TRANSPLANTING ANTI-SUIT INJUNCTIONS*

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When adjudicating high-value cases involving the licensing of patents covering industry standards such as Wi-Fi and 5G (standards-essential patents or SEPs), courts around the world have increasingly issued injunctions preventing one party from pursuing parallel litigation in another jurisdiction (anti-suit injunctions or ASIs). In response, courts in other jurisdictions have begun to issue anti-anti-suit injunctions, or even anti-anti-anti suit injunctions, to prevent parties from hindering the proceedings in those courts. Most of these activities have been limited to the United States and Europe, but in 2020 China emerged as a powerful new source of ASIs in global SEP litigation. The comparative law literature uses the notion of legal transplant to describe the introduction of a foreign legal concept, rule, or procedure. Taking

 Earlier versions of this Article were presented at the 9th International Intellectual Property Scholars Roundtable hosted by Chicago-Kent College of Law, the ATRIP Congress 2021 hosted by the Centre for Information and Innovation Law at the University of Copenhagen, the Workshop on Anti-Suit Injunctions and FRAND Litigation in China hosted by the Faculty of Law of the Chinese University of Hong Kong and Texas A&M University School of Law, and the Section of Comparative Law Works in Progress Session at the 2022 Annual Meeting of the Association of American Law Schools. The authors thank Mark Cohen, Thomas Cotter, Lee Jyh-An, Dicky Tsang, Margaret Woo, Saurabh Vishnubhakat, and Zheng Wentong for detailed feedback on earlier drafts and other participants of these events for valuable comments and suggestions.

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the view that the emergence of ASIs in China represents a new form of transplant from Western legal systems, this Article analyzes the transplantation of this procedural mechanism to China. This recent development can be viewed as both surprising, given China's civil law tradition, and predictable, considering the country's prominence in global technology markets. Equally predictable have been the strong reactions of foreign courts and policymakers to China's use of this mechanism, which has now proceeded at a pace that outstrips that of any other country. This Article traces the emergence of ASIs in China by examining how the Chinese legal system has adapted a procedural mechanism that has been repeatedly used in the United States and other jurisdictions. The Article further elucidates the internal and external forces that led to the mechanism's rapid adoption in China. It sheds new light on the process of legal transplantation in the twenty-first century as well as its global ramifications.

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INTRODUCTION

On December 25, 2020, the Wuhan Intermediate People's Court in China issued an "act preservation" order[1] prohibiting Swedish patent holder Ericsson from bringing a legal action anywhere else in the world to resolve its patent dispute with Korean manufacturer Samsung until the Wuhan court had completed its adjudication.[2] This order provided a remedy that was functionally equivalent to the anti-suit injunctions (ASIs) increasingly issued by courts in the United States

1. *See* Zhonghua Renmin Gongheguo Minshi Susong Fa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, amended June 27, 2017, effective July 1, 2017), art. 100 [hereinafter 2017 Civil Procedure Law]. Some commentators and media have also used the translation "behavior preservation" order or measure. *E.g.*, Mark Cohen, *China's Evolving Case Law on ASI's*, CHINA IPR (Mar. 4, 2021), https://chinaipr.com/2021/03/04/chinas-evolving-case-law-on-asis [https://perma.cc/6ZMW-JGNA] [hereinafter Cohen, *China's Evolving Case*].

2. Sanxing Dianzi Zhushihuishe Yu Ailixin Gongsi Biaozhun Biyao Zhuanli Xukefei Jiufen An (三星电子株式会社与爱立信公司标准必要专利许可费纠纷案) [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) [hereinafter *Samsung Elecs.* (Wuhan)]. Samsung filed its initial complaint in the Wuhan court on December 7, 2020. Ericsson Inc. v. Samsung Elecs. Co., No. 2:20-CV-00380-JRG, 2021 WL 89980, at *1 (E.D. Tex. Jan. 11, 2021).

and other jurisdictions in global patent disputes.[3] At stake were the royalties—likely in the billions of dollars—that Samsung would pay to Ericsson to operate under the latter's worldwide patents covering 4G and 5G wireless telecommunications standards, as well as Ericsson's compliance with its obligation to offer Samsung a license on terms that are at least fair, reasonable, and nondiscriminatory (FRAND).[4]

Prior to being notified of Samsung's claim in the Wuhan court, Ericsson brought a claim of its own in the U.S. District Court for the Eastern District of Texas.[5] Three days after the Chinese ruling, the Texas court issued a temporary restraining order barring Samsung from taking any action in Wuhan that would interfere with the Texas court's ability to determine Ericsson's FRAND obligations to Samsung.[6] Known generally as an anti-anti-suit injunction (AASI), this order posed a direct conflict with the Wuhan court's order, which included an anti-anti-anti-suit injunction (AAASI) to prevent Ericsson from taking legal action elsewhere that would undermine the Wuhan court's original ASI.[7]

In the end, there was no clear court to resolve this dispute. If the Wuhan court determined Ericsson's global FRAND rate, Samsung might violate the Texas injunction. But if the Texas court made that determination, Ericsson might violate the Wuhan injunction. The competing orders in the *Ericsson v. Samsung* dispute sounded alarm bells throughout the international patent community, prompting a number of amicus briefs and other filings by individuals including a former Director of the U.S. Patent and Trademark Office,[8] two former

3. *See* discussion *infra* Section III.C.4, Part IV.

4. A FRAND commitment is an obligation undertaken by a participant in a standards development organization to grant licenses of its patents that are essential to the implementation of one of the organization's standards on terms that are fair, reasonable, and nondiscriminatory. *See* discussion *infra* Section II.B.

5. Emergency Application for Temporary Restraining Order and Anti-Interference Injunction Related to Samsung's Lawsuit Filed in the Wuhan Intermediate People's Court of China, *Ericsson*, No. 2:20-CV-00380-JRG (E.D. Tex. Dec. 28, 2020).

6. *Ericsson*, No. 2:20-CV-00380-JRG (E.D. Tex. Dec. 28, 2020) (granting the temporary restraining order). The district court followed the temporary restraining order with a preliminary injunction on January 11, 2021. *Ericsson*, 2021 WL 89980, at *1.

7. *Samsung Elecs.* (Wuhan), *supra* note 2.

8. Brief for Senator Thom Tillis, Honorable Paul R. Michel, and Honorable Andrei Iancu as Amici Curiae Supporting Appellees, *Ericsson*, No. 21-1565 (Fed. Cir. Apr. 9, 2021) [hereinafter Tillis-Michel-Iancu Brief].

Chief Judges of the U.S. Court of Appeals for the Federal Circuit,[9] a former chair of the Intellectual Property Subcommittee of the U.S. Senate Judiciary Committee,[10] as well as a group of international intellectual property professors.[11] Under the pressure of this type of high-stakes legal stalemate, the parties' only option might be to settle, which Ericsson and Samsung did, on undisclosed terms, during the appeal of the Texas order to the Federal Circuit.[12]

These clashing orders by Chinese and U.S. courts, buttressed by additional claims and crossclaims in other jurisdictions,[13] as well as an action in the U.S. International Trade Commission,[14] are symptomatic of the jurisdictional battles that have recently arisen in global FRAND disputes. In these battles, which are routinely waged in up to a dozen jurisdictions,[15] courts have increasingly issued ASIs to prevent one party from pursuing parallel litigation in another jurisdiction. In the FRAND context, these ASIs—traditionally granted by courts in the United Kingdom and the United States[16]—prevent a party from seeking a rate determination in a foreign court when that determination is pending in the issuing court.

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9. *Id.*; Brief for Honorable Paul R. Michel (Ret.) Supporting Plaintiffs, *Ericsson*, No. 2:20-CV-00380-JRG (E.D. Tex. Jan. 5, 2021); Declaration of Randall R. Rader, *Ericsson*, No. 2:20-CV-00380-JRG (E.D. Tex. Jan. 1, 2021).

10. Tillis-Michel-Iancu Brief, *supra* note 8.

11. Brief for International Intellectual Property Law Professors as Amici Curiae Supporting Neither Party, *Ericsson*, No. 21-1565 (Fed. Cir. Mar. 1, 2021) [hereinafter International Intellectual Property Law Professors' Brief]. Two of us (Contreras and Peter Yu) were signatories to this brief.

12. Press Release, Ericsson, Ericsson and Samsung Sign Global Patent License Agreement (May 7, 2021), https://www.ericsson.com/en/press-releases/2021/5/ericsson-and-samsung-sign-global-patent-license-agreement.

13. *See* Lucia Osborne-Crowley, *Ericsson Brings Samsung 5G Patent Battle to UK Courts*, LAW360 (Apr. 16, 2021, 2:08 PM), https://www.law360.com/articles/1375442/ericsson-brings-samsung-5g-patent-battle-to-uk-courts (referencing Case No. HP-2021-000008 in the High Court of Justice).

14. *See* Dave Simpson, *Ericsson Fires Back, Asks ITC to Block Samsung 5G Imports*, LAW360 (Jan. 22, 2021, 11:15 PM), https://www.law360.com/articles/1347796/ericsson-fires-back-asks-itc-to-block-samsung-5g-imports.

15. For example, when Vringo, an SEP holder, sued Chinese smartphone manufacturer ZTE, the litigation occurred over four years across twelve different jurisdictions: Australia, Brazil, China, France, Germany, India, Malaysia, the Netherlands, Romania, Spain, the United Kingdom, and the United States. David L. Cohen, *A Short History of Vringo's Battle with ZTE*, KIDON IP (Aug. 2, 2018), https://www.kidonip.com/news/a-short-history-of-vringos-battle-with-zte [https://perma.cc/9NLB-JVZ8].

16. *See* discussion *infra* Section II.D.

In response, courts in other jurisdictions—namely France, Germany, and India—have begun to issue AASIs to prevent parties from seeking ASIs that would hinder the proceedings in those courts.[17] Some courts have even issued AAASIs, prohibiting a party from seeking an AASI, as evidenced by the Wuhan court's order in *Samsung*.[18] Amid this international jockeying for jurisdictional control, commentators have wondered where and how these patent litigation battles will end and whether every country involved in multi-jurisdictional FRAND disputes will get into the ASI game.[19] With five judgements issued in 2020 alone, China has now emerged as another major jurisdiction—and perhaps *the* jurisdiction—in which litigants may seek ASIs in global FRAND disputes.[20]

This new development is noteworthy for three reasons. First, the ASI, as a procedural mechanism, is largely a creation of courts in common law jurisdictions, as opposed to civil law jurisdictions. This mechanism, which has existed in the Anglo-American legal tradition for centuries, originated in the need to rationalize parallel jurisdiction in the English courts of law and the ecclesiastical courts of equity.[21] Given this common law heritage, the ASI has not historically been utilized in civil law jurisdictions such as China, France, or Germany. Indeed, civil law judges have expressed displeasure at their increasing use and have issued AASIs to counter their effects.[22]

Second, a procedural mechanism like an ASI has not traditionally existed under Chinese law until recently. Other than a few cases in maritime law, we are unaware of the issuance of an ASI by a modern Chinese court until 2020.[23] The recent spate of ASIs by Chinese courts

17. *See infra* text accompanying note 177.

18. *Samsung Elecs.* (Wuhan), *supra* note 2.

19. *See* Jorge L. Contreras, *It's Anti-Suit Injunctions All the Way Down—The Strange New Realities of International Litigation over Standards-Essential Patents*, IP LITIGATOR, July/Aug. 2020, at 14, 20 [hereinafter Contreras, *All the Way Down*].

20. *See* discussion *infra* Section III.C; *see also* Yu Yang & Jorge L. Contreras, *Will China's New Anti-Suit Injunctions Shift the Balance of Global FRAND Litigation?*, PATENTLY-O (Oct. 22, 2020), https://patentlyo.com/patent/2020/10/contreras-injunctions-litigation.html [https://perma.cc/TX9S-3YEG] (discussing *Conversant v. Huawei and ZTE* and *InterDigital v. Xiaomi*, the first two cases in which Chinese courts issued ASIs).

21. *See infra* note 142 and accompanying text.

22. *See infra* text accompanying note 171.

23. *See infra* text accompanying notes 320–24. Historical research has shown the use of a prototype of this injunction in imperial China. *See* Bradly W. Reed, *Money and Justice: Clerks, Runners, and the Magistrate's Court in Late Imperial Sichuan*, 21 MOD. CHINA 345, 373–74 (1995) ("In Jiaqing 18 (1813), . . . Baxian magistrate Dong Shun responded to [a request for an injunction barring adjudication at the subcounty level]

therefore deserves scholarly and policy attention, as it will inform our understanding of both the changing international patent litigation landscape and recent legal and intellectual property developments in China.[24]

Third, the Chinese courts' proactive effort in issuing ASIs in FRAND disputes has alarmed policymakers, international observers, and patent litigants. For example, in April 2021, the United States Trade Representative referred to China's increasing use of ASIs as "worrying."[25] In March 2022, a bipartisan group of five U.S. senators introduced the Defending American Courts Act, which seeks to impose penalties on parties seeking to enforce foreign ASIs, including those from China, in U.S. courts.[26] Across the Atlantic, the European Commission has noted the growing challenges that "very broad extraterritorial anti-suit injunctions" have posed to European companies operating abroad.[27] Alarmed by the issuance of ASIs by Chinese courts, the European Union, in July 2021, submitted a formal request to China under Article 63.3 of the Agreement on Trade-Related Aspects of Intellectual Property Rights[28] (TRIPS Agreement) of the World Trade Organization (WTO).[29] That request sought information concerning the latest cases involving the issuance of ASIs, the legal status of the

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by commanding a tablet to be inscribed with orders, forbidding local residents from lodging [legal] plaints with either of the subcounty yamens. Following a petition from twelve Baxian gentry sixty-three years later in Guangxu 2 (1876), circuit intendant Yao Jinyuan issued a similar proclamation proscribing the hearing of cases at subcounty yamens." (citation omitted)).

24. *See* discussion *infra* Part IV.

25. OFF. OF THE U.S. TRADE REPRESENTATIVE, 2021 SPECIAL 301 REPORT 40, 47–48 (2021).

26. S. 3772, 117th Cong. § 2; *see* Jorge L. Contreras, *Guest Post by Prof. Contreras: A Statutory Anti-Anti-Suit Injunction for U.S. Patent Cases?*, PATENTLY-O (Mar. 18, 2022), https://patentlyo.com/patent/2022/03/contreras-statutory-injunction.html (exploring the reasons behind the Defending American Courts Act and its potential impact).

27. *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).

28. Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 63.3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

29. 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) [hereinafter *Article 63.3 Request*].

"typical case" (*dianxing anjian*)[30] designation, adjudication guidelines on act preservation measures, as well as the legal bases for setting global license rates and issuing ASIs and AAASIs.[31] The Chinese government subsequently contested its obligation to provide the requested information.[32] In February 2022, the European Union filed a WTO complaint against China,[33] alleging violations of Article 63.1 and 63.3 of the TRIPS Agreement.[34]

This Article traces the emergence of ASIs in China by examining how the Chinese legal system has made available to local and foreign litigants a procedural mechanism that has traditionally been used in the United States and other common law jurisdictions. The Article aims to elucidate the internal and external forces that led to the rapid adoption of this mechanism in China. By focusing on the Chinese courts' issuance of ASIs, we also hope to shed new light on the process of legal transplantation[35] in the twenty-first century as well as its global ramifications.

Part I of this Article summarizes the theory and history of legal transplants, with a focus on the transplantation of Western legal and

30. *See* Zuigao Renmin Fayuan Caipan Wenshu Gongbu Guanli Banfa, Fashi [2016] Shijiu Hao (最高人民法院裁判文书公布管理办法, 法释【2016】19号) [Administrative Measures for the Publication of Judgements by the Supreme People's Court, Judicial Interpretation No. 19 [2016]] (promulgated by the Judicial Comm. Sup. People's Ct., June 15, 2000, effective June 15, 2000), art. 2.2 (referring to *dianxing anjian* as cases that have "certain guiding effects"); *see also* Council for Trade-Related Aspects of Intell. Prop. Rts., *Response to the European Union's Request for Information Pursuant to Article 63.3 of the TRIPS Agreement: Communication from China*, ¶ 4, WTO Doc. IP/C/W/683 (Sept. 7, 2021) [hereinafter *Article 63.3 Response*] ("[T]he 'typical' cases, 'typical technology cases' and 'big' cases mentioned in the EU communication are cases for reference and have no legal effect of general application. These cases and adjudication guidelines extracted from these cases serve to timely summarize the trial experiences, strengthen publicity of the rule of law and provide references for judicial practices and legal education."). Given the civil law nature of the Chinese legal system, a *dianxing anjian* is different from a binding legal precedent under the principle of stare decisis in the common law tradition.

31. *Article 63.3 Request*, *supra* note 29, at 3–5.

32. *See Article 63.3 Response*, *supra* note 30, ¶ 2 (noting that "China has taken note of the request for information by the European Union pursuant to Article 63.3 of the TRIPS Agreement" and that "there is no such obligation under the TRIPS Agreement for China to respond").

33. Request for Consultations by the European Union, *China—Enforcement of Intellectual Property Rights*, WTO Doc. WT/DS611/1 (Feb. 22, 2022).

34. TRIPS Agreement, *supra* note 28, arts. 63.1, 63.3.

35. *See* discussion *infra* Section I.A (detailing legal transplants and the process of legal transplantation).

intellectual property standards in China. Part II describes the international standardization system and the global jurisdictional battles that have recently emerged over standards-essential patents (SEPs) and FRAND licensing. This Part also discusses the increasing use of ASIs in FRAND disputes in the United Kingdom, the United States, and other jurisdictions. To facilitate comparative analysis and to illustrate the process of legal transplantation, Part III traces similar developments in China. Specifically, this Part documents the evolution of the Chinese standardization system and the country's growing role in international standardization. It also discusses FRAND litigation in China and the Chinese courts' issuance of ASIs in 2020. Part IV explores the internal and external forces driving China's recent effort to transplant ASIs from abroad. Arguing that the ASI represents a new form of legal transplant in the country, this Part discusses the distinctive features of this transplant and its global ramifications. This Article takes note of the impact Chinese ASI transplants will have on U.S. and global FRAND litigation and concludes with a call for a renewed emphasis on international comity in cases where courts consider the issuance of ASIs, AASIs, and AAASIs.

I. THEORY AND HISTORY OF LEGAL TRANSPLANTATION

A. Legal Transplants

From Jeremy Bentham to Alan Watson, many leading lights have studied legal transplants,[36] which the latter has defined as "the borrowing and transmissibility of rules from one society or system to another."[37] Although comparative law scholars remain divided about the normative desirability of legal transplants or the place of this concept in the field of comparative law,[38] legal transplants can be

36. For early book-length treatments of legal transplants, see generally Jeremy Bentham, *Of the Influence of Time and Place in Matters of Legislation*, *in* 1 THE WORKS OF JEREMY BENTHAM 171 (John Bowring ed. 1962) (1843); ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed. 1993).

37. WATSON, *supra* note 36, at 19; *see also* Paul Edward Geller, *Legal Transplants in International Copyright: Some Problems of Method*, 13 UCLA PAC. BASIN L.J. 199, 199 (1994) (defining legal transplant as the process by which "any legal notion or rule which, after being developed in a 'source' body of law, is . . . introduced into another, 'host' body of law").

38. *See* William Twining, *Globalisation and Comparative Law*, *in* COMPARATIVE LAW: A HANDBOOK 69, 83 (Esin Örücü & David Nelken eds., 2007) (noting the "long-running debates between Alan Watson and a number of leading scholars, including Otto Kahn-Freund, Lawrence Friedman, Pierre Legrand, and Esin Örücü").

found in virtually every country today. The borrowing and diffusion of laws dates back to the time before the Roman Empire.[39] In his seminal work, *Legal Transplants: An Approach to Comparative Law*, Professor Watson discusses the reception of Roman law in Roman Egypt and Scotland.[40] In the past few centuries, European colonial powers have also transplanted their legal standards extensively to their colonies.[41] Even three decades ago, many African countries retained on their books outdated intellectual property laws left behind by colonial powers.[42]

Today, the use of legal transplants continues, often in the form of obligations under international trade agreements. In the intellectual property area, for instance, developing country policymakers and their

39. *See* Chen Lei, *Contextualizing Legal Transplant: China and Hong Kong*, *in* METHODS OF COMPARATIVE LAW 192, 192 (Pier Giuseppe Monateri ed., 2012) ("Long before the publication of Alan Watson's magisterial book on the historical transposition of Roman laws to Europe, China had already been experimenting both with exporting its own law and importing foreign law." (footnote omitted)); WATSON, *supra* note 36, at 21 ("[L]egal transplants . . . have been common since the earliest recorded history."); Peter K. Yu, *Sinic Trade Agreements*, 44 U.C. DAVIS L. REV. 953, 997–98 (2011) (discussing the imperial tributary system through which pre-modern China transplanted values, norms, and institutions to its neighbors).

40. WATSON, *supra* note 36, at 31–35, 44–56; *see also id.* at 22 ("[I]t is an accepted fact that most of the private law of all the modern legal systems of the Western world (and also of some non-Western countries), apart from the Scandinavian, derives more or less directly from either Roman Civil Law or English Common Law.").

41. *See* Robert Burrell, *Reining in Copyright Law: Is Fair Use the Answer?*, 4 INTELL. PROP. Q. 361, 362 (2001) ("Although most former colonies have now had their own copyright legislation for a considerable number of years, for the most part this legislation has tended to follow the Imperial model developed in 1911." (footnote omitted)); Ruth L. Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*, 7 SING. J. INT'L & COMPAR. L. 315, 325 (2003) (noting "the extension of intellectual property laws to the colonies for purposes associated generally with the overarching colonial strategies of assimilation, incorporation and control"); Peter K. Yu, *Customizing Fair Use Transplants*, LAWS, Mar. 2018, no. 9, at 12, https://www.mdpi.com/2075-471X/7/1/9 [https://perma.cc/K6PC-K84N] [hereinafter Yu, *Customizing Fair Use Transplants*] ("Australia, Malaysia, Hong Kong, Israel (as Mandate Palestine), Singapore and Sri Lanka were all parts of the British Empire. Because of their colonial status, they had no choice but to adopt the British fair dealing model.").

42. *See* Okediji, *supra* note 41, at 335 & n.73 ("It is well-known . . . that most developing countries retained the structure and form of laws and institutions established during the colonial period, including intellectual property laws. Indeed, prior to the compelled compliance with intellectual property rights imposed by the TRIPS Agreement, many developing and least developed countries still had as their own domestic laws the old Acts and Ordinances of the colonial era." (footnote omitted)).

supportive commentators have repeatedly criticized the TRIPS Agreement[43] and TRIPS-plus bilateral, regional, and plurilateral agreements for imposing high and inappropriate protection and enforcement standards on developing countries.[44] More subtle attempts at legal transplants have also emerged out of technical assistance or capacity building programs, especially those funded by countries interested in transplanting their laws locally.[45]

Thus far, commentators have advanced four main lines of criticism of legal transplants.[46] First, as the failed "law and development"

43. *See generally* GRAEME B. DINWOODIE & ROCHELLE C. DREYFUSS, A NEOFEDERALIST VISION OF TRIPS: THE RESILIENCE OF THE INTERNATIONAL INTELLECTUAL PROPERTY REGIME 33–34 (2012) (discussing the coercion narrative on the origins of the TRIPS Agreement); Donald P. Harris, *TRIPS and Treaties of Adhesion Part II: Back to the Past or a Small Step Forward?*, 2007 MICH. ST. L. REV. 185, 188 (characterizing the TRIPS Agreement as a "treaty of adhesion . . . that was procured through coercion as a result of unequal bargaining power, resulting in unfair surprise and grossly unfair burdens for the weaker party"); Peter K. Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 373–75 (2006) (discussing the coercion narrative).

44. *See generally* INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS (Christopher Heath & Anselm Kamperman Sanders eds., 2007) (collecting essays discussing free trade agreements in the intellectual property context); Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827, 866–70 (2007) [hereinafter Yu, *International Enclosure Movement*] (discussing the TRIPS-plus enclosure of the developing countries' policy space in the intellectual property area).

45. *See* CAROLYN DEERE, THE IMPLEMENTATION GAME: THE TRIPS AGREEMENT AND THE GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES 181 (2009) ("In the realm of TRIPS implementation, capacity-building was rarely just a 'technical' matter. . . . On the economic front, capacity-building was often used to 'buy' stronger [intellectual property] administration and enforcement in developing countries."); Rochelle Cooper Dreyfuss, *TRIPS-Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21, 25 (2004) ("[T]he countries in a position to provide assistance do so on their own terms; that is, they help implement highly protectionist regimes, without regard for the actual needs of developing nations."); Christopher May, *Capacity Building and the (Re)production of Intellectual Property Rights*, 25 THIRD WORLD Q. 821, 822 (2004) ("[C]apacity building for [intellectual property rights] . . . may . . . lead to effective 'epistemic lock-in': capacity building programmes socialise policy makers, practitioners and others into a specific way of dealing with, and regulating, [intellectual property rights]. It encourages the development of a TRIPs mind-set."); Peter K. Yu, *Thinking About the Trans-Pacific Partnership (and a Mega-Regional Agreement on Life Support)*, 20 SMU SCI. & TECH. L. REV. 97, 109 (2017) ("Oftentimes, . . . 'best practices' are introduced [by technical assistance experts] without regard to a particular country's local needs, interests, conditions, or priorities.").

46. *See generally* Peter K. Yu, *The Transplant and Transformation of Intellectual Property Laws in China*, *in* GOVERNANCE OF INTELLECTUAL PROPERTY RIGHTS IN CHINA AND EUROPE 20, 29–32 (Nari Lee et al. eds., 2016) [hereinafter Yu, *Transplant and Transformation*] (discussing these four main lines of criticisms in greater detail).

movement in the 1960s and early 1970s has taught us, legal transplants tend to be insensitive to the local environment.[47] Second, the introduction of reforms based on foreign legal standards may exacerbate the dire economic plight of recipient jurisdictions, especially those in the developing world.[48] Third, legal transplants reduce interjurisdictional competition while taking away valuable opportunities for experimentation with new regulatory and economic policies.[49] Finally, legal transplants, especially those involving controversial laws and policies from abroad, could import problems from source jurisdictions while generating unintended consequences.[50]

Notwithstanding these shortcomings, legal transplants can provide important assistance to recipient jurisdictions. In prior work, one of us (Peter Yu) identified four major benefits of legal transplants:

> First, legal transplants allow countries, especially those with limited resources, to take a free ride on the legislative efforts of other, usually more economically and technologically developed, countries. . . . Second, [these] transplants can provide standards that have served as time-tested solutions to similar problems,

47. *See* JAMES A. GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA 280 (1980) (contending that the law and development movement is "an energetic but flawed attempt to provide American legal assistance and to transfer American legal models, which were themselves flawed").

48. *See* Yu, *International Enclosure Movement*, *supra* note 44, at 828 (lamenting how the erosion of policy space in the international intellectual property arena has "forced [developing countries] to adopt inappropriate intellectual property systems" while taking away "their ability to respond to domestic crises within their borders").

49. *See* John F. Duffy, *Harmony and Diversity in Global Patent Law*, 17 BERKELEY TECH. L.J. 685, 703–09 (2002) (discussing how interjurisdictional competition can enable each jurisdiction to match its laws to local preferences while providing a check on government and how countries can develop legal systems by experimenting with new regulatory and economic policies).

50. *See* Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, 7 J. INT'L ECON. L. 279, 300–02 (2004) (expressing concern about international patent harmonization "at the very time when the domestic standards of the United States and the operations of its patent system are under critical assault" and fearing that "bad decisions and bad laws are far more likely to emerge than good laws that appropriately balance public and private interests"); Jerome H. Reichman, *Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?*, 46 HOUS. L. REV. 1115, 1127 (2009) ("At the end of the day, discreetly following in the technology-exporting countries' [intellectual property] footsteps will merely bring the high- and middle-income developing countries face to face with the serious problems that [developed] countries have themselves failed to solve.").

> drawing on lessons learned from the experiences in the source countries—both positive and negative. . . . Third, legal transplants may help provide pre-emptive defences to countries that face repeated or intense pressure from their more powerful trading partners, not to mention the strong likelihood that the laws in these powerful countries will eventually become international standards by virtue of the source countries' sheer economic and political might. . . . [Fourth], if a substantial portion of the international community has already adopted the transplanted laws, such transplants will promote benefits that are derived from greater harmonization.[51]

Whether a country can take advantage of these benefits and use legal transplants effectively will depend on its success in customizing and assimilating the imported standards based on local needs, interests, conditions, and priorities.[52] The more customized and assimilated those transplants are, the more appropriate and effective they will become.

Finally, the same laws may operate differently in the source and recipient jurisdictions. As Professor Watson reminds us:

> [A] voluntary reception or transplant almost always—always in the case of a major transplant—involves a change in the law, which can be due to any number of factors, such as climate, economic conditions, religious outlook . . . or even chance largely unconnected either with particular factors operating within the society as a whole or with the general historical trend.[53]

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51. Yu, *Transplant and Transformation*, *supra* note 46, at 32–34.

52. *See* Nari Lee, *Intellectual Property Law in China—From Legal Transplant to Governance*, *in* GOVERNANCE OF INTELLECTUAL PROPERTY RIGHTS IN CHINA AND EUROPE, *supra* note 46, at 5, 9 ("[I]f the law is there to recognize a pre-existing normative order, without localization, the laws that are introduced to a foreign culture may only be implemented successfully as a matter of an 'unusual and accidental coincidence' as noted by Montesquieu."); Yu, *Customizing Fair Use Transplants*, *supra* note 41, at 11 ("[R]egardless of whether a legal transplant is widely supported by the local populace or forced upon them from abroad, the transplanted law needs to be customized to local conditions if it is to be effective and if it is to receive wide public support."); Peter K. Yu, *Digital Copyright Reform and Legal Transplants in Hong Kong*, 48 U. LOUISVILLE L. REV. 693, 755 (2010) ("[L]ike the transplant of plants or human organs, the [legal transplantation] process requires a careful process of evaluation, selection, adaptation, and assimilation."); *see also* WATSON, *supra* note 36, at 27 ("A successful legal transplant—like that of a human organ—will grow in its new body, and become part of that body just as the rule or institution would have continued to develop in its parent system.").

53. WATSON, *supra* note 36, at 97.

Such transformation is unsurprising considering the vast differences in histories, cultures, values, and philosophies across jurisdictions.[54] Because laws tend to be applied or interpreted by reference to domestic market conditions, social contexts, competitive conditions, and local practices, transplanted laws can also generate very different outcomes and impacts in the recipient jurisdiction even if those laws have been transplanted verbatim from the source jurisdiction.[55]

B. Legal Transplants in China

China is no stranger to legal transplants. Since the First Opium War (1839–1842) forced its door open to the outside world, the country has slowly embraced Western laws and institutions.[56] In the beginning, China did so very reluctantly, and its "unequal treaties" with the Western colonial powers dictated most of the legal and institutional reforms.[57] For example, the widely detested extraterritoriality provisions (*lingshi caipanquan*) allowed foreigners accused of crimes against Chinese subjects to be tried in China not by local laws or local courts, but by their own laws and the representatives of their home governments.[58] As William Alford observes, those provisions "mandated that Chinese seeking redress against foreigners avail

54. *See id.* at 116 ("Transplanting frequently, perhaps always, involves legal transformation.").

55. *See id.* ("Even when the transplanted rule remains unchanged, its impact in a new social setting may be different. The insertion of an alien rule into another complex system may cause it to operate in a fresh way."); Graeme B. Dinwoodie, *International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought?*, 49 AM. J. COMPAR. L. 429, 436 (2001) ("[E]ven identical rules of law may lead to different results when applied in different social contexts by different tribunals. National laws . . . are normally applied by reference to national market conditions. Factual differences in social practices, competitive conditions or consumer attitudes will lead to different legal conclusions (even under the same legal standard) that rest on those factual findings."); Geller, *supra* note 37, at 207–09 (discussing relativist challenges to legal transplant analysis caused by differing linguistic, cultural, or historical perspectives).

56. *See generally* IMMANUEL C.Y. HSÜ, THE RISE OF MODERN CHINA 858–69 (6th ed. 2000) (discussing the First Opium War and its aftermath).

57. *See generally id.* at 139–219, 295–350, 387–406 (discussing semicolonial rule in China in the nineteenth and early twentieth centuries and many "unequal treaties" the country was forced to sign).

58. *See id.* at 190–91 (noting the inclusion of exterritoriality provisions in the 1843 Treaty of the Bogue with Great Britain, the 1844 Treaty of Wangxia with the United States, and the 1844 Treaty of Whampoa with France). *See generally* GEORGE W. KEETON, THE DEVELOPMENT OF EXTRATERRITORIALITY IN CHINA (1969) (providing a comprehensive discussion of the development of extraterritoriality in China).

themselves, especially without assistance, of a legal order the fundamental principles of which were alien to the Chinese legal tradition."[59] As a result, the imposition of extraterritoriality on China created the same problems that the Western powers complained about when the imperial court in the Qing dynasty required foreign nationals and businesses to abide by local laws and customs.[60]

By the mid-nineteenth century, however, some in the Qing court began to realize the need for modernization.[61] For the next few decades, China undertook major diplomatic, military, industrial, and institutional reforms in what historians have referred to as the Self-Strengthening Movement.[62] China's love-hate relationship with Western technologies, ideas, and institutions, and the push and pull factors that dominated this historic movement, would find parallels in later transplantation efforts in the country, including those we see today.[63]

In the past century, commentators have documented a wide array of transplants in different areas of law in China.[64] Particularly notable

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59. WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 33 (1995) (footnote omitted).

60. *See id.* ("Ironically, th[e] system [of extraterritoriality], imposed by Westerners because of the injustices Chinese law supposedly perpetrated on foreigners, perpetrated many of the same injustices on the Chinese, leaving them with few victories and much skepticism regarding Western justice.").

61. *See* HSÜ, *supra* note 56, at 289–90 ("The great majority of the scholar-official class regarded foreign affairs and Western-style enterprises as 'dirty' and 'vulgar,' beneath their dignity.").

62. The Self-Strengthening Movement lasted from 1861 to 1895. *See generally id.* at 261–312 (discussing the Self-Strengthening Movement); Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT'L. L.J. 1, 22–24 (2001) [hereinafter Yu, *Piracy, Prejudice, and Perspectives*] (discussing the movement in relation to intellectual property reforms in China).

63. *See* Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-first Century*, 50 AM. U. L. REV. 131, 189 (2000) [hereinafter Yu, *From Pirates to Partners I*] (discussing the "paradox of admiration and skepticism" Chinese officials have toward the West and Western institutions since the mid-nineteenth century).

64. *See, e.g.*, Chen Jianfu, *Modernisation, Westernisation, and Globalisation: Legal Transplant in China*, *in* ONE COUNTRY, TWO SYSTEMS, THREE LEGAL ORDERS—PERSPECTIVES OF EVOLUTION 91, 91 (Jorge Costa Oliveira & Paulo Cardinal eds., 2009) ("[T]he modern evolution of Chinese law is largely a process of legal transplantation in the name of modernization."); Zheng Wentong, *Transplanting Antitrust in China: Economic Transition, Market Structure, and State Control*, 32 U. PA. J. INT'L L. 643, 671–715 (2010) (discussing the Chinese Anti-Monopoly Law as a legal transplant); Zhou Ling, *The Independent Director System and Its Legal Transplant into China*, 6 J. COMPAR. L. 262,

were the efforts to modernize the country's legal system in the early twentieth century, rebuild that system in the 1980s shortly after the end of the Cultural Revolution (1966–1976), and prepare for its accession to the WTO in December 2001.[65] To illustrate the evolving process of legal transplantation in China, the next Section provides more detailed discussion in one area of law: intellectual property.

C. Intellectual Property Transplants in China

Until the late 2000s, legal transplants have provided the primary means by which modern intellectual property standards have been established in China. To a large extent, "[t]he history of intellectual property laws in China is a history of legal transplants."[66] Such transplants can be found in the Great Qing Copyright Law of 1910 (*Da Qing Zhuzuoquan Lü*),[67] the intellectual property laws introduced in the Republican era (1911–1949),[68] as well as the more recent laws and regulations adopted after the reopening of China in the late 1970s and in the run-up to the country's

273–80 (2011) (discussing the transplant of the independent director system into China).

65. *See generally* ALBERT CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 27–47 (4th ed. 2011) (providing a legal history of modern China); Peter K. Yu et al., *China and the WTO: Progress, Perils, and Prospects*, 17 COLUM. J. ASIAN L. 1, 11–15 (2003) (discussing the legal reforms in the run-up to China's accession to the WTO).

66. Yu, *Transplant and Transformation*, *supra* note 46, at 20.

67. Da Qing Zhuzuoquan Lü (大清著作权律) [Great Qing Copyright Law] (1910), *reprinted in* HISTORICAL DOCUMENTS OF CHINA'S COPYRIGHT LAW 89–94 (Zhou Lin & Li Mingshan eds., 1999), *translated in* NORWOOD F. ALLMAN, HANDBOOK ON THE PROTECTION OF TRADE-MARKS, PATENTS, COPYRIGHTS, AND TRADE-NAMES IN CHINA 112–21 (1924). For discussions of the Great Qing Copyright Law, see generally Lee Jyh-An & Li Yangzi, *The Untold Story of the First Copyright Statute of China: Exploring the 1910 Copyright Code of the Great Qing Dynasty*, *in* INTELLECTUAL PROPERTY AND THE LAW OF NATIONS, 1860–1920 (P. Sean Morris ed., forthcoming 2022); Li Yufeng & Catherine W. Ng, *Understanding the Great Qing Copyright Law of 1910*, 56 J. COPYRIGHT SOC'Y U.S.A. 767 (2008). Adopted the year before the fall of the Qing dynasty and the end of imperial rule in China, the Republican government continued to use the statute in the form of a provisional act. Peter K. Yu, *A Half-Century of Scholarship on the Chinese Intellectual Property System*, 67 AM. U. L. REV. 1045, 1054 n.35 (2018) [hereinafter Yu, *Half-Century of Scholarship*].

68. *See* ALFORD, *supra* note 59, at 41–53 (discussing the intellectual property laws adopted during the Republican era, including the 1912 Patent Law, the 1923 Trademark Law, the 1928 Copyright Law, the 1930 Trademark Law, and the 1944 Patent Law).

accession to the WTO.[69] Even the Soviet-style intellectual property regulations and resolutions that were put in place in the first three decades of the People's Republic were transplanted from abroad.[70]

Although commentators have frequently characterized intellectual property transplants in China as coerced or involuntary,[71] the transplantation process, like the country's earlier modernization efforts, was driven by both "push" and "pull" factors.[72] Consider, for instance, the adoption of the 1984 Patent Law,[73] the first modern Chinese patent statute that included mostly transplanted laws from Western countries.[74] The push factors are both obvious and dominant. The United States and other trading partners of China wanted stronger patent protection for their businesses and nationals. Article VI of the Agreement on Trade Relations Between the United States of

69. China became the 143rd member of the WTO on December 11, 2001. *China*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/acc_e/a1_chine_e.htm [https://perma.cc/ZL2L-Z3X6].

70. *See* ALFORD, *supra* note 59, at 56–66 (discussing the Soviet-style regulations and resolutions introduced in China in the 1950s, 1960s, and 1970s); Mark Sidel, *The Legal Protection of Copyright and the Rights of Authors in the People's Republic of China, 1949–1984: Prelude to the Chinese Copyright Law*, 9 COLUM. J. ART & L. 477, 478–88 (1985) (same).

71. *See, e.g.*, Robert Burrell, *A Case Study in Cultural Imperialism: The Imposition of Copyright on China by the West*, *in* INTELLECTUAL PROPERTY AND ETHICS 195, 198 (Lionel Bently & Spyros M. Maniatis eds., 1998) (arguing that the Western approach toward China "fails to respect other voices and other traditions, and instead posits the moral superiority of a value system which is far more recent than the tradition it seeks to condemn"); Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 62, at 3–16 (discussing the United States' repeated attempts to convert China into a Western intellectual property regime).

72. *See* Niklas Bruun & Zhang Liguo, *Legal Transplant of Intellectual Property Rights in China: Norm Taker or Norm Maker?*, *in* GOVERNANCE OF INTELLECTUAL PROPERTY RIGHTS IN CHINA AND EUROPE, *supra* note 46, at 43, 46 ("Because there was no sufficient resource of IP [intellectual property] law in the Chinese legal tradition, the easiest way to build up an IP system was to borrow rules from other countries. The use of transplants in the IP legislation has been a natural way to go forward in the process."); Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, *in* INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA 173, 188–202 (Daniel J. Gervais ed., 1st ed. 2007) [hereinafter Yu, *China Puzzle*] (discussing the internal push that drove intellectual property reforms in China in the latter half of the 1990s and in the 2000s).

73. Zhonghua Renmin Gongheguo Zhuanli Fa (中华人民共和国专利法) [Patent Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, effective Apr. 1, 1985) [hereinafter 1984 Patent Law].

74. *See* Yu, *Transplant and Transformation*, *supra* note 46, at 24–27 (documenting the history of intellectual property transplants in China).

America and the People's Republic of China called for reciprocal protection of patents, in addition to copyrights and trademarks.[75]

The pull factors were equally influential. Recognizing the lack of appropriate indigenous models for developing new intellectual property laws, China sent delegations to the U.N. Educational, Scientific and Cultural Organization (UNESCO), the World Intellectual Property Organization (WIPO), and countries such as Australia, Brazil, France, West Germany, Japan, Romania, Switzerland, the United States, and Yugoslavia in the 1970s.[76] Even though Chinese officials had major discomfort with the impact of a new patent law on science and technology and with the introduction of private ownership in a socialist economy, they realized the country's desperate need for intellectual property reforms to move forward and adopted the new law a few years later.[77]

In the run-up to China's accession to the WTO, similar push and pull factors existed. When China amended the Patent Law for the

75. Agreement on Trade Relations Between the United States of America and the People's Republic of China, China-U.S., art. VI(3), July 7, 1979, 31 U.S.T. 4652 ("Both Contracting Parties agree that each Party shall seek, under its laws and with due regard to international practice, to ensure to legal or natural persons of the other Party protection of patents and trademarks equivalent to the patent and trademark protection correspondingly accorded by the other Party."); *id.* art. VI(5) ("Both Contracting Parties agree that each Party shall take appropriate measures, under its laws and regulations and with due regard to international practice, to ensure to legal or natural persons of the other Party protection of copyrights equivalent to the copyright protection correspondingly accorded by the other Party.").

76. *See* ALFORD, *supra* note 59, at 69 (noting the dispatch of Chinese delegations to the U.N. Educational, Scientific and Cultural Organization, the World Intellectual Property Organization, major industrial nations, and relatively prosperous socialist states); ANDREW C. MERTHA, THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA 78 (2005) (recounting the Chinese delegation to the World Intellectual Property Organization in November 1973, which was led by future Chief Justice of the Supreme People's Court Ren Jianxin); William O. Hennessey, *Protection of Intellectual Property in China (30 Years and More): A Personal Reflection*, 46 HOUS. L. REV. 1257, 1283 (2009) (discussing Ren's 1973 visit to WIPO); Maria C.H. Lin, *The Patent Law of the People's Republic of China*, 13 AIPLA Q.J. 107, 108 (1985) ("In 1978, delegations were sent to Japan, the United States, France, West Germany, Switzerland, Australia, Brazil, Romania and Yugoslavia to study their patent laws.").

77. For discussions of the debates surrounding the drafting of the 1984 Patent Law, see generally STAFF OF THE SPEC. SUBCOMM. ON U.S. TRADE WITH CHINA OF THE H. COMM. ON ENERGY & COMMERCE, 98TH CONG., CHINA'S NEW PATENT LAW AND OTHER RECENT LEGAL DEVELOPMENTS 18–33 (Comm. Print 1984); ALFORD, *supra* note 59, at 67–69; MERTHA, *supra* note 76, at 82–87; Peter K. Yu, *Building the Ladder: Three Decades of Development of the Chinese Patent System*, 5 WIPO J. 1, 6 (2013) [hereinafter Yu, *Building the Ladder*].

second time in August 2000 in preparation to join the international trading body,[78] a large part of the amendment was instituted to conform the law to TRIPS standards and to respond to external pressure from the developed world.[79] Starting in the mid-1980s, those pressures, coming mostly from the United States, were filled with threats of economic sanctions, trade wars, non-renewal of most-favored-nation status, and opposition to China's entry into the WTO.[80] Among the changes China introduced through the second amendment were a prohibition on offers to sell infringing products, the tightening of the standards for obtaining a compulsory license, the introduction of preliminary injunctions, the provision of judicial review of patent invalidation decisions, and the allowance for the use of appropriate royalties to calculate damages.[81]

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78. Zhonghua Renmin Gongheguo Zhuanli Fa (中华人民共和国专利法) [Patent Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, amended Aug. 25, 2000, effective July 1, 2001) [hereinafter 2000 Patent Law]. When China amended the law the first time in 1992, less than eight months after it signed the Memorandum of Understanding on the Protection of Intellectual Property with the United States, external pressure was the primary driver behind that amendment. Zhonghua Renmin Gongheguo Zhuanli Fa (中华人民共和国专利法) [Patent Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, amended Sept. 4, 1992, effective Jan. 1, 1993) [hereinafter 1992 Patent Law]; *see* Memorandum of Understanding on the Protection of Intellectual Property, China-U.S., art. 1, Jan. 17, 1992, T.I.A.S. No. 12,036 (stipulating the levels of protection provided by Chinese patent law).

79. *See* Yu, *Building the Ladder*, *supra* note 77, at 10 ("[T]he Second Amendment was adopted to conform the Chinese patent system to WTO standards. The need for such conformity was understandable considering China's willingness to make significant sacrifices to join the WTO."). This Amendment nonetheless addressed the rapidly changing local conditions, such as "the Chinese leaders' changing attitude towards the rule of law, the emergence of private property rights and local stakeholders, the increasing concerns about ambiguities over relationships in state-owned enterprises, and the government's active push for modernization." Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901, 908 (2006); *see also id.* at 914–22 (discussing these changing conditions).

80. *See* Yu, *From Pirates to Partners I*, *supra* note 63, at 140–51 (describing the United States' use of Section 301 sanctions and various trade threats to induce China to strengthen protection of intellectual property rights). Section 301 permits the U.S. President to investigate and impose sanctions on countries engaging in unfair trade practices that threaten the United States' economic interests. *See* 19 U.S.C. §§ 2411–2420.

81. 2000 Patent Law, *supra* note 78, arts. 11, 46, 48–50, 60, 63; *see also* Peter K. Yu, *China's Innovative Turn and the Changing Pharmaceutical Landscape*, 51 U. PAC. L. REV.

Like the 1984 Patent Law and the subsequent 1992 amendment, the 2000 amendment was also driven by some pull factors.[82] For example, China placed very high importance on its accession to the WTO,[83] leading Samuel Kim to observe that the country was eager "to gain WTO entry at almost any price."[84] The reformist factions also saw the benefits of using external pressure and WTO accession to provide impetus for intellectual property law reforms that they would have supported in any event.[85] To strike an appropriate balance, China carefully practiced "selective adaptation" strategies to transplant those intellectual property standards that had been pushed by foreign countries but that could also provide local benefits.[86] In retrospect,

593, 598 (2020) [hereinafter Yu, *China's Innovative Turn*] (highlighting the major changes in the 2000 Patent Law).

82. *Compare* 2000 Patent Law, *supra* note 78, *with* 1992 Patent Law, *supra* note 78; 1984 Patent Law, *supra* note 73.

83. *See* Yu, *Transplant and Transformation*, *supra* note 46, at 26 ("[M]any Chinese leaders and members of the public considered the WTO membership not only as an economic issue, but also as an issue affecting national pride.").

84. Samuel S. Kim, *China in World Politics*, *in* DOES CHINA MATTER? A REASSESSMENT: ESSAYS IN MEMORY OF GERALD SEGAL 37, 49 (Barry Buzan & Rosemary Foot eds., 2004).

85. *See* MARK A. GROOMBRIDGE & CLAUDE E. BARFIELD, TIGER BY THE TAIL: CHINA AND THE WORLD TRADE ORGANIZATION 41 (1999) ("[A]n international institution such as the WTO can help bolster China's reform leadership against powerful hard-liners."); Richard Janda & Men Jing, *China's Great Leap of Faith: Telecommunications and Financial Services Commitments*, *in* CHINA AND THE LONG MARCH TO GLOBAL TRADE: THE ACCESSION OF CHINA TO THE WORLD TRADE ORGANIZATION 66, 67 (Sylvia Ostry et al. eds., 2003) ("The Chinese leadership obviously chose to use WTO entry not only to solidify existing reforms, but also as an engine for further and more dramatic reforms in the key financial services and telecommunications sectors."); Kenneth Lieberthal & Geoffrey Lieberthal, *The Great Transition*, *in* HARVARD BUSINESS REVIEW ON DOING BUSINESS IN CHINA 1, 7 (2004) ("[T]he reformers in the government plan to use the WTO entry requirements to force the domestic reforms that they believe will make Chinese firms competitive internationally in the coming decades."); Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 440 (2003) (noting that the United States' trade threats and coercive tactics "provid[ed] the reformist leaders with the needed push that helped reduce resistance from their conservative counterparts").

86. *See* Wu Handong, *One Hundred Years of Progress: The Development of the Intellectual Property System in China*, 1 WIPO J. 117, 118–19 (2009) (discussing the stage of "selective arrangement in light of domestic development"); Peter K. Yu, *When the Chinese Intellectual Property System Hits 35*, 8 QUEEN MARY J. INTELL. PROP. 3, 12 (2018) ("[A]s China moved from the imitation and transplantation phase to the indigenization and transformation phase, it has skilfully deployed 'selective adaptation' strategies to ensure the incorporation of only beneficial features of the TRIPS Agreement without also transplanting its harmful and unsuitable elements."). *See generally* Peter K. Yu, *TRIPS and Its Contents*, 60 IDEA 149, 207–15 (2020) (discussing the process of selective adaptation).

these strategies helped China make the needed legal and policy changes to catch up with the developed world.

In the late 2000s, China adopted the National Intellectual Property Strategy[87] and began taking an innovative turn that would have serious ramifications for intellectual property developments at both the national and international levels.[88] The active push for stronger intellectual property standards was no longer just an effort to placate the European Union, the United States, and other developed countries. Rather, China made a deliberate choice to improve its intellectual property system so that the system could be used to its advantage. Indeed, the Third Amendment to the Patent Law, the first major intellectual property law reform the country undertook after releasing the National Intellectual Property Strategy, differed significantly from the two earlier amendments.[89] While the first two amendments focused on facilitating compliance with external norms, this round of patent law reform aimed to address internal needs, interests, conditions, and priorities.[90] The subsequent amendments to

87. STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, GUOJIA ZHISHI CHANQUAN ZHANLÜE GANGYAO (国家知识产权战略纲要) [AN OUTLINE OF THE NATIONAL INTELLECTUAL PROPERTY STRATEGY] (2008), *translated at* https://wipolex.wipo.int/en/text/475076 [https://perma.cc/Y6HE-4M3D]; *see also* Yu, *Half-Century of Scholarship*, *supra* note 67, at 1079–85 (discussing the National Intellectual Property Strategy). This strategy "provided a comprehensive plan to improve the protection and management of intellectual property rights while emphasizing the need for active development of independent or self-controlled intellectual property." Yu, *Transplant and Transformation*, *supra* note 46, at 27.

88. *See* Yu, *China's Innovative Turn*, *supra* note 81, at 599–602 (discussing China's innovative turn).

89. *Compare* Zhonghua Renmin Gongheguo Zhuanli Fa (中华人民共和国专利法) [Patent Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, amended Dec. 27, 2008, effective Oct. 1, 2009) [hereinafter 2008 Patent Law], *with* 2000 Patent Law, *supra* note 78; 1992 Patent Law, *supra* note 78.

90. *See* Guo He, *Patents*, *in* CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY LAWS 25, 28 (Rohan Kariyawasam ed., 2011) ("The impetus for the early amendments came from outside, whilst the need for the third amendment [to the Patent Law] originated from within China, that is to say, the majority of the third amendment was to meet the needs of the development of the domestic economy and technology originating in China."); Yu, *Transplant and Transformation*, *supra* note 46, at 27–28 (noting that "China, for the first time, adjusted its patent standards based on its own needs").

trademark, unfair competition, patent, and copyright laws also generally proceeded in the same direction.[91]

For instance, the 2019 amendment to the Trademark Law added new emphasis on the "intent to use,"[92] similar to what is found in the United States.[93] The 2020 amendment to the Patent Law included a new provision on effective patent term extension,[94] which Section III.C will explore in greater depth.[95] Adopted around the same time, the 2020 amendment to the Copyright Law expanded the list of copyrightable subject matter in Article 3,[96] embracing new standards

91. These amended laws, in chronological order, were Zhonghua Renmin Gongheguo Shangbiao Fa (中华人民共和国商标法) [Trademark Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, amended Aug. 30, 2013, effective May 1, 2014) [hereinafter 2013 Trademark Law]; Zhonghua Renmin Gongheguo Fan Buzhengdang Jingzheng Fa (中华人民共和国反不正当竞争法) [Law Against Unfair Competition of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993, amended Nov. 4, 2017, effective Jan. 1, 2018); Zhonghua Renmin Gongheguo Shangbiao Fa (中华人民共和国商标法) [Trademark Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, amended Apr. 23. 2019, effective Nov. 1, 2019) [hereinafter 2019 Trademark Law]; Zhonghua Renmin Gongheguo Zhuanli Fa (中华人民共和国专利法) [Patent Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, amended Oct. 17, 2020, effective June 1, 2021) [hereinafter 2020 Patent Law]; Zhonghua Renmin Gongheguo Zhuzuoquan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amended Nov. 11, 2020, effective June 1, 2021) [hereinafter 2020 Copyright Law].

92. *See* 2019 Trademark Law, *supra* note 91, art. 4 ("A mala fide application for trademark registration for a purpose other than use shall be rejected."); *see also* Dong Huijuan & Lin Xiuqin, *Major Changes in the Chinese Trademark Law in the Transitional Period*, 8 QUEEN MARY J. INTELL. PROP. 50, 51–53 (2018) (discussing the greater emphasis in Chinese trademark law on trademark use and factual use despite the "established principle that the exclusive trademark right is primarily obtained by registration").

93. *See* 15 U.S.C. § 1051(b) (allowing for "[a]pplication for bona fide intention to use trademark").

94. *See* 2020 Patent Law, *supra* note 91, art. 42 (granting a limited extension of the patent term for up to five years to compensate for the time lost when a pharmaceutical product is undergoing regulatory review).

95. *See* discussion *infra* Section III.C.

96. *See* 2020 Copyright Law, *supra* note 91, art. 3 (extending coverage to all works in the fields of literature, arts, and sciences as long as those works are original and are expressed in a certain form). For discussions of the major changes in the 2020 amendment, see generally Peter K. Yu, *The Long and Winding Road to Effective Copyright*

that are quite similar to the originality and fixation requirements in U.S. copyright law.[97] Striking a compromise between the closed-list approach to copyright limitations and exceptions in Europe and the open-ended fair use approach in the United States, Article 24 also added "other circumstances provided for by laws and administrative regulations" to the list of enumerated circumstances in which a copyrighted work may be used without authorization or remuneration.[98] Taken together, all of these amendments were carefully transplanted from abroad to improve China's national advantage. The transplantation process involved resembles the one used to introduce ASIs in China, which will be the focus of the remainder of this Article.

II. USE OF ASIS IN INTERNATIONAL FRAND DISPUTES

To provide the background needed to fully understand the ASIs issued by Chinese courts, this Part discusses the international standardization system, global disputes arising from FRAND licensing, and the increasing use of ASIs in such cases.

A. International Standardization

Technical interoperability standards such as Wi-Fi, 5G, Bluetooth, and USB enable a wide range of electronic devices—from smartphones and computers to electric meters and home appliances—to communicate and interoperate with one another seamlessly and with minimal user intervention. Such standards, and the widespread product interoperability that they enable, can promote innovation, reduce development costs, increase consumer utility, and yield significant market efficiencies known as "network effects."[99] The importance of standards continues to grow in today's interconnected global economy. Efforts are now underway to develop future generations of wireless communications protocols that will link a vast array of devices embedded in personal accessories, medical devices,

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Protection in China, 49 PEPP. L. REV. 681 (2022) [hereinafter Yu, *Long and Winding Road*]; Peter K. Yu, *Third Amendment to the Chinese Copyright Law*, 69 J. COPYRIGHT SOC'Y U.S.A. (forthcoming 2022).

97. *See* 17 U.S.C. § 102(a) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . .").

98. 2020 Copyright Law, *supra* note 91, art. 24.

99. *See* CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 45–46 (1999); U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 33 (2007).

vehicles, home appliances, and the built environment: the so-called "Internet of Things."[100]

Such technical standards may be developed in a variety of settings. Government agencies develop some health, safety, and environmental standards.[101] Individual firms may develop proprietary technologies that, through broad market adoption, become de facto standards—for example, Adobe's portable document format (PDF).[102] But most interoperability standards today are developed by groups of industry participants that collaborate within voluntary associations known as standards development organizations (SDOs).[103] The standards produced within these organizations are often referred to as "voluntary consensus standards," as they are developed through consensus-based collaborative processes, and there is no requirement that participants use the resulting standards.[104]

The earliest voluntary SDOs in Europe and the United States arose at the end of the nineteenth century from professional engineering associations.[105] The first of these SDOs with a truly international outlook was the International Association for Testing Materials, which was established in 1898.[106] Since then, a wide range of international SDOs have emerged. Examples include officially recognized bodies that standardize technologies across a wide range of disciplines, such as the International Organization for Standardization (ISO) and the

100. *See* Ari Keränen & Carsten Bormann, *Internet of Things: Standards and Guidance from the IETF*, IETF J. (Apr. 17, 2016), https://www.ietfjournal.org/internet-of-things-standards-and-guidance-from-the-ietf [https://perma.cc/K5CR-FZE6].

101. Jorge L. Contreras, *Technical Standards, Standards-Setting Organizations and Intellectual Property: A Survey of the Literature (with an Emphasis on Empirical Approaches), in* RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW: VOL. II—ANALYTICAL METHODS 185, 186 (Peter S. Menell & David L. Schwartz eds., 2019) [hereinafter Contreras, *Technical Standards*].

102. SHAPIRO & VARIAN, *supra* note 99, at 16, 254. In several well-known cases (e.g., Betamax vs. VHS and HD-DVD vs. Blu-ray), competing firms have engaged in commercial "standards wars" to determine which of their proprietary formats will prevail in the market. *Id.* at 17.

103. *Id.* at 237; Jorge L. Contreras, *A Tale of Two Layers: Patents, Standardization, and the Internet*, 93 DENV. L. REV. 855, 857 (2016) [hereinafter Contreras, *A Tale of Two Layers*].

104. *See* SHAPIRO & VARIAN, *supra* note 99, at 238 (explaining that the fundamental principle in consensus-based standard setting is openness, which is a powerful tool for establishing credibility).

105. *See generally* JOANNE YATES & CRAIG N. MURPHY, ENGINEERING RULES: GLOBAL STANDARD SETTING SINCE 1880, at 19–51 (2019) (providing an overview of the historical development of international standardization).

106. *Id.* at 43.

European Telecommunications Standards Institute (ETSI); large private organizations that develop a range of related standards, such as the Institute of Electrical and Electronics Engineers (IEEE) Standards Association and Internet Engineering Task Force (IETF); and smaller groups often referred to as "consortia" that focus on one or a handful of related standards, such as the HDMI (High-Definition Multimedia Interface) Forum and the Bluetooth Special Interest Group.[107]

B. Patents and Standards

A patent gives its owner the exclusive right to exclude others from practicing (i.e., making, using, selling, and importing) a claimed invention throughout the issuing jurisdiction. Patent protection in most countries lasts for a period of twenty years from the date that the relevant patent application was filed.[108] Patents may cover any system, device, product feature, process, or improvement so long as it is useful, novel, and nonobvious, in view of existing technologies and publications.[109] These basic features of patent law are now found in not only developed countries but also throughout the world, thanks in part to the legal transplants driven by the TRIPS Agreement.[110]

Patents often cover products that implement the interface protocols and designs specified by technical standards. Most of these patents are owned by one or more firms engaged in the standards-development process.[111] Patents that will necessarily be infringed by a product conforming to a particular standard are referred to as SEPs.[112] Complex technological products may implement dozens or even hundreds of standards,[113] each of which may be covered by hundreds

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107. *See generally* C. Bradford Biddle, *No Standard for Standards: Understanding the ICT Standards-Development Ecosystem*, *in* CAMBRIDGE HANDBOOK OF TECHNICAL STANDARDIZATION LAW: COMPETITION, ANTITRUST, AND PATENTS 17, 17–28 (Jorge L. Contreras ed., 2018). The term SDO is often used interchangeably with the term SSO (standard setting organization). While fine distinctions can be made, this Article treats these terms as synonymous.

108. *See, e.g.*, 35 U.S.C. § 154(a)(2) (providing a patent term of twenty years subject to the payment of maintenance fees).

109. *Id.* §§ 101–103.

110. TRIPS Agreement, *supra* note 28, arts. 27.1, 33.

111. Contreras, *A Tale of Two Layers*, *supra* note 103, at 860.

112. *Id.*

113. *See* Brad Biddle et al., *How Many Standards in a Laptop? (And Other Empirical Questions)*, *in* PROCEEDINGS OF THE 2010 ITU-T KALEIDOSCOPE ACADEMIC CONFERENCE 123, 125 & fig.2 (2010) (finding that 75% of the laptop computer standards studied were subject to a RAND commitment and 22% were royalty-free).

or thousands of SEPs.[114] The result today is a large body of patents covering different aspects of certain standards.

For more than a century, SDOs and SDO members have been aware of the implicit risks in allowing features of an interoperability standard to be patented. Ordinarily, if the vendor of a product that allegedly infringes a patent is unable or unwilling to obtain a license on the terms offered by the patent holder, that vendor has three choices: (1) stop selling the infringing product; (2) design around the patent; (3) do neither and risk liability as an infringer.[115] With standards-compliant products, however, designing around the patent may be impossible or may make the product non-compliant with the standard.[116] Moreover, once an SDO publishes a standard, market participants may make significant investments anticipating the manufacture of products incorporating that standard.[117] In such cases, the cost of switching from the standardized technology to an alternative technology may be prohibitive, creating a "lock in" situation.[118] When a product manufacturer is locked into a particular standard, the SEP holder that is negotiating with that manufacturer has inordinate bargaining power and may thus be able to charge a license fee in excess of the value of the patented technology.[119] This phenomenon has been termed "patent hold-up" and is discussed extensively in the scholarly literature.[120]

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114. *See generally* Justus Baron & Tim Pohlmann, *Mapping Standards to Patents Using Declarations of Standard-Essential Patents*, 27 J. ECON. & MGMT. STRATEGY 504, 504–26 (2018).

115. Jorge L. Contreras, *The Global Standards Wars: Patent and Competition Disputes in North America, Europe and Asia* 3 (Univ. of Utah, S.J. Quinney Coll. of L. Legal Stud. Rsch. Paper Series, Paper No. 353, 2018).

116. *Id.*

117. These investments include contractual commitments, purchases of durable goods and capital equipment, employee training, development or procurement of information technology, identification and outfitting of suppliers, and marketing campaigns. *See* SHAPIRO & VARIAN, *supra* note 99, at 116–30.

118. *Id.* at 116; *see also In re* Rambus, Inc., No. 9302, 2006 WL 2330117, at *51–52 (F.T.C. Aug. 2, 2006) (determining that implementers and producers of complementary products would have needed to spend hundreds of millions of dollars to switch to an alternative, non-infringing technology).

119. *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 99, at 38.

120. *E.g.*, Norman V. Siebrasse, *Holdup, Holdout, and Royalty Stacking: A Review of the Literature*, *in* PATENT REMEDIES AND COMPLEX PRODUCTS: TOWARD A GLOBAL CONSENSUS 239 (C. Bradford Biddle et al. eds., 2019); Jorge L. Contreras, *Much Ado About Holdup*, 2019 U. ILL. L. REV. 875.

Recognizing this threat, SDOs have implemented a range of policies to avert patent hold-up affecting their standards. In 1970, the American National Standards Institute (ANSI) adopted a policy requiring ANSI-accredited SDOs to obtain an assurance from the patent holder that it would make a license available to all applicants on terms that either were royalty-free or bore fair and reasonable royalties.[121] The U.S. federal government has enshrined such licensing commitments in its rules for federal use of privately developed standards,[122] and the European Commission has repeatedly expressed support for such measures as means to avoid blocking the adoption of standards.[123] As a result, most SDOs around the world today have adopted policies requiring that SEP holders grant licenses to all manufacturers of standardized products on royalty-free or FRAND terms.[124]

Despite the widespread imposition of FRAND commitments by SDOs, there is little consensus regarding the methodology to determine what royalty rates should be considered "fair" and "reasonable" in any given instance.[125] What's more, few SDOs offer any guidance on how these elusive terms are defined, and many SDOs affirmatively disclaim any role in establishing, interpreting, or adjudicating the reasonableness of FRAND licensing terms.[126] As a

121. ANSI ESSENTIAL REQUIREMENTS: DUE PROCESS REQUIREMENTS FOR AMERICAN NATIONAL STANDARDS § 3.1.1 (AM. NAT'L STANDARDS INST. 2021).

122. Revision of OMB Circular No. A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities," 81 Fed. Reg. 4,673 (Jan. 27, 2016).

123. *See Standard Essential Patents*, EUR. COMM'N, https://ec.europa.eu/growth/industry/strategy/intellectual-property/patent-protection-eu/standard-essential-patents_en [https://perma.cc/LQJ9-EGLZ] ("The European Commission supports the improvement of the framework governing the inclusion of patent-protected technologies into standards and the facilitation of the licensing process for these technologies.").

124. *See* Contreras, *Technical Standards*, *supra* note 101, at 206–07 (summarizing various studies of the patent policies of SDOs and observing that the vast majority of these policies require SEPs to be licensed on royalty-free or FRAND terms).

125. *See id.* at 212–15 (describing competing approaches to assessing the fair and reasonable royalty for a given SEP).

126. *See, e.g.*, Inst. of Elec. & Elecs. Eng'rs, Inc., *IEEE-SA Standards Board Bylaws* § 6.2 (Feb. 2022), http://standards.ieee.org/wp-content/uploads/import/documents/other/sb_bylaws.pdf [https://perma.cc/KH7Y-7ZRZ] ("The IEEE is not responsible for . . . [d]etermining whether any licensing terms or conditions provided in connection with submission of a Letter of Assurance, if any, or in any licensing agreements are reasonable or non-discriminatory."); S. Bradner & J. Contreras, *Intellectual Property Rights in IETF Technology* § 4.D (2017), https://ietf.org/rfc/

result, when parties cannot agree on FRAND royalty rates, the ultimate arbiter of these rates is often a court.

C. International Jurisdictional Disputes over SEPs

Courts adjudicating disputes over FRAND royalties face a dilemma. On one hand, patents are issued under national law and, by definition, have legal effect only in the issuing jurisdiction. On the other hand, the parties to FRAND disputes are often multinational corporations with operations (and patents) around the world. In determining a FRAND royalty rate, a court must decide whether to focus only on the patents issued and asserted in its jurisdiction, or to consider the global business relationship between the parties.[127] Even though a domestic court typically lacks authority to adjudicate infringement damages for foreign patents, it may determine a global rate for the licensed patent portfolio in a FRAND dispute because the dispute is essentially contractual (as opposed to one involving infringement damages for patents in other jurisdictions).[128]

In some cases, courts have limited their assessment of FRAND royalties to the national patents that have been asserted. These cases include *Microsoft Corp. v. Motorola, Inc.*,[129] *In re Innovatio IP Ventures, LLC*,[130] *Ericsson, Inc. v. D-Link Systems, Inc.*,[131] and *Optis Wireless Technology, LLC v. Huawei Device Co.*[132] In each of these cases, a U.S.

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rfc8179.txt.pdf [https://perma.cc/Z4AD-4WJZ] (IETF RFC 8179) ("[IETF] will not make any determination that any terms for the use of an Implementing Technology (e.g., the assurance of reasonable and non-discriminatory terms) have been fulfilled in practice.").

127. Deng Fei et al., *Comparative Analysis of Court-Determined FRAND Royalty Rates*, ANTITRUST, Summer 2018, at 47, 47.

128. *See* Jorge L. Contreras et al., *The Effect of FRAND Commitments on Patent Remedies*, *in* PATENT REMEDIES AND COMPLEX PRODUCTS: TOWARD A GLOBAL CONSENSUS, *supra* note 120, at 160, 161–63 (discussing the differences between adjudication of patent damages and FRAND royalty rates).

129. No. C10-1823JLR, 2013 U.S. Dist. LEXIS 60233, at *275–76, *294–95 (W.D. Wash. Apr. 25, 2013) (noting that the royalty rate should be based on the SEPs used in a particular device and discounted for the unused patents in an SEP portfolio).

130. No. 11 C 9308, 2013 U.S. Dist. LEXIS 144061, at *41 (N.D. Ill. Sept. 27, 2013) (finding that all of the 168 claims are essential to the 802.11 standard and therefore subject to a RAND obligation).

131. 773 F.3d 1201, 1232 (Fed. Cir. 2014) (explaining that royalties should be based on the value added by the claimed features in the asserted patents).

132. No. 2:17-CV-00123-JRG, 2019 U.S. Dist. LEXIS 43489, at *8 (E.D. Tex. Mar. 18, 2019) (holding that the court can only extend relief as far as its jurisdiction allows, and thus cannot adjudicate infringement on Chinese patents).

court determined a FRAND royalty rate and awarded damages to the SEP holder based on the asserted U.S. patents.[133]

However, in the recent U.K. case, *Unwired Planet International Ltd. v. Huawei Technologies Co.*,[134] the court dictated the terms of a global FRAND license between the parties, covering not only the licensor's U.K. patents but also foreign patents covered by the licensor's FRAND commitment.[135] The U.S. District Court for the Central District of California took a similar approach in *TCL Communication Technology Holdings, Ltd. v. Telefonaktienbolaget LM Ericsson*.[136] With the consent of both parties, that court also determined worldwide FRAND royalty rates that TCL, a phone manufacturer, should pay to the SEP holder.[137]

The ability of one domestic court to determine FRAND rates on a global basis can lead to two forms of legal "race." First is a "race to the bottom" among jurisdictions—a well-documented phenomenon in which jurisdictions intentionally adapt their rules, procedures, and substantive outlook to attract litigation or other business.[138] While such systemic adaptations are not inherently socially detrimental, there are numerous examples in which jurisdictional competition has resulted in lax regulation of public safety and corporate procedure.[139] Second, differences among jurisdictions are likely to encourage parties to initiate litigation in the most favorable jurisdiction as quickly as possible, often to foreclose a later suit in a less favorable jurisdiction. Referred to as a "race to judgement" or a "race to the courthouse," this situation may prematurely drive parties to litigation rather than negotiation or settlement.[140] A natural corollary to this type of race is the attempt by one party to strike first and seek an ASI that prevents

133. *Ericsson*, 773 F.3d at 1233, 1235; *Optis Wireless*, 2019 U.S. Dist. LEXIS 43489, at *8; *In re* Innovatio, 2013 U.S. Dist. LEXIS 144061, at *186–88; *Microsoft*, 2013 U.S. Dist. LEXIS 60233, at *302–03.

134. [2017] EWHC (Pat) 711 (Eng.), *aff'd*, [2020] UKSC 37.

135. *Id.* at [793], [794], [807].

136. No. CV 15-2370 JVS(DFMx), 2018 WL 4488286, at *50–52 (C.D. Cal. Sept. 14, 2018), *rev'd in part, vacated in part*, 943 F.3d 1360 (Fed. Cir. 2019), *cert. denied*, 141 S. Ct. 239 (2020).

137. *Id.* at *34, *56.

138. Jorge L. Contreras, *The New Extraterritoriality: FRAND Royalties, Anti-Suit Injunctions and the Global Race to the Bottom in Disputes over Standards-Essential Patents*, 25 B.U. J. SCI. & TECH. L. 251, 280–83 (2019) [hereinafter Contreras, *New Extraterritoriality*].

139. *See id.* at 280–81 (citing examples that include corporate registration, ship registry, and autonomous vehicle regulation).

140. *Id.* at 283–86.

another party from pursuing litigation in another or a more favorable jurisdiction.

D. ASIs in FRAND Cases

1. Background on ASIs

ASIs are interlocutory in personam remedies issued by a court in one jurisdiction to prohibit a litigant or related party from initiating or continuing parallel litigation in another jurisdiction.[141] These remedies are established features of the international litigation landscape and have been known since the fifteenth century—when they were developed by the English common law courts to enjoin parallel proceedings in the equitable Court of Chancery, and vice versa.[142] Today ASIs are issued most frequently by courts in the United Kingdom and the United States, as courts in civil law jurisdictions have historically viewed ASIs with suspicion.[143] ASIs are issued in a wide variety of disputes including international commercial, antitrust, and bankruptcy actions, as well as actions to prevent a party to an

141. Given the jurisdictional rules in different courts, the litigant subject to an ASI in one jurisdiction may not be the same corporate entity as the litigant in a foreign jurisdiction. For example, in *Ericsson v. Samsung*, the Samsung entity that brought an action in Wuhan was not the same Samsung entity sued by Ericsson in Texas. Nevertheless, the orders of both the Wuhan and Texas courts encompassed the actions of Samsung's applicable corporate family members, which the Texas court viewed at least as "functionally the same." Ericsson Inc. v. Samsung Elecs. Co., No. 2:20-CV-00380-JRG, 2021 U.S. Dist. LEXIS 4392, at *3 n.2 (E.D. Tex. Jan. 11, 2021).

142. *See* George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L. L. 589, 593–94 (1990) (noting that the ASI "has deep roots in English law" and is "[t]raceable at least to fifteenth-century England, [when] the remedy first appeared in the form of a writ of prohibition by the common law courts to the ecclesiastical courts to prevent their expansive jurisdictional assertions"); Trevor C. Hartley, *Comity and the Use of Antisuit Injunctions in International Litigation*, 35 AM. J. COMPAR. L. 487, 489–90 (1987) (providing the historical origins of ASIs in England); S.I. Strong, *Anti-Suit Injunctions in Judicial and Arbitral Procedures in the United States*, 66 AM. J. COMPAR. L. (SUPPLEMENT) 153, 155–56 (2018) (discussing the English roots of the U.S. approach to ASIs).

143. *See* John J. Barceló III, *Anti-Foreign-Suit Injunctions to Enforce Arbitration Agreements*, *in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION—THE FORDHAM PAPERS 2007, at 107 (Arthur W. Rovine ed., 2008); Alex C. Lakatos, *Anti-Suit Injunctions in Defence of Arbitration: Protecting the Right to Arbitrate in Common and Civil Law Jurisdictions (Part II)*, MAYER BROWN (Mar. 3, 2008), https://www.mayerbrown.com/en/perspectives-events/publications/2008/03/antisuit-injunctions-in-defence-of-arbitration-pro [https://perma.cc/3BLZ-23GB].

arbitration agreement from commencing litigation over the arbitral matter.[144]

In the United States, the legal standard for issuing ASIs is, as one commentator puts it, "ambiguous and fragmented."[145] Generally speaking, courts follow some variant of the three-part framework developed by the U.S. Court of Appeals for the Ninth Circuit in *E. & J. Gallo Winery v. Andina Licores S.A.*[146] Under this framework, a court considering a request for an ASI must first determine whether the parties and the issues in the action in which the injunction is sought (the local action) are functionally equivalent to those in the action sought to be enjoined (the foreign action).[147] If not, an injunction barring a party from pursuing the foreign action would not reduce duplicative litigation, and would thus be unjustified.[148] If the parties are the same and the issues are functionally equivalent, the court must next determine whether resolution of the local action would dispose of the foreign action.[149] Generally, a court is unlikely to find the issuance of an ASI justified if the local action will not resolve the foreign action. Second, the court must assess whether any of the four factors identified by the U.S. Court of Appeals for the Fifth Circuit in *In re Unterweser Reederei GMBH*[150] are present—namely, whether the foreign litigation would "(1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing court's in rem or quasi in rem jurisdiction; or (4) . . . prejudice other equitable considerations."[151] Finally, if at least one of the *Unterweser* factors is present, the court must ask whether the injunction will have a significant impact on international comity.[152] If not, the ASI may be issued.

144. *See* Lakatos, *supra* note 143 (discussing ASIs in the arbitration context).

145. Strong, *supra* note 142, at 154.

146. 446 F.3d 984, 989–91 (9th Cir. 2006). *See generally* Strong, *supra* note 142, at 159–64 (discussing ASIs in the international context).

147. *Gallo*, 446 F.3d at 991.

148. *Id.*

149. *Id.*

150. 428 F.2d 888 (5th Cir. 1970), *aff'd per curiam*, 446 F.2d 907 (5th Cir. 1971) (en banc), *vacated*, 407 U.S. 1 (1972).

151. *Id.* at 890.

152. *See Gallo*, 446 F.3d at 991; *see also id.* at 994 ("Comity is 'the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws'" (quoting Hilton v. Guyot, 159 U.S. 113, 164 (1895))).

2. ASIs and FRAND

The first notable ASI in a FRAND case was issued by the U.S. District Court for the Western District of Washington in *Microsoft Corp. v. Motorola, Inc.*[153] This case reflects a typical fact pattern in which ASIs are sought in FRAND cases. Microsoft argued in the Washington court that Motorola failed to offer Microsoft a license of certain SEPs on FRAND terms in violation of Motorola's commitments to two SDOs.[154] Six months later, Motorola sued Microsoft for infringement on some of those SEPs in Germany.[155] The German court, finding infringement, enjoined Microsoft from selling infringing products in Germany.[156] In response, Microsoft sought an ASI from the Washington court to prevent Motorola from enforcing its German injunction.[157] The Washington court found that the resolution of the U.S. matter would dispose of the German matter (i.e., if Motorola were found in the U.S. action to have breached its FRAND obligations, Motorola would not be entitled to seek injunctive relief against Microsoft in any jurisdiction, including Germany).[158] Moreover, the Washington court found that Motorola's litigation tactics (i.e., seeking the German injunction) frustrated its own ability to adjudicate the case.[159] As a result, the court entered the ASI against Motorola.[160] On appeal, the Ninth Circuit affirmed.[161]

Several other ASI actions followed in U.S. FRAND cases including *Vringo, Inc. v. ZTE Corp.*,[162] *TCL Communication Technology Holdings, Ltd. v. Telefonaktienbolaget LM Ericsson*,[163] *Apple Inc. v. Qualcomm Inc.*,[164] *Optis Wireless Technology, LLC v. Huawei Technologies Co.*,[165] and *Huawei*

153. 871 F. Supp. 2d 1089, 1096–97 (W.D. Wash.), *aff'd*, 696 F.3d 872 (9th Cir. 2012).
154. *Id.* at 1094–95.
155. *Id.* at 1096.
156. *Id.* at 1103 n.14.
157. *Id.* at 1096.
158. *Id.* at 1099–1100.
159. *Id.* at 1100.
160. *Id.* at 1103.
161. Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 889 (9th Cir. 2012).
162. No. 14-cv-4988(LAK), 2015 WL 3498634, at *11 (S.D.N.Y. June 3, 2015) (denying Vringo's motion for an ASI).
163. No. 8:14-cv-00341-JVS-AN, 2015 U.S. Dist. LEXIS 191512, at *18 (C.D. Cal. June 29, 2015) (granting TCL's motion for an ASI with respect to foreign actions).
164. No. 3:17-cv-00108-GPC-MDD, 2017 WL 3966944, at *18 (S.D. Cal. Sept. 7, 2017) (denying Qualcomm's motion for an ASI).
165. No. 2:17-Cv-00123-JRG-RSP, 2018 U.S. Dist. LEXIS 81129, at *5 (E.D. Tex. May 14, 2018) (denying Optis's motion for an ASI).

Technologies Co. v. Samsung Electronics Co.[166] Utilizing the framework established in *Gallo* and *Unterweser*, U.S. courts granted ASIs in about half of these cases.[167]

3. The emergence of AASIs

By 2018, international litigants began resisting ASIs imposed by U.S. courts by requesting non-U.S. courts that had been targeted by ASIs to issue AASIs to prevent the U.S. litigants from seeking or enforcing those ASIs.[168] Like an ASI, an AASI operates in personam, prohibiting a litigant from taking a particular action, rather than purporting to restrain the authority of a foreign court.[169]

AASIs are sought less frequently than ASIs, and there is no uniform framework determining whether and when they will be granted.[170] While courts in common law jurisdictions—primarily the United Kingdom and the United States—have historically issued ASIs, courts in civil law jurisdictions more typically issue AASIs as counterresponses, as they have historically found ASIs to be "offensive, even violative of international law."[171]

In *Lenovo (United States) Inc. v. IPCom GmbH & Co. KG*,[172] Lenovo brought an action in the U.S. District Court for the Northern District of California, claiming that IPCom breached its FRAND obligations and asking the California court to determine a global FRAND royalty rate.[173] IPCom responded with an action in the United Kingdom seeking a declaration that Lenovo infringed one of IPCom's U.K.

166. No 3:16-cv-02787-WHO, 2018 WL 1784065, at *1 (N.D. Cal. Apr. 13, 2018) (granting Samsung's motion for an ASI to prevent Huawei from enforcing injunctions issued by a Chinese court).

167. *See* Contreras, *New Extraterritoriality*, *supra* note 138, at 265–78 (summarizing the facts and holdings of these cases).

168. Contreras, *All the Way Down*, *supra* note 19, at 8–9 (listing various cases in which European courts issued AASIs to counter the ASIs issued by U.S. courts).

169. *Id.* at 7 (describing how AASIs work).

170. The leading U.S. case regarding AASIs is *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 927–31 (D.C. Cir. 1984). *See* Alexander Shaknes, *Anti-Suit and Anti-Anti-Suit Injunctions in Multi-jurisdictional Proceedings*, 21 NYSBA INT'L L. PRACTICUM 96, 99–100 (2008) (discussing *Laker Airways*).

171. Barceló, *supra* note 143, at 107; *see also* Maximilian Haedicke, *Anti-Suit Injunctions, FRAND Policies and the Conflict Between Overlapping Jurisdictions*, 71 GRUR INT'L 101, 106 (2022) ("German courts consider a prohibition to litigate a violation of fundamental German law principles.").

172. No. 5:19-cv-01389-EJD, 2019 WL 6771784 (N.D. Cal. Dec. 12, 2019).

173. *Id.* at *2.

patents and an injunction against further infringement.[174] Soon thereafter, Lenovo asked the U.S. court for an ASI prohibiting IPCom from prosecuting an infringement action in the United Kingdom or elsewhere during the pendency of the U.S. action.[175] Before the U.S. court could make a substantive ruling, IPCom brought an action in the Paris Court of First Instance seeking to enjoin Lenovo's sale of allegedly infringing products in France and to prevent Lenovo from enforcing the U.S. ASI.[176] The Paris court granted the AASI, holding that ASIs are contrary to French *ordre public* except when they seek to prevent the violation of contractual arbitration or jurisdiction clauses. The court further noted that "seeking an anti-suit injunction—such as the one pursued by Lenovo in California—would infringe upon IPCom's fundamental rights pursuant to French laws."[177] IPCom also filed a motion for an AASI in the United Kingdom.[178] The U.K. court granted this motion shortly after the decision of the Paris court, reasoning that "it would be vexatious and oppressive to IPCom if it were deprived entirely of its right to litigate infringement and validity of [its U.K. patent]."[179]

III. USE OF ASIS IN CHINA

Whereas the previous Part documents the use of ASIs in international FRAND disputes in the source jurisdictions in the legal transplant narrative, this Part turns to the recipient jurisdiction, China. Specifically, this Part traces the evolution of the Chinese standardization system and the country's growing role and leadership in international standardization. It then discusses recent SEP and FRAND cases in China and concludes by providing an in-depth look at the Chinese courts' use of ASIs in international FRAND disputes beginning in 2020.

174. IPCom GmbH & Co. KG v. Lenovo Tech. (U.K.) Ltd. [2019] EWHC (Pat) 3030 [7], [10] (Eng.).

175. *Lenovo (U.S.)*, 2019 WL 6771784, at *1.

176. Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Nov. 8, 2019, 19/59311, *aff'd*, Cour d'appel [CA] [regional court of appeal] Paris, Mar. 3, 2020, 19/21426 (Fr.), *translated at* http://caselaw.4ipcouncil.com/french-court-decisions/ipcom-v-lenovo-court-appeal-paris-rg-1921426 [https://perma.cc/Y9NL-PF3R].

177. Enrico Bonadio & Luke McDonagh, *Paris Court Grants an SEP Anti-Anti-Suit Injunction in* IPCom v Lenovo*: A Worrying Decision in Uncertain Times?*, 15 J. INTELL. PROP. L. & PRAC. 149, 149 (2020).

178. *IPCom GmbH*, [2019] EWHC (Pat) 3030 [1].

179. *Id.* at [52], [54], [60].

A. China's Growing Role in International Standardization

Despite having a centuries-old appreciation for standardized systems,[180] China entered the arena of international technical standardization relatively late. In the 1980s, when international telecommunications standards were first being developed and shortly after China reopened its economy to the outside world, the country did not have a domestic technology sector similar to what existed in Western countries and in Asian rivals such as Japan and South Korea.[181] As a result, China operated in catch-up mode in both technology development and technical standardization.[182] Dieter Ernst describes China's standardization strategy during this period as "combin[ing] the adoption of international standards with the insertion of indigenous innovations into domestic and international standards."[183]

Unlike the industry-driven Western standardization system, the Chinese system heavily depends on a number of governmental agencies, most notably the State Administration for Market Regulation and previously the General Administration of Quality Supervision, Inspection, and Quarantine.[184] Given this governmental focus, it has traditionally been difficult for foreign firms to participate meaningfully in Chinese SDOs.[185]

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180. *See* Wang Ping & Zheng Liang, *Beyond Government Control of China's Standardization System—History, Current Status, and Reform Suggestions*, *in* MEGAREGIONALISM 2.0: TRADE AND INNOVATION WITHIN GLOBAL NETWORKS 311, 311–14 (Dieter Ernst & Michael G Plummer eds., 2018).

181. *See* OFF. OF TECH. ASSESSMENT, OTA-ISC-340, TECHNOLOGY TRANSFER TO CHINA 4–6 (1987) (discussing the need for technology in China after its reopening to the outside world in the late 1970s).

182. For discussions of China's catch-up efforts in technology development and technical standardization, see generally DIETER ERNST, INDIGENOUS INNOVATION AND GLOBALIZATION: THE CHALLENGE FOR CHINA'S STANDARDIZATION STRATEGY (2011) [hereinafter ERNST, INDIGENOUS INNOVATION]; Gao Xudong & Liu Jianxin, *Catching Up Through the Development of Technology Standard: The Case of TD-SCDMA in China*, 36 TELECOMMS. POL'Y 531 (2012); Richard P. Suttmeier et al., *Standards of Power? Technology, Institutions, and Politics in the Development of China's National Standards Strategy*, 1 GEOPOLITICS, HIST. & INT'L RELS. 46 (2009); Pierre Vialle et al., *Competing with Dominant Global Standards in a Catching-Up Context: The Case of Mobile Standards in China*, 36 TELECOMMS. POL'Y 832 (2012); Liu Xielin & Cheng Peng, *Is China's Indigenous Innovation Strategy Compatible with Globalization?* (E.-W. Ctr., Pol'y Stud. No. 61, 2011).

183. ERNST, INDIGENOUS INNOVATION, *supra* note 182, at 21.

184. *See, e.g.*, D. Daniel Sokol & Zheng Wentong, *FRAND in China*, 22 TEX. INTELL. PROP. L.J. 71, 79–81 (2013); John Seaman, *China and the New Geopolitics of Technical Standardization*, NOTES DE L'IFRI, Jan. 2020, at 11–12.

185. *See* DAN BREZNITZ & MICHAEL MURPHREE, THE RISE OF CHINA IN TECHNOLOGY STANDARDS: NEW NORMS IN OLD INSTITUTIONS 25 (2013), https://www.uscc.gov/sites/

China's experience with wireless standardization is representative of its historical standardization efforts. During the development of international 1G and 2G wireless standards, China lacked strong technological capabilities.[186] In the case of both the 2G GSM standard deployed throughout Europe and Qualcomm's competing cdmaOne standard, which was widely adopted in South Korea and the United States,[187] Chinese carriers and the government balked at the high patent rates charged by foreign vendors.[188] Thus, by the time that international 3G standards were developed at the 3rd Generation Partnership Project (3GPP) in the late 1990s, China decided that it should embark on its own 3G standardization program.[189]

China's 3G standardization effort resulted in the creation of TD-SCDMA, which the Chinese Academy of Telecommunications Research and its state-owned affiliate, Datang, developed in collaboration with German equipment vendor Siemens.[190] China submitted TD-SCDMA to the International Telecommunications Union (ITU) for recognition as an international standard (over the objection of U.S. and European representatives), and the ITU approved TD-SCDMA in 2000.[191] Yet despite this recognition, and broad adoption within China, TD-SCDMA had little support internationally.[192]

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default/files/Research/RiseofChinainTechnologyStandards.pdf [https://perma.cc/HM2Q-2J6D] ("For foreign firms, . . . there remain obstacles to complete and open participation in Chinese standards, even as old formal prohibitions are removed."); ERNST, INDIGENOUS INNOVATION, *supra* note 182, at 91–92 (discussing the lack of foreign participation in the Intelligent Grouping and Resource Sharing standards project).

186. *See* Tomoo Marukawa, *Diminishing Returns to High-Tech Standards Wars: China's Strategies in Mobile Communications Technology* 10 (Nat'l Bureau Asian Rsch., Working Paper, 2014) ("China was merely a consumer of technologies designed by companies from developed countries at the start of 2G.").

187. Whasun Jho, *Global Political Economy of Technology Standardization: A Case of the Korean Mobile Telecommunications Market*, 31 TELECOMMS. POL'Y 124, 127 (2007); Kenji E. Kushida, *Wireless Bound and Unbound: The Politics Shaping Cellular Markets in Japan and South Korea*, 5 J. INFO. TECH. & POL. 231, 246–47 (2008).

188. *See* ERNST, INDIGENOUS INNOVATION, *supra* note 182, at 5; Gao & Liu, *supra* note 182, at 533; Vialle et al., *supra* note 182, at 837–38.

189. *See* ERNST, INDIGENOUS INNOVATION, *supra* note 182, at 69; Gao & Liu, *supra* note 182, at 531; Vialle et al., *supra* note 182, at 839.

190. ERNST, INDIGENOUS INNOVATION, *supra* note 182, at 69; Gao & Liu, *supra* note 182, at 531, 534; Vialle et al., *supra* note 182, at 839.

191. Gao & Liu, *supra* note 182, at 531; Vialle et al., *supra* note 182, at 839.

192. *See* Vialle et al., *supra* note 182, at 836, 839–40.

A similar pattern developed with respect to encrypted wireless local area networking (WLAN) standards. As Richard Suttmeier and his collaborators describe:

> In November 2003 Beijing announced that China's indigenously developed encryption standard for wireless communication was being adopted as a "national standard" to which, in the future, all wireless devices sold in China would need to adhere. This WLAN Authentication and Privacy Infrastructure (WAPI) standard was reportedly developed to overcome known security problems with the existing, widely used 802.11x "wi-fi" standard developed by the IEEE. Beijing announced that the technology supporting the standard was to be protected and made available only to a limited number of Chinese companies. Gaining access to the technology, which is necessary for meeting the standard, not only would require that foreign firms partner with Chinese firms but would also increase the chances that valuable intellectual property would diffuse to the Chinese partners.[193]

Chinese efforts to persuade foreign manufacturers to build WAPI into their products failed,[194] as did attempts to have WAPI recognized by ISO (which had already recognized the widely used Wi-Fi WLAN standard produced by IEEE).[195] Today, the WAPI standard remains mandatory for mobile devices sold in China, though reports state that it is rarely used even within the country.[196]

Thus, by the mid-2000s, Chinese technology vendors, which were eager to expand into international markets, realized that they could not effectively participate in those markets with products that implemented only Chinese standards, while Chinese consumers began to demand networks capable of supporting devices produced by premier foreign suppliers such as Apple.[197] This shift resulted in a

193. Suttmeier et al., *supra* note 182, at 50–51.

194. *See* Sumner Lemon, *No Compromise on WAPI as Intel's Barrett Heads to China*, INFOWORLD (Apr. 5, 2004, 6:54 AM), https://www.infoworld.com/article/2667069/no-compromise-on-wapi-as-intel-s-barrett-heads-to-china.html [https://perma.cc/7E37-H7BQ] (reporting Intel's refusal to offer chips that would support China's WAPI standard).

195. *See* Suttmeier et al., *supra* note 182, at 52.

196. Jacob Schindler, *Beijing IP Court Slaps Sony Mobile with Injunction Based on SEP Infringement*, INTELL. ASSET MGMT. (Mar. 23, 2017), https://www.iam-media.com/frandseps/beijing-ip-court-slaps-sony-mobile-injunction-based-sep-infringement [hereinafter Schindler, *Beijing IP Court*].

197. *E.g.*, Xin Haiguang, *Why Are Chinese Consumers Crazy for Apple?*, FORBES (June 11, 2012, 9:06 AM), https://www.forbes.com/sites/insead/2012/06/11/why-are-

dramatic increase in participation by Chinese vendors, led by Huawei, in international standardization activities, and China's desire to shape, rather than receive, standards.[198] Between 2004 and 2010, Chinese attendance at IETF meetings, the principal international forum for developing internet standards, increased from negligible levels to levels that were second only to the United States and that far surpassed that of Japan and South Korea.[199] Chinese participation in ISO technical committees and subcommittees also increased substantially between 2006 and 2015.[200] By 2010, Huawei, a frequent party to SEP disputes, was already a member of 120 international standardization bodies.[201]

Today, Chinese firms have become leaders in international standardization efforts in technology areas ranging from autonomous vehicles and lightbulbs to video encoding and 5G wireless telecommunications.[202] Huawei and other Chinese firms have secured a growing number of leadership positions in influential international SDOs[203] and have declared increasing numbers of SEPs covering international technology standards.[204] Particularly in the area of 5G,

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chinese-consumers-crazy-for-apple/?sh=4077e201a613 [https://perma.cc/HF7P-QS3S] (translated by Aileen Huang).

198. ERNST, INDIGENOUS INNOVATION, *supra* note 182, at 103 ("China's government is very serious in its aspiration to move from [a] mere standard taker to a co-shaper, and in some areas, a lead shaper of international standards."); Seaman, *supra* note 184, at 10–19 (discussing China's evolution from a standards taker to a standards maker).

199. Jorge L. Contreras, *Divergent Patterns of Engagement in Internet Standardization: Japan, Korea and China*, 38 TELECOMMS. POL'Y 914, 923–24 (2014) [hereinafter Contreras, *Divergent Patterns*].

200. Seaman, *supra* note 184, at 20–21.

201. ERNST, INDIGENOUS INNOVATION, *supra* note 182, at 52.

202. *See* Valentina Pop et al., *From Lightbulbs to 5G, China Battles West for Control of Vital Technology Standards*, WALL ST. J. (Feb. 8, 2021, 12:37 AM), https://www.wsj.com/articles/from-lightbulbs-to-5g-china-battles-west-for-control-of-vital-technology-standards-11612722698; Matt Sheehan, *Standards Bearer? A Case Study of China's Leadership in Autonomous Vehicle Standards*, MARCOPOLO (June 3, 2021), https://macropolo.org/analysis/standards-bearer-a-case-study-of-chinas-leadership-in-autonomous-vehicle-standards [https://perma.cc/9UN2-QWYY]; Dan Strumpf, *Where China Dominates in 5G Technology*, WALL ST. J. (Feb. 26, 2019, 10:05 PM), https://www.wsj.com/articles/where-china-dominates-in-5g-technology-11551236701.

203. Contreras, *Divergent Patterns*, *supra* note 199, at 927–28; Justus Baron & Olia Kanevskaia, Global Competition for Leadership Positions in Standards Development Organizations 1–2 (Mar. 31, 2021), https://ssrn.com/abstract=3818143.

204. DIETER ERNST, CHINA'S STANDARD-ESSENTIAL PATENTS CHALLENGE: FROM LATECOMER TO (ALMOST) EQUAL PLAYER? 10–11 (2017), https://www.cigionline.org/

Huawei has, by some counts, declared more SEPs than any other firm in the world.[205] Its new prominence in the standards and SEP arena has made the resolution of FRAND disputes a priority for China.[206]

B. SEP and FRAND Disputes in China

As discussed in the previous Section, the 2010s saw a number of global SEP disputes involving actions in the United States, Europe, Japan, and other jurisdictions. Similar cases arose in China. These cases include *Conversant v. Huawei and ZTE*,[207] *Huawei v. InterDigital*,[208] *Vringo, Inc. v. ZTE Corp.*,[209] *Apple Inc. v. Qualcomm Inc.*,[210] *Iwncomm v. Sony*,[211] and *Optis Wireless Technology, LLC v. Huawei Device Co.*[212] Because the limited length of this Article does not allow for an in-depth discussion of all of these cases,[213] this Section focuses on Conversant's litigation due to its relevance to the emergence of ASIs in China.

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static/documents/documents/China's%20Patents%20ChallengeWEB.pdf [https://perma.cc/SMK3-RSEM]; Contreras, *Divergent Patterns*, *supra* note 199, at 924–25.

205. *See* Jacob Schindler, *Huawei, Samsung and LG Are Top Owners of 'Core' 5G Patents So Far, New Study Claims*, INTELL. ASSET MGMT. (June 2, 2020), https://www.iam-media.com/frandseps/new-essentiality-study-shows-huawei-samsung-and-lg-are-top-owners-of-core-5g-patents; Strumpf, *supra* note 202.

206. *See* discussion *infra* Section IV.C.

207. Huawei Techs. Co. v. Conversant Wireless Licensing S.A.R.L. [2019] EWCA (Civ) 38 (Eng.).

208. *See* Sokol & Zheng, *supra* note 184, at 88–89.

209. No. 14-cv-4988(LAK), 2015 WL 3498634 (S.D.N.Y. June 3, 2015).

210. No. 3:17-cv-00108-GPC-MDD, 2017 WL 3966944, at *18 (S.D. Cal. Sept. 7, 2017) (denying Qualcomm's motion for an ASI).

211. Xi'an Xidian Jietong Wuxian Wangluo Tongxin Gufen Youxian Gongsi Yu Suoni Yidong Tongxin Chanpin (Zhongguo) Youxian Gongsi Zhuanli Qinquan Jiufen An (西安西电捷通无线网络通信股份有限公司与索尼移动通信产品(中国)有限公司专利侵权纠纷案) [Xi'an Xidian Jietong Wireless Network Commc'n Co. (Iwncomm) v. Sony Mobile Commc'ns Prods. (China) Co.], (2015) Jing Zhi Min Chu No. 1194 ((2015)京知民初1194号) (Beijing Intell. Prop. Ct. Mar. 22, 2017), *aff'd*, (2017) Jing Min Zhong No. 454 ((2017)京民终454号) (Beijing High People's Ct. Mar. 28, 2018); *see also* Schindler, *Beijing IP Court*, *supra* note 196 (discussing the *Iwncomm* ruling).

212. No. 2:17-cv-123-JRG-RSP, 2018 WL 476054 (E.D. Tex. Jan. 18, 2018).

213. *See generally* Zhao Qishan & Lu Zhe, *Chinese Courts Step into the SEP Space*, INTELL. ASSET MGMT. (Nov. 4, 2020), https://www.iam-media.com/frandseps/chinese-courts-step-the-sep-space (providing statistics and detailed information regarding SEP cases in China from 2011 to 2019).

Conversant is a Luxembourg-domiciled patent assertion entity that has its principal operations in Canada and the United States.[214] It acquired from Nokia a portfolio of patents that have been declared essential to ETSI standards in forty countries.[215] For several years, Conversant engaged in negotiations to license this global portfolio of SEPs to Huawei and ZTE, two Chinese mobile device manufacturers with global operations.[216]

In July 2017, Conversant asserted four U.K. SEPs against Huawei and ZTE, requesting the High Court determine the FRAND terms for a license of its global portfolio of patents covering the ETSI standards.[217] Concurrently, ZTE brought an action in the Shenzhen Intermediate People's Court requesting a determination of the FRAND royalty rate for Conversant's Chinese patents and a declaration that Conversant's prior licensing offers violated its FRAND commitments.[218] ZTE also sought an injunction to prevent Conversant from engaging in "unfair, unreasonable, discriminatory overpricing and other acts which are in violation of the FRAND principle," including the continuation of the English proceedings and a finding of liability against Conversant for such acts.[219]

In response, Conversant alleged in the English court that ZTE's pleadings in the Shenzhen case "directly attacked, and sought relief in respect of, the proceedings before [that] court . . . and sought to block and frustrate the English [p]roceedings."[220] Accordingly, Conversant requested an ASI barring ZTE from prosecuting its conflicting claims in Shenzhen.[221] Soon thereafter, ZTE amended its Shenzhen complaint "to remove all claims for liability which might involve . . . damages or other financial relief . . . other than in relation to the FRAND rate and FRAND licence terms for [Conversant's] Chinese [p]atents."[222]

The English court explained that the test for granting an ASI depended on whether the foreign claims "were vexatious, in that they

214. Huawei Techs. Co. v. Conversant Wireless Licensing S.A.R.L. [2019] EWCA (Civ) 38 [7] (Eng.).
215. *Id.* at [6]–[7].
216. *Id.* at [10].
217. *Id.* at [3], [18]–[20].
218. Conversant Wireless Licensing S.A.R.L. v. Huawei Techs. Co. [2018] EWHC (Ch) 2549 [10], [12] (Eng.).
219. *Id.* at [12(ii)], [12(v)] (emphasis omitted).
220. *Id.* at [11].
221. *Id.*
222. *Id.* at [18].

sought to obstruct, or could have had the effect of obstructing, pending proceedings before the English court; or of undermining or frustrating the performance of a judgement given by the English court."[223] The court noted that, under the English test, the elements that ZTE had recently deleted from its Shenzhen complaint would have justified an ASI.[224] However, no such injunction was required because the offending portions of the complaint had already been removed.[225]

On appeal, the Court of Appeal of England and Wales, though not addressing the Chancery Division's ASI ruling, rejected Huawei's and ZTE's forum non conveniens challenge to the jurisdiction of the English courts to establish global FRAND rates.[226]

Separately, in January 2018, Huawei brought an action in the Nanjing Intermediate People's Court, seeking a declaration that it did not infringe three of Conversant's Chinese patents and, if it did, it was entitled to a license on FRAND terms.[227] In September 2019, the Nanjing court declined to issue a declaration regarding infringement but established a top-down FRAND royalty for the three Conversant patents—a decision widely heralded as China's first top-down FRAND royalty determination.[228]

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223. *Id.* at [24] (citing Aerospatiale v. Lee Kui Jak [1987] AC 871 (PC) [892]–[897] (Eng.) and Airbus v. Patel [1999] 1 AC 119 (HL) [133]–[140] (Eng.)).

224. *Id.*

225. *Id.*

226. Huawei Techs. Co. v. Conversant Wireless Licensing S.A.R.L. [2019] EWCA (Civ) 38 [120], [127] (Eng.).

227. Huawei Jishu Youxian Gongsi Yu Kangwensen Wuxian Xuke Youxian Gongsi Queren Bu Qinhai Zhuanliquan Jiufen An (华为技术有限公司与康文森无线许可有限公司确认不侵害专利权纠纷案) [Huawei Techs. Co. v. Conversant Wireless Licensing S.A.R.L.], (2019) Zuigao Fa Zhi Min Zhong 732, 733, 734-1 ((2019)最高法知民终732、733、734号之一) (Sup. People's Ct. Aug. 28, 2020) [hereinafter *Huawei Techs.* (SPC)], *translated at* https://patentlyo.com/media/2020/10/Huawei-V.-Conversant-judgment-translated-10-17-2020.pdf [https://perma.cc/W65M-Q5XJ]; *see also Top 10 Typical Technology-Related IP Cases of the Intellectual Property Court of the Supreme People's Court in 2020*, SUP. PEOPLE'S CT. (Apr. 26, 2021, 9:24 PM), https://ipc.court.gov.cn/en-us/news/view-1226.html [https://perma.cc/H564-K9ZC].

228. *See* Jacob Schindler, *Nanjing Judge Sets Chinese SEP Rate in Dispute Between Conversant and Huawei*, INTELL. ASSET MGMT. (Sept. 23, 2019), https://www.iam-media.com/frandseps/nanjing-judge-sets-chinese-sep-rate-in-dispute-between-conversant-and-huawei; *see also* Alexandra P. Yang, *Inside China's First Top-Down FRAND Royalty Decision*, INTELL. ASSET MGMT. (Aug. 5, 2020), https://www.iam-media.com/frandseps/inside-chinas-first-top-down-frand-royalty-decision.

C. China's 2020 Shift Toward ASIs

In April 2018, a U.S. court in *Huawei Technologies Co. v. Samsung Electronics Co.*, granted an ASI that enjoined the parties from pursuing an action in a Chinese court.[229] A few months later, the UK court in *Conversant*, discussed in the previous Section, also indicated that it would have granted an ASI had Huawei not amended its claims in a Chinese proceeding.[230] In the face of these intrusions, or potential intrusions, on China's judicial sovereignty, it is understandable why Chinese courts were eager to look for their own ASI-like mechanism.

For more than a decade, commentators in China have explored the idea of introducing ASIs in the country.[231] During the National People's Congress in May 2020, Justice Luo Dongchuan, the President of the Intellectual Property Court of the Supreme People's Court (SPC), took the debate to the next level by advancing a series of proposals to strengthen China's judicial procedures.[232] Among his proposals was the expansion of China's act preservation system to achieve effects similar to ASIs in foreign jurisdictions.[233] Without such an expansion, he indicated, China would find it difficult to compete with other international dispute resolution fora.[234]

Chinese courts seemingly took Justice Luo's proposals and related commentary to heart. In 2020, Chinese courts issued five ASIs in international FRAND disputes. This Section discusses each case in turn.

1. Conversant v. Huawei *and* ZTE

The dispute between Conversant and Huawei and ZTE gave rise to two separate ASIs in China. In addition to the U.K. matters discussed

229. Huawei Techs. Co. v. Samsung Elecs. Co., No. 16-cv-02787, 2018 WL 1784065, at *4, *12 (N.D. Cal. Apr. 13, 2018); *see* discussion *supra* Section II.D.

230. Conversant Wireless Licensing S.A.R.L. v. Huawei Techs. Co. [2018] EWHC (Ch) 2549 [24] (Eng.).

231. *See infra* text accompanying notes 329–33.

232. *See* Jacob Schindler, *China's Top IP Judge Suggests Mechanisms for Anti-Suit Injunctions Needed*, INTELL. ASSET MGMT. (June 26, 2020), https://www.iam-media.com/copyright/chinas-top-ip-judge-suggests-mechanisms-anti-suit-injunctions-needed [hereinafter Schindler, *China's Top IP Judge*]; *SPC Vice President Luo Dongchuan Proposes Enhanced Damages to Tackle with IP Infringement with Malice*, SUP. PEOPLE'S CT. (July 22, 2020, 10:28 AM), https://ipc.court.gov.cn/en-us/news/view-425.html [https://perma.cc/KJW6-GVCA] [hereinafter *SPC Vice President Proposes Damages*].

233. Schindler, *China's Top IP Judge*, *supra* note 232; *SPC Vice President Proposes Damages*, *supra* note 232.

234. Schindler, *China's Top IP Judge*, *supra* note 232.

above,[235] Conversant sued Huawei and ZTE in the District Court of Düsseldorf in Germany in April 2018, alleging infringement of several European patents.[236] On August 27, 2020, the Düsseldorf court granted Conversant an injunction against Huawei's and ZTE's sale, use, or importation in Germany of devices infringing one of Conversant's German SEPs.[237]

On the same day, in response to Conversant's appeal of the Nanjing court's FRAND rate judgement, Huawei petitioned the SPC for an "act preservation" ruling (which we will refer to from now on as an ASI) to prevent Conversant from enforcing the Düsseldorf injunction until the conclusion of the Chinese proceedings.[238] The SPC granted the ASI the next day,[239] after an ex parte hearing in which Conversant did not participate.[240] In its decision, the SPC cited a number of factors weighing in favor of granting the ASI, many of which resemble the factors considered by U.S. courts.[241] First, it established that the parties to the Chinese and German actions were the same, and there was some overlap between the subject matter of the cases.[242] The SPC then found

235. Huawei Techs. Co. v. Conversant Wireless Licensing S.A.R.L. [2019] EWCA (Civ) 38 (Eng.); *Conversant Wireless Licensing* [2018] EWHC (Ch) 2549.

236. Mathieu Klos, *Conversant Wins in Germany with EIP Against Huawei and ZTE*, JUVE PATENT (Sept. 2, 2020), https://www.juve-patent.com/news-and-stories/cases/conversant-wins-in-germany-with-eip-against-huawei-and-zte [https://perma.cc/5AWD-87ZZ] [hereinafter Klos, *Conversant Wins*].

237. Landgericht Düsseldorf [LG] [District Court of Düsseldorf], Aug. 27, 2020, 4b O 30/18, paras. 17–19, 66, 124 (Ger.), https://www3.hhu.de/duesseldorfer-archiv/?p=8586; *see* Klos, *Conversant Wins*, *supra* note 236; Richard Lloyd, *Following Big UK Win, Conversant Seals Injunction Against ZTE and Huawei in German Suit*, INTELL. ASSET MGMT. (Aug. 28, 2020), https://www.iam-media.com/frandseps/after-big-uk-win-conversant-seals-injunction-against-zte-and-huawei-in-german-suit. The matter concerned Conversant's European patent EP1797659. Lloyd, *supra*.

238. *Huawei Techs.* (SPC), *supra* note 227.

239. *Id.*; *see* Zhao Bing, *China's Supreme Court Orders Conversant Not to Enforce German Injunction Against Huawei*, INTELL. ASSET MGMT. (Sept. 14, 2020), https://www.iam-media.com/frandseps/chinas-supreme-court-orders-conversant-not-enforce-german-injunction-against-huawei.

240. Because the ASI was issued ex parte, Conversant was entitled to apply for reconsideration within five days. Cohen, *China's Evolving Case*, *supra* note 1. It did so, and its request was denied on September 11, leaving the ASI in force. *Id.*

241. *Huawei Techs.* (SPC), *supra* note 227 (listing among the factors for consideration the impact of the respondent's application for enforcing a foreign judgement on litigation in China, the necessity of granting an act preservation measure, the interests of the parties, the harm to the public interest, and international comity); *see* Cohen, *China's Evolving Case*, *supra* note 1; Yu & Contreras, *supra* note 20; *see also* discussion *supra* Section II.D.

242. *Huawei Techs.* (SPC), *supra* note 227.

that Conversant's enforcement of the German injunction would interfere with the Chinese action.[243] In the court's view, to avoid the effects of the German injunction, Huawei would be forced to either withdraw from the German market or accept the license offered by Conversant in Germany, which established a global FRAND royalty that was more than eighteen times higher than the rate set by the Nanjing court.[244] In contrast, the issuance of the ASI in China, the SPC explained, would not materially prejudice Conversant's rights in Germany with respect to any merits decision of the German court.[245] Finally, the Court found that the ASI would not harm the public interest or adversely affect international comity.[246] Upon entry of the ASI, the SPC established a penalty of RMB one million per day (over US $140,000) for any violation by Conversant.[247]

Like Huawei, ZTE sought an ASI in the Shenzhen Intermediate People's Court to prevent Conversant's enforcement of a German injunction against it.[248] The Shenzhen court issued an ASI in September 2020.[249] Because Conversant and ZTE settled their dispute over the FRAND royalty rate two months later,[250] there is no further opportunity for Chinese and German courts to address this dispute.

243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.* Also relevant to the SPC's decision, though not specifically included in its consideration of the ASI, was the August 2018 ruling of the State Intellectual Property Office of China (now the China National Intellectual Property Administration) invalidating the Chinese counterpart to the German SEPs. *Id.*
248. *See China's Top 20 Patent Cases of 2020:* ZTE v. Conversant, CHINA INTELL. PROP. [hereinafter *Top 20 Patent Cases*], http://www.chinaipmagazine.com/en/journal-show.asp?id=1787 [https://perma.cc/B7EN-C3FC]; Du Guodong & Liu Qiang, *Shenzhen Court Issues "Anti-Suit" Injunction in ZTE and Conversant SEP Licensing Dispute*, CHINA JUST. OBSERVER (June 20, 2021), https://www.chinajusticeobserver.com/a/shenzhen-court-issues-anti-suit-injunction-in-zte-and-conversant-sep-licensing-dispute [https://perma.cc/Z9VX-65SM].
249. Zhongxing Tongxun Gufen Youxian Gongsi Yu Kangwensen Wuxian Xuke Youxian Gongsi Biaozhun Biyao Zhuanli Xuke Jiufen An (中兴通讯股份有限公司与康文森无线许可有限公司标准必要专利许可纠纷案) [ZTE Corp. v. Conversant Wireless Licensing S.A.R.L.] (Shenzhen Interm. People's Ct. Sept. 29, 2020); *see Top 20 Patent Cases*, *supra* note 248; Du & Liu, *supra* note 248.
250. *See Top 20 Patent Cases*, *supra* note 248; Du & Liu, *supra* note 248.

2. InterDigital v. Xiaomi[251]

The dispute between InterDigital, a U.S. entity, and Xiaomi, a Chinese electronics firm, relates to five InterDigital SEPs covering the 3G and 4G standards. When licensing negotiations between the parties broke down, Xiaomi sought a declaration by the Wuhan Intermediate People's Court of the appropriate FRAND royalty rate for the patents on June 9, 2020.[252]

On July 29, InterDigital sued Xiaomi for infringement in the High Court of Delhi in India, seeking monetary damages and an injunction.[253] In response, on August 4, Xiaomi asked the Wuhan court to issue an ASI to prevent InterDigital from enforcing any injunction issued by the Delhi court while the Wuhan proceeding was in progress.[254]

The Wuhan court granted Xiaomi's request, reasoning that InterDigital's initiation of parallel litigation in India showed a lack of respect for the Wuhan court and the case before it.[255] The Chinese court also concluded that the Indian action was intended to interfere with or obstruct the Wuhan case and would likely lead to a conflicting ruling.[256] Thus, the court concluded that the determination of a FRAND royalty rate in India would likely cause significant harm to Xiaomi.[257] Because InterDigital, unlike Xiaomi, was a non-practicing entity that did not make products but relied solely on licensing income, the Wuhan court found that the issuance of an ASI would not substantially harm InterDigital.[258]

Accordingly, on September 23, 2020, the Wuhan court ordered InterDigital to withdraw its request for injunctive relief in India, prohibited it from seeking injunctive relief in China or any other

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251. Xiaomi Tongxin Keji Youxian Gongsi Yu Jiaohu Shuzi Gongsi Biaozhun Biyao Zhuanli Xuke Feilu Jiufen An (小米通信科技有限公司与交互数字公司标准必要专利许可费率纠纷案) [Xiaomi Commc'n Tech. Co. v. InterDigital Tech. Corp.], (2020) E 01 Zhi Min Chu No. 169-1 ((2020)鄂01知民初169号之一) (Wuhan Interm. People's Ct. Sept. 23, 2020) [hereinafter *Xiaomi Commc'n* (Wuhan)], *translated at* https://patentlyo.com/media/2020/10/Xiaomi-v.-InterDigital-decision-trans-10-17-2020.pdf [https://perma.cc/4MNC-TBYD].

252. *Id.* at 5.

253. Interdigital Tech. Corp. v. Xiaomi Corp. (2020) 8772 I.A. [7], [15] (India).

254. *Xiaomi Commc'n* (Wuhan), *supra* note 251, at 2, 10.

255. *Id.* at 6–7.

256. *Id.* at 7, 9.

257. *Id.* at 7–8.

258. *Id.* at 8.

country with respect to the 3G or 4G patents currently at issue in the Wuhan case, and enjoined it from asking another court in China or any other country to determine a FRAND royalty rate or resolve a FRAND dispute relating to the 3G or 4G patents at issue.[259] As in *Conversant v. Huawei*, the Wuhan court established a penalty of RMB one million per day for any violation of the ASI by InterDigital.[260] But unlike the ASI issued by the SPC in *Conversant v. Huawei*, the Wuhan court's ASI in *InterDigital v. Xiaomi* covered not only a specific foreign action, but all pending and prospective foreign actions.[261]

In response to the Wuhan ASI, the Delhi court, on October 9, 2020, issued an AASI preventing Xiaomi from enforcing its ASI against InterDigital.[262] The parties settled their dispute on August 3, 2021, by agreeing to a multi-year, worldwide, non-exclusive, royalty-bearing license.[263]

3. OPPO v. Sharp[264]

In January 2020, Sharp—a Japanese operating subsidiary of the manufacturing firm Hon Hai/Foxconn—sued Chinese handset

259. *Id.* at 10–11.

260. *Id.*

261. *Compare Huawei Techs.* (SPC), *supra* note 227, *with Xiaomi Commnc'n* (Interm. People's Ct.), *supra* note 251. *See generally* Yu & Contreras, *supra* note 20 (commenting on the broad scope of the ASI).

262. InterDigital Tech. Co. v. Xiaomi Corp. (2020) 8772 I.A. [79] (India); *see also* Rajiv Choudhry, *Delhi High Court Issues Anti Anti-Suit Injunction in* InterDigital v. Xiaomi *Patent Infringement Dispute*, SPICYIP (Oct. 12, 2020), https://spicyip.com/2020/10/delhi-high-court-issues-anti-anti-suit-injunction-in-interdigital-v-xiaomi.html [https://perma.cc/T2QY-S97X].

263. InterDigital, *InterDigital Signs Licensing Agreement with Xiaomi*, GLOBENEWSWIRE (Aug. 3, 2021, 4:00 PM), https://www.globenewswire.com/news-release/2021/08/03/2273347/0/en/InterDigital-signs-licensing-agreement-with-Xiaomi.html [https://perma.cc/SU3G-2DM5].

264. Xiapu Zhushi Huishe Yu OPPO Guangdong Yidong Tongxin Youxian Gongsi Biaozhun Biyao Zhuanli Xuke Jiufen An (夏普株式会社与OPPO广东移动通信有限公司标准必要专利许可纠纷案) [Sharp Corp. v. OPPO Guangdong Mobile Telecomms. Co.], (2020) Zuigao Fa Zhi Min Xia Zhong No. 517 ((2020)最高法知民辖终517号) (Sup. People's Ct. Aug. 19, 2021) [hereinafter *Sharp* (SPC)], https://www.chinaiplawupdate.com/wp-content/uploads/2021/09/2020-%E6%9C%80%E9%AB%98%E6%B3%95%E7%9F%A5%E6%B0%91%E8%BE%96%E7%BB%88517-%E5%8F%B7.pdf [https://perma.cc/Y3FL-MCQC]; *see also* Cheng Zhongren, *The Chinese Supreme Court Affirms Chinese Court's Jurisdiction Over Global Royalty Rates of Standard-Essential Patents:* Sharp v. Oppo, BERKELEY TECH. L.J. (Jan. 3, 2022), https://btlj.org/2022/01/the-chinese-supreme-court-affirms-chinese-courts-jurisdiction-over-global-royalty-rates-of-standard-essential-patents-sharp-v-oppo

manufacturer OPPO in the Tokyo District Court for infringement of SEPs relating to several standards.[265] Soon thereafter, OPPO brought an action in the Shenzhen Intermediate People's Court accusing Sharp of violating its FRAND obligations and asking the court to set a global FRAND rate for Sharp's SEPs.[266] Over Sharp's objections, the Shenzhen court held that it had jurisdiction over the matter on the basis of OPPO's operations in China and the implementation of the patented standards in products sold in the country.[267] The court also indicated that its determination of a global FRAND rate could improve efficiency, resolve the dispute between the parties, and avoid litigation in multiple jurisdictions.[268] In this regard, the Shenzhen court in *OPPO v. Sharp* joined the U.K. court in *Unwired Planet*, seeking to establish a global FRAND rate for the parties before it.[269]

Sharp responded to the filing in Shenzhen with additional claims in Tokyo, as well as actions in the District Courts of Munich and Mannheim in Germany.[270] In the wake of these filings, OPPO sought an ASI from the Shenzhen court to prevent Sharp from pursuing its foreign actions before the conclusion of the Chinese proceeding.[271]

[https://perma.cc/DQ3A-7YK6] (discussing this case); Aaron Wininger, *China's Supreme People's Court Affirms Right to Set Royalty Rates Worldwide in OPPO/Sharp Standard Essential Patent Case*, NAT'L L. REV. (Sept. 5, 2021), https://www.natlawreview.com/article/china-s-supreme-people-s-court-affirms-right-to-set-royalty-rates-worldwide [https://perma.cc/Q67H-W953] (same).

265. Jacob Schindler, *Sharp Sues Oppo in Japanese Court*, INTELL. ASSET MGMT. (Jan. 31, 2020), https://www.iam-media.com/frandseps/sharp-sues-oppo-in-japanese-court.

266. *See* Zhao Bing, *Sharp vs Oppo Patent Dispute Spreads to China and Germany*, INTELL. ASSET MGMT. (Mar. 10, 2020), https://www.iam-media.com/frandseps/sharp-and-oppo-patent-dispute-spreads-china-and-germany [hereinafter Zhao, *Sharp vs Oppo*].

267. Zhao Bing, *Chinese Court to Set Global FRAND Rate in Oppo-Sharp Dispute*, INTELL. ASSET MGMT. (Dec. 4, 2020), https://www.iam-media.com/frandseps/chinese-court-set-global-sep-portfolio-rate-in-oppo-sharp-dispute.

268. *Sharp* (SPC), *supra* note 264; *see also Guangdong OPPO Mobile Telecommunications Co. Ltd v. Sharp Corp. OPPO*, CHINA JUST. OBSERVER (Oct. 16, 2020), https://www.chinajusticeobserver.com/law/x/guangdong-oppo-mobile-telecommunications-v-sharp-corp-20201016 [https://perma.cc/63Y5-KKBP].

269. [2020] UKSC 37 (Eng.).

270. Zhao, *Sharp vs Oppo*, *supra* note 266.

271. Xiapu Zhushi Huishe Yu OPPO Guangdong Yidong Tongxin Youxian Gongsi Biaozhun Biyao Zhuanli Xuke Jiufen An (夏普株式会社与OPPO广东移动通信有限公司标准必要专利许可纠纷案) [Sharp Corp. v. OPPO Guangdong Mobile Telecomms. Co.], (2020) Yue 03 Min Chu No. 689-1 ((2020)粤03民初689号) (Shenzhen Interm. People's

The Shenzhen court granted the ASI, imposing a penalty of RMB one million per day for any violation of the injunction by Sharp.[272]

In response, Sharp sought an AASI from the Munich court to prevent OPPO from enforcing the ASI by the Shenzhen court.[273] The Munich court granted the AASI a mere seven hours after entry of the Shenzhen ASI.[274] The Shenzhen court, however, found that Sharp's request for an AASI from the Munich court constituted a breach of the ASI in China. Rather than face the penalty of that breach, Sharp voluntarily and unconditionally withdrew its AASI request from the Munich court.[275]

In an April 2021 report, the SPC highlighted *OPPO* and *Huawei v. Conversant* as the two cases that had portrayed China's evolution from a "follower" of international intellectual property rules to a "guide" who helps shape these rules (*yindaozhe*).[276] Four months later, the SPC upheld the Shenzhen court's ruling in *OPPO*, noting the parties'

Ct. Dec. 3, 2020), *aff'd*, (2020) Zuigao Fa Zhi Min Xia Zhong No. 517 ((2020)最高法知民辖终517号) (Sup. People's Ct. Aug. 19, 2021).

272. *Id.*

273. Mark Cohen, *Three SPC Reports Document China's Drive to Increase Its Global Role on IP Adjudication*, CHINA IPR (May 5, 2021), https://chinaipr.com/2021/05/05/three-spc-reports-document-chinas-drive-to-increase-its-global-role-on-ip-adjudication [https://perma.cc/H3GC-89H8] [hereinafter Cohen, *Three SPC Reports*].

274. *Id.*; Huang Zeyu, *The Latest Development on Antisuit Injunction Wielded by Chinese Courts to Restrain Foreign Parallel Proceedings*, CONFLICTOFLAWS.NET (July 9, 2021), https://conflictoflaws.net/2021/the-latest-development-on-anti-suit-injunction-wielded-by-chinese-courts-to-restrain-foreign-parallel-proceedings/?print=pdf [https://perma.cc/Z4HY-MFH5] [hereinafter Huang, *Latest Development*].

275. *See* Cohen, *Three SPC Reports*, *supra* note 273; Huang, *Latest Development*, *supra* note 274.

276. *See* Guanyu Yinfa 2020 Nian Zhongguo Fayuan Shida Zhishichanquan Anjian He Wushi Jian Dianxing Zhishichanquan Anli De Tongzhi, Faban [2021] Yi Si Liu Hao (关于印发2020年中国法院10大知识产权案件和50件典型知识产权案例的通知, 法办【2021】146号) [Notice of the Publication of the Top 10 Intellectual Property Cases and 50 Typical Intellectual Property Cases Decided by Chinese Courts in 2020, Legal Notice No. 146 [2021]] (issued by the Gen. Off. Sup. People's Ct., Apr. 16, 2021) [hereinafter Top 10 IP Cases], http://www.court.gov.cn/fabu-xiangqing-297991.html [https://perma.cc/JSW5-6BF2]. For discussions of how China is slowly moving from a norm taker to a norm shaker or norm maker, see generally Henry Gao, *China's Ascent in Global Trade Governance: From Rule Taker to Rule Shaker and Maybe Rule Maker?*, *in* MAKING GLOBAL TRADE GOVERNANCE WORK FOR DEVELOPMENT: PERSPECTIVES AND PRIORITIES FROM DEVELOPING COUNTRIES 153 (Carolyn Deere Birkbeck ed., 2011); Peter K. Yu, *The Rise of China in the International Intellectual Property Regime*, *in* HANDBOOK ON THE INTERNATIONAL POLITICAL ECONOMY OF CHINA 424 (Zeng Ka ed., 2019); Peter K. Yu, *The Middle Kingdom and the Intellectual Property World*, 13 OR. REV. INT'L L. 209 (2011).

willingness to enter into a global SEP license, their participation in the negotiations, and the fact that the SEP dispute was closely related to China.[277]

4. Ericsson v. Samsung

The final Chinese ASI case of 2020, *Samsung Electronics Co. v. Telefonaktienbolaget LM Ericsson*, with which we began this Article, represents an important variant in the evolution of global FRAND disputes. Though the case was litigated primarily in China and the United States, neither party was based in either jurisdiction; Ericsson and Samsung are headquartered in Sweden and South Korea, respectively. The parties thus selected jurisdictions for litigation based on procedural and substantive advantages, independent of any "home court advantage."

These procedural and substantive advantages are well-known among industry players. For example, Chinese courts have earned a reputation for setting FRAND royalty rates that are substantially lower than rates determined by courts in other jurisdictions—a feature attractive to product manufacturers but unattractive to SEP holders.[278] In contrast, the bifurcated German adjudication system for patent cases results in the nearly automatic issuance of permanent injunctions after a finding of infringement, and before any determination of patent validity, making Germany an attractive venue for SEP holders.[279]

Ericsson v. Samsung involved an existing SEP cross-license between the two parties that was due to expire at the end of 2020.[280] Given the parties' inability to agree on renewal terms and their prior litigation,

277. *Sharp* (SPC), *supra* note 264; *see also* Wininger, *supra* note 264; Zhao Bing, *Chinese Judges Can Set Global SEP Rates and Licence Terms, Supreme People's Court Confirms*, INTELL. ASSET MGMT. (Sept. 2, 2021), https://www.iam-media.com/frandseps/chinese-courts-can-set-global-sep-rate-and-licensing-terms-spc-confirms.

278. *See* Lee Jyh-An, *Implementing the FRAND Standard in China*, 19 VAND. J. ENT. & TECH. L. 37, 78–79 (2016); Sophia Tang, *Anti-Suit Injunction Issued in China: Comity, Pragmatism and Rule of Law*, CONFLICTOFLAWS.NET (Sept. 27, 2020), https://conflictoflaws.net/2020/anti-suit-injunction-issued-in-china-comity-pragmatism-and-rule-of-law [https://perma.cc/V3XP-UX26]; Zhao Bing, *China's Courts Deserve a Bigger Say in Global SEP Policy*, INTELL. ASSET MGMT. (May 29, 2021), https://www.iam-media.com/frandseps/china-courts-sep-disputes-zhao-saturday-opinion.

279. *See, e.g.*, THOMAS F. COTTER, COMPARATIVE PATENT REMEDIES: A LEGAL AND ECONOMIC ANALYSIS 245–46 (2013); Arno Rißе, *Injunctions in Germany*, *in* PATENT LAW INJUNCTIONS 63, 63 (Rafał Sikorski, ed., 2019).

280. Ericsson Inc. v. Samsung Elecs. Co., No. 20-CV-00380, 2021 WL 89980 (E.D. Tex. Jan. 11, 2021).

Samsung, on December 7, filed a complaint in the Wuhan Intermediate People's Court, asking it to determine a global FRAND royalty rate for the SEPs held by Ericsson.[281] On December 11, Ericsson filed an infringement action against Samsung in the U.S. District Court for the Eastern District of Texas.[282]

In response, on December 14, Samsung requested that the Wuhan court issue an ASI preventing Ericsson from seeking relief in the United States or elsewhere on the asserted SEPs during the pendency of the Wuhan action.[283] The Wuhan court expeditiously issued an order on December 25 that included both an ASI and an AAASI,[284] prohibiting Ericsson from taking actions to negate the ASI while imposing a penalty of RMB one million per day for noncompliance.[285] Like the ASI issued by the Wuhan court in *InterDigital v. Xiaomi*, the ASI in *Ericsson v. Samsung* was of global scope, covering actions in the United States and other countries.[286]

On December 28, Ericsson sought a temporary restraining order (effectively an AASI) from the U.S. court to prevent Samsung from interfering with Ericsson's right to assert the full scope of its patent rights in the United States.[287] The U.S. court granted Ericsson's request on the same day and issued a preliminary injunction against Samsung's enforcement of the Chinese ASI on January 11, 2021.[288] In addition to prohibiting Samsung from enforcing the Chinese order, the U.S. court's AASI also required Samsung to indemnify Ericsson against any penalties the Chinese court levied against Ericsson for violation of the ASI.[289] While the appeal in the matter was pending before the Federal Circuit, Ericsson brought further actions against Samsung in the United Kingdom and before the U.S. International Trade

281. *Id.* at *1.
282. *Id.*
283. *Id.* at *2.
284. *Samsung Elecs.* (Wuhan), *supra* note 2; *see* Mathieu Klos, *China Wakes up in Global SEP Litigation*, JUVE PATENT (Jan. 29, 2021), https://www.juve-patent.com/news-and-stories/legal-commentary/china-wakes-up-in-global-sep-litigation [https://perma.cc/R9YY-QET9].
285. *Samsung Elecs.* (Wuhan), *supra* note 2; *Ericsson*, 2021 WL 89980, at *2–3.
286. *Xiaomi Commnc'n* (Wuhan), *supra* note 251; *Samsung Elecs.* (Wuhan), *supra* note 2.
287. *Ericsson*, 2021 WL 89980.
288. *Id.*
289. *Id.*

Commission.[290] The parties, however, settled their worldwide disputes shortly thereafter.[291] The remarkably rapid actions and counteractions in this case exemplify the worst features of the "race to the courthouse" described in Section II.C.[292]

5. AASIs issued against potential Chinese ASIs

The issuance of ASIs by Chinese courts in 2020 attracted significant international attention from administrative bodies[293] and courts in Europe and the United States. As discussed above, courts in Germany, India, and the United States have issued AASIs to prohibit the enforcement of Chinese ASIs.[294]

More recently, the District Courts of Düsseldorf and Munich in Germany issued AASIs to *pre-emptively* prevent parties from seeking ASIs in Chinese courts in the future.[295] According to one report, the Munich court issued an AASI against Huawei given the mere likelihood "that Huawei will file an anti-suit injunction with a Chinese court in order to prevent [the opposing party] from making SEP claims in Germany."[296] Likewise, in Düsseldorf, three SEP holders sought an AASI against Xiaomi based on "the prevalent trend of Chinese companies filing ASIs."[297]

Taken together, these actions suggest that foreign courts have come to view Chinese ASIs as threats to their own jurisdiction. Table 1 below illustrates the emergence of China in 2020 as an issuer of ASIs in global FRAND litigation and the global response to these ASIs.

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290. *Id.*; Certain Electronic Devices with Wireless Connectivity, Components Thereof, and Products Containing Same, Inv. No. 337-TA-1245, USITC (Feb. 2, 2021) (Notice); Osborne-Crowley, *supra* note 13.

291. Jacob Schindler, *Samsung and Ericsson Settle Patent Licensing Dispute*, INTELL. ASSET MGMT. (May 7, 2021), https://www.iam-media.com/frandseps/samsung-and-ericsson-settle-patent-licensing-dispute.

292. *See supra* text accompanying note 140.

293. *See supra* text accompanying notes 25–34 (discussing U.S. and EU reactions to Chinese ASIs).

294. *See* discussion *supra* Sections III.C.2, III.C.3, III.C.4.

295. *See* Mathieu Klos, *Munich Regional Court Upholds AASI Application Against Huawei*, JUVE PATENT (June 30, 2021), https://www.juve-patent.com/news-and-stories/cases/munich-regional-court-upholds-aasi-application-against-huawei [https://perma.cc/7EUR-USJ8] [hereinafter Klos, *Munich Regional Court*]; Amy Sandys, *Düsseldorf on New Ground with Partial AASI Against Xiaomi*, JUVE PATENT (July 20, 2021), https://www.juve-patent.com/news-and-stories/cases/dusseldorf-on-new-ground-with-partial-aasi-against-xiaomi [https://perma.cc/5Q8W-KB7V].

296. Klos, *Munich Regional Court*, *supra* note 295.

297. Sandys, *supra* note 295.

Table 1: ASIs in SEP Disputes 2012–2021

Case	Year	1st Juris.	Foreign Juris.	ASI Granted	AASI Issued
Microsoft v. Motorola	2012	US	DE	Yes	N/A
Vringo v. ZTE	2015	US	CN	No	N/A
TCL v. Ericsson	2015	US	FR,BR, RU, UK, DE, AR	Yes	N/A
Apple v. Qualcomm	2017	US	UK, JP, CN, TW	No	N/A
Conversant v. Huawei and ZTE	2018	UK	CN	Yes*	N/A
Optis v. Huawei	2018	US	CN	No	N/A
Huawei v. Samsung	2018	US	CN	Yes	N/A
Continental v. Avanci	2019	US	DE	N/A	DE
IPCom v. Lenovo	2019	US	UK, FR	N/A	UK, FR
Conversant v. Huawei	2020	CN	DE	Yes	N/A
InterDigital v. Xiaomi	2020	CN	IN, DE	Yes	IN, DE
Oppo v. Sharp	2020	CN	JP, DE, TW	Yes	DE
Ericsson v. Samsung	2020	CN	US	Yes	US
IPBridge v. Huawei	2021	CN	DE	N/A	DE
Philips, GE, Mitsubishi v. Xiaomi	2021	CN	DE	N/A	DE
Ericsson v. Apple	2021	US	NL	N/A	No

IV. ASI AS A NEW FORM OF LEGAL TRANSPLANT IN CHINA

Parts II and III document the use of ASIs in both source and recipient jurisdictions as well as the growing global international jurisdictional battles over SEPs and FRAND licensing. This Part takes a closer look at the transplantation of ASIs in China. Arguing that this procedural mechanism represents a new form of legal transplant in the country, this Part identifies the internal and external forces driving China's recent effort to adapt a foreign procedural mechanism. This Part further interrogates the appropriateness of calling this mechanism a legal transplant, the mechanism's distinctive features (when compared with other recent legal transplants in the pharmaceutical area), and its potential domestic and global ramifications.

A. Local Roots and Emergence

1. Basic contours of injunctive mechanisms

Thus far, China has not enacted new laws or regulations to create an ASI mechanism.[298] Nevertheless, some injunctive mechanisms have existed in the country since 2000. To some extent, these mechanisms perform the same functions as the ASIs issued by courts in the United Kingdom, the United States, and other jurisdictions. To outline the basic contours of injunctive mechanisms in China, this Section focuses on three distinct legal domains: intellectual property law, maritime law, and civil procedure law.

a. Intellectual property law

The Patent Law was enacted in 1984 and has since been amended in 1992, 2000, 2008, and 2020.[299] When the law was amended in 2000, shortly before China entered the WTO, Article 61 was added to provide Western-style preliminary injunctions,[300] as required by Article 44 of the TRIPS Agreement.[301] Article 61 reads:

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298. Interspersed among a variety of laws, regulations, and judicial interpretations are rules dealing with how to tackle transnational parallel civil litigation. One of the earliest rules of this kind is Article 15 of the *Opinions of the Supreme People's Court on Some Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China*, which provides:

> If one party is a Chinese citizen residing abroad and the other a Chinese citizen residing in China, no matter which party files a divorce lawsuit with the people's court, the people's court at the place where the party resides in China has the jurisdiction over the lawsuit. If the party residing abroad files a lawsuit with the court at his or her country of residence and the party residing in China files a lawsuit with the people's court, the people's court with which the lawsuit is filed has the jurisdiction over the lawsuit.

Zuigao Renmin Fayuan Guanyu Shiyong <Zhonghua Renmin Gongheguo Minshi Susong Fa> Ruogan Wenti De Yijian, Fashi [1992] Ershi'er Hao (最高人民法院关于适用《中华人民共和国民事诉讼法》若干问题的意见, 法释【1992】22号) [Opinions of the Supreme People's Court on Some Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China, Judicial Interpretation No. 22 [1992]] (promulgated by the Judicial Comm. Sup. People's Ct., July 14, 1992, effective July 14, 1992), art. 15, http://www.lawinfochina.com/display.aspx?id=6690&lib= law&SearchKeyword=Civil [https://perma.cc/M3MA-NLTX].

299. 2020 Patent Law, *supra* note 91; 2008 Patent Law, *supra* note 89; 2000 Patent Law, *supra* note 78; 1992 Patent Law, *supra* note 78; 1984 Patent Law, *supra* note 73.

300. 2000 Patent Law, *supra* note 78, art. 61.

301. *See* TRIPS Agreement, *supra* note 28, art. 44.

> Where any patentee or interested party has evidence to prove that another person is infringing or will soon infringe its or his patent right and that if such infringing act is not checked or prevented from occurring in time, it is likely to cause irreparable harm to it or him, it or he may, before any legal proceedings are instituted, request the people's court to adopt measures for ordering the suspension of relevant acts and the preservation of property.[302]

Notwithstanding the provision's subsequent amendments in 2008 and 2020,[303] which altered some of the language used, the provision's inherent thrust remains substantially unchanged. That provision (now renumbered Article 72) also retains the legal nomenclature of "preservation measures," as opposed to "injunctions."[304] Similar provisions can be found in copyright[305] and trademark laws,[306] both of which were amended around the same time shortly before China joined the WTO.

In February 2004, the SPC issued a noteworthy judicial interpretation, implicitly confirming the injunctive nature of preservation measures in intellectual property law.[307] As the court stated:

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302. 2000 Patent Law, *supra* note 78, art. 61.

303. This article was revised and renumbered Article 66 in 2008 and Article 72 in 2020. 2008 Patent Law, *supra* note 89, art. 66; 2020 Patent Law, *supra* note 91, art. 72.

304. 2000 Patent Law, *supra* note 78, art. 61; 2020 Patent Law, *supra* note 91, art. 72.

305. Zhonghua Renmin Gongheguo Zhuzuoquan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amended Oct. 27, 2001, effective Nov. 1, 2001), art. 49. This provision was revised and renumbered Article 50 in 2010 and Article 56 in 2020. Zhonghua Renmin Gongheguo Zhuzuoquan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amended Feb. 26, 2010, effective Apr. 1, 2010), art. 50; Zhonghua Renmin Gongheguo Zhuzuoquan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amended Oct. 17, 2020, effective June 1, 2021), art. 56.

306. Zhonghua Renmin Gongheguo Shangbiao Fa (中华人民共和国商标法) [Trademark Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, amended Oct. 27, 2001, effective Dec. 1, 2001), art. 57. This provision was revised and renumbered Article 65 in 2013 and remained unchanged when the law was amended again in 2019. 2013 Trademark Law, *supra* note 91, art. 65; 2019 Trademark Law, *supra* note 91, art. 65.

307. Zuigao Renmin Fayuan Guanyu Suqian Zeling Tingzhi Qinfan Zhuanliquan Shangbiaoquan Zhuzuoquan Xingwei Anjian Bianhao He Shouqu Anjian Shoulifei Wenti De Pifu, Fashi [2004] Shiqi Hao (最高人民法院关于诉前责令停止侵犯专利权、商标

> The cases involving pre-litigation orders to stop patent, trademark, or copyright infringements fall within a new, independent category. For the convenience of judicial statistics and to correctly indicate the nature of the case, the document numbers for this type of case shall be uniformly prefixed by the word *jin*.[308]

More recently, the SPC released a relatively comprehensive judicial interpretation in 2018, with the aim of providing guidance on the appropriate handling of the application of preservation measures, particularly act preservation measures, in intellectual property cases.[309]

b. Maritime law

Maritime law is another legal domain in China that provides injunctive measures. The Special Maritime Procedure Law was adopted in December 1999 and came into force in July 2000.[310] Chapter IV introduced a newly designed legal mechanism of maritime injunction. Article 51 defined this injunction as follows:

> A maritime injunction means the compulsory measures adopted on the application of a maritime claimant by the maritime court to compel the person against whom a claim is made to do or not to do certain things, so as to prevent the lawful rights and interest of the claimant from being infringed upon.[311]

权、著作权行为案件编号和收取案件受理费问题的批复，法释【2004】17号) [Official Reply of the Supreme People's Court on the Issue Concerning the Document Number and Case Acceptance Fee for Cases Involving Pre-Litigation Orders to Stop Patent, Trademark, or Copyright Infringements, Judicial Interpretation No. 17 [2004]] (issued by the Judicial Comm. Sup. People's Ct., Feb. 16, 2004, effective Feb. 16, 2004), https://www.pkulaw.com/en_law/6ac3eaa9e6137621bdfb.html [https://perma.cc/65UT-8NBM].

308. *Id.* The word *jin* can be translated as "ban," "forbid," "prohibit," or "enjoin."

309. Zuigao Renmin Fayuan Guanyu Shencha Zhishi Chanquan Jiufen Xingwei Baoquan Anjian Shiyong Falü Ruogan Wenti De Guiding, Fashi [2018] Ershiyi Hao (最高人民法院关于审查知识产权纠纷行为保全案件适用法律若干问题的规定，法释【2018】21号) [Provisions of the Supreme People's Court on Several Issues Concerning the Applicable Law in the Review of Act Preservation Measures in Intellectual Property Disputes, Judicial Interpretation No. 21 [2018]] (promulgated by the Judicial Comm. Sup. People's Ct., Dec. 12, 2018, effective Jan. 1, 2019), https://www.pkulaw.com/en_law/fff3c32a8e6a3fb1bdfb.html [https://perma.cc/J97X-PLEJ].

310. Zhonghua Renmin Gongheguo Haishi Susong Tebie Chengxu Fa (中华人民共和国海事诉讼特别程序法) [Special Maritime Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 25, 1999, effective July 1, 2000).

311. *Id.* art. 51.

The remedy provided by this provision is essentially the same as a Western-style injunction. Yet, it is more limited in scope, as it applies solely in the specialized field of maritime litigation.

c. Civil procedure law

The final legal domain, and one that is highly relevant to Chinese courts when they issue ASIs, is civil procedure law. In August 2012, the Civil Procedure Law, initially adopted in April 1991, was amended to introduce a new mechanism of act preservation.[312] Article 100 (now renumbered Article 103[313]) provides, in pertinent part:

> In the event that, because of the conduct of a party to the case or any other reason, the judgement on the case may become difficult to enforce or damage may be caused to the other party, the people's court may, upon the request of the said party, order the preservation of the property of the other party, specific performance or injunction; in the absence of such request, the people's court, where it deems necessary, may also order property preservation measures.[314]

This provision remained unchanged when the law was amended in June 2017 and more recently in December 2021.[315] Since its introduction, the act preservation mechanism has been in operation for almost a decade. This mechanism works in tandem with the longstanding mechanism of property preservation, which already existed at the inception of the Civil Procedure Law in 1991.[316] Taken

312. Zhonghua Renmin Gongheguo Minshi Susong Fa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, amended Aug. 31, 2012, effective Jan. 1, 2013) [hereinafter 2012 Civil Procedure Law].

313. Zhonghua Renmin Gongheguo Minshi Susong Fa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, amended Dec. 24, 2021, effective Jan. 1, 2022), art. 103 [hereinafter 2021 Civil Procedure Law].

314. 2012 Civil Procedure Law, *supra* note 312, art. 100.

315. 2021 Civil Procedure Law, *supra* note 313, art. 103; Zhonghua Renmin Gongheguo Minshi Susong Fa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, amended June 27, 2017, effective July 1, 2017), art. 100.

316. *See id.* ch. 9 (covering property preservation and advance execution). Before the law's formal enactment in 1991, a comparable version operated for trial implementation for almost a decade since March 1982. This provisional statute included a chapter on property preservation as well. *See* Zhonghua Renmin Gongheguo Minshi Susong Fa (Shixing) (中华人民共和国民事诉讼法(试行)) [Civil

together, these two sets of preservation measures represent a mixture of piecemeal legal transplants from the former Soviet Union, Germany, the United Kingdom, and the United States.[317] As one commentator laments, "the drafters of the various Chinese laws in their construction of the interim relief system lacked a unified macro-conception."[318]

In sum, two tiers of rules provide for injunctive mechanisms in China: specific rules in the domains of intellectual property and maritime laws and general rules in the domain of civil procedural law. In the past two decades, these rules have played a critical role that is fundamentally equivalent to those played by Western-style injunctions.

d. The introduction of an ASI-like remedy

With the arrival of the new millennium, the increase in economic globalization, and its entry into the WTO, China became more integrated with the global economy. As a result, an ever-growing number of Chinese enterprises have engaged in overseas business activities. At the same time, Chinese courts began to be confronted with ASIs issued by foreign courts or arbitral bodies against the parties appearing before them.[319]

The earliest ASIs issued by Chinese courts appeared in maritime litigation.[320] The SPC's report on *Conversant v. Huawei* recounted two

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Procedure Law of the People's Republic of China (For Trial Implementation)] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 8, 1982, effective Oct. 1, 1982), ch. 23 (covering preservation measures in litigation).

317. *See* Zhou Cui (周翠), *Xingwei Baoquan Wenti Yanjiu—Dui <Minshi Susong Fa> Di 100–105 Tiao De Jieshi* (行为保全问题研究—对《民事诉讼法》第100–105条的解释) [*Study on Act Preservation: Interpretation of Articles 100–105 of the Civil Procedure Law*], FALÜ KEXUE (法律科学) [SCI. L.], no. 4, 2015, at 92, 92–93.

318. *Id.* at 93.

319. *See, e.g.*, Xiamen Zhonghe Shiye Youxian Gongsi Yu Nisenkaiwen Youxian Gongsi Haishang Huowu Yunshu Hetong Jiufen An (厦门中禾实业有限公司与尼森凯文有限公司海上货物运输合同纠纷案) [Xiamen Zhonghe Indus. Co. v. Nissen Kaiun Co.], (2007) Xia Hai Fa Shang Chu No. 241 ((2007)厦海法商初241号) (Xiamen Mar. Ct. 2007); Shenzhen Shi Liangshi Jituan Youxian Gongsi Yu Meijingyienyi Gongsi Tidan Yunshu Huowu Sunhai Jiufen An (深圳市粮食集团有限公司与美景伊恩伊公司提单运输货物损害纠纷案) [Shenzhen Grain Group Co. v. Future E.N.E.], (2004) Qing Hai Fa Hai Shang Chu No. 245 ((2004)青海法海商初245号) (Qingdao Mar. Ct. Nov. 20, 2004).

320. Zhongguo Zhishi Chanquan Shenpan Fachu De Shouli Jinsuling—Anjian Heyiting Xiangjie Kangwensen Gongsi Yu Huawei Gongsi Biaozhun Biyao Zhuanli Xuke Jiufen An (中国知识产权审判发出的首例禁诉令—案件合议庭详解康文森公司与华为公

cases in this area. In May 2012, the Qingdao Maritime Court issued a maritime injunction ordering the respondent to immediately release the arrest of the applicant's ship in Australia and to refrain from arresting any of the applicant's property or taking other obstructing measures.[321] In July 2017, the Wuhan Maritime Court issued a civil ruling ordering the respondent to immediately apply to the High Court of the Hong Kong Special Administrative Region to withdraw the ASI.[322] In both cases, the courts issued maritime injunctions to prevent the parties from repeating the request for preservation measures abroad.

These maritime injunctions paved the way for the development of the act preservation mechanism in Article 100 of the Civil Procedure Law. As one commentator observes:

> The Civil Procedure Law specifically stipulates the conditions, procedures, and legal consequences of act preservation so that the maritime injunctions in maritime litigation can enjoy the procedural protection of the Civil Procedure Law. It promotes the coherence between the procedures for maritime and civil litigation and is

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司标准必要专利许可纠纷案) [*The First Anti-Suit Injunction Issued in a Chinese Intellectual Property Case—A Detailed Explanation of the* Conversant v. Huawei *SEP Licensing Dispute by the Collegial Panel*], INTELL. PROP. CT. SUP. PEOPLE'S CT. (Feb. 26, 2021, 10:49 AM), http://ipc.court.gov.cn/zh-cn/news/view-1056.html [https://perma.cc/M2R8-WWAG] [hereinafter *First ASI Issued*]; *see also* Li Xiaofeng (李晓枫), *Lun Yi Woguo Xingwei Baoquan Zhidu Shixian Jinsuling Gongneng* (论以我国行为保全制度实现禁诉令功能) [*Discussion on the Use of Act Preservation System to Achieve the Functions of Anti-Suit Injunction*], FAXUE ZAZHI (法学杂志) [L. SCI. MAG.], no. 7, 2015, at 132, 135 (noting that the Chinese courts' early encounters with ASIs from foreign countries concentrated in the field of maritime litigation). Chinese commentators frequently started the discussion of maritime injunctions with the 2008 case involving Nanyuan Co. *See* Wang Juan (王娟), *Guanyu Woguo Yinru Jinsuling Zhidu De Sikao* (关于我国引入禁诉令制度的思考) [*Thoughts on the Introduction of an Anti-Suit Injunction System in China*], FAXUE PINGLUN (法学评论) [L. REV.], no. 6, 2009, at 72, 72 [hereinafter Wang, *Thoughts on ASI*].

321. *First ASI Issued*, *supra* note 320; *see also* Atlasnavios Navegacao, LDA v. Ship "Xin Tai Hai" (2012) 291 ALR 795 [3]–[8], [15]–[17] (Austl.) (discussing the proceedings in China).

322. Huatai Caichan Baoxian Youxian Gongsi Shenzhen Fengongsi Yu Kelibo Zuchuan Gongsi Chuanbo Zuyong Hetong Jiufen An (华泰财产保险有限公司深圳分公司与克利伯租船公司船舶租用合同纠纷案) [Huatai Prop. & Cas. Ins. Co. v. Clipper Chartering SA], (2017) E 72 Xing Bao No. 3 ((2017)鄂72行保3号) (Wuhan Mar. Ct. July 21, 2017).

> conducive to solving the problem of "difficult enforcement" (*zhixing nan*) involving maritime injunctions.[323]

Justice Luo has also confirmed the experimental nature of maritime injunctions and their significance for providing practical guidance to the establishment of the act preservation mechanism in the Civil Procedure Law.[324]

2. Expanded use in SEP cases

In 2020, Chinese courts began issuing ASI-like remedies in SEP cases. Because Section III.C offered an in-depth discussion of the five specific cases that provided for such remedies, this Section focuses on the local roots of the injunctive measures granted in those cases. At the outset, it is worth noting that the SPC's decision in *Conversant v. Huawei* has attracted worldwide attention from judges, academics, and practitioners. The *People's Court Daily*, published by the SPC, also included this case in its list of "Top Ten Cases of the People's Court in 2020."[325] This selection was particularly notable considering that the list was nationwide and included all areas of law, not just intellectual property law.

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323. Zheng Dengzhen (郑登振), <*Minshi Susong Fa*> *Xiuding Dui Haishi Susong De Yingxiang* (《民事诉讼法》修订对海事诉讼的影响) [*The Impact of the Revision of the Civil Procedure Law on Maritime Litigation*], ZHONGGUO HAISHANG FA YANJIU (中国海商法研究) [CHINESE J. MAR. L.], no. 2, 2013, at 112, 114.

324. Luo Dongchuan (罗东川), Zhigua Yunfan Ji Canghai (直挂云帆济沧海) [*Hoisting a Full Sail to Navigate the Boundless Sea*], ZHONGGUO FAYUAN WANGXUN (中国法院网) CHINA CT. NET (Sept. 2, 2014), https://www.chinacourt.org/article/detail/2014/09/id/1430591.shtml [https://perma.cc/HX9Q-D9XY].

325. As the *People's Court Daily* reported:

> The ten selected cases, including criminal, civil, and administrative cases, are among those reported by this newspaper in 2020 that have major influence, that are of wide concern to society, that reflect major breakthroughs in trial results, and that play exemplary and leading roles in promoting public order and good customs.

Dong Xingyu (董星雨), Benbao Pingchu 2020 Niandu Renmin Fayuan Shida Anjian (本报评出2020年度人民法院十大案件) [*The* People's Court Daily *Has Selected the Top Ten Cases of the People's Court in 2020*], RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S CT. DAILY] (Jan. 9, 2021), http://rmfyb.chinacourt.org/paper/html/2021-01/09/content_175437.htm [https://perma.cc/33J8-2LSJ]. More recently, the SPC also selected this case for its list of "Top 10 Intellectual Property Cases in 2020." Top 10 IP Cases, *supra* note 276.

In its report on *Conversant v. Huawei*, the SPC noted:

> This case was based on the act preservation system in Article 100 of the Civil Procedure Law. It broadened the scope and boundary of the application of the act preservation system in China and provided the early steps of the path toward putting anti-suit injunctions in Chinese judicial practice.[326]

Thus, even though China has not released any law, regulation, or judicial interpretation to formally adopt ASIs,[327] the 2020 case seems to have set a guiding precedent for comparable cases in the future. It is particularly noteworthy that the SPC used the term ASI (*jinsuling*) in its report.[328]

In addition, the establishment of an ASI-like mechanism can find theoretical and practical support from Chinese scholars and practitioners. For more than a decade, scholars have put forward this mechanism, emphasizing the necessity and rationality of its establishment in China. As one commentator observed as early as 2007: "In a case over which both the Chinese and foreign courts have jurisdiction, if the foreign court has the means of issuing an anti-suit injunction but the Chinese court does not, the lack thereof will inevitably disadvantage the Chinese court in a jurisdictional battle."[329] This view, which was representative of Chinese scholars and practitioners, is emblematic of the intention to protect the judicial authority of domestic courts from being undercut by foreign courts. Thus far, it appears that most Chinese scholars and judges in relevant

326. *First ASI Issued*, *supra* note 320.

327. An interesting contrast is the introduction of the forum non conveniens doctrine in China. That doctrine was transplanted through a judicial interpretation that the SPC promulgated in January 2015. Zuigao Renmin Fayuan Guanyu Shiyong <Zhonghua Renmin Gongheguo Minshi Susong Fa> De Jieshi, Fashi [2015] Wu Hao (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释, 法释【2015】5号) [Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China, Judicial Interpretation No. 5 [2015]] (promulgated by the Judicial Comm. Sup. People's Ct., Jan. 30, 2015, effective Feb. 4, 2015), art. 532, https://www.pkulaw.com/en_law/82f91c0394dcdc28bdfb.html [https://perma.cc/AW36-NEEK].

328. *See First ASI Issued*, *supra* note 320.

329. Zhang Limin (张利民), *Guoji Minsu Zhong Jinsuling De Yunyong Ji Woguo Jinsuling Zhidu De Goujian* (国际民诉中禁诉令的运用及我国禁诉令制度的构建) [*The Use of Anti-Suit Injunctions in Transnational Civil Litigation and the Construction of the Anti-Suit Injunction System in China*], FAXUE (法学) [LEGAL SCI.], no. 3, 2007, at 122, 127.

fields, including a senior SPC judge,[330] agree and support the establishment of an ASI mechanism.[331]

In sum, the SPC's issuance of an ASI in 2020 has buttressed the judicial efforts to prophylactically halt potential SEP-related parallel proceedings in competing judicial fora abroad. There is also a wide range of theoretical and practical support for the formal introduction of an ASI-like mechanism in China. In the future, it is likely that a formal statutory basis—or, in the context of this Article, a legal transplantation with clearly defined parameters—will be developed.

Until such development, however, there remains no formal statutory basis for a western-style ASI under Chinese law.[332] Nor is there an institutional bar to issuing ASIs. Indeed, Chinese judges are already authorized to use discretion to evaluate the appropriateness of such issuance.[333] They can do so mutatis mutandis as they see fit, based on

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330. *See, e.g.*, Shen Hongyu (沈红雨), *Woguo Fa De Yuwai Shiyong Falü Tixi Goujian Yu Shewai Minshangshi Susong Guanxiaquan Zhidu De Gaige—Jian Lun Bufangbian Fayuan Yuanze He Jinsuling Jizhi De Goujian* (我国法的域外适用法律体系构建与涉外民商事诉讼管辖权制度的改革—兼论不方便法院原则和禁诉令机制的构建) [*The Construction of a Legal System for the Extraterritorial Application of Chinese Law and the Reform of the Jurisdiction System Concerning Foreign-Related Civil and Commercial Litigation—and the Discussion of the Forum Non Conveniens Principle and the Construction of the Anti-Suit Injunction Mechanism*], ZHONGGUO YINGYONG FAXUE (中国应用法学) [CHINA J. APPLIED JURIS.], no. 5, 2020, at 114, 126 (authored by the Deputy Chief Judge of the Fourth Civil Tribunal of the Supreme People's Court).

331. *See, e.g.*, OU FUYONG, ANTI-SUIT INJUNCTIONS IN TRANSNATIONAL CIVIL LITIGATION 249–55 (2007); Peng Yi (彭奕), Woguo Neidi Shiyong Jinsuling Zhidu Tanxi (我国内地适用禁诉令制度探析) [*A Probe into a Suitable Anti-Suit Injunction System for Mainland China]*, WUHAN DAXUE XUEBAO (ZHEXUE SHEHUI KEXUE BAN) (武汉大学学报(哲学社会科学版)) [WUHAN U.J. (PHIL. & SOC. SCI. ED.)], no. 5, 2012, at 57; Wang, *Thoughts on ASI*, *supra* note 320; Yao Jianjun (姚建军), *Yingmei Faxi Guojia (Diqu) De Jinsuling Zhidu Ji Dui Woguo De Jiejian* (英美法系国家(地区)的禁诉令制度及对我国的借鉴) [*The Anti-Suit Injunction System in Common Law Countries (Regions) and Its Use as a Reference for China]*, RENMIN SIFA (人民司法) [PEOPLE'S JUDICATURE], no. 1, 2011, at 102; Zhu Jianjun (祝建军), *Woguo Ying Jianli Chuli Biaozhun Biyao Zhuanli De Jinsuling Zhidu* (我国应建立处理标准必要专利争议的禁诉令制度) [*China Should Establish an Anti-Suit Injunction System to Handle SEP Disputes*], ZHISHI CHANQUAN (知识产权) [INTELL. PROP.], no. 6, 2020, at 25.

332. Other commentators have made this observation as well. *Accord* Tang, *supra* note 278 ("Chinese law does not explicitly permit the courts to issue anti-suit or anti-arbitration injunctions.").

333. *See id.*

factors that are typically weighed in cases that call for an act preservation mechanism, broadly defined. Such an approach, to a certain degree, reflects the need for and benefits of legal pragmatism.

As ASIs continue to develop in China, other factors may affect the mechanism's development trajectory. For instance, in June 2021, China promulgated the Anti-Foreign Sanctions Law, which took effect immediately.[334] Although the law falls in the domain of public law and was enacted to provide effective and adequate countermeasures against foreign sanctions on China, some commentators have linked this new law to the discussion of ASIs.[335] It remains to be seen whether the Anti-Foreign Sanctions Law will be invoked in the SEP context or in relation to ASIs in the future.

B. Are ASIs Legal Transplants?

Considering the availability of injunctive mechanisms under Chinese intellectual property, maritime, and civil procedure laws, and the legal basis for Chinese courts to issue ASIs in international FRAND disputes, one could query whether ASIs are legal transplants. Based on its local roots in China, the ASI could be classified as an indigenous legal device that Chinese courts have adapted in response to foreign legal actions. After all, ASIs are by their nature act preservation mechanisms. These mechanisms have been part of the Civil Procedure Law since 2012, and even earlier if one counts the 1999 Special Maritime Procedure Law.[336]

Nevertheless, four reasons support the view that the ASI mechanism is a legal transplant by China. First, as the SPC Intellectual Property Court stated, the ASI is a new, sui generis form of act preservation mechanism that was first created in the 2020 case of *Conversant v. Huawei*.[337] As noted in the previous Section, the Court specifically used the term *jinsuling* (ASI) alongside *xingwei baoquan* (act preservation) in its report on this case.[338] This word choice strongly suggests that the ASI is a foreign transplant that Chinese courts have operationalized

334. Zhonghua Renmin Gongheguo Fan Waiguo Zhicai Fa (中华人民共和国反外国制裁法) [Anti-Foreign Sanctions Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., June 10, 2021, effective June 10, 2021).

335. *Cf.* Mark Cohen, *China's New Blocking Statute Comes into Effect*, CHINA IPR (June 11, 2021), https://chinaipr.com/2021/06/11/chinas-new-blocking-statute-comes-into-effect [https://perma.cc/XE7Z-BMWM].

336. *See* discussion *supra* Section IV.A.1.

337. *See First ASI Issued*, *supra* note 320.

338. *Id.*

through, and assimilated into, the act preservation mechanism provided under Article 100 of the Civil Procedure Law.[339]

Second, Section II.D noted the different approaches taken by courts in civil law jurisdictions, in particular their reluctance to issue ASIs and their eagerness to issue AASIs to protect their own jurisdiction.[340] Considering the civil law tradition in China and the Germanic roots of its legal system,[341] it is peculiar that Chinese courts did not follow the continental European approach. Instead, these courts used the act preservation mechanism creatively to achieve outcomes that ASIs would generate in the United Kingdom, the United States, and other common law jurisdictions.[342] The Chinese courts' willingness to reorient a preexisting legal remedy to achieve a distinctive outcome is another piece of evidence supporting the view that the ASI mechanism is a legal transplant.

Third, legal transplantation takes place in a continuum. As one of us (Peter Yu) has noted in relation to the slowly emerging global effort to transplant the fair use provision in U.S. copyright law,[343] "the jurisdictions seeking to introduce the fair use model [often] retain a considerable part of their status quo."[344] As a result, these jurisdictions frequently end up with hybrid transplants that incorporate the distinctive features of a new legal standard transplanted from the source jurisdiction while also retaining a considerable part of the preexisting standard rooted in the recipient jurisdiction.[345] In this type of hybrid situation, it is not always easy to distinguish whether the legal standard has evolved locally or been transplanted from abroad, or whether the doctrine or procedure in the recipient jurisdiction differs so significantly from that of the source jurisdiction that the local version can no longer be fairly characterized as a legal transplant.

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339. 2017 Civil Procedure Law, *supra* note 1, art. 100.

340. *See supra* text accompanying note 171.

341. *See* CHEN, *supra* note 65, at 28–29 (discussing the early Chinese legal reforms based on the German and Japanese models).

342. *See* Tang, *supra* note 278 ("The Chinese judgments show clear sign of borrowing the common law tests.").

343. 17 U.S.C. § 107.

344. Peter K. Yu, *Fair Use and Its Global Paradigm Evolution*, 2019 U. ILL. L. REV. 111, 157 [hereinafter Yu, *Fair Use*].

345. We readily acknowledge that the ASIs issued in China are not necessarily identical to the ASIs issued in the United States or elsewhere. One of the most notable differences is the global scope of the ASIs issued by the Wuhan court in *InterDigital v. Xiaomi* and *Samsung v. Ericsson*, which is far broader than the ASIs issued by U.S. courts in prior FRAND cases. *See* discussion *supra* Sections III.C.2, III.C.4.

Finally, from both an academic and a policy standpoint, there are many benefits to viewing the ASIs issued by Chinese courts as legal transplants. Such a perspective allows us to link developments in China with those in other jurisdictions, thereby enriching our understanding of recent Chinese legal and intellectual property developments. Because legal transplant is a useful concept for comparative legal analysis, such linkage will also enable us to develop a deeper appreciation of the fast-changing landscape of international patent litigation, especially in relation to SEP disputes and FRAND licensing.

C. Why Did China Transplant ASIs?

Before 2020, Chinese courts had not restrained parties from pursuing intellectual property proceedings in foreign courts. This fairly restrained position changed dramatically after the SPC issued its first ASI in a SEP dispute, creating international preclusive effect that has serious ramifications for both the domestic legal system and transnational civil litigation.[346] To help develop a richer and more holistic understanding of the emergence of ASIs in China, as well as the reasons behind the Chinese courts' sudden position shift, this Section identifies the various forces driving the introduction of ASIs in China—and, for many, the transplant of a foreign procedural mechanism. It groups these forces in two broad categories: (1) legal and judicial developments and (2) developments in the intellectual property and innovation domain.

1. Legal and judicial developments

a. Jurisdiction and judicial sovereignty

Like the essential purpose of ASIs in foreign jurisdictions, a key objective behind the Chinese courts' issuance of ASIs is to protect their jurisdiction and, in turn, judicial sovereignty. Such protection provides the primary and immediate cause of transplanting ASIs into China. As the SPC observes in its report on *Conversant v. Huawei*:

> Dealing with ASIs is an unavoidable problem confronting the Chinese judiciary in the intellectual property area. Many Chinese lawsuits have already encountered ASIs issued by courts in other countries. The internationalization trend surrounding ASIs profoundly reflects the competition among major powers for jurisdiction over international disputes and for dominance in

346. *See* discussion *supra* Section III.C.

> rulemaking. The ASI is an important tool for preventing and reducing the abuse of parallel litigation and safeguarding national judicial sovereignty. Without ASIs, Chinese courts will be put in a passive position in the international judicial competition.[347]

As noted in Section II.D, an ASI is usually issued by a court against a party taking part in an action in that court and does not seek directly to limit the jurisdiction of a foreign court. In practice, however, an ASI indirectly affects the jurisdiction of a foreign court by preventing the enjoined party and related parties from initiating, or continuing to take part in, an action in the affected court.[348] Judicial sovereignty is an integral part of national sovereignty, and courts are generally unwilling to tolerate intrusions upon, or damage to, their judicial sovereignty. As a result, issues involving judicial sovereignty tend to be politically sensitive.

In general, the court first seised of the action is expected to have priority to exercise jurisdiction, at least during the pendency of the action. For example, Article 21 of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which is applicable to the members of the European Union, states explicitly: "Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion decline jurisdiction in favour of that court."[349] In *Allianz SpA v West Tankers Inc.*,[350] the European Court of Justice (now the Court of Justice of the European Union) relied on this provision to prohibit the use of ASIs among EU member states.[351]

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347. *First ASI Issued*, *supra* note 320. Similar views have been expressed earlier. *See, e.g.*, Ding Wenyan (丁文严) & Han Ping (韩萍), *Zhongguo Qiye Zhuanli Shewai Sifa Baohu Zhong De Guanxia Kunjing Yu Yingdui* (中国企业专利涉外司法保护中的管辖困境与应对) [*The Jurisdictional Dilemma and Responses Concerning Foreign-Related Judicial Protection of Patents Owned by Chinese Enterprises*], RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S CT. DAILY] (May 30, 2018), http://rmfyb.chinacourt.org/paper/images/2018-05/30/07/2018053007_pdf.pdf [https://perma.cc/CJ8G-9HBM] (underscoring that ASIs issued by foreign courts through long-arm jurisdiction "will inevitably damage China's judicial credibility and reduce its judicial authority on an international scale").

348. For instance, "American courts have generally refused to distinguish between addressing an injunction to parties before a court and addressing an injunction to the court itself." George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589, 589 n.1 (1990).

349. 1972 O.J. (L 299) 32, art. 21.

350. Case C-185/07, 2009 E.C.R. I-686 (Grand Chamber).

351. *Id.* at I-699.

Nevertheless, in the absence of an international consensus or a treaty-based obligation to harmonize or regulate transnational ASIs, AASIs, and AAASIs, no court appears willing to give up its judicial sovereignty to abide by such a first-seised principle. Instead, courts appear to feel compelled to develop new approaches to protect their own jurisdiction.

One way that courts may be willing to adjust their positions on judicial sovereignty is through the principle of reciprocity. In China, this principle is embodied in Article 5 of the Civil Procedure Law, which provides, in pertinent part:

> If the courts of a foreign country impose restrictions on the civil procedural rights of citizens, legal persons and other organizations of the People's Republic of China, the people's courts of the People's Republic of China shall implement the principle of reciprocity in respect of the civil procedural rights of citizens, enterprises and organizations of that foreign country.[352]

Linking the principle of reciprocity to ASIs helps explain why Chinese courts were eager to transplant this foreign procedural mechanism. Although no domestic court has an obligation to recognize and enforce ASIs issued by foreign courts, the principle of reciprocity may cause them to exercise restraint in cases involving foreign ASIs if the issuing courts are willing to do the same in return. Nevertheless, before Chinese courts can apply the principle of reciprocity in the ASI context, they need their own ASI mechanism. Thus, to some extent, the ASI can be viewed as a tool enabling Chinese courts to make reciprocal arrangements to promote international comity.

The Chinese courts' ability to effectively respond to undesirable foreign court orders issued against parties appearing before them can also be tied to the ongoing effort to increase China's discourse power (*huayuquan*) over foreign-related (*shewai*) matters.[353] In recent years, such power has become a hotly discussed topic in China, finding its way into speeches and resolutions made by top leaders. For instance, in an important nationwide macro-level guidance decision, the Central Committee of the Communist Party of China (Central Committee) underscored the need to "actively participate in the formulation of

352. 2017 Civil Procedure Law, *supra* note 1, art. 5.

353. *See* Wang Jiangyu, *Between Power Politics and International Economic Law: Asian Regionalism, the Trans-Pacific Partnership and U.S.-China Trade Relations*, 30 PACE INT'L L. REV. 383, 428–31 (2018) (discussing China's recent push for greater "discursive power" in international affairs).

international rules, promote the handling of foreign-related economic and social affairs in accordance with the law, and enhance China's discourse power and influence in international legal affairs."[354] This policy guidance helped set an important tone for subsequent developments in China's foreign-related legal affairs.

More specifically, in the intellectual property area and in relation to the SEP debate, a growing volume of scholarly publications have focused on or discussed foreign-related discourse power.[355] With the country's growing desire to increase this power, it is understandable why measures that would help strengthen the protection of judicial

354. Resolution of the CPC Central Committee on the Major Achievements and Historical Experience of the Party over the Past Century (adopted at the Fourth Plenary Session Eighteenth Cent. Comm., Oct. 23, 2014), *translated at* https://english.www.gov.cn/policies/latestreleases/202111/16/content_WS6193a935c6d0df57f98e50b0.html [https://perma.cc/P8PB-82MG].

355. *See, e.g.*, Huang Jin (黄进), *Xi Jinping Quanqiu Zhili Yu Guoji Fazhi Sixiang Yanjiu* (习近平全球治理与国际法治思想研究) [*Research on Xi Jinping's Thought on Global Governance and International Rule of Law*], ZHONGGUO FAXUE (中国法学) [CHINA LEGAL SCI.], no. 5, 2017, at 5; Kong Xiangjun (孔祥俊), *Lun Zhishi Chanquan De Gonggong Zhengce Xing* (论知识产权的公共政策性) [*On the Public Policy Nature of Intellectual Property*], SHANGHAI JIAOTONG DAXUE XUEBAO (上海交通大学学报(哲学社会科学版)) [J. SHANGHAI JIAO TONG UNIV. (PHIL. & SOC. SCI.)], no. 3, 2021, at 19; Ma Yide (马一德), *Zhongguo Zhishi Chanquan Zhili Sishi Nian* (中国知识产权治理四十年) [*Forty Years of Intellectual Property Governance in China*], FAXUE PINGLUN (法学评论) [L. REV.], no. 6, 2019, at 10; Zhang Naigen (张乃根), *"Yidai Yilu" Changyi Xia De Guoji Jingmao Guize Zhi Zhonggou* ("一带一路"倡议下的国际经贸规则之重构) [*The Reconstruction of International Economic and Trade Rules Under the Belt and Road Initiative*], FAXUE (法学) [LEGAL SCI.], no. 5, 2016, at 93; Zhu Jianjun (祝建军), *Biaozhun Biyao Zhuanli Jinsuling Yu Fan Jinsuling Banfa De Chongtu Ji Yingdui* (标准必要专利禁诉令与反禁诉令颁发的冲突及应对) [*The Conflict Created by the Issuance of SEP-Related Anti-Suit Injunctions and Anti-Anti-Suit-Injunctions and Responses*], ZHISHI CHANQUAN (知识产权) [INTELL. PROP.], no. 6, 2021, at 14; Zhu Yiang (朱怡昂), *Zhongguo Guoji Shangshi Fating Guanxiaquan Yanjiu* (中国国际商事法庭管辖权研究) [*Research on the Jurisdiction of the China International Commercial Court*], FALÜ SHIYONG (法律适用) [J.L. APPLICATION], no. 7, 2021, at 136; Jiang Huasheng (蒋华胜), *Biaozhun Biyao Zhuanli Anjian Shenli Zhong De Wenti Ji Yingdui* (标准必要专利案件审理中的问题及应对) [*Problems and Reponses Concerning the Adjudication of SEP-Related Cases*], RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S CT. DAILY] (May 13, 2021), http://rmfyb.chinacourt.org/paper/html/2021-05/13/content_204367.htm [https://perma.cc/8YQR-KRNF].

sovereignty in foreign-related matters, such as ASIs, have become increasingly popular.

b. Preferred forum for international intellectual property dispute settlement

In 2018, the General Offices of the Central Committee and the State Council jointly issued the Opinions on Several Issues Concerning the Strengthening of Reform and Innovation in the Field of Intellectual Property Adjudications.[356] As noted in the public announcement, the Opinions represented "the first landmark programmatic document issued by the two General Offices that specifically addressed intellectual property adjudications."[357] Among the basic principles listed is one emphasizing the need to "actively build a new mode of judicial protection with Chinese characteristics for intellectual property rights and to continuously strengthen China's leading power in the international intellectual property governance rules."[358]

In the context of international jurisdictional competition in the intellectual property area, this principle has been interpreted to encompass the objective of making Chinese courts the "preferred place" (*youxuan di*) for international intellectual property dispute settlement that is trusted by the parties concerned. This objective was explicitly mentioned in *An Outline for Building a Powerful Intellectual Property Nation (2021–2035)*, which the State Council released in September 2021.[359] At the subnational level, some courts have also

356. Guanyu Jiaqiang Zhishi Chanquan Shenpan Lingyu Gaige Chuangxin Ruogan Wenti De Yijian (关于加强知识产权审判领域改革创新若干问题的意见) [Opinions on Several Issues Concerning the Strengthening of Reform and Innovation in the Field of Intellectual Property Adjudications] (promulgated by the Gen. Off. Cent. Comm. Communist Party & Gen. Off. State Council, Feb. 27, 2018), http://www.gov.cn/xinwen/2018-02/27/content_5269267.htm [https://perma.cc/663J-D6W9] [hereinafter Opinions on IP Adjudications].

357. *Xinwenban Jiu <Guanyu Jiaqiang Zhishi Chanquan Shenpan Lingyu Gaige Chuangxin Ruogan Wenti De Yijian> Youguan Qingkuang Juxing Xinwen Fabu Hui* (新闻办就《关于加强知识产权审判领域改革创新若干问题的意见》有关情况举行新闻发布会) [*The Press Office Held a Press Conference on the Situation Surrounding the Opinions on Several Issues Concerning the Strengthening of Reform and Innovation in the Field of Intellectual Property Adjudications*], ZHONGGUO ZHENGFU WANG (中国政府网) [CHINA GOV'T NET] (Feb. 28, 2018), http://www.gov.cn/xinwen/2018-02/28/content_5269454.htm [https://perma.cc/Z76U-JEK2].

358. Opinions on IP Adjudications, *supra* note 356.

359. State Council of the People's Republic of China, Zhishi Chanquan Qiangguo Jianshe Gangyao (2021–2035 Nian) (知识产权强国建设纲要(2021–2035年)) [An Outline

embraced a similar objective of striving to become the "preferred place" for intellectual property dispute resolution within the country.[360] While becoming the preferred forum for intellectual property dispute settlement can be an end in itself, this stated objective is also a means to the ultimate end of promoting economic development. After all, a close relationship exists between intellectual property protection and business environment optimization.[361]

2. Intellectual property and innovation

Technological progress is one of the main drivers of contemporary economic growth, and the intellectual property system, especially the patent system, provides important institutional incentives to attain such progress. China has therefore viewed intellectual property protection as a crucial factor for promoting national interests and global competitiveness, even though such protection involves private rights.[362] As President Xi Jinping recently declared:

> Intellectual property is a core factor for competitiveness on the international stage, as well a focal point of international dispute. We need to have the courage and the capacity to stand up for ourselves

for Building a Powerful Intellectual Property Nation (2021–2035)], pt. VIII, http://www.gov.cn/zhengce/2021-09/22/content_5638714.htm [https://perma.cc/82NN-MLAP].

360. Zhao Yan (赵岩) & Kong Qingbing (孔庆兵), *Beijing Gaoyuan Chutai <Jiaqiang Zhishi Chanquan Shenpan Cujin Chuangxin Fazhan De Ruogan Yijian> Nuli Dazao Zhishi Chanquan Zhengduan Jiejue "Youxuan Di"* (北京高院出台《加强知识产权审判促进创新发展的若干意见》努力打造知识产权争端解决"优选地") [*The Beijing Municipal High People's Court Issued Several Opinions on Strengthening Intellectual Property Adjudications and Promoting Innovative Development: Striving to Create a "Preferred Place" for Intellectual Property Dispute Settlement*], ZHONGGUO FAYUAN WANG (中国法院网讯) CHINA CT. NET (Sept. 20, 2018), https://www.chinacourt.org/article/detail/2018/09/id/3509268.shtml [https://perma.cc/9PW7-EQST].

361. *See* Zhang Weilun (张伟伦), Zhongguo: Guoji Zhishi Chanquan Zhengduan Jiejue Youxuan Di (中国：国际知识产权争端解决"优选地") [*China: "Preferred Place" for International Intellectual Property Dispute Settlement*], ZHONGGUO MAOYI BAO (中国贸易报) [CHINA TRADE NEWS] (May 21, 2019), https://www.chinatradenews.com.cn/epaper/content/1/2019-05/21/A6/20190521A6_pdf.pdf [https://perma.cc/J9LM-6S46] (discussing State Council's *2018 New Progress Report on China's Intellectual Property Protection and Business Environment*).

362. *See* TRIPS Agreement, *supra* note 28, pmbl. ("[I]ntellectual property rights are private rights.").

> in this regard, and refuse to yield our legitimate rights and interests or jeopardize our core national interests.[363]

Because Chinese leaders and policymakers view technological innovation as one of the most crucial strategic devices for promoting global competitiveness, the past decade has seen them attach increasing importance to indigenous scientific and technological innovation.[364] As *China Economic Daily* reported in 2015:

> Among the more than 100 State Council executive meetings held by the State Council, twenty-one meetings related to scientific and technological innovation, indicating that scientific and technological innovation has been placed at core of country's overall national development.[365]

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363. Xi Jinping, *Stepping up Intellectual Property Rights Protection to Stimulate Innovative Vigor for Fostering a New Development Dynamic*, QIUSHI J. (Apr. 30, 2021), http://en.qstheory.cn/2021-04/30/c_618275.htm [https://perma.cc/AAH7-NTVN].

364. In addition to other more widely known key objectives of promoting and facilitating inward technology transfer and foreign investment, cultivating indigenous technological innovation is one of the stimuli provided by the adoption of the Chinese Patent Law in March 1984. *See* L. Mark Wu-Ohlson, *A Commentary on China's New Patent and Trademark Laws*, 6 NW. J. INT'L L. & BUS. 86, 92 (1984) ("Of even greater importance is the impact over the long term which a patent law will have on the development of indigenous Chinese invention and technological advancement."). Particularly in the past decade, an increasing number of international articles addressing, in whole or in part, China's indigenous technological innovation from diverse perspectives. *See, e.g.*, Keith E. Maskus, *China's Uneasy Engagement with Intellectual Property Reforms During Its Globalization*, 22 BROWN J. WORLD AFFS. 137, 148–50 (2016) (addressing in part the relationship between the development of China's indigenous innovation policy and the domestic acquisition and development of patents in key technologies); Edward J. Walneck, *The Patent Troll or Dragon: How Quantity Issues and Chinese Nationalism Explain Recent Trends in Chinese Patent Law*, 31 ARIZ. J. INT'L & COMPAR. L. 435, 447–48 (2014) (reviewing some of China's indigenous innovation policies to provide the background for analyzing patent-based issues in China); Wang Heng, *How May China Respond to the U.S. Trade Approach: Retaliatory, Inclusive and Regulatory Responses*, 31 COLUM. J. ASIAN L. 1, 52 (2018) ("Responding to U.S. concerns, China agreed to eliminate its indigenous innovation products catalogues under [the Strategic and Economic Dialogue]."); Peter K. Yu, *Five Oft-repeated Questions About China's Recent Rise as a Patent Power*, 2013 CARDOZO L. REV. DE NOVO 78, 88–96 (discussing independent innovation and intellectual property).

365. Ye Ban (叶瓣), *Zhengfu Chixu Jujiao Keji Chuangxin Shuoming Shenme?* (政府持续聚焦科技创新说明什么?) [*What Does the Government's Continued Focus on Scientific and Technological Innovation Explain?*], ZHONGGUO JINGJI RIBAO (中国经济日报) [CHINA ECON. DAILY] (Aug. 25, 2015), http://paper.ce.cn/jjrb/html/2015-08/25/content_254474.htm [https://perma.cc/83MC-W8BW].

This high level of attention is understandable considering China's history of inadequate technological development and innovation.[366] For decades, Chinese policymakers have prioritized strategies and efforts that would leap-frog the country in science and technology while elevating its economy beyond the widely noted strength in low-cost manufacturing.[367] So far, China has made considerable progress. For example, "[w]hile overall digitalization is still lagging advanced economies, China has emerged as a global leader in some key new industries," such as e-commerce.[368] In addition, based on the latest WIPO statistics, China has had the world's largest volume of international applications through the Patent Cooperation Treaty since 2019.[369] The country also ranked twelfth in the latest Global Innovation Index.[370] Even though some commentators continue to question these rankings, pointing in particular to the sharp contrast between the volume of domestic and foreign patent filings by Chinese

366. *See Xi Jinping: Chuangxin Nengli Bu Qiang Shi Woguo Fazhan De "Akaliusi Zhi Zhong"* (习近平：创新能力不强是我国发展的"阿喀琉斯之踵") [*Xi Jinping: Weak Innovation Capacity Is the "Achilles' Heel" of China's Development*], ZHONGGUO GONGCHAN DANG XINWEN WANG (中国共产党新闻网) [CPC NEWS NET] (Mar. 11, 2016, 3:14 PM), http://cpc.people.com.cn/xuexi/n1/2016/0311/c385474-28192539.html [https://perma.cc/DYH3-TW6N].

367. For instance, China released a three-step innovation-driven development blueprint in 2016, delineating three future objectives that were emblematic of steadfast national innovation self-assertiveness—that is, becoming an innovative nation by 2020, an international leader in innovation by 2030, and a world powerhouse of scientific and technological innovation by 2050. *See Guideline for China's Innovation-Driven Development Published*, STATE COUNCIL PEOPLE'S REPUBLIC CHINA (May 20, 2016, 8:23 PM), http://english.gov.cn/policies/latest_releases/2016/05/20/content_28147535 3682191.htm [https://perma.cc/9HAA-KZFG].

368. *See* Zhang Longmei & Sally Chen, *China's Digital Economy: Opportunities and Risks* 4 (Int'l Monetary Fund, Working Paper No. 19/16, 2019).

369. *See* Press Release, World Intell. Prop. Org., Innovative Activity Overcomes Pandemic Disruption—WIPO's Global Intellectual Property Filing Services Reach Record Levels (Feb. 10, 2022), https://www.wipo.int/pressroom/en/articles/2022/article_0002.html [https://perma.cc/FTD6-87S9]; Press Release, World Intell. Prop. Org., Innovation Perseveres: International Patent Filings via WIPO Continued to Grow in 2020 Despite COVID-19 Pandemic (Mar. 2, 2021), https://www.wipo.int/pressroom/en/articles/2021/article_0002.html [https://perma.cc/CJS4-HBXG]; Press Release, World Intell. Prop. Org., China Becomes Top Filer of International Patents in 2019 amid Robust Growth for WIPO's IP Services, Treaties and Finances (Apr. 7, 2020), https://www.wipo.int/pressroom/en/articles/2020/article_0005.html [https://perma.cc/MJV8-YLL3].

370. GLOBAL INNOVATION INDEX 2021: TRACKING INNOVATION THROUGH THE COVID-19 CRISIS 4 (Soumitra Dutta et al. eds., 2021).

inventors,[371] there is no denying that China has made an "innovative turn" and is now undertaking enormous amounts of intellectual property and innovative activities.[372]

Since April 2020, China has also gradually begun to build a new development pattern featuring major domestic cycles as the mainstay while ensuring that the domestic and international cycles reinforce each other.[373] As the Xinhua News Agency reports, President Xi "attaches great importance to self-reliance and self-strengthening in science and technology and indigenous innovation and has frequently emphasized this 'basic capability' for more than a year."[374]

In April 2021, he published an intellectual property-focused article, which garnered widespread attention both at home and abroad.[375] Drawing on his speech at the group study session of the Political Bureau of the 19th Central Committee in November 2020, this article repeatedly stressed the importance of indigenous innovation: "Only by rigorously protecting [intellectual property] can we safeguard indigenous Chinese [research and development] on core technologies in key fields and forestall and defuse major risks."[376] The article also underscored the interface between intellectual property protection and innovation as well as the indispensability and contemporary function of rigorously protecting intellectual property rights—particularly patents, which are most closely linked to scientific and technological innovation.[377]

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371. *See* Mark Cohen, *Counting and Discounting Patents—The USPTO Study on Patenting Activity in 5G*, CHINA IPR (Feb. 16, 2022), https://chinaipr.com/2022/02/16/counting-and-discounting-patents-the-uspto-study-on-patenting-activity-in-5g [https://perma.cc/HJ4W-47CG] (calling for the need to have a proper understanding of objective understanding of the threats posed by China's emergence as a major patent filer, especially in light of "its relatively low level of overseas filing . . . [but] high level of domestic filing").

372. *See supra* text accompanying notes 87–91; *see also* Yu, *China's Innovative Turn*, *supra* note 81, at 599–602 (discussing China's innovative turn).

373. *See* Yinian Lai Xi Jinping Pinfan Qiangdiao Zhege "Jichu Nengli" (一年来，习近平频繁强调这个"基础能力") [Over the Past Year, Xi Jinping Has Frequently Emphasized This "Basic Capability"], XINHUA WANG (新华网) [XINHUANET] (May 25, 2021), http://www.xinhuanet.com/politics/xxjxs/2021-05/25/c_1127490481.htm?flag=true [https://perma.cc/NYT3-96J2].

374. *Id.*

375. *See* Xi, *supra* note 363.

376. *Id.*

377. *Id.*

In China, at the moment, building indigenous innovation capabilities is a key driver behind the emphasis on intellectual property protection.[378] The current debate has downplayed other roles of intellectual property protection, such as the attraction of foreign investment, which was heavily emphasized in the 1980s when the modern Chinese intellectual property system was undergoing its formative development.[379]

Shortly before and after President Xi's speech, a panoply of national-level implementation measures were released across multiple sectors.[380] The SPC also issued a new judicial interpretation

378. See sources cited *supra* note 364.

379. *See* Yu, *China Puzzle*, *supra* note 72, at 180–82 (discussing the ambiguous relationship between intellectual property and foreign direct investment in the Chinese context); William E. Beaumont, *The New Patent Law of the People's Republic of China (PRC): Evidence of a Second Chinese "Renaissance"?*, 27 IDEA 39, 56 (1986) ("The Chinese leadership appears particularly interested in acquiring advanced foreign technology and foreign investment to vitalize their ambitious program of modernization."); Eugene A. Theroux, *Technology Sales to China: New Laws and Old Problems*, 14 J. INT'L L. & ECON. 185, 192 (1980) ("During his October 1970 visit to the United States, Trade Minister Li repeated China's interest in attracting foreign technology and investment."); Wu-Ohlson, *supra* note 364, at 113 ("A further impetus to change in China's trademark system has been the policy of encouraging foreign investment in China."); David Ben Kay, Comment, *The Patent Law of the People's Republic of China in Perspective*, 33 UCLA L. REV. 331, 334 (1985) ("Foreign investment and importation of foreign technology have played an increasingly important role in China's modernization program since the early 1970's, particularly since 1978, when China adopted an 'open-door' economic policy.").

380. *See, e.g.*, Guanyu Tuidong Keyan Zuzhi Zhishi Chanquan Gaozhiliang Fazhan De Zhidao Yijian, Guo Zhi Fa Yun Zi [2021] Qi Hao (关于推动科研组织知识产权高质量发展的指导意见, 国知发运字【2021】7号) [Guiding Opinions on Promoting the High-Quality Development of Intellectual Property in Scientific Research Organizations, Notice No. 7 [2021]] (issued by the China Nat'l Intell. Prop. Admin., Chinese Acad. Sci., Chinese Acad. Eng'g & China Ass'n Sci. & Tech., Apr. 1, 2021), https://www.cnipa.gov.cn/art/2021/4/1/art_75_158160.html [https://perma.cc/G45H-W39Q]; Guanyu Guifan Shenqing Zhuanli Xingwei De Banfa, Gonggao Si Yi Yi Hao (关于规范申请专利行为的办法, 公告411号) [Measures Regarding the Regulation of Patent Applications, Announcement No. 411] (issued by the China Nat'l Intell. Prop. Admin., Mar. 12, 2021), https://www.cnipa.gov.cn/art/2021/3/12/art_74_157677.html [https://perma.cc/RLG2-94GU]; Guanyu Shiye Danwei Keyan Renyuan Zhiwu Keji Chengguo Zhuanhua Xianjin Jiangli Naru Jixiao Gongzi Guanli Youguan Wenti De Tongzhi, Renshebu Fa [2021] Shisi Hao (关于事业单位科研人员职务科技成果转化现金奖励纳入绩效工资管理有关问题的通知, 人社部发【2021】14号) [Notice of Issues Concerning the Incorporation into Performance Salary Management of Cash Rewards for the Conversion of Scientific and Technological Achievements of Scientific Researchers in Public Institutions, Notice No. 14 [2021]] (issued by the Ministry Hum.

on the award of punitive damages in intellectual property cases[381] as well as a new judicial protection plan.[382] Taken together, these measures and the overall effort to promote indigenous innovation reflect the strong political will of the top Chinese leadership.

In sum, two sets of forces have been working in tandem to drive Chinese courts to issue ASIs. On one hand, the political sensitivity associated with protecting judicial sovereignty spurs the transplantation of ASIs as a means to curb growing duplicative parallel foreign litigation over SEPs and FRAND licensing. On the other hand, the enhanced political will among the top Chinese leadership[383] to improve indigenous innovation capabilities has augmented the position and weight of the patent system. Of direct relevance is the issuance of ASIs, which have become an integral part of this system and will likely be expanded in the near future.

Ress. & Soc. Sec., Ministry Fin. & Ministry Sci. & Tech., Feb. 8, 2021), http://www.mohrss.gov.cn//xxgk2020/fdzdgknr/zcfg/gfxwj/rcrs/202103/t20210330_412031.html [https://perma.cc/H5A5-7BVZ]; Guanyu Xiugai <Zhuanli Shencha Zhinan>, Gonggao San Jiu Yi Hao (关于修改《专利审查指南》, 公告391号) [Announcement of the Amendment of the Patent Examination Guidelines, Announcement No. 391] (issued by the China Nat'l Intell. Prop. Admin., Dec. 14, 2020), https://www.cnipa.gov.cn/art/2020/12/14/art_74_155606.html [https://perma.cc/4WHD-54YV].

381. Zuigao Renmin Fayuan Chutai Zhishi Chanquan Chengfa Xing Peichang Sifa Jieshi Yifa Chengchu Yanzhong Qinhai Zhishi Chanquan Xingwei, Fashi [2021] Si Hao (最高人民法院出台知识产权惩罚性赔偿司法解释依法惩处严重侵害知识产权行为, 法释【2021】4号) [Interpretation of the Supreme People's Court on Punitive Damages Applicable to Civil Intellectual Property Cases, Judicial Interpretation No. 4 [2021]] (promulgated by the Judicial Comm. Sup. People's Ct., Feb. 7, 2021), http://www.court.gov.cn/fabu-xiangqing-288861.html [https://perma.cc/Z7RK-MPC8].

382. SUPREME PEOPLE'S CT., RENMIN FAYUAN ZHISHI CHANQUAN SIFA BAOHU GUIHUA (2021–2025 NIAN) (人民法院知识产权司法保护规划(2021–2025年)) [JUDICIAL PROTECTION PLAN OF THE PEOPLE'S COURT FOR INTELLECTUAL PROPERTY RIGHTS (2021–2025)] (2021), http://www.court.gov.cn/fabu-xiangqing-297981.html [https://perma.cc/973X-ULTE].

383. *See Zongshuji Wei "Keji Zili Ziqiang" Jiashang Le Yige Zhongyao Dingyu* (总书记为"科技自立自强"加上了一个重要定语) [*General Secretary Added an Important Attribute to Self-Reliance and Self-Strengthening in Science and Technology*], XINHUA WANG (新华网) XINHUANET (May 29, 2021, 1:12 PM), http://www.xinhuanet.com/politics/leaders/2021-05/29/c_1127505875.htm [https://perma.cc/7ZGM-WWDK] (reporting the first time President Xi's addition of the "high-level" attribute to self-reliance and self-strengthening in science and technology).

D. ASIs Compared with Pharmaceutical Transplants in China

To highlight the unprecedented nature of the ASI transplant in China, it is instructive to compare it with two other recently adopted transplants in the pharmaceutical area.[384] In April 2018, the National Medical Products Administration of China, the Chinese equivalent of the U.S. Food and Drug Administration, released the draft Provisional Measures for the Implementation of Test Data Protection for Pharmaceutical Products.[385] Article 5 provides twelve years of market exclusivity to undisclosed test or other data for innovative therapeutic biological products (*chuangxin zhiliao yong shengwu zhipin*).[386] This draft provision puts China in parity with the United States, which offers similar protection.[387] China's willingness to proactively transplant U.S. market exclusivities for biological products is interesting because the United States has been unsuccessful in transplanting this standard abroad through recent international trade negotiations. For instance, during the Trans-Pacific Partnership negotiations, the American negotiators' strong push for market exclusivities for biological products were met with heavy opposition from their counterparts.[388]

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384. One could further compare the ASI transplant with the introduction of a new patent linkage system in China under Article 76 of the 2020 Patent Law. 2020 Patent Law, *supra* note 91, art. 76. This Section, however, does not make such a comparison, in view of the unsettled debate over whether patent linkage was already transplanted to China two decades ago. *See* Benjamin P. Liu, *Fighting Poison with Poison? The Chinese Experience with Pharmaceutical Patent Linkage*, 11 J. MARSHALL REV. INTELL. PROP. L. 623, 629 (2012) ("China is the first country to feature regulatory patent linkage outside of North America and has had linkage regulations on its books for a full decade.").

385. Yaopin Shiyan Shuju Baohu Shishi Banfa (Zanxing) (药品试验数据保护实施办法(暂行)) [Provisional Measures for the Implementation of Test Data Protection for Pharmaceutical Products] [hereinafter Provisional Measures], https://chinaipr2.files.wordpress.com/2018/04/draftdataexclusivityrules.doc (last visited Apr. 13, 2022); *see also* Yu, *China's Innovative Turn*, *supra* note 81, at 602–03 (discussing these provisional measures).

386. Provisional Measures, *supra* note 385, art. 5. *But see* Mark Cohen, *Unpacking the Role of IP Legislation in the Trade War*, CHINA IPR (May 19, 2019), https://chinaipr.com/2019/05/19/unpacking-the-role-of-ip-legislation-in-the-trade-war [https://perma.cc/755L-A6QT] ("There were also rumors that China and [the United States Trade Representative] has scaled back regulatory data protection for biologics from the 12 years that had originally been proposed by China in 2018 to the 10 year period provided by the US Mexico Canada Free Trade Agreement.").

387. *Compare* Provisional Measures, *supra* note 385, art. 5 (providing twelve years of market exclusivity to biological products), *with* 42 U.S.C. § 262(k)(7)(A) (same).

388. *See* Frederick M. Abbott, *The Evolution of Public Health Provisions in Preferential Trade and Investment Agreements of the United States*, *in* CURRENT ALLIANCES IN

Likewise, even though the United States managed to include, to the disappointment of both Canada and Mexico, a weakened version of the provision on biological products in the 2018 text of the United States-Mexico-Canada Agreement,[389] that provision was eventually removed when the agreement was amended in December 2019.[390]

The second transplant occurred in October 2020, when China adopted the Fourth Amendment to the Patent Law.[391] Entering into effect on June 1, 2021, this Amendment provided the latest updates to the Patent Law, which, as Section I.C noted, included mostly legal transplants from developed countries until the late 2000s.[392] Article 42 of the amended statute grants a limited extension of the patent term for up to five years to compensate for the time lost when a pharmaceutical product is undergoing regulatory review.[393] This new provision parallels the Hatch-Waxman Act of 1984[394] in the United States and similar provisions on patent term extension in TRIPS-plus bilateral, regional, and plurilateral agreements.[395]

INTERNATIONAL INTELLECTUAL PROPERTY LAWMAKING: THE EMERGENCE AND IMPACT OF MEGA-REGIONALS 45, 55 (Pedro Roffe & Xavier Seuba eds., 2017); Peter K. Yu, *Data Exclusivities and the Limits to TRIPS Harmonization*, 46 FLA. ST. U. L. REV. 641, 676 (2019). After the United States' withdrawal from the Trans-Pacific Partnership Agreement, the remaining signatories suspended the provision on biological products when it established the replacement pact. Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Mar. 8, 2018, art. 2, annex, https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/Comprehensive-and-Progressive-Agreement-for-Trans-Pacific-Partnership-CPTPP-English.pdf [https://perma.cc/FS8Q-KX7U] (suspending Article 18.51 of the Trans-Pacific Partnership Agreement).

389. United States-Mexico-Canada Agreement art. 20.49, Can.-Mex.-U.S., Nov. 30, 2018, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement [https://perma.cc/2VDM-W28S] (offering protection to the undisclosed test or other data for biological products "for a period of at least ten years from the date of first marketing approval of that product").

390. Protocol of Amendment to the Agreement Between the United States of America, the United Mexican States, and Canada art. 3.E, Can.-Mex.-U.S., Dec. 10, 2019, https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Protocol-of-Amendments-to-the-United-States-Mexico-Canada-Agreement.pdf [https://perma.cc/JY2S-3S9U].

391. 2020 Patent Law, *supra* note 91.

392. *See supra* text accompanying notes 73–86.

393. 2020 Patent Law, *supra* note 91, art. 42.

394. Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, § 201(a), 98 Stat. 1585, 1598–1602 (codified at 35 U.S.C. § 156) (providing a limited extension of the patent term based on the period during which a pharmaceutical product undergoes regulatory review).

395. *See, e.g.*, Dominican Republic-Central America Free Trade Agreement, art. 15.9.6, Aug. 5, 2004, https://ustr.gov/trade-agreements/free-trade-agreements/cafta-

At first glance, these two pharmaceutical transplants are similar to the ASI transplant. All three transplants are important to patent holders—domestic and foreign alike. They were also adopted to make China more innovative and globally competitive. While the ASI transplant positions the country and local patent holders better in the debates on SEPs and FRAND licensing and in global intellectual property litigation, the pharmaceutical transplants strengthen the local pharmaceutical sector while seeking to attract foreign pharmaceutical and biotechnology companies to undertake research and development in China.

Upon closer scrutiny, however, the two pharmaceutical transplants continue the narrative of external pressure ("push" factors) and selective adaptation (both "push" and "pull" factors) discussed in Section I.B.[396] The patent term extension in Article 42 was adopted in part to respond to U.S. demands made over the years and enshrined more recently in Article 1.12 of the United States-China Economic and Trade Agreement,[397] and the market exclusivities in Article 5 of the Provisional Measures address a demand that the United States has also made repeatedly in international trade and intellectual property fora.[398] By contrast, China has not encountered any external demands from the United States or other governments to introduce ASIs. In fact,

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dr-dominican-republic-central-america-fta/final-text [https://perma.cc/Q6N9-2EDN]; United States-Australia Free Trade Agreement, Austl.-U.S., art. 17.9.8, May 18, 2004, https://ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text [https://perma.cc/M9K6-KXNL]; United States-Singapore Free Trade Agreement, Sing.-U.S., art. 16.7.8, May 6, 2003, https://ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text [https://perma.cc/EMS7-HAKB].

396. *See* discussion *supra* Section I.B.

397. Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China art. 1.12, China-U.S., Jan. 15, 2020, https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreemen/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf [https://perma.cc/Q8HQ-VY9N]. This Agreement is also referred to as the Phase One Agreement. This provision, along with other changes in the recent amendment, has been under deliberation in China for years. It remains an open question whether the Phase One Agreement led to the adoption of some of these changes or whether that agreement merely incorporated those changes that had already been underway. *See* Peter K. Yu, *US-China Intellectual Property Trade Wars*, *in* RESEARCH HANDBOOK ON TRADE WARS 271, 280 (Zeng Ka & Liang Wei eds., 2022) [hereinafter Yu, *US-China IP Trade Wars*]; Yu, *Long and Winding Road*, *supra* note 96, at 708.

398. *See supra* text accompanying notes 388–92.

as noted in Section III.C, courts in the United States and Europe have had strong reactions to the issuance of ASIs by Chinese courts.[399]

Like the dynamics regarding external pressure, the institutional setting for these transplants differs significantly. While the pharmaceutical transplants (and most other legal transplants) were effected through legislative action in China, the transplantation of ASIs did not require the introduction of new legislation. Instead, the ASI transplants arose mostly from the Chinese courts' desire to respond to actions taken by foreign courts and the interpretation of existing procedural rules to grant this new form of relief. Such a judicially driven transplant represents a novel approach to legal transplantation in China, if not more broadly.

Moreover, the two sets of transplants have very different orientations. Even though all of them were brought into China and customized to improve the country's national advantage,[400] the pharmaceutical transplants have a mostly inward-looking orientation. They focus on the essential legal standards that China will need to improve the position of the local sector in the area of pharmaceutical innovation. If such improvements have generated a global impact, such as China's increasing competitiveness vis-à-vis the European Union, the United States, and other developed countries, the impact is somewhat indirect.

By contrast, the ASI transplant has an outward-looking orientation. Apart from protecting judicial sovereignty, the transplant aims to increase China's discourse power over foreign-related matters while enhancing the country's ability to compete as a preferred forum for international intellectual property dispute resolution. Unlike the pharmaceutical transplants, which aim to improve domestic capabilities and conditions, the ASI transplant focuses on cross-border or global engagement.

Finally, and importantly for our purposes, the ASI transplant enables China to influence the development of global standards relating to SEPs and FRAND licensing. As the SPC declared in the April 2021 report noted earlier, China is no longer content to be a "follower" of international intellectual property rules, but it also wants to be a "guide" who helps shape these rules.[401] Even though it remains to be seen what future role China will play in shaping international rules in

399. *See* discussion *supra* Section III.C.5.

400. *See* Yu, *China's Innovative Turn*, *supra* note 81, at 603–05.

401. *See supra* text accompanying note 276.

the area of SEPs and FRAND licensing, there is no denying that the emergence of ASIs in the country has caught the attention of policymakers and commentators—domestic and foreign alike.

To some extent, the ASI transplant in China has created a boomerang effect in other countries.[402] Even though ASIs originated abroad and may not have direct antecedents in China,[403] they have now been transplanted to China with serious ramifications in the United States and other foreign jurisdictions. This boomerang effect recalls the legal transplant literature concerning how a law, once transplanted, can affect the source jurisdiction as much as the recipient jurisdiction.[404] The transplant of a foreign procedural mechanism to preempt foreign interests also brings up the widely used *yi yi zhi yi* policy of imperial China, which historians have translated as "using foreigner barbarians to control foreigner barbarians."[405] In the ASI context, the transplant allows Chinese courts to respond to foreign legal actions by adapting a foreign procedural mechanism.

In sum, the ASI mechanism represents a new form of legal transplant in China. It shows how the legal transplantation process has evolved in the twenty-first century and alerts us to the global ramifications of this evolving process.

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402. Commentators have discussed the boomerang effect in other international intellectual property contexts. *See, e.g.*, Jerome H. Reichman, *Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?*, 46 HOUS. L. REV. 1115, 1119 (2009) ("[A]s often happens in international law, efforts to rig a regime for short-term advantages may turn out, in the medium-and long-term, to boomerang against those who pressed hardest for its adoption."); Harold C. Wegner, *TRIPs Boomerang—Obligations for Domestic Reform*, 29 VAND. J. TRANSNAT'L L. 535 (1996) (discussing the boomerang effect created by the TRIPS Agreement); Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975, 1044–70 (2011) (discussing the boomerang effect created by the Anti-Counterfeiting Trade Agreement).

403. *See* discussion *supra* Section III.A.

404. *See* Bentham, *supra* note 36, at 185 ("That a system might be devised, which, while it would be better for Bengal, would also be better even for England."); WATSON, *supra* note 36, at 99 ("[T]he time of reception is often a time when the provision is looked at closely, hence a time when law can be reformed or made more sophisticated. It thus gives the recipient society a fine opportunity to become a donor in its turn."); Yu, *Fair Use*, *supra* note 344, at 159 (noting that "legal transplant is a two-way street" that will affect both source and recipient jurisdictions).

405. *See* Peter K. Yu, *Can the Canadian UGC Exception Be Transplanted Abroad?*, 26 INTELL. PROP. J. 175, 183 (2014) (linking legal transplants to the *yi yi zhi yi* policy of imperial China).

CONCLUSION

In view of the international jurisdictional battles in cases involving SEPs and FRAND licensing and the potential boomerang effect generated by China's transplant of ASIs, one logically would wonder whether solutions can be crafted to reduce these tensions and confrontations. In the past few years, commentators have advanced a wide variety of proposals. For example, one of us (Contreras) has called for the establishment of a global, non-governmental rate-setting tribunal to determine FRAND rates.[406] He recommends that domestic courts voluntarily refrain from setting global FRAND rates until an international solution has been implemented to resolve FRAND disputes.[407] Another of us (Yu Yang, along with Zhang Lei) has offered a trade-based solution that relies on international coordination and the development of new plurilateral norms.[408] Other commentators have advanced a wide variety of proposals, including "mandatory 'ex ante' rate disclosures, collective rate agreements, expedited bilateral arbitration, . . . [and] patent pooling structures."[409]

Instead of rehashing these proposals, this Article concludes by calling for a renewed emphasis on international comity. Such an emphasis will be important not only for reducing international jurisdictional battles in global FRAND litigation and other contexts, but also for minimizing the complications and unintended consequences caused by proactive legal transplants. The principle of international comity also reflects a widely settled international consensus. Thanks to legal transplants, Chinese courts have now joined U.S. courts in considering the impact on international comity before issuing an ASI, AASI, or AAASI.[410]

The discussion of this important principle in international litigation brings us back to *Ericsson v. Samsung*,[411] the case that began this Article. When the U.S. District Court for the Eastern District of Texas was

406. Jorge L. Contreras, *Global Rate-Setting: A Solution for Standards-Essential Patents?*, 94 WASH. L. REV. 701 (2019).

407. Jorge L. Contreras, *Anti-Suit Injunctions and Jurisdictional Competition in Global FRAND Litigation: The Case for Judicial Restraint*, 11 NYU J. INTELL. PROP. & ENT. L. 171 (2021).

408. Yu Yang & Zhang Lei, *A Trade-Based Approach to Resolving Escalating FRAND-based Disputes in the Digital Age*, 12 QUEEN MARY J. INTELL. PROP. L. (forthcoming 2022).

409. *See* Contreras, *New Extraterritoriality*, *supra* note 138, at 287 (collecting and summarizing proposals).

410. *See supra* text accompanying notes 152 and 246.

411. Ericsson Inc. v. Samsung Elecs. Co., No. 2:20-CV-00380-JRG, 2021 U.S. Dist. LEXIS 4392 (E.D. Tex. Jan. 11, 2021).

deciding whether to issue an AASI in response to the ASI issued by the Wuhan Intermediate People's Court, a key consideration was whether the injunction would have a significant impact on international comity.[412] Drawing on the amicus brief that two of us (Contreras and Peter Yu) and other academic colleagues submitted to the Federal Circuit, this Article argues that, contrary to the belief held by some judges, commentators, and litigants, a court's willingness to respect an ASI validly issued by a foreign court and exercise restraint in issuing AASIs can promote international comity.[413] As the brief noted in relation to the AASI issued by the Texas court:

> It should not be ignored that many . . . ASIs have been directed at enjoining parallel Chinese proceedings. If a Chinese ASI will not be honored by U.S. courts, Chinese courts may well respond in kind, denying litigants in both jurisdictions streamlined resolution of their disputes and exacerbating the problem [of duplicative parallel litigation].[414]

Indeed, "[i]f U.S. courts expect foreign legal systems to respect their own injunctions, it is difficult to see how that deference will be maintained if it is not reciprocal."[415] Efforts to promote international comity will therefore invite courts to pay attention to the growing need for transnational judicial reciprocity,[416] an issue that is of great importance to courts in China as well as other jurisdictions. Such reciprocity is badly needed considering the growing volume of parallel FRAND litigation and the fact that China now has the world's largest volume of intellectual property litigation.[417]

To be sure, many American judges, policymakers, and litigants will question the Chinese courts' ability to render fair decisions in FRAND cases involving American litigants, especially amid an ongoing trade

412. *Ericsson*, No. 2:20-CV-00380-JRG (E.D. Tex. Dec. 28, 2020) (granting the temporary restraining order).

413. International Intellectual Property Law Professors' Brief, *supra* note 11.

414. *Id.* at 26–27.

415. *Id.* at 6–7.

416. *See* Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 19 (1st Cir. 2004) ("[C]omity is . . . a protean concept of jurisdictional respect").

417. *See* CHINA NAT'L INTELL. PROP. ADMIN. (国家知识产权局), 2020 ZHONGGUO ZHISHI CHANQUAN BAOHU ZHUANGKUANG (二零二零中国知识产权保护状况) [THE STATUS OF INTELLECTUAL PROPERTY PROTECTION IN CHINA IN 2020] 4 (2020), http://www.gov.cn/xinwen/2021-04/25/5602104/files/9cfbfa3fed814e1f9d04e5695ed13fb.pdf [https://perma.cc/QZ6K-9GK5] (reporting 443,326 new intellectual property cases and 28,528 new patent cases in China in 2020).

war.[418] Nevertheless, just as American judges worry that Chinese courts may treat U.S. litigants unfairly, Chinese judges may also question whether American courts will adequately protect the interests of Chinese businesses and individuals, especially in view of the aggressive actions the U.S. government took against Huawei and ZTE in the previous Administration.[419] In a world of strong mutual distrust, the problem generated by ASIs and international jurisdictional battles will only escalate, leading one of us (Contreras) to lament how global FRAND litigation has become "anti-suit injunctions all the way down."[420]

Given these international jurisdictional battles and the inherent challenges of resolving global FRAND disputes, it may take some time before countries develop the needed long-term solutions. Fortunately, a renewed emphasis on international comity and greater attention to the need for transnational judicial reciprocity can help slow down these battles. Even better, such an emphasis can be spread through court decisions as well as the judicial community.[421] To the extent that those courts that have now embraced ASIs continue to pay attention to the rulings of other courts, a greater emphasis on international comity in one court could be easily "transplanted" to another, benefiting both the source and recipient jurisdictions.

418. *See* China Briefing Team, *U.S.-China Relations in the Biden-Era: A Timeline*, CHINA BRIEFING (Oct. 12, 2021), https://www.china-briefing.com/news/us-china-relations-in-the-biden-era-a-timeline (providing an updated timeline of U.S.-China developments during the Biden Administration); Dorcas Wong & Alexander Chipman Koty, *The US-China Trade War: A Timeline*, CHINA BRIEFING (Aug. 25, 2020), https://www.china-briefing.com/news/the-us-china-trade-war-a-timeline [https://perma.cc/KN5D-NGRL] (providing an updated timeline of the tariffs China and the United States have imposed as part of the trade war).

419. *See* Yu, *US-China IP Trade Wars*, *supra* note 397, at 280.

420. Contreras, *All the Way Down*, *supra* note 19, at 14.

421. *See generally* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65–103 (2004) (discussing the interactions of judges in a transnational network).