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China's Practice of Anti-suit Injunctions in Standard-Essential Patent Litigation

Transplant or False Friend?

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I. INTRODUCTION TO THE ANTI-SUIT INJUNCTION TRANSPLANT

Based on published data from various sources, in late 2020, China emerged, at least temporarily, as the largest grantor of anti-suit injunctions (ASIs) against overseas assertions of standard-essential patents (SEPs) in the world with the issuance of five ASIs.[1] This unexpected development was attributed to China "transplanting" Chinese ASI practices from other countries. A legal transplant is "the borrowing and transmissibility of rules from one society or system to another."[2] In a typical ASI, a Chinese court will order parties appearing before it to refrain from pursuing litigation on the same matter in one or more foreign countries on the basis that the foreign litigation would have a substantially negative impact on Chinese litigation. It may also involve imposing penalties on a litigant who seeks an ASI in another jurisdiction. If the order seeks to prohibit the litigant from filing an anti-suit injunction in another country, it is more precisely known as an "anti-anti-suit injunction" or AASI. ASIs entered Chinese legal practice in maritime disputes[3] and then quickly emerged as a tool for litigants to seek control over non-Chinese patent litigation. In Chinese civil litigation practice, an ASI is accomplished by a Chinese court granting a Behavior Preservation Order, which is similar to a preliminary injunction.

[1] King Fung Tsang & Jyh-An Lee, *The Ping-Pong Olympics in Antisuit Injunction in FRAND Litigation*, 28 MICH. TECH L. REV. 305 (2022) [hereinafter *Ping-Pong Olympics*].

[2] ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed. 1993), cited by Peter K. Yu, Jorge L. Contreras, & Yang Yu, *Transplanting Anti-suit Injunctions*, 71 AM. U.L. REV. 1537, 1545 n.36 (2022) [hereinafter *Transplanting ASIs*].

[3] John Liu & Minli Tang, *The First Official Shot from Chinese Court against an Anti-suit Injunction*, ALLBRIGHT LAW OFFICES (July 27, 2017), www.lexology.com/library/detail.aspx?g=cf8d3bde-2c31-4526-9848-eab60842f016; *see also* Zhang Weiping, *The Construction and Implementation of My Country's Anti-suit Injunctions* (我国禁诉令的建构与实施), GUANGZHOU MARITIME COURT OF THE PRC (Apr. 24, 2022), www.gzhsfy.gov.cn/web/content?gid=93982&lmdm=1029 [hereinafter *Zhang Weiping Article*].

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Chinese ASIs have not yet extended into other areas of law, including in international commercial arbitration.[4] Prior to their adoption by Chinese courts, they were long in use in common law countries, including the United States, particularly in matters where courts of equity conflicted with the law courts or ecclesiastical courts.[5]

ASIs are the newest of several Chinese tools to undermine foreign parallel intellectual property (IP) litigation. As with any legal transplant, questions may be raised concerning the ability of China to "customiz[e] and assimilate[e] the imported standards based on local needs, interests, conditions, and priorities."[6] In view of its motives and implementation, an alternative perspective is to view China's ASIs as a type of "false friend." A "false friend" is a linguistic term referring to words in a foreign language bearing resemblance to words in one's own language but having different meanings. A Chinese saying describes this legal phenomenon: "similar appearance, different spirit" (形似神异).[7] In legal terms, a false friend may manifest itself as a legal transplant that has significantly departed from the original purposes of its "exporting" country. In this sense, a false friend may present itself as a more extreme form of the challenges in legal and cultural adaption of a transplant, which are often themselves "endemically riddled with value laden, open-ended notions" of a country's legal culture.[8] However, when a system is transplanted but is widely divergent (or unstable), characterization as a transplant, which is inherently value-neutral, may also lead to undue acceptance of borrowed practices that may be fundamentally different, or even experimental in nature.[9]

As an example of prior efforts to normalize an IP transplant, China on two separate occasions sought to justify an expansion of its administrative system for IP protection on the basis that the United States had a similar system administered by the United States International Trade Commission (USITC). The first such effort occurred in 2004. At that time, China legislated a procedure to exclude infringing imports under China's Foreign Trade Law modeled on US law. However, Chinese Customs already had the authority to exclude infringing imports without the

[4] *Zhang Weiping Article*, *supra* note 3.

[5] S. I. Strong, *Anti-suit Injunctions in Judicial and Arbitral Procedures in the United States*, 66 Am. J. Comp. L. 153 (2018) [hereinafter *S. I. Strong Article*].

[6] *Transplanting ASIs*, *supra* note 2, at 1549.

[7] Mark Cohen, David Kappos, & Randall Rader, *Faux Amis: US-China Administrative Enforcement Comparison*, 4 China Patents & Trademarks 33 (2016) [hereinafter *Faux Amis Article*].

[8] Paul Edward Geller, *Legal Transplants in International Copyright: Some Problems of Method*, 13 UCLA Pac. Basin L.J. 199, 210 (1994).

[9] *Faux Amis Article*, *supra* note 7. For a different view of how developing countries such as China may support IP false friends without understanding their commercial consequences, see Miranda Forsyth & Blayne Haggart, *The False Friends Problem for Foreign Norm Transplantation in Developing Countries*, 6 Hague J. Rule L. 202 (2014). In this chapter, I take a different approach by suggesting that calling a legislative "import" a transplant may be part of an intentional effort to make the receiving country's conduct less offensive to other countries.

necessity of extensive and costly USITC-style administrative proceedings.[10] As far as I know, this system has never been implemented. Another effort at transplanting USITC practice occurred in 2015, when China sought to justify a 23-fold increase in its vast domestic administration for patent enforcement over a six-year period on the basis that the USITC had a similar procedure. As a consequence, China had nearly 1,000 times more cases than the USITC by 2015. In fact, China's administrative system did not replicate the USITC remedy, an in rem enforcement remedy used solely to address the challenges of infringing imports, based on US civil procedure, and the subject of a published docket. In a sense, USITC remedies were transplanted twice, and not at all.[11] China's efforts to transplant USITC practice also shared a common theme of legal experimentation with ASIs, which can make it especially difficult to anticipate how a legal transplant can develop in China over time.

Unlike other recent foreign transplants in China's IP regime, such as the recent introduction into China's civil practice of punitive damages, burden of proof reversals, and "patent linkage" in pharmaceutical IP disputes,[12] ASIs do not address domestic lawsuits but are directed exclusively to overseas cases. One scholarly Chinese commentator has explicitly disavowed the possibility of a domestic ASI regime, by noting that Chinese ASIs "can only be used in international or extraterritorial parallel litigation situations" and that they are a legal tool to deal with "differences arising from different legal systems." This scholar has contrasted the Chinese system with other countries, such as the United States, where ASIs can also affect federal/state judicial relationships.[13]

Put another way, there does not appear to be a Chinese interest in a domestic counterpart to China's practice of ASIs. This is not because it is unneeded. Conflicts can arise from China's extensive multiple-track domestic IP litigation system, including overlapping civil, criminal, administrative, and customs remedies and conflicts; delays attributed to separation of IP validity and infringement proceedings; and conflicts that may arise between national and local government authorities.[14] The Chinese government has attempted to mitigate those differences through

[10] *Faux Amis Article*, *supra* note 7.

[11] *Id.*

[12] Mark Cohen, *Synthesizing Developments on Linkage from the July 15 Berkeley Program*, China IPR (July 19, 2021), https://chinaipr.com/2021/07/19/synthesizing-developments-on-linkage-from-the-july-15-berkeley-program/.

[13] *Zhang Weiping Article*, *supra* note 3; see also *S. I. Strong Article*, *supra* note 5.

[14] Mark Cohen, *Draft Judicial Interpretation on Patent Linkage Released by SPC*, China IPR (Oct. 29, 2020), https://chinaipr.com/2020/10/29/draft-judicial-interpretation-on-patent-linkage-released-by-spc/; *see also Outline for a Strong IP Country (2021–2035)* (中共中央 国务院印发《知识产权强国建设纲要》(2021–2035)), (Sept. 22, 2021), www.gov.cn/zhengce/2021-09/22/content_5638714.htm (Item 10 states that in order to address the complex enforcement roles of different Chinese institutions, China will "clarify the responsibilities, powers and jurisdictions of administrative organs and judicial organs, improve the connection mechanism between administrative protection of intellectual property rights and judicial protection, and form a joint protection force.").

national and local coordinating agencies and through policies mandating cooperative interactions. However, due to the lack of a separation of powers doctrine and limited opportunity for judicial review of administrative action, Chinese courts have no general authority to countermand the action of another domestic court or administrative agency.[15] Chinese ASIs stand out in part because they are, in the words of Judge Zhu Jianjun, who has adjudicated many key SEP decisions, intended to help assist China "to build the main battlefield for foreign-related dispute resolution."[16]

This outwardly facing approach of issuing ASIs also differs from prior approaches of the Chinese courts and governmental institutions toward transnational parallel litigation. In the past, China typically used domestically focused civil strategies to ensure that foreign litigation did not impact Chinese domestic litigation. Judge Zhu described this approach: "China's traditional legal system mainly focuses on resolving domestic disputes, which is coupled with a relatively inward-facing traditional culture (including legal culture). Chinese laws mainly deal with foreign-related disputes based on the rules and experience of handling domestic disputes."[17]

Arguably, all courts rely on domestic law in the treatment of cases. What I believe instead distinguished China's prior approach from the common law system in handling parallel litigation was something more narrow: the judicial attitude of "not formally recognizing or enforcing" ASIs.[18] There are, indeed, arguments to be made that China's new system of extraterritorial ASIs is now instead a part of a tradition within Chinese law of enacting separate institutions, procedures, and rules for dealing with foreign-related matters. These differences today include a separate tribunal for foreign-related civil cases at China's Supreme People's Court (the Number 4 Civil Tribunal), separate time frames for the resolution of foreign-related cases pursuant to China's Civil Procedure Law (CPL) (Art. 277), an inability of foreigners to sit for the bar and an inability of foreign law firms to appear before Chinese courts,[19] and a greater likelihood for intervention in a case by an

[15] Shen Kui, *Administrative "Self-Regulation" and Rule of Administrative Law in China*, 13 U. Pa. Asian L. Rev. 72 (2018); Ian Johnson, *China Grants Courts Greater Autonomy on Limited Matters*, N.Y. Times, Jan. 3, 2016, www.nytimes.com/2016/01/03/world/asia/china-grants-courts-greater-autonomy-on-limited-matters.html.

[16] Mark Cohen, *Unwired Planet and the Role of Chinese Courts: A Perspective from Shenzhen*, China IPR (Jan. 18, 2021), https://chinaipr.com/2021/01/18/unwired-planet-and-the-role-of-chinese-courts-a-perspective-from-shenzhen/.

[17] Zhu Jianjun, *Conflicts and Responses in Issuing SEP ASIs and AASIs and How to Counter Them* (标准必要专利禁诉令与反禁诉令颁发的冲突及应对), S. China Inst. Int'l Intell. Prop. (Aug. 8, 2021), https://sciiip.gdufs.edu.cn/info/1026/1760.htm [hereinafter *Zhu Jianjun Article*].

[18] *Zhang Weiping Article*, *supra* note 3; *see also* Vivienne Bath, *Overlapping Jurisdictions and the Resolution of Disputes before Chinese and Foreign Courts*, Sydney L. Sch. Rsch. Paper No. 16/102, Dec. 5, 2016, https://ssrn.com/abstract=2880942 [hereinafter *Vivienne Bath Article*].

[19] Mark A. Cohen, *International Law Firms in China: Market Access and Ethical Risks*, 80 Fordham L. Rev. 2569 (2012).

"Adjudication Committee," rather than the judges listening to the case, in resolving a dispute involving a foreigner.[20] While the utility and necessity of disparate treatment of foreigners in China's civil IP system is a general topic that is beyond the scope of this chapter, differential treatment of foreigners, in fact, has a long history in China's legal system and could be considered a distinguishing feature of China's ASI regime.

China's historical approaches to foreign ASIs were also based on judicial practices that generally respected the territoriality of IP rights by not considering validity, infringement, or damages in overseas patent litigation, unless there was consent by the parties to consider extraterritorial issues. China instead relied on certain advantages of its legal proceedings to exert some influence over parallel proceedings, including an expedited court docket, expert judges, and the near-automatic granting of injunctive relief to stop the manufacturing or sales of infringing products within China. Unlike US patent litigation, but like continental legal systems, Chinese injunctions are granted nearly 100% of the time when requested by a successful patent litigant who is suing on patents that have not yet expired.[21] Injunctions have traditionally been important for litigants in China due to traditionally low damages for patent infringement. Chinese injunctions have also become increasingly valuable with the growth of China's manufacturing prowess and the expansion of its domestic consumer markets. Injunctions may also provide a significant incentive toward settlement of a global SEP litigation.

China has also taken other nonjudicial steps to insulate itself from foreign parallel cases, such as by limiting possibilities for dismissal of cases on grounds of forum non conveniens[22] or limiting exposure to enforcing foreign SEP judgments through mutual legal assistance agreements. One narrowly tailored example of the latter is found in the "Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region," which specifically excludes "cases on the confirmation of the license fee rate of a standard-essential patent heard by a court of the Mainland or a court of the Hong Kong Special Administrative Region."[23]

A turning point in China's approach toward ASIs occurred about the time of the *Huawei v. Samsung* litigation that resulted in a US court issuing an ASI against

[20] *Dialogue – Issue 39: Only in China: "Adjudication Committees" Serve Judicial System*, Dui Hua Foundation, https://duihua.org/dialogue-issue-39-only-in-china-adjudication-committees-serve-judicial-system/ (last visited on June 11, 2022).

[21] Bian Renjun, *Patent Litigation in China: Challenging Conventional Wisdom*, 33 Berkeley Tech L.J. 413, 436 (2018).

[22] *Vivienne Bath Article*, *supra* note 18, at 12–17.

[23] Agreement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by Courts of the Mainland and of the Hong Kong Special Administrative Region, Hong Kong Dep't of Just. (Jan. 18, 2019), at Art. 3, www.doj.gov.hk/en/mainland_and_macao/pdf/Doc3_477379e.pdf.

Huawei.[24] Huawei had simultaneously filed parallel rate setting proceedings in the Northern District of California and Shenzhen, China. Judge Zhu described China developing its own ASIs as a necessary response to this type of ASI:

> The extraterritorial court issued ASIs to Chinese wireless communication companies that were seriously affected and hindered in the civil litigation rights enjoyed by Chinese civil litigants in accordance with Chinese law. These ASIs may further affect and hinder civil substantive rights. At the same time, although the object of an ASI issued by an extraterritorial court is a party to a civil lawsuit in China, it will hinder the normal development of civil lawsuits in my country, and even lead to the termination of civil lawsuits already underway in my country or unenforceable judgments. The extraterritorial ASI directly or indirectly affects the exercise of judicial jurisdiction by Chinese courts over SEP disputes and interferes with and undermines China's judicial sovereignty.[25]

Judge Zhu's reference to an extraterritorial court issuing an ASI may suggest the negative pregnant that there are Chinese territorial courts issuing domestic ASIs. As noted, this does not appear to be the case in China. His focus on "sovereignty" is also not atypical in Chinese discussions of ASIs. As Professor Vivienne Bath has noted, "Chinese cases and judicial documents dealing with international legal matters tend to refer both to the important concept of judicial sovereignty … and to the more general idea of reciprocity. The phrase 'judicial sovereignty' is used in connection with the protection from foreign encroachment of the jurisdiction and autonomy of Chinese courts."[26] Judge Zhu also does not account for the fact that Huawei was the plaintiff in both the US and Chinese *Huawei v. Samsung* cases. According to Judge Orrick in the California dispute, Huawei had requested a global rate determination from the US court.[27] *Huawei v. Samsung* may not, therefore, be a good example of why China should develop its own ASI system, as the offending party was Huawei when it initiated duplicative lawsuits in two jurisdictions. Indeed, the ASI decisions subsequent to *Huawei v. Samsung*, such as *Samsung v. Ericsson*,[28] have looked to the minimization of inefficient duplicative litigation as a reason for granting an ASI and rejected comity arguments to defer to an overseas court. Arguably, a Chinese court could also have considered Huawei estopped by subsequently pursuing a contrary position in its parallel litigation in Shenzhen. This

[24] Huawei Techs. Co. v. Samsung Elecs. Co., No. 3:16-cv-02787-WHO, 2018 U.S. Dist. LEXIS 63052 (N.D. Cal. Apr. 13, 2018).

[25] *Zhu Jianjun Article*, *supra* note 17.

[26] *Vivienne Bath Article*, *supra* note 18, at 25.

[27] Huawei Techs. Co. v. Samsung Elecs. Co., No. 3:16-cv-02787-WHO, 2018 U.S. Dist. LEXIS 63052, at *11 (N.D. Cal. Apr. 13, 2018).

[28] Wuhan Intermediate People's Court, *Samsung v. Ericsson, Civil Ruling of PRC Wuhan Intermediate People's Court (2020) E 01 Zhi Min Chu No. 743*, at pp. 10–11 (Dec. 25, 2020), www.ipeconomy.cn/index.php/mobile/news/magazine_details/id/2148.html (last visited June 26, 2022).

position also appears to be supported by Article 100 (now Art. 103) of China's CPL regarding "Behavior Preservation," which Chinese courts have utilized as the legislative basis for granting extraterritorial ASIs. In its current form, it primarily seeks to address damages caused to a litigation based on behavior of the "other party."

Article 100 was based in part on China's experience in granting preliminary injunctions in IP matters, as was required by its accession to the WTO. It was a rarely used IP remedy, that has since been made broadly available in all civil disputes:

> **Chapter IX Preservation and Preliminary Execution**
>
> Article 100 In the event that the judgment on the case may become impossible to enforce or such judgment may cause damage to a party *because of the behavior of the other party* to the case or because of any other reason, the people's court may, upon the request of the said party, order the preservation of the property of the other party, specific performance or injunction; in the absence of such request, the people's court may, where it deems necessary, also order property preservation measures.
>
> When a people's court adopts any preservation measure, it may order the applicant to provide security; where the party refuses to provide such security, the court shall reject the application.
>
> When a people's court receives an application for preservation in an emergency, it shall decide within 48 hours after the receipt of the application; if the court accepts the application, such measures shall come into force immediately.[29]

Article 100 was also an odd basis on which to consider the situation posed in SEP cases such as *Huawei v. Samsung*. As Zhang Weiping, a noted scholar of China's CPL, has pointed out, Article 100 was drafted with "the understanding that its significance did not include ASIs."[30] Moreover, by its own terms, it is primarily intended to "resolve domestic disputes."[31] It gives no guidance concerning its potential extraterritorial application. "Chinese law," one commentator has noted, "does not explicitly permit the courts to issue anti-suit or anti-arbitration injunctions."[32] Chinese academics and others have justified these actions as responses to similar actions taken by foreign courts on SEP-related litigation

[29] *Civil Procedure Law of the People's Republic of China*, China Int'l Com. Ct. (June 29, 2017) (emphasis added), http://cicc.court.gov.cn/html/1/219/199/200/644.html.

[30] *Zhang Weiping Article*, *supra* note 3.

[31] *Id.*

[32] Sophia Tang, *Anti-suit Injunction Issued in China: Comity, Pragmatism and Rule of Law*, Conflict of Laws (Sept. 27, 2020), https://conflictoflaws.net/2020/anti-suit-injunction-issued-in-china-comity-pragmatism-and-rule-of-law/.

involving China,[33] either more generally on the basis that this was a "legal transplant" that was part of the "ping-pong"[34] of conflicting ASIs from different jurisdictions, or the "gaming"[35] by litigants in pursuit of optimal judicial fora, which China was fully in its rights to enter. Not surprisingly, in light of its domestic orientation, Article 100 does not explicitly consider the impact of an ASI on a foreign jurisdiction, nor is it reflected in a Judicial Interpretation of the Supreme People's Court regarding behavior preservation orders in IP-related cases that are intended to provide more granular guidance under China's CPL.[36] Comity was subsequently introduced as a consideration in the landmark *Huawei v. Conversant* decision and has thereafter been followed in other ASI cases.[37] In that decision, the Chinese court ordered an ASI directed to the pendency of a potentially conflicting German court decision regarding a patent royalty rate that was significantly higher than the calculation of a Chinese court. By contrast, courts in Wuhan have since issued global ASIs precluding lawsuits anywhere in the world that might interfere with their efforts to set global FRAND rates, as did the Shenzhen court in *Oppo v. Sharp*.

Descriptions of Chinese procedures as a "transplant" based on outward similarities might also be understood as part of a broader effort to normalize novel actions by Chinese courts toward other sovereign courts. Such euphemistic nomenclature downplays any deficiencies in a domestic court's practices. One misleading aspect of that description is that it does not account for changes that the transplant "receiver" must make to adjust to a new legal institution. China's experience with ASIs to date shows that ASIs have required reinterpretation of China's CPL and adoption of other measures. Judge Zhu has noted that Article 100 did not explicitly contemplate the complexities entailed in granting an ASI compared to other types of provisional measures called for under Article 100.[38] Other changes have also occurred to accommodate this more aggressive posture of the Chinese courts, including global FRAND rate setting,[39] judicial jurisdiction based on the *situs* of negotiations,[40]

[33] Cheng Zhongren, *The Chinese Supreme Court Affirms Chinese Courts' Jurisdiction over Global Royalty Rates of Standards Essential Patents*, Berkeley Tech. L.J. Blog (Jan. 3, 2022), https://btlj.org/2022/01/the-chinese-supreme-court-affirms-chinese-courts-jurisdiction-over-global-royalty-rates-of-standard-essential-patents-sharp-v-oppo [hereinafter *BTLJ Blog*].

[34] *Ping-Pong Olympics*, *supra* note 1.

[35] Guan Yuying, *ASIs: China's Attitude towards Responding to Global IP Dispute Jurisdiction Gaming* (禁诉令：应对全球知识产权纠纷司法管辖权博弈的中国态度), Intell. Prop. Ct. Supreme People's Ct. (Feb. 26, 2021), https://ipc.court.gov.cn/zh-cn/news/view-1060.html.

[36] SPC, Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in Examining Act Preservation Cases in Intellectual Property Disputes, Art. 7 (issued Dec. 12, 2018, effective Jan. 1, 2019).

[37] Huawei v. Conversant, Zuigaofa Zhimin Zhong (最高法知民中) (Aug. 28, 2020), translation available at https://patentlyo.com/media/2020/10/Huawei-V.-Conversant-judgment-translated-10-17-2020.pdf.

[38] *Zhu Jianjun Article*, *supra* note 17.

[39] *BTLJ Blog*, supra note 33.

[40] *Id*.

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imposition of daily recurring penalties for continuous violation of the ASI despite a Judicial Interpretation that had provided otherwise,[41] and creation of a new *sui generis* cause of action for a FRAND rate setting.[42]

Another possible indication of the unique challenges posed by this transplant is the conflicts with foreign countries that have arisen from a Chinese court's granting of ASIs. Foreign courts have issued preemptive ASIs forbidding parties from seeking or enforcing ASIs in a Chinese court. Judge Gilstrap in *Ericsson v. Samsung* imposed an indemnity on Samsung for any fine imposed by a Chinese court for Ericsson seeking relief in a US court.[43] In March 2022, the Defending American Courts Act was introduced in Congress.[44] It could impose penalties upon foreign litigants seeking ASIs involving US court proceedings. As the Chinese decisions directly impact foreign courts, the lack of transparency over the cases has also been troubling. The European Union filed a WTO "transparency" request pursuant to Article 63 of the TRIPS Agreement during the summer of 2021, which has since been followed by a request for WTO consultations filed by the European Union on February 18, 2022.[45] The United States, Canada, and Japan have all requested to join these consultations.[46]

Other indications that a rush to normalize ASIs may be premature are the attendant instabilities of China's ASI practice as it seeks to address the challenges just noted. Judge Zhu and others have called for China to further clarify how China should grant ASIs, including harmonizing varying local Chinese judicial approaches to granting ASIs, incorporating the experience of the Conversant decision, and carefully considering the experience of foreign countries in handling ASIs.[47] As one indication of a possible change in direction, there appear to have been no new published decisions on ASIs since the initial spate of late 2020 when China emerged as the global leader in granting ASIs. Another indication of that possible reconsideration is the decision to publish the *Lenovo v. Nokia* case in March 2022 on the website of the IP Court of the Supreme People's Court, about

[41] SPC, Interpretations on Application of Civil Procedure Law, Art. 184 (2020).

[42] *Rule on Civil Procedure Cases Causes of Action* (最高人民法院印发修改后的"民事案件案由规定), Sup. People's Ct. China (Dec. 30, 2020), www.court.gov.cn/shenpan-xiangqing-282031.html.

[43] Ericsson Inc. v. Samsung Elecs. Co., No. 2:20-CV-00380-JRG, 2021 U.S. Dist. LEXIS 4392, at *23-24 (E.D. Tex. Jan. 11, 2021).

[44] Defending American Courts Act, S. 3772, 117th Cong. (2021–2022).

[45] Mark Cohen, *EU Files Request for Consultations on Chinese Judicial SEP Practices*, China IPR (Feb. 18, 2022), https://chinaipr.com/2022/02/18/eu-files-request-for-consultations-on-chinese-judicial-sep-practices/.

[46] Council for Trade-Related Aspects of Intellectual Property Rights, Request for Information Pursuant to Article 63.3 of the TRIPS Agreement, Communication from the European Union to China, WTO Doc. IP/C/W/682 (June 7, 2021).

[47] *Zhu Jianjun Article*, *supra* note 17; *Zhang Weiping Article*, *supra* note 3.

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14 months after its decision date.[48] In that case, a Chinese plaintiff was denied an ASI in circumstances that seemed quite similar to other cases where ASIs were granted.[49] Judge Zhu was a member of the judicial panel deciding that case. This is an important decision, as it may be the first Chinese case where a party was denied an ASI. The case may also have not been well known in the West prior to publication, as it is not referenced in recent English-language academic literature on ASIs as transplants or otherwise,[50] nor does it appear in recent WTO proceedings.

II. CHINESE ASI PRACTICE IN HISTORICAL CONTEXT

Chinese efforts to control foreign parallel patent litigation have a long history, stretching back to the late Qing dynasty in 1897, when two foreigners sued each other before the US Consulate in Shanghai over infringement of a US patent for the manufacture of cigarettes. During that era, US patents also had extraterritorial effect in China.[51] As the United States Consul General of Shanghai, acting in his judicial capacity, noted in *Mustard and Co. v. R. H. Wright et al.*, "The treaty between the United States and China provides that no American citizen residing in China can have his right adjudicated except in the consular courts of his country sitting in the Empire of China, such courts being United States Courts and governed by laws passed by the Congress of the United States." Furthermore, the Consul General noted, "the fact that the plaintiffs resided in China cannot except them" from "the legal principle announced as securing business certainty and safety" of a patent "granted and recorded" in the United States.[52] Disputes like these lend credence to Chinese arguments that patents were a tool of humiliation and extraterritorial oppression against China's own autonomy, "judicial sovereignty," and industrial growth. They also continue to be cited in the academic literature on legal transplants and ASIs.[53]

Another dispute at about the same time also revealed the difficulties foreigners faced in China's nontransparent and nascent patent regime. It involved the assignment of a Chinese patent to two Americans, who subsequently filed two patent applications in the United States based on this original application. Despite the intervention of the US State Department in support of the American assignees of the

[48] Lenovo v. Nokia, 2020 Yue 3 Min Chu 5105 (2020) 粤 03 民初 5105 号 (Published Mar. 9, 2022, Decided Jan. 27, 2021), https://ipc.court.gov.cn/zh-cn/news/view-1820.html.

[49] Nokia Press Release, Nokia and Lenovo Conclude Patent Cross-Licensing Agreement (Apr. 7, 2021), www.nokia.com/about-us/news/releases/2021/04/07/nokia-and-lenovo-conclude-patent-cross-licensing-agreement/.

[50] *Ping-Pong Olympics*, *supra* note 1; *Transplanting ASIs*, *supra* note 2.

[51] Mark Cohen, *An American Patent Dispute in the Qing Dynasty*, China IPR (July 2, 2012), https://chinaipr.com/2012/07/02/an-american-patent-dispute-in-the-qing-dynasty/.

[52] Mustard and Co. v. R.H. Wright et al., N. China Herald & Sup. Ct. & Consular Gazette, L. Reps. 38 (July 2, 1897), https://chinaipr2.files.wordpress.com/2012/07/1897-us-patent-case.pdf.

[53] *Transplanting ASIs*, *supra* note 2, at 1550.

patent, the Chinese government advised that there was no law affording foreign buyers of Chinese patents the authority to address infringement in China.[54] Although much has changed in China's IP system since that time, issues related to transparency, national treatment, extraterritoriality, fairness, and politics have continued to raise concerns.

China's concern with foreign IP assertions, including SEP litigation, began most prominently with debates over royalty payments for patents that read on optical media equipment. Peking University Professors Zhang Ping and Ma Xiao described the environment facing China two decades ago in their highly influential treatise "Standardization and Intellectual Property Strategies" (标准化与知识产权战略) (2005):

> In recent years, hot issues have multiplied on the topic of standardization and intellectual property. Beginning in early 2002 with the DVD patent royalties, continuing with Cisco suing Huawei, the appearance of the EVD standard, controversies over digital TV standards, the promulgation of TDS-CDMA standards, the WAPI standard running aground, up until INTEL's suit against DongJin in Shenzhen, we have seen too many cases of IP disputes arising from technical standards.[55]

In 2003, the former State Administration for Industry and Commerce (SAIC) commissioned the report "The Competition Restricting Behavior of Multinational Companies in China and Counter Measures." The report notes that multinationals "squeeze" the Chinese market by refusing to license IP.[56] The study reflected the view that had been widely adopted in China that "patent holdup" was an increasing problem for Chinese manufacturers. It also expressed an urgent need for an Antimonopoly Law (AML) to address this anticompetitive behavior.[57] The study provided an example of an unidentified company, presumably Cisco, that refused to license its IP to permit interconnectivity with its equipment. The report was released about the time that Cisco successfully won a preliminary injunction against Huawei in Texas in a trade secret dispute in June 2003.[58] Cisco and Huawei would ultimately settle their dispute in August 2004, which occurred shortly after the release of the final report.[59] Since that time, various other reports have surfaced

[54] Mark Cohen, *A New Winner: China's First Patentee in the U.S. and One of China's First Patentees in China*, China IPR (Sept. 11, 2005), https://chinaipr.com/2015/09/11/a-new-winner-chinas-first-patentee-in-the-us-and-one-of-chinas-first-patentees-in-china/.

[55] Ma Xiao & Zhang Ping, Standardization and Intellectual Property Strategies (标准化与知识产权战略) at Preface (2d ed. 2005).

[56] H. Stephen Harris, Jr. et al., Anti-Monopoly Law and Practice in China 230 (2d ed. 2011) [hereinafter *AML and Practice*].

[57] Dai Yan, *Monopoly Law Badly Needed, Report Says*, China Daily (May 25, 2004).

[58] This survey was undertaken after Cisco had sued Huawei for trade secret theft in Cisco Systems, Inc. v. Huawei Technologies, Co., 266 F. Supp. 2d 551 (E.D. Tex. 2003).

[59] *Cisco, Huawei Settle Lawsuit*, Wall St. J. (July 29, 2004).

regarding legal and extralegal threats placed by China on foreign companies to improve China's position in parallel litigation on SEPs involving a Chinese party.[60]

In another development in 2004, Wuxi Multimedia and Orient Power brought an unsuccessful lawsuit in the United States against the DVD patent pool, arguing that the pricing strategies of that pool violated the Sherman Act.[61] The claimants argued that the optical media licensing program was a vehicle for price-fixing and monopolization of the DVD-player market, and that it included so-called nonessential patents in the package license, which the plaintiffs claimed amounted to illegal tying. Prof. Huang Yong noted at the time that future legislation on monopolies needs to stipulate clear criteria for activities deemed anticompetitive, and the ongoing DVD suit could be an example for legislators to study.[62] This case was one of the few efforts by Chinese companies to bring their disputes overseas to companies seeking to license technology to China. The AML itself was finally enacted in 2007, after over a decade of discussion and legislative proposals. It has since been revised in 2022.[63] AML cases have since been used to establish FRAND rates in addition to civil litigation.

Another effort to address overseas litigation was made when China amended its Foreign Trade Law in 2004. The law authorized the Ministry of Commerce (MofCOM) to "take such measures as prohibiting the import of the relevant goods from being produced or sold by the infringer within a certain period."[64] The effort, as with ASIs, was often cloaked in the language of countering an alleged growing threat of foreign patent assertions.[65] As previously discussed, this was a transplant that was unnecessary, as China already had procedures in place to address imports that infringed Chinese patents.

In August 2005, still another effort was undertaken to develop legislation to compel licensing of SEPs by foreigners through Chinese standardization policy. Ms. Dai Hong of the High Technology Department of the Standardization Administration of China (SAC) noted at a conference hosted by the US government that "if a patentee refused to … permit exploitation of a patent, the Standardization Administration of China will suspend the implementation of the

[60] *See, for example*, David L. Cohen, *A Short History of Vringo's Battle with ZTE*, KIDON IP (Aug. 2, 2018), https://kidonip.com/news/a-short-history-of-vringos-battle-with-zte/; Reuters Staff, *InterDigital Execs Fear Arrest, Won't Meet China Antitrust Agency*, REUTERS (Dec. 16, 2013), www.reuters.com/article/us-interdigital-china-idUSBRE9BF0CW20131216.

[61] Wuxi Multimedia, Ltd. v. Koninklijke Philips Elecs., N.V., No. 04cv1136DMS (BLM), U.S. Dist. LEXIS 9160 (S.D. Cal. Jan. 5, 2006).

[62] *IPR Disputes Highlight Absence of Law*, CHINA DAILY (Feb. 2, 2005), www.chinadaily.com.cn/english/doc/2005-02/02/content_414284.htm.

[63] *Anti-Monopoly Law*, NPC OBSERVER, https://npcobserver.com/legislation/anti-monopoly-law.

[64] *Foreign Trade Law of the PRC*, MINISTRY OF COMMERCE Art. 29 (July 5, 2004), http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045871.shtml.

[65] *Id*. at 34.

standard and will petition the Chinese patent office for a compulsory license."[66] Her comments were projected on a screen but were not otherwise recorded, leaving many in the audience to guess the intentions of SAC regarding compulsory licensing of SEPs to discourage SEP assertions, including the relationship with international standardization processes and China's emerging antitrust laws,[67] as well as the role of SAC in coordinating these procedures with other Chinese agencies.

Shortly after that time, China's State Intellectual Property Office (SIPO) also attempted to enter the fray. A draft of the proposed third amendment to China's patent law set forth an elaborate flowchart to compel licensing of patents in national standards based on an SAC recommendation for a compulsory license.[68] This process, however, was also ultimately never adopted by the National People's Congress in the amended patent law (2008), nor did it appear in more recent revisions of the patent law (2020).

In 2006, MofCOM also sought to convince WTO members that the incorporation of patents constituted a "technical barrier to trade" and should therefore be regulated by the WTO:

> China is of the view that, IPR issues in preparing and adopting international standards have become an obstacle for Members to adopt international standards and facilitate international trade. It is necessary for the WTO to consider negative impacts of this issue on multilateral trade and explore appropriate trade policies to resolve difficulties arising from this issue.[69]

At about this time, China's courts also began to explore their potential role in reducing royalty payments involved in standardization. The IP Division of the Supreme People's Court issued an "instruction letter" to the Liaoning High People's Court advising that "if … a patent has been included in a standard, the People's Court may deem that the patentee has licensed others to use its patents to implement standards. Such use does not constitute infringement under … the Patent Law." However, this practice was also not ultimately widely implemented.

During the period after the AML and before China's transplanting ASIs, Chinese courts occasionally undermined foreign cases through expedited decisions in their own jurisdiction. China's CPL mandates that first instance cases are required to be completed in six months, and second instance cases are required to be completed in

[66] AML *and Practice*, *supra* note 56, at 236. Notes were taken by the author of the presentation *Overview of China's Perspectives on IP in Standards* (Aug. 23, 2005).

[67] Marketa Trimble, *Patent Working Requirements: Historical and Comparative Perspectives*, 6 U.C. Irvine L. Rev. 483, 506 (2016).

[68] *Id.*

[69] Committee on Technical Barriers to Trade, Intellectual Property Rights Issues in Standardization, Communication from the People's Republic of China, WTO Doc. G/TBT/W/251 (May 25, 2005), Document 05-2126; see also addendum Background Paper for Chinese Submission to WTO on Intellectual Property Right Issues in Standardization (WTO Doc. G/TBT/W/251/Add.1 (Nov. 9, 2006), Document 06-5389).

three months (Arts. 152, 164). According to one database of 7,885 cases, first instance patent litigation in China was completed on average in 5.9 months.[70] By comparison, most US "rocket" dockets commit to trying a patent case within one year.[71] Appeals of patent cases at the Federal Circuit take considerably longer due to lengthy docketing and briefing periods and an estimated period of 180 days after oral argument before a final decision is rendered.[72] In many cases, a Chinese appellate court may render a final decision before discovery has been completed in US district courts or the USITC.

Pursuant to Article 277 of the CPL, litigation time limits are also suspended when a foreign party is involved. A Chinese court may leverage this flexibility to issue rulings at key junctures in a foreign court proceeding, effectively undermining foreign cases by rendering final judgments in advance of foreign decisions. Although adjustment of time frames may sometimes be necessary to accommodate foreign litigants, the unconstrained ability to adjust time frames raises concerns over national treatment under TRIPS. Such national treatment exceptions should be narrowly tailored to avoid undue discrimination.

A US district court enjoining a Chinese-backed defendant for infringement of an IP right or a USITC decision granting an exclusion order may be of little moment if the US plaintiff becomes a defendant in the parallel Chinese case, and especially if the US defendant in the Chinese case has sufficient market presence in China to be placed at risk of an adverse Chinese court or administrative decision.[73] A Chinese judgment could stop the US company's sales, manufacturing, and exports without incurring the attendant controversy of issuing an ASI.

Expedited civil procedures have long had the impact[74] of undercutting foreign parallel litigation, regardless of the availability of ASIs. A good example of the litigation race that China offers for SEP litigation is *Huawei v. Samsung*. The US and Chinese cases were filed at the same time by the same plaintiff (Huawei) on May 24–25, 2016. (Differences in dates were due to the international dateline.) On January 4, 2018, a judgment was issued by Shenzhen Intermediate People's

[70] CIELA, www.ciela.cn (last visited Apr. 11, 2021).

[71] Saurabh Vishnubhakat, *Reconceiving the Patent Rocket Docket: An Empirical Study of Infringement Litigation 1985–2010*, 11 J. Marshall Rev. Intell. Prop. L. 58 (2011).

[72] *The Life of an Appeal*, U.S. Ct. Appeals Fed. Cir., https://cafc.uscourts.gov/wp-content/uploads/RulesProceduresAndForms/FilingResources/Life_of_an_Appeal_Narrative_and_flowchart.pdf (last visited June 20, 2022); *Case Filings*, U.S. Ct. Appeals Fed. Cir., https://cafc.uscourts.gov/home/case-information/case-filings/ (last visited June 20, 2022).

[73] Certain Silicone Microphone Packages and Products Containing Same, Inv. No. 337-TA-888 (USITC) (for a discussion of this case, see Song Haining, *The Story of Battling Giants: Comments on Goertek Acoustics v. Knowles Electronics*, CCPIT Patent & Trademark Law Office (Oct. 2014), www.lexology.com/library/detail.aspx?g=82c14aac-7e05-40ed-985b-6dd884c7efd4); Ericsson Inc. v. Samsung Elecs. Co., No. 2:20-CV-00380-JRG, 2021 U.S. Dist. LEXIS 4392 (E.D. Tex. Jan. 11, 2021) (Chinese case: Samsung v. Ericsson).

[74] Mark Cohen, *China IP Time and the New York Minute*, China IPR (Nov. 21, 2012), https://chinaipr.com/2012/11/21/china-ip-time-and-the-new-york-minute/.

Court granting an injunction against Samsung.[75] Meanwhile, in the United States, on April 13, 2018, an ASI was granted in favor of Samsung, prohibiting Huawei from enforcing the injunctions issued by the Shenzhen court. Judge Orrick acknowledged the slowness of his court:

> The Chinese actions have proceeded quicker than this one. In particular, the Shenzhen court has held trials on two of Huawei's SEPs and two of Samsung's SEPs. The trials addressed both FRAND issues and technical issues specific to each SEP. During these trials, the parties had full opportunities to present their evidence and argument [references omitted] . . .
>
> We are scheduled to proceed to trial in December of this year.[76]

The ASI was granted by the US court after a decision had already been reached in the underlying dispute and at best would be limited to enforcement of the order. The case was settled while it was on appeal to the Guangdong High Court on or about April 14, 2019,[77] well before the start of the US trial, which was rescheduled to September 2019. With its limited duration, Judge Zhu noted Judge Orrick's ASI's "influence on comity could be ignored."[78]

Chinese judicial practices of expediting domestic litigation to undermine foreign parallel cases are also found outside of the SEP context.[79] This is also not surprising in light of the important role that the courts play in breaking through patent "monopolies" and "technological stiff necks" (bottlenecks).[80] These bottlenecks are often described in the Chinese media as patents or patent families, whether or not incorporated into standards, that are under the control of foreign entities. This type of language has also been more widely used to justify other actions that

[75] *Case of Huawei Sues Samsung et al. for Infringement of Invention Patents* (华为公司诉三星公司等侵害发明专利权纠纷案 (2016) 粤 03民初816, 840), China Ct. Trial Online (Jan. 11, 2018), http://tingshen.court.gov.cn/live/1759564.

[76] Huawei Techs. Co. v. Samsung Elecs. Co., No. 3:16-cv-02787-WHO, 2018 U.S. Dist. LEXIS 63052 (N.D. Cal. Apr. 13, 2018) (Order Granting Samsung's Motion for Antisuit Injunction, Re: Dkt. Nos. 234, 235, 240, 244, 277, 278).

[77] Guangdong High Court, *Huawei and Samsung Patent Infringement Dispute Cases Have Been Settled through Mediation* (广东高院：华为与三星专利侵权纠纷系列案调解结案), IPR Law (May 18, 2019), www.iprlaw.cn/index/news/show/id/7072.html; Florian Mueller, *Breaking News: Huawei and Samsung Settle*, FOSS Patents (Feb. 26, 2019), http://www.fosspatents.com/2019/02/breaking-news-huawei-and-samsung-settle.html.

[78] *Zhu Jianjun Article*, *supra* note 17.

[79] Mark A. Cohen, *Semiconductor Patent Litigation: Part 2 Nationalism, Transparency and Rule of Law*, China IPR (July 4, 2018), https://chinaipr.com/2018/07/04/semiconductor-patent-litigation-part-2-nationalism-transparency-and-rule-of-law/ (discussing timing of Veeco v. Amec parallel patent litigation).

[80] *Id.*

constrain China's techno-nationalist ambitions, such as high prices for patents[81] and trade secret theft.[82]

As Chinese judges are not part of an independent branch of the government, and Chinese courts are ultimately guided by Party policy, it is not surprising that Chinese judges also openly encourage utilization of Chinese judicial mechanisms to thwart Western technological assertions. Often this may occur through elevation of particular cases to a leading case for study, including awarding it a status as a "top 10," "innovative" case, or similar language. Sometimes, the court may directly exhort rightsholders to learn from the case as well. The Presiding Judge of the Guangdong High Court who heard the appeal in *Huawei v. InterDigital Corporation* (IDC) (2013), an AML case involving SEPs, advised Chinese companies that they should utilize the AML to "break through technical barriers in the development of space for their own gain."[83] A recent report from the Hubei Provincial High People's Court discussed these "bottle-necked, key core technologies, emerging industries" with specific reference to two SEP cases adjudicated in the provincial capital of Wuhan involving American interests. In both cases, the courts issued two ASIs to halt litigation in the United States and elsewhere overseas:

> Courts across the province heard key intellectual property cases, etc., involving bottleneck critical core technologies and newly emerging industries, in a fair and efficient manner in accordance with the law. Such as … Samsung Company v. Ericsson Company's SEP royalty case …
>
> In 2020, the Wuhan Intellectual Property Tribunal tried the ASI case filed by Xiaomi against the American IDC, ruling that IDC is prohibited from filing similar parallel lawsuits abroad, and thereby effectively safeguarded my country's high-tech enterprises' participation in intellectual property rights in transnational competition, and highlighted the wisdom and authority of China's judicial protection of intellectual property rights.[84]

These policies of thwarting foreign adjudications by protecting domestic entities were significantly elevated in January 2021, when Communist Party General Secretary Xi Jinping published an article in the leading Communist Party journal

[81] Hao Yuan, *Antitrust Aspects of "Unfairly High Patent Pricing" for Licensing Transactions in China*, China IPR (Mar. 29, 2020), https://chinaipr.com/2020/03/29/antitrust-aspects-of-unfairly-high-patent-pricing-for-licensing-transactions-in-china/.

[82] See United States v. Xiaorong You, No. 2:19-CR-14, 2022 U.S. Dist. LEXIS 80032, at *3 (E.D. Tenn. May 3, 2022) ("Defendant intended to 'break[] through both green and technical international trade barriers' to 'earn a share of the global market,' as well as 'break the international monopoly [on can coatings].'").

[83] Xu Qibin, *What Is the Meaning of Huawei's Victory*, S.E.U. (Oct. 30, 2013), www.seu.edu.cn/2013/1101/c124a52344/page.htm.

[84] Ke Xuewen and Lu Ming (eds.), *By the Establishment of Intellectual Property Courts and Quick Trial of Technical Cases Involving "Bottlenecks", the Hubei Courts Have Organized an Intellectual Property Network*, Hubei Daily (Oct. 27, 2021), https://hubeigy.chinacourt.gov.cn/article/detail/2021/10/id/6333102.shtml.

Qiushi ("Seeking Truth"). Secretary Xi called on China to "rigorously protect IP [to] safeguard indigenous Chinese R&D in core technologies in key fields."[85] Xi also renewed the call for China to form an efficient "early warning system for international intellectual property risks" and "increase assistance for overseas intellectual property rights protection of Chinese enterprises." Development of case law for lower courts to handle these types of cases was also especially critical, as Xi Jinping himself has propounded, "One case is better than a dozen documents."[86]

Whether in their policymaking or adjudication functions, Chinese courts have tended for some time to focus disproportionately on foreign-related IP cases due to their political sensitivity and their potential to disrupt domestic industrial plans, including those regarding technology, employment, and manufacturing.[87] These types of cases are identified by the court's own rules as requiring "special treatment" in their adjudication, including by formation of collegial panels, involvement of the court's leadership, or referral to Adjudication Committees for ultimate decision-making.[88] The Supreme People's Court (SPC) has also specifically elevated consideration of ASIs into an important research topic for the courts in order to protect China's "judicial sovereignty."[89] The endgame, to quote the Hubei Provincial High Court, is to protect China's role in "transnational competition."

Despite much high-level rhetoric, it is difficult at this time to ascertain whether China's changing policies toward overseas SEP assertions are durable long-term solutions to a perceived problem or short-term politicized responses and experiments. Efforts to date may be viewed as experimental in nature insofar as they are not fully codified into law. However, even codified transplants, such as China's short-term experiment with "Section 337" litigation in China's Foreign Trade Law, as previously discussed, may exist in name only. Economic changes may also drive changes in policy. An example of this shifting rhetoric is the change from China's official position that patents constitute a technical barrier to trade to one where China is seeking a larger share of the patent royalties, based on China's significant

[85] Xi Jinping, *Comprehensively Strengthen the Protection of Intellectual Property Rights, Stimulate Innovation and Promote the Construction of a New Development Pattern*, Qiushi (Jan. 31, 2021), http://en.qstheory.cn/2021-04/30/c_617533.htm.

[86] Ding Yuejia (ed.), *General Security Xi Jinping Urges "One Case Is Greater than a Dozen Policy Documents* (习近平总书记强调，"一个案例胜过一打文件"), Legal Daily (June 25, 2021).

[87] Mark A. Cohen, Presentation at Berkeley Law, When IP Systems Collide (Oct. 2015), www.law.berkeley.edu/wp-content/uploads/2015/07/Mark-Cohen-When-IP-Systems-Collide.pdf.

[88] *Guiding Opinions on the Oversight and Management of "Four Types of Cases"* (关于进一步完善"四类案件"监督管理工作机制的指导意见), China Law Translate, Art. 3 (Nov. 11, 2021), www.chinalawtranslate.com/en/4-types-of-cases/.

[89] Susan Finder, *Supreme People's Court's New Policy Document on Opening to the Outside World*, Sup. People's Ct. Monitor (Oct. 9, 2020), https://supremepeoplescourtmonitor.com/2020/10/09/supreme-peoples-courts-new-policy-document-on-opening-to-the-outside-world/.

holdings of SEPs.[90] China's ability to experiment with new laws and its continuous adaptation to changing economic and political circumstances in IP often makes it difficult to determine whether changes in Chinese legal practices are durable. IP especially has also been an area of experimentation for China's legal system in a wide range of areas, including in such areas as specialized IP courts, preliminary injunctions, publication of cases, and precedent.[91]

While ASIs are a nominal "transplant" from common law countries, it is only by also considering the differences between Chinese and other systems that one can begin to determine whether China's ASIs are also a type of "false friend" with foreign ASI practice. Some of the distinguishing features of China's ASI practice from common law jurisdictions include:

(a) Chinese ASIs are part of long-term efforts by the Chinese government to increase the value of Chinese technology and decrease the value of foreign technology "monopolies."
(b) Unlike common law countries, Chinese ASIs are exclusively extraterritorial in nature.
(c) Chinese ASIs are part of a national effort to increase the role of Chinese courts in establishing global judicial norms.
(d) Chinese ASIs have also precipitated other changes in the adjudication of SEPs to accommodate this more aggressive posture, including a greater willingness to set global FRAND rates, the extension of jurisdiction to foreigners based on situs of negotiations, recurring daily penalties for violations of ASIs, and the creation of a new civil cause of action for FRAND rate setting.
(e) China's ASI practices have been promoted and endorsed by the highest levels of China's political and judicial leadership.
(f) China's ASIs may be experimental in nature.

Despite these differences, the extent to which these policy differences impact how ASIs are administered in China is difficult to determine, since China does not publish all its final decisions and does not usually publish interim measures. China's emerging power in standards and its own domestic regulatory capacity, however, does raise concerns that it may yet become a significant "rules breaker" or even "rules faker," where it adjusts adherence to the international order to better advance

[90] National Security Commission on Artificial Intelligence, Final Report National Security Commission on Artificial Intelligence 471 (2021). Note that the author of this article contributed to this report.

[91] Mark Cohen, *Crossing the River by Feeling the IP Stones: How China's Civil Procedure System Benefits from Reforms Made in IP Civil Litigation*, China IPR (Nov. 8, 2012), https://chinaipr.com/2012/11/08/crossing-the-river-by-feeling-the-ip-stones-how-chinas-civil-procedure-system-benefits-from-reforms-made-in-ip-civil-litigation/.

its own short- or long-term interests.[92] China's rejection of complete transparency in ASIs may therefore be seen as a strategic tool to maintain maximum regulatory flexibility in this evolving area. This decision is not cost-free, as it may also minimize the predictability afforded to the affected public by transparent judicial decisions.

III. TRANSPARENCY: HOW CHINA'S ASI REGIME FAILS

China's use of Article 100 of the CPL ("Behavior Preservation") has raised two major transparency concerns, one of which is long-standing: (1) the public availability of any final judicial decisions, as well as any behavior preservation orders that are final with respect to the issue at hand; and (2) the extent to which courts may act in an ex parte manner without disclosure to affected litigant(s) or other courts that may have an interest in the decision. Both aspects of transparency are governed by the international norms set by the TRIPS Agreement, which provides a useful, internationally recognized benchmark to judge regulatory compliance.

A. *The Public Availability of Judicial Decisions*

Article 63 of the TRIPS Agreement is entitled "Transparency." It falls within Part V of the TRIPS Agreement regarding "Dispute Prevention and Settlement." It is clear from these descriptions that the drafters of Article 63 intended to promote transparency in large part to prevent disputes and encourage their settlement. Article 63 provides:

> 1. Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published . . . in such a manner as to enable governments and right holders to become acquainted with them . . ..
> 3. Each Member shall be prepared to supply, in response to a written request from another Member, information of the sort referred to in paragraph 1. A Member, having reason to believe that a specific judicial decision or administrative ruling or bilateral agreement in the area of intellectual property rights affects its rights under this Agreement, may also request in writing to be given access to or be informed in sufficient detail of such specific judicial decisions or administrative rulings or bilateral agreements . . ..

During the summer of 2021, China received an Article 63 request from the European Union to disclose three SEP cases: *Xiaomi v. InterDigital* (Wuhan Int. Ct.), *OPPO v. Sharp* (Shenzhen Int. Ct.), and *Samsung v. Ericsson* (Wuhan Int.

[92] Sandra Lavenex, Omar Serrano, & Tim Büthe, *Power Transitions and the Rise of the Regulatory State: Global Markets in Flux*, 15 Reguls. & Governance 445 (2021).

https://doi.org/10.1017/9781009274289.017 Published online by Cambridge University Press

Ct.). The request asked for further information to enable rightsholders to "acquaint themselves with those decisions that are identified as typical, example cases."[93] The European Union filed the request independently of, and prior to, the initiation of formal consultations that are a prerequisite to the formal WTO dispute process.[94] China briefly responded to the Article 63 request that these cases "mentioned in the EU communication are cases for reference and have no *legal effect* of general application" (para. 4) [emphasis supplied]. This response did not differ significantly from an earlier Article 63 request that the United States filed in 2005, where China responded that it was not obligated to provide cases, as China "does not follow the common law system."[95] The United States also subsequently filed a dispute after it received this response. The EU request for consultations identified the same SEP cases, which China had failed to produce plus a fourth case, *ZTE v. Conversant* (Shenzhen Int. Ct). In addition, the European Union claimed substantive violations of WTO rules by reason of China's ASIs prohibiting access to non-Chinese courts, creating legitimate barriers to trade, and imposing excessively high fines for the owners. The EU request has since been joined by the United States, Canada, and Japan.

The lack of "legal effect" identified in the Chinese response in its response to the EU Article 63 request introduces surplus language not otherwise found anywhere in the TRIPS Agreement. The precise treaty language in Article 63, without any qualifiers, is "general application."

The issue of China's obligation to publish precedential or quasi-precedential cases also appeared prior to the request during the Trade Policy Review of China at the WTO between the European Union (October 20 and 22, 2021).

> EU Question No 80: Could China therefore clarify what is the status of these adjudication guidelines for deciding on an anti-suit injunction and daily penalties in light of the above reply?
>
> Reply: The "major cases," "typical cases," "typical technical cases" and the key points of decisions selected by the Chinese courts are reference cases with no universal application. These cases and the main points of decisions summarized on the basis of which reflect the judicial philosophy, trial ideas and decision methods of the Supreme People's Court in handling difficult, complex and new types of IPR cases. *Their role is to summarize trial experience, strengthen the*

[93] Council for Trade-Related Aspects of Intellectual Property Rights, Request for Information Pursuant to Article 63.3 of the TRIPS Agreement, Communication from the European Union to China, WTO Doc. IP/C/W/682 (June 7, 2021).

[94] European Union Permanent Mission to the WTO, *Request for Consultations by the European Union* (Feb. 18, 2022), https://trade.ec.europa.eu/doclib/docs/2022/february/tradoc_160051.pdf.

[95] Council for Trade-Related Aspects of Intellectual Property Rights, Communication from China, Response to a Request for Information Pursuant to Article 63.3 of the TRIPS Agreement, WTO Doc. IP/C/W/465 (Jan. 23, 2006) (available with other background materials from the author).

promotion of the rule of law, and provide reference for judicial practice and legal teaching and research.[96]

By its terms, Article 63 also does not explicitly refer to, nor require, that the cases are precedential. Nor does it limit its application solely to cases arising in a common law system. In this respect, the *travaux préparatoires* (negotiating history) of the TRIPS Agreement is of legal significance under the Vienna Convention on Law of Treaties (Art. 32). The negotiating history indicates that there was a specific rejection of a Swiss proposal on October 1, 1990, to substitute "precedential value," in favor of "general application." Since the conclusion of the TRIPS Agreement, the language around what constitutes cases of "general application" has undergone little further clarification.[97]

Application of Article 63 of TRIPS to Chinese SEP jurisprudence will ultimately entail careful consideration by a WTO panel of China's evolving practice in using cases to guide judges and rightsholders, including their specific application to China's recent ASI cases. This judicial practice is not unique to SEPs and has been widely used in IP. For example, a number of Chinese local courts recognized the significance of their "big" trade secret cases shortly after China amended its trade secret law.[98] Cases that have also sought to address the risks presented by parallel IP litigation have also had this recognition.[99] These cases generally fall within the category of "judicial normative documents." This category of documents includes "trial practice documents, guiding cases, and reference cases." According to Professor Susan Finder, "judicial normative documents are often cited by courts as a supplementary legal basis for a judgment and judges will recognize their validity and implement them in their judicial decision making."[100]

There is ample evidence that Chinese judicial institutions are utilizing precedents for various kinds of guidance, whether or not they are being cited in cases and despite a commitment in China to civil law norms.[101] Dr. Zhao Hong, a former member of the WTO appellate body and MofCOM official, has similarly noted that "though the legal theories or concepts of the two major legal families [civil and

[96] Trade Policy Review Body, *Trade Policy Review China, Minutes of Meeting*, WTO Doc. WT/TPR/M/415/Add.1 (Dec. 22, 2021), at 428 (emphasis added).

[97] Marketa Trimble, *Unjustly Vilified TRIPS-Plus?: Intellectual Property Law in Free Trade Agreements*, 71 Am. U.L. Rev. 1449 (2022).

[98] Jerry Xia & Wang Yulu, *Analysis of Guiding Trade Secret Cases in China Published during the World IP Day in 2020*, *in* Mark Cohen, *An Update on Data Driven Reports on China's IP Enforcement Environment*, China IPR (July 13, 2020), https://chinaipr.com/2020/07/13/an-update-on-data-driven-reports-on-chinas-ip-enforcement-environment/.

[99] Mark Cohen, *The SPC's "Top Two" Dueling IPR Cases*, China IPR (May 4, 2014), https://chinaipr.com/2014/05/04/the-spcs-top-two-dueling-ipr-cases/.

[100] Susan Finder, *China's Translucent Judicial Transparency*, *in* Transparency Challenges Facing China 141, 164 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3344466.

[101] Yuan Ye, *How "Case Law" Works in the Chinese Courts*, Sup. People's Ct. Monitor (May 29, 2022), https://supremepeoplescourtmonitor.com/2022/05/29/how-case-law-works-in-the-chinese-courts/.

common law] differ significantly, their practices actually have achieved similar effects in maintaining the consistency of decisions by judiciary bodies."[102] Widespread utilization of case law databases may also constitute a form of case "general application" by lawyers, litigants, policymakers, academics, and judges that use these services. As of May 22, 2022, the official Chinese judicial database alone had 87,284,333,307 hits since it first launched in 2013, with a library of over 132 million documents.[103] There are also private IP case law databases, which have additionally attracted significant usage for their search functions as well as the value-added services that they may provide.

Despite the great interest in cases and case law, SEP adjudication is not highly transparent. As a starting point, only about 46–54% of final patent decisions are published.[104] Only about 18% of SEP cases from 2010 to 2019 in the Chinese courts have been reported in a published decision of some kind.[105] Approximately 75% of these cases involved foreigners, and 96% of the cases were in the ICT sector. The data was sourced by contacting Chinese courts individually. It is especially difficult to estimate the percentage of interim behavior preservation measures that are published, as Chinese law does not require publication of nonfinal decisions. This general lack of transparency mandated that the opening paragraph to this article include the disclaimer that the discussion herein is based on "published data." Non-publication or unofficial publication of cases can occur for many reasons and limits the ability to draw authoritative conclusions based on published data.[106]

Since the early spate of ASI cases involving SEPs in China, there have also been several newer cases involving foreign SEP assertions, none of which have been officially published as of this writing (May 2022). The failures to publish cases may suggest a waning enthusiasm for ASIs, as they were previously granted. Many of these cases involve parallel litigation in other countries and may therefore be ripe for an ASI. These cases include *Coolpad v. Pantech*;[107] *Oppo v. IDC*;[108] *ZTE v. Tinno*

[102] Dr. Hong Zhao, Appellate Body Member, Farewell Speech (Nov. 30, 2020), www.wto.org/english/tratop_e/dispu_e/farwellspeechhzhao_e.htm.

[103] Supreme People's Court, China Judgments Online, http://wenshu.court.gov.cn (last visited June 20, 2022).

[104] Chris Bailey, Douglas Clark, Mark Cohen, & Aria Tian, *Chinese Patent Litigation Data: What It Tells Us and What It Doesn't*, Intell. Asset Mgmt. (Nov. 17, 2021), https://rouse.com/insights/news/2021/chinese-patent-litigation-data-what-it-tells-us-and-what-it-doesn-t.

[105] Lexfield, *Statistics of Chinese SEP Cases 2010–2019*, https://chinaipr2.files.wordpress.com/2020/07/statistics-of-chinese-sep-cases-in-2011-2019-lexfield9892.pdf (last visited June 20, 2022).

[106] Echo Xie, *Millions of Court Rulings Removed from Official Chinese Database*, S. China Morning Post (June 26, 2021), www.scmp.com/news/china/politics/article/3138830/millions-court-rulings-removed-official-chinese-database.

[107] Shenzhen Int. Ct., Mar. 2022. IPR Daily-Rene (ed.), *Patent War Resumes, Coolpad Sues South Korea NPE Pantech for Royalty Rates*, IPR Daily (Mar. 22, 2022), www.iprdaily.com/article/index/16197.html.

[108] Guangzhou IP Ct., Feb. 2022. Bing Zhao, *Oppo Suit in Guangzhou Sets Up Next Chance for Global FRAND Ruling in China*, Intell. Asset Mgmt. (Mar 9, 2022), www.iam-media.com/article/oppo-suit-in-guangzhou-sets-next-chance-global-frand-ruling-in-china.

Mobile;[109] and *Oppo v. Nokia*.[110] The delayed availability of the *Lenovo v. Nokia* decision is another indication of possible substantive changes in China's ASI practice as well as the continuing challenge of limited judicial transparency. A further indication of controversy around China's practice of ASIs is the lack of information on any ASI cases in Wuhan, which had been an initial center for ASI litigation. Perhaps the EU case will bring additional pressure on both transparency and ASI reform. One Chinese scholar who favors reform of China's ASI regime has pointed to the EU WTO case itself as an example of the evidence that the system and its implementation need to be "further perfected."[111]

While the lack of full transparency in judicial decisions in China is problematic with respect to these five SEP decisions, it is arguably even more problematic with respect to the SEP decisions to date or the several hundred thousand IP cases decided each year. It also remains impossible to address broader concerns, such as national treatment, without recourse to a complete judicial database where foreign and domestic litigants can be fully compared. Nonetheless, the relatively few ASI decisions and their legal significance underscore that the EU request has been limited in scope and should also be relatively easy to address for China.

B. *Extended and Opaque Ex Parte Decision-Making*

Another transparency concern involves the disclosure of information to adversely affected parties in the issuance of an ASI. Concerns about a lack of transparency in ex parte ASIs have also been voiced by the Office of the United States Trade Representative in its annual Section 301 Report for 2021:

> Right holders have also expressed strong concerns about the emerging practice in Chinese courts of issuing anti-suit injunctions in standards essential patents (SEP) disputes, reportedly without notice or opportunity to participate in the injunction proceedings for all parties. Since the first issuance of such an anti-suit injunction in August 2020, Chinese courts have swiftly issued additional anti-suit injunctions in other SEP cases. Several of these anti-suit injunctions are not limited to enjoining enforcement of an order from a specific foreign proceeding but broadly prohibit right holders from asserting their patents anywhere else in the world.[112]

Article 50 of the TRIPS Agreement sets up a skeletal standard for notice to affected parties of a provisional measure:

[109] Florian Mueller, *ZTE Reportedly Goes on the Offense, Sues Unnamed Chinese Smartphone Maker over 4G Standard-Essential Patents: Possibly Tinno or Transsion?*, FOSS PATENTS (Sept. 24, 2021), www.fosspatents.com/2021/09/zte-reportedly-goes-on-offense-sues.html.

[110] Chongqing No. 1 Int. Ct., July 2021. Gregers Maller, *Oppo Files 5G Patent Infringement Suits against Nokia in China and Europe*, ScandAsia (Sept. 9, 2021), https://scandasia.com/oppo-files-5g-patent-infringement-suits-against-nokia-in-china-and-europe/.

[111] *Zhang Weiping Article*, *supra* note 3.

[112] United States Trade Representative, 2021 SPECIAL 301 REPORT 47–48 (2022).

> 50.2 The judicial authorities shall have the authority to adopt provision measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the rightsholder.
>
> 50.4 Where provisional measures have been adopted *inaudita altera parte*, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed.

Application of Articles 50.2 and 50.4 to *Samsung v. Ericsson*, as one example, suggests that China may not be affording adequate opportunities to be heard in ASI litigation. In that case, Samsung sued on December 7, 2020, in Wuhan (qisu/起诉). Ericsson filed its case in Texas on December 11, 2020. Samsung filed its request for an ASI on December 14, 2020. The ASI was issued on December 25, 2020. There is no record of service or notice having been delivered to Ericsson for the initiation of the case, or on the motion for an ASI, although a minimum of 11 days had passed since Samsung requested its ASI. Article 100 of the CPL would otherwise require the court to decide within 48 hours if there is an emergency. By these domestic and international standards, the 11-day delay undercuts the argument that the provisional measure was necessary due to the possibility that "any delay" in granting the ASI would cause irreparable harm. This period was also more than adequate for a court to deny a motion to grant an ASI *inaudita altera parte*. On December 17, 2020, Samsung notified Ericsson of the Chinese action but did not provide Ericsson with any of the filings from the Chinese action. The Chinese civil complaint was not provided to Ericsson until December 22, 2020, or three days before the ASI motion was granted.[113]

These are not, however, the only periods of opacity in a Chinese proceeding involving an ASI. A party initiates a case by "suing" (qisu/起诉). When a party "sues," it should file a complaint that meets the criteria set forth in Article 122 et seq. of the CPL, including setting forth the cause of action (Art. 124). The court has seven days to "accept and review" (shouli/受理) the complaint. After acceptance and review, the case will be "established" (li'an/立案). This process is generally not open to the public but could provide a starting point for notice to be delivered to an affected party. The Case Acceptance Division of the courts at one time also had primary responsibility for issuing preliminary injunctions in IP matters, the predecessor remedy to Article 100 (now 103) of the CPL.[114] It is quite possible that

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

[114] Liu Nanping & Michelle Liu, *Justice without Judges: The Case Filing Division in the People's Republic of China*, 17 U.C. Davis J. Int'l L. & Pol'y 283 (2011); see also *Zhang Weiping Article*, *supra* note 3.

Samsung had given notice to the Wuhan Court of its intent to seek an ASI when it originally filed its complaint with the Wuhan Court, one week before case acceptance. If so, this may further militate against a finding that delay would cause "irreparable harm," given a delay that was 18 days from initial case filing, or 11 days from case acceptance.

Judge Gilstrap noted in the US counterpart to the Chinese case, *Ericsson v. Samsung*, that there is no Chinese "PACER"-type system making nonfinal judicial order publicly available (PACER, an abbreviation for Public Access to Court Electronic Records, is an electronic public access service for US federal court documents). Ericsson moved the court to require Samsung's counsel to "promptly send documents filed in the Chinese Action to Ericsson." Unfortunately, Judge Gilstrap denied this request to avoid the court "insert[ing] itself into matters of Chinese law or civil procedure" and because "it is not for this Court to require Samsung to operate in a foreign jurisdiction as though it were here."[115] As the TRIPS Agreement is not self-executing, Judge Gilstrap was not obligated to consider whether the lack of notice provided by China comported with China's TRIPS obligations in his comity analysis. Nonetheless, reference to TRIPS might have been helpful, as it could have helped the court avoid requiring imposition of a US-centric standard that Judge Gilstrap thought would otherwise be inappropriate. The perspective that China's procedures for ASIs should be understood in purely Chinese terms was also shared by former Supreme People's Court IP Tribunal Chief Judge Kong Xiangjun, who submitted an expert declaration in *Ericsson v. Samsung* regarding Samsung's lack of notice of its filing on December 14, 2020, that resulted in the court issuing its Christmas Day ASI: "Samsung's notice in Wuhan lawsuit is consistent with the common practice under civil proceedings in China, where Samsung may choose to notify or not, or may choose to notify the other party of the lawsuit at any point in time. It is in line with the common practice of Chinese litigation."[116]

Whether or not Chinese practice is in accordance with Chinese law, courts in the United States and in third countries have raised serious objections to China's lack of transparency in its ex parte decisions, including the failure to advise counsel of pending decisions. The Delhi High Court in *Interdigital Technology v. Xiaomi Corp & Ors.* (May 3, 2021), after reviewing six separate times when counsel for Xiaomi had appeared before the court without revealing that it was undertaking steps to take away the court's jurisdiction, stated that "the manner in which the defendants have acted borders on fraud, not only with the plaintiffs, but also towards this Court."[117] The Court also imposed a fine in the form of an indemnity against any penalty

[115] Ericsson, *supra* note 113.
[116] Declaration of Professor Kong Xiangjun, No. 2:20-CV-00380-JRG, ECF 26-12 (E.D. Tex. Jan. 1, 2021).
[117] Interdigital Tech. Corp. v. Xiaomi Corp., High Court of Delhi, I.A. 8772/2020 in CS (COMM) 295/2020 (May 3, 2021).

imposed by the Wuhan Court on IDC, the plaintiff in India.[118] Former Federal Circuit Chief Judge Paul Michel noted in his amicus filing in *Ericsson v. Samsung* that Samsung's behavior "raise[d] significant concerns about … sufficient notice and due process."[119]

Foreign counsel may also bear some responsibility for this lack of transparency and unwillingness to inform foreign courts of pending ASIs. In another US case, Judge Sleet in Delaware, on hearing that he had been misled by ZTE into granting an ex parte ASI against Vringo's global patent campaign by not being informed of an ongoing SEP case in the Southern District of New York in violation of the Federal Rules of Civil Procedure, Rule 65, noted that Vringo could have been within its rights to "lay [the judge] low" for granting that motion based on these misrepresentations of counsel. Judge Sleet promptly retracted his prior ASI.[120]

"Submarine" ASIs of the type described previously raise difficult questions regarding how to accommodate two jurisdictions' differing procedures, cultures, and professional behavior.[121] Courts may not feel obligated to disclose key nonfinal decisions, service of process may not have been officially effected for initiation of the case, counsel may claim that there are violations of fundamental notions of due process or at least TRIPS obligations, and affected countries may complain of a lack of transparency. Judges may also raise concerns about the ethical responsibilities of counsel to inform bench and bar of developments affecting a court's jurisdiction. Hearings and deadlines may be timed to conflict with national holidays. The issues of civility and professional responsibility raised by such decisions have thus far been handled inconsistently by courts throughout the world and are worthy of further research.

IV. CONCLUSION

China's ASI regime is distinct from those of common law systems in many aspects. The most important distinctions may be its exclusively extraterritorial orientation and its high degree of politicization and experimentation. China's lack of transparency also acts to shield China from an understanding by outsiders of its practices and maximizes China's regulatory flexibility. Whether or not the legal regime is a

[118] *Id.* ¶ 119.

[119] Brief of Amicus Curiae the Honorable Paul R. Michel (Ret) in Support of Plaintiff's Motion, Ericsson Inc. v. Samsung Elecs. Co., No. 2:20-CV-00380-JRG (E.D. Tex. Jan. 5, 2021), https://chinaipr2.files.wordpress.com/2021/01/2021.01.05-29-ntc-by-cj-paul-r-michel-ret-of-amicus-curiae-br-iso-ericsson-emergency-application-for-anti-main-document.pdf.

[120] Official Transcript of Teleconference Held on Feb. 10, 2015, ZTE Corp. v. Vringo Inc., No. 1:15-cv-00132, ECF 29 (D. Del. Feb. 11, 2015).

[121] *See, for example*, Richard Vary, *The Wuhan Submarine Surfaces at Christmas, to Be Met by a Texan TRO*, Bird & Bird Pat. Hub (Dec. 29, 2020), www.twobirds.com/en/patenthub/shared/insights/2020/global/the-wuhan-submarine-surfaces-at-christmas-to-be-met-by-a-texan-tro.

transplant,[122] it is not exempt from justified criticism, particularly if the transplant precipitates such undesirable consequences as not providing adequate respect for the jurisdictional priorities of other courts, limiting access by the public to key decisions, inducing attorneys to deceive their colleagues or a tribunal, or potentially depriving parties of adequate due process. These distinctions may suggest that other terminology, such as a "false friend," may be more appropriate in describing how China's ASIs function in practice.

Due to the continuing lack of transparency, it may be several years before we fully understand the impact of this particular transplant on China's legal system as well as the impact on the global ecosystem for licensing SEPs.

[122] *Transplanting ASIs*, *supra* note 2, at 1598.