

A Study on the Application of Anti-Suit Injunctions in Standard-Essential Patent Litigation in China

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Abstract: In recent years, disputes between Standard-Essential Patent (SEP) holders and implementers concerning patent validity and compliance with FRAND licensing commitments have intensified. Chinese parties have frequently faced anti-suit injunctions (ASIs) issued by courts in UK, US and other countries in transnational disputes over Standard Essential Patents (SEPs). In response, Chinese courts have issued ASIs in six SEP-related cases by invoking behavior preservation measures. At the institutional level, China's Civil Procedure Law still lacks explicit provisions establishing the ASI as a distinct legal instrument, and the existing behavior preservation system provides an insufficient doctrinal foundation for ASIs. At the practical level, the application of ASIs in Chinese judicial decisions lacks uniformity and clarity, with most rulings offering limited concrete analysis of the principle of international comity. China should systematically develop a coherent legal framework for ASIs through future legislation and judicial interpretations, clarifying the relevant factors for granting ASIs, application procedures and consequences for non-compliance. Simultaneously, judicial opinions should elaborate more thoroughly on the role of comity in ASI issuance.

Keywords: Anti-Suit Injunction (ASI); Anti-Anti-Suit Injunction (AASI); Behavior Preservation; Standard Essential Patent (SEP); Jurisdictional Competition

1 Introduction

An Anti-Suit Injunction (ASI) is a restrictive order issued by a national court prohibiting a party from initiating or continuing proceedings in a foreign court concerning a matter that is identical or substantially similar to a pending domestic case. Broadly defined, ASIs typically encompass three types: the ASI in a narrow sense, anti-enforcement injunctions, and anti-anti-suit injunctions (AASIs). A narrow-sense ASI refers to a court order restraining a party from pursuing litigation in a foreign court. An anti-enforcement injunction directs a party not to seek recognition or enforcement of a foreign judgment. An AASI refers to a court order compelling a party to withdraw its application for an ASI or refraining from applying for the enforcement of an ASI issued by a foreign court. It is important to note that an AASI targets only extraterritorial ASIs and does not affect the validity of judgments or rulings rendered by foreign courts.

The function of an ASI is to prohibit parties from litigating in foreign courts, thereby actively "seizing" jurisdictional authority. This contrasts with the doctrine of forum non conveniens, which has been adopted in China's judicial practice. The doctrine of forum non conveniens, as provided in Article 282 of the newly revised Civil Procedure Law of the People's Republic of China, reflects a passive "yielding" of jurisdictional authority. Some scholars argue that since the controversial doctrine of forum non conveniens has been accepted by Chinese courts, the ASI mechanism should likewise be recognized. The ASI regime and the forum non conveniens doctrine are functionally complementary, serving offensive and defensive purposes, respectively. When a foreign court's exercise of jurisdiction is manifestly inappropriate, Chinese courts may issue an ASI to safeguard the interests of Chinese parties and protect judicial sovereignty.

Conversely, when adjudication by a Chinese court would be significantly inconvenient, the court may employ the *forum non conveniens* doctrine to limit its own jurisdiction and reduce the judicial burden.

Chinese parties have both actively applied for ASIs from foreign courts and frequently been subject to ASIs issued by foreign courts. At present, China's Civil Procedure Law only incorporates the *forum non conveniens* doctrine but lacks a systematic ASI regime. This results in a structural imbalance in China's framework for coordinating jurisdiction in foreign-related cases. Therefore, China should establish an ASI mechanism through future legislation, creating a complementary system alongside the existing *forum non conveniens* doctrine to fully address parallel proceedings in foreign-related civil disputes. Since 2020, with the increasing number of SEP dispute cases accepted by Chinese courts, scholars predominantly focus on discussing the principles and conditions for granting ASIs. There remains a scarcity of concrete proposals regarding how to operationalize the specific review rules within judicial interpretations. Drawing upon the criteria established in Anglo-American jurisprudence for issuing ASIs and incorporating analysis of recent cases, this article examines both the necessity of constructing China's ASI regime and the inadequacies in the judicial reasoning concerning the principle of international comity. It aims to provide valuable insights for the future formulation of detailed rules governing the review of ASIs in China.

2 Standards and Judicial Practice for Granting ASIs in the UK and the US

2.1 The ASI Regime in the United Kingdom

The United Kingdom is the birthplace of the ASI, with its institutional origins traceable to the medieval period, where it initially functioned to resolve jurisdictional conflicts between royal courts and ecclesiastical courts. Following the establishment of the Court of Equity, the ASI was employed by equity courts to restrain the jurisdiction of Common Law Courts. The modern ASI regime was established by the English courts in *Bushby v. Munday*, used to prohibit the defendant from pursuing parallel litigation concerning the same matter in Scottish courts.

Currently, the primary legal basis for UK courts to issue ASIs is Section 37 of the Senior Courts Act 1981, which states: "The High Court may by order (whether interlocutory or final) grant an injunction...in all cases in which it appears to the court to be just and convenient to do so." Parties may apply to the court for an ASI pursuant to this provision. Additionally, Section 44 of the Arbitration Act 1996 provides that "...the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about...(e) the granting of an interim injunction or the appointment of a receiver." The court retains broad discretion in determining whether granting an injunction is just. Through long-standing judicial practice, English courts have established two core requirements for review: First, as established in *British Airways v. Laker Airways*, the applicant must demonstrate a legal right not to be sued in the foreign court. Such a right typically arises from an exclusive jurisdiction clause, a choice-of-court agreement, or an arbitration agreement designating the UK as the forum. Second, per *St Pierre*, the applicant must show that the foreign proceedings are "vexatious" or "oppressive". The principle for determining "vexatious or oppressive" conduct is whether the foreign suit is "against conscience, unjust, or unreasonable".

In UK judicial practice, *British Airways v. Laker Airways* is a landmark case. The House of Lords held unequivocally that where an applicant possesses a "legal right not to be sued in a foreign court" by virtue of an exclusive jurisdiction clause, an arbitration agreement, or another pact between the parties, the English court has the authority to issue an ASI. This ruling laid the groundwork for a series of subsequent related precedents. For instance, in "*The Angelic Grace*", a party initiated foreign proceedings in breach of an arbitration agreement. *Rix J.* held that both the main claim and the counterclaim arising from the incident

were subject to the arbitration clause and should be arbitrated in London; the charterer's litigation in Italy constituted a breach of contract. Similarly, in *Sohio v Gatoil*, a party initiated foreign proceedings in breach of a contractual jurisdiction agreement. Staughton J. stated that where a contract contained a jurisdiction clause providing for litigation in England, a party's pursuit of litigation in a forum other than the agreed one constituted "vexatious or oppressive" conduct; the court therefore enjoined the defendant from continuing the proceedings in Texas, USA.

2.2 The ASI Regime in the United States

Within the U.S. judicial system, the standards applied by courts in issuing ASIs can be broadly categorized into two approaches: some courts adopt a more permissive stance, known as the "liberal approach", notably exemplified by the Fifth, Seventh, and Ninth Circuit Courts of Appeals; others, including the First, Second, Third, Sixth, Eighth, and D.C. Circuits, adhere to a stricter "conservative approach".

2.2.1 The Liberal Approach

Under the liberal approach, a court may grant an ASI if the parties and the issues involved in the simultaneous proceedings are substantially the same, and the foreign litigation would undermine the prompt and efficient resolution of the dispute. Courts following this path typically engage in a balancing test based on principles of equity to determine whether the foreign proceedings are vexatious, oppressive, or potentially prejudicial. *Seattle Totems Club Inc. v. National Hockey League* is a seminal case where this liberal standard was applied. The federal district court granted the plaintiff's request for an ASI. On appeal, the Ninth Circuit affirmed, reasoning that the parallel proceedings in U.S. and Canadian courts concerning the same dispute would increase inconvenience and costs for the parties and witnesses, lead to procedural delays, and potentially result in conflicting judgments. Thus, enjoining the Canadian litigation was deemed necessary. The reasoning in this case has been profoundly influential and widely cited in subsequent similar rulings.

Building on this precedent, the U.S. Court of Appeals for the Ninth Circuit in *E. & J. Gallo Winery v. Gallo Cattle Co.* established a structured three-part test for issuing ASIs, known as the "Gallo Test". This test entails the following steps:

- (1) Substantial Identity: Determine whether the two sets of proceedings constitute parallel litigation by assessing whether the parties and the issues involved are substantially the same or highly related.
- (2) Necessity for Injunction: Evaluate the necessity for issuing the injunction, incorporating the "Unterweser factors" established by the Fifth Circuit in *Unterweser Reederei GmbH v. Zapata Off-Shore Co.* These factors include:
 - (i) whether the foreign action would frustrate a strong public policy of the forum court;
 - (ii) whether the foreign proceedings are vexatious or oppressive;
 - (iii) whether the foreign action threatens the forum court's jurisdiction in rem or quasi in rem; and
 - (iv) whether the foreign action prejudices other equitable considerations.

Notably, not all factors must be satisfied; the presence of even one may suffice.

(3) Impact on comity: Assess whether the degree of interference with principles of comity is acceptable (it is not required that comity remain completely unimpaired).

2.2.2 The Conservative Approach

The conservative approach places greater emphasis on the importance of comity and consequently sets a higher threshold for granting an ASI. Courts adhering to this stance generally hold that merely having the same parties or subject matter, or the inconvenience of a foreign forum, does not constitute sufficient grounds for issuing an injunction. Typically, a U.S. court will consider an ASI only if the foreign proceedings undermine the forum court's jurisdiction or jeopardize vital national policies.

Laker Airways v. Sabena Belgian World Airlines is a leading case exemplifying the application of the conservative approach in the United States. The U.S. Court of Appeals for the D.C. Circuit imposes strict conditions for issuance, requiring that the foreign litigation must infringe upon the U.S. court's in personam jurisdiction and that the domestic forum must possess exclusive jurisdiction over the relevant dispute.

In determining whether to issue an injunction, conservative courts often rely on the “China Trade factors”, established by the Second Circuit Court of Appeals. These factors build upon the *Unterweser* test by adding a fifth consideration: whether the foreign litigation would likely lead to procedural delays, litigation inconvenience, increased expenses, conflicting judgments, or encourage a “race to the courthouse”. Unlike the liberal method, the conservative approach requires a comprehensive weighing of all these factors. An injunction will be granted only if the justifications for it are sufficiently compelling to outweigh the deference ordinarily accorded to principles of comity.

2.3 Insights and Lessons from the Anglo-American ASI Regimes

The historical evolution and judicial practice of the Anglo-American ASI systems offer a highly valuable comparative law perspective for China. These extraterritorial experiences illuminate the core challenge of balancing judicial sovereignty with comity in the context of globalization. At the level of institutional reference, the technical approach of the common law system in translating abstract legal principles into operable review standards is noteworthy. The United Kingdom, through its dual requirements of “a legal right not to be sued abroad” and the “vexatious or oppressive” nature of foreign proceedings, and the United States, via multi-factor balancing methods like the “Gallo test” and the “China Trade factors”, have successfully established structured adjudicative frameworks. This element-based review model effectively enhances the predictability of legal application. Regarding value balancing, the Anglo-American ASI regimes demonstrate a capacity for flexibly handling complex cases. When exclusive jurisdiction clauses exist, English courts tend to uphold party autonomy through ASIs, considering it to take precedence over comity. In *Airbus Industrie GIE v. Patel*, the English court posited that the true requirement of comity is that the English court must have a sufficient interest in or connection with the matter. When assessing compliance with comity, English courts must evaluate connecting factors between the case and the forum, such as factors affecting convenience and expense, the law governing the relevant transaction, the location of property, and the residence or place of business of the parties.

However, the Anglo-American regimes also exhibit defects warranting vigilance. For instance, excessive judicial discretion can lead to inconsistent standards and legal uncertainty. English courts lack specific statutory criteria for assessing “convenience”, and its application in adjudication has not been consistently

impartial. In *Conversant v. Huawei & ZTE*, Huawei argued that the Chinese court was the more convenient forum, since sales of the patent-related products in the UK constituted an extremely low proportion of global sales. Despite the tenuous connection to the case and the obvious greater convenience of trial in China, the English court still maintained that it was the more appropriate forum, exemplifying excessive extraterritorial jurisdictional expansion. For another, the symbolic treatment of comity in practice is particularly concerning. Although Anglo-American precedents require judges to consider comity when granting ASIs, the established comity review models are characterized by a unilateral approach. They primarily focus on determining the necessity of a local remedy or the existence of a local jurisdictional interest, lacking the comparative balancing of national interests required by the principle of comity. The symbolic treatment of comity under the US liberal approach easily triggers international judicial conflicts, leading to a vicious cycle of AASIs.

In view of the experience and shortcomings of Anglo-American systems, China could draw on the element-based review model in constructing an ASI regime. Abstract concepts like the principle of comity could be transformed into operable standards for judicial practice by enumerating categorized factors and establishing a tiered review pathway. China must establish comity as a core criterion permeating all stages of the ASI review process. When assessing whether the requirements of comity are satisfied, courts should avoid unilateralism by examining not only sufficient connection of Chinese courts to the case, but also whether foreign courts have a stronger jurisdictional link to the dispute.

3 Judicial Practices Involving ASIs in Chinese SEP Litigation

Since 2020, Chinese courts have issued behavioral preservation rulings in six SEP disputes, functionally equivalent to ASIs. The landmark case of *Huawei v. Conversant* marked China's first ASI ruling. Subsequently, in *ZTE v. Conversant*, the Shenzhen Intermediate Court adopted the SPC's review framework and daily fine system. In *OPPO v. Sharp*, Shenzhen Intermediate Court became the first Chinese court to adjudicate the global FRAND licensing rate for SEPs. Then, *Xiaomi v. InterDigital* marked the first Chinese global ASI. Most recently, in *Huawei v. Netgear*, the SPC issued China's first AASI.

3.1 Huawei v. Conversant: China's First De Facto ASI Ruling

Beginning with the case of *Huawei v. Conversant*, Chinese courts started issuing ASIs in the form of behavior preservation rulings within SEP disputes. In January 2018, Huawei filed a suit with the Nanjing Intermediate People's Court, seeking a declaration of non-infringement of Conversant's patents and a determination of the royalty rates for the Chinese market. Subsequently, Conversant initiated patent infringement proceedings in Germany. After the Nanjing Intermediate Court determined the royalty rates and Conversant appealed, the German court ruled that Huawei had infringed the patents and ordered an injunction, setting a royalty rate approximately 18.3 times higher than that determined by the Chinese court. The Supreme People's Court of China (SPC) reasoned that allowing the enforcement of the German judgment would force Huawei to either accept excessively high royalty rates or withdraw from the German market. Consequently, it deemed it necessary to issue an ASI via the behavior preservation system, prohibiting Conversant from applying for the enforcement of the German injunction pending the final judgment in the Chinese proceedings.

This landmark case established a preliminary framework for reviewing ASI applications, outlining five key factors: the impact of enforcing the foreign judgment on the Chinese proceedings, necessity, balance of interests, public interest, and the principle of international comity. Non-compliance with the injunction was sanctioned by daily cumulative fines. The pressure exerted by this injunction ultimately facilitated a global

settlement between the parties. Later, in *ZTE v. Conversant*, the Shenzhen Intermediate Court applied the same review standard established by the SPC to issue a behavior preservation ruling, which also led to a settlement.

3.2 OPPO v. Sharp: China's First Global FRAND Royalty Rate Determination

In the aforementioned cases, Huawei and ZTE only sought determinations of royalty rates for the Chinese market. The first instance where a Chinese court asserted jurisdiction to set a global FRAND rate occurred in *OPPO v. Sharp*. During licensing negotiations, Sharp abruptly terminated discussions and sued OPPO for patent infringement in various jurisdictions, including Japan and Germany. In response, OPPO filed a lawsuit with the Shenzhen Intermediate Court. OPPO argued that Sharp was attempting to leverage multi-jurisdictional litigation to force OPPO into accepting unfavorable licensing terms. Therefore, OPPO requested the court to determine a global FRAND rate for the SEPs and to issue an injunction prohibiting Sharp from continuing its infringement lawsuits against OPPO in foreign courts.

Sharp challenged the court's jurisdiction, contending the dispute was fundamentally about tort infringement. The Chinese courts dismissed this objection, characterizing the core of the dispute as contractual in nature. The Shenzhen Intermediate Court held that it could properly exercise jurisdiction based on the “reasonable connection” to China, given the existence of sufficient connecting factors. In justifying its jurisdiction over the global FRAND rate, the court analyzed factors such as the intended scope of the parties’ negotiations, the countries where the patents were granted and their distribution, the sales volume of patented products in different countries, combined with the fact that the negotiation location and OPPO’s relevant property were situated in China. It concluded that the dispute had a “closer connection” to China. The Shenzhen Intermediate Court consequently issued an ASI against Sharp and rendered China’s first decision on a global FRAND royalty rate. This ruling was subsequently upheld by the SPC.

3.3 Xiaomi v. InterDigital: China's First Global ASI

In *Xiaomi v. InterDigital Inc. (IDC)*, Xiaomi applied to the Wuhan Intermediate Court for a determination of a global FRAND rate. IDC subsequently initiated patent infringement proceedings against Xiaomi at the Delhi High Court in India. Since the Chinese proceedings were commenced first, the Wuhan Intermediate Court regarded the Indian lawsuit as duplicative and obstructive to the ongoing proceedings in China. It therefore issued an injunction prohibiting IDC from seeking any ASIs or rulings on royalty rates against Xiaomi in any court worldwide concerning the patents in suit, under penalty of a daily fine of one million RMB. This marked the first global ASI issued by a Chinese court. It demonstrated the court's resolve to comprehensively prevent Chinese enterprises from suffering harm due to multiple foreign litigations. However, the use of global ASIs is rare among nations, and its exceptionally broad scope attracted criticism from the Indian court. In reaction to this injunction, the Indian court issued an AASI. The parties eventually reached a settlement.

3.4 Huawei v. Netgear: China's First AASI Ruling

The 2024 case of *Huawei v. Netgear* represents the most recent Chinese judicial decision involving injunctive relief in this context and notably marks China's first ruling explicitly categorized as an AASI. After repeated unsuccessful attempts to engage Netgear in patent licensing negotiations, Huawei filed SEP infringement lawsuits in China, Germany, and the Unified Patent Court (UPC). In response, Netgear initiated an antitrust lawsuit against Huawei in the United States and sought an ASI. Huawei, in turn, applied for AASIs in multiple jurisdictions, receiving support from the German courts and the UPC.

On December 22, 2024, the SPC issued an AASI. It ordered Netgear not to apply for or enforce any ASI in the United States or other foreign courts, mandated the withdrawal or suspension of any already-filed applications within 24 hours, and prohibited Netgear from applying for any further anti-anti-anti-suit injunction (AAASI) against this specific ruling. This judicial pressure prompted Netgear and Huawei to reach a global settlement in early January 2025. This resolution brought an end to all pending litigation between the parties across all jurisdictions, including China, Germany, the UPC, and the United States, concluding a dispute that had begun in 2022 involving multiple national courts.

4 Predicaments in the Application of ASIs in Chinese SEP Litigation

Significant Predicaments persist in current ASI issuance in the Chinese SEP Litigation. Consequently, the substantive standards, procedural rules, and stipulated consequences for violating ASIs in Chinese SEP litigation all require further refinement.

Regarding substantive standards, despite the 2023 revision of the Civil Procedure Law, China still lacks a dedicated statutory framework for ASIs. Current practice relies on the behavioral preservation system to achieve effects approximating those of ASIs. However, the legal foundation of the behavioral preservation system provides insufficient doctrinal support for ASIs, and its review framework is inadequate to meet the specific requirements of ASI applications. Furthermore, the applicable rules for ASIs in judicial decisions lack uniformity and clarity. Most rulings either lack a concrete analysis of international comity or conduct such analysis inappropriately.

Procedurally, all the above-mentioned courts denied hearings due to “urgent circumstances”, thereby failing to solicit the opinions of the respondents. Regarding consequences for violations, courts have uniformly applied a daily fine of RMB 1,000,000 without substantiating the legal basis for this specific amount.

4.1 Issues with the Substantive Standards for Anti-Suit Injunctions

4.1.1 The Behavioral Preservation System is Inadequate for ASIs

Article 103 of the Civil Procedure Law of China contains only a general provision on behavioral preservation, allowing courts to order a party to perform, or refrain from performing, a specific act to prevent “difficulties in the enforcement of a judgment or other harm to a party.” The factors for courts to consider when reviewing behavioral preservation applications are stipulated in Article 7 of the Judicial Interpretation on Behavioral Preservation issued by the SPC. However, these factors lack the international elements specific to ASIs and are thus insufficient to meet the requirements for granting an ASI.

While ASIs share similarities with the traditional behavioral preservation system, they differ fundamentally in their institutional function and scope of effect. In terms of function, ASIs can be used to protect both private interests and Chinese public policy interests. The latter function is absent in the behavioral preservation system, which was designed primarily for resolving domestic disputes. Consequently, the behavioral preservation system cannot fully substitute for the functions of an ASI. Regarding the scope of effect, behavioral preservation constitutes a provisional restriction on a party’s conduct, generally limited territorially. In contrast, the legal effects of an ASI extend abroad, indirectly interfering with foreign judicial proceedings and potentially triggering international jurisdictional conflicts. Many scholars argue that the behavioral preservation system was originally conceived to focus on the temporary balancing and protection of private interests between parties. In contrast, ASIs directly regulate a party’s litigation activities in foreign courts, which are acts of a public law nature. Therefore, the reliance by Chinese courts on the behavioral preservation system to issue ASIs has inherent limitations.

4.1.2 The Existing ASI Framework Provides Inadequate Consideration of International Comity

The principle of international comity is a crucial factor that should be considered in the process of issuing an ASI. In principle, courts should extend comity to foreign courts, issuing an ASI only when strict exceptional conditions are met. In *Huawei v. Conversant*, the SPC proposed a three-pronged test for considering international comity, encompassing the sequence of case filings, the appropriateness of jurisdiction, and the reasonableness of the impact on the proceedings and adjudication of the foreign court. Subsequently, only the ruling in *ZTE v. Conversant* analyzed international comity from these three aspects. The rulings in the other four ASI cases did not mention the principle of international comity, analyzing only the sequence of case filings. This renders Chinese ASIs less persuasive internationally and has frequently provoked AASIs from foreign courts.

First, the “first-filed” standard has led to inconsistencies. The SPC in *Huawei v. Conversant* explicitly treated the earlier filing of the lawsuit in China as justification for compliance with international comity. Subsequent rulings in *ZTE v. Conversant*, *Xiaomi v. InterDigital*, and *Samsung v. Ericsson* also cited the earlier filing of the Chinese lawsuit as grounds for finding the ASI consistent with international comity. However, *OPPO v. Sharp* presented a scenario where the foreign lawsuits were filed first. Sharp had initiated patent infringement proceedings against OPPO in multiple countries before OPPO filed the request for a global SEP license rate determination in a Chinese court. In this case, the Chinese court still issued an ASI, and its ruling mentioned neither the “first-filed” standard nor the principle of international comity, creating a contradiction with the standards applied in prior ASI rulings. This promptly triggered an anti-anti-suit injunction from an Indian court. Therefore, courts should not mechanically apply the “first-filed” standard as synonymous with international comity, as the first-seized court is not necessarily the most appropriate forum.

Second, most ASI rulings lack a comparative analysis of the jurisdictional appropriateness of different forums. Only in *OPPO v. Sharp* did the court provide a relatively detailed discussion on why the Chinese court had a “closer connection” to the dispute regarding the global FRAND rate. The court analyzed factors such as the intended scope of the parties’ negotiations, the countries where patents were granted and their distribution, the sales ratio of patented products in different countries, and combined these with the fact that the place of negotiation and the location of relevant assets were in China, concluding that the dispute had a “closer connection” to China.

Third, the application of global ASIs may excessively impact foreign court proceedings. Starting with *Xiaomi v. InterDigital*, Chinese courts began issuing preventative global ASIs alongside decisions on global SEP license rates. The territorial scope of these injunctions extends to potential litigation in any jurisdiction worldwide. In *Samsung v. Ericsson*, *OPPO v. Sharp* and *Huawei v. Netgear*, courts issued preventative global ASIs targeting litigation conduct that the parties had not yet initiated abroad. While this demonstrates the determination of Chinese courts to comprehensively prevent domestic enterprises from suffering harm due to multiple foreign lawsuits, the reasonableness of global ASIs, which entirely preclude adjudication by foreign courts, is questionable. A national court’s resolution of a global SEP licensing dispute does not wholly resolve issues concerning patent validity and compliance with FRAND obligations in all countries.

4.2 Issues with Procedures for ASI application and Consequences for Violating ASIs

Regarding the procedural application of ASIs, hearing procedures have been omitted in all existing Chinese

judicial practice concerning ASIs. This is based on Article 5 of the Judicial Interpretation on Behavioral Preservation, which stipulates that parties need not be heard in “urgent circumstances”. In *Huawei v. Conversant*, *Xiaomi v. InterDigital* and *Samsung v. Ericsson*, the courts issued ASIs without hearing the respondents’ opinions, citing “urgent circumstances.” While applications for ASIs are typically filed under the pressing threat of imminent harm, the current practice of Chinese courts in denying hearings based on overly simplistic reasoning may be criticized for providing insufficient protection for the respondent’s procedural rights. Future Chinese legislation and judicial interpretations should place greater emphasis on hearing procedures, adequately safeguarding all parties’ right to be heard and to participate in the proceedings.

Regarding the consequences for violating an ASI, the Supreme People’s Court ruled to impose a fine of RMB 1,000,000 per day for non-compliance in *Huawei v. Conversant*. Similarly, other Chinese courts also imposed daily fines of 1 million RMB. However, the rulings applying these daily fines uniformly fail to state the legal basis or reasoning for determining this specific fine amount. Article 114 of China’s Civil Procedure Law(as revised in 2023) stipulates the legal consequences for refusing to perform effective judgments or rulings, including fines, detention, and even criminal liability. Article 118 specifies that the amount of a fine against an entity shall be between RMB 50,000 and RMB 1,000,000. According to this provision, RMB 1,000,000 represents the maximum statutory fine for an entity. If the court is determining the fine amount based on Article 118 of the Civil Procedure Law, this needs to be explicitly stated in the ruling. Furthermore, a daily cumulative fine is distinct from a one-time penalty; the total amount accrues day by day, constituting a particularly severe sanction. The court must, considering the specific circumstances of the case, explain the necessity and proportionality of applying such a measure.

5 Pathways for Constructing China's ASI Regime

The current behavioral preservation system demonstrates a clear inadequacy in its legal foundation when dealing with ASI requests, which carry distinct characteristics of international public law. In the future, China should establish separate provisions for the substantive standards, procedural rules, and consequences for violating ASIs in legislation and judicial interpretations, tailored to the specific nature of ASIs. Based on the general principles of ASIs, the conditions courts must examine for issuing an anti-anti-suit injunction are fundamentally the same as those for issuing an ASI; thus, the review standards for ASIs can be applied by reference.

5.1. Refining the Substantive Standards for Applying ASIs

When establishing the substantive standards for ASIs in the future, China could add specialized clauses for ASIs, including anti-anti-suit injunctions, in Part IV of the Civil Procedure Law. These clauses should reference the general provisions on behavioral preservation, setting out requirements for security and timelines for ruling and execution. Subsequently, specialized judicial interpretations should be formulated to guide judges in reviewing the necessity and justification of ASIs in individual cases. Guided by the principle of international comity, these interpretations should clarify that courts must exercise caution and restraint when examining ASI applications and establish a concrete review framework.

First, the court shall determine the jurisdiction of the Chinese court and analyze its appropriateness. Since SEPs often involve multi-jurisdictional patent portfolios with globally dispersed connecting factors, positive jurisdictional conflicts arise when courts in different countries claim jurisdiction based on their respective procedural laws. Given the lack of a stable foundation for mutual judicial trust between China and many other countries, the first-filed rule cannot be mechanically applied to international parallel

litigation. Instead, interest balancing should be conducted utilizing the principle of the closest connection and the forum non conveniens doctrine, comparing the number and closeness of connecting factors in various countries. Issuing an ASI to restrict duplicative foreign litigation would not contravene international comity only if the Chinese court is a more appropriate forum than the foreign court.

Second, the court shall examine whether the foreign proceedings cause irreparable harm to the interests of a party or Chinese public interests, and whether the harm caused by issuing the ASI is less than the harm caused by not issuing it. Even if a Chinese court is the more appropriate forum, respect for foreign court proceedings is generally required under international comity. However, exceptions exist. An ASI may be necessary if foreign proceedings or judgments would severely harm the applicant's interests or domestic public interests. Furthermore, the harm resulting from not granting the ASI must outweigh the harm the ASI would cause to the respondent, satisfying the balance of interests.

Third, the court shall assess the reasonableness of the ASI's impact on foreign courts and appropriately determine its scope. Before prohibiting related foreign parallel proceedings, a Chinese court must confirm that it has already adjudicated the specific issues in dispute. It should not uniformly preclude the legitimacy of foreign courts adjudicating matters not addressed in its own judgment. Even if most patents in suit are Chinese patents, the validity of patents granted in other countries should be determined by the laws of those countries. If a global ASI must be issued, the court must clearly articulate the close connection between the subject matter of the foreign proceedings and the issues decided in the Chinese judgment, and whether the litigation purposes are identical. ASIs should primarily target litigation conduct that a party has already initiated in a specific foreign court and generally should not be extended to potential litigation conduct not yet commenced in numerous jurisdictions.

Last but not least, the court shall examine whether the ASI contradicts international treaties concluded or acceded to by China. Some bilateral judicial assistance treaties signed by China stipulate that the court first seized of a substantive dispute may refuse recognition and enforcement of judgments from the other party's court while its proceedings are pending; other treaties cite the existence of parallel litigation as grounds for refusing recognition and enforcement, regardless of which court was seized first. Having signed the 2005 Hague Choice of Court Agreements Convention, China must respect the validity of exclusive choice-of-court agreements.

5.2. Improving the Procedures for ASI Application and Consequences for Violating ASIs

The procedural rules for ASIs can be designed by drawing on Article 4 (application procedure), Article 5 (hearing procedure), and Article 11 (security requirement) of China's Judicial Interpretation on Behavioral Preservation. The application procedure for ASIs should provide clear guidance for applicants. When presenting the facts and grounds for the application, the details of the foreign-related civil dispute, the progress of the foreign proceedings, and the potential harm to the applicant's lawful rights and interests and public interest must be explained. The hearing procedure for ASIs must fully protect the parties' right to be heard. Courts may employ written review in urgent circumstances to enhance efficiency but must ensure the respondent has a sufficient opportunity to submit written opinions. For complex cases involving significant public interests, courts should hold public hearings, allowing parties and the public to express their views. The security requirements for ASIs can adopt the provisions for behavioral preservation. Traditional behavioral preservation mechanisms require the applicant to provide security. In *Huawei v. Conversant*, the Industrial and Commercial Bank of China Shenzhen Huawei Sub-branch provided security equivalent to the amount claimed by Conversant, sufficient to protect the interests of the

respondent. A security requirement should also be incorporated into the ASI system.

To ensure the effectiveness of ASIs, it is essential to establish deterrent legal consequences for respondents who violate them. The innovative use of daily fines by Chinese courts has already had a deterrent effect, as seen in *OPPO v. Sharp*, where Sharp withdrew its AASI application under the pressure of daily fines imposed by the Shenzhen Intermediate Court. Currently, Articles 114 and 118 of China's newly revised Civil Procedure Law stipulate that fines or detention may be imposed on parties who refuse to perform effective judgments or rulings, specifying fine ranges for individuals and entities and detention periods. However, the existing legal provisions do not mention the practice of imposing cumulative daily fines. Consequently, the daily fines imposed by Chinese courts for violating ASIs lack a clear legislative basis. If Chinese courts wish to continue applying daily fines in future ASI rulings, it would be preferable to explicitly establish a daily fine system within the relevant ASI rules. Furthermore, given the severity of daily fines, courts must be required to determine the daily amount reasonably based on the specific circumstances of each case, rather than uniformly setting it at 1 million RMB. In the future, when issuing ASIs, Chinese courts must carefully consider the fine amount based on the potential losses the parties might suffer and explicitly state the reasoning for the determined amount in the ruling, ensuring that the daily fine measure is both justified and proportionate.

6. Conclusion

In recent years, the application of ASI-related mechanisms by Chinese courts has occurred primarily in the realm of SEP disputes. As the international competitiveness of China's wireless communication enterprises continues to strengthen, disputes over SEP licensing fees with foreign patent holders have arisen frequently. Chinese companies have gradually become major participants in international parallel litigation in this field. ASIs issued by foreign courts have severely impacted the civil litigation rights of Chinese parties and indirectly interfered with the jurisdiction of Chinese courts. Chinese parties urgently need the ASI mechanism as a tool to counter the threat of international parallel litigation.

Since Chinese legislation has not yet established a formal ASI regime, courts have resorted to issuing rulings in the form of behavioral preservation orders to achieve the effect of ASIs. The current practice of "borrowing" the behavioral preservation mechanism is provisional and lacks a solid jurisprudential foundation. In the future, the SPC could institutionalize the ASI through judicial interpretations, constructing a review framework that complies with the principle of comity, thereby providing clear guidance for judges in case-by-case adjudication. By refining the ASI system, China can enhance its international discourse power in the SEP domain and provide more effective judicial protection for domestic enterprises, thus safeguarding national interests and the legitimate rights and interests of companies in global competition.

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