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Judicial Fragmentation: anti-suit injunctions between L&E and geopolitics

Abstract: This piece delves into the global surge of litigation involving "antisuit injunctions" ("ASIs"), a judicial tool aimed at curtailing patent holders from enforcing their standard essential patents ("SEPs"). This phenomenon carries the inherent danger of splintering the judicial landscape across the UK, China, US, and the EU. The implications of these legal conflicts extend significantly, potentially disrupting the world trade in information and communication technology ("ICT") products like smartphones and Internet of Things devices.

The study explores how a regulatory framework founded on the principles of law and economics, designed to address issues like patent hold-up and moral hazard behaviours by patent holders, is colliding head-on with complex geopolitical dynamics. The work showcases the recent trend in UK and Chinese courts, where setting global licensing terms has sparked a global race to file lawsuits. Litigants are racing to secure their preferred legal venue for establishing worldwide licensing rates, while also attempting to prevent patent holders from initiating patent infringement proceedings elsewhere using ASIs.

In response, the European Union has activated the WTO's Dispute Settlement Mechanism to address China's deployment of ASIs, which allegedly represents a unilateral measure favouring Chinese manufacturers to the detriment of European companies holding high-tech patents. The paper delves into this and other disputes, with the aim of assessing potential solutions based on a robust incentive framework to prevent ASIs from continuing to erode global trade in industries that heavily depend on Intellectual Property Rights (IPRs).

Keywords: standards, geopolitics, competition, lawfare, patents, ICT

1. Introduction

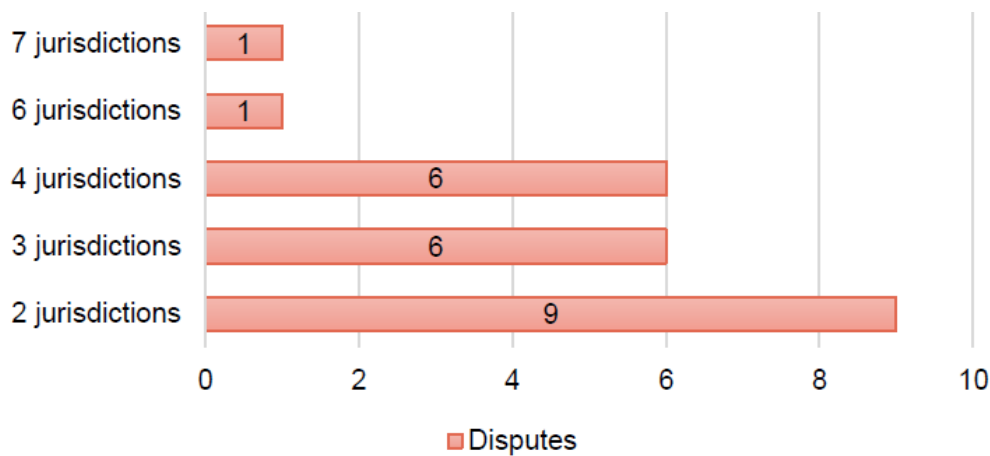
Technical standards ensure the quick diffusion of interoperability and new technologies. The widespread adoption throughout different industry sectors of 3G, 4G or 5G standards demonstrate their importance to enable digital integration. The Internet of Things is set to leverage such potential by enabling a large pile of products and devices manufactured by different entities to interact and communicate seamlessly.

Technical standards are usually designed under the umbrella of Standards Developing Organization ("SDO") under which several manufacturers and R&D companies contribute their often-patented technologies. By "Standard Essential Patents" ("SEPs") we mean those intellectual property covering technologies that necessarily need to be implemented for complying with a specific standard. Striking a balance between the competing interests of standard implementers and SEPs holders is a difficult task. SDOs often try to address such issue by requiring SEPs owners to abide by Intellectual Property Rights ("IPR") policies dictating either no-royalty or Fair, Reasonable, and Non-Discriminatory ("FRAND") conditions. It no surprise that the vague nature of such concepts triggered endless

* Bank of Italy. Any opinions expressed in this presentation are personal and are not to be attributed to the Bank of Italy.

litigation. While in many instances implementers and SEP holders manage to negotiate their way to a license agreement, in different occasions parties are unable to avoid litigation.¹ For instance, SEP holders sue implementers for patent infringement and manufacturers resort to court for setting a FRAND license. The national (i.e. territorial) character of patent rights mean that litigants will face a number of controversies throughout those jurisdictions which are most relevant for the production and marketing of standard-compliant goods, namely Germany, the UK, China, and the US. Accordingly, empirical evidence as in Figure 1 shows that SEPs are usually litigated in two (or more) jurisdictions.²

Figure 1: Disputes related to declared SEPs – number of jurisdictions per dispute



Tribunals dealing with litigation over SEPs have traditionally been mindful of the territorial nature of patent rights and thus reluctant to exceed the scope of their jurisdiction. However, in recent times, such trend has changed. In particular, English courts facing a national patent infringement case (*Unwired Planet v Huawei*³) opted for setting the terms of a global license covering non-UK patents, which the implementer had to comply with at the risk of facing a judicial injunction. Yet, this viewpoint is polarizing, sparking debates about whether national courts should have the authority to set such global terms.

The repercussions of the *Unwired Planet* case have triggered far-reaching effects across the global landscape. The English judiciary's actions appear to have ignited a widespread competition among legal jurisdictions, akin to a global race to the bottom.⁴ This race manifests as a jurisdictional contest aimed at attracting litigants through the enticing prospect of establishing universal FRAND rates.

¹ SEP holders are driven by a compelling incentive to optimize their royalty gains. In contrast, implementers, occupying a distinct role, primarily cultivate their revenue streams in the downstream market by vending standard-compliant goods (such as smartphones). Consequently, their strategic focus orbits around the minimization of the royalties they are compelled to remunerate.

² Justus Baron et al., 'Empirical Assessment of Potential Challenges in SEP Licensing' (2023) Study commissioned by the European Commission, p. 89. The Authors considered 23 pairs of litigants identified as repetitive litigants.

³ *Unwired Planet v Huawei*, [2020] UKSC 37, 26 August 2020, on appeals from: [2018] EWCA Civ 2344 and [2019] EWCA Civ 38.

⁴ Jorge L. Contreras, 'The New Extraterritoriality: FRAND Royalties, Anti-Suit Injunctions and the Global Race To The Bottom In Disputes Over Standards-Essential Patents' (2019) 25 BU J. Sci. & Tech. L. 251.

Notably, the Chinese courts have asserted their authority in determining global FRAND rates as well. It is conceivable that other legal domains will soon follow suit, as they endeavour to keep pace with their international counterparts. In response, litigants are actively engaging in a race to secure their favoured legal venue. They do so by employing pre-emptive measures to thwart their adversaries from initiating proceedings in less favourable jurisdictions. This strategic approach often involves the utilization of "anti-suit injunctions" (ASIs), a legal remedy historically prevalent in common law systems, but increasingly adopted by civil law systems, including China. ASIs essentially impede SEP holders from relying on patent infringement lawsuits to block manufacturers and marketers in foreign countries.

However, the story does not end with the issuance of ASIs. SEPs holders now frequently pursue countermeasures in the form of "anti-anti-suit injunctions" (AASIs), which in turn trigger new "anti-anti-anti-suit injunctions" (AAASIs).⁵ These complex legal manoeuvres, often sought urgently and temporarily, assume the shape of preliminary injunctions and undermine international "comity". Such term refers to the recognition granted by one nation within its borders to the legislative, executive, or judicial actions of another nation, taking into consideration international obligations, practical considerations, and the rights of its citizens and individuals under its legal safeguard.

This convoluted game of jurisdictional back-and-forth represents a disconcerting pattern. It squanders judicial resources, erodes confidence in the judicial system, and favours those companies who can act swiftly or possess substantial financial means. This trend raises legitimate concerns of judicial fragmentation in the realm of IPR-intensive industries such as electric vehicles, personalized medicines, smart devices and the IoT more broadly.

As different national courts issue conflicting ASIs, each asserting their jurisdiction, a state of legal inconsistency and uncertainty can arise. In addition to complicating the resolution of SEP disputes, this scenario fosters an environment where conflicting injunctions might lead to contradictory outcomes for the same patent-related issue. Indeed, disparate judicial decisions across various jurisdictions are likely to hamper the development of consistent legal standards while escalating the ongoing international commercial tension between China, US, and the EU.⁶ As ASIs proliferate and trigger a jurisdictional "race to the courthouse", the risk of exacerbating this judicial fragmentation becomes more pronounced, necessitating careful consideration and coordination among courts to avoid further entrenching this concern.

This work delves into the realm of SEP-related ASIs, examining their implications for global SEP litigations and the ensuing dispute between the EU and China at the WTO. Chinese courts have recently wielded ASIs in high-profile cases revolving around 3G, 4G, and 5G technologies, including

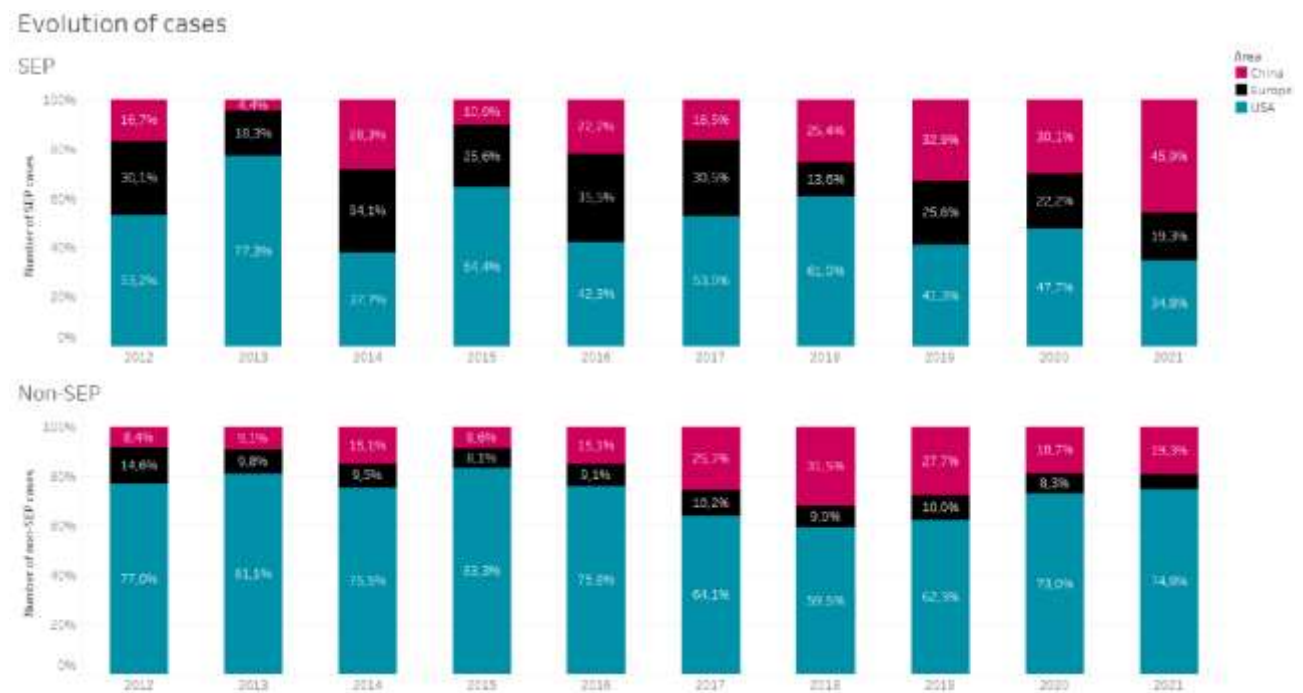
⁵ Contreras, Jorge L. 'Anti-Suit Injunctions and Jurisdictional Competition in Global FRAND Litigation: The Case for Judicial Restraint' (2021) 11 NYU JIPEL 171.

⁶ Hess, Felix K, 'US Anti-Suit Injunctions and German Anti-Anti-Suit Injunctions in SEP Disputes' (2022) 25 JWIP 536; Giuseppe Colangelo and Valerio Torti, 'Anti-Suit Injunctions and Geopolitics in Transnational SEPs Litigation' (2022) EJLS [EJLS Online First, 1 September 2022] <https://doi.org/10.2924/EJLS.2022.019>.

Xiaomi v InterDigital⁷, Huawei v Conversant⁸, OPPO v Sharp⁹, and Ericsson v Samsung¹⁰. The issuance of four ASIs in rapid succession, with three favouring Chinese entities, has positioned China as a key jurisdiction for SEP litigation, thereby intensifying competition with other nations such as the US, Germany, the UK (following the Unwired Planet ruling), and additional states. This stance by Chinese courts on ASIs stems from a discernible aspiration to establish itself as the paramount venue for determining global FRAND licensing rates amidst perceived analogous actions taken by US and European counterparts.¹¹

Figure 2 presents a snapshot of patent litigation involving declared SEPs compared to other patent disputes across three regions. The graph highlights the **rising popularity of Chinese courts for SEP cases** (red), a consistent trend for European courts (black), and a gradual decline in the preference for US courts (blue). Non-SEP litigation trends remain relatively stable, with the US leading in patent litigation counts.

Figure 2: Number of SEP/ Non-SEP litigations by jurisdiction and year



⁷ Hubei Province—Wuhan Intermediate People's Court, Case E 01 Zhi Min Chu No 169 (2020), *Xiaomi Communication Technology Co Ltd v Inter Digital Inc.*

⁸ Supreme People's Court of the People's Republic of China, Case Zui Gao Fa Zhi Min Zhong No 732, 733, 734 (2020), *Huawei Technologies Co Ltd and another v Conversant Wireless Licensing.*

⁹ *Xiapu Zhushi Huishe Yu OPPO Guangdong Yidong Tongxin Youxian Gongsì Biaozhun Biyao Zhuanli Xuke Jiufen An [Sharp Corp. v. OPPO Guangdong Mobile. Telecomms. Co.]*, (2020) Zuigao Fa Zhi Min Xia Zhong No. 517 (2020) (Sup. People's Ct. Aug. 19, 2021).

¹⁰ *Sanxing Dianzi Zhushi Huishe [Samsung Elecs. Co., v. Telefonaktiebolaget LM Ericsson]*, E 01 Zhi Min Chu No. 743 (Wuhan Interm. People's Ct. Dec. 25, 2020) (China).

¹¹ Nikolic Igor (2022) *Global standard essential patent litigation: anti-suit and anti-anti-suit injunctions*, Robert Schuman Centre for Advanced Studies Research Paper No. 2022/10, <https://cadmus.eui.eu/handle/1814/74282>.

Chinese courts have notably exhibited a penchant for establishing FRAND royalty rates that tend to be lower than those adjudicated by courts in other jurisdictions. This particular attribute has rendered China an appealing legal landscape, particularly for SEP implementers. As a result, foreign courts are beginning to perceive Chinese ASIs not only as potential threats to their own jurisdictional authority but also as biased in favour of manufacturers' interests. The European Union (EU) has expressed heightened apprehension, with the European Commission voicing concerns over the far-reaching nature of these extraterritorial ASIs and their potential to undermine European patent holders' competitiveness within the global ICT market.¹² The United States government has also raised concerns together with the U.S.-China Economic and Security Review Commission with reference to China's escalating reliance on ASIs.¹³ This trajectory has raised general anxieties that ASIs have evolved into tools of competition deployed by China to devalue foreign patents, shape lower FRAND rates, and safeguard its telecommunications firms and broader economic interests.

Given this background, the article briefly introduces ASIs' history and aims (Section II) and illustrate the Chinese SEPs disputes which brought the European Union to trigger the dispute settlement mechanism of the World Trade Organization (Section III). Finally, the work provides preliminary proposals on what could be done to overcome judicial fragmentation by looking at arbitration and international cooperation (Section IV).

2. The law and economics of FRAND commitments

According to several authorities¹⁴, courts¹⁵ and commentators¹⁶, the primary purpose of FRAND commitments is to avoid patent holdup, preventing SEPs holders from demanding excessively high royalties when implementers are already locked into a standard. Indeed, once a standard is adopted, implementers invest significant resources to ensure their production processes comply with the standard. Due to this investment, switching to alternative technologies can be prohibitively expensive. This situation creates an opportunity for SEP holders to obtain substantial leverage and demand royalties far beyond the fair value of their contribution to the standard.

From this perspective, FRAND policies become necessary because negotiations between SEP holders and implementers generally take place only after the implementers have used and infringed the technologies covered by SEPs.¹⁷ Thus, because of implementers' ongoing infringement, the licensing negotiations are conducted in the shadow of litigation. This is particularly problematic in the communications and technology sector, in which products typically include hundreds or thousands of patented technologies. Hence, a court-ordered injunction would deprive the implementer of not

¹² Making the Most of the EU's Innovative Potential: An Intellectual Property Action Plan to Support the EU's Recovery and Resilience, at 17, COM (2020) 760 final (Nov. 25, 2020).

¹³ 2022 Annual Report to Congress of the U.S.-China Economic and Security Review Commission, <https://www.uscc.gov/>.

¹⁴ See e.g. Canadian Competition Bureau (2019), para. 199; Government of India (2016); U.S. Federal Trade Commission (2011), 22; U.S. Department of Justice and Federal Trade Commission (2007), 37-38.

¹⁵ See e.g. *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1031 (9th Cir. 2015); *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1209 (Fed. Cir. 2014); *In re Innovatio IP Ventures, LLC Patent Litigation*, 921 F. Supp. 2d 903 (N.D. Ill. 2013).

¹⁶ See e.g. Lemley and Shapiro (2017); Shapiro (2010); Farrell, Hayes, Shapiro, and Sullivan (2007); Shapiro (2001).

¹⁷ Melamed and Shapiro (2018), 2113-2115.

only the value of the technology covered by the patent-in-suit, but also the value of its all standard-compliant products already marketed.¹⁸

Since holdup describes the ability of SEP holders to demand royalty payments based on implementers' switching costs,¹⁹ a FRAND royalty should reflect the incremental value of the patented technology over alternatives available at the time the standard was chosen (*ex ante* incremental value).²⁰ Thus, in order to determine reasonable royalty damages for a patent subject to a FRAND commitment, courts should apply the hypothetical negotiation framework. This concept reflects the principle that reasonable royalty damages should be based on what a willing licensor and willing licensee would have agreed to in a hypothetical negotiation.²¹ In a hypothetical negotiation, the maximum amount a licensee would pay depends upon the economic value of the patented invention, meaning the incremental value of the invention compared to alternatives.²²

FRAND commitments are also called upon to address another potential risk posed by SEPs, namely royalty stacking.²³ Even if royalty rates, taken separately, can be fair and reasonable, when large numbers of patents are involved, there is a risk of double marginalization. Notably, the total royalty burden on a standardized product can become so significant that the overall price paid exceeds the value of the corresponding contributions, and the aggregate royalties obtained for the various features of a product outweigh the value of the product itself. Royalty stacking is a variant of the Cournot complements problem in which different firms each control necessary inputs to production and act in an uncoordinated manner when charging a manufacturer for the use of their respective inputs.²⁴ As well as holdup, royalty stacking may result in supracompetitive total royalty rates. In fact, the existence of royalty stacking may exacerbate the holdup problem, since the magnitude of the holdup problem is multiplied by the number of patents that read on the product.²⁵ However, unlike holdup, royalty stacking can arise even in the absence of sunk costs.

¹⁸ Melamed and Shapiro (2018), 2113-2115.

¹⁹ However, according to Cotter, Hovenkamp, and Siebrasse (2019), the popular assumption that switching costs necessarily contribute to holdup is false in general and tends to overstate the potential for extracting excessive royalties: patent holdup can be viewed as opportunistic exploitation of path dependence effects serving to inflate the value of a patented technology (relative to the alternatives) after it is adopted.

²⁰ U.S. Federal Trade Commission (2011), 22-23.

²¹ U.S. Federal Trade Commission (2011), 19-20. See also *Lucent Techs. v. Gateway*, 580 F.3d 1301, 1324 - 1325 (Fed. Cir. 2009), holding that “the hypothetical negotiation or the “willing licensor-willing licensee” approach, attempts to ascertain the royalty upon which the parties would have agreed had they successfully negotiated an agreement just before infringement began. ... The hypothetical negotiation tries, as best as possible, to recreate the *ex ante* licensing negotiation scenario and to describe the resulting agreement. In other words, if infringement had not occurred, willing parties would have executed a license agreement specifying a certain royalty payment scheme.”

²² *Contra* see, e.g., Sidak (2013), 975-976, arguing that “[t]he *ex ante* incremental value approach contains a strong implicit assumption which, when recognized explicitly, is manifestly absurd. Because SEPs are *complements*—not substitutes, like implementation patents— one cannot examine the next-best noninfringing alternative to an SEP unless one backdates the hypothetical negotiation between the patent holder and the implementer to the moment of standard adoption. The *ex ante* incremental value method does so and then implicitly makes the economist’s *ceteris paribus* assumption— all other factors remain the same.”

²³ See, e.g., European Commission (2017a); *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201 (Fed. Cir. 2014); *Microsoft Corp. v. Motorola Inc.*, 963 F. Supp. 2d 1176 (W.D. Wash. 2013); *In re Innovatio IP Ventures, LLC*, 921 F. Supp. 2d 903 (N.D. Ill. 2013); U.S. Department of Justice and U.S. Federal Trade Commission (2007).

²⁴ Charles River Associates (2016), 15-17; Farrell, Hayes, Shapiro, and Sullivan (2007), 642; Lemley and Shapiro (2007), 2013-2015.

²⁵ Lemley and Shapiro (2007). However, see Denicolò, Geradin, Layne Farrar, and Padilla (2008) noting that whether the cost of designing around two patents at once is less than the sum of designing around each of the patents separately, then

The concerns about holdup and royalty stacking are fueled by the emerging role played by patent assertion entities (PAEs, often referred to as patent trolls) in the realm of standard-setting. This umbrella concept refers to undertakings whose business model primarily focuses on purchasing, license and enforcing patents, rather than actively develop or commercialize the underlying technologies. The term includes entities owning SEPs but not active in downstream standardized product markets. Indeed, PAEs are becoming increasingly involved in the SEP licensing market.²⁶

These firms and their business model have been thoroughly scrutinised by many authors, who have underlined the potential risks for innovation and competition deriving from their conduct.²⁷ The concerns associated with the PAEs reflect structural problems of the patent system, namely its complexity and uncertainty.²⁸ By acting as opportunistic litigation mills, PAEs engage in *ex post* licensing and abuse of patent remedies to extract unreasonable royalties from practicing firms.²⁹ Namely, the reasons that induce practicing firms to avoid litigation, *i.e.* high costs and significant uncertainty about the final outcome, are the very same reasons that make litigations appealing to trolls.³⁰ Indeed, since PAEs do not sell products or offer services, they are not exposed to retaliatory countersuits, hence they may exploit this bargaining position to exercise leverage against manufacturing firms pressuring them into settlement or unfavourable licensing terms.³¹

PAEs do not pose anti-competitive threats as long as they operate within the boundaries of the legal system by licensing their IPRs in compliance with the rules adopted by the competent SSOs. Conversely, serious concerns arise when PAEs charge supracompetitive and unfair royalties from implementers by leveraging to the extreme their bargaining power. In the same way, by nurturing the disaggregation of rights, PAEs' activities may take full advantage of the double marginalization problem thereby exacerbating the royalty stacking. The risk is particularly concrete in light of the business method of these entities, which is to maximize their profits through licensing.

The potential economic harms flowing from PAE activities increase when privateering strategies come to the fore. Under these conducts, firms sponsor the assertion of intellectual property claims by hybrid PAEs (typically by transferring patent rights to PAEs with an agreement to share royalties and other benefits flowing from patent assertion rights), with the ultimate objective of raising rival competitors' costs and driving them out of the market.³² Hence, privateering exacerbates the harms created by PAEs by transforming them into agents of third parties.³³

the holdup problem is less than additive. Hence, the existence of royalty stacking exacerbates the holdup problem only if the cost of redesign is independent.

²⁶ See European Commission (2017a), 11, arguing that PAEs should be subject to the same rules as any other SEP holder, including after the transfer of SEPs from patent holders to PAEs. For an analysis of the assertion of SEPs by PAEs in Europe, see Contreras, Gaessler, Helmers and Love (2017); Contreras and Picht (2017); Love, Helmers, Gaessler, and Ernicke (2017); Nikolic (2017); Europe Economics (2016). See also Lemley and Simcoe (2019); Cohen, Gurun, and Kominers (2017); and Contreras (2017c) empirically assessing what happens when NPEs enforce SEPs in court.

²⁷ See e.g. Cohen, Gurun, and Kominers (2018); Bessen and Meurer (2014); Tucker (2013); Bessen, Ford, and Meurer (2012); Allison, Lemley, and Walker (2011); Merges (2009).

²⁸ Feldman (2013); Lemley and Melamed (2013).

²⁹ Scott Morton and Shapiro (2014).

³⁰ Scott Morton and Shapiro (2014).

³¹ Cotropia (2009), 55; Subramanian (2008), 427.

³² Sokol (2017).

³³ Rubinfeld (2018), 119.

To sum up, courts and competition authorities have paid close attention over the years to the potential anticompetitive consequences created by patent holdup, technology lock-in, and royalty stacking. However, in *Ericsson v. D-Link* the U.S. Federal Circuit wisely emphasized the need to consider evidence of actual holdup and royalty stacking, which cannot be simply assumed to exist.³⁴

Indeed, some academics and practitioners gathered empirical evidence contradicting this narrative. More specifically, they denounced the risk of a fallacy based on a substantial lack of economic foundation showing anticompetitive effects of standardization practices.³⁵ In fact, according to this school of thought, supporters of the holdup problem disregard - or at least underestimate - the risk of reverse patent holdup (or holdout). This occurs when potential licensees opportunistically rely on FRAND commitments in order to escape the payment of royalties or strike a better deal. Such objective may be achieved by dragging out artificially license negotiations or by entering into time-consuming and costly litigation with SEP holders. Given the inherent vagueness of the FRAND acronym, patent holders and licensees often disagree over what licensing rates are FRAND, and the latter may use FRAND commitments as a leverage to demand subcompetitive royalty rates under threat of litigation. From this perspective reverse holdup strategies represent the real threat for innovation, since they may lower incentives to invest in standard related innovations and increase litigation costs.

Similarly, the actual economic impact of PAEs is a burning issue.³⁶ Contrary to those who consider patent trolls nothing else than a private tax on innovation and a threat for the entire patent system, some academics cast doubt on their actual existence³⁷. Further, other scholars claim that there is no evidence of PAEs systematically engaging in anti-competitive practices, such as asserting lower-quality patents or bringing more vexatious than normal practicing entities.³⁸

Having said that, it must be borne in mind that there is often confusion as to the difference between PAEs and non-practicing entities (NPEs). The latter encompasses a wider category of players that do not produce or sell products covered by their patents, such as universities and private research centres.³⁹ Since PAEs are a subset of NPEs, failing to appreciate such difference among the two concepts might have affected the interpretation of their competitive effects.⁴⁰ Moreover, within the so-called trolls arena, different business models have emerged.⁴¹

³⁴ *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201 (Fed. Cir. 2014).

³⁵ See, e.g., Galetovic, Haber, and Zaretzki (2018); Galetovic and Haber (2017); Galetovic, Haber, and Levine (2015); Sidak (2015a); Geradin (2014a); Layne-Farrar (2014); Langus, Lipatov, and Neven (2013); Spulber (2013); Epstein, Kieff, and Spulber (2012). See also Galetovic and Gupta (2017) holding that royalty stacking has not been a systemic problem in the wireless industry, despite the large number of SEP owners.

³⁶ As acknowledged by Hagi and Yoffie (2013), 62, the task of empirically measuring the net economic impact of any intellectual property intermediary and deciding whether it is harmful to society is inherently difficult, since it would require measuring the net effect on operating companies, inventors, universities, and financial investors, both in terms of short-run payments made or received and in terms of long-run innovation incentives.

³⁷ Risch (2012).

³⁸ Ashtor, Mazzeo, and Zyontz (2013).

³⁹ NPEs are entities that do not manufacture or sell products covered by their patents, hence the definition includes also universities. In this sense, PAEs are a subset of NPEs.

⁴⁰ Cotropia, Kesan, and Schwartz (2014).

⁴¹ Lemley and Melamed (2013), 2126-2127, identify three main troll business models: lottery-ticket trolls (which hope to strike its patent in court in order to achieve a big jury award against one or more entrenched players in the industry; hence, it is relevant to them that their patent be held valid and infringed), bottom-feeder trolls (by relying on the high cost of patent litigation, they try to induce the parties they sue to sign quick and low-value settlements; hence these trolls are not

According to some scholars, these companies may increase competition and innovation by acting as intermediaries between promising independent inventors and users of technology.⁴² Namely, they may reduce the enforcement hurdles facing small inventors and start-ups, and create a market for monetization of patents, hence increasing liquidity in the secondary market for patents, which can drive funding to R&D.⁴³ In the same vein, it has been suggested that patent privateers (hybrid PAEs) facilitate patent monetization by looking for high-quality assets, falsifying the extortion theory's assertions.⁴⁴ However, other empirical studies do not support these findings and question whether PAEs and NPEs serve any innovation at all by promoting technology transfer.⁴⁵

In sum, whereas holdup theory points the finger at the opportunism of patent holders for rent-seeking, holdout theory is more concerned with the moral hazard implementers over relying on FRAND commitments. Consequently, whereas the holdout story implies that patent rights should not be watered down, holdup proponents argue that SEPs holders are reaping supra competitive rents by abusing their market power.⁴⁶

3. Anti-suit injunctions and jurisdiction outreach

ASIs are temporary court orders that restrain a party from engaging in foreign legal proceedings.⁴⁷ Essentially, it is a procedural tool aimed at managing litigation across different jurisdictions. By stipulating that disputes should be resolved in a specific jurisdiction before being pursued elsewhere, ASIs serve not only to manage litigation costs but also to mitigate the risk of contradictory legal outcomes.⁴⁸ ASIs are *in personam* remedies meaning they target the claimant involved in foreign proceedings, not the foreign court itself. Strictly speaking, an ASI does not extend its effect beyond its territorial boundaries as it provided for fines on entities within the jurisdiction at stake. However, due to its potential to indirectly lead to penalties for non-compliance, an ASI holds significant influence in cross-border litigation. Notably, both English and US courts acknowledge that ASIs can touch upon matters of comity involving indirect interference with the jurisdiction of foreign courts.⁴⁹

ASIs are not a novel concept as they have existed for a while, especially within common law jurisdictions. These equitable remedies trace their origins back to at least the 14th century in England. The Court of the King's Bench and the Court of Chancery initially issued writs of prohibition, which can be considered the earliest ASIs. These writs aimed to halt legal proceedings in royal courts while

particularly interested in the quality of their patents or whether they are infringed), aggregator trolls (which collect thousands of patents with the aim of demanding royalties to license the portfolio and threatening to sue those that do not pay; these trolls depend on sheer numbers rather than the quality and value of any given patent). For other differentiations in terms of business models, see Europe Economics (2016); U.S. Federal Trade Commission (2016).

⁴² See e.g. Nikolic (2019); Risch (2014); Ewing and Feldman (2012); Geradin, Layne-Farrar, and Padilla (2012).

⁴³ Ramirez (2013).

⁴⁴ Kesan, Layne-Farrar, and Schwartz (2019).

⁴⁵ See e.g. Lemley and Feldman (2018); Kiebzak, Rafert, and Tucker (2016); Feldman and Lemley (2015); Chien (2014b); Feldman (2013). However, see Abrams, Akcigit, Oz, and Pearce (2019), finding mixed results about the overall impact of NPEs.

⁴⁶ Chien (2014a), 5-6.

⁴⁷ Damien Geradin and Dimitrios Katsifis, 'The Use and Abuse of Anti-Suit Injunctions in SEP Litigation: Is There a Way Forward?' (2022) 71(7) GRURI 603.

⁴⁸ Enrico Bonadio and Nicola Lucchi, 'Antisuit injunctions in SEP disputes and the recent EU's WTO/TRIPS case against China' (2023) The Journal of World Intellectual Property.

⁴⁹ Comity means the recognition granted by one nation within its borders to the legislative, executive, or judicial actions of another nation, taking into consideration international obligations, practical considerations, and the rights of its citizens and individuals under its legal safeguard. See *Hilton v. Guyot*, [159 U.S. 113, 164](#), [16 S.Ct. 139](#), [40 L.Ed. 95](#) (1895).

ecclesiastical court cases were still ongoing.⁵⁰ The objective was to clearly define and uphold the jurisdictional boundaries between these two types of courts. This became necessary due to the ecclesiastical courts' tendency to interpret their authority broadly, occasionally diverging from that of the royal courts. More recently, ASIs have been employed to safeguard the jurisdictional authority of English courts under Section 37 of the UK Supreme Court Act. This section grants the court large power to issue injunctions under reasonable and convenient circumstances. ASIs have also been invoked to protect arbitration agreements, whether for temporary or permanent relief. The precedent set by Lord Hoffmann in *The Front Comor* case highlights how English courts have regularly exercised this authority to prevent parties bound by arbitration agreements from initiating or continuing legal actions in foreign courts.⁵¹ Over time, the application of this injunction expanded to include proceedings before foreign judicial authorities. The traditional "ordinary" ASI was later abolished by Article 24 (5) of the Judicature Act of 1873.⁵² Subsequently, this remedy was restricted to blocking judicial proceedings initiated abroad.

In the context of standard essential patents (SEPs), ASIs are often sought by implementers to achieve similar ends—namely, avoiding imbalances arising from SEP holders' forum shopping and preventing jurisdictional conflicts. In the context of FRAND (fair, reasonable, and non-discriminatory) licensing obligations, ASIs become significant for implementers. If a court evaluates whether a SEP holder has adhered to FRAND licensing commitments, it may issue an injunction to halt the patent owner from pursuing foreign infringement actions (including injunctions against the sale of infringing products) until the FRAND dispute is settled in the jurisdiction granting the ASI. It is worth noting that ASIs are most commonly employed in common law jurisdictions. US courts have used ASIs in SEP disputes, with the *Microsoft v. Motorola* case being a prominent example.⁵³ Conversely, judges in civil law countries maintain a skeptical view on ASIs, seeing them as foreign court interferences. Consequently, tribunals in countries like Germany and France, handling SEP disputes, have countered ASIs with what are known as anti-antisuit injunctions (AASIs) to neutralize the impact of ASIs.⁵⁴ In fact, German courts have granted four AASIs specifically to protect SEP holders affected by Chinese ASIs.⁵⁵

Furthermore, within the European Union, ASIs are prohibited by the Brussels Regulation, which governs jurisdiction, recognition, and enforcement of judgments in civil and commercial matters.⁵⁶

⁵⁰ Raphael Thomas (2019) *The Anti-Suit Injunction* (2d ed Oxford University Press 2019), at 151–53; Strong SI, 'Anti-Suit Injunctions in Judicial and Arbitral Procedures in the United States' (2018) 66 *AJCL* 153.

⁵¹ [2007] 1 *LLR* 391 at 393 (HL), paragraph 10.

⁵² *Supreme Court of Judicature Act, 1873* (U.K.), 36 and 37 *Vict.*, c. 66.

⁵³ *Microsoft Corp. v. Motorola Inc.*, 696 F.3d 872 (9th Cir. 2012) (US Federal Court)

⁵⁴ *RC Munich, Beck RS 2019, 25536* (*Nokia v Daimler/Continental*); *Cour d'appel de Paris, 3 Mars 2020, RG 19/21426* (*Lenovo v IPCOM*). It is worth noting that on July 11, 2019, the Munich District Court issued the first ASI within a patent dispute, effectively restraining automobile manufacturer Daimler from pursuing legal actions in the United States. This landmark event transpired in the context of the *Nokia v Daimler/Continental* case. Moreover, the Munich Regional Court took an even bolder stance by suggesting that a SEP implementer seeking an ASI could potentially be construed as an unwilling licensee. This notion is akin to the initiative seen in the *Defending American Courts Bill*, introduced to the US Congress in March 2022. This bill establishes a presumption that patent infringement is wilful when considering the escalation of damages in litigation against any party that has invoked an anti-suit injunction in any US tribunal to curtail claims of patent infringement.

⁵⁵ *RC Düsseldorf, BeckRS 2021, 36218* (*HEVC Advance v Xiaomi*), vacated on appeal, cf. *HRC Düsseldorf, GRUR 2022, 318*; *RC Munich, GRUR-RS 2021, 17662* (*IP Bridge v Huawei*); *RC Munich, GRUR-RS 2021, 3995* (*InterDigital v Xiaomi*). The fourth ASI was issued by the Regional Court of Munich in *Sharp v Oppo*, but eventually it was not enforced (*Hess 2022: 544*)

⁵⁶ *Regulation 1215/2015*. In particular, Article 27 of this regulation states that once a procedure has been triggered in a

As determined by the Court of Justice of the European Union in the Turner case of 2004, these injunctions generally breach the Brussels Regulation by interfering with the jurisdiction of foreign courts.⁵⁷ Some have even argued that the Brussels Regulation (Article 24) could mandate judges to issue AASIs if an ASI from another country deprives them of their exclusive jurisdiction.⁵⁸

Empirical evidence shows that the number of litigation worldwide involving ASIs and AASIs has consistently increased since 2011. Baron et al. found 46 decisions delivered between 2011 and 2021 in which an ASI has been requested by a party and 7 decisions in which an AASI has been requested (Figures 3).⁵⁹

Figure 3: Requests for Anti-Suit and Anti- Anti-Suit Injunctions - by jurisdiction (2011-2021)



In their analysis of 53 decisions, Baron et al. narrowed their focus to 25 cases (15 ASIs and 10 AASIs) specifically involving requests for ASIs and/or AASIs in the context of SEP-related disputes (Figure 4). These instances occurred between 2012 and 2021. The majority of ASI requests were observed in the US (9 instances), followed by China (4 instances). In contrast, Germany saw the highest number of AASI requests (5 instances). These findings underscore the trend of ASI requests primarily originating from non-EU countries, while EU courts often respond with AASIs to restore their jurisdiction.

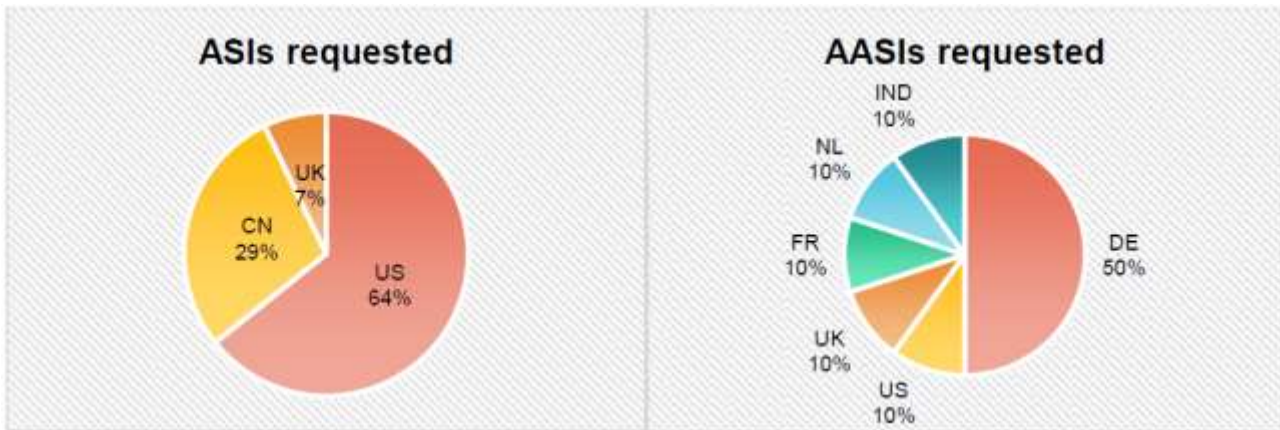
Figure 4: Requests for Anti-Suit and Anti- Anti-Suit injunctions – SEP disputes (2012-2021)

court of any EU Member State, all other EU courts must not commence parallel actions.

⁵⁷ Case C-159/02.

⁵⁸ Hess (2022).

⁵⁹ Justus Baron et al., ‘Empirical Assessment of Potential Challenges in SEP Licensing’, Study commissioned by the European Commission, p. 103.



4. The WTO case between EU and China over ASIs

Within a three-year timeframe, Chinese courts, including the Supreme People's Court (SPC), have issued four ASIs. Furthermore, these courts have amplified the magnitude of associated penalties, frequently aligning them with the upper limits prescribed by China's Civil Procedure Law.

4.1. *InterDigital v. Xiaomi (Wuhan Intermediate People's Court)*⁶⁰

On the 3rd of June 2020, Xiaomi, a prominent Chinese consumer electronics manufacturer renowned for its prominent position in the smartphone sector, initiated legal proceedings at the Wuhan Intermediate Court. The objective was to ascertain the FRAND royalty rates for a selection of 3G and 4G SEPs owned by the US firm InterDigital. In response, InterDigital launched legal action against Xiaomi on the 29th of July 2020 at the Delhi High Court⁶¹, alleging infringement of its Indian patents related to 3G, 4G, and H.265/HEVC video compression standards.⁶² As indicated in a regulatory filing, InterDigital sought "injunctive relief to prevent further infringement of the litigated patents in India, unless Xiaomi elects to take a license on terms determined to be FRAND".⁶³

During this period, specifically on the 23rd of September 2020, the Wuhan Court issued an ASI against InterDigital. This remedy essentially prohibited the US company from pursuing an injunction against Xiaomi in India. In the event of non-compliance, InterDigital would incur a penalty of up to one million yuan (approximately 125,000€) per day. The Wuhan Court's decision acknowledged that InterDigital had initiated proceedings in India with the intention of impeding the ongoing case in China. Thus, the Wuhan Court stated that the injunction was deemed necessary to safeguard Xiaomi's interests as parallel judicial outcomes in Delhi and China might prove irreconcilable. Further, the

⁶⁰ Interdigital Technology Corp v Xiaomi Corp and others (I.A. 8772/2020 in CS(COMM) 295/2020).

⁶¹ Rajiv Choudhry, Chinese Court Issues Anti-Suit Injunction Re Pending DHC Case by InterDigital against Xiaomi; Rajiv Choudhry, Delhi HC Becomes the Go to Venue for Adjudicating SEP Disputes in India <https://spicyip.com/2020/08/delhi-hc-becomes-the-go-to-venue-for-adjudicating-sep-disputes-in-india.html>

⁶² Nos. 262910; 295912; 298719; 313036; 320182; 242248; 299448; and 308108

⁶³ See U.S. Securities & Exchange Comm'n, Form 10-Q, Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the Quarterly Period Ended June 30, 2020, Commission File Number 1-33579 Interdigital, INC., at 15 <https://www.sec.gov/ix?doc=/Archives/edgar/data/1405495/000140549520000046/idcc-q263020.htm>.

Chinese judges considered that the imposition of the injunction would not adversely affect InterDigital's interests.

Barely a week later, on the 29th of September 2020, InterDigital reacted to the Chinese order by submitting an application for an Anti-Antisuit Injunction (AASI) before the Delhi Court. This prompted the Delhi Court to grant the AASI on the 9th of October 2020, effectively restraining the defendants from enforcing the Wuhan antisuit order until the Delhi proceedings were concluded. The court's decision rested on the premise that "public policy trumps the comity principle".⁶⁴ Conversely, the Wuhan Court perceived this action as a violation of its order. InterDigital's lawsuit in India garnered criticism, being perceived as a "deliberate attempt by InterDigital to scuttle or at least severely dilute the matter before the Chinese courts".⁶⁵

4.2. *Conversant v. Huawei and ZTE*⁶⁶ (Supreme People's Court)

Huawei, the leading player in the global smartphone market in terms of market share, took the initiative to initiate legal proceedings against Conversant, a US company, in the Nanjing Intermediate Court on the 25th of January 2018.⁶⁷ In this Nanjing litigation, Huawei sought a determination of FRAND royalty rates concerning an array of SEPs encompassing 2G, 3G, and 4G technologies, owned by Conversant. Subsequently, on the 20th of April 2018, Conversant launched a distinct legal action in the Düsseldorf Regional Court, alleging infringement of its German patents by Huawei.

Prior to the German Court rendering a verdict, on the 16th of September 2019, the Nanjing Court established relatively modest royalty rates. This decision prompted Conversant to appeal the case to China's Supreme People's Court (SPC).⁶⁸

Subsequently, on the 27th of August 2020, the Düsseldorf Court ruled in favour of Conversant, finding Huawei in violation of Conversant's patent EP1797659, a patent that Conversant had acquired from Nokia in 2014. Significantly, the Düsseldorf Court not only prohibited Huawei's activities within the nation's borders but also sanctioned the sale of UMTS-enabled devices (Universal Mobile Telecommunications Systems). Additionally, the Düsseldorf Court endorsed the FRAND terms initially proposed by Conversant, which were nearly twentyfold higher than those originally set by the Nanjing Court.⁶⁹ In response, Huawei promptly submitted an application for an ASI to the Supreme People's Court. This application received approval, effectively restraining Conversant from enforcing the German verdict until the SPC rendered its own judgment in the ongoing Chinese

⁶⁴ See Rajiv Choudhry, Delhi High Court Issues Anti Anti-Suit Injunction in InterDigital v. Xiaomi Patent Infringement Dispute <<https://spicyip.com/2020/10/delhi-high-court-issues-anti-anti-suit-injunction-in-interdigital-v-xiaomi.html>> accessed 31 March 2023

⁶⁵ Rajiv Choudhry, Chinese Court Issues Anti-Suit Injunction Re Pending Delhi HC Case by InterDigital against Xiaomi <https://spicyip.com/2020/10/chinese-court-issues-anti-suit-injunction-re-pending-dhc-case-by-interdigital-against-xiaomi.html>.

⁶⁶ Decision by the Supreme People's Court of the People's Republic of China, Civil Ruling, of August 28, 2020 in Cases No. 732, No. 733 and No. 734, between Huawei Technology Co. LTD and Conversant Wireless Licensing.

⁶⁷ Sally Gao and Andrew White, Chinese court judgement on SEP royalty dispute between Huawei and Conversant, <https://www.mathys-squire.com/insights-and-events/news/chinese-court-judgment-on-sep-royalty-dispute-between-huawei-and-conversant/>.

⁶⁸ Sophia Tang, Anti-Suit Injunction Issued in China: Comity, Pragmatism and Rule of Law, <https://conflictoflaws.net/2020/anti-suit-injunction-issued-in-china-comity-pragmatism-and-rule-of-law/>.

⁶⁹ Mathieu Klos, The global SEP race, <https://www.juve-patent.com/people-and-business/the-global-sep-race/>.

proceedings. Analogous to the *Xiaomi v. InterDigital* case, the SPC imposed a daily fine of one million yuan for non-compliance with the injunction. Notably, the rationale behind the SPC's decision bore resemblance to the justifications presented by the Wuhan Court.

The SPC outlined, among other things, that enforcement of the German decision would negatively impact the ongoing Chinese proceedings. Thus, the injunction was considered imperative to avert irreparable harm to Huawei since the Chinese case had been initiated before its German counterpart.

4.3. *OPPO v. Sharp*⁷⁰ (Shenzhen Intermediate People's Court)

ScienBiziP, the Chinese arm of Japan's Sharp Corporation, engaged in negotiations with Chinese handset manufacturer OPPO to secure a license for Sharp's SEPs within China. In the subsequent course of events, Sharp took legal action against OPPO in 2020 by filing a patent infringement injunction in both Japan and Germany. This action was based on Sharp's Japanese and German patents covering intelligent terminal products, particularly pertaining to Wi-Fi, 3G, and 4G technologies.

In response, in March 2020, OPPO and its subsidiary, OPPO Shenzhen Corporation, initiated legal proceedings by lodging a lawsuit at the Shenzhen Intermediate People's Court. The lawsuit contended that Sharp Corporation and its Chinese subsidiary had violated their licensing commitments under FRAND terms during the negotiation process.⁷¹ Sharp challenged the jurisdiction of the Chinese court on the grounds that similar cases were already underway in Japan and Germany. However, the court ultimately dismissed this argument, asserting its jurisdiction over the case. The Supreme People's Court subsequently rejected Sharp Corporation's appeal against the ruling of the Shenzhen Intermediate People's Court.⁷²

Subsequently, on the 16th of October 2020, the Shenzhen Intermediate People's Court issued an ASI that restrained Sharp from initiating patent litigations or seeking injunctions against OPPO and its affiliated subsidiaries based on Sharp's Wi-Fi, 3G, and 4G SEPs. This injunction was reinforced with daily penalties.

4.4. *Samsung v. Ericsson*⁷³ (Wuhan Intermediate People's Court)

⁷⁰ Xiapu Zhushi Huishe, Sai'enbeiji Riben Zhushi Huishe Su OPPO Guangdong Yidong Tongxin Youxian Gongsi, OPPO Guangdong Yidong Tongxin Youxian Gongsi Shenzhen Fen Gongsi [Sharp Corp. and ScienBizip Japan Corp. v. OPPO Guangdong Mobile Telecommunications Co. Ltd. and Shenzhen Branch of OPPO Guangdong Mobile Telecommunications Co. Ltd.], Zhi Min Xia Zhong No. 517 (2020) (Sup. People's Court 19 August 2021).

⁷¹ Deng Fei and others, 'The Current State of SEP Litigation in China' (2021) 35-SPG Antitrust 95; Seiya S Takeuchi, Teleological interpretation of Article 63 TRIPS based on the Vienna Convention on the Law of Treaties and customary international law—analysis of the EU's request for information on China's SEP cases' (2022) 17 JIPLP 674

⁷² Guangdong Oppo Mobile Telecommunications Corp., Ltd (Oppo), Newsroom, IP, 'The Supreme People's Court Confirmed China's Jurisdiction Over SEP Global Rate Setting in the OPPO and Sharp Case' (2 September 2021), <https://www.oppo.com/en/newsroom/ip/jurisdiction-over-sep-global-rate-setting/>.

⁷³ Sanxing Dianzi Zhushihuishe Yu Ailixin Gongsi Biaozhun Biyao Zhuanli Xukefei Jiufen An [Samsung Elecs. Co. v. Telefonaktienbolaget LM Ericsson], (2020) E 01 Zhi Min Chu No. 743 ((2020)鄂01知民初743号) (Wuhan Interm. People's Ct. Dec. 25, 2020)

The dispute between Swedish company Ericsson and Samsung revolves around SEPs encompassing 4G and 5G technologies, with Ericsson holding ownership of these patents.⁷⁴ In a prior instance, in 2014, the two parties engaged in SEPs cross-licensing. However, this license was set to expire by the close of 2020, and attempts to renegotiate terms proved unsuccessful.

On the 7th of December 2020, Samsung initiated a civil complaint in Wuhan, seeking a determination of FRAND conditions for a new global license. Notably, Ericsson remained unaware of these proceedings in Wuhan. This lack of notification prompted Ericsson to bring a lawsuit against Samsung in the District Court for the Eastern District of Texas, citing the latter's failure to negotiate in good faith.

In a retaliatory move, Samsung presented a petition before the Wuhan Intermediate People's Court, requesting an ASI against Ericsson's lawsuit in the United States.⁷⁵ Subsequently, the Intermediate People's Court in Wuhan granted Samsung the ASI, primarily to circumvent jurisdictional conflicts arising from competing national authorities. The ASI, as issued by the Wuhan court, additionally restrained Ericsson from seeking a FRAND judgment from another Chinese court and from pursuing an Anti-ASIs to challenge the Wuhan court's decision. Ultimately, the two corporations reached a resolution to settle their global disputes.

The evolving practice of granting ASIs in Chinese courts has raised concerns within the European Union (EU) due to a perceived intensifying protectionist trend towards Chinese manufacturers. The EU asserts that China's approach hampers European companies that possess vital technology, including 3G, 4G, and 5G, from safeguarding their patents against unauthorized exploitation or inadequate compensation. Of particular concern is the fear that Chinese mobile phone manufacturers could gain access to European technology at a reduced cost. The EU emphasizes that Chinese courts have issued these ASIs without providing prior notice or an opportunity for all parties involved to participate in the legal proceedings. Consequently, in order to avert substantial penalties in China, European patent holders could essentially be compelled to resolve these disputes in China, agreeing to lower than market value royalties. This situation, in turn, could limit the competitive ability of European tech companies and have broader adverse repercussions on the overall European innovation ecosystem.

Scholars have also cast criticism on China's utilization of ASIs.⁷⁶ It has been observed that these injunctions, particularly evident in cases like *InterDigital v. Xiaomi* and *Ericsson v. Samsung*, possess excessive geographic scope. These ASIs hinder owners of SEPs from making decisions on licensing matters and enforcing existing injunctions globally. This perspective, in general, posits that ASIs present a challenge from the standpoint of maintaining the rule of law.⁷⁷ These viewpoints align with recent determinations by national courts in Germany⁷⁸ and France⁷⁹, where, as mentioned earlier, SEP

⁷⁴ *Ericsson, Inc. v. Samsung Elecs. Co.*, No. 2:20-CV-00380-JRG, 2021 WL 89980 (E.D. Tex. Jan. 11, 2021).

⁷⁵ *Sanxing Dianzi Zhushi Huishe [Samsung Elecs. Co., v. Telefonaktiebolaget LM Ericsson]*, E 01 Zhi Min Chu No. 743 (Wuhan Intern. People's Ct. Dec. 25, 2020) (China).

⁷⁶ Nikolic (2022).

⁷⁷ Haris Tsilikas, 'Anti-Suit Injunctions For Standard-essential Patents: The Emerging Gap in International Patent Enforcement' (2021) 16(7) *JIPLP* 729

⁷⁸ *Nokia v Continental*, Higher District Court of Munich, decision dated 12 December 2019, Case-No. 6 U 5042/19. Yet, it should be reminded that on 11 July 2019, the Munich District Court issued the first ever ASI in in German a patent dispute, preventing carmaker Daimler from pursuing proceedings in the United States.

⁷⁹ Paris Court of Appeal, March 3, 2020, Case no 19/21426.

owners were granted AASIs to counteract the impacts of ASIs. This measure is ostensibly designed to protect public order, property rights, and ensure equitable legal proceedings.

In July 2021, in response to the issuance of ASIs by Chinese courts, the European Union took formal action by making a request to China under Article 63(3) of the TRIPS Agreement.⁸⁰ This request sought information about recent cases where ASIs had been granted, as well as the legal basis for determining comprehensive licensing rates and granting such injunctions. However, Chinese authorities rejected the responsibility to furnish the requested information, citing the TRIPS Agreement and asserting that no obligation exists for China to respond to the EU's information inquiry.

Consequently, in February 2022, the EU initiated the consultations phase of the World Trade Organization's (WTO) dispute settlement procedure, alleging violations of TRIPS Articles 63(1) and 63(3).⁸¹ Importantly, the EU's consultation request claimed that China's recent jurisprudence on ASIs constitutes a policy that contravenes several provisions of the TRIPS Agreement. This includes Articles 28, as this policy creates barriers to legitimate trade by restricting the competitive opportunities for patented good and does not provide for safeguards against the misuse of enforcement processes. Besides, the EU argument goes, the Chinese policy is claimed to breach Article 64 since it obstructs or attempts to obstruct judicial authorities of other WTO member states from ordering a party to cease infringement in China. This dispute has attracted the interest of other prominent countries hosting ICT-intensive industries like the United States, Canada, and Japan, all of which have expressed intent to participate in consultations. This underscores the global significance of the case and the international attention it commands.

However, the consultations phase did not yield positive outcomes, leading the EU to request the WTO's Dispute Settlement Body in December 2022 to establish a panel for resolving the dispute. The panel composition was finalized on March 28, 2023. On June 8 the EU presented its first written submission to the Panel detailing its claim against China.⁸² Subsequently, on July 4, 2023, both the EU and China informed the Dispute Settlement Body about their agreement on formal procedures for Arbitration under Article 25 of the DSU. This arbitration framework aims to address potential appeals by China or the EU against any final panel report issued in this dispute. This measure was necessary

⁸⁰ Council for Trade-Related Aspects of Intell. Prop. Rts., Request for Information Pursuant to Article 63.3 of the TRIPS Agreement: Communication from the European Union to China, WTO Doc. IP/C/W/682 (July 6, 2021). As is known the TRIPS Agreement is a WTO treaty which sets minimum standards for the protection of IP rights including patents, trademarks and copyright.

⁸¹ Request for Consultations by the European Union, China—Enforcement of Intellectual Property Rights, WTO Doc. WT/DS611/1 (Feb. 22, 2022). Article 63(1) TRIPS provides that ‘Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them. [...]’. And Article 63(3) TRIPS states that ‘Each Member shall be prepared to supply, in response to a written request from another Member, information of the sort referred to in paragraph 1. A Member, having reason to believe that a specific judicial decision or administrative ruling or bilateral agreement in the area of intellectual property rights affects its rights under this Agreement, may also request in writing to be given access to or be informed in sufficient detail of such specific judicial decisions or administrative rulings or bilateral agreements’.

⁸² European Union, First Written Submission by the European Union (DS611), 8 June 2023.

to establish a framework for delivering final decisions on appeals as the WTO's Appellate Body is currently unable to function given its ongoing vacancies.⁸³

5. Avoiding the judicial fragmentation spiral

In the academic debate around the use of SEP-related ASIs there is a diversity of viewpoints. Certain scholars posit that ASIs should be employed sparingly and with caution, particularly in a manner that does not compromise international comity.⁸⁴ This entails a comprehensive assessment of comity ramifications before granting ASIs to mitigate the potential for jurisdictional conflicts. Critics argue that ASIs in SEP disputes waste judicial resources, erode trust in the legal system, and introduce risks to global trade relationships.⁸⁵ The ASIs issued by Chinese courts, subsequently contested by the EU at the WTO, encapsulate these negative implications associated with a jurisdictional measure that has encountered wide skepticism.

Indeed, it is true that ASIs granted by Chinese courts exhibit a broad reach, especially evident in instances such as *InterDigital v Xiaomi* and *Ericsson v Samsung*—an attribute not easily matched by ASIs in other jurisdictions. Nevertheless, certain parallels exist with ASIs issued by US courts. In *Conversant v Huawei*, for instance, the Supreme People's Court (SPC) considered factors akin to those deliberated upon by certain US courts, as exemplified by the case of *Microsoft v Motorola*. Put differently, **the legal basis of Chinese ASIs as mechanisms for preserving rights closely mirrors the rationale employed by US courts when issuing their own ASIs.**

A noteworthy observation arises from the fact that Chinese judges have encountered ASIs granted by foreign courts. In this context, the issuance of Chinese ASIs can be seen as a reciprocal response to actions taken by other nations (so-called legal transplant).⁸⁶ This perspective posits that the power to exercise such measures is not confined to a specific nation like the US or the UK; any judicial entity holds the capability.⁸⁷ This notion is substantiated by instances such as the UK's initiation of ASIs against Chinese enterprises, particularly evident in cases like *Conversant v Huawei* and *ZTE*.⁸⁸ Additionally, if UK courts assert the authority to determine global FRAND licenses, thereby attracting SEP disputes, it follows that Chinese courts might adopt a similar approach to stimulate SEP-related litigations within their jurisdiction.⁸⁹ Yu, Contreras, and Yang have persuasively argued that Chinese ASIs serve as a legal tool that domestic judges have adopted from foreign jurisdictions, particularly the US, and adapted to the Chinese legal framework.⁹⁰ This "legal transplant" empowers

⁸³ Lorenzo Bencivelli and Filippo Vergara Caffarelli, 'The EU and the WTO Reform' (2023) Nota n. 0658454/23, 12/04/2023 discussing the paralysis of the WTO's Dispute Settlement Mechanism.

⁸⁴ Nikolic (2022).

⁸⁵ Geradin and Katsifis (2022).

⁸⁶ Richard Arnold, 'The EU's WTO complaint against China can only be resolved by establishing legally enforceable global arbitration of SEP disputes' (2022) *JIPLP* 329 349. The Author outlines that the decision in *Conversant v. Huawei* and *ZTE* is a 'response to the practice of the courts of a number of Western countries of granting anti-suit (and anti-anti-suit) injunctions in jurisdictional battles over SEPs and FRAND terms, including a decision by the late Henry Carr J that he would have granted an antisuit injunction against Huawei in the *Conversant v Huawei* litigation if Huawei had not agreed to withdraw the relevant part of its parallel claim in the Chinese courts'.

⁸⁷ Yu, Contreras, Yang, 'Transplanting Anti-Suit Injunctions' (2022) 71 *AULR* 1537

⁸⁸ *Conversant Wireless Licensing v Huawei Technologies Co Ltd and ZTE Corp* [2018] EWHC 2549 (Ch), [2018] Costs LR 1049.

⁸⁹ Geradin and Katsifis (2022).

⁹⁰ Yang Yu and Jorge L. Contreras (2020).

China to influence the evolution of global SEP standards. A recent statement by the influential English judge Richard Arnold resonates with this perspective, noting the inconsistency in accepting ASIs from Western countries while questioning their validity when issued by Chinese courts.⁹¹ This sentiment aligns with China's stance at the WTO, asserting that China is not the primary proponent of anti-suit injunctions. Yu, Contreras, and Yang also raise the point that Chinese ASIs are a mechanism safeguarding jurisdiction and judicial sovereignty.⁹² The SPC's report on *Conversant v Huawei* builds on this argument, highlighting the importance of ASIs in preventing the misuse of parallel litigation and upholding national judicial sovereignty.

Viewed through this lens, ASIs could be perceived as instruments allowing Chinese courts to establish reciprocal arrangements that enhance international comity without undermining it. Moreover, when foreign courts adhere to legally sanctioned Chinese ASIs and refrain from issuing "neutralizing" AASIs, this in turn fosters international comity and judicial alignment. Even if ASIs are acknowledged to negatively impact on comity, their transient nature makes such interference tolerable.

The discourse surrounding SEP-related ASIs, particularly those originating from Chinese courts, and their implications for global jurisdictional harmony, is undoubtedly contentious. One perspective tends to view them as encroachments upon the jurisdictional sovereignty of other nations, while the opposing view regards them as guardians of the issuing nation's judicial autonomy—China, in this context. Given that countries like the US have leveraged ASIs in SEP scenarios, the possibility remains that a WTO Panel could interpret them as compatible with TRIPS.

What remains evident is that recent years have witnessed a surge in jurisdictional clashes, marked by an array of ASIs, AASIs, and AAASIs.⁹³ This phenomenon poses risks to the broader ICT global market and could potentially spiral out of control. To counter this, several proposals promoting greater jurisdictional collaboration have been put forth. An intriguing idea proposed by Jorge Contreras suggests the establishment of a non-governmental tribunal for determining FRAND rates for SEPs. This concept, endorsed by other scholars as well, finds mention in the UK Supreme Court's *Unwired Planet* decision. While the establishment of an international rate-setting tribunal might face practical challenges, more informal mechanisms and 'soft law' approaches, like consensus-building on FRAND calculations, could prove more feasible. Additionally, suggestions have been made to establish 'best practices' for SEP licensing disputes and FRAND methodologies, potentially leading to an international treaty that sets binding rules and minimizes the risk of jurisdictional conflicts.⁹⁴ However, given the complex economic and geopolitical interests involved, achieving consensus among governments during treaty negotiations remains a formidable task. The lack of consensus, as demonstrated within the EU, underscores the challenges in addressing burning SEP issues on a global

⁹¹ Arnold, Richard, 'Arbitration of FRAND Disputes' in Picht, Cotter and Habich (eds), *FRAND: German Case Law and Global Perspectives* (Edward Elgar, forthcoming 2023).

⁹² Yu, Contreras, Yang (2022).

⁹³ Thomas F. Cotter, 'Is Global FRAND Litigation Spinning Out of Control?' (2021) P-O LJ 1.

⁹⁴ Geradin and Katsifis (2022).

scale.⁹⁵ The inability to reach consensus in such matters further underscores the need for innovative solutions to navigate the intricate landscape of SEP-related disputes.⁹⁶

6. Conclusion

The discourse surrounding ASIs in the context of SEPs is undoubtedly contentious, as evidenced by the cases and complexities elucidated in this study. This paper shows how an antitrust legal framework built around law and economics rationale is tilting towards geopolitics tensions. Looking ahead, it will prove intriguing to observe the trajectory of ASI case law, encompassing not only ASIs but also AASIs and AAASIs, particularly within the jurisdictions of the primary ICT superpowers, including India.

Presently, it is evident that China has emerged as a key player in the ongoing global contest for supremacy in the realm of international markets, notably concerning pivotal technologies such as WiFi, 4G, 5G, and potentially the forthcoming 6G. China's strategy has involved showcasing its willingness to oversee SEP disputes by issuing far-reaching ASIs, a strategic move that has prompted the EU to engage in a confrontation with China within the framework of the WTO. Nevertheless, it is worth noting that China is not the sole participant in this arena. The United States, the United Kingdom, and other nations are set to be active contenders, aiming to wield similar legal instruments as China, including the utilization of injunctions of varying degrees of scope and intensity to gain a leading judicial dominance in worldwide SEP litigation. The ultimate outcome of the WTO dispute initiated by the EU remains uncertain at present, making accurate predictions challenging.

In the event that the WTO Panel were to determine that Chinese ASIs contravene the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), a ripple effect could ensue, potentially implicating ASIs issued by the US, the UK, and other jurisdictions as well. Furthermore, it must be acknowledged that the stance on ASIs from EU member states could undergo transformation. Despite initial resistance to such injunctions in the realm of SEPs within civil law jurisdictions, recent years have witnessed a degree of receptiveness among courts and commentators in these regions to the concept of ASIs in a broader context. The dynamic legal landscape surrounding ASIs and the intricate jurisdictional intricacies relating to SEPs currently appear to be in a state of change. Consequently, the outcome of the WTO case initiated by the EU introduces an element of uncertainty, contributing to the evolving nature of this ongoing debate.

⁹⁵ Justus and others Group of Experts on Licensing and Valuation of Standard Essential Patents—Contribution to the Debate on SEPs. (January 2021—E03600) (2021) <<https://ec.europa.eu/docsroom/documents/45217>> accessed 31 March 2023

⁹⁶ Bonadio and Lucchi (2023).