

# Much Ado About Nothing? EU's WTO Complaints Against China Have Distracted from Useful Dialogue on the Enforcement of IP Rights

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## ABSTRACT

In December 2022, the EU lodged a complaint against China with the WTO regarding the power of Chinese courts to issue worldwide and prospective anti-suit injunctions (ASIs) that extend beyond its jurisdiction. As a result, standard essential patents (SEP) holders may be prohibited from asserting their patent rights protected by the TRIPS Agreement in non-Chinese jurisdictions. Such ASIs may not be limited to the specific scope, conditions or circumstances related to the concrete cases before a Chinese court, either. The EU substantiated its allegation by taking the examples of ASI orders granted in 2020 by various Chinese courts in four licensing disputes related to SEPs. In the same context, the EU complained that China has not applied and administered its laws, regulations and other measures in a uniform, impartial and reasonable manner.

In each of the four licensing disputes mentioned above, an ASI was sought by the complainant in a Chinese court while being sued by the respondent for patent infringement in non-Chinese jurisdictions in parallel proceedings. However, despite the litigation, the parties continued their negotiations. Licensing agreements were reached, and lawsuits were withdrawn, even before the EU submitted its complaint.

The ASIs granted by the Chinese courts are not without controversy, indeed, in relation to their respective scope. Nonetheless, however unjustifiable, they were all neutralised subsequently by the anti-ASIs issued by non-Chinese courts when adjudicating the patent infringement cases in front of them. Thus, although presently there are no international rules that govern ASI application, courts in different jurisdictions are efficient in preserving judicial sovereignty and protecting patent rights. In other words, judges are competent in fixing unjustifiable ASIs.

It is regrettable that the EU and China were not able to resolve their differences on ASIs through dialogue. This is despite the fact that both sides have succeeded in resolving many IPR issues, including IP legislation, in the past two decades thanks to the comprehensive EU-China IPR Dialogue mechanism. With its robust telecoms innovation landscape, China will emerge as a global IP litigation centre, epitomised by ASI litigation. Meanwhile, Chinese jurisprudence will also gradually influence international IP law-making, which should encourage the EU to cooperate more closely with China on IP protection.

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## INTRODUCTION

As a legal procedure, the ASI is controversial because under an ASI order, a court of one jurisdiction could restrain the conduct of litigation in another jurisdiction. In recent years, ASIs have often been applied in SEP-licensing disputes.

On 9 December 2022, the EU lodged a complaint with the WTO Dispute Settlement Body (DSB) against China concerning the ASI procedure applied by Chinese courts. The complaint, China — Enforcement of intellectual property rights (DS611), is two-fold. First, it concerns IP rights protection; second, it is about judicial transparency.

On IP rights protection, the EU claimed that, through the ASI procedure, Chinese courts prohibit patent holders from asserting their rights as protected under the TRIPS Agreement in non-Chinese jurisdictions. The EU substantiated its claim with four litigation cases adjudicated by Chinese courts concerning SEP-licensing disputes in quick succession in the course of 2020.

Specifically, on the ASIs in question, the EU alleged that the power of Chinese courts has been extended beyond its jurisdiction when granting worldwide, prospective ASIs in SEP-licensing disputes. Such ASIs,

which have been repeatedly granted by Chinese courts when adjudicating SEP-licensing disputes in the course of 2020, prohibit SEP holders from 1) initiating patent infringement litigation in, 2) enforcing judgments issued from, or 3) seeking injunction or requesting similar relief measures, in non-Chinese jurisdictions. These ASIs are not limited to the specific scope, conditions or circumstances related to the concrete cases in front of the particular court – they could even prohibit SEP holders from initiating any patent infringement cases, seeking injunction or requesting similar judicial relief in non-Chinese jurisdictions, under the sanction of 1 million RMB daily penalties.

Thus, the EU declared that China had not applied and administered its laws in a uniform, impartial and reasonable manner. This is because, according to the EU, although the ASI is established by a set of Chinese laws such as the Civil Procedure Law, when granting the ASIs in question Chinese courts have departed from the original judicial meaning of the ASI. Instead, Chinese courts have followed an ASI policy that is an 'anti-suit injunction system with Chinese characteristics'. To reinforce this argument, the EU has added<sup>1</sup> the ASI granted by China's Supreme People's Court (SPC) in *Huawei v Conversant*<sup>2</sup> in its First Written Submission dated 8 June 2023. The same goes for the daily fines. The EU claimed that certain Chinese laws have prescribed one penalty, but, for the ASIs in question

<sup>1</sup> It is to be noted that SPC's decision in *Huawei v Conversant* was not provided with full details as evidence in the EU's complaint submitted to the WTO DSB on 9 December 2022. The case, however, appeared in the First Written Submission by the European Union dated 8 June 2023. The scope of the ASI granted by the SPC in *Huawei v Conversant* was restricted to the parallel patent infringement ruling delivered by the Düsseldorf court. This is unlike the expansive scope of the four cases criticised by the EU in its WTO complaint. Nonetheless, the EU added the dispute *Huawei v Conversant* in its First Written Submission to challenge the legitimacy of the ASI (including the daily penalties in case of violation) issued by the SPC in general. In detail, and specifically in relation to *Huawei v Conversant*, the EU alleged that 1) the ASI directly restricted, or sought to restrict, the exercise by *Conversant* of its exclusive rights in Germany; 2) the SPC asserts a clear link between the ASI and the "global package agreement" (on licensing) reached by the parties after the ASI was issued – in its confirmation of the case which was later issued on 11 December 2020; 3) the SPC directly interfered with the authority of the German court. See [First Written Submission by the European Union](#), and [Huawei v Conversant](#).

<sup>2</sup> Before the Chinese proceedings took place, and after negotiating for years without success, *Conversant* sued *Huawei* (and *ZTE*) at the High Court of Justice in London on July 24, 2017. *Conversant* claimed that *Huawei* (and *ZTE*) had infringed its four UK SEPs and requested the court to determine the global FRAND rates for its multinational patent portfolio, and to grant an injunction against *Huawei* (and *ZTE*), in case they refused to commit to the court-determined terms. With *Conversant* asserting eleven Chinese patents in late 2017, *Huawei* (and *ZTE*) initiated the administrative proceedings to invalidate all these patents.

On 25 January 2018, *Huawei* brought a lawsuit before Nanjing Intermediate Court against *Conversant*, applying for 1) non-infringement declaration for three SEPs and 2) determination of FRAND terms for all SEPs in Chinese market. (In the same month, *ZTE* sued *Conversant* before Shenzhen Intermediate Court, requesting the court to set the FRAND terms for all SEPs *Conversant* held in Chinese market.)

On 20 April 2018, *Conversant* filed a patent infringement action against *Huawei* before the District Court of Düsseldorf. In September 2019, the Nanjing Court delivered its decision, in which several *Conversant*'s Chinese patents were found to be either invalid or not infringed. The Nanjing Court also determined the rates payable for the Chinese SEPs held by *Conversant*. *Conversant* appealed this decision. On 27 August 2020, Düsseldorf court delivered its decision confirming *Huawei*'s infringement and, inter alia, granted an injunction against *Huawei*. On the same day, *Huawei* applied for an ASI and requested the SPC to order *Conversant* to not apply for enforcement of the injunction granted by the Düsseldorf court before the final judgment on the three cases were delivered, with a daily fine of 1 million RMB (approximately €136,000) in case of violation of the ASI by *Conversant*. For the three cases, *Huawei* requested the courts to rule that it did not infringe the Chinese SEPs owned by *Conversant* for 2G, 3G, 4G standards or technical specifications and to determine FRAND terms for the licensing of any such valid Chinese patents.

The SPC granted an ASI in *Huawei v Conversant* based on a five-factor test: i) the effect of *Conversant*'s application for enforcement of judgments of the German injunction in China (i.e. an extraterritorial court on litigation in China); ii) is it truly necessary to grant an ASI because of the irreparable damage *Huawei* may suffer; iii) a reasonable balance of the interests of *Huawei* and *Conversant*, i.e. the damages to *Huawei* caused by not granting the injunction may outweigh the damages to *Conversant* by granting the same; iv) granting the injunction is not detrimental to the public interest; and v) consideration of international comity factors (and the SPC concluded that prohibiting *Conversant* from enforcing the judgment of the Düsseldorf court before the 'three cases' were decided would neither affect the subsequent trial on the German case nor detract from the legal validity of the German judgment, but only suspend the enforcement of it. Thus, the impact of an ASI on Düsseldorf court trial and the judgment would be within a moderate extent. Therefore, international comity would not be violated by the ASI.)

Chinese courts have applied another in the event of violation of an ASI by levying this maximum level in daily fines.<sup>3</sup>

On judicial transparency, the EU complained that China has failed to publish the relevant judicial decisions invoked as 'guiding materials' by the courts when granting the ASIs in question. Due to this failure, China has breached its obligations on transparency within the meaning of the TRIPS Agreement.

This policy insight will focus on the scope of the four ASIs highlighted in the EU's complaint. From the outset, it needs to be borne in mind that SEP-licensing disputes, which involve a holder of the relevant SEPs and a manufacturer of telecom products based on such SEPs (also known as implementor), are complicated issue. For example, a SEP-licensing dispute sometimes involves parallel proceedings across different jurisdictions, with the implementor requesting a court in one jurisdiction for adjudicating on licensing terms, and the SEP holder suing the implementor for patent infringement in half a dozen other jurisdictions. Facing the multiple patent infringement lawsuits, the implementor may resort to applying an ASI to prevent the SEP holder from enforcing parallel decisions concerning patent infringement lawsuits. In response, the SEP holder may apply an anti-ASI to prevent its proceeding from being hindered. Amidst the multiple lawsuits, the ASI adds further complication due to its extraterritorial nature.

The outline of each of the four litigation cases cited by the EU's complaint follows this pattern of development. In each instance, the disputing parties were negotiating a SEP-licensing agreement, based on the FRAND principle – fair, reasonable, and non-discriminatory. Litigation was initiated when negotiations hit a deadlock.

Certainly, the international jockeying for jurisdiction<sup>4</sup> is concerning. Despite being a well-established common law instrument, the ASI procedure was introduced in an intellectual property case for the first time in China by the country's SPC through its decision in Huawei v Conversant, issued on 28 August 2020. At present, there are no international rules, or guidelines, that govern the application of the ASI.

This policy insight is divided into two main parts. The first part focuses on the ASI; and the second on the EU-China IPR Dialogue. The first part highlights the main features of the four SEP-licensing disputes cited in the EU's complaint. By examining the chronology of the cases, it proceeds to query the rationale of the EU's complaint regarding the scope of the ASIs issued by Chinese courts. However controversial their scope may be, the ASIs in question caused no injuries to the SEP holders. Even before the EU complaint was submitted to the WTO, the contingent lawsuits were all withdrawn by the disputing parties following the conclusion of the respective SEP-licensing agreements. The paper goes on to scrutinise the scope of the ASIs granted by the Chinese courts, before analysing the two key considerations of 'judicial sovereignty' and 'international comity', upon which an ASI may be contested. The second part emphasises the importance of strengthening bilateral dialogue between the EU and China in resolving differences. It will highlight the little-known fact that, over the past 20 years, the EU-China IPR Dialogue mechanism has achieved much progress for both parties on IP rights protection.

Annex 1 explains the concepts of SEPs, FRAND, ASI and international comity because they are involved throughout the disputes and EU complaint. Annex 2 provides further details of the chronology of events in the four SEP-licensing lawsuits cited in the EU's complaint. Also presented in Annex 2 is the ratio decidendi issued by the Chinese courts and other courts, e.g., the Delhi High Court, when granting the relevant ASIs and anti-ASIs. Analysis in this paper also frequently refers to both.

## PART I : THE EU'S COMPLAINT AND THE ASI CONTROVERSIES

### Main features of the four ASI lawsuits

The four SEP-licensing disputes cited by the EU's complaint against China share similar features. The disputes were in relation to the licensing terms based on the FRAND principle. Among the four lawsuits, three of them took place between a non-Chinese SEP holder and a Chinese implementor. The three SEP holders are from the US, the UK and Japan, respectively. The fourth lawsuit is related to the renewal of an existing SEP cross-

<sup>3</sup> WTO (2022), China – Enforcement of Intellectual Property Rights, WT/DS611/5, 9 December.

<sup>4</sup> Yu and Contreras (2020), Will China's New Anti-Suit Injunctions Shift the Balance of Global FRAND Litigation: [Guest Post by Profs. Contreras and Yu: Will China's New Anti-Suit Injunctions Shift the Balance of Global FRAND Litigation? | Patently-O \(patentlyo.com\)](#)

licence agreement between Samsung and Ericsson that was due to expire at the end of 2020.

The development of all the four lawsuits followed the same pattern. The parties had been conducting negotiations on SEP-licensing terms over a period of time; then 1) the implementor asked a Chinese court to decide on FRAND licensing terms when the negotiations reached an impasse; subsequently 2) the SEP holder sued the implementor in a few non-Chinese jurisdictions for patent infringement; in response, 3) the implementor applied for an ASI order in the relevant Chinese court in order for its case not to be jeopardised by the patent infringement lawsuits. The ASI was granted. It prohibited the SEP holder from applying for enforcement of judgments, seeking injunction or requesting similar judicial relief, in non-Chinese jurisdictions, under the sanction of 1 million RMB (approximately €136,000) in daily penalties; as soon as the ASI was granted, 4) the SEP holder applied for an anti-ASI in one of the non-Chinese jurisdictions where a patent infringement lawsuit was previously filed; 5) an anti-ASI order was then granted inhibiting the enforcement of the ASI order granted by the Chinese courts; however, despite the tit-for-tat litigation spanning multiple jurisdictions, the SEP holder and the implementor continued their licensing negotiations, and 6) a licensing agreement was concluded and the lawsuits withdrawn by the disputing parties.

Given the above facts, one cannot help but query the EU's rationale in its complaint.

### **Two queries concerning the EU's complaint**

The EU's allegation against China on IPR protection and enforcement has two aspects, the first concerning patent protection. The EU alleged that the ASIs granted by the Chinese courts prohibited the patent holders from asserting their rights in non-Chinese jurisdictions. The second is with regard to the unlimited scope of such ASIs, which is without due regard to the specific scope, conditions or circumstances related to the concrete cases in front of the courts in question.

Following the logic of the EU's complaint, the four Chinese ASIs look unfair to patent holders and appear unconstrained in terms of jurisdiction. Nonetheless, after examining the four cases in detail (Annex 2) and the two key considerations of 'judicial sovereignty' and

'international comity' upon which an ASI may be contested, we can query the EU's complaint as follows.

#### ***1. Why did the EU want to become involved in private disputes that were all eventually settled by the disputing parties themselves?***

Reflecting on the facts illustrated in Annex 2, filing multiple lawsuits across half a dozen of jurisdictions overall, including applying ASI and anti-ASI orders, appears to be more a case of tactics with which the disputing parties intended to gain an upper hand in their SEP-licensing negotiations. Fundamental offences were not obvious in these cases. Therefore, it is perplexing that the EU wanted to become involved. In fact, while fighting each other in courts across a few continents, the disputing parties continued their licensing negotiations at the same time. Even before the EU submitted its complaint to the WTO, the licensing agreements were already concluded, and the lawsuits withdrawn. The same happened in all four disputes cited by the EU.

The chronology of events in *Xiaomi v. InterDigital* (Annex 2:1) can help prove the above point. The EU's intervention looks superfluous.



*WTO Flags.* Unknown author. Photo retrieved from InsightIAS' website.

Since 2015, Xiaomi had been negotiating with InterDigital in order to license some SEPs related to wireless communications standards without success.

On 28 July 2020, Xiaomi informed InterDigital that it had asked the Wuhan Intermediate Court to adjudicate their licensing dispute on royalty rates. The next day, InterDigital sued Xiaomi in the Delhi High Court in India. InterDigital alleged that Xiaomi infringed the patents of the same SEP family that had been under licensing negotiations and enforced in India. InterDigital also

requested two injunctions from the Delhi court.<sup>5</sup> (A month later, InterDigital filed the same applications in the Munich Regional Court in Germany.)

After having learned about the two injunction applications submitted in India, on 4 August 2020 Xiaomi applied for an ASI order in Wuhan, which was granted. The ASI issued by the Wuhan Intermediate Court ordered InterDigital to stop the injunction applications in India. InterDigital was also prohibited from 1) applying injunctions, 2) determining FRAND royalty rates for the same patent families or 3) enforcing already-granted injunctions in any country.<sup>6</sup>

However, despite the multiple litigation initiated against each other, Xiaomi and InterDigital continued their licensing negotiations. An agreement was eventually reached and the lawsuits were withdrawn.

Indeed, although there were moments where the relationship turned sour, even vicious, between the parties, each side had a significant business stake in their SEP-licensing negotiations based on the FRAND principle (Annex 1.1), for example when a SEP holder seeks to promote the adoption of particular technology architecture or platforms. Therefore, the disputing parties continued their negotiations. Surely, the parties are mature enough to handle their business interests and licensing negotiations. The EU's intervention in private business entanglement does not look necessary.

## 2. Why didn't the EU leave court to fix unjustifiable ASIs?

Simply put, an unjustifiable ASI can be neutralised by an anti-ASI. In essence, judges know how to protect a party's lawful rights to defend judicial sovereignty by ruling against an unjustifiable ASI. When the Delhi High Court issued an anti-ASI order in InterDigital's favour,<sup>7</sup>

after the Wuhan court granted Xiaomi an ASI order with an allegedly unjustifiable scope, the Delhi High Court pronounced that, although ordinarily a court of a sovereign state will be loath to inhibit enforcement of an order passed by a court in another sovereign country, if the order passed by one jurisdiction without justification impinges on the lawful invocation of remedies, the court in the latter sovereign is '... duty bound to protect such incursion on its jurisdiction and on the fundamental rights of its citizen to seek legal redress'.

Indeed, amidst parallel proceedings in a SEP-licensing dispute, and with the help of anti-ASI, one jurisdiction is in a position to prevent its proceedings from being hindered by another.<sup>8</sup> A party's legitimate rights for legal redress will remain intact. As seen from the four lawsuits in Annex 2, by issuing an anti-ASI order, courts in non-Chinese jurisdictions were able to assert their judicial sovereignty and protect a party's right for legal redress – when the scope of an ASI appeared unjustifiable.

Therefore, even if the scope of the ASIs issued by Chinese courts were, in the EU's words, 'not limited to specific scope, conditions or circumstances related to the concrete cases submitted to the court in question', the anti-ASIs issued by non-Chinese jurisdictions succeeded in rectifying this failure. As no injuries were caused, why did the EU believe there was a case to seek remedies? Complaining to the WTO suggests that the EU was convinced that China's ASIs caused irretrievable injuries to the SEP holders (three of them are not even EU companies).

Also, in *Samsung v Ericsson* (Annex 2:4), on 14 December 2020 Samsung submitted an ASI application to the Wuhan Intermediate People's Court to prevent Ericsson from seeking relief in relation to the patent

<sup>5</sup> The injunctions consisted of a temporary injunction and a permanent injunction against Xiaomi from producing and selling REDMI NOTE8, REDMIK20 and other wireless communication terminal products (mobile phone products), to restrict Xiaomi from producing and selling the aforesaid infringing products.

<sup>6</sup> The motivation of the Wuhan court's decision was that InterDigital intentionally brought a conflicting action in India to interfere with the Chinese court proceedings; the Indian proceedings might lead to judgments making the Chinese one difficult to enforce; an ASI is necessary to prevent irreparable harm to Xiaomi's interests; and an ASI will not harm InterDigital's legitimate interests or public interests. For example, according to the Wuhan court, InterDigital is an NPE profiting from FRAND licensing negotiations and litigation, and it does not produce products based on SEP-based technologies. Therefore, an ASI, except for the delay of InterDigital's rights relief after the licensing negotiations broke down, would not affect the SEPs it held and managed. No substantial damage would be caused, neither would any public interest be harmed. Whereas Xiaomi must negotiate SEP-licensing with InterDigital to manufacture and sell the relevant products in global markets, including in India. Therefore, the two injunctions applied by InterDigital in India against Xiaomi would severely harm the interest of Xiaomi, and the damage would be difficult to repair. See Hubei Province Wuhan Intermediate People's Court of the People's Republic of China Civil Ruling [September 23, 2020]: <https://patentlyo.com/media/2020/10/Xiaomi-v-InterDigital-decision-trans-10-17-2020.pdf>.

<sup>7</sup> See I.A. 8772/2020 in CS(COMM) 295/2020, para 90.

<sup>8</sup> See Contreras, Jorge L., *The New Extraterritoriality: FRAND Royalties, Anti-Suit Injunctions and the Global Race To The Bottom In Disputes Over Standards-Essential Patents* (February 21, 2019). 25 BU J. Sci. & Tech. L. 251 (2019), University of Utah College of Law Research Paper No. 306, Available at: SSRN:<https://ssrn.com/abstract=3339378>; also *It's Anti-Suit Injunctions All The Way Down – The Strange New Realities of International Litigation Over Standards-Essential Patents* (July 9, 2020). IP Litigator, 26(4):1-7 (July/August 2020), University of Utah College of Law Research Paper No. 386, Available at SSRN:<https://ssrn.com/abstract=3647587>.

infringement lawsuit that Ericsson had filed against Samsung in Texas (USA), on 11 December 2020.

On 25 December 2020, the Wuhan court granted Samsung an ASI order. As a result, Ericsson was prohibited from 1) seeking injunctive relief on 4G and 5G SEPs around the world; 2) seeking a FRAND adjudication anywhere other than Wuhan; and 3) seeking an anti-ASI.

Ericsson was not informed about the ASI application in Wuhan until the moment an ASI order was issued on Christmas morning, on 25 December 2020.

On 28 December 2020, Ericsson applied in the Texas court for an 'emergency ex parte temporary restraining order', or an anti-ASI, which was granted on the same day (a hearing for the preliminary injunction was scheduled on 7 January 2021). As a result, Samsung was prohibited from 1) seeking injunctions that would impair the jurisdiction of the US court or 2) filing lawsuits or administrative actions to enforce or defend its patent rights protected in the United States.<sup>9</sup> The Wuhan ASI was thus rendered entirely futile.



Shenzhen intermediate court. Photo: Handout. Retrieved from [SCMP's](#) website.

Besides anti-ASI, a court is powerful enough to grant a 'pre-emptive' ASI, as seen in *IPBridge v. Huawei*<sup>10</sup> in

<sup>9</sup> Samsung was also asked to indemnify Ericsson; and to provide Ericsson with copies of all court papers in the Wuhan lawsuits.

<sup>10</sup> In *IPBridge v. Huawei*, IP Bridge brought an infringement action against Huawei in Germany (and in the UK) on 8 January 2021. IP Bridge also applied for an 'anti-ASI', requesting the German court to order Huawei to refrain from applying an ASI in China as well as to withdraw any, in case it had already applied one. On 11 January 2021, the German court issued an anti-ASI. Huawei filed an objection against this order, which was not granted. On 5 March 2021, Huawei filed a lawsuit against IP Bridge in Guangzhou, China, asking the court to determine the FRAND royalty rates for IP Bridge's SEP portfolio, which would apply to a licensing agreement covering only the Chinese territory (Chinese FRAND proceedings). On 19 March 2021, IP Bridge asked Huawei in the parallel UK proceedings to declare that it would apply an ASI in China. Huawei did not make such declaration, but no ASI was applied in China against the UK proceeding, either. The parties were involved in licensing negotiations since 2015. During this time, IP Bridge made several offers to Huawei, but agreement was not able to reach. For details, see: <https://caselaw.4ipcouncil.com/german-court-decisions/lg-munich-district-court/ip-bridge-v-huawei>.

Also, in December 2020, Philips, General Electric and Mitsubishi Electric applied an anti-ASI at the Regional Court Düsseldorf against Xiaomi. The court delivered a judgment confirming an anti-ASI for any jurisdiction outside Germany, (without the litigating parties' presenting a concrete indication of imminent or planned infringement. Xiaomi refused to provide the German court information on whether it planned to apply an ASI in China. Xiaomi opposed the ex parte anti-ASI. The court then decided that the anti-ASI is only enforceable against ASIs in China. See [here](#) for details.

<sup>11</sup> See Supreme People's Court Report on the implementation of the "Decision of the Standing Committee of the National People's Congress on Several Issues Concerning Litigation Procedures in Patent and Other Intellectual Property Cases" of 27 February 2022. 最高人民法院关于《全国人民代表大会常务委员会关于专利等知识产权案件诉讼程序若干问题的决定》实施情况的报告, 2022年2月27日在第十三届全国人民代表大会常务委员会第三十三次会议上: <https://www.court.gov.cn/zixun-xiangqing-347911.html>.

<sup>12</sup> See WTO: China – Enforcement of Intellectual Property Rights, WT/DS611/5, 9 December 2022.

order to uphold patent rights. The EU's attempt to lend a helping hand to ASIs and anti-ASIs litigation looks redundant. Courts across different jurisdictions are competent to settle the matter by engaging the ASI in different ways.

Fundamentally, with its extraterritorial nature, ASI is inherently controversial and uniform international guidance on its use (Annex 1:2) does not exist. Therefore, as long as the relevant international judicial principles are adhered to, such as international comity (Annex 1:3), it does not appear inappropriate for China to build an ASI system to safeguard judicial sovereignty over foreign-related IPR,<sup>11</sup> which the EU highlights in its WTO complaint.<sup>12</sup>

Having said that, it is still under debate among different jurisdictions whether 'international comity' is relevant to the 'international jockeying' around judicial sovereignty. That is how contested the ASI is.

Still, the ASIs issued by Chinese courts caused no injuries to the SEP holders. It is therefore puzzling why the EU resolved to seek redress at the WTO DSB, which does not make law, not least for ASIs.

Of course, ASIs are a new legal instrument for the Chinese legislature, which means the courts may lack experience. Given the worldwide lockdowns or quasi-lockdowns in 2020 amidst the Covid-19 pandemic when communication was reduced to the minimum, the four ASIs in question could have been influenced by thinking in isolation, too, by the judges. Indeed, Chinese courts' decisions on ASIs are open to criticism.

## Criticisms of China's ASIs

The EU's criticisms of China's ASIs in summary are about disproportionality that 1) the unlimited scopes of the ASIs granted by the Chinese courts disregard the specific scope, conditions, or circumstances related to the concrete cases in front of the courts in question; 2) the power of Chinese courts beyond the jurisdiction of China, when the ASIs issued by them prohibit a party from applying for enforcement of, or from seeking judicial relief in, non-Chinese courts.

Concerning the scopes, some scholars have argued that usually, when deliberating an ASI order, a domestic court must compare its action with the parallel action in foreign courts. This is to determine whether 1) it addresses the same matter, and 2) the decision of an ASI would dispose of the foreign action. If we follow this argument, at least in *Xiaomi v InterDigital*, the Chinese courts failed on both fronts. This was confirmed by the Delhi High Court when delivering its anti-ASI order.

As seen in the dispute between Xiaomi and InterDigital, InterDigital sued Xiaomi in the Delhi High Court for infringing six patents owned by InterDigital and enforced in India, and asked the Delhi court for one temporary and one permanent injunction.<sup>13</sup> But the ASI order granted later by the Wuhan court, as a response to the action in the Indian Delhi High Court, prohibited InterDigital from enforcing the entire portfolio of all SEPs held by InterDigital.<sup>14</sup> The scale and sweeping scope of the Wuhan ASI order appears overwhelmingly larger than that of InterDigital's infringement litigation against Xiaomi in Delhi.

On Chinese courts' judicial power beyond the Chinese territory, the essence of this criticism is that Chinese courts disregarded the difference between the patent infringement lawsuit submitted in non-Chinese jurisdictions and the SEP-licensing disputes in their purview. The territorial nature of patent rights means patents are granted only by the jurisdictions concerned. Judgments on patent infringement are also jurisdictional-specific. This is diametrically opposite to

SEP-licensing on FRAND terms, which has a global reach in terms of industrial practice. And, because of the intention of FRAND licensing rules and of being in conformity to the FRAND principle, a domestic court may have the discretion to extend the scope of its jurisdiction and decide on global SEP-licensing terms, such as royalty rates. However, the patent infringement cases in the non-Chinese jurisdictions did not concern global FRAND rates or SEP licensing. In the context of *Xiaomi v InterDigital*, the scope of the patent infringement lawsuits was restricted to those 'Indian patents' such as REDMI NOTE8 and REDMIK20. The two injunctions that InterDigital requested in Delhi were restricted to SEP-specific products. InterDigital requested two injunctions, one temporary and one permanent, against Xiaomi from producing and selling REDMI NOTE8, REDMIK20 and other wireless communication terminal products (mobile phone products, e.g., REDMI NOTE 7 PRO and REDMI NOTE 8 PRO handsets), to restrict Xiaomi from producing and selling these products for which patent infringement was alleged. Therefore, it looks rather inappropriate for the Wuhan Court to issue an ASI of worldwide effect going fundamentally beyond the meaning of the 'Delhi case' to which the Wuhan ASI was supposed to respond.<sup>15</sup>

Some scholars were also concerned that the four ASIs granted by Chinese courts were in stark contrast with China's usual approach of 'non-interference'. In parallel proceedings, judicial sovereignty means each country should exercise jurisdiction pursuant to their domestic law, in accordance with Article 533 of the Civil Procedural Law Judicial Interpretation issued by the SPC.<sup>16</sup> Thus, a Chinese court should not attempt to obstruct legal proceedings taking place in a foreign jurisdiction. Following this logic, the Chinese courts overstepped the limits of their jurisdiction when granting the ASIs in all the four cases cited by the EU's complaint, since the effect of these ASIs extended to foreign courts.

Nonetheless, it is well established that ASIs are ordinarily granted if the foreign proceedings are found

<sup>13</sup> The injunctions consisted of a temporary injunction and a permanent injunction against Xiaomi from producing and selling REDMI NOTE8, REDMIK20 and other wireless communication terminal products (mobile phone products), to restrict Xiaomi from producing and selling the aforesaid infringing products.

<sup>14</sup> See I.A. 8772/2020 in CS(COMM) 295/2020, para 99.

<sup>15</sup> See also I.A. 8772/2020 in CS(COMM) 295/2020, paras 98-104.

<sup>16</sup> Article 533 of the Interpretation stipulates: 'As for a case on which both the people's courts of the People's Republic of China and foreign courts have the jurisdiction, where a party concerned lodges a lawsuit to a foreign court while the other party concerned institute another lawsuit to a people's court of China, the said people's court can accept the lawsuit.

Where the foreign court applies or the parties concerned request the people's court to acknowledge and execute the judgment or ruling it has made on the case, the people's court shall not approve, unless otherwise specified in the international agreements reached or participated in by both parties.

Where the judgment or ruling made by the foreign court have been acknowledged by the people's court and a party concerned lodges a lawsuit to the people's court out of the same dispute, the people's court shall not accept.'

'oppressive or vexatious' or where declining an injunction would result in, or perpetuate, injustice. Following this logic, the Chinese courts may well be justified in granting the ASIs in all four cases; and the 'non-interference' would appear less relevant, which refers more conventionally to China's foreign policy after all. For example, it seems a spirit of revenge may have led InterDigital to sue Xiaomi in Delhi for patent infringement and request injunctions the day after it had been informed by Xiaomi about the case at the Wuhan Intermediate People's Court on licensing fee rates (Annex 2.1).

Also, as InterDigital initially failed to respond to the Wuhan court, to sign the receipt of the court summons, etc., the Wuhan court may have well regarded this behaviour 'vexatious' thereby serving as grounds for the grant of the ASI.<sup>17</sup>

## **ASI: an unsettled international issue**

As illustrated by the four ASI lawsuits, the interactions between ASIs (including pre-emptive ASIs) and anti-ASIs laid down by non-Chinese jurisdictions, such as Germany, India, and the US, are many and frequent. No wonder some scholars have called this phenomenon a 'strategic race to courthouse',<sup>18</sup> or 'international jockeying for jurisdiction'.<sup>19</sup> It has caused concerns among policymakers, too, as demonstrated by the EU's complaint against China, which was joined by 18 third parties so far.

### **1. Different approaches towards ASI**

The problem is that, in the absence of uniform international guidance, different jurisdictions undertake different approaches towards ASIs. For example, U.S. courts are reluctant, in general, to award injunctive relief in cases of SEP disputes (but have shown willingness to

determine FRAND royalty rates).<sup>20</sup> The German approach is in many respects precisely the opposite. German courts authorise injunctive relief in many instances (while generally not wanting to establish FRAND licensing terms but instead leaving parties to work matters out for themselves).<sup>21</sup>

Also, the dominant view in German law has long been that the prevailing patent owner is entitled to a permanent injunction, whereas in common law countries, such as the US, injunctive relief is entrusted to the judge's discretion based on equity. German courts also have little or no tolerance for ASIs, which are viewed as potentially depriving litigants of their fundamental right to assert their claims in the chosen litigating forum.<sup>22</sup>

Chinese courts started to apply ASIs from August 2020, as mentioned above. The SPC then affirmed in *OPPO v Sharp* that a Chinese court is competent to adopt ASIs to prohibit a party from applying for enforcement of judgments of a non-Chinese court, and from seeking judicial relief outside the jurisdiction of China.<sup>23</sup>

### **2. The question of judicial sovereignty**

Among the various judicial considerations, 'judicial sovereignty' may have been featured more prominently by the Chinese judiciary as far as ASIs are concerned. In fact, previously, Chinese courts were exclusively at the receiving end of the ASI orders issued by foreign courts, to which the Chinese judiciary's emphasis on sovereignty could be a reaction.

As mentioned above in *Xiaomi v InterDigital*, the Wuhan court may have been convinced that, with the Delhi lawsuit including the request for two injunctions, InterDigital had sought to dismiss Wuhan's jurisdiction and to interfere with Xiaomi's litigation in the Wuhan court. In this sense, the Wuhan court may have granted

<sup>17</sup> Hubei Province Wuhan Intermediate People's Court of the People's Republic of China Civil Ruling [September 23, 2020] (2020) One of the E 01 Zhi Min Chu No.169.

<sup>18</sup> See Contreras J.L. (2021), Anti-suit Injunctions and Jurisdictional Competition in Global FRAND Litigation: the Case for Judicial Restraint, Vol.11 Journal of Intellectual Property and Entertainment Law, Fall, No.2.

<sup>19</sup> Yu and Contreras (2020), Will China's New Anti-Suit Injunctions Shift the Balance of Global FRAND Litigation? | Patently-O (patentlyo.com).

<sup>20</sup> Also, in the US, failure to adhere to a FRAND commitment is addressed based on contract law principles. For royalty rates, courts look at several factors, such as the economic value of the patented technology, the importance of the SEPs to the standard, etc., in order to determine a 'reasonable' rate. See Wong-Erwin K.W., Standard-Essential Patents: The International Landscape, Federal Trade Commission, Spring 2014.

<sup>21</sup> US and German courts also have different positions on the applicability of antitrust law to SEP disputes—with antitrust providing one of the few avenues for denying injunctive relief in Germany while having relatively little bearing so far on SEP disputes in the US. For a detailed discussion on the different judicial approaches in the US and Germany to SEP disputes, see Cotter T., Like Ships That Pass in the Night: U.S. and German Approaches to FRAND Disputes, in *FRAND: German Case Law and Global Perspectives* (Peter George Picht, Erik Habich & Thomas F. Cotter eds., Edward Elgar Publishing Ltd. 2023).

<sup>22</sup> This position has led German courts, according to Professor Cotter, not only to grant anti-ASIs as a countermeasure, but also to find defendants who have applied for (or perhaps even not ruled out applying for) ASIs be unwilling licensees and thus precluded from successfully asserting the competition-law defence. This attitude seems to have the effect of reducing the likelihood of granting ASIs by other jurisdictions; and implementers seem to have more incentives to settle claims early on to avoid the risk of being prevented from operating in the German market. For a detailed discussion, see work referenced in previous footnote.

<sup>23</sup> See Supreme People's Court of the People's Republic of China Civil Ruling (2020) Zui Gao Fa Zhi Min Xia Zhong No. 517.



an ASI with a full-scale and sweeping scope in order to safeguard China's judicial sovereignty.

Besides, as some Chinese telecom companies, such as Huawei, have been subject to a series of market access barriers in the US and in the EU spurred by the rumour of national security breaches, the Chinese legislature may have well become alert to the need to protect the lawful rights of these Chinese telecom companies, including their IP rights.<sup>24</sup> For example, on protecting patents and other IP rights, China's SPC recognised '... the increasingly important role of intellectual property as a strategic resource for national development and a core element of international competitiveness'.<sup>25</sup>

All the above may have driven Chinese courts in their resolve to safeguard judicial sovereignty. But what court will not want to preserve its judicial sovereignty?

It is observed that judicial sovereignty was emphasised as well by the courts that granted those anti-ASI orders, which were meant to neutralise the effect of the ASIs granted by Chinese courts. For example, the Delhi court stipulated in *InterDigital v Xiaomi* that, among others, a foreign court does not have jurisdiction to prevent a party before it from pursuing its cause before an Indian court.<sup>26</sup> The Delhi court therefore issued an anti-ASI against Wuhan's ASI rendering the latter futile, in order to protect its citizen's legitimate rights to seek judicial redress in patent protection.

As illustrated by the dynamics between Wuhan and Delhi, when courts in different jurisdictions vie for their judicial sovereignty, 'international comity' does not seem to be able to find its place between ASIs and anti-ASIs.

### 3. *The question of international comity*

As Justice Shankar has laid out in his judgment on *InterDigital v Xiaomi*, international comity is a 'two-way

street', and more fluid than absolute. If the proceeding or order were 'oppressive' to the applicant seeking an injunction, comity was of relatively little importance. In 'oppressive' circumstances, although granting an injunction would likely offend a foreign court, that consideration could not inhibit the granting of an anti-ASI. After all, comity is subject to '... the condition that the foreign law, or the foreign proceeding or order, was not offensive to domestic public policy or customary international law.' Moreover, a proceeding or an order that divests the patent holder of the right of patent protection is 'ex facie oppressive'.<sup>27</sup> Of course, Justice Shankar spoke from the point of view of protecting the relevant patents enforced in India; therefore, patent rights protection must prevail. 'International comity' was of little relevance in this case in relation to patent rights protection.

Admittedly, for those courts that grant ASIs, their stances are diametrically opposite to the above obiter dicta. These courts scrutinise a SEP-licensing dispute on the grounds of contractual obligation. Their view is that an ASI is less likely to threaten comity in the context of a private contractual dispute than in a dispute involving public international law or government litigants.<sup>28</sup> In other words, the extraterritoriality inherent in an ASI is not viewed as an offence to 'international comity'. For example, in *Microsoft Corp. v Motorola Inc.*, the US courts confirmed that the US had jurisdiction in a contract action (i.e. SEP-licensing agreement) to grant an ASI order against enforcement of foreign patents covered by the contractual obligation. Judge Berzon further noted that '... a US court is not enforcing German patent law but, rather, the private law of the contract between the parties. Although patents themselves are not extraterritorial, there is no reason a party may not freely agree to reservations or limitations on rights that it would have under foreign patent law... in a contract enforceable in US courts.'

<sup>24</sup> In this regard, to those who are not familiar with China's innovation capacity in telecoms technologies, according to the [statistics](#) published by the World Intellectual Property Organisation (WIPO), Huawei (China) topped the ranking of Patent Cooperation Treaty (PCT) applicants for a fifth consecutive year, with 6,952 PCT applications published in 2021, while Qualcomm Inc. (U.S.) ranked in second position, followed by Samsung (Korea).

<sup>25</sup> See Supreme People's Court Report on the implementation of the "Decision of the Standing Committee of the National People's Congress on Several Issues Concerning Litigation Procedures in Patent and Other Intellectual Property Cases" of 27 February 2022. 最高人民法院关于《全国人民代表大会常务委员会关于专利等知识产权案件诉讼程序若干问题的决定》实施情况的报告, 2022年2月27日在第十三届全国人民代表大会常务委员会第三十三次会议上: <https://www.court.gov.cn/zixun-xiangqing-347911.html>.

<sup>26</sup> The Delhi High Court opined that '... it is totally impermissible for a Court in one sovereign jurisdiction to injunct the party before it from pursuing its cause against infringement of its intellectual property before another sovereign jurisdiction, where such latter jurisdiction is the only forum competent to adjudicate the claim of infringement, save and except where continuation of the infringement proceedings are vexatious or oppressive to the proceedings pending before the former, injuncting, court ...' See I.A. 8772/2020 in CS(COMM) 295/2020, paras 98, 110.

<sup>27</sup> According to Justice Shankar, protection of the jurisdiction of the court is also a guiding factor. See I.A. 8772/2020 in CS(COMM) 295/2020, para 88.

<sup>28</sup> See *Microsoft Corp. v Motorola Inc.* 696 F 3d 872 (9th Cir 2012), also in UK Supreme Court [2020] UKSC 37 on appeals from [2018] EWCA Civ 2344 and [2019] EWCA Civ 38, para 71.



Delhi High Court. Photo by: Aditi/X. Retrieved from Barandbench's website.

In China's case, the newly revised Civil Procedure Law (CPL) (coming into force on 1 January 2024) has confirmed the doctrine of reciprocity, but not international comity, in its latest amendment with regard to recognition and enforcement of a foreign judgement. The fact of reciprocity does not necessarily give rise to international comity. Moreover, in accordance with Article 301 of the CPL, the relevant international treaties that China concluded or acceded to, China's national sovereignty, security, social and public interests are equal considerations that must be taken into account before a foreign judgement may be recognised and enforced.<sup>29</sup> 'International comity' alone will not inhibit Chinese judges from granting ASIs when it comes to FRAND licensing disputes.

To summarise the above, in the context of a SEP-licensing dispute, and amidst parallel proceedings, international comity may not be so relevant whether for FRAND or patent infringement litigation, since each proceeding deals with entirely different legal matters.

This being the case, it is doubtful if, by focusing exclusively on the aspect of patent protection while ignoring the context of SEP licensing, the EU's WTO complaint against China would achieve its purpose of strengthening IPR protection, or ultimately settle the dispute on ASI scope between the EU and China.

## **PART II : EU-CHINA COOPERATION ON IPR PROTECTION**

As the EU's WTO complaint appears rather as a result of overreaction towards private disputes over SEP

licensing, one cannot help but ask why the EU and China did not try to resolve their differences on ASI scope through dialogue.

This is especially the case since there is a comprehensive EU-China IPR Dialogue mechanism. In the past 20 years, this mechanism helped resolve many IPR issues across the whole spectrum of IP rights that EU businesses faced in China, from legislation to practices. In a few IP legislation areas, the dialogue mechanism also achieved the EU's objective of 'Europeanising' China's IP law through judicial cooperation. China has benefitted considerably from the EU's contribution when strengthening its IP protection system. This will prove helpful as China moves up the innovation ladder. In patent protection alone, a strengthened patent protection system with effective enforcement will enable China to safeguard the proceeds of its own innovation. According to the [WIPO Global Innovation Index 2023](#), China already ranked 12<sup>th</sup> among the world's most innovative economies.<sup>30</sup>

### **1. The structure of the EU-China IPR Dialogue**

Established in 2004, the EU-China IPR Dialogue is a comprehensive and structured cooperation platform for discussing all issues related to IPR protection and enforcement between the EU and China. Prior to the outbreak of the Covid-19 pandemic when contacts became restricted, bilateral ministerial meetings took place every year for exchanging views on IPR cooperation (and for political impetus). And, twice a year, IP Working Group meetings took place between policymakers and stakeholders in the EU and China, for which the initial focus was to discuss 'specific problems European industry and IP rights holders' were having in China. But later, the Working Group became highly relevant to Chinese companies seeking to expand and protect their IP.

For more than a decade, the IP Key projects, directed and implemented by the EU Intellectual Property Office, have been complementing the political discourse and practical exchanges on IP issues, with four phases to date.<sup>31</sup> In each phase, the IP Key project is devoted to a different set of priorities on IPR

<sup>29</sup> For details, see <http://www.szline.cn/law/2023/0902/665.html> (Chinese).

<sup>30</sup> Also, according to the WIPO, in 2020, for the first time in the PCT's 40-year-history, China overtook the US as the world's No.1 PCT patent applicant. China remains the world's No.1 PCT patent applicant to date.

<sup>31</sup> The IPR1 project aimed to promote international standards of IPR protection in Chinese legislation; the IPR2 covered cross-cutting areas (i.e., legal framework, capacity building, training, access to information) and specific areas (e.g., civil, administration and procedures, enforcement and support for rights holders). IP Key Phases I & II shared the same objectives of, among others, promoting progressive convergence of China towards European standards in IPR legislation, protection and enforcement

protection according to what characterises China's IP development reality. For example, the IP Key Phases I & II projects focused on EU-China cooperation regarding issues related to market access. The projects also sought to promote progressive convergence of Chinese with European standards in IPR legislation, protection and enforcement and the development of best practices. These objectives exemplify the EU's aim to 'Europeanise' China's IP system.

## 2. The achievements of the EU-China IPR Dialogue

The success of the IPR Dialogue is well documented.<sup>32</sup> Legislative exchanges, peer exchanges and comparative analysis have been especially helpful in increasing knowledge and forging a common understanding of IP protection between the EU and China. These interventions substantially contributed to the development of China's national IP legislation, which has gone a long way to strengthening economic relations between the EU and China. The rapid progress of China's IP legislation, including its harmonisation with international IP standards and increasing sophistication, has laid down a solid foundation that China's robust innovation landscape now finds indispensable.



WTO headquarters in Geneva. Photo by Denis Balibouse/Reuters. Retrieved from [The Epoch Times'](#) website.

There are many notable stories that can highlight the achievements of the EU-China IPR Dialogue,

encompassing the whole spectrum of IP rights, from copyright, and geographical indication (GI) to patent rights. With IP legislation converging from both sides, economic benefits accrue to both the EU and China. In GI protection, for example, after China adopted the EU's sui generis GI protection system,<sup>33</sup> and since the EU-China Agreement on Cooperation on, and Protection of, Geographical Indications came into force in March 2021, more GI products from both sides are being protected under the agreement. According to a Chinese study, for example, once a product is registered as a GI, its price level increases by 50.11% on average, while farmers' income from GI production at the place of origin increases by 65.94%. Moreover, of all GI products, 53.38% have become regional economic pillar industries, and GIs may generate more than 30% of the economic impact on local employment, income and overall development.<sup>34</sup> China has in recent years become keen to promote GI protection as an instrument of rural development and poverty alleviation. In China, some GI-rich areas also happen to be less developed. Certainly, promoting GI registration for rural development requires the prerequisite of effective protection. Like other IP-protected products, GI products may be subject to misuse and counterfeiting. With a strengthened GI protection system, the Chinese GI producers will be able to reap the profits of their GI products more effectively and improve their lives.

## 3. China's innovation capability, and as a SEP-licensing litigation centre

Compared to 20 years ago when the IPR Dialogue was established, China's IP capabilities have increased enormously.

On SEPs per se, the fact that China has now emerged as a SEP litigation centre epitomises the landscape of the country's robust telecoms innovation activities, including innovation, SEP-licensing negotiations, and

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and the development of best practices; contributing to greater transparency and fair implementation of the IPR protection and enforcement system in China, avoiding and discouraging any protectionist market access barriers through the misuse of IPR legislation and to further improve the IPR environment. The latest IP Key China project (2022-2025) builds on earlier EU-China cooperation on IPP, and aims to create a more conducive IP environment for European enterprises, increase the importance of IPR in the local market and contribute to stronger IPR protection and enforcement in China. See <https://ipkey.eu/en/china>, [IP Key China](#), and [IP Key China \(2022-2025\)](#).

<sup>32</sup> See, for example, Celebrating 10 years of the EU-China IP Dialogue Mechanism [201510-a-decade-of-discussion\\_ip-key\\_final.pdf](#) (ipkey.eu).

<sup>33</sup> See Hu W. (2018), Reciprocity and Mutual Benefits: EU-China cooperation on and protection of geographical indications, CEPS Research Report, No. 2018/04, June.

<sup>34</sup> The study of the Relationship between Trademark Protection and Economic Development was conducted by SAIC. The study was quoted by Cui Shoudong, Deputy Director of Trademark Protection at SAIC, when presenting an overview of SAIC's work on GIs protection at the 2017 International Symposium on Geographical Indication, 29 June-1 July 2017, Yangzhou, China ([http://home.saic.gov.cn/zt/fw/dlbz/201707/t20170708\\_267423.html](http://home.saic.gov.cn/zt/fw/dlbz/201707/t20170708_267423.html), in Chinese).

It is worth noting that for price level increases, the above-mentioned estimate provided by the Chinese side seems very conservative. Based on a study published in October 2012, the average value premium rate achieved by EU GIs was 2.23. According to the study Value of Production of Agricultural Products and Foodstuffs, Wines, Aromatised Wines and Spirits Protected by a Geographical Indication (GI) and based on the year 2010 with the prices retained at the regional wholesale stage (ex-factory/ex-winery), the value premium rates were higher for wines (2.75) and spirits (2.57) than for agricultural products and foodstuffs (1.55) (a value premium rate of 2 means that GI products were sold for twice as much as non-GI products for the same volume). For study details, see [https://ec.europa.eu/agriculture/external-studies/value-gi\\_en](https://ec.europa.eu/agriculture/external-studies/value-gi_en).

manufacturing of the relevant products. For example, China holds more than a third of the world's key 5G patents. Some Chinese companies, like those involved in the EU's WTO complaint, Xiaomi, OPPO, and ZTE, are all global innovation giants in telecoms technologies in their own right, as mentioned above. They are the world's leading telecoms manufacturers at the same time. Naturally, because of their dynamic telecoms activities, these companies often find themselves in dispute with other patent holders, such as the respondents in the cases concerned, regarding patent infringement or SEP licensing terms.

Before China entered the scene, disputes over SEP-licensing terms were frequently litigated in Europe, the UK, and the US, the world's leading innovators – with whom China's innovation capacity is now compatible. As a natural consequence, Chinese courts' decisions will gradually start to establish jurisprudence that has an impact on SEP-licensing beyond its territories. Recall that Chinese courts have since established their jurisdiction to rule on global FRAND licensing terms, including FRAND royalty rates, by applying a China-nexus test as seen in *OPPO v Sharp* (Annex 2:3) (the Chinese judiciary have in addition adopted similar grounds to those established by courts in the UK<sup>35</sup>). The facts to consider for the China-nexus test include China being 1) the place where the parties negotiated, 2) the main place of implementation, 3) the main place of business operation or the place of main source of revenue of the implementers of the SEPs involved, and 4) the place where the parties' seizeable or enforceable properties are located. The China-nexus test was applied in a later case in *OPPO v Nokia, in 2022*.

#### 4. (IPR) dialogue matters

It is encouraging to see that communication between the EU and China has picked up steam recently, after having been reduced to the minimum for a couple of years due to the outbreak of the Covid-19 pandemic at the beginning of 2020. Nonetheless, in the meantime, the EU's rhetoric of 'de-risking' from China has been growing louder, as 'national security' has become the dominant consideration in bilateral economic

relationships. It is debatable whether such an approach is reasonable,<sup>36</sup> but it should not be at the expense of communication in order for both sides to keep abreast of a broader range of factors, instead of the single issue of national security, for example. Many specific challenges of IP protection faced by European industry and IP holders in China have been solved in the past thanks to the IPR Dialogue. A case in point is that the EU's 'supplementary protection certificates' regime is now incorporated in China's 2020 Patent Law, whereby patent protection for pharmaceutical and plant protection products is extended for five more years in China.

Returning to the EU-China dispute regarding ASI scope, given the current absence of uniform international guidance on ASIs, dialogue would have perhaps been a better channel to resolve the differences between the EU and China.

In any case, IP legislative exchanges should continue between the EU and China as before so that Chinese courts may be in a position to ameliorate their adjudication, for example, in order to continuously improve Chinese market conditions while safeguarding judicial sovereignty, as well as Chinese companies' lawful rights. European judges and policy-makers could keep up with the development of the Chinese legislature's approach, too. In the past, among other IP-related activities conducted under the IPR Dialogue mechanism, the EU and China legislatures routinely shared information on national IP legislation and practices to identify shortcomings and formulate proposals for improvement.



2015 EU-China Intellectual Property Forum. Unknown author. Retrieved from [IPKEV's website](#).

<sup>35</sup> See [the UK Supreme Court \[2020\] UKSC 37](#), paras 66-84.

<sup>36</sup> For example, China is leading among the sectors of microelectronics, quantum computing, robotics, artificial intelligence, biotech, etc., that the EU aims to de-risk from. Logically, China should de-risk from the EU to safeguard China's national security, instead of the other way around. For example, in recent years, China has achieved a series of breakthroughs in quantum technologies, including the world's first quantum satellite, a 2,000-km quantum communication line between Beijing and Shanghai, and the world's first optical quantum computing machine prototype. In October 2021, Chinese scientists unveiled the world's fastest programmable quantum computer, a million times more powerful than Google's most advanced supercomputer. It is also believed that, overall, China has been outpacing the US in the race in quantum technology research and development. For quantum computers hold the potential to drive innovations across a country's economy, in fields from materials science and pharmaceuticals to finance and energy.

Equally, engagement will help update the EU on the dynamic development of China's IP landscape. With its ever-growing innovation capabilities, China's influence in patent-related law-making will be expanding as Chinese courts' SEP-licensing adjudication has proven. China's legislature has started to establish its own test for law-making purposes, e.g., the China-nexus test in global SEP rate-setting adjudication. The EU would be advised to continue with close IP judicial dialogue with China, since the country's development in IP law-making is probably faster than one would imagine.

Of course, as a relative latecomer to IP legislation (e.g., China enacted its first patent law in 1984), China is open to incorporating good law and practices from foreign jurisdictions in its own legislation, as long as it fits the country's circumstances. It is therefore observed that, in addition to the EU's patent law elements and practices, China has adopted, for example, the US' patent linkage system (although implementing rules, guidelines, etc. are pending).<sup>37</sup> If the EU's aspiration to 'Europeanise' Chinese IPR legislation and practices remains, dialogue and cooperation with China is perhaps the only way for the EU to achieve this goal, and, ultimately, to solve bilateral differences.

## CONCLUSION

One aspect of the EU's WTO complaint against China focuses on the expansive scope of four ASIs, which were granted by Chinese courts in 2020 amidst parallel proceedings on FRAND terms adjudication and patent infringement across different jurisdictions.

In the context of such litigation, an ASI may be obtained by a disputing party in a FRAND licensing lawsuit in order to halt the parallel proceeding on patent infringement in a particular foreign jurisdiction against it. To protect a patent holder's rights to seek legal redress and to defend judicial sovereignty, etc., an anti-ASI order may be granted by a court adjudicating on patent infringement. An anti-ASI will render an ASI futile, therefore sometimes a patent holder will engage this legal means.

However, in a relationship between the SEP holder and the implementor, each side has a significant business stake in reaching a SEP-licensing deal. Therefore, it may not be such a surprise that the parties mentioned in the EU's complaint have all settled their respective

disputes between themselves with duly concluded SEP-licensing agreements.

Nonetheless, the debate is still ongoing as to how to resolve international jurisdictional conflicts and competing ASIs in litigation over SEP-licensing disputes. At present, judges in different jurisdictions may engage the ASI for different purposes in parallel proceedings involving the same disputing parties. In fact, for the four disputes, the ASIs issued by the Chinese courts were all neutralised by the anti-ASIs issued by non-Chinese jurisdictions. The ASIs did not cause damages to the holders of the SEPs in any of the cases.

Given the above facts, it is regrettable that the EU and China were not able to resolve their differences on ASIs by dialogue. This is especially the case since the EU-China IPR Dialogue mechanism tackled many IPR issues over the past 20 years, and achieved much, equally on IP regulatory convergence, between the two sides.

Standing at the forefront of global telecoms innovation, and with many foreign-related disputes occurring in its territory, China's influence in international IP law-making will be growing accordingly. The EU should reinforce its dialogue with China – no doubt a more effective way to resolve differences than lodging a complaint at the WTO.

## ABOUT THE AUTHOR



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She has served as team leader for the EU for coordination of the Asia-Europe Meeting (ASEM), the multilateral political dialogue process between Asia and European regions.

<sup>37</sup> For more detailed explanation, see: [https://intellectual-property-helpdesk.ec.europa.eu/news-events/news/ten-highlights-chinas-new-patent-law-2020-10-23\\_en](https://intellectual-property-helpdesk.ec.europa.eu/news-events/news/ten-highlights-chinas-new-patent-law-2020-10-23_en).

## ANNEX 1: THREE CONCEPTS

### 1. SEPs and FRAND

The patents in dispute in the EU's complaint are known as standard essential patents (SEP). They are technologically essential patents, closely related to the interoperability focus of the standard. Some patent holders are willing to license their SEPs based on the FRAND principle – fair, reasonable, and non-discriminatory. A FRAND commitment obligates a patent holder to grant licences to manufacturers of standardised products on terms on this basis and usually involves patents covering well-known standards such as 4G LTE, Wi-Fi, H.264, or technological specifications in general.

A FRAND commitment is not entirely in line with the monopolistic nature of patent rights exploitation (albeit with a limited term). Under a FRAND commitment, a patent holder will limit the rights for enforcement or other monopolistic rights to exploit the specific patents.

A few motivations can explain why some patent holders are willing to forsake their exclusive rights for patent exploitation. This includes 'inducement'. For example, a SEP holder may want to lower patent barriers in order to encourage market participants to adopt (and invest in products which comply with) a particular standard or technology platform that is favoured by the patent holder.<sup>38</sup> In this context, interoperability, platform leadership and market development are often the more specific reasons for entering FRAND commitments, when a patent holder seeks to promote the adoption of a particular technology architecture or platforms.<sup>39</sup>

Committing to FRAND licensing terms means that the patent in question will be disclosed to the public and

without any direct monetary compensation or other economic consideration.<sup>40</sup>

Nonetheless, these patent holders retain ownership of their patents, and the ability to exercise at least some rights over these patents. The right of 'defensive suspension' is one of such retained rights, which is also one of the most important patent rights. 'Defensive suspension' means that the patent holder may suspend a licence that has been granted to a licensee that brings a patent infringement lawsuit against the patent holder.<sup>41</sup>

### 2. Anti-suit injunction / anti-anti-suit injunction

Created in the 15<sup>th</sup> century, anti-suit injunctions (ASI) are a common law instrument, by which a court of one jurisdiction seeks to restrain the conduct of litigation in another jurisdiction. ASI therefore appears extraterritorial and opposes the doctrine of 'international comity' (see below).

However controversial it may be, when deliberating an ASI order a court examines the following factors including whether the foreign litigation would 1) frustrate a policy of the issuing forum; 2) be vexatious or oppressive; 3) threaten the issuing court's jurisdiction; or 4) prejudice other equitable considerations. If at least one of these factors is present, the court must consider whether the injunction will have a significant impact on international comity. If not, then the ASI may be issued.<sup>42</sup>

In recent years, the most significant use of ASIs has been in connection with global FRAND disputes. ASIs may be applied if 1) contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, or 2) a claim falling within the

<sup>38</sup> Other major motivations for pledging a FRAND licence include, 1) collective action (in order to advance the achievement of a collective goal that is beneficial to the pledgor); 2) voluntary restraint (which restrains the pledgor's ability to assert its patents, often addressing concerns of governmental authorities); 3) philanthropic (in order to advance a social cause or other public good with concomitant public relations benefits to the pledgor). For detailed descriptions of patent pledges and motivations across the different industrial sectors, see Contreras J.L.(2015), Patent Pledges, 47(3) Arizona State Law Journal 543.

<sup>39</sup> For example, in order to promote interoperability standards, patent holders may be required by standards-development organisations (SDOs) to pledge licensing commitment. Therefore, SDO participants/patent holders may opt to license their essential patents on FRAND terms or other terms, such as 'non-assertion', which means without enforcing such patents at all. Such pledges can prevent patent holders from blocking the sale of the products imbedded with the standards patents in question or charging a royalty that makes them economically infeasible. Assurances of such kind are vital in inducing market participants to adopt the standard and to make investments on the basis of the standardised technology. Sometimes, patent holders may make licensing pledges above and beyond their SDO commitments for similar goals, but also for alleviating market concerns regarding potential patent stacking when patent-heavy technologies are concerned. For details, see Contreras J.L.(2015), Patent Pledges, 47(3) Arizona State Law Journal 543.

<sup>40</sup> Indeed, since the beginning of 1990s to date, hundreds of major patent holders, including those in the computing and software industries, have started to champion open-source code platforms such as Linux and Android. To support the growth of these emerging open-source platforms, companies like IBM and Google each pledged not to assert hundreds of patents against open-source products.

<sup>41</sup> ABA Committee on Tech Standardization, Section of Science & Technology Law, Standards Development Patent Manual 62–67 (Jorge L. Contreras ed., 2007).

<sup>42</sup> ABA Committee on Tech Standardization, Section of Science & Technology Law, Standards Development Patent Manual 62–67 (Jorge L. Contreras ed., 2007). See Contreras J.L. (2021), Anti-suit Injunctions and Jurisdictional Competition in Global FRAND Litigation: the Case for Judicial Restraint, Vol.11 Journal of Intellectual Property and Entertainment Law, Fall, No.2.

scope of the agreement is made in proceedings in a jurisdiction other than the one agreed by the contracting parties. When confronted with the latter, a court may exercise its discretion by restraining litigation in the non-contractual forum of law. Conversely, a court can impose compliance with the contractual bargain.<sup>43</sup>

An anti-ASI is sought when a disputing party finds out that its opponent has applied an ASI to restrain its rights in one jurisdiction. Essentially, filing an anti-ASI is requesting an injunction in other jurisdictions to inhibit the enforcement of an ASI. Examples of competing ASIs and anti-ASIs can be found in the four cases in Annex 2.

### 3. International comity

'International comity' is the recognition allowed by one nation within its territory to the legislative, executive, or judicial acts of another nation.<sup>44</sup> The doctrine is the voluntary maintenance of amicable external relations with other national states.<sup>45</sup> By nature, an ASI impinges on foreign judicial sovereignty – since it seeks to restrain the conduct of litigation in other jurisdiction(s). Consequently, ASIs and international comity cannot be reconciled.

Therefore, issuing an ASI order could be a delicate judicial act, requiring a balance between equity (to prevent a miscarriage of justice) and the respect of international comity.<sup>46</sup>

For this reason, in *Huawei v Conversant* when deliberating whether issuing an ASI might not be in conformity to 'international comity', China's SPC examined 1) the time sequence of the cases accepted by courts, 2) whether the jurisdiction of the case before it was appropriate, 3) whether the impact on the trial and judgment of extraterritorial courts was moderate, etc. On the second question, the SPC stipulated that by accepting the case subsequent to first instance adjudication and the ASI order that it was issuing would only have a temporary effect on the German court proceeding. As a result, the legal validity of the German judgment – of which the enforcement would only be suspended – would remain intact and the impact on

Düsseldorf court trial and the judgment would be moderate.

Eventually, the SPC issued China's first ASI order in *Huawei v. Conversant* (28 August 2020), which also set daily fines during the appeal procedure. The ASI prohibited Conversant from enforcing the first instance injunction order issued by the District Court of Düsseldorf of Germany on August 27, 2020. An ASI was subsequently issued in four more lawsuits in 2020 by Chinese courts (Annex 2).

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<sup>43</sup> Aside from FRAND litigation, ASI is usually applied in international private law litigations, when litigations involve in 'forum shopping' in certain judicial cases. For example, parties may seek to litigate in jurisdictions other than their home jurisdictions, presumably due to the advantages that they perceived in the laws and procedures of those jurisdictions. For detailed discussions, see Contreras J.L. (2021), *Anti-suit Injunctions and Jurisdictional Competition in Global FRAND Litigation: the Case for Judicial Restraint*, Vol.11 *Journal of Intellectual Property and Entertainment Law*, Fall, No.2.

<sup>44</sup> *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

<sup>45</sup> See Salava, Laura M. (1994), *Balancing Comity with Antisuit Injunctions: Considerations beyond Jurisdiction; Legislative Reform*, *Journal of Legislation*: Vol. 20: Iss. 2, Article 8.

<sup>46</sup> See Bermann G.A. (1989), *The Use of Anti-Suit Injunctions in International Litigation*.

## ANNEX 2: FOUR LAWSUITS IN DETAIL

### 1. *Xiaomi v InterDigital*

Since 2015, Xiaomi and InterDigital have been negotiating on licensing for the SEPs related to wireless communication standards.

On 9 June 2020, Xiaomi<sup>47</sup> filed a lawsuit against InterDigital<sup>48</sup> in the Wuhan Intermediate Court, which consequently served the latter with all the legal papers. Xiaomi requested the court to determine the global SEP-licensing royalty rate covering the 3G, 4G, 5G and 802.11, HEVC standards held by InterDigital. InterDigital, a US company, owns some wireless communication technologies and has been participating in the development of the relevant international standards and contributing such technologies (owned and managed) to international standards-setting organisations in the same field.

On 28 July 2020, Xiaomi informed InterDigital that it had asked the Wuhan court to adjudicate their dispute concerning the SEP-licensing fee rates. The next day, InterDigital sued Xiaomi in the Delhi High Court in India for infringement of those patents of the same patent family that were enforced in India. InterDigital also asked the Delhi court for two injunctions, one temporary and one permanent, in order to prevent Xiaomi from producing and selling REDMI NOTE8, REDMIK20 and other wireless communication terminal products, and to restrict Xiaomi from producing and selling the aforesaid infringing products. (A month later, InterDigital filed the same injunction applications in the Munich Regional Court in Germany.)

Having learned of the two injunction applications that InterDigital submitted in India, Xiaomi filed an ASI application in Wuhan on 4 August 2020, and it was granted. As a result, the Wuhan Intermediate Court

ordered InterDigital to halt the injunction applications in India and prohibited InterDigital from applying 1) injunctions, 2) the determination of a FRAND rate for the same patent families or 3) enforcing injunctions already received in any countries.<sup>49</sup>

Later, InterDigital requested the Wuhan court reconsider its decision, including the daily penalties. The request was denied.

Subsequently, the Delhi court issued an anti-ASI order against Wuhan's decision. The Delhi court ruled that, among others, a foreign court does not have jurisdiction to prevent a party before it from pursuing its cause before an Indian court. Thus, Xiaomi was prohibited from enforcing Wuhan's decision in India.

Similarly, after the Wuhan court rejected InterDigital's appeal, the Munich Regional Court issued an anti-ASI in InterDigital's favour. The German court decided that Wuhan's decisions did not apply in Germany. Equally, Xiaomi could not prevent InterDigital from filing patent infringement lawsuits in Germany. As a result, Xiaomi was no longer able to enforce the ASI issued by Wuhan; neither could Xiaomi prevent InterDigital from filing patent lawsuits in Germany against Xiaomi. Xiaomi filed an opposition against this decision. It did not succeed. Munich's decision also included penalties.

Nonetheless, in August 2021, Xiaomi and InterDigital announced that a global licensing agreement has been reached between them, granting Xiaomi access to the SEPs in question. The agreement ended the ASI battles fought by both companies in multiple jurisdictions.

### 2. *ZTE v Conversant*<sup>50</sup>

<sup>47</sup> Xiaomi Corporation, commonly known as Xiaomi, is a Chinese designer and manufacturer of consumer electronics with smartphones and smart hardware connected by an IoT platform at its core: <https://www.mi.com/global/about/>.

<sup>48</sup> InterDigital is a technology research and development company that provides wireless and video technologies for mobile devices, networks, and services worldwide: <https://www.interdigital.com/history>.

<sup>49</sup> The motivation of the Wuhan court's decision was that InterDigital intentionally brought a conflicting action in India to interfere with the Chinese court proceedings; the Indian proceedings may lead to judgments making the Chinese one difficult to enforce; an ASI is necessary to prevent irreparable harm to Xiaomi's interests; and an ASI will not harm InterDigital's legitimate interests or public interests. For example, according to the Wuhan court, InterDigital is an NPE profiting from FRAND licensing negotiations and litigation, and it does not produce products based on SEP-based technologies. Therefore, an ASI, except for the delay of InterDigital's rights relief after the licensing negotiations broke down, would not affect the SEPs it held and managed. No substantial damage would be caused and neither would any public interest be harmed. Whereas Xiaomi must negotiate SEP licensing with InterDigital in order to manufacture and sell the relevant products in global markets, including in India. Therefore, the two injunctions applied by InterDigital in India against Xiaomi would severely harm the interest of Xiaomi, and the damage would be difficult to repair. See Hubei Province Wuhan Intermediate People's Court of the People's Republic of China Civil Ruling [September 23, 2020]: <https://patentlyo.com/media/2020/10/Xiaomi-v-InterDigital-decision-trans-10-17-2020.pdf>.

<sup>50</sup> See also China's top 20 patent cases of 2020: ZTE v. Conversant. Available at : <http://www.chinaiptoday.com/post.html?id=1609#:~:text=Conversant%20and%20ZTE%20are%20in%20dispute%20due%20to,grant%20ZTE%20the%20rate%20of%20Chinese%20SEP%20package>.



On 17 January 2018, ZTE filed a lawsuit against Conversant<sup>51</sup> in the Intermediate People's Court of Shenzhen. ZTE requested the court adjudicate the rate and conditions under which Conversant's SEPs enforced in China could be licensed to ZTE.

On 20 April 2018, Conversant filed a lawsuit with the Düsseldorf District Court against ZTE alleging the latter had infringed its SEP rights.

On 27 August 2020, the Düsseldorf Court ruled in Conversant's favour. However, the decision was conditional depending on whether the estimates from Conversant and ZTE during their SEP-licensing negotiations were in compliance with the FRAND principle. The Court also granted an interim injunction order. As a result, ZTE was prohibited to provide, sell, use, import or hold smartphones with the UMTS function or other mobile terminals in Germany. This injunction order could be provisionally enforced if Conversant were to provide a guarantee of €700,000.

A day after the Düsseldorf court delivered its decision, on 28 August 2020, ZTE filed an ASI application in the Shenzhen Court, requesting the court order Conversant to not file an application to enforce the Düsseldorf decision before the Shenzhen court delivered its decision on the SEP-licensing rate and conditions. ZTE provided a guarantee of RMB 6 million (approximately €814,753).

The ASI application was granted, after the Shenzhen court took several factors into consideration, including:

- the impact of enforcing the Düsseldorf injunction on the case filed in Shenzhen (for example if Conversant were to enforce the Düsseldorf decision, the trial and enforcement of the Shenzhen judgment might be hindered, thus causing the trial and judgment of this case to lose its significance);
- the necessity for adopting an ASI (for example the prospect of market losses and lost business opportunities for ZTE in Germany should an ASI not be granted in Shenzhen);
- the impact of an ASI on both ZTE and Conversant;

- whether the public interest would be compromised due to an ASI;
- international comity (for example, since the case was first accepted in Shenzhen then in Germany, should an ASI be adopted it would neither affect subsequent trial procedures of the German lawsuit nor undermine the legal effect of the German judgment for Conversant, and have only modest influence on the trial and adjudication of the case in the Düsseldorf court.)

Conversant did not apply for an anti-ASI in Düsseldorf in order to frustrate the effect of the ASI granted to ZTE by the Shenzhen court. Both sides continued negotiations, and an SEP-licensing agreement was eventually concluded. On 2 November 2020, ZTE applied to the Shenzhen court to withdraw its lawsuit against Conversant. The SEP dispute between Conversant and ZTE was thus resolved out of court.

### 3. *OPPO v Sharp*<sup>52</sup>

In the course of 2018 and 2019, Sharp<sup>53</sup> had been conducting negotiations with OPPO, including having meetings in Shenzhen, concerning licensing terms for 3G, 4G, WiFi, and HEVC standard-related SEPs. However, between January and April 2020, Sharp filed lawsuits against OPPO in Japan, Germany (in both Munich and Mannheim), and Taiwan for infringing its LTE-related SEPs.

In March 2020, OPPO filed a lawsuit against Sharp at the Shenzhen Intermediate People's Court with regard to the licensing dispute between the two. OPPO requested the court determine, among other things, the global royalty rate for the SEPs concerned.

In October 2020, OPPO applied for an ASI in Shenzhen to prohibit Sharp from requesting judicial injunctions (or other similar relief measures in other countries or regions). OPPO also sought to prohibit Sharp from initiating patent infringement cases or from applying for judicial injunctions (or other similar relief measures) against OPPO in other countries or regions. The Shenzhen court granted both applications. Sharp

<sup>51</sup> Conversant Wireless Licensing SARL ("Conversant") is a company registered in Luxembourg and part of a Canadian group of companies managed from the United States. It is an intellectual property licensing company or Patent Assertion Entity, which licenses patents for royalties. Conversant acquired a portfolio of about 2,000 patents and patent applications, covering over 40 countries, from Nokia in 2011. Available at: [Unwired Planet International Ltd and another \(Respondents\) v Huawei Technologies \(UK\) Co Ltd and another \(Appellants\)](#) (bailii.org)

<sup>52</sup> See also Wininger A., China's Supreme People's Court Affirms Right to Set Royalty Rates Worldwide in OPPO/Sharp Standard Essential Patent Case. Available at: <https://www.natlawreview.com/article/china-s-supreme-people-s-court-affirms-right-to-set-royalty-rates-worldwide>.

<sup>53</sup> Sharp Corporation, a Japanese company, mainly manufactures and sales telecommunications equipment, electric and electronic application equipment, and electronic components: <https://global.sharp/>.

appealed before the SPC, which upheld Shenzhen's decision.

In its appeal, Sharp contested the appropriateness of China's jurisdiction over the dispute since Sharp has no domicile or representative organisation in China. To ascertain Chinese courts' jurisdiction over the case, the SPC applied a 'China-nexus' test and, subsequently, established a close link between China and the SEP-licensing dispute.<sup>54</sup>

The factors examined in the context of the 'China-nexus' test included the fact that many SEPs involved in the case were granted in China and (there are also those granted in the United States, Japan, etc.); China is OPPO's main source of revenue from the SEP involved (71.08% as of 31 December 2019) vis-à-vis other relevant markets in the case (0.21% in Europe and 0.07% in Japan in the same period); China is the location where the properties can be seized or rights enforced.

By extending the 'China-nexus' test, the SPC also asserted its jurisdiction in deciding the global licensing terms of the SEPs involved in the case. For example, and essentially, the disputing parties were willing to agree on global licensing terms for the SEPs involved and had conducted negotiations accordingly. The global scope of the negotiations conducted between the parties constitutes the basis for the courts to determine the global licensing terms of the SEPs involved in the case. Therefore, the court may exercise its jurisdiction over the dispute.

Based on the close 'China-nexus' and the disputing parties' intention to agree on global licensing terms of the SEPs involved in the case, the Chinese court confirmed its jurisdiction was able to adjudicate accordingly.

Nonetheless, in October 2021, OPPO and Sharp reached an agreement on global cross patent licences, which also terminated all ongoing parallel litigation between the two parties around the world. The case filed in October 2020 in Shenzhen was withdrawn.

#### **4. Samsung v Ericsson**

On 7 December 2020, Samsung filed a lawsuit in the Wuhan Intermediate People's Court against Ericsson. Samsung requested the court, among other matters, determine the global licensing terms, including royalty rates, of the 4G and 5G SEPs held or controlled by Ericsson for Samsung's communications products. Ericsson was not notified about the Wuhan lawsuit filed by Samsung.

On 11 December 2020, Ericsson filed a complaint against Samsung in Texas (US) seeking to resolve a dispute concerning licensing terms for 3G, 4G, and 5G-related cellular technology SEPs. Prior to the lawsuit, the parties had negotiated for two years in order to renew their cross-licence but were unable to come to an agreement before its expiration.

On 14 December 2020, Samsung submitted an ASI application in the Wuhan Court in order to prevent Ericsson from seeking relief in relation to the patent infringement case that Ericsson had filed against Samsung in Texas.

On 25 December 2020, the Wuhan Court granted Samsung an ASI order. As a result, Ericsson was prohibited from 1) seeking injunctive relief on 4G and 5G SEPs around the world; (2) seeking a FRAND adjudication anywhere other than Wuhan; and (3) seeking an Anti-ASI.

Ericsson was not informed about the ASI application in Wuhan until the moment the ASI was issued on Christmas morning, 25 December 2020.

On 28 December 2020, Ericsson applied in the Texas court for an 'emergency ex parte temporary restraining order', or an anti-ASI. It was granted on the same day (a hearing for the preliminary injunction was scheduled on 7 January 2021). As a result, Samsung was prohibited from 1) seeking injunctions that would impair the jurisdiction of the US court or 2) filing lawsuits or administrative actions to enforce or defend its US patent rights.<sup>55</sup>

However, on 7 May 2021, it was announced that Samsung and Ericsson reached a global patent

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<sup>54</sup> The factors that the court considered when examining the 'China-nexus' include where the patent is granted, the place where the patent is implemented, the place where the patent licensing agreement is signed or negotiated, the place where the patent licensing agreement is performed, and the location where properties can be seized or rights enforced. For more details of the court's deliberation, see Supreme People's Court of the People's Republic of China Civil Ruling (2020) Zui Gao Fa Zhi Min Xia Zhong No. 517.

<sup>55</sup> Samsung was also asked to indemnify Ericsson; and to provide Ericsson with copies of all court papers from the Wuhan lawsuits.

licensing agreement, including global patent cross-licence of cellular technologies, for example 5G. This settlement ended all cases filed by both companies in several countries.

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