

Research on the Systematic Positioning of Anti-Suit Injunctions in China's Foreign-Related Intellectual Property Litigation

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Abstract: This paper explores the systematic positioning of anti-suit injunctions (ASI) in China's international intellectual property litigation. It begins by tracing the origins of ASIs and their evolution into international legal tools. The paper then examines the current application of ASIs in China, where they are substituted by behavioral preservation measures due to the lack of specific legal provisions. The challenges of this substitution are discussed, highlighting the differences between ASIs and behavioral preservation in terms of legal effects, discretionary scope, and deterrence. The paper argues for the establishment of an independent ASI system within China's legal framework to effectively manage international jurisdictional conflicts and protect intellectual property rights.

1. Origins of Anti-Suit Injunctions

The modern concept of anti-suit injunctions (ASIs) typically emerges from the perspective of international litigation, where a court of one country issues a restrictive order against the opposing party under its jurisdiction, preventing them from pursuing litigation or arbitration elsewhere.^[1] The ASI system originated in the United Kingdom, evolving from domestic anti-suit injunctions, which prohibit litigation in other domestic courts, to international anti-suit injunctions, which prevent litigation in foreign courts.^[2] Broadly speaking, the ASI system also includes anti-anti-suit injunctions and anti-anti-anti-suit injunctions, among others. As the names suggest, an anti-anti-suit injunction is a countermeasure against an ASI issued by a court in another country, while an anti-anti-anti-suit injunction is a countermeasure against an anti-anti-suit injunction... This also reflects the chaotic "war" of endless ASIs.

2. The Current Application of Anti-Suit Injunctions in China's Foreign-Related Intellectual Property Litigation: Substitution by the Behavior Preservation System

China's current legal framework does not specifically provide for ASIs, nor does it explicitly stipulate the conditions for their issuance in any laws or judicial interpretations. However, the behavior preservation system shares some similarities with ASIs in terms of content and legal effects. Therefore, the current practice of issuing ASIs by courts in China is primarily based on the

behavior preservation provisions in the Civil Procedure Law of the People's Republic of China (hereinafter referred to as the Civil Procedure Law), supplemented by considerations of international comity when reviewing applications for intellectual property behavior preservation, to meet the demand for ASIs.

Article 72 of the Patent Law of the People's Republic of China^[1] and Articles 103 and 104 of the Civil Procedure Law provide for the corresponding behavior preservation system. In summary, behavior preservation in China is essentially a temporary measure, where, before or during a lawsuit, the court orders one party to take or refrain from certain actions, based on an application by the other party, to ensure the smooth execution of future judgments and to prevent the expansion of losses. The provisions of behavior preservation apply to the entire field of civil litigation, making them more generalized.

3. Issues Related to Anti-Suit Injunctions in China's Foreign-Related Intellectual Property Litigation: The Inadequacy of Behavior Preservation to Cover the ASI System

Regarding the introduction of ASIs, many viewpoints currently support the legislative subsidiarity theory, suggesting that behavior preservation should be broadly interpreted to cover ASIs. However, broad interpretation always brings unease: if the legislative provisions on behavior preservation are already recognized as vague, then a cautious approach is warranted when interpreting such a legally ambiguous system.^[3] In fact, what is crucial is not the overlap between behavior preservation and ASIs, but rather their differences, which are key to distinguishing between the two systems and recognizing the value each one offers. Specifically:

Firstly, the legal effects of the two systems differ. Some scholars believe that the goal of behavior preservation is to ensure the final execution of civil judgments and to prevent creditors from suffering irreparable harm due to the improper actions of debtors.^[4] ASIs also aim to reduce damage to creditors and can thus be seen as part of the second goal of behavior preservation.^[5] However, the value of ASIs extends beyond this. Besides imposing mandatory constraints on the legitimate litigation rights of parties, the significance of ASIs in current international judicial practice lies in their function of mediating international parallel litigation. While ASIs protect the plaintiff's litigation rights in the issuing country, their broader institutional function is to coordinate international parallel litigation, ultimately aiming to resolve jurisdictional conflicts between courts in different countries—a value pursuit that behavior preservation, focusing on the temporary protection of the litigants' rights, cannot accommodate. This is also why the United States has adopted a proactive attitude towards ASIs, with scholars noting that U.S. courts are not only ready but also willing to issue more aggressive ASIs in international cases to retain control over cases.^[6] Through in-depth analysis of functional characteristics, the substantial differences between the two systems' objectives become increasingly apparent, indicating that behavior preservation cannot achieve all the functions of ASIs.

Secondly, the scope of discretion in the two systems is substantially different. Behavior preservation aims to prevent one party's interests from suffering irreparable harm, with key factors including the appropriateness of the claim basis, the comparison of the damage to the parties' interests with or without behavior preservation, and the extent of damage to the public interest.^[2] Judges must weigh the damage claimed by both parties on a case-by-case basis.^[3] In summary, the

^[1] The patentee or an interested party who has evidence proving that another person is infringing or is about to infringe the patent, which would cause irreparable harm to the legitimate rights and interests if not stopped in time, may apply to the people's court before filing a lawsuit to take measures to preserve property, order certain actions, or prohibit certain actions.

^[2] See Article 7 of the Provisions of the Supreme People's Court on the Application of Law in the Review of Cases Involving Behavior Preservation in Intellectual Property Disputes.

^[3] See "Xiaomi Communication Technology Co., Ltd. v. InterDigital Corporation, Civil Ruling No. (2020) E 01 Zhi Min Chu 169 issued by Wuhan Intermediate People's Court, Hubei Province.

issuance of behavior preservation should follow the principles of minimal intervention and proportionality. However, ASIs restrict a party's legitimate right to litigation in a foreign country and ultimately deny their right to sue, making it evident that they do not conform to the principle of minimal intervention. In fact, given their effect, ASIs indirectly interfere with the jurisdiction of foreign courts.¹⁷¹ Their review involves issues of foreign courts' jurisdiction and judicial effectiveness, requiring a balance and fairness between the parties and the courts of both countries, rather than merely weighing harm and interest. Therefore, the discretion in ASIs and behavior preservation cannot be considered equivalent. Examining the practice of British and American courts, it is clear that the discretion to issue ASIs, which deprives parties of their right to litigation, lacks a single judicial guideline and often emerges through extensive case law. In contrast, the rules and application of behavior preservation in civil law systems are relatively stable. Similarly, the rules governing behavior preservation in China cannot accommodate the various application standards of ASIs, which originate from common law. The principles for issuing ASIs exceed the expectations of existing legislation.

Finally, from a deterrence perspective, the penalties for violating ASIs are minimal. According to Article 118 of the Civil Procedure Law, the maximum fine for violating an ASI is capped at 1 million yuan, which offers little deterrence in standard-essential patent cases where the stakes often exceed hundreds of millions of yuan. Moreover, if a foreign court issues an anti-anti-suit injunction in retaliation, the losses suffered by the respondent can be fully compensated in the foreign court's anti-anti-suit injunction case. Therefore, applying the distinct features of ASIs within the general framework of behavior preservation inevitably faces theoretical and logical challenges.

4. The Chinese Model and Response to Anti-Suit Injunctions in Foreign-Related Intellectual Property Litigation: Clarifying the Independent Systematic Position of ASIs

Introducing a new system in a civil law country requires careful arrangement of its corresponding legal framework. ASIs, on the one hand, contrast with the doctrine of *forum non conveniens*, together forming two pivotal legal tools for handling international parallel litigation; on the other hand, in the international judicial environment of intellectual property competition, ASIs can serve as an effective strategy to counter foreign monopolies on intellectual property rights. The reasonable use of ASIs can provide more efficient and predictable protection for Chinese enterprises, as well as foreign applicants seeking relief in Chinese courts. As long as their issuance adheres to strict conditions and procedural mechanisms, ASIs can certainly become part of China's strategic countermeasures in judicial practice. Given the important function of ASIs in international parallel litigation, it is necessary to clarify their systematic position in intellectual property litigation to ensure that their implementation is both reasonable and compliant with international standards.

Firstly, the issuance of ASIs must consider issues of international comity. The principle of international comity must always be considered in the issuance of ASIs. ASIs restrict foreign parties' rights to access justice in their home country. Therefore, the impact of an ASI on China's international relations should be carefully considered in each case, as ASIs could potentially lead to diplomatic disputes. A rigorous review of the jurisdictional basis is necessary before issuing an ASI, particularly in cases involving foreign-related elements. In particular, when issuing an ASI that targets ongoing foreign litigation, Chinese courts must demonstrate prudence and issue an order only when absolutely necessary.

Secondly, the legal basis and procedural requirements for issuing ASIs must be clear. Given the differences between ASIs and behavior preservation, the issuance of ASIs should be based on clearly defined legal provisions. Considering the deterrent effect and international nature of ASIs, their issuance should follow the principle of legal certainty, with explicit procedural requirements.

The court should consider the potential consequences of issuing an ASI, the jurisdictional basis for issuing the order, the specific circumstances of the case, and the potential impact on the opposing party. Furthermore, the issuance of ASIs should involve a higher level of judicial scrutiny, with careful consideration given to the impact on international relations and the principle of judicial restraint.

Finally, the penalty for violating an ASI should be proportional to its deterrent effect. To enhance the deterrent effect of ASIs, the penalties for violating an ASI should be proportional to the stakes involved in the case. Given the significant economic interests at stake in standard-essential patent cases, the current penalties under the Civil Procedure Law may be insufficient to deter violations. Therefore, it may be necessary to consider introducing more severe penalties for violating an ASI, such as the suspension of enforcement of foreign judgments or the imposition of higher fines. These measures would enhance the deterrent effect of ASIs and ensure that they are respected by parties involved in international intellectual property disputes.

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