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Antisuit injunctions in SEP disputes and the recent EU's WTO/TRIPS case against China

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Abstract

The existence of standard essential patents (SEPs)—and the associated litigation—has potentially disruptive consequences for the manufacture, marketing and distribution of complex products that incorporate many patented standards, for example, information and communication technology (ICT) products such as smartphones that incorporate a camera, video, web browser, wireless communications, text messaging, and so on, as well as an increasing number of ‘connected’ Internet of Things products such as wearable devices and ‘smart home’ devices. Indeed, SEP owners may use the patent enforcement system to prevent implementers of these technologies from bringing to market competing products that use the same standards. As is known, this raises concerns about competition in the market and the need to maintain interoperability to ensure the development of the ICT industry. One of the legal tools which can be used by implementers to (try to) neutralise SEP holders' anti-competitive behaviours is the ‘antisuit injunction’ (ASI). ASIs are not uncommon in common law jurisdictions while they are foreign to civil law countries within the European Union (EU). ASIs are particularly useful to SEP implementers when patent holders disrespect their commitment to license their patents on a FRAND basis. For example, a judge who is in

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the process of assessing whether the SEP owner complies with FRAND terms may at the same time grant an ASI to stop the patentee taking patent infringement actions in other jurisdictions until the FRAND litigation has been concluded. In February 2022, the EU filed a complaint at the World Trade Organization (WTO), arguing that China's use of ASIs prevents EU-based companies from properly protecting their SEPs. Indeed, ASIs have recently been granted in several Chinese disputes, including in *Huawei v Conversant* and *Xiaomi v. InterDigital*. More specifically, China's Supreme People's Court held that Chinese courts can use ASIs to prevent SEP owners from filing disputes in any foreign courts to enforce their patents; and that anyone who does not comply with the injunction should be fined €130,000 per day. In the WTO case the EU notes that such a case law jeopardises innovation and growth in Europe, 'effectively depriving European technology companies of the possibility to exercise and enforce the rights that give them a technological edge'. From a legal perspective, according to the EU, China's conduct is in violation of various Trade-Related Aspects of Intellectual Property Rights (TRIPS) provisions, including Article 28 which grants exclusive rights to patent owners. The paper focuses on this EU–China WTO/TRIPS dispute and more generally, on the relevance of ASIs within SEP cases.

KEYWORDS

FRAND, patents, standard essential patents antisuit injunction, TRIPS, WTO

1 | INTRODUCTION

The existence of standard essential patents (SEPs)—and the associated litigation—has potentially disruptive consequences for the manufacture, marketing and distribution of complex products that incorporate many patented standards, for example, information and communication technology (ICT) products such as smartphones that incorporate a camera, video, web browser, wireless communications, text messaging, and so on, as well as an increasing number of 'connected' products such as wearable devices and 'smart home' devices. Indeed, SEP owners may use the patent enforcement system to prevent implementers of these technologies from bringing to market competing products that use the same standards. As is known, this raises concerns about competition in the market and the need to maintain interoperability to ensure the development of the Internet of Things industry. One of the

legal tools which can be used by implementers to (try to) neutralise SEP holders' anticompetitive behaviours is the 'antisuit injunction' (ASI).

In general, the past decade has witnessed a sharp increase in litigation over SEPs around the world. Some national courts have ruled they can set global FRAND rates, the Unwired Planet case in post-Brexit UK being the most notable example.¹ This approach is controversial and has sparked debates over the ability of national judges to impose their determination on FRAND terms over foreign courts. ASIs within SEP litigations are also among the measures which have raised discussions. Such ASIs are contentious because—many commentators note—they touch on sensitive issues of national judicial sovereignty. Some SEP-related ASIs have also been followed by anti-anti-suit injunctions (AASIs) and even anti-anti-anti-suit injunctions (AAASIs), which intensify a 'global race to the bottom' and a 'race to the courthouse',² thus stirring jurisdictional 'jockeying' between national judges.³ The risk is that such spiral eventually gets out of control⁴ and exacerbate geopolitical tensions among the main players of the global ICT market, that is, China, the United States (US), European Union (EU), and the United Kingdom (UK) among others.⁵

This paper focuses on SEP-related ASIs, the debate around their impact on SEP global litigations and the EU/China row at the WTO. Chinese courts have recently issued ASIs in high-profile SEP cases on 3G, 4G and 5G technologies: *Xiaomi v InterDigital*,⁶ *Huawei v Conversant*,⁷ *OPPO v Sharp*⁸ and *Ericsson v Samsung*.⁹ After four ASIs issued in a short period of time (three of which were in favour of Chinese companies), China has positioned itself as a major jurisdiction for SEP litigation, in competition with other countries, including the US, Germany as well as UK (post-Unwired Planet) and other states.¹⁰ As has also been noted, the 'principal reason' of the recent Chinese courts' stance on ASIs is 'a desire to be the ultimate venue for setting global FRAND licensing rates between the parties, in response to what it sees as the same approach adopted by US and European courts'.¹¹

Indeed, Chinese courts are known for determining FRAND royalty rates which are lower than those decided by judges in other countries, which has made China an attractive jurisdiction, especially for SEP implementers. And some foreign courts have started viewing Chinese ASIs as threats to their own jurisdiction. The EU is particularly worried. As has been noted,¹² the European Commission has highlighted concerns that 'very broad extraterritorial antisuit injunctions' may jeopardise European patent owners competing in the global ICT market.¹³ Not only the EU is concerned. The US government has some reservations as well. The US Trade Representative pointed out that China's growing reliance on ASIs is 'worrying'. In general, it is feared that ASIs have become a competitive tool used by China to undervalue foreign patents by establishing lower FRAND rates and protect its telecom companies and in general its own economic interests.¹⁴

Against this background, the article will first briefly introduce ASIs' history and aims (Section 2) and address the Chinese SEPs disputes which have triggered the WTO case (Section 3). We will then remind that Chinese ASIs, while being controversial, may not be completely unacceptable also, considering that (i) courts in other countries such as US and UK have granted them and (ii) they may actually promote rather than jeopardise international comity (Section 4). Section 5 concludes.

2 | ANTISUIT INJUNCTIONS

An ASI, in its simplest form, is a temporary sanction granted by a court in one country preventing a party from starting or continuing a parallel action in another forum or jurisdiction.¹⁵ In other words, it is a procedural means aimed to manage multi-jurisdictional litigation.¹⁶ By requiring that disputes be settled in one jurisdiction before being contested in another, ASIs not only help control litigation costs but also lessen the possibility of contradictory outcomes.

ASIs are not new. They have long been available, especially in common law countries. They are an equitable remedy that dates back at least to the 14th century in England. Specifically, the Court of the King's Bench and the Court of Chancery issued writs of prohibition as the first ASIs to halt litigation while ecclesiastical court cases

were still ongoing.¹⁷ The purpose of these injunctions was to define and uphold the lines of jurisdiction between the royal courts and the ecclesiastical courts.¹⁸ They were considered essential as a result of the ecclesiastical courts' tendency to see the subject broadly within the scope of their authority, which occasionally differed from that of the royal courts.¹⁹ More recently, ASIs have been issued to defend the English courts' authority to hear cases under Section 37 of the UK Supreme Court Act. Under this provision, the court has broad authority to issue an injunction 'in all circumstances in which the court appears to be reasonable and convenient to do so'.²⁰ Likewise, arbitration agreements have been protected by ASIs under this section, whether for temporary or permanent relief. According to Lord Hoffmann, 'the English courts have routinely exercised this authority to give injunctions to prohibit parties to an arbitration agreement from initiating or continuing actions in the courts of other nation', as stated in *The Front Comor* case.²¹ The injunction, intended to prevent the abusive use of this procedural tool within the English system, was gradually extended to court proceedings outside that area. Subsequently, the use of the injunction was also permitted to block proceedings before other judicial authorities abroad. The 'ordinary' antisuit injunction was then abolished by Article 24 (5) of the Judicature Act of 1873.²² Since that date, the remedy in question can only be used to block judicial proceedings initiated abroad.

In the SEPs context, ASIs are usually requested by implementers to pursue similar aims—that is, they avoid inequities that may arise as a result of forum shopping pursued by SEP holders, thus preventing jurisdictional conflicts.²³ ASIs are important to implementers, especially when they claim that SEP holders have breached their FRAND licensing obligations.²⁴ Indeed, a court reviewing a SEP holder's compliance with a FRAND license obligation may issue an injunction to prevent the patent owner from bringing foreign infringement actions (including injunctions against the sale of infringing products) until the FRAND license dispute is resolved in the jurisdiction which grants the ASI.

As also mentioned, ASIs are issued most frequently in common law jurisdictions. US courts have resorted to this tool in SEP disputes, *Microsoft v. Motorola* being the most prominent case.²⁵ On the other hand, judges in civil law countries look at ASIs with suspicion,²⁶ considering them an interference by foreign courts.²⁷ Accordingly, courts in Germany and France adjudicating SEP disputes have started issuing AASIs as counter-responses to neutralise ASIs effectiveness.²⁸ (Four AASIs granted by German courts specifically aimed at protecting SEP holders affected by Chinese ASIs).²⁹

Moreover, within the EU, ASIs are prohibited by the Brussels Regulation on the jurisdiction and the recognition and enforcement of judgements in civil and commercial matters.³⁰ As the Court of Justice of the European Union held in *Turner* in 2004, this type of injunctions in general violate the Brussels Regulation because they constitute an interference with the jurisdiction of a foreign court.³¹ It has even been argued that the Brussels Regulation (Article 24) would require judges to issue AASIs if an ASI from other countries deprives them of their exclusive jurisdiction.³²

3 | CHINA'S ASIS AND THE WTO CASE

As mentioned, in a short period of time, Chinese courts, including the Supreme People's Court (SPC) have granted four ASIs. They have also strengthened such penalties, often set at the highest amount permitted under China's Civil Procedure Law.

(i) *InterDigital v. Xiaomi*³³ (*Wuhan Intermediate People's Court*)

On 3rd June 2020, Chinese consumer electronics maker Xiaomi—known for its prominence in the smartphone industry—initiated proceedings at the Wuhan Intermediate Court, seeking to determine the FRAND royalty rates for a number of 3G and 4G SEPs owned by US company InterDigital. In response, on 29 July 2020, InterDigital launched an action against Xiaomi at the Delhi High Court,³⁴ alleging infringement of its Indian patents on 3G and 4G and H.265/HEVC video compression standards.³⁵ According to a regulatory filing,

InterDigital is 'seeking [...] injunctive relief to prevent further infringement of the litigated patents in India, unless Xiaomi elects to take a license on terms determined to be FRAND'.³⁶

In the meantime, on 23 September 2020, the Wuhan Court issued an ASI against InterDigital which effectively prohibited the US company from seeking an injunction against Xiaomi in India. InterDigital was subject to a penalty of up to one million yuan (125,000€) per day. The Wuhan Court provided a number of justifications for its decision, stating that InterDigital intentionally started proceedings in India to hinder the ongoing case in China; the outcome in Delhi might not be reconcilable with the decision in China; the injunction is needed to safeguard Xiaomi's interests; and that imposing an injunction will not harm InterDigital's interests.³⁷

Not even a week later, on 29 September 2020, InterDigital—noting that the Chinese order was imposed with no prior notice and there was no opportunity to be heard in China—responded by filing an AASI application before the Delhi Court.³⁸ The latter granted the AASI on 9 October 2020, effectively restraining the defendants from enforcing the Wuhan antisuit order until it completed its own proceedings. The court reached this decision on the basis that 'public policy trumps the comity principle'.³⁹ (Comity is a self-imposed obligation to take into account the laws and judgements of other jurisdictions). On its part, the Wuhan Court has seen this action as a breach of its order. InterDigital's suit in India has been criticised as a 'deliberate attempt by InterDigital to scuttle or at least severely (sic) dilute the matter before the Chinese courts'.⁴⁰

(ii) *Conversant v. Huawei and ZTE*⁴¹ (Supreme People's Court)

Huawei, the world's top smartphone maker in terms of market share, initiated a noninfringement action against US company Conversant in the Nanjing Intermediate Court on 25 January 2018.⁴² In the Nanjing proceedings, Huawei requested a determination of FRAND royalties for a range of SEPs on 2G, 3G and 4G held by Conversant. On 20 April 2018, Conversant brought a separate action in the Düsseldorf Regional Court, alleging that Huawei had infringed a number of its German patents. Before the German Court had made a decision, on 16 September 2019, the Nanjing Court imposed relatively low royalty rates, which prompted Conversant to appeal the case to the SPC.⁴³

Then, on 27 August 2020, the Düsseldorf Court found that Huawei had infringed Conversant's patent EP1797659, which Conversant itself had acquired from Nokia in 2014.⁴⁴ Critically, the Düsseldorf Court prohibited Huawei's operations within the territory of the country, including the sale of UMTS-enabled devices (Universal Mobile Telecommunications Systems), and approved the FRAND terms originally requested by Conversant (which are nearly 20 times higher than those initially imposed by the Nanjing Court).⁴⁵

This prompted Huawei to immediately apply for an ASI at the SPC. The latter approved the request, thus prohibiting Conversant from enforcing the German decision until the SPC reached its own verdict in the ongoing Chinese proceedings. As in *Xiaomi v. InterDigital*, the Court imposed a fine of one million yuan a day for violating the order. Moreover, its justifications are strikingly similar to those provided by the Wuhan Court. The SPC stated that, inter alia, enforcing the German decision would have a negative impact on the Chinese proceedings; the injunction was necessary to prevent irreparable harm to Huawei; and the Chinese case was launched before the German case.

(iii) *OPPO v. Sharp*⁴⁶ (Shenzhen Intermediate People's Court)

The Chinese subsidiary (ScienBizIP) of the Japanese electronics business Sharp Corporation entered negotiations with Chinese handsets' manufacturer OPPO for a license for Sharp's SEPs in China. Afterwards, in 2020 Sharp filed a patent infringement injunction against OPPO in Japan and Germany based on its Japanese and German patents covering intelligent terminal products regarding Wi-Fi, 3G and 4G technologies. In response, in March 2020, OPPO and its Shenzhen subsidiary, OPPO Shenzhen Corporation, filed a lawsuit in the Shenzhen Intermediate People's Court, alleging that Sharp Corporation and its Chinese subsidiary had breached their licensing obligation under FRAND terms during the licensing negotiation process.⁴⁷ Sharp had challenged the Chinese court's authority to hear the action on the grounds that similar cases were already ongoing in Japan and Germany. Yet, the court ultimately rejected this argument and found that the Chinese

court did have jurisdiction over this matter. The Supreme People's Court then denied Sharp Corporation's appeal of the Shenzhen Intermediate People's Court's ruling.⁴⁸ Then, on 16 October 2020, the Shenzhen Intermediate People's Court issued an ASI, preventing Sharp from starting patent suits or asking for injunctions against OPPO and its subsidiaries based on its WiFi, 3G and 4G SEPs. The injunction was strengthened by daily penalties.

(iv) *Samsung v. Ericsson (Wuhan Intermediate People's Court)*.

The dispute between the Swedish company Ericsson and Samsung also involves SEPs covering 4G and 5G technologies, the patents being owned by the former.⁴⁹ In 2014, the parties had engaged into SEPs cross-licensing—yet the licence was set to expire at the end of 2020, and attempts at renegotiation failed.⁵⁰ On 7 December 2020, Samsung filed a civil complaint in Wuhan, seeking a determination of the FRAND conditions for a new worldwide licence. Yet, the SEP holder Ericsson was not notified. Being unaware of the Wuhan proceedings, Ericsson sued Samsung in the District Court for the Eastern District of Texas for failing to negotiate in good faith.⁵¹ In retaliation, Samsung petitioned the Wuhan Intermediate People's Court for an ASI against Ericsson's lawsuit in the US.⁵² Finally, the Intermediate People's Court granted Samsung the ASI injunction on the grounds of avoiding jurisdictional conflicts among national authorities. The injunction issued by the Wuhan court also prohibited Ericsson from seeking a FRAND judgement from another Chinese court and from seeking an AASI to overturn the Wuhan court's decision. The two companies eventually settled their global disputes.

The emerging ASIs practice in Chinese courts has been perceived by the EU as increasingly aggressive. The latter argues that China makes it difficult for European businesses that own crucial technology (3G, 4G and 5G) to enforce their patents when they are exploited without authorisation or proper remuneration (the bloc is evidently concerned that Chinese mobile phone makers can get access to European technology at a reduced cost). Emphasis is also put on the fact that Chinese courts have granted the ASIs in question without notice or an opportunity for all litigants to take part in the proceedings. Thus, also to avoid hefty penalties in China, European patent holders would de facto be forced to settle these disputes in China for lower-than-market royalties, which in turn would restrict the ability of European tech firms to compete and more broadly has negative effects on the European innovation ecosystem.

Scholars have also criticised China's ASIs. It has been noted that these injunctions (especially those in *InterDigital v. Xiaomi* and *Ericsson v. Samsung*) are geographically too broad as they prevent SEP owners from deciding licensing issues and enforcing existing injunctions anywhere in the world;⁵³ and in general, that ASIs represent a challenge from a rule of law perspective.⁵⁴ These points are backed up by recent findings of national courts in Germany⁵⁵ and France⁵⁶ which as mentioned granted SEP owners AASIs to fend off ASIs' effects and thus—the argument goes—aim to protect *ordre public*, property rights and ensure fair legal proceedings.

In July 2021, the European Union, concerned by the issuance of ASIs by Chinese courts, made a formal request to China under Article 63(3) of the TRIPS Agreement.⁵⁷ Through this request, the EU solicited information on recent cases in which ASIs had been granted and the legal grounds for setting overall licensing rates and granting the injunctions. In response, Chinese authorities denied their responsibility for releasing the requested information as under TRIPS, asserting that there would be no obligation for China to respond to the EU's request for information.⁵⁸ As a result, the EU started the consultations' phase of the WTO dispute settlement procedure in February 2022, alleging a violation of TRIPS Articles 63(1) and 63(3).⁵⁹ More importantly, in the request for consultation the EU claimed that China's recent case law on ASIs amounts to a policy which violates several provisions of the TRIPS Agreement, including Articles 28 (which gives patentees exclusive rights over their inventions), 41 (because China's measures would create barriers to legitimate trade and fail to provide for safeguards against the abuse of enforcement procedures) and 44 (because this policy would prevent, or try to prevent, the judicial authorities of other WTO states from ordering a party to desist from an infringement in China).⁶⁰ The United States, Canada and Japan have also requested to join the consultations, which shows that the other ICT superpowers of the world have

an interest in this case and are watching it closely. Consultations, however were not successful, and in December 2022 the European Union requested the WTO's Dispute Settlement Body to establish a panel to resolve the dispute. The panel has been established in January 2023.⁶¹

4 | CHINESE ASIS AND JURISDICTIONAL SOVEREIGNTY

Some commentators contend that SEP-related ASIs should be an exceptional remedy used only in limited and rare circumstances and in a way which does not impact negatively on international comity.⁶² In other words, courts should strictly analyse the repercussions on comity before granting ASIs to minimise the risk of jurisdictional clashes. It has also been argued that ASIs within SEP disputes waste judicial resources, diminish trust in the court system, and are capable of jeopardising international trade relationships.⁶³ The ASIs granted by Chinese courts, and challenged by the EU at the WTO, would epitomise such negative connotations of a jurisdictional measure which has attracted criticism.⁶⁴

It is certainly true that the ASIs granted by Chinese courts are broad (especially those issued in *InterDigital v Xiaomi* and *Ericsson v Samsung*)—something which is not comparable to ASIs granted in other countries. Yet, there are also some similarities with ASIs issued by US courts. Indeed, in *Conversant v Huawei*, the SPC took into account factors analogous to those considered by some US courts, for example, in *Microsoft v Motorola*.⁶⁵ In other words, the legal basis of Chinese ASIs as act preservation measures is similar to the one relied on by US courts when granting their own ASIs.⁶⁶

It has also been interestingly noted that since Chinese judges started to be confronted with ASIs granted by courts in other jurisdictions, then the issuance of Chinese ASIs should be considered a fair reply to other countries' moves;⁶⁷ and that the judiciary of any nation—not just US or UK—would be able to exercise such power.⁶⁸ It should be reminded that in 2018 UK started granting ASIs against Chinese companies, *Conversant v Huawei* and *ZTE*⁶⁹ being the most striking example.⁷⁰ Also, if UK courts decide they can determine a global FRAND license and thus entice SEP disputes across the Channel—it has been pointed out—why should the Chinese judiciary restrain from adopting an approach with the same effects which may attract SEP litigation in China?⁷¹ In this specific regard, Yu, Contreras and Yang have made a convincing point: Chinese ASIs constitute a legal tool that local judges have borrowed from other countries such as US (and adapted to the Chinese landscape) and used to respond to foreign legal suits—a sort of legal transplant which eventually allows China to steer the development of SEP global standards.⁷² Similarly, the influential English judge Richard Arnold has recently noted that 'the EU [WTO] complaint does not explain why it is acceptable for Western countries to grant such injunctions, but not [...] Chinese courts'⁷³—a statement which matches China's very position at the WTO: 'China said it is neither the creator nor the major user of the anti-suit injunction'.⁷⁴

Yu, Contreras and Yang make another (related) convincing point. In an interesting twist of arguments, they argue that the issuance of ASIs by Chinese courts aims at protecting their own jurisdiction and accordingly judicial sovereignty.⁷⁵ This is also what the SPC highlighted in its report on *Conversant v Huawei*:

- 'Dealing with ASIs is an unavoidable problem confronting the Chinese judiciary in the intellectual property area. Many Chinese lawsuits have already encountered ASIs issued by courts in other countries. The internationalisation trend surrounding ASIs profoundly reflects the competition among major powers for jurisdiction over international disputes and for dominance in rulemaking. The ASI is an important tool for preventing and reducing the abuse of parallel litigation and safeguarding national judicial sovereignty. Without ASIs, Chinese courts will be in a passive position in international judicial competition'.⁷⁶

Thus, from this perspective, ASIs could be deemed as an instrument which allows Chinese courts to make reciprocal arrangements to bolster (and not disturb) international comity; and that symmetrically a foreign court's

availability to comply with a legally granted Chinese ASI and its refusal to issue a 'neutralising' AASI, again can promote international comity.⁷⁷ And even where it is accepted that ASIs may interfere somewhat with comity, such interference could be considered tolerable because of ASIs' temporary nature.⁷⁸

The debate over SEP-related ASIs, especially those issued by Chinese courts, and their impact on global jurisdictional harmony is certainly polarised. One camp considers them a threat to other nations' jurisdictional independence, the other does not condemn them and notes they can be guardian of the judicial autonomy of the country which grants them, in our case China (but not only). Considering that other countries such as US have granted ASIs in the context of SEPs, it cannot be ruled out that a WTO Panel considers them in line with TRIPS. What is also clear is that the jurisdictional clashes of recent years, with a flurry of ASIs, AASIs and AAASIs, do not benefit the ICT global market as a whole and as mentioned may eventually get out of control.

It is to neutralise or at least reduce such risk that a number of proposals to promote more jurisdictional collaboration have been put forward. An interesting suggestion has been made by Jorge Contreras, that is, the establishment of a nongovernmental FRAND rate-setting tribunal whose main task would be to set FRAND fee rates for SEPs.⁷⁹ This proposal has been backed by other scholars⁸⁰ and even mentioned by the UK Supreme Court in *Unwired Planet*, which suggested that a world tribunal might be better placed to resolve SEP disputes rather than through country-by-country enforcement. Specifically, it stated that '[t]he participants in the relevant industry ... can devise methods by which the terms of a FRAND licence may be settled, ... by amending the terms of the policies of the relevant SSOs to provide for an international tribunal ...'.⁸¹

Regardless of the merits of such a proposal, the practical chances of establishing an international rate-setting tribunal are not high, at least in the current era. Less formal and more 'soft law' mechanisms might be more realistic instead. National governments for example could more easily attempt to build up consensus or best practices on FRAND calculation aspects, with the purpose of minimising the risk of jurisdictional clashes.⁸² Likewise, Geradin and Katsifis noted that governments and other actors should take steps to establish SEP 'best practices' over licensing disputes and FRAND methodologies: practices which could then form the basis for putting forward a binding legal instrument such as an international treaty establishing binding rules over SEP licensing disputes aimed at avoiding jurisdictional clashes (Geradin—Katsifis 2022).⁸³ Reaching an international convention signed by all the ICT superpowers and crystallising those practices would certainly be a welcome outcome for all stakeholders. Yet, chances to reach consensus among governments during treaty negotiations are not high given the serious economic and geopolitical interests at stake.⁸⁴ The inability to attain consensus when it comes to burning SEP issues is recurring, even inside the EU. The final report of the recent European Commission's Expert Group on Standards Essential Patents was filled with dissenting opinions;⁸⁵ and as a result, it was unable to achieve an agreement on the future of SEP licensing and was criticised by both SEP owners and implementers.⁸⁶

5 | CONCLUSION

The ASIs debate within the SEP context is heated. The cases and issues highlighted in this paper are testament to that. Going forward, it will be interesting to monitor the evolution of the case law on ASIs (and AASIs and AAASIs) in the territory of the key ICT superpowers (including India).

What is already clear is that China has emerged within this global ICT war for the dominion of international markets, especially with regard to WiFi, 4G and 5G technologies and probably the upcoming 6G. And it has done so by showcasing its availability to police SEP disputes by granting far-reaching ASIs.⁸⁷ A move which has prompted the EU to challenge China at the WTO. But China is not the only country which issues ASIs and wants to position itself as a major jurisdiction for global SEP litigation. The US and UK among other countries want to 'be in the game' as well and compete by relying on the same legal tools as those used by China, including the issuance of injunctions which with different degrees of far-reachingness and intensity aim at enticing SEP litigation.

What is not clear is how the WTO row started by the EU will eventually play out. At the moment, it is difficult to predict its outcome. If the WTO Panel eventually finds that Chinese ASIs violate TRIPS, ASIs issued by US and UK and other jurisdictions—one may note—may also need to be condemned. It should moreover be reminded that the tide against ASIs in continental Europe could also turn. Despite the opposition against these injunctions in the SEP ecosystem in civil law countries, in recent years courts and commentators from these jurisdictions have shown a degree of openness to the concept of ASIs in general.⁸⁸ The whole legal landscape around ASIs and the SEP jurisdictional issues seems thus in a state of flux—which makes the result of the EU-triggered WTO case uncertain.

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DATA AVAILABILITY STATEMENT

The data supporting the findings of this study are available from the corresponding author upon request. Access to the data will be granted after verification of the requestor's identity and completion of a data use agreement.

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ENDNOTES

- ¹ Unwired Planet v Huawei, [2020] UKSC 37, 26 August 2020, on appeals from: [2018] EWCA Civ 2344 and [2019] EWCA Civ 38.
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- ³ See Yang Yu and Jorge L. Contreras, Will China's New Anti-Suit Injunctions Shift the Balance of Global FRAND Litigation? (2020) University of Utah College of Law Research Paper No. 403 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3725921> accessed 31 March 2023.
- ⁴ See Hess, Felix K, 'US Anti-Suit Injunctions and German Anti-Anti-Suit Injunctions in SEP Disputes' (2022) 25 JWIP 536.
- ⁵ See Giuseppe Colangelo and Valerio Torti, 'Anti-Suit Injunctions and Geopolitics in Transnational SEPs Litigation' (2022) EJLS [EJLS Online First, 1 September 2022] <<https://doi.org/10.2924/EJLS.2022.019>> accessed 31 March 2023.
- ⁶ See Hubei Province—Wuhan Intermediate People's Court, Case E 01 Zhi Min Chu No 169 (2020), Xiaomi Communication Technology Co Ltd v Inter Digital Inc.
- ⁷ See Supreme People's Court of the People's Republic of China, Case Zui Gao Fa Zhi Min Zhong No 732, 733, 734 (2020), Huawei Technologies Co Ltd and another v Conversant Wireless Licensing.
- ⁸ See Xiapu Zhushi Huishe Yu OPPO Guangdong Yidong Tongxin Youxian Gongsi Biaozhun Biyao Zhuanli Xuke Jiufen An (夏普株式会社与OPPO广东移动通信有限公司标准必要专利许可纠纷案) [Sharp Corp. v. OPPO Guangdong Mobile Telecommunications Co.,] (2020) Zuigao Fa Zhi Min Xia Zhong No. 517 ((2020)最高法知民辖终517号) (Sup. People's Ct. Aug. 19, 2021).
- ⁹ See Sanxing Dianzi Zhushi Huishe [Samsung Elecs. Co., v. Telefonaktiebolaget LM Ericsson], E 01 Zhi Min Chu No. 743 (Wuhan Interim. People's Ct. Dec. 25, 2020) (China).
- ¹⁰ Arnold, Richard, 'The EU's WTO complaint against China can only be resolved by establishing legally enforceable global arbitration of SEP disputes' (2022) JIPLP 329. The A. notes that the 'SPC's decision was a response to the decisions of the United Kingdom Supreme Court (UKSC) just 2 days earlier in Unwired Planet v Huawei and Conversant v Huawei'.
- ¹¹ See Nikolic, Igor (2022) Global standard essential patent litigation: anti-suit and anti-anti-suit injunctions, Robert Schuman Centre for Advanced Studies Research Paper No. 2022/10, <<https://cadmus.eui.eu/handle/1814/74282>> accessed 31 March 2023.

- ¹² See Yu, Peter K and others, 'Transplanting Anti-Suit Injunctions' (2022) 71 AULR 1537.
- ¹³ Making the Most of the EU's Innovative Potential: An Intellectual Property Action Plan to Support the EU's Recovery and Resilience, at 17, COM (2020) 760 final (Nov. 25, 2020).
- ¹⁴ See Colangelo and Torti (n 5).
- ¹⁵ See Enrico Bonadio and Luke McDonagh, 'Paris Court Grants an SEP Anti-Anti-Suit Injunction in IPCOM v Lenovo: A Worrying Decision in Uncertain Times?' (2020) 15 JIPLP 149.
- ¹⁶ See Jorge Contreras and Michael Eixenberger, 'The Anti-Suit Injunction—A Transnational Remedy for Multi-Jurisdictional SEP Litigation' in J Contreras (ed), *The Cambridge Handbook of Technical Standardization Law: Competition, Antitrust and Patents* (Cambridge University Press 2018), at 451.
- ¹⁷ See Raphael Thomas (2019) *The Anti-Suit Injunction* (2d ed Oxford University Press 2019), at 151–53; Strong SI, 'Anti-Suit Injunctions in Judicial and Arbitral Procedures in the United States'(2018) 66 AJCL 153.
- ¹⁸ See George A. Bermann, 'The Use of Anti-Suit Injunctions in International Litigation' (1990) 28 CJTL 589.
- ¹⁹ See Richard H. Helmholz, 'Writs of Prohibition and Ecclesiastical Sanctions in English Court Christian' (1975) 60 MLR 101.
- ²⁰ See Section 37(1) of the UK Supreme Court Act 1981.
- ²¹ [2007] 1 LLR 391 at 393 (HL), paragraph 10.
- ²² Supreme Court of Judicature Act, 1873 (U.K.), 36 and 37 Vict., c. 66.
- ²³ See Damien Geradin and Dimitrios Katsifis, 'The Use and Abuse of Anti-Suit Injunctions in SEP Litigation: Is There a Way Forward?' (2022) 71(7) GRURI 603.
- ²⁴ See Contreras and Eixenberger (n 16).
- ²⁵ *Microsoft Corp. v. Motorola Inc.*, 696 F.3d 872 (9th Cir. 2012) (US Federal Court).
- ²⁶ See Yu et al. (n 12).
- ²⁷ See Colangelo and Torti (n 5); Geradin and Katsifis (n 23).
- ²⁸ RC Munich, Beck RS 2019, 25536 (*Nokia v Daimler/Continental*); Cour d'appel de Paris, 3 Mars 2020, RG 19/21426 (*Lenovo v IPCOM*). Yet, it should be reminded that on 11 July 2019, the Munich District Court issued the first ever ASI in German a patent dispute, preventing carmaker Daimler from pursuing proceedings in the US. In *Nokia v Daimler/Continental*, the Munich Regional Court even went further by suggesting that a SEP implementer could be considered as an unwilling licensee if it asks for an ASI (likewise, the Defending American Courts Bill was pushed into the US Congress in March 2022, introducing a presumption that 'the infringement is wilful when determining whether to increase damages' in case of legal actions 'against any person that has asserted an anti-suit injunction in any tribunal of the United States seeking to restrict the claim of infringement of the patent').
- ²⁹ RC Düsseldorf, BeckRS 2021, 36218 (*HEVC Advance v Xiaomi*), vacated on appeal, cf. HRC Düsseldorf, GRUR 2022, 318; RC Munich, GRUR-RS 2021, 17662 (*IP Bridge v Huawei*); RC Munich, GRUR-RS 2021, 3995 (*InterDigital v Xiaomi*). The fourth ASI was issued by the Regional Court of Munich in *Sharp v Oppo*, but eventually it was not enforced (*Hess* 2022: 544).
- ³⁰ Regulation 1215/2015. In particular, Article 27 of this regulation provides that once a procedure has commenced in a court of any EU Member State, all other EU courts must deny jurisdiction over parallel actions.
- ³¹ Case C-159/02.
- ³² See *Hess* (n 4).
- ³³ *Interdigital Technology Corp v Xiaomi Corp and others* (I.A. 8772/2020 in CS(COMM) 295/2020).
- ³⁴ Rajiv Choudhry, Chinese Court Issues Anti-Suit Injunction Re Pending DHC Case by InterDigital against Xiaomi <<https://spicyip.com/2020/10/chinese-court-issues-anti-suit-injunction-re-pending-dhc-case-by-interdigital-against-xiaomi.html>>; Rajiv Choudhry, Delhi HC Becomes the Go to Venue for Adjudicating SEP Disputes in India <<https://spicyip.com/2020/08/delhi-hc-becomes-the-go-to-venue-for-adjudicating-sep-disputes-in-india.html>> accessed 31 March 2023.
- ³⁵ Nos. 262910; 295912; 298719; 313036; 320182; 242248; 299448; and 308108.
- ³⁶ See U.S. Securities & Exchange Comm'n, Form 10-Q, Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the Quarterly Period Ended June 30, 2020, Commission File Number 1-33579 *Interdigital, INC.*, at 15 <<https://www.sec.gov/ix?doc=/Archives/edgar/data/1405495/000140549520000046/idcc-q263020.htm>> (accessed 31 March 2023).

- ³⁷ Sophia Tang, Anti-Suit Injunction Issued in China: Comity, Pragmatism and Rule of Law <<https://conflictoflaws.net/2020/anti-suit-injunction-issued-in-china-comity-pragmatism-and-rule-of-law/>> accessed 31 March 2023.
- ³⁸ Interdigital, Inc. <https://www.sec.gov/Archives/edgar/data/1405495/000114036120021828/brhc10015616_8k.htm> accessed 31 March 2023.
- ³⁹ See Rajiv Choudhry, Delhi High Court Issues Anti Anti-Suit Injunction in InterDigital v. Xiaomi Patent Infringement Dispute <<https://spicyip.com/2020/10/delhi-high-court-issues-anti-anti-suit-injunction-in-interdigital-v-xiaomi.html>> accessed 31 March 2023.
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- ⁴¹ Decision by the Supreme People's Court of the People's Republic of China, Civil Ruling, of August 28, 2020 in Cases No. 732, No. 733 and No. 734, between Huawei Technology Co. LTD and Conversant Wireless Licensing.
- ⁴² Sally Gao and Andrew White, Chinese court judgement on SEP royalty dispute between Huawei and Conversant <<https://www.mathys-squire.com/insights-and-events/news/chinese-court-judgment-on-sep-royalty-dispute-between-huawei-and-conversant/>> accessed 31 March 2023.
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- ⁴⁵ Mathieu Klos, The global SEP race <<https://www.juve-patent.com/news-and-stories/people-and-business/the-global-sep-race/>> accessed 31 March 2023.
- ⁴⁶ Xiapu Zhushi Huishe, Sai'enbeiji Riben Zhushi Huishe Su OPPO Guangdong Yidong Tongxin Youxian Gongsi, OPPO Guangdong Yidong Tongxin Youxian Gongsi Shenzhen Fen Gongsi (夏普株式会社, 赛恩倍吉日本株式会社诉OPPO广东移动通信有限公司, OPPO广东移动通信有限公司深圳分公司) [Sharp Corp. and ScienBizip Japan Corp. v. OPPO Guangdong Mobile Telecommunications Co. Ltd. and Shenzhen Branch of OPPO Guangdong Mobile Telecommunications Co. Ltd.], Zhi Min Xia Zhong No. 517 (2020) ((2020) 最高法知民辖终517号), (Sup. People's Court 19 August 2021).
- ⁴⁷ See Deng Fei and others, 'The Current State of SEP Litigation in China' (2021) 35-SPG Antitrust 95; Seiya S Takeuchi, 'Teleological interpretation of Article 63 TRIPS based on the Vienna Convention on the Law of Treaties and customary international law—analysis of the EU's request for information on China's SEP cases' (2022) 17 JIPLP 674.
- ⁴⁸ See Guangdong Oppo Mobile Telecommunications Corp., Ltd (Oppo), Newsroom, IP, 'The Supreme People's Court Confirmed China's Jurisdiction Over SEP Global Rate Setting in the OPPO and Sharp Case' (2 September 2021) <<https://www.oppo.com/en/newsroom/ip/jurisdiction-over-sep-global-rate-setting/>> accessed 15 September 2022.
- ⁴⁹ Sanxing Dianzi Zhushihuishe Yu Ailixin Gongsi Biaozhun Biyao Zhuanli Xukefei Jiufen An (三星电子株式会社与爱立信公司标准必要专利许可费纠纷案) [Samsung Elecs. Co. v. Telefonaktienbolaget LM Ericsson], (2020) E 01 Zhi Min Chu No. 743 ((2020)鄂01知民初743号) (Wuhan Intern. People's Ct. Dec. 25, 2020).
- ⁵⁰ See Takeuchi (n 47).
- ⁵¹ See Ericsson, Inc. v. Samsung Elecs. Co., No. 2:20-CV-00380-JRG, 2021 WL 89980 (E.D. Tex. Jan. 11, 2021).
- ⁵² See Sanxing Dianzi Zhushi Huishe [Samsung Elecs. Co., v. Telefonaktiebolaget LM Ericsson], E 01 Zhi Min Chu No. 743 (Wuhan Intern. People's Ct. Dec. 25, 2020) (China).
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- ⁵⁵ See again Nokia v Continental, Higher District Court of Munich, decision dated 12 December 2019, Case-No. 6 U 5042/19. Yet, it should be reminded that on 11 July 2019, the Munich District Court issued the first ever ASI in in German a patent dispute, preventing carmaker Daimler from pursuing proceedings in the United States.
- ⁵⁶ See again Paris Court of Appeal, March 3, 2020, Case no 19/21426.
- ⁵⁷ Council for Trade-Related Aspects of Intell. Prop. Rts., Request for Information Pursuant to Article 63.3 of the TRIPS Agreement: Communication from the European Union to China, WTO Doc. IP/C/W/682 (July 6, 2021). As is known,

the TRIPS Agreement is a WTO treaty which sets minimum standards for the protection of IP rights including patents, trademarks and copyright.

- ⁵⁸ For a full discussion of the teleological interpretation of Article 63 TRIPS, see Takeuchi (n 47).
- ⁵⁹ Request for Consultations by the European Union, China—Enforcement of Intellectual Property Rights, WTO Doc. WT/DS611/1 (Feb. 22, 2022). Article 63(1) TRIPS provides that ‘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, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them. [...]’. And Article 63(3) TRIPS states that ‘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’.
- ⁶⁰ Ibid.
- ⁶¹ Information on the current status of the dispute is available from the WTO Secretariat at <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds611_e.htm> accessed 31 March 2023.
- ⁶² See Nikolic (n 11).
- ⁶³ See Geradin and Katsifis (n 23).
- ⁶⁴ In *Nokia v Daimler/Continental*, the Munich Regional Court even went further by suggesting that a SEP implementer could be considered as an unwilling licensee if it asks for an ASI.
- ⁶⁵ *Microsoft v. Motorola* (see the first instance ruling (W.D. Wash. 2012), affirmed on appeal (9th Cir. 2012)). In that case, Motorola had signalled its willingness to license patents relating to the 802.11 (WLAN protocols) and H.264 (video compression) standards on FRAND terms. Following unsuccessful negotiations, Microsoft alleged that Motorola had violated this commitment and filed a breach of contract action against the telecommunications company in Washington, DC. While the US proceedings were still ongoing, 6 months later, Motorola responded by filing an infringement action in Germany. The German court found Microsoft liable and enjoined the company from selling its popular Xbox (and other PC) products on the territory of the country. This string of proceedings culminated in Microsoft filing an ASI application in Washington. The US Court granted the ASI and held that the dispute in the US was dispositive of the German matter, despite the fact that one concerned breach of contract and the other focused on infringement. The Ninth Circuit affirmed the decision on appeal. On this dispute see <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3647587> and <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3339378> accessed 31 March 2023.
- ⁶⁶ See Geradin and Katsifis (n 23).
- ⁶⁷ See Arnold (n 10) 349. The A. notes that the SPC decision in *Conversant v. Huawei and ZTE* is a ‘response to the practice of the courts of a number of Western countries of granting anti-suit (and anti-anti-suit) injunctions in jurisdictional battles over SEPs and FRAND terms, including a decision by the late Henry Carr J that he would have granted an anti-suit injunction against Huawei in the *Conversant v Huawei* litigation if Huawei had not agreed to withdraw the relevant part of its parallel claim in the Chinese courts’.
- ⁶⁸ See Yu et al. (n 12).
- ⁶⁹ *Conversant Wireless Licensing v Huawei Technologies Co Ltd and ZTE Corp* [2018] EWHC 2549 (Ch), [2018] Costs LR 1049.
- ⁷⁰ See Colangelo and Torti (n 5).
- ⁷¹ See Geradin and Katsifis (n 23).
- ⁷² See Yu et al. (n 12)
- ⁷³ See Arnold, Richard, ‘Arbitration of FRAND Disputes’ in Picht, Cotter and Habich (eds), *FRAND: German Case Law and Global Perspectives* (Edward Elgar, forthcoming 2023) (on file with the author).
- ⁷⁴ See WTO webpage at <https://www.wto.org/english/news_e/news22_e/dsb_20dec22_e.htm> accessed 31 March 2023.
- ⁷⁵ See Yu et al. (n 12).
- ⁷⁶ See the webpage at <<https://ipc.court.gov.cn/zh-cn/news/view-1056.html>> accessed 31 March 2023.
- ⁷⁷ See Yu et al. (n 12).

- ⁷⁸ See Colangelo and Torti (n 5).
- ⁷⁹ See Contreras (n 2).
- ⁸⁰ See Julien Chaisse and A. Marisport, 'Arbitration of FRAND Disputes in SEP Licensing: Towards Global Substantive and Procedural Rules' (2021) IPQ 264; Ishaan Aditya, 'Competition in a Global "FRANDship": The Argument for an International FRAND Tribunal in Light of the Unwired Planet v Huawei Judgment' (2022) 43 ECLR 134; Arnold (n 10).
- ⁸¹ Unwired Planet v Huawei, [2020] UKSC 37, Para 90.
- ⁸² See Thomas F. Cotter, 'Is Global FRAND Litigation Spinning Out of Control?' (2021) P-O LJ 1.
- ⁸³ See Geradin and Katsifis (n 23).
- ⁸⁴ See Contreras (n 2).
- ⁸⁵ See Justus and others Group of Experts on Licensing and Valuation of Standard Essential Patents—Contribution to the Debate on SEPs. (January 2021–E03600) (2021) <<https://ec.europa.eu/docsroom/documents/45217>> accessed 31 March 2023.
- ⁸⁶ It should be noted that the report's primary policy recommendations do not reflect the official position of the European Commission and are not legally binding. The experts' panel basically emphasised the need for improved SEP disclosure and greater validity chances for approved SEPs. In addition, it advocated for a shift toward greater collective industry actions, such as settling on aggregate royalty rates for a standard across product categories, coordinating at different tiers of supply chains to license SEPs, and forming patent pools and implementer licensing platforms. While these are positive developments, they have yet to be fully implemented. See Igor Nikolic and Niccolò Galli, 'The European Commission Expert Group's Take on Standard-Essential Patents: A Short Commentary for a Long Report', in Jarmila Lazikova, Lubica Rumanovska (eds) *EU Intellectual Property: Innovations and Intellectual Property in Various Fields of Human Life* (Slovak University of Agriculture in Nitra 2021).
- ⁸⁷ See Geradin and Katsifis (n 23).
- ⁸⁸ Raphael (n 17).

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