal basis and illegal specific administrative actions which cause damage consequences or have opportunities to cause damage.

The administrative monopoly caused by abstract administrative actions could not enter into the administrative proceeding in the current law framework. At the same time abstract administrative action have the nature of creating rights, and it would not cause illegal state because of specific administrative behavior going against the principle "there is no explicit provision in law, that is prohibited".

In the process of review of abstract administrative behavior such as illegal abstract administrative action, the authorities or administrative organs authorized by law to review should make decisions to revoke or alter directly. If the abstract administrative actions do not violate the law, while it caused legal consequences of limiting competition, the authorities or administrative organs authorized by law to review and make judgment of appropriate actions according to the law decide to alter or revoke the laws.

Improvement of representative litigation system in civil proceedings

Article 54 of China's "Civil Procedure Law" regulates representative litigation system about "If the persons comprising a party to a joint action are large in number, the party may elect representatives from among themselves to act for them in the litigation. The acts of such representatives in the litigation shall be valid for the party they represent.

Modification or waiver of claims or admission of the claims of the other party or pursuing a compromise with the other party by the representatives shall be subjected to the consent of the party they represent." And its application conditions were regulated in article 59, article 60 and article 61 of "Supreme People's Court's advice on the issues of the application of civil procedure law in civil trial" (Referred to Advice).

Mainly: first, one or both parties are large in number; large in number refers to "more than ten" in the 'Advice'. Second, the subject matter of litigation of the party which is large in number is the common or the same type. That

means there are two relationship types among the parties. One is that there is only one right and liability relationship and their disputes must be solved in the same litigation. The other one is equivalent to relationship among necessary co-litigants, that is, the subject matter of litigation of the party which is large in number is the same type and there is no substantial relationship between parties. The reason why they undertake the civil proceedings together is that their litigation subjects are the same type and nature, and their disputes for the same facts and reasons. For economic aims of litigation, they are deal with in the same proceeding.

Third, the number of one or both parties is uncertain in the prosecution. Fourth, the party which is large and certain in number could elect representatives by all litigants or elect 2 to 5 representatives by partial litigants to take litigation activity for the profits of all litigants. The results of litigation are taken by themselves and other litigants they represent. The litigants who cannot elect representatives could bring personal actions in necessary co-litigation and they could bring litigation in common co-litigation.

The Civil Procedure Law in 1991 established China's representative litigation system to solve the contradiction of the large number of objects and lack of suit space to achieve the economic aims of litigation. With the economic development, increased legal dispute complexity expose a lot of flaws. First, a large number of parties of group disputes cannot promptly incorporated into proceedings because of China's traditional qualified litigant system.

The first paragraph of Article 55 of China's Civil Procedure Law regulates as this "here the object of action is of the same category and the person comprising one of the parties is large but uncertain in number at the commencement of the action, the people's court may issue a public notice, stating the particulars and claims of the case and informing those entitled to participate in the action to register their rights with the people's court within a fixed period of time."

Therefore, only after the parties register in the people's court they could participate in the representative litigation or it must be re-litigated. This practice in fact determines the number of litigants by registration procedure so that it is convenient for proceedings.

However, the American group litigation does not base on the number of litigants in prosecution. The uncertain privies are still entitled in the member group litigation. If the court does not apply to the court to withdraw from the group explicitly, then it will be regarded as participant in the proceeding without further prosecution. For the requirement of litigation subject, the litigation subject of American group litigation may be a common one or the same type.

While according the Article 55 of China's Civil Procedure law, the litigation subject was limited to the same type. That shows the application scope of American

group litigation is much greater than China's representative litigation.

In administrative monopoly litigation, there are a large number of infringed operators in the relevant market due to extensive damage caused by administrative monopoly. Reference to American group litigation, we should expand the scope of litigants so as to protect the profits of infringed operators. Second, the generation approaches of representatives are too simple.

China's representative litigation was generated by other parties' authorities or the agreement of the court and majorities. Article 55 of China's Civil Procedure Law "here the object of action is of the same category and the person comprising one of the parties is large but uncertain in number at the commencement of the action, the people's court may issue a public notice, stating the particulars and claims of the case and informing those entitled to participate in the action to register their rights with the people's court within a fixed period of time." While American group litigation does not require that the representatives can only be prosecuted when they are specially authorized, they could recognize the representative status in a negative way by silence. One or several members of the group could bring a lawsuit as a representative as long as they are qualified the necessity requirements of group litigation in accordance with law. Third, the limitation on the rights of representatives is too harsh.

Article 54 and 55 of China's Civil Procedure Law "modification or waiver of claims or admission of the claims of the other party or pursuing a compromise with the other party by the representatives shall be subjected to the consent of the party they represent." This means that the representatives lose the ability of disposing their substantive rights.

On the occasion of great numbers of litigation parties, excessive restriction on the rights of representatives will result that China's representative litigation system fall into the frame of common litigation system and lose their good intentions of avoiding repeat action, improving the efficiency of cases, achieving economic litigation. The effectiveness of lawsuit judgments is too narrow.

Article 55 of Civil Procedure Law is about "The judgments or written orders rendered by the people's court shall be valid for all those who have registered their rights with the court." For the registered privies, they only have undirected expansion power, that is, when other people who do not register independently bring the lawsuit to the court independently within the limitation period, the court's judgment is suitable to the decisions or determinations of representative's litigation.

However, the decision of American group litigation is directly applicable for those members who do not exclude themselves out of the group explicitly. Such as article 23 of Federal Rule of Procedure specified: "Representative of prosecution or respondents have to representative the profits of all parties fairly and appropriately and then the

effect covers all parties whether it is beneficial.

The identification of attribution principles

The principle of attribution is an important component of litigation system. Either from the basic principle of protecting the plaintiffs, or from their own characteristics of administrative monopoly disputes, or reference to other country's' legislation mode, we should identify the principle of attribution as "no fault" attribution principle.

First, from the basic principle of protecting the plaintiffs, administrative monopoly litigation should adopt "no fault" attribution principle. In the disputes caused by administrative monopoly, there's wide margin between the defendants and plaintiffs and the plaintiffs' burden of proof is relatively limited. It is hard to ask the plaintiffs to prove defendant's subject fault. The defendants often whitewash their administrative monopoly behaviors with "protecting consumers", "correcting market failure" and other reasons.

Second, from their own characteristics of administrative monopoly disputes, the plaintiff does not need to prove the defendants' subject fault. Because the aim of administrative monopoly behaviors made by administrative bodies and relevant market players is to limit competition and gain unfair advantage. Under the guidance of this purpose, restricting competition behavior is impossible for the administrative bodies and relevant market players to implement administrative monopoly behavior in the occasion of "unconscious or unwillful". The United States believes that the anti-competition is almost entirely intentional act (Li, 2004). Therefore, it is not necessary to examine the defendants' subject fault in the administrative monopoly litigation.

Last, reference to other country's' legislation mode, the anti-monopoly compensation litigation does not require the plaintiffs to bear the burden of proof that the defendants do not have subject fault. At present, there are three modes of legislation modes of anti-monopoly compensation elements in world countries.

The first one is Japanese mode; Paragraph 2 article 15 in Japanese "Prohibition of private monopolies and insurance of fairness and exchange Act": the operators who could prove their non-intentional or negligent should also take the liability of the preceding paragraph." This is clearly defined by law that the compensation liability of anti-monopoly law is a kind of no-fault responsibility, so does the Korea.

The second is American mode; whether the 'Sherman Act' or "Clayton Act", do not mention fault issues when stipulating the damages. This is neither a legislative oversight nor deliberately obscuring, but the United States believes that the anti-competition is almost entirely intentional act. Therefore, it is not necessary to examine the defendants' subject fault in the administrative monopoly litigation. In American anti-trust law, fault is not

an element for compensation.

The third one is Taiwan mode; Paragraph 1 article 32 of China's Taiwan's "Fair Trade Law" regulates: The court has to depend on the infringement plot to decide the compensation above the damage due to the victims' request such as intentional acts." According to this article, China Taiwan's law is not regard intention as an element of anti-monopoly compensation but as an aggravating circumstance. That is to say, without deliberate plot, the court can only apply the single-fold compensation; if there is intentional plot, the court could decide the amount of compensation between once to three times base on the severity of circumstance. Therefore, China should establish the "no fault" principle when establishing attribution principle of anti-monopoly proceedings.

The solution of the burden of proof

First, it should take the principle of reverse burden of proof in the representative proceeding where the plaintiffs are large in number. In civil proceedings caused by administrative monopoly limiting competition behavior implemented by defendant market players is a kind of tort. Coupled with the plaintiff in the power imbalance, during the process of proof, the interest of disadvantage market players could not be protected effectively.

However, China's current law and regulations on the liability of evidence is too general. China's current judicial interpretation has some kind of cases which apply the principle of reverse burden of proof. Such as article 4 of "Supreme People's Court on a number of provisions of civil procedure evidence" specified that environmental pollution compensation litigation, tort litigation of defective products which result damages, tort litigation caused by medical treatment, in these litigations, the defendants take the burden of proof.

The regulation provides several special cases that apply the principle of reverse burden of proof, which is a supplementary of the general principle of burden of proof of article 64 of Civil Procedure Law. However, it does not cover all kinds of representative litigation cases. This article holds that in the civil litigations caused by administrative monopoly behavior, the judges should be granted the right of deciding the burden of proof. For example, in security group litigation, on the occasion that it is hard to guarantee the rights of knowing the security information of ordinary shareholder, it is more difficult for the ordinary shareholders to take the burden of proof of fault of listed companies and other relevant bodies. Therefore, the court should impose the burden of proof on defendants when they deal with group litigation cases, such as Yian Technology.

Second, the plaintiffs' burden of proof should be treated differently. Due to the fact that there are great differences on the plaintiffs' claim and the amount of compensation, therefore, some scholars put forward three kinds of evidence approach; first, when placing on file, requiring

each client clearly understanding their claim and providing perspective actual proofs.

When it is necessary in the future, the court could ask the client continue to the burden of proof; second, the representatives take the burden of proof on the common fact; third, the court should investigate and verify the necessary evidences and they should collective evidences ex officio for those facts that is difficult to determine but must be identified and audited (Dan and Su, 1998).

The resolution of conflict of action of litigation

The regulation of litigation of action involved in administrative monopoly is complex. In the administrative litigation caused by administrative monopoly, article 39 in China's Administrative Procedure Law: "If a citizen, a legal person or any other organization brings a suit directly before a people's court, he or it shall do so within three months from the day when he or it knows that a specific administrative act has been undertaken, except as otherwise provided for by law".

Also, article 15 in China's General Principles of the Civil Law: "Except as otherwise stipulated by law, the limitation of action regarding applications to a people's court for protection of civil rights shall be two years." Then there will be a conflict: if a citizen, a legal person or any other organization does not bring a suit directly before a people's court, he or it shall do so within three months form the day he or it knows that a specific administrative act has been undertaken, the specific administrative act enter into force.

However, the basis of civil litigation is the result of the nature of judgment of administrative action by administrative procedure. Just as the case mentioned before, four Beijing security companies prosecute the State General Administration for Quality Supervision (AQSIQ) in the name of forcing to promote economic monitoring codes suspected of administrative monopoly, the people's court dismissed the prosecution limitation on the grounds of in the request of the plaintiffs against the administrative act of AQSIQ beyond the limitation of action. Actually, this kind of ruling admits the legitimate of this administrative act.

Naturally, the damage suffered by the four Beijing security companies cannot be dealt with by courts. At the same time, in the issues of review of abstract administrative act, the law does not make specific regulations on the review of period of abstract administrative act. If review period is beyond the regulation of two years' civil action of litigation, the victims' damage claim is merely a sue right in the sense of procedure rather than an actual relief. This kind of conflict of action of litigation is not conductive to protect the legal civil rights of citizens, legal persons or other organizations.

This paper argues that the executive should establish a special system of administrative monopoly to coordinate

the conflicts of action of litigation between different procedures and propose to adapt the four-year action of litigation in Paragraph b Article IV in "the Clayton Act".

Improvement of the system of civil damage

First, adding civil punitive damage system, the civil compensation system should be more flexible on the amount of compensation. Current national legislation style against monopoly damages include the following: First, triple damages, represented by the US. Article 7 in "Sherman Act": Anyone who have suffered damage because of the matter prohibited by anti-trust law, could bring the lawsuit to the United States District Court where the defendant live or was found or have agencies, regardless of the extent of damage, they all given triple compensations of the damages and litigation costs and reasonable attorney's fees." Second, single-fold damage is represented by Japan. Paragraph one Article 25 of "Prohibition of private monopoly and ensure fairness and exchange act": the operators who implement private monopoly or unfair trade restrictions or the use of unfair methods of transaction"; Paragraph two: "the operators who prove their non- intentional or negligent, cannot immune form liability of the preceding paragraph." Third, a discretion triple damage is represented by China's Taiwan region. Article 32 of "Fair Trade Law": the court has to depend on the infringement plot to decide the compensation above the damage due to the victims' request such as intentional acts but not beyond three times of the proved damages." Thus, the "Fair Trade Law" with the single-fold principle give the judge discretion rights on compensation amount for that intentionally illegal behavior.

There is no necessary link between compensation amount and magnification but it should not exceed the maximum rate of three times of amount of compensation. Besides, "Green paper of anti-trust compensation litigation" issued by the Europe Union in December 2005 advice their members to adopt double compensation system which has important effect (Wang, 2008).

Although, the actual compensation or single-fold compensation is easy to implement, it is not conductive to protect the legal profits of consumers and relevant competitors which have great limitations. We should adopt punitive damage system in the process of improvement of China's legal liability system on anti-administrative monopoly. But it is not necessary as absolute as American's triple damage system in determining the amount of compensation (Zheng, 2006). Instead, it should give full consideration of actual situations to decide a reasonable damage scope of the amount.

In the scope, the judge have the discretion right and decide the damage amount in different cases according the actual situation, such as the degree of malignancy, consequence and local economic development level and so on.

This quantitative rules will encourage rational action and prevent the abuse of sue rights and ensure procedure quality and substantial quality in the proceeding and control the antitrust cases in a moderate scale. The discretion triple damages in China's Taiwan region is no less than the lower limit of compensation and not higher than upper limit of three times of the actual loss, which is a good choice. Is the leading force of law implementation and enforcement government's top-down or the bottom-up by strength of civil society?

The writer believes the combination of private implement and public implements is the best model. The application of punitive damage system in China's administrative monopoly and granting the victims the rights of civil litigation could extend the anti-monopoly power from the governments to the public. It is necessary to improve the article 50 of China's anti-monopoly law so as better to reflect the purpose of anti-monopoly law and implement the law (Qi, 2008).

Second, providing the corresponding national compensation system as mentioned previously, the administrative bodies should be brought in to civil liability subjects. That is, in the forms of civil liability of anti-monopoly legal liability system, it should specify the civil liability of administrative bodies who implement monopoly behaviors and adapt the liability distribution mechanism that based on individual compensation supplementing the state compensation liability.

Administrative monopoly behaviors apply different compensation mechanism due to different implement behaviors. There are differences between the administrative monopoly behaviors due to different effect of specific administrative monopoly behavior implemented by administrative bodies. The performance of one kind specific administrative monopoly behavior is the specific administrative monopoly behavior implemented by administrative bodies act on the market directly, causing the results of restriction of competition.

The performance of another specific administrative behavior is just an administrative authorization act that is, to award the right to market players to impose restrictions on competitive behaviors. It is found through the analysis of actual effect of the two kinds of behaviors that both of them restrict the market competition and undermine the market order and harm the interests of other operators. But the direct behavior subjects resulting such consequences in the first kind are those administrative bodies illegally or unlawfully exercise the administrative power to implement administrative behaviors while in the second are those market players who shielded by administrative power to implement restricting competition behaviors.

The subjects of the compensation mechanism applying for the second kind behaviors are those market players who implement restricting competition behaviors; for the first kind behaviors should adapt the liability distribution mechanism that based on individual compensation supplementing the state compensation liability.

The reason is that although the market players do not

implement restricting competition behaviors, they get illegal profits from the restricting competition behaviors made by administrative bodies, based on the principle of equality; the market players should take the responsibility of compensation. China's "state Compensation Law" specified: "Where state organs or State functionaries, in violation of the law, abuse their functions and powers infringing upon the lawful rights and interests of the citizens, legal persons and other organizations, thereby causing damage to them, the victims shall have the right to state compensation in accordance with this Law."

Therefore, where government administrative agencies illegally exercise administrative punishment or enforcement measures or administrative decisions to restrict competition, restricted victims have the rights to get relief and compensation. Such a system design totally cut off the interest link between administrative bodies and protected market players.

CONCLUSION

How to cut off the interest link between administrative bodies and market players is the key to regulate administrative monopoly. It is of no use to adapt a top-down administrative measure of unary model of regulation.

The author advocates by the introduction of litigation mechanism to absorb the micro-subjects in the market economy into the power of administrative monopoly regulation and form a bottom-up private implement model of anti-monopoly law, thus, the current legal system which is inefficient and single channeled can be instead of the mechanism with high efficiency and comprehensiveness which can meet complicated social demands during the transition of the society.

The core of the new legal system is, coupled with public implementation system to investigate and affix administrative liability or even criminal responsibility against the person responsible for administrative monopoly, the introduction of litigation mechanism would achieve a dual regulation system against administrative monopoly (Wang, 2008).

However, the introduction of litigation mechanism is necessary but far from enough, the scientific design of many micro issues such as the solution of the burden of proof, the resolution of the conflict in action of litigation, the improvement of representative litigation system in civil proceedings, should be held enough attention as well to ensure the implementation of the former. Only in this way, it can be said that a scientific anti-monopoly system is built up to cut off the interest link between administrative bodies and market players and equally protect the rights of all the subjects in the market. That is the key and basis in the legal framework of China's Anti-monopoly law to resolve the problems.

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