

Application of Anti-Suit Injunctions in SEP Disputes

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I. Case study — *Huawei v. Conversant*

In August 2020, the Chinese court issued the first anti-suit injunction (ASI) in *Huawei Technologies Co., Ltd. (Huawei) v. Conversant Wireless Licensing S.àr. l. (Conversant)*.

On 29 April 2014, Core Wireless Licensing S.àr. l. (Core) (later changed to Conversant Wireless Licensing S.àr. l.) sent an email to Huawei, informing Huawei that it had obtained some of Nokia's patents essential to communications standards (2G, 3G and/o 4G) and further claiming that Huawei's products fell within the scope of protection of the above patents and Huawei should acquire licenses from it. On 28 February 2017, Core sent a letter to Huawei about a newly-proposed royalty rate. On 12 December 2017, Conversant provided a list of standard-essential patents to Huawei in another letter. On 21 December 2017, Huawei urged Conversant in a letter to file a lawsuit about those controversial issues mentioned in the above letters at Chinese courts, but Conversant did not take any action in China.

On 25 January 2018, Huawei, together with its Chinese affiliates, filed a lawsuit with the Nanjing Intermediate People's Court of Jiangsu Province, requesting the court to declare that Huawei did not infringe upon Conversant's related patents in China, and meanwhile determine, on the fair, reasonable and non-discriminatory (FRAND) terms, the royalty rate and licensing conditions for the above patents essential to 2G, 3G and 4G standards, which are owned and can be licensed by Conversant and which have been implemented by Huawei and its Chinese affiliates.

On 20 April 2018, Conversant initiated a lawsuit against Huawei and its German affiliates for infringement of SEPs with the Düsseldorf Court of Germany.

On 16 September 2019, the Nanjing Intermediate People's Court of Jiangsu Province made the first-instance judgment, holding that the accused products manufactured by Huawei and its Chinese affiliates fell within the scope of

protection of the invention patent owned by Conversant, and determining the royalty rate and licensing conditions for SEPs to be licensed by Conversant to Huawei and its Chinese affiliates. Conversant appealed to the Supreme People's Court (SPC) of China due to its dissatisfaction.

On 27 August 2020, the Düsseldorf Court issued the first-instance judgment, finding that Conversant's SEP royalty rate offer to Huawei did not violate the FRAND principle (the royalty rate offered by Conversant was approximately 18.3 times the SEP royalty rate determined by the Nanjing Intermediate People's Court of Jiangsu Province in the Civil Judgment of the non-infringement declaration case), and granting Conversant an injunction against Huawei and its German affiliates. The judgment can be temporarily enforced with Conversant's guarantee of 2.4 million euros.

During the second-instance trial of *Huawei v. Conversant* (a dispute over non-infringement declaration and SEP licensing) in China, given that the Düsseldorf Court of Germany made the first-instance judgment on 27 August 2020 to set the royalty rate and licensing conditions between the two parties and grant an injunction, Huawei applied for an ASI with the SPC on the same date. On the following day, the SPC made a ruling that Conversant should not request the enforcement of the first-instance judgement on injunction made by the Düsseldorf Court of Germany on 27 August 2020 before the SPC's final judgement, and in case of violation of this ruling, a daily fine of RMB 1 million shall be imposed from the date of violation, and accrued on a daily basis.

Conversant was dissatisfied with the ruling and filed a request for reconsideration with the SPC on 2 September 2020, and the SPC ruled to reject Conversant's request for reconsideration on 11 September 2020. In the end, Huawei and Conversant formally reached a license agreement for the worldwide SEP portfolio in 2021.

Ever since *Huawei v. InterDigital Corporation (IDC)* in

2012, the first dispute over the license of SEPs on the FRAND terms in China, China's SEP trial practice has developed for more than ten years with relatively mature rules established on the whole. As of the year of 2017, the battles for jurisdictions over global SEP royalty rates among countries all over the world have been increasing ferocious. The UK courts were the first to adopt a radical approach for the application of injunctions, which had a tremendous impact on corporate, industrial and national interests of China. ASIs and anti-anti-suit injunctions (AASIs) arise for resolving jurisdictional conflicts and reducing the impact of injunctions in international civil lawsuits, and have become tools mostly used by the parties in SEP litigation.

Chinese courts have made constant beneficial explorations in judicial practice regarding ASIs as of August 2020 when the SPC issued the first ASI judgment, in an active attempt of adopting ASIs against injunctions improperly issued by foreign courts so as to reduce the resulting adverse impact on the parties concerned. For instance, in 2020, the Shenzhen Intermediate People's Court granted an injunction against *Conversant* in *ZTE v. Conversant*; and in 2021, the Shenzhen Intermediate People's Court granted an injunction against SHARP in *OPPO v. SHARP*. There are also cases where Chinese courts refused to grant ASIs applied by the parties. For instance, in *Lenovo v. Nokia*, the Shenzhen Intermediate People's Court rejected Lenovo's application for ASI. Chinese courts have made constant efforts to improve their judging rationale for ASIs in practice.

Noteworthy, on 22 December 2024, the SPC granted China's first AASI upon Huawei's application in *Huawei v. Netgear*, in which the patentee Huawei filed lawsuits against Netgear for Wi-Fi SEP infringement with the Jinan Intermediate People's Court, the Düsseldorf Regional Court of Germany, the Munich Regional Court of Germany, and the Unified Patent Court (UPC) and won the cases at the Jinan Intermediate People's Court and the UPC. The UPC issued an injunction for infringement against Netgear. However, in hope that the US lawsuit can serve as leverage to offset the adverse effects of lawsuits filed in China and Europe, Netgear filed a lawsuit with the US District Court for the Central District of California on 30 January 2024, and asked for an ASI with the US court on 4 December 2024. In view of the above moves of Netgear, Huawei applied for an AASI with the Munich Regional Court of Germany, UPC and SPC. On 22 December 2024, the SPC granted the AASI, which was the first AASI granted by a Chinese court in the

field of global SEP governance.

At present, parallel proceedings in the field of SEPs occur frequently in the world, and the application of ASIs and AASIs continues unabated. Abundant judicial cases are the foundation for research thereof, and also underscore the necessity of clarifying their legal attributes and application requirements, as well as limitations and improvements to be made. AASIs can be regarded as the countermeasure to ASIs and are similar to the latter in terms of causes and factors examined by the courts. This article conducts analysis on the basis of ASIs. Discussion is concentrated on the legal attributes of ASIs, the legal basis for the application of ASIs under China's current legal framework, and the reasons why Chinese judicial authorities follow ASIs closely and keep deepening their understanding thereof and refining the application of ASIs in practice. Based on the above analysis, the article puts forward several suggestions on how to improve the legal application of ASIs in China.

II. Legal attributes of ASIs

In *Huawei v. Conversant*, the SPC ruled to grant an ASI according to Article 100 of the Civil Procedure Law (2017), which is a provision about behavior preservation, also known as injunction. There are no clear provisions on ASIs in China. The first case involving ASI is a ship collision case in May 2012, in which the Qingdao Maritime Court ruled to order the respondent to withdraw its application for injunction from the relevant Australian court. This case is known as the first cross-border ASI case in China. At that time, the Qingdao Maritime Court made the maritime ASI according to the provisions on behavior preservation in the Civil Procedure Law.

In this regard, there is a view that the behavior preservation system is "merely targeted at the parties' behaviors under private law, rather than under public law, but the ASI is targeted at the parties' behaviors under the public law of another country".¹ A similar view further explains that the legal basis for the application of ASIs by Chinese courts is the behavior preservation system established in Article 103 of the Civil Procedure Law, the original intention of which is to set forth rules for temporary protective measures against respondents so as to resolve domestic disputes. This Article falls within the category of injunctions in nature. This Article is weak as the basis for the application of ASIs.² Another view is that behavior preservation can encompass ASIs,

but, if applied to ASIs, needs to be appropriately modified.³ There is also a view which, on the one hand, recognizes that it is legal and reasonable for China to “temporarily” realize the function of ASIs through behavior preservation, and on the other hand, proposes the construction of an independent ASI system in the future due to the deficiencies of the behavior preservation system.⁴

The author is of the opinion that ASIs are not targeted at the jurisdictions of foreign courts, but aimed to enjoin the respondents in ASI-related cases from performing certain acts, to be specific, the respondent should not apply for an injunction against the ASI applicant at a foreign court or apply for the enforcement of any injunction made by a foreign court against the ASI applicant. The underlying logic lies in that if the respondent applies for an injunction against the applicant in a foreign court and therefore impairs the legitimate rights and interests of the applicant, the respondent’s act is not essentially different from the tortious act in an infringement dispute or the impairing act in a breach-of-contract dispute. The only difference therebetween is that the respondent infringes upon the legitimate rights and interests of others in the name of the so-called protection of rights and interests by resorting to the public tool of litigation. It is evident that such a behavior, like the abuse of litigation rights, can be classified as an infringing act. Therefore, it is absolutely incorrect to regard an ASI as the defiance against the jurisdiction of the judicial authority in one country by that in another country, and separate the ASIs from behavior preservation based on the above understanding. In the AASI case *Huawei v. Netgear*, the SPC still followed the judging rationale in a series of ASI cases, i.e., focusing on the examination as to whether the application for behavior preservation could be approved, without evaluating the impact of the application on foreign litigation.

1. The aims of ASIs and behavior preservation are essentially the same

According to Article 103 of the existing Civil Procedure Law, the aim of behavior preservation is to overcome the difficulty of enforcing a judgment or prevent other damages caused to the opposite party due to one party’s behavior. As stipulated in Article 7.2 of the Provisions of the Supreme People’s Court on Several Issues Concerning the Application of Law in the Examination of Intellectual Property Disputes Involving Behavior Preservation (No. Fashi 21/2018, hereinafter referred to as the Provisions on Behavior Preservation in IP Disputes), the aim of behavior preservation is to

prevent the legitimate rights and interests of one party from suffering irreparable damage or damages such as difficulty in enforcing case rulings. According to Articles 10.2 & 3 of the Provisions on Behavior Preservation in IP Disputes, “irreparable damage” is caused where the respondent’s behavior will render infringement uncontrollable and significantly increase the damage to the applicant, and where the respondent’s infringement will lead to a significant reduction in the applicant’s relevant market share.

Judging from *Huawei v. Conversant* and other numerous cases involving the application of ASIs, it can be seen that Chinese courts granted ASIs obviously for the purpose of preventing the legitimate rights and interests of one party from being significantly impaired by the other party’s special infringement as a result of parallel proceedings, or avoiding the situations where one party is forced to accept the royalty rates and licensing conditions of SEPs on non-FRAND terms, or even one party is forced to pay unreasonable fees and withdraw from a certain regional market due to injunction. It can thus be seen that ASIs and behavior preservation have common inherent value orientation and are in essence preventive measures for the sake of balancing the legitimate interests of all parties through correction and ultimately achieving substantive justice through procedural justice. In *Huawei v. Netgear*, there was evidence proving that Netgear had applied for an ASI with the US court. Once the US court grants the ASI upon Netgear’s application, Huawei will encounter the pressure of terminating litigation in Chinese courts, including waiving the right to apply to enforce judgments made by Chinese courts. The legitimate substantive and procedural rights of Huawei will definitely suffer irreparable damage. Under such circumstances, granting an AASI promptly is in line with the purpose of the behavior preservation system.

2. The methods for implementing ASIs and behavior preservation are essentially the same

The fundamental legal basis for behavior preservation in China stems from the Civil Procedure Law, and later on, the Provisions on Behavior Preservation in IP Disputes clarifies the ways to implement behavior preservation, which include, among other things, the application, examination, criteria for judging emergencies, guarantee and reconsideration of behavior preservation. It is noticeable that ASIs are substantially the same as behavior preservation in terms of the methods for implementation from the application to its grant. Issues in relation to ASIs can surely be handled ac-

ording to the provisions on behavior preservation in the Civil Procedure Law.

Injunction in parallel litigation, to which ASI is targeted, is in essence a special infringement, so the procedural system established for behavior preservation is consistent with the ASI. From this perspective, handling ASIs as behavior preservation should not be understood as a stopgap measure. Of course, there is no need to make a fresh start to abandon the behavior preservation and set up an ASI system separately. To say the least, even if the ASI system is established in a different approach, it will not demonstrate a substantial difference from behavior preservation on the practical level, nor will there be any obvious difference therebetween in terms of the method for implementation. As a result, doubts over repetitive system design may be triggered. Hence, dealing with issues in relation to ASIs under the behavior preservation framework of the Civil Procedure Law complies with the current judicial practice.

3. Whether it is necessary to further optimize the application environment of ASIs on the basis of behavior preservation

Generally speaking, the application of ASIs in China is only confined to maritime disputes and SEP royalty rate disputes. The most typical characteristics of these two types of disputes are that such disputes involve significant foreign elements, and the rulings are often made against relevant foreign injunction rulings. Although, judging from legal attributes, ASIs are aimed to regulate the behaviors of private subjects, namely the parties concerned, the impact thereof will inevitably affect the judicial power which pertains to a public power. Considering that international trade disputes are extremely fierce, the WTO's dispute settlement mechanism is ineffective and China is making vigorous efforts to create a good business environment, the author believes that Chinese courts should maintain the current situation of ASI application, and in particular, they should mainly issue defensive ASIs and confine ASIs to the maritime disputes and SEP royalty rate disputes as mentioned above, rather than expand them to other civil and commercial disputes.

ASIs are a type of behavior preservation by nature. Since the ASI is the result of an action initiated by one party for the purpose of restraining, in the form of legal remedies, the opposite party from performing certain behaviors, there is definitely a causal relationship between the ASI and the behavior preservation. The opposite party will unavoidably suffer losses due to the observance of pro-

hibition from certain behaviors, and such losses may be actual losses or expectable loss of profits. As such, the ASI is a remedy provided to the party that has suffered damage due to injunction. Under the framework of the behavior preservation system stipulated in the existing Civil Procedure Law, the application of ASIs is based on clear legal provisions.

In *Huawei v. Conversant*, the SPC conducted advantageous explorations on how to examine the application for an ASI based on the current behavior preservation system in China, and summarized the highly feasible five-element standard (see below for details). Thereafter, the Shenzhen Intermediate People's Court and the Wuhan Intermediate People's Court, for example, made relevant decisions with reference to the aforesaid five-element standard in cases in relation to SEP ASIs. In order to make the five-element standard more universally applicable, what needs to be done in the future is to further refine and fix the application standard and conditions for ASIs based on the experience accumulated in current judicial practice, thereby providing the standard with a universal legal binding force through law revision in the future.

III. Application of ASIs in domestic and foreign judicial practice

1. The support of foreign courts for injunctions has nurtured an environment for the application thereof

In April 2017, the UK court made a ruling on the global SEP royalty rate and injunction in *Unwired Planet International Ltd. (UPI) v. Huawei*, which first confirmed the jurisdiction of a national court over the global royalty rate, and thereby triggered battles among courts all over the world for jurisdiction over the global SEP royalty rate. As a result, the ASI system which was originally prevalent in the common law system has gradually been adopted by civil law countries, including China, through the SEP injunction relief and fights for jurisdiction over global royalty rates.

In *UPI v. Huawei*, UPI is a patent assertion entity (PAE),⁵ which is a business entity that does not conduct any production or business activities, but primarily engages in patent operations such as patent acquisition, licensing and litigation.⁶ In 2014, UPI purchased from Ericsson a global SEP portfolio, including 2,185 patents, which are related to 2G, 3G or 4G communications standards. Subsequently, UPI sent licensing negotiation notices to Huawei

and other companies. After a short time period of licensing negotiation, UPI sued a few companies, including Huawei, for infringement of its SEPs at the UK High Court in March 2014, requesting the court to determine the global FRAND royalty rate for the patent portfolio in suit.⁷

During the trial of the case, both parties offered quotations and counter-quotations back and forth, but still failed to reach an agreement on related terms. In April 2017, the UK High Court found that the quotations of both UPI and Huawei did not comply with the FRAND principle, and required both parties to express their opinions on whether the UK court can rule on the global SEP royalty rate proposed by UPI. UPI would surely agree with this, but Huawei stated that it only accepted the UK court's rulings on the UK SEP royalty rate and related terms. The UK High Court made the first-instance judgment in June 2017, setting forth the global FRAND license terms for SEPs for both parties and issuing an injunction to prohibit Huawei from infringing two UK SEPs owned by UPI before signing the FRAND license agreement with the terms set by the court.⁸ Huawei appealed to the UK Supreme Court, but the latter ultimately upheld the original judgment in August 2020.

This case illustrated that injunctions have a significant impact on the negotiation and litigation strategies of both parties in SEP disputes. For SEP implementers, once the injunctions take effect, they have no way but to withdraw from the relevant market, which will affect their market operations. For SEP holders, injunctions are an important bargaining chip in licensing negotiations and a crucial guarantee for patent exploitation. Therefore, the implementers have the motivation to apply for ASIs to alleviate the pressure imposed by injunctions in other jurisdictions, and right holders are also motivated to apply for AASIs to eliminate the obstacles to the lawful exploitation of patents. Since ASIs and AASIs can both objectively lower the value of judgments in other jurisdictions, the application of injunctions nurtured the environment for the application of ASIs and AASIs.

Statistics show that Chinese enterprises are mostly standard implementers in the field of patents essential for wireless communications standards. As reported in the Latest Trends in the Development of Standard-Essential Patents in 5G+ Industry released by the China Academy of Information and Communications Technology, the number of lawsuits initiated by non-practicing entities (NPE) against Chinese enterprises has increased from 9 in 2011 to 126 in 2020 and is still on the rise. The lawsuits against Chinese

enterprises such as Huawei, ZTE, Lenovo, Haier, Hisense, DJI and OPPO accounted for about 80% of the total lawsuits initiated by NPEs in the world.⁹ Given that the communications industry is a pillar industry in China, the rulings on global royalty rates and infringement injunctions issued by foreign courts have a profound impact on the corporate, industrial and national interests of China. Thus, foreign judgments have also become an important reason for China to establish an ASI legal mechanism.

2. China has established the adjudicative rules for the application of ASIs through trials of specific cases

If it weren't for *UPI v. Huawei* and a series of other cases involving determination of royalty rates in the field of SEPs, ASIs which arise against injunctions may have received little attention. At the beginning of 21st century, some scholars in Chinese academia began to explore and research ASI-related issues. However, due to the influence of the judicial and litigation systems, theories and notions of civil law countries, ASIs have not been given due concern for a long time.¹⁰ In addition, it has been a long time that people think ASIs are a litigation system unique to the common law system and a manifestation of long-arm jurisdiction, and may be suspected of interfering with judicial sovereignty of a country.¹¹ As a consequence, the public emotionally resist ASIs by nature. In a very long time period, except maritime disputes, there have been no cases in Chinese judicial practice that provoke people's thoughts on whether ASI relief should be introduced to address practical issues.

As mentioned above, however, foreign courts have actively exercised jurisdiction over disputes in relation to the determination of the SEP royalty rates and resulting injunctions, such that Chinese companies and industries in the communications field have undergone great pressure and some even suffered huge losses. Chinese enterprises in the communications field are major contributors to global 4G and 5G SEPs in the communications field, and primary implementers of 2G to 5G SEPs. China is also the major field to implement global SEPs in the communications field and more importantly the most important target market for global end products in the communications field. Against this backdrop, Chinese communications enterprises (as well as several foreign communications companies, like Samsung, for sure) have applied for ASIs with Chinese judicial authorities in a bid to defend parallel litigation initiated by opposite parties with foreign judicial authorities, which is a move to

protect their legitimate rights and interests.

In *Huawei v. Conversant*, the SPC held that ASIs should be regarded as a type of behavior preservation in terms of legal nature. It should be acknowledged that ASIs are indeed different from the behavior preservation in the Civil Procedure Law of China in terms of connotation and denotation. For instance, in the examination of the application for behavior preservation, full consideration shall be given to the likelihood that the applicant's (plaintiff's) infringement claim can be established (i.e., the likelihood of success). If the infringement claim is less likely to be established or its establishment is doubtful, it means that the behavior preservation imposed by the court lacks sufficient factual and legal basis. Nevertheless, when examining the application for ASI, the court takes into consideration the substantive impact of the foreign injunction, rather than the likelihood of success of the respondent of the foreign injunction (the applicant of the ASI) in the lawsuit for substantive rights. Through comparison, ASIs seem to be obviously different from behavior preservation. But a more in-depth analysis reveals that ASIs and behavior preservation are quite similar in terms of institutional value orientation and substantive jurisprudence. Hence, the author believes that the SPC ultimately granted the ASI based on behavior preservation through thorough and comprehensive consideration and with reference to the judicial experience accumulated from maritime disputes from the perspective of judicial activism.

Furthermore, the SPC has conducted useful explorations on the examination standards of ASIs in *Huawei v. Conversant*, which makes them more feasible. The judgment of this case pointed out that when issuing an ASI, the court must comprehensively take five elements into consideration: the impact of the enforcement of the foreign judgment on Chinese litigation; the necessity of behavior preservation applied for by the applicant; the reasonable evaluation of the interests or predicaments of both parties, especially the harm to the parties caused by the behavior preservation; the possibility of harming the public interest; and the possibility of conflicting with the principle of international comity.¹² Hence, under the current behavior preservation framework of the China's Civil Procedure Law, a legal remedy model for ASIs has been established.

In face of the impact of injunctions granted by foreign courts in disputes over SEP royalty rates on China's corporate, industrial and national interests, and the interference of such injunctions with Chinese courts' independent and

autonomous exercise of jurisdiction under the principle of *forum non conveniens*, China introduced ASIs in judicial practice as a countermeasure, which is obviously a passive and defensive move. With the accumulation of judicial experience in cases in relation to ASIs, what needs to do in the future is to further refine and optimize the relevant factors based on the examination criteria established in *Huawei v. Conversant*, such that the system is more workable systematically, valuable as a guidance and effective in prediction.

(1) The impact of the enforcement of foreign judgments on Chinese litigation

The impact of the enforcement of injunctions issued by foreign courts on Chinese litigation refers to the impact on the ongoing trial and the possible future judgment enforcement of the lawsuits heard in China in which the ASI is applied for. The SPC determined that the judgment made by the Düsseldorf Court of Germany, if enforced upon the *Conversant's* application, would have an impact on the Chinese litigation for the following three reasons: first, the parties involved in both Chinese and German lawsuits are the same; second, both the lawsuit in China for SEP royalty rate and the lawsuit in Germany for infringement involve the determination under the FRAND principle, and the issues examined in both lawsuits partially overlap; and third, if *Conversant* succeeds in its application for enforcement of the injunction issued by the Düsseldorf Court, it will have a negative impact on the trial and execution of judgment of Chinese lawsuit.

Prior to the determination as to whether the impact exists, effort shall be made to decide whether the foreign lawsuit and the Chinese lawsuit constitute parallel proceedings (or overlapping proceedings). In short, if they constitute parallel proceedings, such an impact is surely unavoidable. In practice, parallel proceedings are divided into domestic parallel proceedings and cross-border parallel proceedings in China. For domestic parallel proceedings, Article 247 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (No. Fa-shi 11/2022) stipulates the "three sameness" standard, i.e., sameness in the parties concerned, subject matters and claims.

But there are no specific provisions on the identification of cross-border parallel proceedings.¹³ Some people think that when examining whether cross-border proceedings are parallel, reference should be made to the "three sameness" standard for the domestic parallel proceedings. That

is to say, if, according to the “three sameness” standard, the lawsuits are initiated based on different legal relationships or rights, they are unlikely to be regarded as contradictory or mutually influential, and the courts do not need to consider how to cope with these lawsuits (to waive its own jurisdiction, transfer jurisdiction, restrict the jurisdiction of other courts, etc.). This narrowly-defined notion has been criticized by scholars as an improper understanding of the subject matter of litigation.¹⁴ Other people suggest taking “the particular interests claimed by the parties in litigation” as the subject matter of litigation.¹⁵ There is also a view that in the United States, the entire event giving rise to litigation is taken as the subject matter of litigation ... which is defined from the perspective of facts of life ... the event refers to a natural group or common core of facts that create a legal effect ... and this is a relatively optimal approach regarding the subject matter.¹⁶

In *Huawei v. Conversant*, the SPC did not rigidly follow the “three sameness” standard which is often applied to determine domestic parallel proceedings as mentioned above. Instead, the SPC placed more emphasis on whether the foreign litigation had a substantive impact on Chinese litigation, ultimately determining that they constituted parallel proceedings. The judgment on parallel proceedings under a lenient standard is more suitable in view of the actual characteristics of SEPs, and contributes to a more accurate decision on whether the enforcement of overseas judgment will affect Chinese litigation.

(2) The necessity of ASIs as a preservation measure

As for the necessity of preservation measure, examination shall be conducted on whether no preservation measure will cause irreparable damage to the legitimate rights and interests of the applicant for preservation, or render it difficult to enforce the judgment of a case. The issuance or enforcement of the foreign judgment will have a substantive impact on the parallel litigation, and further damage the legitimate rights and interests of one party excessively. It should be noted that once parallel proceedings are confirmed, the court in one country should consider whether overlapping foreign proceedings will cause excessive or improper damage to the claimant. The key is not to find out whether there is damage, but whether the damage is “excessive”.¹⁷ In other words, a great amount of damage, rather than the damage *per se*, should be a necessary condition for a judicial authority to grant an ASI.

What is meant by “excessive damage”? According to

Article 10.2 of the Provisions on Behavior Preservation in IP Disputes, “irreparable damage” is caused “where the respondent’s behavior will render infringement uncontrollable and significantly increase the damage to the applicant”, and Article 10.3 thereof stipulates that “where the respondent’s infringement will lead to a significant reduction in the applicant’s relevant market share”. It is obvious that the word “significantly” in Article 10.2 and the word “significant” in Article 10.3 are used to describe that something is large in number or degree. If there is no evidence to prove the “significant” damage caused or market share reduced, the ASI cannot be granted even if damage exists.

In *Huawei v. Conversant* tried by the SPC, suppose Conversant applied for the enforcement of injunction in Germany, Huawei would have to exit the German market or be forced to reach a settlement with Conversant (the royalty rate offered by Conversant was approximately 18.3 times the SEP royalty rate determined by the first-instance court in China). Apparently, such potential damage, if occurring, would be “significant” in degree, which may substantially harm Huawei’s legitimate rights and interests. To avoid such irreparable damage, an ASI is necessary to be granted.

(3) Balance of interests of both parties

When weighing up the balance of interests, the damage caused to the respondent by the ASI should also be taken into account. If the ASI causes little damage to the respondent or the damage can be repaired by other means, it can be deemed that it is highly reasonable to grant the ASI as a preservation measure.

In order to balance the interests, consideration should be given to the legal status of patent holders and standard implementers in the legal relationship surrounding SEPs. SEP lawsuits are mostly filed by PAEs of NPEs. PAEs are active in acquiring patents and enforcing patents. They do not conduct any production or business activities, but primarily engage in patent operations such as patent acquisition, licensing and litigation. Standard implementers are manufacturers that conduct actual production and business activities. They do business for the sake of profits, and are equal in terms of legal relationship, and their legitimate rights and interests should be equally and fully protected. However, undeniably, PAEs’ interests and demands can all be satisfied by money, with the only difference in the amount. But the standard implementers conduct actual production and business activities, which objectively contribute to techno-

logical advancement, industrial revolution, consumer welfare and public security to varying degrees. Under such circumstances, the standard implementers are inherently at a disadvantage in negotiations over SEP royalty rates and licensing conditions, and injunctions if enforced would put them in a more disadvantageous situation. As such, it is necessary to balance the legal relationship between standard implementers and patent holders through ASIs.

In *Huawei v. Conversant*, Conversant is a typical PAE that does not engage in the manufacturing and selling of products, but focuses on patent management and licensing so as to make profits through licensing and litigation. Conversant's litigation in Germany is primarily aimed to obtain economic damages. The losses resulting from suspended enforcement of injunction issued by the German court can be compensated by means of awarding additional economic damages. Huawei has provided a corresponding guarantee. Hence, it can be determined that Conversant suffered little loss due to the ASI. From the perspective of the balance of interests, if no ASI is used, the damage suffered by Huawei will obviously exceed the damage suffered by Conversant because of the ASI, and therefore the application of the ASI is reasonable.

(4) The impact of ASI on the public interest

Since the case involves a dispute between Huawei and Conversant and what is prohibited from enforcement is the patent infringement injunction issued by the German court, the SPC concluded that the ASI did not affect the public interest. ASIs are a type of behavior preservation. According to Article 7 of the Provisions on Behavior Preservation in IP Disputes, whether the issuance of the ASI affects the public interest should be one of the important factors that need to be taken into consideration. Since the ASI is granted to regulate the respondent's behavior, i.e., to require the respondent to perform or refrain from performing certain acts, the ASI is targeted to private interests; and the dispute over the SEP royalty rate belongs to a dispute over intellectual property licensing and therefore is a civil dispute between equal parties. Hence, from this perspective, the issuance of the ASI does not have an impact on the public interest.

(5) International comity

In terms of international comity, the SPC mainly considers such factors as the sequence of accepted cases and whether the impact of the ASI on the trial and judgment of the foreign court is appropriate.

In this case, the lawsuit in China was initiated earlier

than that in Germany. It is generally recognized that the sequence of lawsuits will have an impact on the two parallel proceedings for sure. As such, in order to eliminate such an impact in practice, the later lawsuit should evade the earlier one, which is known as comity. Conflicts between domestic parallel proceedings often occur as well. However, according to the provisions of the Civil Procedure Law of China, the ways to resolve such conflicts include, among other things, the absorption of the later lawsuit by the earlier lawsuit or the withdrawal of the later lawsuit by its initiator. Following the sequence rule, the later lawsuit should not interfere with the trial of the earlier one that goes in parallel.

When analyzing whether the principle of international comity should apply, the sequence of lawsuits should not be the sole factor that is taken into consideration. If so, the principle of international comity may be utilized to steal a march by preemptively filing a lawsuit, which goes against the prevailing practice that both parties should try to resolve disputes through negotiations under the FRAND principle and further exacerbates battles over jurisdiction. What's more, the temporary prohibition of Conversant from applying for the enforcement of the injunction issued by the German court will not affect the subsequent proceedings and the validity of the German judgment. ASIs are essentially behavior preservation, and pertain to preliminary, not permanent, injunctions. They are targeted to the respondents' behaviors, rather than the jurisdiction of foreign judicial authorities. Hence, the impact of the ASI on the German lawsuit is appropriate.

When deciding whether the principle of international comity should apply, the SPC did not rely on the sequence of accepted cases as the sole or core factor, but made a determination based on the comprehensive assessment of the sequence of parallel proceedings and the impact of the ASI on foreign litigation.

IV. Resolution to ASI disputes — Beyond ASIs

Although ASIs were first triggered in maritime disputes in China, they have been widely applicable to umpteen disputes over SEP royalty rates in the field of mobile communications. Due to the high incidence of such disputes and significant corporate, industrial and national interests involved, it is predictable that disputes in the future will gradually extend to intelligent connected vehicles, one of the "new

three” representing new quality productive forces. With the development of Internet of Everything, more enterprises and industries may get involved into such disputes.

It can be said that SEP-related disputes offer a viable judicial environment for the application of ASIs. The increasingly frequent and expanded global economic and trade exchanges, as well as scientific and technological communications, have made it extremely urgent to internationalize technical standards, standardization activities have become specialized international, organized and periodic institutional practices, and the technology and industry sectors of various countries are, either actively or passively, deeply involved in the standardization process. Patents are an important tool for them to compete and battle with each other.¹⁸

This is especially prominent in the mobile communications industry, where technological accomplishments gained through research and development have been constantly converted into patents and then into standards that are in turn promoted for use on a global scope with the help of international organizations. From 2020 to 2024, Chinese courts heard five cases in relation to ASIs in SEP disputes, which are respectively *Huawei v. Conversant* ruled by the SPC, *Xiaomi v. IDC* and *Samsung v. Ericsson* ruled by the Wuhan Intermediate People’s Court,¹⁹ and *OPPO v. SHARP* and *ZTE v. Conversant* ruled by the Shenzhen Intermediate People’s Court.²⁰ ASIs are merely a temporary intervention measure in litigation and inherently have the drawback of inability to ultimately resolve disputes over jurisdiction over global SEP royalty rates.

1. Limitations of ASIs

(1) ASIs may stand in violation of the principle of international comity

The frequent issuance of ASIs against injunctions and AASIs against ASIs will objectively aggravate conflicts under international laws and may evoke trade disputes. For instance, on 18 February 2022, the European Union (EU) requested consultations with China with regard to communications patents at the World Trade Organization (WTO), arguing that Chinese courts prevented EU companies from enforcing their patent rights by granting ASIs and AASIs against their SEPs in the communications field. On 7 December of the same year, the EU requested the establishment of panels at the WTO Dispute Settlement Body.

The alternating application of ASIs and AASIs will also stimulate negotiating parties to choose a forum that is favor-

able to them and further compress the reasonable procedure and room for pre-litigation negotiations, which eventually hinder the formation of FRAND business negotiation conventions. Today, countries in the world can hardly reach a consensus on the jurisdiction over global SEP royalty rates. On account of the increasingly frequent application of ASIs, courts of a variety of countries are also applying AASIs in an attempt to mitigate the impact of ASIs. For instance, in *Huawei v. Netgear* as mentioned above, after Huawei obtained the injunction from the UPC, Netgear applied for an ASI with the US court and then Huawei applied for an AASI with the Chinese court. The counterpunch with ASIs and AASIs will actually drain out all the effects, rendering the judicial power of courts back to null. As a matter of fact, all parties remain locked in stalemate on this issue, which is of no use for resolving actual problems. Disputes and negotiations over this issue have arisen in international organizations such as WTO.

International comity is one of the vital factors to be considered before granting ASIs. However, judging from ASIs granted in SEP-related cases in various countries, the sequence of accepted lawsuits has been simplistically taken as one of the key factors when determining issues regarding international comity (obviously, the time sequence should not be and is not the sole factor). Nevertheless, it will definitely render the parties inclined to preemptively file lawsuits at preferable courts without conducting sufficient negotiations, thereby undermining the balance between patentees and implementers established by courts worldwide to fight against patent hold-up and patent hold-out. Apparently, this move is disadvantageous to the establishment of business negotiation conventions encouraged by the FRAND principle.

(2) ASIs are a temporary intervention measure

As restricted by the principle of international comity, a court in one country can only refrain a party from temporarily seeking an injunction or requesting the enforcement of judgment made by a court in a foreign country until the former court issues a judgment. ASIs actually cannot prevent patentees from seeking injunctive relief after the expiration of injunctions. Factors such as the patent term and the importance that patentees attach to the time when injunctions are enforced do play a certain role in SEP licensing negotiations. However, after the grant of injunction by a foreign court, the patentee does have a substantive judgment that puts it in a more favorable position in negotiations. ASIs can-

not fundamentally resolve the problem of patent hold-up. Even if the court ends up with a judgment on patent royalty rate that is different from a judgment on global SEP royalty rate made by a foreign court, the conflicts therebetween cannot be eliminated at ease. Therefore, ASIs granted by other courts can only temporarily restrain and intervene the injunctions and royalty rates determined by the relevant courts, and cannot radically eliminate the impact of the decisions of the relevant courts on SEP hold-up.

2. Improvement of injunctive relief is beneficial for resolving disputes over jurisdiction over global royalty rates

ASI, as a type of behavior preservation, has inherent drawbacks, and its limitations must be fully recognized. In order to resolve the disputes over jurisdiction over global SEP royalty rate, China can make some attempts in the substantive legal relief system for SEPs in addition to strengthening international dialogues and cooperation so as to reach a consensus.

For the sake of preventing the patent abuses arising from the introduction of patented technologies during the technical standard setting process, such as patent hold-up, discriminatory charging or bundling sale, which affect the development of related industries, standardization organizations usually require the standard setting participants to disclose the patents in relation to the technical solutions they propose, and to make commitments to negotiate with and license their patents to standard implementers on FRAND terms. As constrained by their FRAND commitments, injunction claims of patentees in litigation are subject to more restrictions than those in ordinary patent litigation. Even if patentees and standard implementers resort to law to resolve their disputes over royalty rates, negotiations are still the predominant approach to resolve disputes between them under the FRAND principle. During this process, the patentees should not impose pressure on the standard implementers by means of applying for injunctions to thereby gain an advantage during negotiations, nor should the judicial authorities hastily grant injunctions to patentees, which will break the dynamic balance between the patentees and standard implementers during negotiations.

Over recent years, Chinese courts have continued to follow the standards established in cases such as *Huawei v. Samsung* for the injunctive relief for SEPs, instead of taking a radical attitude to be overly biased towards the patentees or standard implementers. To solve disputes, stricter requirements can be set for patentees by means of inter-

preting injunctive relief and FRAND commitments. As long as the implementer makes a commitment to accept the royalty rate determined by the court and pays royalties, the dispute is a contractual dispute, no infringement remedies should be applied, and remedies like cessation of production and sale are not suitable to be applied. As stated in a judgment made by the SPC, “once an implementer requests an SEP holder to license it to implement the patent, the SEP holder shall not, in principle, refuse to grant the license without justified reasons. The issue to be negotiated is no longer whether the SEP holder is willing to license the patent, but under what conditions the patent can be licensed. The licensing conditions, especially the royalties, are the key issue of the SEP implementation and license contract concluded between the right holder (licensor) and the implementer (licensee) through negotiation.”²¹

For instance, if the patentee preemptively initiates an SEP infringement lawsuit abroad in a bid to seek an injunction, its preemptive request for injunction can be determined in Chinese litigation to violate the FRAND obligations, in such a way to restrain the patentee from seeking injunctive relief in China. This approach will affect the patentee’s substantive legal interests. In order to avoid losing the corresponding legal remedies for their Chinese patents, the patentees may consider not seeking the injunctive relief and the enforcement thereof with foreign courts, ultimately facilitating a settlement between both parties.

On the other hand, China, as the major territory for implementing SEPs in the world, can further enhance judicial credibility and establish a powerful litigation platform for determining SEP royalty rates. Over more than a decade, Chinese courts have accumulated considerable experience in examining cases in relation to SEP royalty rates, and should further summarize the past experience comprehensively so as to construct a legal framework for determining SEP royalty rates, injunctions and ASIs in China.

Conclusion

In the battles for jurisdiction over global SEP royalty rates, courts in various countries still adopt ASIs and AASIs as countermeasures, thereby escalating disputes over jurisdiction over global SEP licensing rate. Although the widespread application of ASIs in cases involving SEPs by courts in the world stems from the battles for jurisdiction over global SEP royalty rate,²² we can make effort to ex-

plore changes in the substantive legal system regarding SEPs through active international dialogues and cooperation in pursuit of a more effective resolution. ■

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¹ Ning Lizhi and Gong Tao (2021). Theoretical connotation and practical countermeasures of the war of anti-suit injunctions. *Journal of Political Science and Law*, 6, 34.

² Song Jianli (2023). Construction of the anti-suit injunction system in standard essential patent litigation in China. *China Law Review*, 1, 225.

³ Bin Yuecheng (2021). Factors to be considered in rulings on behavior preservation in the nature of anti-suit injunctions and safeguards thereof — Interpretation of the first anti-suit injunction ruling in China's intellectual property litigation. *Journal of Law Application*, 4, 90-100.

⁴ Ou Fuyong and Yuan Jiangping (2022). Anti-suit injunction system in international patent litigation. *Journal of Hunan University (Social Sciences)*, 2, 143-144.

⁵ Qin Le, Li Mei and Bi Chunli (2022). Global NPE intellectual property risks and countermeasures for China. *Information and Communications Technology and Policy*, 2, 93-96.

⁶ *Ibid.*

⁷ *Unwired Planet v. Huawei*, [2017] EWHC 2831. Cited in Ma Yide (editor-in-chief) (2018). *Selected FRAND Case Studies (Vol. 2)* (pp. 136-301). Science Press.

⁸ *Ibid.*

⁹ China Academy of Information and Communications Technology. *Latest Trends in the Development of Standard-Essential Patents in 5G+ Industry (2021)*. Retrieved from www.caict.ac.cn/kxyj/qwfb/ztbg/202112/t20211227_394644.htm. Last visit on 30 June 2025.

¹⁰ Zhang Weiping (2022). Construction and implementation of anti-suit injunctions in China. *China Law Review*, 2, 174.

¹¹ Tan Yuhang (2023). Research on anti-suit injunctions in SEP-related disputes. *SJTU Law Review*, 3, 150-164.

¹² See the Civil Ruling No. Zuigaofazhiminzhongzi 732/2019, 733/2019 and 734/2019-I.

¹³ Cui Guobin (2023). Application of anti-suit injunctions in SEP-related disputes. *Intellectual Property*, 2, 47.

¹⁴ Zhao Xiuju (2018). On the conflict and coordination between the theory of competing claims and the theory of object of action. *SJTU Law Review*, 1, 32.

¹⁵ Jiang Wei and Duan Housheng (2003). Restatement on the relationship between claims and the litigation subject matter theory. *The Ju-*

rist, 4, 82.

¹⁶ Yan Renqun (2013). Domestic route for object of action. *Chinese Journal of Law*, 3, 104.

¹⁷ *Deutsche Bank AG v. Highland Crusader Offshore Partner LP*, [2009] EWCA Civ 725, [2010]1 WLR 1023. "The prosecution of parallel proceeding in different jurisdictions is undesirable but not necessarily vexatious or oppressive".

¹⁸ Li Zonghui (2022). Historical evolution and enlightenment of the relationship between technology standardization and patents. *Forum on Science and Technology in China*, 10, 127-136.

¹⁹ See the Civil Rulings Nos. E01zhiminchu 169/2020-II and E01zhiminchu 743/2020.

²⁰ See the Civil Rulings Nos. Yue03minchu 689/2020-I and Yue03minchu 335/2018-I.

²¹ See the Civil Judgment No. Zuigaofazhiminzhong 918/2022.

²² Roya Ghafele (2020). Global Licensing on Fraud Terms in Light of *Unwired Planet v. Huawei*. 24 *UCLA Journal of Law & Technology*, 14.

China contributes over 40% of world's new energy patents

China has emerged as a global leader in new energy technology and equipment, with its new energy patents accounting for more than 40 percent of the world's total, an official said on 26 August 2025.

Wang Hongzhi, head of the National Energy Administration, told a press conference that China kept breaking world records in key areas during the 14th Five-Year Plan period (2021-2025), including photovoltaic conversion efficiency and the single-unit capacity of offshore wind turbines. The scale of China new-type energy storage has also surged to the top position worldwide.

Source: Xinhua