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Summary Report

by Ralph NACK, Reporter General
Guillaume HENRY and Johanna FLYTHSTRÖM, Deputy Reporters General
Rafael ATAB, Klaudia BLACH-MORYSINSKA, Mamta RANI JHA, Yanfeng XIONG
Assistants to the Reporter General

2025 – Study Question

Preliminary Injunctions: Requirements for compensating damage suffered by Defendant

Introduction

This Study Question concerns the existence and nature of the plaintiff's liability for compensating damages suffered by a defendant, in case a Preliminary Injunction ("PI") is granted but the claims are ultimately dismissed (liability regime).

This Study Question will also address the balancing of the rights of the applicant and the defendant, while investigating the requirements for possible compensation. This may also include the extent and limits of damages and the concept of adequate compensation.

Furthermore, the Study Question will also review the standards and requirements for a court or other relevant authority to request a bond, a security or undertaking to compensate a defendant, as well as for setting a "sufficient amount".

The Reporter General has received Reports from the following Groups and Independent Members in alphabetical order: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China, Chinese Taipei, Czech Republic, Denmark, Ecuador, Egypt, Finland, France, Germany, Hungary, India, Indonesia, Italy, Japan, Latvia, Malaysia, México, Netherlands, Paraguay, Peru, Philippines, Poland, Romania,

Russia, Singapore, South Korea, Spain, Sweden, Switzerland, Thailand, Türkiye, United Arab Emirates, United Kingdom, United States, and Vietnam.

43 Reports were received in total. The Reporter General Team thanks the Groups and Independent Members for their helpful and informative Reports. All Reports may be in AIPPI's library at www.aippi.org.

The Reports provide a comprehensive overview of national and regional laws, practices, and policies relating to the requirements for compensating damage suffered by Defendant in the framework of Preliminary Injunctions, set out in three parts:

- Part I – Current law and practice
- Part II – Policy considerations and proposals for improvements of your Group's current law
- Part III – Proposals for harmonisation.

This Summary Report does not summarise Part I of the Reports received. Part I of any Report is the definitive source for an accurate description of the current state of the law in the jurisdiction in question.

This Summary Report has been prepared on the basis of a detailed review of all Reports (including Part I) but focuses on Parts II and III, given AIPPI's objective of proposing improvements to, and promoting the harmonisation of, existing laws. As it is a summary, if any question arises as to the exact position of a particular Group in relation to Parts II or III, please refer to the relevant Report directly.

In this Summary Report:

- references to Reports of or responses by one or more "Groups" may include references to Independent Members;
- where percentages of responses are given, they are rounded to the nearest 5%; and
- in Part IV below, some conclusions have been drawn in order to provide

guidance to the Study Committee for this Study Question.

I. Current law and practice

For the replies to Questions 1) to 17) set out in the Study Guidelines for this Study Question, reference is made to the full Reports. The Study Guidelines may be accessed in AIPPI's library at www.aippi.org.

Notwithstanding, all Groups mentioned that, in their respective laws and/or practices, applicant for a PI may be held liable for compensating damages suffered by Defendant, if certain requirements are met and/or under particular circumstances.

II. Policy considerations and proposals for improvements of your Group's current law

18. Could your Group's current law or practice relating to the requirements for compensating damage suffered by the defendant and related topics be improved? If yes, please explain.

A significant majority of the Groups which responded to this general question (41 Groups) answered YES (30 Groups, i.e. 75%), while 11 Groups (25%) answered NO.

However, among those who answered NO, a few Groups still believed that their law could benefit from some additional refinement in certain aspects. The Chinese Group, for instance, advocated for additional clarification on scope of compensation and methods for calculating compensation, as well as "further refinement of the discretionary criteria for the security amount required from the applicant". The German Group, on the other hand, shared some debates generated by this question, particularly on whether strict liability could be perhaps too harsh in certain situations.

With regard to those jurisdictions defending the need for additional improvements, Australia outlined that "It would be fairer and more efficient to introduce an assessment of foreseeable loss, and to require a bond to be posted which reflects that assessment", while Canada pointed out that "There is some discrepancy

between the presumptive entitlement to damages across Canada's provincial courts".

The need for additional clarity relating to certain aspects has been highlighted by multiple groups. The Latvian Group, for instance, underscores the need for clearer provisions on the civil liability regime, while jurisdictions such as United States, Spain, Italy and Japan advocate improvements on provisions relating to the requirement of bonds and/or counterbonds, including the determination of their amounts.

With regard to the groups that generally consider that no improvements are necessary, such perception apparently stems from the existence of appropriate levels of court discretion or flexibility, as it seems to be the case of the Argentinean, Brazilian, Singaporean and UK Groups.

19. Could any of the following aspects of your Group's current law relating to the requirements for compensating damage suffered by the defendant be improved? Please explain:

This question delves deeper into the previous one. Not surprisingly, a similar percentage of Groups have pointed out that at least one of the three main areas discussed below would call for improvements (70%, in a total number of 29 Groups).

(a) The existence or not of liability;

Among the Groups which indicated at least one of the three main topics under this question, 45% outlined that the existence or not of liability should be an important aspect to be improved.

Canada, for instance, calls for harmonization within its jurisdiction, while Chinese Taipei highlights that "*the standards for determining liability could be clarified, especially regarding whether negligence or strict liability applies in different circumstances*".

Furthermore, India outlines that statutory provisions could clarify "*how an applicant should be held liable for damages suffered by the defendant, thereby reducing uncertainty and ensuring fairness*", while the South Korean Group defends that additional criteria should exist for determining "*exactly in which cases an unjust preliminary injunction can be recognized*".

(b) The nature of such liability and limits thereof;

50% of the Groups called for improvements relating to the nature of such liability and limits thereof. The Polish Group highlights that "*considering the characteristics of IP rights' based PIs it would be advisable to consider inserting criteria specific for IP cases*", while the Hungarian Group advocates for the inception of the same legal regimes in all IP legislation, and not only in the Patent Act.

In addition, the Sweden Group, referring to their answer for Question 18, noted that the liability regime is unclear on whether it extends to other impacted entities (e.g., within the same corporate group) or affected third parties (like patients or regulators).

(c) The possibility of determining bonds and guarantees for securing a PI, and/or counter-bonds;

A substantial part (75%) of the Groups inviting improvements has identified the determination of bonds and guarantees as an area for improvement.

The Mexican Group, for instance, defends establishing clearer standards for setting bond amounts. Similar comments from resonate from Peru, China, Japan, Russia, Philippines, South Korea, the United States and Spain Groups, with Spanish members adding that "*there is room for improvement, especially with regard to the correct determination of the bond, as well as the simplification and greater efficiency in the subsequent procedure for the determination of damages*". In a similar trend, the Australia Group indicates that it would be "*fairer and more efficient to introduce an assessment of foreseeable loss and to require a bond to be posted which reflects that assessment*". The Italian Group, on its turn, suggests

the introduction of counterbonds as an appropriate improvement to the law, while the Chilean Group also suggested "*giving a broader application to the counter guarantee*".

According to the opinion of your Group, what is the policy rationale for compensating damages suffered by the defendant in case of a PI?

Most of the Groups seems to agree that a general policy rationale for compensating damages suffered by defendant in case of a wrongfully granted PI stems from general principles of fairness, justice and equity, and it involves the need for balancing the interests of both parties. It is therefore related to the need for balancing IP protection with principles relating to freedom to conduct business.

The Finland Group, for instance, outlines that "*PI proceedings are of summary nature*", adding that "*a court does not fully assess the merits, such as infringement and/or validity*". Based on similar understanding, the French Group underscores that "*provisional measures are always carried out at the plaintiff's own risk, which justifies compensation for damages suffered by the defendant when these measures are lifted or cancelled*". Such rationale is also shared by Belgium Group.

The deterrence of unjustified or potentially abusive PI applications is also explicitly cited in several reports, including, Belgium, Brazil, China, Egypt, Germany, Hungary, Latvia, India, Malaysia, Mexico, Peru, South Korea, UAE, and Vietnam Groups. In this connection, the Chinese Group points out that "*some companies may use the application for an injunction as a means to disrupt the normal operations of their competitors",* highlighting that "*establishing a compensation system for wrongful applications aims to compensate the respondent for the actual economic damages suffered due to the erroneous injunction application, which helps to maintain a fair competitive market order".* Furthermore, the German Group indicates that "*the defendant should not suffer unnecessary disadvantages in case of a PI*".

The United States Group underscores that "*A wrongfully issued PI restricts the defendant from performing acts it had a right to perform absent the plaintiff's*

demand for such an injunction before full adjudication of the merits of the case". The Swedish Group also adds that "*the freedom to conduct a business is a fundamental right",* while "*the issuance of a PI constitutes an exception to this constitutionally protected right and can have significant financial consequences for the defendant*.". The Polish Group further weighs in mentioning that "*even in the situation of the defendant's win, his market position might be hard to restore*". Citing an extreme example, the Austrian Group further reminds that the consequences of an unjustified PI "*cannot always be reversed*", such as in the case of bankruptcy of the defendant.

Finally, sharing an additional view, the UK Group indicates that "*The approach is compensatory based on contractual law principles. This is because in exchange for being granted equitable relief from the court, the applicant provides contractual assurances that if that equitable relief was wrongly granted they will compensate the respondent for damages flowing from the wrongly granted order*".

20. Are there any other policy considerations and/or proposals for improvement to your Group's current law falling within the scope of this Study Question?

While most Groups seem to have exhausted their comments in the previous questions, a few of them present additional comments on possible improvements.

The Chinese Taipei, for instance, advocates for a possible improvement with the "*introduction of a more streamlined process for assessing and awarding compensation in wrongful PI cases*", citing clearer procedural rules or the use of ADR (alternative dispute resolution) mechanisms as possible solutions.

Clearer guidelines for calculating and assessing damages and streamlined processes for compensation are cited, at least to a certain extent, by a few groups, such as Denmark, Ecuador, Egypt, India, Mexico, Peru, Philippines, and Switzerland.

Furthermore, the India Group lists other areas for improvement, including the

"integration of counter-guarantee mechanisms" and counter-bonds.

III. Proposals for harmonisation

21. Do you believe that there should be harmonisation in relation to the requirements for compensating damage suffered by Defendant and related issues, as well as in connection with the setting of bonds or guarantees?

A significant majority of the Groups (75%) agrees that harmonisation on such issue is desirable.

The German Group advocates harmonisation, as it may "*make risk assessments of multi-jurisdiction PI campaigns more efficient and predictable*", adding that it should "*improve efficiency and reduce costs for the users of the patent system*". The Chinese Group, for instance, underscores that harmonisation may be helpful in "*increasing the predictability of judgments and judicial credibility across different jurisdictions, reducing the compliance costs and legal risks for multinational corporations, and maintaining the consistency of rules for the global implementation of patent technologies*".

However, even among some of the groups which responded NO to this question, there is some recognition that harmonisation to certain extent may exist. For instance, the Bulgarian Group indicates that "*the harmonisation limit should be the existence of liability, not the requirements for compensating the damages as well as for setting of bonds or guarantees",* while the Dutch Group "*would however like to propose that compensating damages as a result of a PI that was unfounded should be the norm, and not an exception*".

Presenting a dissenting view, the Swiss Group states that "*while harmonization is generally desirable in IP laws, the Swiss Group is of the view that there is already a sufficient basis for harmonization in the TRIPS Agreement. More detailed rules are not desirable, as the structure of PI proceedings, costs and damages rules vary*

from country to country, and it does not seem justified to treat IP matters differently from other areas where unjustified PI measures may be granted."

Furthermore, presenting a sceptical view on harmonization on this subject, the Dutch Group shares its deep concerns on the potential "*implications for procedural and civil law more generally*". The Group explains that "*under current Dutch law the judge has a wide latitude to grant bonds or security and determine the damages to be awarded*", which "*allows for tailor-made solutions*", fearing, thus, that any harmonisation could impact such scenario.

22. Should the applicant for a PI be held liable for defendant's damages in case a PI is lifted or reversed?

Almost all Groups (95%) agree that the applicant for a PI should be held liable for defendant's damages in case a PI is lifted or reversed.

Once again, the primary justifications for holding the applicant liable include ensuring fairness, preventing abuse of the PI process, and correctly allocating the risk associated with obtaining an extraordinary remedy before a final decision on the merits.

While responding "No", the Peruvian Group clarifies that liability should not be a "by default conclusion", requiring the presence of some factors, requiring that "*malice or bad faith be demonstrated, along with the actual and quantifiable verification of damages incurred".* In concurring responses, the negative response from the Italian Group also has a caveat, as the group indicates that "*liability must certainly be asserted where bad faith, serious misconduct, spirit of emulation or dilatory purposes recurs, i.e. in case of abuse of the right of action*", while the UAE Group agrees that "evidence of abuse should be established".

23. Should a defendant need to request the court or relevant authority to decide on the liability of the applicant (that is, a court will not

automatically issue such a finding upon revocation of the PI)?

Although three Groups responded "No" to this question, a review of the full answers allows one to establish that the Groups unanimously (100%) consider that the defendant needs to request the court or relevant authority to decide on the liability of the PI applicant. That is, there is no automatic finding on the liability without the proper request.

In this regard, the Canada Group outlines that "*court proceedings are adversarial, and someone needs to bring an application, supported by evidence to show the damages suffered*", while the Argentina Group mentions that "*damages are not awarded automatically. They must be quantified and requested by the defendant*". The Danish Groups adds that a specific request is necessary for "*securing procedural fairness*". The German Group further indicates that this approach "*allows more efficient proceedings, e.g., settlements outside of the court with reduced costs (for the court and the parties) as no decision needs to be substantiated and issued*". Agreeing with such approach, the Swedish Group underscores that "*the liability, however strict, must be balanced by an obligation of the defendant to demonstrate the damages suffered as a result of the wrongful PI*".

In addition, the India Group indicates that "*PI reversal merely indicates that the underlying IP claim was not sufficiently substantiated or that the balance of convenience no longer favors the applicant; it does not by itself establish that the applicant acted with malice*", so that courts should "*require the defendant to file a specific motion seeking a determination of liability and the quantum of damages, rather than automatically imposing liability upon the mere revocation of the PI".*

Moreover, the United States Group also supports that a "*court should, upon application by the defendant, determine that the defendant was wrongfully enjoined and should determine the actual costs and damages suffered as a result".*

24. Should there be any particular time or moment for the defendant to request compensation?

(a) YES, as soon as the PI is lifted or revoked;

(b) YES, only after a final judgment is delivered;

(c) NO, at any time.

(d) Other. Please comment.

Based on the aggregated responses, the Groups seem to be quite split as to the appropriate timing for the defendant to request compensation, as follows:

(a) YES, as soon as the PI is lifted or revoked: 25%

(b) YES, only after a final judgment is delivered: 20%

(c) NO, at any time: 20%

(d) Other: 35%

Among those advocating for an immediate request, the Danish Group indicates that a short timeframe helps to "*secure procedural fairness*". The United States Group adds that "*the extraordinary nature of the injunctive relief requires diligence of all parties*", also indicating that there would be "*no justification for requiring the defendant to wait in seeking a remedy for a wrongfully issued injunction*". Malaysia Group also adds that "requiring the defendant to wait final judgment may frustrate the purpose of such undertakings and potentially exacerbate the harm suffered." While opting for this possibility, the Singaporean Group advocates that defendant should be allowed to seek damages either once the PI is lifted or following final judgment.

For those defending the need for waiting a final decision, certainty seems to be an important factor. The Polish Group defends the need for waiting, inasmuch as "A final court decision removes doubts as to the existence of an infringement of an IP right and allows a trial for damages to proceed without another (same) dispute over the existence of that infringement".

Some jurisdictions, however, defend that such claims may be done at any time. Germany highlighted that "*it should be on the defendant's discretion whether reclaiming damages is desirable to retrieve liquidity or whether reclaiming damages is postponed until a final judgment is delivered. However, the legal regulations governing statute of limitations shall apply. The limitation shall ensure legal certainty".* The Italian and Japanese Groups also defend similar approaches. Switzerland, while agreeing with such position, underscores that, in any case, such claims should be subject to the applicable statute of limitations.

Finally, for those describing alternative timings, some also retake the possibility of simply respecting the applicable statute of limitations, as it is the case for Argentina, China, Spain and Russian Federation Groups. In any case, the similar trend in the Groups' responses is that a decision on when to apply for damages should be made on a case by case basis or, as the UK Group outlines, "depending on the circumstances".

25. Should an applicant benefit from an exemption or safe harbour from any liability based on the fact that it holds a valid IP right and is reasonably exercising such lawful right?

The majority of Groups (80%) believe that holding a valid IP right and reasonably exercising it should not automatically provide an exemption or safe harbour from liability if a preliminary injunction is later lifted or reversed.

Supporting this trend, US Group, underscores that "preliminary injunctions are an extraordinary remedy, disrupting the business of a defendant before any finding of liability." The Group further adds that PI should therefore "*be available to plaintiffs to protect their legitimate interests, but plaintiffs should bear the risk of error in disrupting the legitimate business of a defendant*". Based on a similar rationale, the Canada Group comments that "*The quid pro quo is that the applicant takes the risk of damages improperly incurred by the defendant*".

The Chinese Group agrees with such approach, but it highlights that "*even if the applicant holds valid intellectual property rights and exercises them reasonably, it should not be exempted from liability*". However, the Group also argues that a court

should take into account "*circumstances mitigating liability due to the applicant's good faith in exercising of rights*".

In a similar fashion, the German Group outlines that such safe harbour could "*discriminate against the defendant that without any fault performs business and due to enforcement by the plaintiff is damaged*". However, the Group also indicates that "*all aspects should be considered by the court when deciding on contributory liability*", including possible false information provided by defendant. The Malaysia Group also advocates for similar mitigating effects, but the Group does not consider these to be safe harbours.

In addition, The Singaporean Group sustains that granting such an exemption ""*could encourage the misuse and/or abuse of IP laws through frivolous or unmeritorious PIs*".

Advocating on the behalf of a possible "safe harbour", the Ecuador Group defends that applicants in good faith and reasonably enforcing rights over valid IP rights should benefit from safe harbour, so as to "*encourage the legitimate enforcement of IP rights*", thus avoiding "*discouraging right holders from seeking preliminary injunctions out of fear of liability*". A similar position is adopted by South Korea. Furthermore, the Romania Group, on its turn, prefers not to discard a possible safe harbour, indicating that "it will depend on each case".

26. Should there be any differences in assessing the applicant's liability if the dismissal of the PI is based on a finding of invalidity or of non-infringement?

A solid majority of respondents (80%) believe that the reason for dismissing the PI should not automatically lead to differences in assessing the applicant's liability (e.g. if the dismissal is based on a finding of invalidity or of non-infringement.).

The Türkiye Group outlines that "there should not be any differences with respect to invalidity or non-infringement", inasmuch as liability concerns the financial or reputation harm of the defendant. In a similar manner, the Mexico Group indicates

that "*liability should refer exclusively to the damage caused to the defendant*", so that no differentiation should occur. UK also reminds that "*damage are non-punitive so the same broad discretion should apply*".

On the other hand, among the Groups defending a possible difference, Poland argues that "*the liability when the right is stated invalid should be higher/ more severe than in case of non-infringement finding*". The Malaysia Group also indicates that "*these two outcomes are distinct, and each carries different implications for evaluating the reasonableness of the applicant's conduct and the appropriate standard of liability*", a view that is, to certain extent, shared by the Hungary Group.

a. **Nature of Liability and limits thereof:**

27. Which should be the nature of the applicant's liability if the PI is lifted, and/or the applicant's claims are ultimately dismissed?

(a) Strict liability (that is, the applicant is liable for damages irrespective of proof of negligence, recklessness or intent to harm).
(b) Liability will depend on proof of negligence, recklessness or intent to harm.
(c) Liability will depend on proof of intent to harm or recklessness only.
(d) Liability will depend on proof of intent to harm only.
(e) Other (Please comment).

Nearly half (45%) of the Groups responded to this question selected answer (a), around one-third (35%) of the Groups selected answer (b), and around 15% of the Groups selected answer (e). Only one Group responded with answer (d). One of the Groups did not reach a clear consensus, indicating that part the Group supported answer (a) while the other part supported answer (e).

Groups favoured answer (a) generally hold the opinion that it would be unfair not to compensate the defendant for damages caused by the injunction even if the applicant acted in good faith. For example, the Swedish Group pointed out that

"*irrespective of the applicant's negligence, recklessness or intent to harm, the defendant should still be able to obtain compensation for the period during which it is ultimately found to have been wrongfully excluded from the market*". Strict liability may help to prevent the abuse of PI's by rights holders. For example, the Chinese Group indicated that "*given that the applicant is both the initiator and beneficiary of the preliminary injunction, subjecting the applicant to strict liability helps to compel the applicant to act prudently when requesting preliminary injunction and reduce the harm to others caused by abusive litigation*". On the side of effective enforcement of IP rights, the Dutch Group added that "*applying a strict liability regime contributes to the effective enforcement of IP rights. A court will likely be more reluctant to grant a PI if there is a risk that the defendant is not compensated if the PI later turns out to have been unfounded. This could therefore result in continuing infringements. If there is liability, the PI is likely to be more easily granted and it is for the IP rights holder to determine if it is willing to take this risk in enforcing the PI*". In addition, the Belgium Group, while in favour of strict liability, held that "*usual causes for exoneration of liability should be taken into account, in particular the 'invincible error'*".

Groups favoured answer (b) hold that strict liability may be too harsh for the applicant, and fault-based liability would better ensure fairness. For example, the Philippine Group stated that "*the defendant must demonstrate that the applicant acted in a way that was negligent or reckless in seeking the injunction. This ensures fairness and protects applicants who acted in good faith from unnecessary financial burdens, while also ensuring that the defendant is properly compensated for any wrongful harm caused*". Regarding the burden of proof, the Japanese Group added that "*if a PI is revoked, the negligence, which is a requirement for establishing torts, should be presumed (reversal of burden of proof). Then, the applicant should prove the non-negligence*".

The UAE Group is the only group that responded with answer (d), supporting the establishment of liability on proof of intent to harm only.

Part of the Groups which responded with answer (e) seemed to favour strict liability, but indicated that, depending on the case, applicant should be exempt or have its liability mitigated, depending on the conducts of the defendant and/or reasons for

the PI to have been revoked. This was the case, for instance, of Denmark, Finland, Türkiye and, to a certain extent, Switzerland and Australia Groups.

The Swiss Group reported divided opinions within the group, with part the group supporting answer (a) while the other part supporting answer (e).

The other Groups believed that the liability should be determined based on a case-by-case assessment taking into account various factors. For example, the Singaporean Group considered that "*a nuanced, fact-sensitive approach should be taken, and liability should be determined based on all the facts of the case, including the circumstances in which the PI was obtained, the success or otherwise of the plaintiff at trial, and any unreasonable conduct of the defendant*". Ecuador Group also added that "This flexible approach allows courts to balance the interests of both parties and prevent unjust outcomes".

While different liability regimes are supported by different groups, the reasoning underlying the choice made by each Group seems to be directed to one common goal, i.e., to find a balance between the parties' interests to achieve fairness.

28. Should a court or relevant authority take into account the conduct of the defendant?

A large majority of the Groups that responded to this general question answered YES, almost 90%, with only 10% Groups answering NO. The Belgium Group did not choose any answer since "*a distinction must first be made between the event giving rise to the applicant's liability and the obligation to pay compensation that may then be incumbent upon them*".

Among the Groups that answered NO, the primary ground was that "*strict liability should apply*". For instance, the Romanian Group stated that "*the main issue is the conduct of the PI Holder in order to determine the good faith or the bad faith registration/his fault*". However, the United Stated Group, when evaluating the specific damages, still stated that "*the court may take into account factors such as a failure to mitigate in setting the amount of damages*".

Among the Groups that answered YES to this Question, while the responses were uniformly affirmative, the factors they believed should be considered varied. For example, the Austrian Group stated that it should apply "*only with regard to the amount of damages*", which is essentially consistent with the United Stated Group's perspective (which answered NO). Some Groups emphasized balancing the interests of both parties and ensuring fairness, such as the Ecuadorian Group, which argued that "*evaluating both parties' conduct promotes fairness and ensures that compensation is proportionate to actual responsibility*". Others focused more on the defendant's conduct, such as the Indian Group, which stated that "*courts should evaluate whether the defendant's actions or omissions, such as enabling the injury to occur or failing to take reasonable measures to avoid or mitigate the injury contributed to the harm*". The Dutch Group similarly highlighted that "*the defendant's own fault enabling the injury should be taken into account*".

Thus, the vast majority of Groups agree that, at least, the defendant's conduct should be considered when determining the damages awarded, largely following the relevant principles and reasoning applied by their respective Groups in tort law.

29. Should the causal link between the damages being claimed, and the issuance of the PI be assessed?

Out of the 42 submitted answers, 41 of the Groups (95%) answered YES, that is, the causal link between damage and PI issuance should be assessed.

Some Groups believed that the assessment of damage of erroneous PI applies the principle of general damages compensation for ordinary acts of Infringement. For example, the Chinese Group believed that "*disputes arising from damages caused by the issuance of preliminary injunctions fall under the category of tort liability. According to the principles of tort liability, there is no pre-existing relationship between the tortfeasor and the damaged party. Civil liability for the resulting harm can only be imposed on the tortfeasor if their conduct constitutes the cause of the damage*". The Egyptian Group cited its own legal provision "*Article 163 of the Egyptian Civil law stipulates on 'any wrongful act that causes harm to another*

obligates the person responsible for it to compensate for the damage". Some Groups also believed that if this causal relationship is not assessed, it may lead to the defendant abusing their rights. According to the Mexican Group, "*considering the damages claimed without any causal link to the imposition of the PI could lead to a potential abuse by the defendant who could claim damages without any prove or evidence that the PI caused such damages*".

Some Groups also discussed the burden of proof of the causal relationship. The Hungarian Group stated that "*the defendant shall prove the causal link between the damages being claimed (typically lost turnover and lost profit), and the issuance of the PI*". The Philippine Group stated that "*the defendant must show that the injury suffered was the direct and proximate result of the PI, and not due to unrelated causes or their own conduct*".

Some Groups have also discussed the scope and calculation of compensation. For example, the Austrian Group stated "*yes, but in a generous way in order to also cover second line damages (like lost opportunities)*". However, the Singaporean Group stated that "*the causal link between the damages claimed and the issuance of the PI should be assessed to ensure that compensation is limited to losses directly resulting from the PI. This ensures fairness by holding the applicant accountable for actual harm caused while preventing speculative or excessive claims by the defendant*".

The only exception is the U.S. Group, which stated that "*the court should not seek a causal link as to the wrongfully enjoined defendant's entitlement to damages – strict liability should apply, but the court should examine causation as to the amount of damages resulting from the improper PI*". All in all, although the U.S. Group selected NO, they at least believed that causation should be considered when determining the amount of compensation.

30. Should there be any limits to the damages to be compensated?

42 Groups answered this question. The majority (70%) answered YES, and the other

responding Groups (30%) answered NO.

31. If YES, please indicate the ones that apply:

(a) Damages should be limited to the actual losses of the defendant or lost profit;

(b) Damages should be limited to the amount of guarantee or security provided by the applicant;

(c) Damages should also include legal costs incurred during litigation.

(d) Other. Please Comment

Among the Groups that answered YES, 55% chose answer (a) "damages should be limited to the actual losses of the defendant or lost profit"; 30% chose answer (c) "damages should also include legal costs incurred during litigation"; only 1 Group chose answer (b) "damages should be limited to the amount of guarantee or security provided by the applicant". Also, 5 Groups (10%) chose answer (d) "other", each of which provided comments on other limitations not included in the other 3 possibilities.

Among the Groups who have simultaneously chosen answers (a) and (c), the Dutch Group explained the reasoning for setting the limitation and commented that "*damages should be limited to the actual losses of the defendant or lost profit. This in order to prevent a claim culture and prevent a chilling effect in regard to obtaining a PI, which would be detrimental to the effective enforcement of IP-rights. Damages should however also include legal costs incurred during litigation (as well as at the stage of PI) as long as the costs were reasonably made taking into account the complexity of the matter*".

The Chinese Group commented that "*in China, damages of tort liability follow the 'principle of full compensation', aiming to put the victim in the position he was in before the tort. Therefore, limitation on damages shall not be confined to the amount of security or guarantee provided by the applicant. Instead, it shall be based on the actual losses incurred due to the issuance of the preliminary injunction*". For the legal costs, Chinese Group added that "*it is important to note*

that such legal costs shall be limited to those arising from the preliminary injunction proceedings. Legal expenses of other legal actions, such as the patent infringement action and the administrative action on patent invalidation that are not arising from the same legal relationship as the preliminary injunction proceedings, shall not be included in the calculation of damages attributed to the preliminary injunction".

The UK Group, who has chosen answer (b) aside from answer (a), commented that "*generally, the damages should be limited to the amount set by the bond or undertaking. However, in exceptional circumstances, the court should have some discretion to award damages that exceed that amount*".

For the 5 Groups that chose (d), specifically, the United Stated Group mentioned that "*damages should be limited to the costs and damages incurred by the enjoined party that are proximately caused by the wrongful PI*".

The Australian Group mentioned that "*actual damages and loss of opportunity should both be recoverable*", and "*costs should also be recoverable in the usual course*".

The Japanese Group explained that, in principle, the answer (a) is the case, "*however, the cost for limitation (court fee, cost for expert opinions, daily wages for witness, translation fee, etc.) should be included in damages. With regard to the cost for litigation, a reasonable amount of attorney's fee should also be recognized as an amount of damage*".

The Philippine Group mentioned that "*since the issuance of a PI requires the existence of irreparable injury, the subsequent finding of wrongful issuance of a PI may make it difficult to quantify and set a cap or limit as to the amount of damages that the defendant may claim against the applicant*", and indicated that "*the damages to be compensated to the defendant must be commensurate to the damages it has proved as a result of the wrongful issuance of the PI, which does not necessarily have to be based on lost profit*".

The Turkish Group chose answers (a) and (d), supporting that damages should be

limited to the actual losses of the defendant or lost profit, adding that "*the court shall have the discretion to add a fair share in the calculation of the damage if it is in the view that there is more impact of the PI than the calculated damage*".

In general, some of the other limitations described in the comments basically indicate answers (a) and (c).

32. Should there be any other factors, circumstances or defences the court or relevant authority should take into account when establishing liability and the amount of damages?

The answers to this question were almost evenly distributed, with 55% of the Groups selecting YES and 45% opting for NO. In fact, this question can be considered supplementary to Question 29. While Question 29 primarily focused on evaluating the defendant's conduct, this question includes all other potential factors or circumstances.

The Groups that answered YES generally believed that all relevant factors or circumstances in individual cases should be considered, based on the principle of fairness and reasonableness. For example, the Canadian Group submitted that "*all factors may be taken into account by the court including causation, the conduct of the parties and whether there has been or will be a disposition on the merits*", somehow emphasizing the effectiveness of relevant dispositions. The Czech Group also stated that "*all circumstances are relevant, including bad faith, discussion between the parties, trial history, etc.*". Specifically, the India Group stated that "*whether the PI was prohibitory or mandatory can affect the assessment of damages. Courts are generally more cautious in granting mandatory injunctions and may scrutinize the resulting damages more closely*" since it submitted that the nature and purpose of the injunction should also be taken into consideration, bringing the discussion of this question to a more specific level. Differently from the answers of the other groups, the Germany Group stated that "*the court or relevant authority should take into account whether the defendant was obliged to desist for other reasons. The applicant shall not be liable for costs that would have been*

incurred in any case as a result of legally compliant behaviour", excluding the factors not directly related to the PIs when establishing the liability.

Interestingly, although nearly half of the Groups selected NO, they do not disregard for other factors. On the contrary, they unanimously stated that their current practice already incorporated comprehensive considerations. For example, the South Korean Group stated that "*there are no factors that should be additionally considered beyond what the court currently considers*"; the Hungarian Group stated that "*the court shall have the discretion to take into account all circumstances when establishing the liability and the amount of damages*" so there is no need to specify these factors. In addition, the Australian Group further stated that "*the court exercises its discretion based on what is fair and reasonable*", which essentially aligns with the consideration of YES Groups.

Although the answer to this question presents an almost fifty-fifty split in results, such a divergence solely stems from different interpretations of the question rather than from its substance. In fact, all Groups agreed that multiple factors, circumstances, and defences should be taken into consideration.

33. Should there be any special circumstances in particular cases, such as SEP/FRAND litigation or pharmaceutical/biotech disputes?

70% of the responding Groups stated NO, while 30% of the responding Groups stated YES on this Question.

The vast majority of the Groups hold that courts need not to apply special rules or consider special circumstances in such cases. Most of them agree that all cases involved the compensation due to wrongful issuance of PI shall apply uniform standards to ensure the consistency and legal certainty (e.g. the Ecuadorian Group), the court has discretion to consider relevant circumstances and make the final decision based on the facts in each individual case. For example, the Swedish Group stated that "*since the calculation of damages is inherently individual, it should not be necessary to consider specific circumstances related to particular*

types of litigation or disputes separately".

On the other hand, some Groups opined that a court should consider special circumstances in particular cases (e.g. SEP/FRAND litigation or pharmaceutical/biotech disputes). The basic reasoning by the Groups supporting such view is that SEP/FRAND litigation and pharmaceutical/biotech disputes possess unique nature, thus some special factors should be taken into account when the court determined whether to grant a PI in such cases. For the cases involving SEP/FRAND litigation, most of the Groups that supported an YES answer highlighted that since the patent holder has to fulfil its Fair, Reasonable, and Non-Discriminatory (FRAND) commitment when assessing whether to grant PI, besides evaluating the possibility of infringement and the necessity of PI, a court would also need to analyse whether the behaviour of the applicant satisfies the FRAND requirements. For example, the Chinese Group stated that "*compared with general infringement cases, courts need to adopt a more cautious attitude when reviewing the application of preliminary injunctions, focusing on assessing whether the patent holder has fulfilled its FRAND obligations to determine whether to grant an injunction*". For the cases involving pharmaceutical/biotech disputes, some Groups regarded public interest as one of the important considerations when a court decided whether to approve the grant of PI. The Malaysian Group highlighted that "*in pharmaceutical/biotech disputes, the public interest in access to medicines (e.g., generics) could influence the court's approach, potentially limiting damages if the PI unduly delayed affordable healthcare answers*".

Finally, some Groups take a relatively intermediate position on this Question. While these affirm the reasonableness of special requirements in SEP/FRAND litigation or pharmaceutical/biotech disputes, they also deny the need to set special rules or exceptions for such cases. For example, the South Korean Group concluded that "*there seems to be no reason to view SEP/FRAND litigation or pharmaceutical/biotech disputes differently. While there may be a public interest for the use of SEPs or certain pharmaceuticals, PIs are being granted according to stricter requirements in these cases*".

b. <u>Possible Bonds and Guarantees for securing a PI</u>:

34. Should there be any specific standards or requirements for a court or relevant authority to request a bond, a security or undertaking to compensate a defendant?

Among the 43 Groups that answered to this question, 29 Groups answered YES (70%) while 13 Groups answered NO (30%).

A majority of the Groups considered that specific standards or requirements are necessary to balance the interests of both plaintiffs and defendants in preliminary injunction proceedings. For instance, the Indian Group stated that "*requiring the applicant to provide security serves as a safeguard to protect the defendant from potential losses if it is later determined that the PI was wrongfully issued. The standards and requirements for such bonds or securities should be carefully considered to balance the interests of both parties*". The Chinese Group also mentioned "*while we should actively and reasonably leverage the system's effectiveness by lawfully adopting intellectual property conduct preservation measures to enhance the timeliness, convenience, and effectiveness of judicial remedies in IP cases, we are also required to simultaneously prevent applicants from abusing the conduct preservation system to unfairly harm competitors*". Several Groups also mentioned that specific standards provide a consistent framework for courts, avoiding arbitrariness and offering clearer guidance for parties when assessing litigation strategies and risks. For instance, the Ecuadorian National Group noted that "*clear criteria would ensure consistency and predictability in the application of preliminary injunctions*", the Polish Group also noted that "*that implementation of specific standards into statutory law enhances the certainty of the legal system*".

Among the 13 Groups that answered NO, most of them emphasized the judicial discretion. For example, the Canadian Group recited that "*the courts should have a discretion to require security from the plaintiff or not, and may take into account the scale of the potential for damage (to both parties) and how compelling the case is for a PI*", and the Denmark Group also defends that "*whether to set a bond and the size hereof should be decided discretionarily by the court*".

While the two positions may appear opposing in nature, Groups from both sides mentioned the importance of flexibility. In addition to the Groups that answered NO, the Belgium Group stated that "*in any case, the court should retain discretionary power in deciding whether to impose a bond or a security*", and the UK Group also emphasized that "*any other specific requirements should be left to the discretion of the court, which should include a consideration of the nature of the parties in dispute, their financial standing, the expected time frame to a final decision on the merits, and approximate estimates of the costs and damages involved*".

35. In your group's opinion, the setting of a bond should be:

a) Mandatory in all cases;
b) Mandatory only in *ex parte* cases;
c) Discretionary in all cases;
d) Other. Please comment

11 of the responding Groups (25%) selected answer (a), 2 of the responding Groups (5%) selected answer (b), 22 of the responding Groups (50%) selected answer (c), while 7 of the responding Groups (20%) selected answer (d).

Groups deems that the setting of a bond should be mandatory in all cases believed that mandatory requirement is necessary to protect defendants and prevent frivolous applications and ensures fairness. For example, the Philippine Group stated that "*an applicant for a PI must file a bond as this serves as a protection for the defendant in the event that the PI is wrongly issued*".

The Austrian Group selected "(b) Mandatory only in *ex parte* cases" but explained that "*In many cases, in which established companies sue, no bond is required to ensure enforcement of damages*". It is to be noted that the French Group, despite having selected "(d) other", also mentioned that "*In an ex parte procedure, the granting of such a guarantee should be mandatory, save in exceptional circumstances*".

About half of the responding Groups agreed that the setting of a bond should be discretionary in all cases. Discretionary principle is believed to allow courts to make comprehensive assessments on a case-by-case basis to balance the interests of both parties, safeguard the legitimate rights of the applicant while avoiding undue financial burden. For example, the Indian Group stated that "*this discretionary approach allows the court to tailor its decision to the specific circumstances of each case, ensuring a fair balance between the interests of both parties*"; the Peruvian Group stated that "*A discretionary bond allows flexibility, ensuring it's only imposed when necessary, balancing protection for the applicant with fairness*", and the Hungarian Group stated that a court "*must ensure that the amount of the security does not deter the claimant from enforcing their rights, but that it is not so low as to give a possibility to the right-holder to make the request for interim measures abusive*". Besides, the Ecuadorian Group specifically highlighted the importance of the discrepancy regarding whether a preliminary injunction is granted in an *ex parte* or an *inter partes* proceeding, and stated "*stricter safeguards should apply in such cases, including a higher standard for granting the PI and a stronger requirement for the applicant to provide a bond or security*".

A few Groups raised additional solutions. For example, the Danish Group proposed that "*in inter partes proceedings the setting of a bond should be discretionary by the court upon the request of the defendant. In ex parte proceedings, where interim measures are ordered without the defendant having been heard, the court shall require a bond unless there are special circumstances not to do so*", and the Swedish Group proposed that "*it balances the interests of the parties in that it is mandatory to lodge a security but that the court can exempt the applicant from doing so if the applicant lacks ability*".

36. Should it matter whether a PI is granted in an ex parte or an inter partes proceeding?

The responding Groups showed an even distribution between two contrasting stances. Half (50%) stated YES, while the rest half (50%) stated NO.

Groups advocating distinct treatment of *ex parte* versus *inter partes* proceedings

believed that whether the defendant is given the opportunity to submit a defence will influence the risk of unbalance of the parties' interests. From the perspective of procedural justice, the participation of defendant in the proceeding of PI is necessary. For example, the Japanese Group highlighted that "*a PI will give a considerable effect to the respondent (defendant). Therefore, in principle, the involvement of respondent (defendant) in the court proceeding should be secured*". Some other Groups also believed that, even if the PI is issued in an *ex parte* proceeding, the court should take measures to reduce the risks, especially for the defendants. For example, the Egyptian Group noted that the court shall order the applicant to provide "*higher security for ex parte proceedings, given that defendants will not have had the opportunity to challenge the PI request before its issuance*". The Ecuadorian Group further stated that "*stricter safeguards should apply in such cases, including a higher standard for granting the PI and a stronger requirement for the applicant to provide a bond or security*".

On the other hand, some Groups disagreed with differentiating between *ex parte* and *inter partes* proceedings. Most of them agreed that as long as a security/guarantee mechanism is established, the interests of the defendants can be protected. For example, the UK Group noted that "*irrespective of whether an interim injunction was granted on an ex parte or in inter partes basis, the defendant should have an opportunity to seek the additional fortification of the undertaking from the applicant (for e.g., by way of a bond or security)*". Others believed that the court's discretions would be enough to mitigate the risk. For example, the South Korean Group noted that "*given that whether security is provided, and the amount are both at the court's discretion, there does not appear to be a need to stipulate differences between ex parte and inter partes proceedings in the law or to establish criteria for this*".

It should be noted that while the two positions may appear opposing in nature, both are ultimately aimed at balancing the interests between the parties involved. *Inter partes* proceedings inherently carry advantages in ensuring procedural justice, whereas even in *ex parte* proceedings, the risk of harm to the defendant can be mitigated through safeguards such as requiring a bond or security.

37. Should there be any specific standards for the amount of the bond to be determined, or otherwise should a pre-set amount be established?

18 of the responding Groups (45%) stated YES, and 23 of the responding Groups (55%) stated NO.

Nonetheless, a vast majority of Groups on both sides are against establishing a pre-set amount for a bond.

Most of the Groups answered NO and considered that a bond should be set discretionarily to ensure its efficacy. For example, the United Stated Group stated that "*the amount of the bond/security should not be a pre-set amount but should reflect the actual costs and damages that the defendant may reasonably be expected to suffer if wrongfully enjoined*"; and the Germany Group stated that "*While the law should provide that the security should cover damage claims of the defendant in the event the PI or its enforcement turns out to have been unjustified, the amount is and should remain discretionary in order to accommodate the fact that the courts should be free to set an amount which is reasonable in a given case*".

As to voices favouring specific standards in this context, the Groups deemed that such standards may reduce judicial arbitrariness and ensure fairness and predictability. For example, the Indian Group stated that "*setting specific standards will: promote Predictability and Uniformity, reduce Judicial Arbitrary Discretion, safeguard Defendants' Interests*"; and the Swedish Group stated that "*It would be beneficial for the parties to have more foreseeability in terms of the required amount of the security*".

A few Groups also proposed the factors that should be taken into consideration when standards are to be established or when the courts determine the amount. For example, the Philippine Group proposed that "*these standards could include the complexity of the case and the estimated length of time for the proceedings, among others*"; the Chinese Group proposed that "*the security provided by the applicant should take the respondent's potential losses into consideration to guarantee the respondent's right to claim full compensation for such damages in specific cases, other factors may also be considered when determining the*

security amount–for instance, preventing the situations that excessively high security requirements unduly burden the applicant's business operations"; and the Malaysian Group also proposed that on should take into account factors such as "*the estimated financial loss to the defendant (e.g., lost profits or business disruption), the duration of the PI's likely effect, the applicant's ability to pay*"; and the Australian Group stated that "*the bond should reflect the assessment of foreseeable loss*".

The loss of the defendant suffered as a result of the PI, among others, is the most frequently mentioned factor.

38. Should courts be allowed to accept a "counter-guarantee" from the defendant to suspend a PI? In which circumstances? Please comment.

65% of the responding Groups stated YES, while 35% of the responding Groups stated NO on this Question. Only the Germany Group put no answer on YES or NO, but with the comment that the court could accept a "counter-guarantee" in some extremely exceptional circumstances.

The majority of the Groups held that the court may accept a "counter-guarantee" from the defendant to suspend a PI when considering the balance between both parties, because a PI carries the nature of "pre-judgment" on the potential infringement, so the court should provide the defendant (respondent) with the opportunity to protect its business freedom while ensuring the plaintiff's losses can be economically covered.

However, regarding in which circumstances the court may allow for a "counter guarantee" from the defendant to suspend a PI, those Groups who answered YES to this Question shared multiple opinions, which can be basically divided into two aspects: in all circumstances and in limited circumstances (which seems to be prevailing opinion).

Those who stated that the "counter-guarantee" can be applied in all circumstances held that the court should allow the defendant to provide a "counter-guarantee" to

suspend a PI as long as the amount of such "counter-guarantee" can adequately cover the possible loss that may be suffered by the applicant. For example, the Czech Republic Group stated that the court could accept a "counter-guarantee" from the defendant "*if it is sufficient to cover damages caused by the purported infringement*".

For those supporting that the court should limit the acceptance of "counter-guarantee" in some particular circumstances, most of them detailed the specific circumstances in their comments. Some opined that the court may allow the "counter-guarantee" when the monetary damages can be the adequate remedy to cover the possible loss of the applicant. For example, the Austrian Group held that the "counter-guarantee" can be only allowed "*in cases that allow reliable calculation of the upcoming damages or upon specific request of applicant and depending on whether these can undo the harm done by the presence of infringing products on the market*". Some held that the "counter-guarantee" can be applied when the harm caused by a PI to the defendant exceed the applicant's potential loss. For example, the South Korean Group stated that "*if there are circumstances where the defendant would suffer much greater damage than the ordinary damage suffered due to the preliminary injunction, it would be equitable to allow the defendant to provide security and cancel the execution of the preliminary injunction*". There is another opinion that the court may allow the acceptance of a "counter-guarantee" based on some factors not connected to the two parties, e.g. the French Group stated that the possibility of accepting a "counter-guarantee" should be "*limited to external, imperative circumstances independent of the defendant, such as, but not limited to, the general interest, public health or the interests of third parties*".

On the other hand, some Groups indicated that the court should not accept a "counter-guarantee" from the defendant to suspend a PI in any circumstance. Firstly, some of the Groups who answered "NO" insisted that the acceptance of "counter-guarantee" does not comply with the objectives of PI mechanism, including preventing the applicant from irreparable harm in potential infringement, considering the urgency of ceasing the possible infringement, and avoiding the unnecessary procedural burden on both parties (e.g. the United Stated Group, the Polish Group, and the Dutch Group). Secondly, some other Groups outlined that the

"counter-guarantee" provided by the defendant is not a statutory consideration in deciding whether to lift a PI, only the balance of interests and the changing of factual circumstances regarding the rationale of PI play a decisive role in determining whether a PI should be cancelled. For example, the Dutch Group stated that "*if a PI has been granted, it can be assumed that the weighing of the interests of the applicant and the defendant has already taken place. It should in that case not be possible to still suspend a PI via the court by the offer of a counter-guarantee by the defendant*".

In summary, despite different answers to this Question, all of the Groups have reached a consensus that the court should pay attention to the balance of interests of both parties, especially evaluating the applicant's interests, even public interests, when determining whether to lift a PI. For example, the Hungarian Group indicated that the court should be cautious in such determination, "*otherwise, the counter-guarantee would function as a kind of compulsory licence, namely a use without the consent of the IP holder (the applicant)*".

39. Should it depend on the consent of the applicant? Please comment.

Among those Groups who answered this Question (39 in total), 90% stated NO, while 10% stated YES on this Question.

The overwhelming majority of the Groups held that the consent of the applicant is not required when the court decides to accept a counter-guarantee from the defendant to suspend a PI. Some of the Groups directly answered NO without any additional comments, since they had previously defended that a court should not accept a counter-guarantee from the defendant to suspend a PI in Q39.

Some of the Groups which were favourable to a counter-guarantee in Q39, denied the need for applicant's consent, with the reason that the court should have discretion on whether to approve a counter-guarantee based on the evaluation of the factual circumstances, so that the consent of the applicant would not be neither a statutory factor, nor an equitable consideration in such determination (e.g. the Italian Group, the Mexican Group, the Malaysian Group, the French Group,

etc.). Furthermore, the Swiss Group took a relatively intermediate position, outlining that "*the applicant should be asked to comment, but no consent should be required*" when the court decided whether to accept a counter-guarantee.

On the other hand, only 5 Groups advocated in favour of seeking applicant's consent under the circumstances. The Chinese Group provided explanation on the rationale of the requirement of the applicant's consent that "*introducing the plaintiff's autonomy in this process and allowing the use of a counter-guarantee with the plaintiff's consent can provide a compromise. This approach can both ensure that the defendant maintains normal operations by providing a guarantee and prevent the abuse of the counter-guarantee system by the defendant*". On the other hand, the United Stated Group pointed out that although the applicant may give its consent and reach a mutually agreement with the defendant to accept a counter-guarantee, "*they would be at risk that a court would consider the agreement inconsistent with irreparable harm*".

40. Please comment on any additional issues concerning any aspect that you consider relevant to this Study Question.

Few Groups offered additional comments or opinions on possible other issues relating to this Study Question.

Australian Group outlined that it would be "*desirable for affected third parties to be able to claim on the undertaking as to damages, provided they can prove that they have suffered loss as a result of the preliminary injunction*".

Mexican Group mentions that the absence of a periodical review on the preliminary injunctions could possibly render a bond inadequate to compensate the defendant.

Finally, Spanish Group points out possible actions to streamline their internal proceedings for determining, calculating and recovering any damages caused by

a wrongful PI.

41. Please indicate which industry sector views provided by in-house counsels are included in your Group's answers to Part III.

Some Groups have indicated the contribution from members of the industry. These reports cite members from food and drinks sector, pharmaceutical, tech, automotive, health and hygiene, as well as consumer goods fields. The reports also cite members from the equipment manufacturing sectors, as well as chemical domain.

IV. Conclusions

The responses submitted by the Groups indicate that the majority (over 75%) considers that harmonisation is desirable, at least to a certain extent. Furthermore, the Groups have also almost unanimously (95%) agreed that the applicant for a PI should be held liable for the defendant's damages if a PI is lifted or reversed.

In addition, the Groups unanimously stated that a defendant must actively request the court or relevant authority to determine the applicant's liability, that is, a court should not automatically issue such a finding upon revocation of the PI.

There is considerable divergence among the Groups regarding the appropriate timing for the defendant to request compensation, with many relying on their respective procedural laws. No single option attracted more than 25% of responses.

On the other hand, most of the Groups (80%) agree that an applicant should not benefit from an exemption or safe harbour from liability solely based on the fact that it holds a valid IP right and/or is reasonably exercising a lawful right.

In addition, a strong majority (80%) believes that the reason for dismissing the PI — whether due to invalidity or non-infringement — should not, by itself, lead to different assessments of the applicant's liability.

With respect to the determination on the liability of the applicant resulting from the wrongful issuance of PI, it can be drawn from the majority of the Groups that:

- In determining liability, the damage suffered by the defendant should be the predominant factor. Courts or relevant authorities should give relatively less weight to the applicant's subjective state (whether it acted in negligence or recklessly, or had actual intent to harm), or even ignore these subjective factors due to a strict liability regime. However, if one combines the Groups that advocate for strict liability with those that accept it subject to mitigation or exemption based on the defendant's conduct or other circumstances, approximately 60% of Groups support such a regime.

- Beyond the liability from the perspective of the applicant, a large majority of the Groups (90%) believe that the court or relevant authority should also take the defendant's conduct into consideration, because the defendant's failure to mitigate the unnecessary damage could affect the reasonable compensation for wrongful issuance of PI.

- The Groups have almost unanimously (95%) agreed it is necessary to assess the causation between the damages, the amount of losses and the wrongful issuance of PI.

- Most of the Groups (70%) highlighted that there should be limits to the damages to be compensated.

- A slight majority of the Groups (55%) advocated for a limit to the damages to be compensated, which should refer to the actual losses of the defendants or lost profits. Notwithstanding, a non-negligible number of Groups (30%) indicated that damages should also include legal costs incurred during litigation.

- The specific circumstances of each case will have different influence on the determination of liability, so the court should fully exercise its discretion in each case. For example, in some particular fields, such as SEP or pharmaceutical cases, the special nature in such fields should be considered, such as whether the applicant has fulfilled the FRAND commitment before the issuance of PI, or whether the issuance of PI would

affect the public access to medical sources.

Regarding the bond provided by the applicant in the issuance of PI:

- The majority of the Groups (70%) believe that there should be specific standards or requirements for a court or relevant authority to request a bond, security or undertaking to compensate the defendant.
- Conversely, at least 50% of the Groups believe that a decision to require a bond should remain discretionary.
- Also, the Groups have split (50%) on whether it should matter if a PI is granted in an ex parte or inter partes proceedings.
- A majority (55%) believe that there should not be a pre-set amount for a bond or specific standards for the amount of the bond to be determined.
- Most Groups (65%) support allowing courts to accept a counter-guarantee, although views differ significantly on the conditions and the circumstances under which such measure should be accepted. Furthermore, many advocate that this should be done in specific or exceptional circumstances. The Groups almost unanimously (90%) agree that a counter-guarantee should not depend on applicant's consent.

In summary, when determining whether to require the applicant to provide a bond, Groups emphasise that the key consideration should be the balance of interests between the applicant and the defendant. The court or relevant authority should make this decision based on a comprehensive assessment aimed at reducing unfair prejudice to the defendant, considering both substantive (e.g., requiring a bond) and procedural aspects (e.g., providing an inter partes hearing to allow the defendant to present arguments).