
Weaponizing Anti-Suit Injunctions in Global FRAND Litigation

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Abstract. Since Chinese courts issued a spate of anti-suit injunctions (“ASIs”) in licensing disputes between holders of standard-essential patents (“SEPs”) and implementers, there have been growing concerns about the weaponization of ASIs in the global SEP licensing battles on fair, reasonable, and non-discriminatory (“FRAND”) terms. This Essay will discuss how the aggressive use of ASIs by Chinese courts, along with their assertion of jurisdiction to set global licensing rates at abnormally low levels, contributes to this concern. It is not helpful, however, to cast the ASIs in purely geopolitical terms. More than anything else, ASIs are being used to gain an advantage in licensing negotiations, and they may perversely play a positive role in facilitating the settlement of FRAND disputes. Instead of trying to curb the use of ASIs per se, more attention needs to be paid to solving the forum shopping problem in global FRAND litigation that leads to the issuance of ASIs in the first place.

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Introduction

In recent years, as applications of newer-generation communications technologies blossomed in mobile devices, disputes over the licensing of Standard-Essential Patents (“SEPs”) at “fair, reasonable, and non-discriminatory” (“FRAND”) rates clogged the dockets of courts in major jurisdictions across the globe.¹ Due to the international character of the standards that govern technology, courts from different jurisdictions commonly render decisions that are inconsistent with one another on the same or similar issues.² Courts in major jurisdictions have rediscovered an archaic legal tool—anti-suit injunctions (“ASIs”)—to protect and strengthen their positions in the global jurisdictional battles on FRAND.³

This short Essay discusses the use of ASIs in global FRAND litigation. It first traces the history of ASIs in FRAND disputes, with an emphasis on the recent ASIs issued by Chinese courts. As shall become clear, Chinese courts have perfected the art of weaponizing ASIs in the global jurisdictional battles on FRAND. This Essay then evaluates the policy reactions to ASIs and explains why rhetoric that ASIs are proxy geopolitical struggles is overblown. This Essay finally discusses where ASIs will be headed. It argues that policymakers should focus more on the forum-shopping problem that led to the use of ASIs, instead of simply trying to pressure national courts out of using ASIs.

I. ASIs as a Legal Weapon

U.S. courts pioneered the use of ASIs in FRAND litigation. In 2012, the U.S. District Court for the Western District of Washington issued the first ASI in a FRAND-related dispute in the world in *Microsoft Corp. v. Motorola, Inc.*⁴ There, the court enjoined defendant Motorola from enforcing a patent infringement injunction it obtained from a German court after plaintiff Microsoft commenced the U.S. proceeding over the licensing of the same patents at FRAND terms.⁵ Since then, U.S. courts have granted ASIs in two

¹ King Fung Tsang & Jyh-An Lee, *The Ping-Pong Olympics of Antisuit Injunction in FRAND Litigation*, 28 MICH. TECH. L. REV. 305, 306–08 (2022).

² *Id.* at 307; see Leon B. Greenfield, Hartmut Schneider & Joseph J. Mueller, *SEP Enforcement Disputes Beyond the Water's Edge: A Survey of Recent Non-U.S. Decisions*, 27 ANTITRUST 50, 50 (2013).

³ George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589, 593–94 (1990); Tsang & Lee, *supra* note 1, at 326–27.

⁴ 871 F. Supp. 2d 1089, 1103–04 (W.D. Wash.), *aff'd*, 696 F.3d 872, 889 (9th Cir. 2012); Tsang & Lee, *supra* note 1, at 307 n.3.

⁵ *Motorola Corp.*, 871 F. Supp. 2d at 1103–04.

other high-profile FRAND disputes.⁶ In one of them, a U.S. court went so far as granting an ASI ordering the defendant to terminate all litigation pending anywhere else in the world over the SEPs at issue in that case.⁷

While ASIs have long been considered a legal “weapon” in global jurisdictional conflicts,⁸ U.S. courts have been relatively cautious in deploying that weapon in FRAND litigation. In *Apple Inc. v. Qualcomm Inc.*,⁹ for example, the U.S. District Court for the Southern District of California denied Qualcomm’s request for an ASI on grounds that the U.S. action would not dispose of foreign actions and that the effect of an ASI on international comity was not tolerable.¹⁰

Nonetheless, the issuance of ASIs by U.S. courts set a precedent for other jurisdictions to follow. One particular jurisdiction that has jumped on the ASI bandwagon is China, which, thanks to its growing role in international technical standardizations and its large manufacturing base that implements SEPs,¹¹ is a major stakeholder in the international legal regime on FRAND licensing.¹² In April 2018, a U.S. court granted an ASI enjoining China’s telecommunications giant Huawei from enforcing injunction orders issued by a Chinese court against Samsung.¹³ Shortly thereafter, China began to lay the groundwork for an ASI counteroffensive. In May 2020, the President of the Intellectual Property Chamber of China’s Supreme People’s Court (“SPC”) put forward a proposal to China’s National People’s Congress on special judicial procedures for intellectual property litigation, including the issuance of “act-preservation” orders functioning as anti-suit injunctions.¹⁴

The opening salvo of China’s ASI counteroffensive came several months later in the FRAND disputes between Conversant, a Luxembourg-based patent assertion entity, and Huawei.¹⁵ In July 2017, Conversant commenced SEP infringement proceedings in a UK court against Huawei.¹⁶ In January

⁶ See, e.g., *TCL Commc’n Tech. Holdings v. Telefonaktienbolaget LM Ericsson*, No. 14-cv-00341, 2015 U.S. Dist. LEXIS 191512, at *19 (C.D. Cal. June 29, 2015); *Huawei Techs. Co. v. Samsung Elecs. Co.*, No. 16-cv-02787, 2018 WL 1784065, at *1 (N.D. Cal. Apr. 13, 2018).

⁷ *Huawei*, 2018 WL 1784065, at *2, *12.

⁸ See Bermann, *supra* note 3, at 607.

⁹ No. 17-cv-00108, 2017 WL 3966944 (S.D. Cal. Sept. 7, 2017).

¹⁰ *Id.* at *10–12, *16–18.

¹¹ See Peter K. Yu, Jorge L. Contreras & Yu Yang, *Transplanting Anti-Suit Injunctions*, 71 AM. U. L. REV. 1537, 1571–75 (2022).

¹² See Tsang & Lee, *supra* note 1, at 326–27.

¹³ *Huawei Techs. Co. v. Samsung Elecs. Co.*, No. 16-cv-02787, 2018 WL 1784065, at *1 (N.D. Cal. Apr. 13, 2018).

¹⁴ See Yu et al., *supra* note 11, at 1539, 1578.

¹⁵ See *id.* at 1578–80.

¹⁶ *Huawei Techs. Co. v. Conversant Wireless Licensing S.A.R.L.* [2019] EWCA (Civ) 38 [18] (Eng.).

2018, Huawei brought an action against Conversant before the Nanjing Intermediate People's Court in China, requesting the court to declare that Huawei did not infringe the Chinese affiliates of Conversant's SEPs or, alternatively, to set the FRAND licensing rates for the Chinese SEPs.¹⁷ While the Nanjing court action was pending, Conversant filed an SEP infringement action against Huawei in a German court.¹⁸ In September 2019, the Nanjing court declined to issue a non-infringement declaration but established the FRAND licensing rates for Conversant's Chinese SEPs.¹⁹ On August 27, 2020, the German court granted an injunction order against Huawei for infringing Conversant's German SEPs.²⁰

The day after the German court issued its injunction against Huawei, China's SPC issued an ASI without Conversant's participation.²¹ The ASI prohibited Conversant from enforcing the judgement of the German court until the final resolution of the matter in Chinese courts, with a daily penalty of RMB one million for violating the ASI.²² The SPC reasoned that the ASI was necessary because the German court's injunction, along with its determination that Conversant's licensing offer to Huawei was on FRAND terms, would make it difficult to enforce the FRAND rates determined by Chinese courts.²³

While the ex parte nature of the SPC's ASI against Conversant raised procedural fairness concerns, the ASI was not extraordinary from a substantive legal point of view. The SPC did not enjoin the enforcement of judgements from UK court proceedings, which were instituted earlier than the Chinese court actions.²⁴ The SPC only enjoined the enforcement of the judgment of the German court proceedings, which Conversant instituted after the Nanjing court issued its judgment in an apparent attempt to gain

¹⁷ See Huawei Jishu Youxian Gongsi Su Kang Wensen Wuxian Xuke Youxian Gongsi (华为技术有限公司诉康文森无线许可有限公司) [Huawei Techs. Co. v. Conversant Wireless Licensing S.A.R.L.], 2019 Zui Gao Fa Zhi Min Zhong No. 732, 733, 734 (Sup. People's Ct. Aug. 28, 2020) (China) [hereinafter *Conversant (SPC)*], translated in Jason Rantanen, *Guest Post by Profs. Contreras and Yu: Will China's New Anti-Suit Injunctions Shift the Balance of Global FRAND Litigation?*, PATENTLY-O (Oct. 22, 2020), <https://perma.cc/3QJC-DRPM>.

¹⁸ See Mathieu Klos, *Conversant Wins in Germany with EIP Against Huawei and ZTE*, JUVE PATENT (Sept. 2, 2020), <https://perma.cc/49LH-F94Z>.

¹⁹ See *Conversant (SPC)*, supra note 17.

²⁰ See Landgericht Düsseldorf [LG] [Düsseldorf Regional Court] Aug. 27, 2020, 4b O 30/18, D-Prax (Ger.), <https://perma.cc/SL6T-4GRZ>.

²¹ See *Conversant (SPC)*, supra note 17.

²² See *id.*

²³ See *id.*

²⁴ There were no UK court judgements in *Conversant v. Huawei* at the time of the Chinese ASI. See *Huawei Techs. Co. v. Conversant Wireless Licensing S.A.R.L.* [2019] EWCA (Civ) 38 [18] (Eng.).

leverage against Huawei in their FRAND licensing negotiations.²⁵ Arguably, the SPC's ASI in this case was justified, as it sought to prevent litigants from using a later-filed foreign proceeding to interfere with the resolution of a pending dispute.

With the blessings of the SPC, local Chinese courts soon began to issue ASIs in earnest. On September 23, 2020, the Wuhan Intermediate People's Court issued an ASI in *Xiaomi v. InterDigital*,²⁶ following an action brought by Chinese cellphone maker Xiaomi against InterDigital in June 2020 to determine the FRAND license rates of the latter's global 3G and 4G SEP portfolios.²⁷ Prior to the issuance of the ASI, InterDigital had sued Xiaomi for SEP infringement in July 2020 in a court in India.²⁸ The ASI issued by the Wuhan court ordered InterDigital to withdraw or suspend the temporary and permanent injunctions it applied in the Indian court, subject to a RMB one million daily penalty for violating the ASI.²⁹ Notably, the ASI issued by the Wuhan court also prohibited InterDigital from applying for and enforcing temporary or permanent injunctions against Xiaomi in future proceedings in courts of China or other countries.³⁰ This prospective, worldwide ASI marks the great length to which the Wuhan court was willing to go to protect its turf in the global jurisdictional battle on FRAND.

The ASIs issued by Chinese courts since August 2020 are even more troubling when viewed in the context of Chinese courts' aggressive assertion of jurisdiction over FRAND disputes in the first place. In January 2020, Sharp Corp. sued Chinese cellphone maker Oppo in a court in Tokyo for infringing its SEPs relating to Wi-Fi and 3G and 4G telecommunications standards.³¹ While the Tokyo court action was pending, Oppo brought an action in the Shenzhen Intermediate People's Court against Sharp, asking the court to determine the global FRAND rates of Sharp's SEP portfolios and to declare that Sharp violated its FRAND obligations in its licensing negotiations with Oppo.³² The Shenzhen court asserted jurisdiction over the case, despite the

²⁵ See *Conversant (SPC)*, *supra* note 17.

²⁶ See *Xiaomi Tongxun Jishu Gongsi Su Jiaohu Shuzi Gongsi* (小米通讯技术公司诉交互数字公司) [*Xiaomi Comm'n Tech. Co. v. InterDigital Tech. Corp.*], 2020 E 01 Zhi Min Chu. No. 169-1 (Wuhan Interm. People's Ct. Sept. 23, 2020) (China), *translated in* Jason Rantanen, *Guest Post by Profs. Contreras and Yu: Will China's New Anti-Suit Injunctions Shift the Balance of Global Frand Litigation?*, *PATENTLY-O*, (Oct. 22, 2020), <https://perma.cc/3QJC-DRPM>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ See Press Release, Sharp Corp., *Sharp Files Patent Infringement Lawsuit Against Oppo Japan* (Jan. 30, 2020), <https://perma.cc/W578-YH8Q>.

³² See Bing Zhao, *Sharp vs Oppo Patent Dispute Spreads to China and Germany*, *IAM* (Mar. 10, 2020), <https://perma.cc/WP26-TURY>.

fact that Oppo did not allege infringement of any Chinese SEPs and the subject matter of the suit was purely a contractual matter.³³ Sharp was not domiciled in China, nor did it have any business operations in China.³⁴ The only connection Sharp had with China was that it once held negotiations with Oppo in Shenzhen on the licensing of its SEPs.³⁵ On August 29, 2021, the SPC affirmed the Shenzhen court's jurisdictional ruling.³⁶ The SPC held that the Shenzhen court had jurisdiction over the dispute because the plaintiff was domiciled in Shenzhen, the subject SEPs were implemented in Shenzhen, and the parties once held licensing negotiations in Shenzhen.³⁷ This jurisdictional ruling is extraordinary because, under its logic, Chinese courts will have jurisdiction over any FRAND disputes as long as the disputes are litigated in China between Chinese implementers and foreign defendants who have minimal contacts with China.

Not only did the SPC assert jurisdiction in *Oppo v. Sharp*,³⁸ but it asserted jurisdiction to determine the FRAND rates of Sharp's global, as opposed to Chinese, SEP portfolios.³⁹ The SPC held that given that the parties had the intention of negotiating a global license of Sharp's SEPs prior to the litigation, it "was not inappropriate" for Chinese courts to determine the global FRAND rates.⁴⁰ According to the SPC, this was because China was the locality that had a closer nexus to the dispute, given that the subject SEPs were implemented in China, the licensing negotiations were held in China, and the implementer's property was located in China.⁴¹ Having Chinese courts determine the global FRAND rates, therefore, would better facilitate the enforcement of the court judgments.⁴²

The SPC's assertion of jurisdiction to set global FRAND rates in *Oppo v. Sharp* is a radical departure from the international norms in FRAND litigation. Prior to *Oppo v. Sharp*, courts in other jurisdictions generally exercised restraint in asserting jurisdiction to set global FRAND rates.⁴³ The

³³ *Id.*

³⁴ See Xiapu Zhushi Huishe Su OPPO Guangdong Yidong Tongxin Youxian Gongsi (夏普株式会社诉OPPO广东移动通信有限公司) [Sharp Corp. v. OPPO Guangdong Mobile Telecomms. Co.] 2020 Zuigao Fa Zhi Min Xia Zhong No. 517 (Sup. People's Ct. Aug. 19, 2021) [hereinafter *Sharp (SPC)*], <https://perma.cc/ZFK9-4KAJ>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ See Garry A. Gabison, *A Two-Dimensional Approach to Non-Discriminatory Terms in FRAND Licensing Agreements*, 24 B.U. J. Sci. & Tech. L. 100, 120 (2018) ("Courts in Germany have usually steered

licensing of SEPs is inextricably intertwined with SEP infringement claims, which can be adjudicated only by courts in the jurisdiction in which the SEPs are granted.⁴⁴ In the United States, courts generally take the position that an SEP holder is not entitled to infringement injunctions because “FRAND commitments . . . strongly suggest that money damages are adequate to fully compensate . . . for any infringement.”⁴⁵ U.S. courts routinely undertake the task of determining global FRAND rates, but they do that with the consent of both parties, either to resolve claims of FRAND violations or to calculate the amount of damages for infringement claims.⁴⁶ Absent the parties’ consent, U.S. courts generally recognize that they lack the authority to set global FRAND rates.⁴⁷ In *Oppo v. Sharp*, however, China’s SPC emphasized that the parties’ consent was not necessary for a court’s jurisdiction on global FRAND rates.⁴⁸ According to the SPC, a court’s close nexus to the dispute, along with the parties’ past willingness to enter into global licensing negotiations, would be sufficient to confer jurisdiction to set global FRAND rates.⁴⁹

Granted, the SPC was not the first court to assert jurisdiction on global FRAND rates. In 2021, in *Unwired Planet International Ltd. v. Huawei Technologies Co.*,⁵⁰ a UK court calculated the FRAND rates of the plaintiff’s global SEP portfolios.⁵¹ The UK Supreme Court affirmed the UK court’s jurisdiction.⁵² There is a fundamental difference, however, between *Unwired Planet* and *Oppo*. In *Unwired Planet*, the UK Supreme Court only held that English courts have jurisdiction to grant an injunction against the infringement of a UK SEP unless the defendant implementer enters into a

away from setting rates.”); Jie Gao, Note, *Development of the FRAND Jurisprudence in China*, 21 COLUM. SCI. & TECH. L. REV. 446, 483 (2020) (noting that a U.S. district court required both parties’ consent to determine global FRAND rates).

⁴⁴ See King Fung Tsang & Jyh-An Lee, *Unfriendly Choice of Law in FRAND*, 59 VA. J. INT’L L. 223, 228 (2019); Jorge L. Contreras, *Global Rate Setting: A Solution for Standards-Essential Patents?*, 94 WASH. L. REV. 701, 722–23 (2019) (“On one hand, patents are artifacts of national law and, by definition, have force only in the jurisdiction in which they are issued.”).

⁴⁵ *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1332 (Fed. Cir. 2014).

⁴⁶ See, e.g., *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1038–39 (9th Cir. 2015); *In re Innovatio IP Ventures, LLC*, No. 11 C 9308, 2013 WL 5593609, at *1 (N.D. Ill. Oct. 3, 2013).

⁴⁷ See Gao, *supra* note 43, at 483.

⁴⁸ *Sharp (SPC)*, *supra* note 34.

⁴⁹ *Id.* The SPC’s partial reliance on the parties’ past willingness to enter into global licensing negotiations in asserting jurisdiction over global FRAND rates is disingenuous at best. If the intent of the parties should carry any weight in the deliberations on jurisdiction, the parties’ present intent of not agreeing to have the court set global FRAND rates, rather than the parties’ past intent of negotiating global FRAND rates, should be dispositive.

⁵⁰ [2017] EWHC (Pat) 2988 (Eng.), *aff’d*, [2020] UKSC 37.

⁵¹ See *id.* at [807].

⁵² See *Unwired Planet Int’l Ltd. v. Huawei Techs. Co.* [2020] UKSC 37, [97] (appeal taken from Eng.).

global license at FRAND rates determined by English courts.⁵³ Under *Unwired Planet*, therefore, UK courts exercise jurisdiction over global FRAND rates only in the context of enforcing injunctions against the infringement of UK SEPs, for which UK courts have inherent authority. But in *Oppo*, China's SPC affirmed jurisdiction over global FRAND rates with no infringement of Chinese SEPs at issue.⁵⁴ The jurisdictional link in *Oppo*, therefore, is much more tenuous than in *Unwired Planet*.

Finally, Chinese courts have consistently set FRAND rates much lower than those asked by SEP holders or those determined by courts in other jurisdictions.⁵⁵ In *Huawei Technologies Co. v. InterDigital, Inc.*,⁵⁶ the Shenzhen Intermediate People's Court determined a 0.019% FRAND rate for InterDigital's Chinese 2G, 3G, and 4G SEP portfolio.⁵⁷ This rate, according to industry experts, is "orders of magnitude lower than the single-digit percentage demands that have been common for holders of large portfolio of patents declared essential to telecommunications standards."⁵⁸ In *Huawei Technologies Co. v. Conversant Wireless Licensing*,⁵⁹ discussed above, the licensing rates offered by Conversant to Huawei for Conversant's 2G, 3G, and 4G SEP portfolio, which were determined by a German court to be on FRAND terms,⁶⁰ were 18.3 times the FRAND rates that were determined by the Nanjing Intermediate People's Court.⁶¹

By now, China has achieved a trifecta in its quest for dominance in the global jurisdictional wars on FRAND: an aggressive assertion of jurisdiction over SEP holders with minimal contacts with China, a tendency to set extraordinarily low FRAND rates, and a willingness to issue ASIs to prohibit SEP holders from enforcing judgments obtained from another jurisdiction. ASIs have become an important weapon in China's arsenal for this war.

⁵³ *Id.* at [49], [61].

⁵⁴ *Sharp (SPC)*, *supra* note 34.

⁵⁵ See Greenfield et al., *supra* note 2, at 53 & n.41; see also *Unwired Planet*, [2017] EWHC (Pat) 2988, [583] ("The comparable licenses show that rates are often lower in China than for the rest of the world.").

⁵⁶ The Shenzhen court's judgment in *Huawei v. InterDigital* was not published because the proceeding was subject to a confidentiality order. For a description of the proceedings from InterDigital see InterDigital, Inc., Annual Report (Form 10-K) 30–31 (Dec. 31, 2014), <https://perma.cc/CA4C-DWJX>.

⁵⁷ *Id.*

⁵⁸ Greenfield et al., *supra* note 2, at 53.

⁵⁹ 2019 Zui Gao Fa Zhi Min Zhong No. 732, 733, 734 (Sup. People's Ct. Aug. 28, 2020) (China).

⁶⁰ See Landgericht Düsseldorf [LG] [Düsseldorf Regional Court] Aug. 27, 2020, 4b O 30/18, D-Prax (Ger.), <https://perma.cc/SL6T-4GRZ>.

⁶¹ See *Conversant (SPC)*, *supra* note 17.

II. Reacting to ASIs

As discussed above, ASIs have been completely weaponized in the global FRAND wars. Initiated by U.S. courts and perfected by Chinese courts, the use of ASIs in FRAND litigation has become little more than an exercise of raw power in geopolitical struggles. As detailed below, the weaponization of ASIs has a tremendous impact on global FRAND licensing landscapes.

First of all, ASIs, particularly Chinese ASIs, limit SEP holders' ability to extract high royalties from their SEP portfolios. Everything being equal, the ASIs issued by Chinese courts—together with the low royalty rates set by Chinese courts—erode the royalty base that rewards innovations.⁶² Undoubtedly, this will have negative long-term consequences for innovators and consumers alike.

Because of their negative impact on innovations, the Chinese ASIs provoked strong reactions from proponents of strong intellectual property protection. In its 2021 Special 301 report, the Office of the U.S. Trade Representative characterized China's ASIs as "worrying" in the context of international trade.⁶³ In February 2022, the European Union filed a consultation request with China at the World Trade Organization ("WTO") regarding China's use of ASIs in FRAND litigation.⁶⁴ The EU alleges, among other things, that China's use of ASIs in the FRAND context restricts patent owners' exercise of exclusive patent rights and rights to conclude licensing contracts, both of which are protected under the WTO Agreement on Trade-Related Intellectual Property Rights.⁶⁵ Depending on how the WTO consultations unfold, they may lead to the establishment of a WTO dispute settlement panel that will hear the dispute.⁶⁶

China's ASIs have also elicited a legislative response from the United States. In March 2022, a bipartisan group of U.S. senators introduced the Defending American Courts Act, which would impose strong disincentives for actors seeking to enforce a foreign ASI in American courts.⁶⁷ Senator

⁶² See, e.g., FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (2003), <https://perma.cc/L4NM-8BS3>, as reprinted in 19 BERKELY TECH L.J. 861, 862 (2004) (explaining that the ability of patents to increase a firm's "expected profits . . . foster[s] innovation that would not occur but for the prospect of a patent.").

⁶³ OFF. OF THE U.S. TRADE REP., 2021 SPECIAL 301 REPORT 40 (2021).

⁶⁴ See Request for Consultations by the European Union, *China—Enforcement of Intellectual Property Rights*, ¶ 1.3, WTO Doc. WT/DS611/1 (Feb. 22, 2022).

⁶⁵ See *id.*

⁶⁶ WORLD TRADE ORGANIZATION, THE PROCESS—STAGES IN A TYPICAL WTO DISPUTE SETTLEMENT § 6.3 (2004), <https://perma.cc/PL9N-RRVB>.

⁶⁷ See Defending the American Courts Act, S. 3772, 117th Cong. (2022). The disincentives include, among others, barring a party who seeks to enforce a foreign ASI in an American court or the

Thom Tillis, one sponsor of the proposed legislation, characterized Chinese ASIs as “[t]he Chinese Communist Party’s attempt to make Chinese courts the world arbiter of intellectual property.”⁶⁸ Senator Tom Cotton, another sponsor of the bill, was similarly blunt, stating that “[w]e shouldn’t allow the Chinese Communist Party to use its corrupt courts to excuse the theft of American intellectual property.”⁶⁹

While national security is certainly an important consideration in the global FRAND wars, it is not helpful to cast ASIs in overly stark geopolitical terms. If the United States could blame Chinese ASIs for threatening the sovereignty of U.S. courts, the same criticisms could certainly apply to ASIs issued by U.S. courts (albeit to a lesser degree because U.S. courts have exercised restraint in issuing ASIs).⁷⁰ Furthermore, treating ASIs merely as an extension of the U.S.–China power struggle shies away from the fundamental question in the FRAND debates: At what levels should FRAND rates be set to strike a balance between protecting innovation and protecting affordable access? One cannot answer this question purely from an innovator’s perspective or purely from an implementer’s perspective. An extremely low FRAND rate set by a court favoring the implementer will be just right for the implementer, and an extremely high FRAND rate set by a court favoring the innovator will be just right for the innovator. The proper FRAND rate has to be somewhere in between the innovator’s rate and the implementer’s rate.

Therefore, it is important to see the real nature of ASIs where it lies: more than anything else, ASIs are one tool out of many potential tools to extract concessions in SEP licensing negotiations. An ASI, coupled with a specific court-determined FRAND rate, serves as a reference point for the eventual FRAND rate to be agreed upon in licensing negotiations.⁷¹ In addition to providing informational values, an ASI-backed, court-determined

International Trade Commission from mounting a validity challenge against the disputed patent at the U.S. Patent and Trademark Office. *See id.* § 2(a).

⁶⁸ *See* Press Release, Thom Tillis, North Carolina Senator, United States Senate, Tillis, Coons, Cotton, Hirono, and Scott Introduce Bipartisan Bill to Prevent the Chinese Communist Party from Stealing American Intellectual Property (Mar. 10, 2022), <https://perma.cc/M5XT-9CZ9>.

⁶⁹ *Id.*

⁷⁰ *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1354 (6th Cir. 1992) (“Comity dictates that foreign antisuit injunctions be issued sparingly and only in the rarest of cases.”); *Apple Inc. v. Qualcomm Inc.*, No. 17-cv-00108, 2017 WL 3966944, at *18 (S.D. Cal. Sept. 7, 2017).

⁷¹ A U.S. court once observed that “[a]ll the Court’s determination of a FRAND rate would accomplish would be to give a data point from which the parties could continue negotiations.” *InterDigital Commc’ns, Inc. v. ZTE Corp.*, No. 13-CV-00009, 2014 WL 2206218, at *3 (D. Del. May 28, 2014).

FRAND rate also functions as a hard constraint on the parties' bargaining positions in FRAND licensing negotiations.⁷²

Viewed in this light, ASIs may play a perversely positive role in FRAND licensing negotiations. The ultimate goal of the innovator is not necessarily to win FRAND lawsuits, but to reach licensing agreements with the implementer. One major risk the innovator faces in FRAND litigation is the loss of revenues from a protracted licensing dispute. For instance, in April 2021, Ericsson, a major SEP holder, reported an income drop of more than 60% amid the company's licensing battles with Samsung.⁷³ After Ericsson reached a settlement with Samsung to end all licensing litigation in May 2021,⁷⁴ the company reported strong growth in licensing revenues in the following quarter.⁷⁵ Dueling ASIs can force parties in a licensing dispute to return to the negotiating table, knowing that neither will win by pursuing litigation in their preferred forum. This will facilitate the settlement of the disputes through compromises. It is not a coincidence that less than two months after Oppo secured an ASI in its Chinese litigation against Sharp, the two sides reached a settlement to end their global patent disputes.⁷⁶

III. Whither ASIs

It has been relatively quiet on the ASI front since the initial outburst of ASIs issued by Chinese courts in 2020. The worst fears about ASIs may not become reality, as there is a self-limiting factor that counteracts against the tendency to use ASIs to blatantly favor the implementer. That self-limiting factor is the evolving SEP landscape where Chinese companies are fast becoming major SEP holders in addition to being SEP implementers. Until the early 2000s, most declared SEPs were filed in the United States, Europe, and Japan, but since then the Asian markets have been increasing in size and activity.⁷⁷ The share of SEPs filed in the United States decreased from around

⁷² See *Apple, Inc. v. Motorola Mobility, Inc.*, 11-CV-178, 2012 WL 5416931, at *1 (W.D. Wis. Nov. 2, 2012) (describing a court-determined FRAND as something that "may be used solely as a negotiating tool between the parties" and which "would likely be used simply as a starting point for future negotiations").

⁷³ See Richard Lloyd, *Ericsson Sees Huge Hit to Licensing Revenues Thanks to Samsung Fight and Huawei Sales Slump*, IAM (Apr. 22, 2021), <http://perma.cc/QVB5-XYDQ>.

⁷⁴ See Press Release, Ericsson, *Ericsson and Samsung Sign Global Patent License Agreement* (May 7, 2021, 6:00 AM), <https://perma.cc/V4NP-3K6D>.

⁷⁵ See *Ericsson Third Quarter Report 2021*, FIN. TIMES (Oct. 19, 2021), <http://perma.cc/SYL3-FKFS>.

⁷⁶ See Aaron Wininger, *China's Supreme People's Court Affirms Right to Set Royalty Rates Worldwide in OPPO/Sharp Standard Essential Patent Case*, CHINA IP L. UPDATE (Sept. 5, 2021), <https://perma.cc/RK99-B98V>; Press Release, Sharp Corp., *Sharp and OPPO Sign a Cross License Agreement and End Global Patent Disputes* (Oct. 8, 2021), <http://perma.cc/6S7Y-42JN>.

⁷⁷ See Tim Pohlman, *Landscaping Standard-Essential Patents*, IAM (Dec. 1, 2015), <https://perma.cc/B2G4-2KS5>.

90% in 1992 to less than 30% in 2015.⁷⁸ For certain wireless communications SEPs, Chinese companies such as Huawei and ZTE have become top owners.⁷⁹ As Chinese courts establish a reputation of being much more friendly to implementers than their Western counterparts, they are already attracting foreign implementers to litigate their FRAND disputes there. For instance, in December 2020, Samsung filed a complaint in the Wuhan Intermediate People's Court against Ericsson, asking the court to determine the FRAND rates of Ericsson's global SEP portfolios.⁸⁰ Neither Samsung nor Ericsson was based in China; Samsung chose China as the jurisdiction to litigate their global FRAND disputes due to procedural and substantive advantages associated with Chinese court proceedings, independent of any "home court advantage."⁸¹ As China moves further up the SEP ownership ladder, it is not inconceivable that foreign implementers may choose to litigate FRAND disputes in Chinese courts against Chinese SEP holders. That prospect may give pause to Chinese courts that may otherwise use ASIs and low FRAND rates to favor implementers.

That said, it is unrealistic to expect an immediate cessation of the use of ASIs. As long as multiple fora exist, parties to FRAND disputes will want to seek advantages through forum shopping, necessitating the use of ASIs in some forms. Absent some radical interventions, ASIs are probably here to stay in global FRAND licensing disputes.

As discussed above, the policy response to ASIs has focused on their negative impact on innovation. The problem with ASIs, however, does not lie with ASIs themselves; the problem lies with the divergent FRAND rates determined by courts in multiple jurisdictions and the arbitrage opportunities they create. The better policy response, therefore, is not to focus on ASIs per se, but to address the divergence of FRAND determinations in multiple jurisdictions and the availability of multiple fora in the first place.

There have been many proposals floating around to address the forum-shopping problem that led to the ASIs. One proposal is to establish a global FRAND rate-setting tribunal that determines the aggregate value of patents covering a particular standard and allocates that value among individual SEP holders.⁸² Another proposal is for national courts to voluntarily exercise judicial restraint and limit their assessment of FRAND rates to rates

⁷⁸ *Id.*

⁷⁹ See DIETER ERNST, CTR. FOR INT'L GOVERNANCE INNOVATION, CHINA'S STANDARD-ESSENTIAL PATENTS CHALLENGE: FROM LATECOMER TO (ALMOST) EQUAL PLAYER? 10 (2017) ("For 4G LTE and LTE Advanced standards, Huawei and ZTE are now the second and third top SEP owners, ahead of Nokia, LG, and Samsung.")

⁸⁰ See *Ericsson, Inc. v. Samsung Elecs. Co.*, No. 20-CV-00380, 2021 WL 89980, at *1 (E.D. Tex. Jan. 11, 2021).

⁸¹ Yu et al., *supra* note 11, at 1585.

⁸² See Contreras, *supra* note 44, at 712, 756–57.

applicable only to patents within their own jurisdictions.⁸³ Yet another proposal is to include an exclusive forum selection clause in the policy documents of standard-setting organizations to reduce undesirable transaction costs stemming from ASIs and subsequent legal actions.⁸⁴ To the extent that such proposals could be implemented, the use of ASIs might conceivably be curtailed. It makes sense, therefore, to channel more policymaking efforts into building consensus around these reform proposals, instead of simply trying to pressure national courts out of using ASIs.

Conclusion

The aggressive use of ASIs by some courts, particularly Chinese courts, in the global FRAND war has been concerning. However, rhetoric casting ASIs as geopolitical power struggles between the United States and China is overblown. Instead of trying to curb the issuance of ASIs, policymakers need to focus on solving the forum shopping problem in global FRAND litigation that leads to the issuance of ASIs in the first place.

⁸³ See Jorge L. Contreras, *Anti-Suit Injunctions and Jurisdictional Competition in Global FRAND Litigation: The Case for Judicial Restraint*, 11 N.Y.U. J. INTELL. PROP. & ENT. L. 171, 182–84 (2021).

⁸⁴ See Tsang & Lee, *supra* note 1, 370–76.