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

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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

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and other jurisdictions in global patent disputes. 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).

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. 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. 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.

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, two former

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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.
7. Samsung Elecs. (Wuhan), supra note 2.
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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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. Some courts have even issued AAASIs, prohibiting a party from seeking an AASI, as evidenced by the Wuhan court’s order in Samsung. 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. 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.

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. 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.

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. The recent spate of ASIs by Chinese courts

17. See infra text accompanying note 177.
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].
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 Bradley 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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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\textsuperscript{28} (TRIPS Agreement) of the World Trade Organization (WTO).\textsuperscript{29} That request sought information concerning the latest cases involving the issuance of ASIs, the legal status of the

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)).

\textsuperscript{24}. See discussion \textit{infra} Part IV.


“typical case” (dianxing anjian) designation, adjudication guidelines on act preservation measures, as well as the legal bases for setting global license rates and issuing ASIs and AAASIs. In February 2022, the European Union filed a WTO complaint against China, alleging violations of Article 63.1 and 63.3 of the TRIPS Agreement.

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 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
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, which the latter has defined as “the borrowing and transmissibility of rules from one society or system to another.” 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, legal transplants can be


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”).

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

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 ("[T]he 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")

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.78 ("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 and TRIPS-plus bilateral, regional, and plurilateral agreements for imposing high and inappropriate protection and enforcement standards on developing countries. 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.

Thus far, commentators have advanced four main lines of criticism of legal transplants. First, as the failed “law and development”
movement in the 1960s and early 1970s has taught us, legal transplants tend to be insensitive to the local environment.\(^4^7\) 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.\(^4^8\) Third, legal transplants reduce interjurisdictional competition while taking away valuable opportunities for experimentation with new regulatory and economic policies.\(^4^9\) Finally, legal transplants, especially those involving controversial laws and policies from abroad, could import problems from source jurisdictions while generating unintended consequences.\(^5^0\)

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’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

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{57} For example, the widely detested extraterritoriality provisions (\textit{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.\textsuperscript{58} As William Alford observes, those provisions “mandated that Chinese seeking redress against foreigners avail

\textsuperscript{54} See \textit{id.} at 116 ("Transplanting frequently, perhaps always, involves legal transformation.").
\textsuperscript{55} See \textit{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, \textit{International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought?}, 49 \textit{Am. J. Comp. 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, \textit{supra} note 37, at 207–09 (discussing relativist challenges to legal transplant analysis caused by differing linguistic, cultural, or historical perspectives).
\textsuperscript{57} See \textit{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).
themselves, especially without assistance, of a legal order the fundamental principles of which were alien to the Chinese legal tradition. 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.

By the mid-nineteenth century, however, some in the Qing court began to realize the need for modernization. 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. 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.

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

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60. See id. ("Ironically, the 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 Hsu, 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.").


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. 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." Such transplants can be found in the Great Qing Copyright Law of 1910 (Da Qing Zhuzuoquan Lü), the intellectual property laws introduced in the Republican era (1911–1949), 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 accessions to WTO.


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. Although commentators have frequently characterized intellectual property transplants in China as coerced or involuntary, the transplantation process, like the country’s earlier modernization efforts, was driven by both “push” and “pull” factors. Consider, for instance, the adoption of the 1984 Patent Law, the first modern Chinese patent statute that included mostly transplanted laws from Western countries. 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


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 Ligu, 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).


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.\footnote{Agreement on Trade Relations Between the United States of America and the People’s Republic of China, China-U.S., art. VI(5), 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.”).}

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.\footnote{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.”).} 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.\footnote{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].}

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
second time in August 2000 in preparation to join the international trading body, 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. 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.

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.


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. For example, China placed very high importance on its accession to the WTO, leading Samuel Kim to observe that the country was eager “to gain WTO entry at almost any price.” 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. 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. In retrospect,

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


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: ESSAY 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 “provided the reformist leaders with the needed push that helped reduce resistance from their conservative counterparts”).

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

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\(^{88}\) See Yu, China’s Innovative Turn, supra note 81, at 599–602 (discussing China’s innovative turn).


\(^{90}\) 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.\textsuperscript{91}

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


\textsuperscript{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. INT’L 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”).

\textsuperscript{93} See 15 U.S.C. § 1051(b) (allowing for “[a]pplication for bona fide intention to use trademark”).

\textsuperscript{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).

\textsuperscript{95} See discussion infra Section III.C.

\textsuperscript{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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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,
vehicles, home appliances, and the built environment: the so-called “Internet of Things.”

Such technical standards may be developed in a variety of settings. Government agencies develop some health, safety, and environmental standards. Individual firms may develop proprietary technologies that, through broad market adoption, become de facto standards—for example, Adobe’s portable document format (PDF). But most interoperability standards today are developed by groups of industry participants that collaborate within voluntary associations known as standards development organizations (SDOs). 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.

The earliest voluntary SDOs in Europe and the United States arose at the end of the nineteenth century from professional engineering associations. The first of these SDOs with a truly international outlook was the International Association for Testing Materials, which was established in 1898. 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

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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.


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).


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.  

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. 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. 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.

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. Patents that will necessarily be infringed by a product conforming to a particular standard are referred to as SEPs. Complex technological products may implement dozens or even hundreds of standards, each of which may be covered by hundreds of related patents.

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. 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. With standards-compliant products, however, designing around the patent may be impossible or may make the product non-compliant with the standard. Moreover, once an SDO publishes a standard, market participants may make significant investments anticipating the manufacture of products incorporating that standard. In such cases, the cost of switching from the standardized technology to an alternative technology may be prohibitive, creating a “lock in” situation. 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. This phenomenon has been termed “patent hold-up” and is discussed extensively in the scholarly literature.


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).


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. The U.S. federal government has enshrined such licensing commitments in its rules for federal use of privately developed standards, and the European Commission has repeatedly expressed support for such measures as means to avoid blocking the adoption of standards. 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.

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. 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. As a

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

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., In re Innovatio IP Ventures, LLC, Ericsson, Inc. v. D-Link Systems, Inc., and Optis Wireless Technology, LLC v. Huawei Device Co. In each of these cases, a U.S.
court determined a FRAND royalty rate and awarded damages to the SEP holder based on the asserted U.S. patents.\footnote{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.}

However, in the recent U.K. case, Unwired Planet International Ltd. v. Huawei Technologies Co.,\footnote{[2017] EWHC (Pat) 711 (Eng.), aff’d, [2020] UKSC 37.} 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.\footnote{Id. at [793], [794], [807].} 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.\footnote{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).} 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.\footnote{Id. at *34, *56.}

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.\footnote{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].} 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.\footnote{See id. at 280–81 (citing examples that include corporate registration, ship registry, and autonomous vehicle regulation).} 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.\footnote{Id. at 283–86.} A natural corollary to this type of race is the attempt by one party to strike first and seek an ASI that prevents
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).


arbitration agreement from commencing litigation over the arbitral matter.\textsuperscript{144}

In the United States, the legal standard for issuing ASIs is, as one commentator puts it, “ambiguous and fragmented.”\textsuperscript{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 \textit{E. \& J. Gallo Winery v. Andina Licores S.A.}\textsuperscript{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).\textsuperscript{147} If not, an injunction barring a party from pursuing the foreign action would not reduce duplicative litigation, and would thus be unjustified.\textsuperscript{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.\textsuperscript{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 \textit{In re Unterweser Reederei GMBH}\textsuperscript{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.”\textsuperscript{151} Finally, if at least one of the \textit{Unterweser} factors is present, the court must ask whether the injunction will have a significant impact on international comity.\textsuperscript{152} If not, the ASI may be issued.

\begin{footnotesize}
\begin{enumerate}
\item See Lakatos, supra note 143 (discussing ASIs in the arbitration context).
\item Strong, supra note 142, at 154.
\item \textit{Gallo}, 446 F.3d at 991.
\item Id.
\item Id.
\item Id.
\item \textit{Gallo}, 446 F.3d 888 (5th Cir. 1970), \textit{aff’d per curiam}, 446 F.2d 907 (5th Cir. 1971) (en banc), \textit{vacated}, 407 U.S. 1 (1972).
\item Id. at 890.
\item See \textit{Gallo}, 446 F.3d at 991; \textit{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 \textit{Hilton v. Guyot}, 159 U.S. 113, 164 (1895))).
\end{enumerate}
\end{footnotesize}
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]


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

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. 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.

AASIs are sought less frequently than ASIs, and there is no uniform framework determining whether and when they will be granted.

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.”

In *Lenovo (United States) Inc. v. IPCom GmbH & Co. KG*, 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. IPCom responded with an action in the United Kingdom seeking a declaration that Lenovo infringed one of IPCom’s U.K.

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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).


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.”).


173. *Id.* at *2.
patents and an injunction against further infringement. 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. 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. 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.” IPCom also filed a motion for an AASI in the United Kingdom. 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].”

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.

175. Lenovo (U.S.), 2019 WL 6771784, at *1.
179. Id. at [52], [54], [60].
A. China’s Growing Role in International Standardization

Despite having a centuries-old appreciation for standardized systems, 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. As a result, China operated in catch-up mode in both technology development and technical standardization.

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.”

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. Given this governmental focus, it has traditionally been difficult for foreign firms to participate meaningfully in Chinese SDOs.

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).


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


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. 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, Chinese carriers and the government balked at the high patent rates charged by foreign vendors. 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.

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. 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. Yet despite this recognition, and broad adoption within China, TD-SCDMA had little support internationally.

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.”).


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

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193. Suttmeier et al., supra note 182, at 50–51.
195. See Suttmeier et al., supra note 182, at 52.
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 SDOs203 and have declared increasing numbers of SEPs covering international technology standards.204 Particularly in the area of 5G,

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 20–21 (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.


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

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, Huawei v. InterDigital, Vringo, Inc. v. ZTE Corp., Apple Inc. v. Qualcomm Inc., Iwncomm v. Sony, and Optis Wireless Technology, LLC v. Huawei Device Co. Because the limited length of this Article does not allow for an in-depth discussion of all of these cases, this Section focuses on Conversant’s litigation due to its relevance to the emergence of ASIs in China.
Conversant is a Luxembourg-domiciled patent assertion entity that has its principal operations in Canada and the United States.\textsuperscript{214} It acquired from Nokia a portfolio of patents that have been declared essential to ETSI standards in forty countries.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{220} Accordingly, Conversant requested an ASI barring ZTE from prosecuting its conflicting claims in Shenzhen.\textsuperscript{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.\textsuperscript{222}

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

\begin{itemize}
  \item\textsuperscript{214}  Huawei Techs. Co. v. Conversant Wireless Licensing S.A.R.L. [2019] EWCA (Civ) 38 [7] (Eng.).
  \item\textsuperscript{215}  Id. at [6]–[7].
  \item\textsuperscript{216}  Id. at [10].
  \item\textsuperscript{217}  Id. at [3], [18]–[20].
  \item\textsuperscript{218}  Conversant Wireless Licensing S.A.R.L. v. Huawei Techs. Co. [2018] EWHC (Ch) 2549 [10], [12] (Eng.).
  \item\textsuperscript{219}  Id. at [12(ii)], [12(v)] (emphasis omitted).
  \item\textsuperscript{220}  Id. at [11].
  \item\textsuperscript{221}  Id.
  \item\textsuperscript{222}  Id. at [18].
\end{itemize}
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.\textsuperscript{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.\textsuperscript{224} However, no such injunction was required because the offending portions of the complaint had already been removed.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{228}

\textsuperscript{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.)).

\textsuperscript{224} Id.

\textsuperscript{225} Id.

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


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.

I. 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

231. See infra text accompanying notes 329–33.
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.
Conversant sued Huawei and ZTE in the District Court of Düsseldorf in Germany in April 2018, alleging infringement of several European patents. 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.

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. The SPC granted the ASI the next day, after an ex parte hearing in which Conversant did not participate. 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. 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. The SPC then found

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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.\footnote{Id.} 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.\footnote{Id.} 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.\footnote{Id.}

Finally, the Court found that the ASI would not harm the public interest or adversely affect international comity.\footnote{Id.} 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.\footnote{Id.}

2. InterDigital v. Xiaomi

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. On July 29, InterDigital sued Xiaomi for infringement in the High Court of Delhi in India, seeking monetary damages and an injunction. 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.

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. 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. Thus, the court concluded that the determination of a FRAND royalty rate in India would likely cause significant harm to Xiaomi. 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.

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
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.\textsuperscript{259} As in \textit{Conversant v. Huawei}, the Wuhan court established a penalty of RMB one million per day for any violation of the ASI by InterDigital.\textsuperscript{260} But unlike the ASI issued by the SPC in \textit{Conversant v. Huawei}, the Wuhan court’s ASI in \textit{InterDigital v. Xiaomi} covered not only a specific foreign action, but all pending and prospective foreign actions.\textsuperscript{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.\textsuperscript{262} The parties settled their dispute on August 3, 2021, by agreeing to a multi-year, worldwide, non-exclusive, royalty-bearing license.\textsuperscript{263}

3. \textbf{OPPO v. Sharp}\textsuperscript{264}

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

\textsuperscript{259} Id. at 10–11.

\textsuperscript{260} Id.

\textsuperscript{261} \textit{Compare Huawei Techs. (SPC), supra note 227, with Xiaomi Commc’n (Intern. People’s Ct.), supra note 251. See generally Yu & Contreras, supra note 20 (commenting on the broad scope of the ASI).}


\textsuperscript{263} InterDigital, \textit{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]

manufacturer OPPO in the Tokyo District Court for infringement of SEPs relating to several standards.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{268} In this regard, the Shenzhen court in \textit{OPPO v. Sharp} joined the U.K. court in \textit{Unwired Planet}, seeking to establish a global FRAND rate for the parties before it.\textsuperscript{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.\textsuperscript{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.\textsuperscript{271}


\textsuperscript{269} [2020] UKSC 37 (Eng.).

\textsuperscript{270} Zhao, \textit{Sharp vs Oppo}, supra note 266.

\textsuperscript{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 Interim 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.\textsuperscript{272} In response, Sharp sought an AASI from the Munich court to prevent OPPO from enforcing the ASI by the Shenzhen court.\textsuperscript{273} The Munich court granted the AASI a mere seven hours after entry of the Shenzhen ASI.\textsuperscript{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.\textsuperscript{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 (\textit{yindaozhe}).\textsuperscript{276} Four months later, the SPC upheld the Shenzhen court’s ruling in OPPO, noting the parties’...
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.\footnote{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.\footnote{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.\footnote{279}

Ericsson v. Samsung involved an existing SEP cross-license between the two parties that was due to expire at the end of 2020.\footnote{280} Given the parties’ inability to agree on renewal terms and their prior litigation,
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.\footnote{Id. at *1.} On December 11, Ericsson filed an infringement action against Samsung in the U.S. District Court for the Eastern District of Texas.\footnote{Id.}

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.\footnote{Id. at *2.} The Wuhan court expeditiously issued an order on December 25 that included both an ASI and an AAASI,\footnote{Id.} prohibiting Ericsson from taking actions to negate the ASI while imposing a penalty of RMB one million per day for noncompliance.\footnote{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/R9VY-QET9].} Like the ASI issued by the Wuhan court in \textit{InterDigital v. Xiaomi}, the ASI in \textit{Ericsson v. Samsung} was of global scope, covering actions in the United States and other countries.\footnote{Id.}

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.\footnote{Ericsson, 2021 WL 89980.} 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.\footnote{Id. at *2–3.} 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.\footnote{Samsung Elecs. (Wuhan), supra note 2; Ericsson, 2021 WL 89980, at *2–3.} 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
The parties, however, settled their worldwide disputes shortly thereafter. The remarkably rapid actions and counteractions in this case exemplify the worst features of the “race to the courthouse” described in Section II.C.

5. AASIs issued against potential Chinese ASIs

The issuance of ASIs by Chinese courts in 2020 attracted significant international attention from administrative bodies 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.

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. 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.” Likewise, in Düsseldorf, three SEP holders sought an AASI against Xiaomi based on “the prevalent trend of Chinese companies filing ASIs.”

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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292. See supra text accompanying note 140.

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


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

297. Sandys, supra note 295.
### Table 1: ASIs in SEP Disputes 2012–2021

<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
<th>1st Juris.</th>
<th>Foreign Juris.</th>
<th>ASI Granted</th>
<th>AASI Issued</th>
</tr>
</thead>
<tbody>
<tr>
<td>Microsoft v. Motorola</td>
<td>2012</td>
<td>US</td>
<td>DE</td>
<td>Yes</td>
<td>N/A</td>
</tr>
<tr>
<td>Vringo v. ZTE</td>
<td>2015</td>
<td>US</td>
<td>CN</td>
<td>No</td>
<td>N/A</td>
</tr>
<tr>
<td>TCL v. Ericsson</td>
<td>2015</td>
<td>US</td>
<td>FR, BR, RU, UK, DE, AR</td>
<td>Yes</td>
<td>N/A</td>
</tr>
<tr>
<td>Apple v. Qualcomm</td>
<td>2017</td>
<td>US</td>
<td>UK, JP, CN, TW</td>
<td>No</td>
<td>N/A</td>
</tr>
<tr>
<td>Conversant v. Huawei and ZTE</td>
<td>2018</td>
<td>UK</td>
<td>CN</td>
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### 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. 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. When the law was amended in 2000, shortly before China entered the WTO, Article 61 was added to provide Western-style preliminary injunctions, as required by Article 44 of the TRIPS Agreement. Article 61 reads:

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.


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.  

Notwithstanding the provision's subsequent amendments in 2008 and 2020, 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." Similar provisions can be found in copyright and trademark laws, 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. 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.
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*.

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.

### 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. 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.

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


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. Article 100 (now renamed Article 103) 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.

This provision remained unchanged when the law was amended in June 2017 and more recently in December 2021. 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. Taken

314. 2012 Civil Procedure Law, supra note 312, 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.\footnote{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."\footnote{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.\footnote{319}

The earliest ASIs issued by Chinese courts appeared in maritime litigation.\footnote{320} The SPC’s report on \textit{Conversant v. Huawei} recounted two
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. 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. 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
conducive to solving the problem of “difficult enforcement” (zhixing nan) involving maritime injunctions.\textsuperscript{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.\textsuperscript{324}

2. \textit{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 \textit{Conversant v. Huawei} has attracted worldwide attention from judges, academics, and practitioners. The \textit{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.”\textsuperscript{325} This selection was particularly notable considering that the list was nationwide and included all areas of law, not just intellectual property law.

\begin{itemize}
  \item \textsuperscript{323} Zheng Dengzhen (郑登振), \textit{<Minshi Susong Fa> Xiuding Dui Haishi Susong De Yingxiang} (《民事诉讼法》修订对海事诉讼的影响) [\textit{The Impact of the Revision of the Civil Procedure Law on Maritime Litigation}, \textit{ZHONGGUO HAISHANG FA YANJIU} (中国海商法研究) [CHINESE J. MAR. L.], no. 2, 2013, at 112, 114.
  \item \textsuperscript{324} Luo Dongchuan (罗东川), \textit{Zhigua Yunfan Ji Canghai} (直挂云帆济沧海) [\textit{Hoisting a Full Sail to Navigate the Boundless Sea}, \textit{ZHONGGUO FAYUAN WANGXUN} (中国法院网) CHINA CT. NET (Sept. 2, 2014), \url{https://www.chinacourt.org/article/detail/2014/09/id/1430591.shtml} [https://perma.cc/HX9Q-D9XY].
  \item \textsuperscript{325} As the \textit{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 Fuyuan Shida Anjian (本报评出2020年度人民法院十大案件) [\textit{The People’s Court Daily Has Selected the Top Ten Cases of the People’s Court in 2020}, \textit{RENMIN FAYUAN BAO} (人民法院报) [PEOPLE’S CT. DAILY] (Jan. 9, 2021), \url{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, \textit{supra} note 276.
\end{itemize}
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.\(^\text{326}\)

Thus, even though China has not released any law, regulation, or judicial interpretation to formally adopt ASIs,\(^\text{327}\) 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.\(^\text{328}\)

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."\(^\text{329}\)

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

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\(^{326}\) *First ASI Issued*, *supra* note 320.


\(^{328}\) *See First ASI Issued, supra* note 320.

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

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. 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. They can do so mutatis mutandis as they see fit, based on


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 Yingjianli Chuli Biaozhun Biyao Zhanli 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. 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. 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.

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." 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. 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
335. Cf. Mark Cohen, China’s New Blocking Statute Comes into Effect, CHINA IPR (June
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.\footnote{2017 Civil Procedure Law, supra note 1, art. 100.}

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.\footnote{See supra text accompanying note 171.} Considering the civil law tradition in China and the Germanic roots of its legal system,\footnote{See CHEN, supra note 65, at 28–29 (discussing the early Chinese legal reforms based on the German and Japanese models).} 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.\footnote{See Tang, supra note 278 (“The Chinese judgments show clear sign of borrowing the common law tests.”).} 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,\footnote{17 U.S.C. § 107.} “the jurisdictions seeking to introduce the fair use model [often] retain a considerable part of their status quo.”\footnote{Peter K. Yu, Fair Use and Its Global Paradigm Evolution, 2019 U. Ill. L. Rev. 111, 157 [hereinafter Yu, Fair Use].} 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.\footnote{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.} 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.
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. 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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{349} In \textit{Allianz Spa v West Tankers Inc.},\textsuperscript{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.\textsuperscript{351}

\textsuperscript{347.} \textit{First ASI Issued}, supra note 320. Similar views have been expressed earlier. See, \textit{e.g.}, Ding Wenyan (丁文严) & Han Ping (韩萍), \textit{Zhongguo Qiye Zhuanli Shewai Sifa Baohu Zhong De Guanxia Kunjing Yu Yingdui} (中国专利涉外司法保护中的管辖困境与应对) [\textit{The Jurisdictional Dilemma and Responses Concerning Foreign-Related Judicial Protection of Patents Owned by Chinese Enterprises}], \textit{Renmin Fayanuo Bao} (人民法院报) [\textit{People’s Ct. Daily}] (May 30, 2018), http://rmfyb.chinacourt.org/paper/images/2018-05/30/2018053007_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”).

\textsuperscript{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.” \textit{George A. Bermann, The Use of Anti-Suit Injunctions in International Litigation}, 28 \textit{COLUM. J. TRANSNAT’L L.} 589, 589 n.1 (1990).

\textsuperscript{349.} 1972 O.J. (L 299) 32, art. 21.

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

\textsuperscript{351.} \textit{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.
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.\footnote{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 \url{https://english.www.gov.cn/policies/latestreleases/202111/16/content_WS6193a935c6d0df7f98e50b0.html} [https://perma.cc/P8PB-82MG].} This policy guidance helped set an important tone for subsequent developments in China’s foreign-related legal affairs.

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. 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.” 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.”

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” (youchuan 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. At the subnational level, some courts have also


358. Opinions on IP Adjudications, supra note 356.

embraced a similar objective of striving to become the “preferred place” for intellectual property dispute resolution within the country.\(^\text{360}\) 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.\(^\text{361}\)

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.\(^\text{362}\) 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


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.\textsuperscript{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.\textsuperscript{364} As \textit{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.\textsuperscript{365}

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This high level of attention is understandable considering China’s history of inadequate technological development and innovation. For decades, Chinese policymakers have prioritized strategies and efforts that would leapfrog the country in science and technology while elevating its economy beyond the widely noted strength in low-cost manufacturing. 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. 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. The country also ranked twelfth in the latest Global Innovation Index. 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


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 OF CHINA (May 20, 2016, 8:23 PM), http://english.gov.cn/policies/latest_releases/2016/05/20/content_281475353682191.htm [https://perma.cc/9HAA-KZFG].


there is no denying that China has made an “innovative turn” and is now undertaking enormous amounts of intellectual property and innovative activities. 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. 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.”

In April 2021, he published an intellectual property-focused article, which garnered widespread attention both at home and abroad. 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.” 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.

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).


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. 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.

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

378. See sources cited supra note 364.
on the award of punitive damages in intellectual property cases as well as a new judicial protection plan. 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 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.


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.\textsuperscript{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.\textsuperscript{385} Article 5 provides twelve years of market exclusivity to undisclosed test or other data for innovative therapeutic biological products (\textit{chuangxin zhiliaoyong shengwu zhipin}).\textsuperscript{386} This draft provision puts China in parity with the United States, which offers similar protection.\textsuperscript{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.\textsuperscript{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, \textit{Fighting Poison with Poison? The Chinese Experience with Pharmaceutical Patent Linkage}, 11 \textit{J. MARSHALL REV. INT’L 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.”).

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386. Provisional Measures, supra note 385, art. 5. But see Mark Cohen, \textit{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).

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, that provision was eventually removed when the agreement was amended in December 2019.

The second transplant occurred in October 2020, when China adopted the Fourth Amendment to the Patent Law. 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. 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. This new provision parallels the Hatch-Waxman Act of 1984 in the United States and similar provisions on patent term extension in TRIPS-plus bilateral, regional, and plurilateral agreements.


See supra text accompanying notes 73–86.

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


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. 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, 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. 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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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%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_and_China_Text.pdf [https://perma.cc/Q8HQ-V9YN]. 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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{401} Even though it remains to be seen what future role China will play in shaping international rules in

\textsuperscript{399} See discussion supra Section III.C.5.

\textsuperscript{400} See Yu, China’s Innovative Turn, supra note 81, at 603–05.

\textsuperscript{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. Even though ASIs originated abroad and may not have direct antecedents in China, 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. 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.” 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.


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).

**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. He recommends that domestic courts voluntarily refrain from setting global FRAND rates until an international solution has been implemented to resolve FRAND disputes. 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. 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.”

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.

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

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

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.” Efforts to promote international comity will therefore invite courts to pay attention to the growing need for transnational judicial reciprocity, 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.

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

414. Id. at 26–27.
415. Id. at 6–7.
416. See Quaak v. Klynveld Peat Marwick Goedeker Bedrijfsrevisoren, 361 F.3d 11, 19 (1st Cir. 2004) (“[C]omity is . . . a protean concept of jurisdictional respect”).
war. 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. 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.”

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. 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.


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