

IP Litigation in China: challenging perceptions

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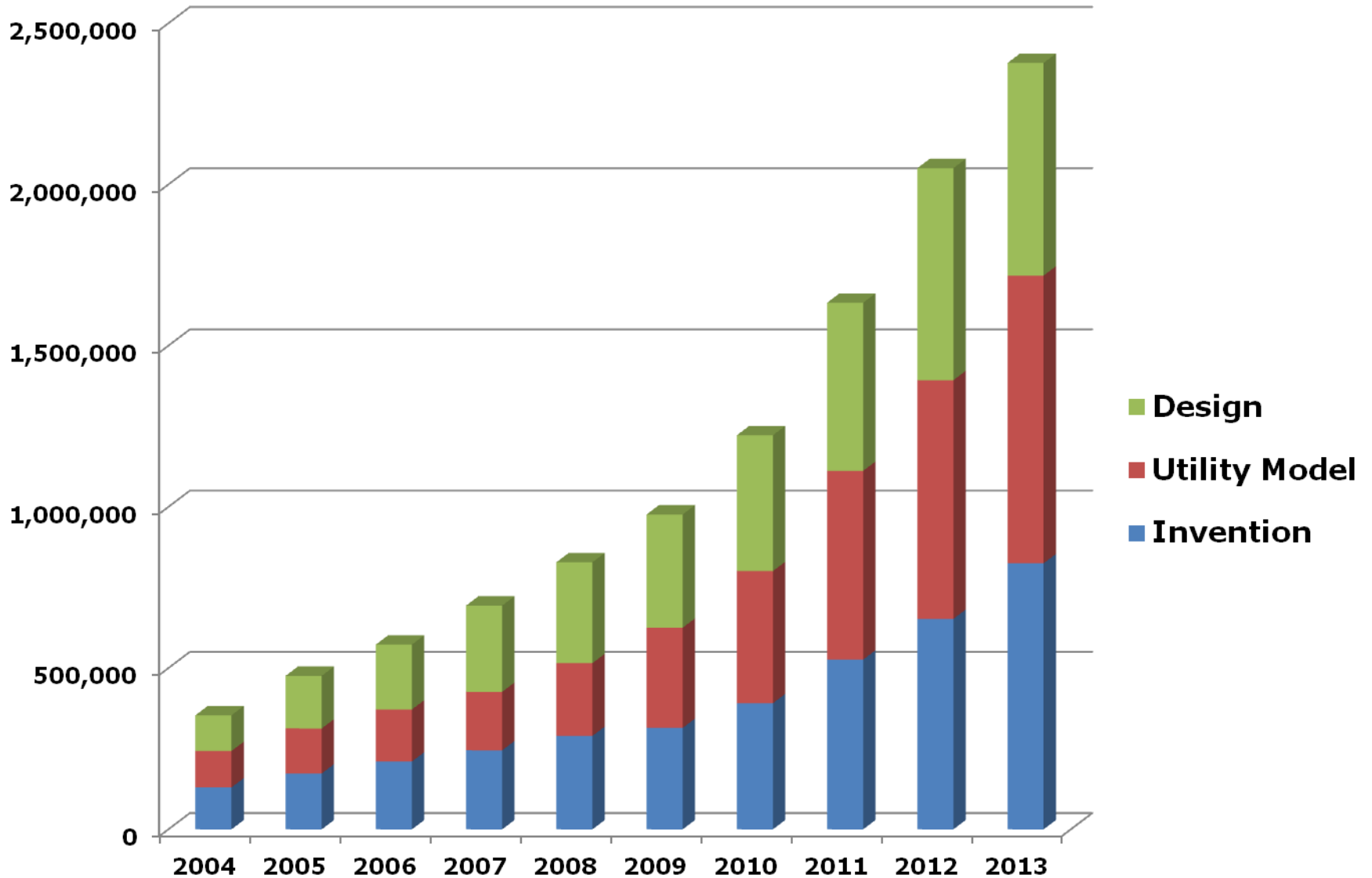
Challenging perceptions

- Chinese civil courts are far from perfect
- Foreign businesses reluctant to engage
- Perceptions of corruption, opacity, heavy evidential burdens, poor enforcement, bias, lack of sophistication
- Media does little but reinforce them
- Misperceptions threaten to colour judgment
- Real positivity to be found
- Balanced view and engagement are required
- Civil litigation can be hugely valuable

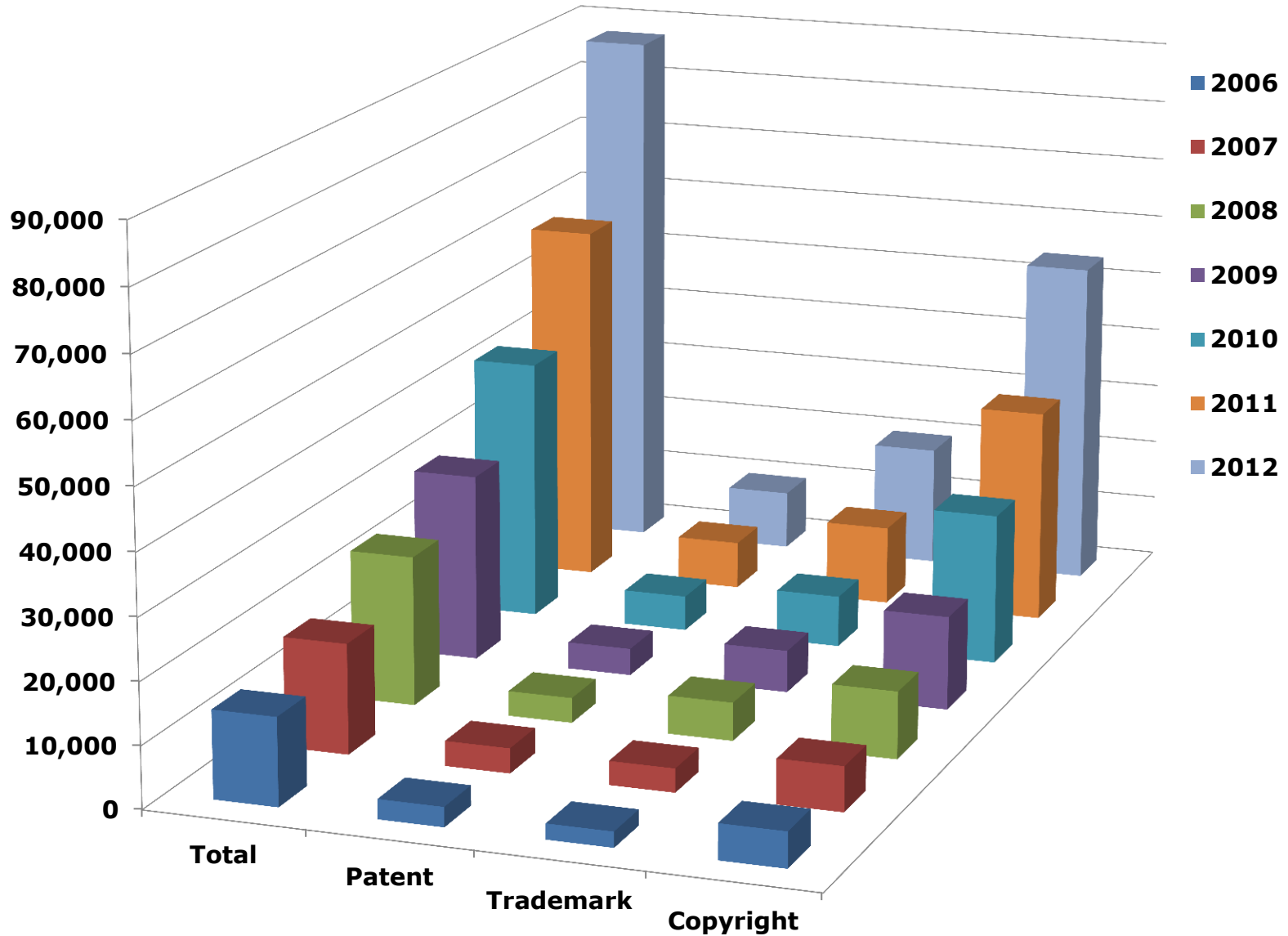
China's commitment to IP

- Massive commitment from government
- Development from manufacturing to innovation is essence of industrial policy
- Entire Hu/Wen decade aligned around it
- 2006 Medium & Long Term Plan for Development of Science & Technology
- 2008 National IP Strategy
- 2010 National Patent Strategy
- Ever increasing stream of policies continues under Xi/Li
- Driving awareness and engagement

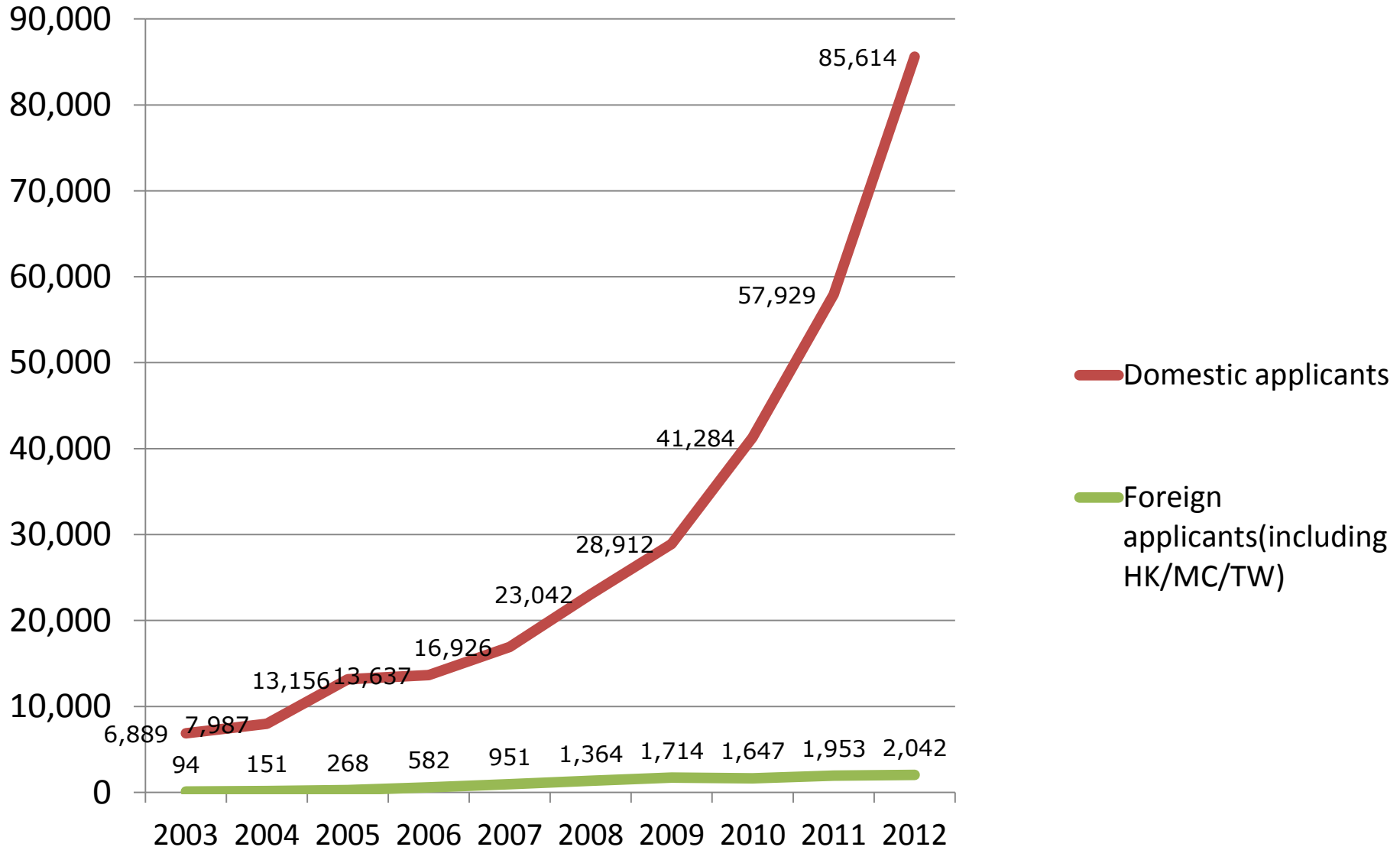
Patent applications



Growth in IP litigation



Foreign v domestic plaintiffs



Foreign business reticence?

- Perceptions skewed by media?
- *AMSC v. Sinovel* – evidential challenges
- *InterDigital v. Huawei* – protectionism
- *Chint v. Schneider* – foreign punishment
- Perceptions need to be challenged
 - Lack of transparency
 - Evidentially unbalanced
 - Biased

Transparency

- 2006 – www.ipr.gov.cn
- 2010 – *SPC's Provisions on Publishing*
- 2012 – *Civil Procedural Rules*
 - *mandate access to decisions*
- 2013 – *SPC's Provisions on Publishing II*
 - *mandate publication of all decisions*
- *CASS Blue Book Rule of Law*
- *SPC Annual List of Model Courts*

Evidential balance

- Civil law system; document-based evidence; burden squarely on plaintiff
- *SPC Circular December 2013*
 - shifting burden in trade secret and method patent infringement cases
- *SPC Model Cases 2013*
 - *Ashland v. Beijing Ruishibang*
 - *Zhuhai Geli v. Guangdong Meidi*
 - drawing inferences and shifting burden to assist plaintiffs where defendants refuse to provide evidence

Bias

- Not all IP decisions are published
- SPC's 2013 *Provisions II* very welcome
- SPC annual *White Paper* on IP cases
- CIELA – www.ciela.cn
 - over 25,000 IP decisions since 2006
 - from 127 major courts across China
 - 7000 patent decisions from 42 cities
- Fills gap between official data & anecdote
- Any evidence of structural or practical bias for Chinese / against foreigners?

Invention patent infringement comparison

OUTCOMES	% of cases	Win rate	Injunction rate	Mean Compensation (CNY)
All plaintiffs	100%	57%	97%	441,430
Foreign v. domestic	23%	74%	99%	233,404
Domestic v. domestic	75%	52%	97%	370,535

- Foreign Ps win significantly more than domestic Ps against domestic Ds
- Final injunctions granted to foreign Ps essentially as a matter of course

Invention patent infringement compensation

BASIS	% of cases	Mean (CNY)
Illegal income	1%	25,756,200
Licence basis	3%	897,157
Lost profit	5%	1,875,008
Statutory damages	91%	180,206

COMPARISON	Median (CNY)	Mean (CNY)
Foreign v. domestic	165,000	277,247
Domestic v. domestic	100,000	137,083

- Very large awards are available
- Foreign Ps awarded significantly more than domestic Ps against domestic Ds
- Conclusions?

More to come?

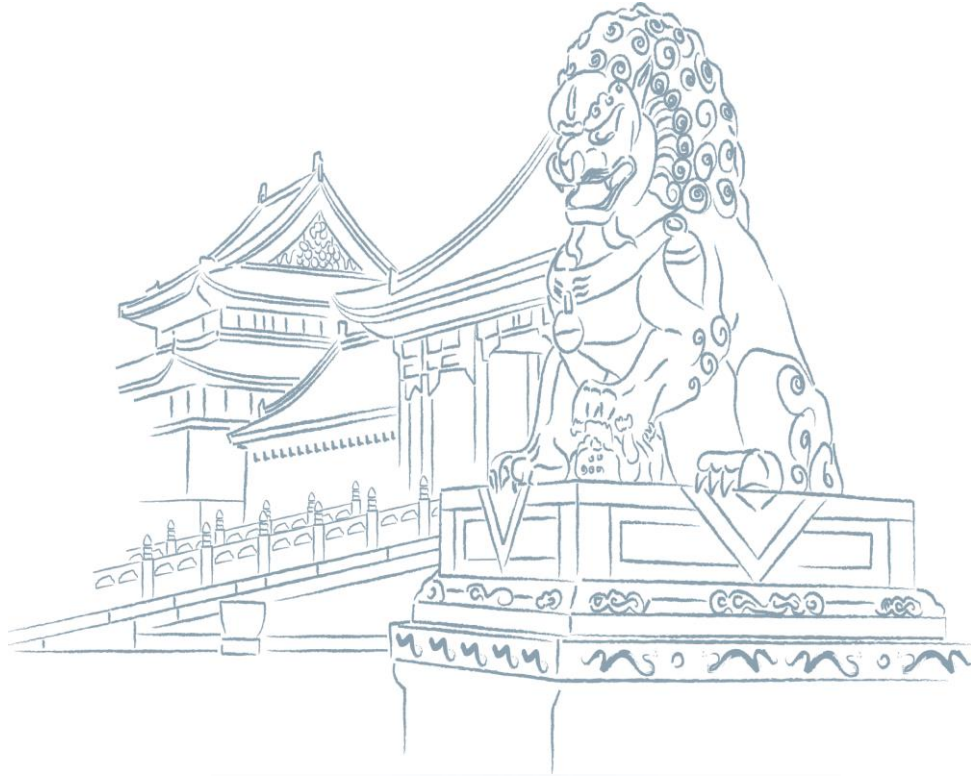
- 3rd Plenum, November 2013:
 - "Move towards open trials, record materials from the entire court process, strengthen the rationality of legal documents and promote the openness of valid court judgments"*
 - "Explore the establishment of judicial systems that are suitably separated from administrative areas and guarantee the uniform and correct implementation of State laws"*
 - "Explore the establishment of IP courts"*
- Li Keqiang and the rise of lawyers

Putting the progress in context

- Fundamentally, courts are constitutionally bound to serve the Party
- Ultimately that limits the rule of law
- But, the industrial policy demands a robust IP regime, for *all* parties
- And IP is not inherently political
- Therefore there is much alignment of Party/State and private interests

What you get today

- In vast centre-ground of non-political IP proceedings, plaintiffs can expect:
 - engaged judges
 - increasingly understanding evidential challenges
 - delivering reasonable quality decisions
 - in swift proceedings
 - absent obvious bias or interference
 - with reasonable costs
- Issues remain, but don't let headlines colour judgments about system as a whole



Thank you

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