WORLD TRADE ORGANIZATION

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CHINA – ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

Arbitration Under Article 25 of the DSU

Award of the Arbitrators

Excerpted version prepared by Prof Daniel Gervais
for teaching purposes only.[1]

Arbitrators:

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I. Introduction

1.1. This arbitration concerns the appeal by the European Union and the cross-appeal by China with respect to certain issues of law and legal interpretations developed in the Panel Report, *China – Enforcement of Intellectual Property Rights.* These issues of law and legal interpretations relate to the Panel's findings regarding the consistency with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) of certain measures taken by China in the context of litigation relating to the determination of a fair, reasonable and non-discriminatory (FRAND) rate for standard essential patents (SEPs).

II. Issues on Appeal

4.1. We address the following issues on the basis of claims raised on appeal by the European Union:

(a) Whether the Panel erred in the interpretation of Article 1.1, first sentence, of the TRIPS Agreement by determining that this provision merely requires WTO Members to implement the provisions of the Agreement within their domestic legal systems and does not require them to refrain from taking measures that undermine the protection and enforcement of intellectual property (IP) rights in the territories of other Members;

(b) Whether the Panel erred in the interpretation of Article 1.1, first sentence, in conjunction with Article 28.2 of the TRIPS Agreement by finding that these provisions only require a WTO Member to ensure that, within its domestic legal system, patent owners have the right to assign or transfer by succession their patent, as well as the right to conclude licensing contracts in respect of patents granted by that Member, and that the European Union has not demonstrated that the ASI policy is inconsistent with those provisions;

(c) Whether the Panel erred in the interpretation of Article 1.1, first sentence, in conjunction with Article 44.1 of the TRIPS Agreement by finding that these provisions do not require Members to refrain from adopting or maintaining in force measures that prevent, or seek to prevent, the judicial authorities of other WTO Members from ordering a party to desist from a patent infringement in the territories of those Members and that the European Union has not demonstrated that the ASI policy is inconsistent with those provisions;

(d) Whether, should we reverse the Panel's legal interpretations of Article 1.1, first sentence, in conjunction with either Article 28.1, 28.2 or 44.1, and of Article 41.1 of the TRIPS Agreement, we are able to complete the analysis and find that the ASI policy and the five individual ASI court decisions are, as the European Union claims, inconsistent with China's obligations under those provisions.

4.2. We address the following issues on the basis of claims raised on appeal by China:

(a) Whether the Panel erred in its application of the DSU […] when it concluded that the European Union had proven the existence and precise content of "an alleged unwritten 'anti-suit injunction policy'" in the absence of a finding by the Panel that this alleged "policy" has normative content distinct from the written Chinese laws and judicial decisions that the European Union challenged separately and identified as evidence of the existence and content of the "policy"; and

(b) Whether the Panel erred in its interpretation and application of Article 63.1 of the TRIPS Agreement as it pertains to what constitutes a "final judicial decision … of general application" within the meaning of that provision, and thereby erred in concluding that the meaning of that provision, and thereby erred in concluding that including its decision on reconsideration, constituted a "final judicial decision … of general application" subject to the obligation of publication or public availability under Article 63.1.

III. Measures at Issue

4.8. [W]e understand that the Panel found the ASI policy to comprise a measure of general and prospective

application that empowers Chinese courts to impose a range of possible prohibitions at the request of SEP implementers. In the context of SEP litigation, which can be enforced through the imposition of cumulative daily fines, and which has been elaborated and promoted by the Supreme People's Court of the People's Republic of China (SPC) and endorsed by the National People's Congress (NPC) Standing Committee. The Panel understood that the range of possible prohibitions in this regard could include preventing the owner of a patent registered in another Member from commencing, continuing or enforcing the results of any proceedings before a non-Chinese court, such as proceedings concerning patent infringement or the terms on which a patent would be licensed. We provide further details on the Panel's reasoning and findings with respect to the ASI policy in section 4.4 in addressing the China's claim on appeal with respect to Article 3.2 of the DSU.

4.9. In addition to the ASI policy as a hwole, the European Union challenged the decisions to grant ASIs in five specific instances – namely, Huawei v. Conversant, ZTE v. Conversant, OPPO v. Sharp, Xiaomi v. InterDigital, and Samsung v. Ericsson – as individual measures. Before the Panel, the European Union also challenged the failure by China to publish some of these ASI decisions, namely those ZTE v. Conversant, OPPO v. Sharp, and Xiaomi v. InterDigital (including the reconsideration decision in that case).

1. Claim under Article 3.2 of the DSU concerning the "measure at issue"

4.13. China appeals the Panel's application of the legal standard for the existence of an unwritten measure.

4.21. Since the European Union's claim in this case was framed as against a policy, i.e. an unwritten measure that operates as a rule or norm of general and prospective application (and, in the alternative, an ongoing conduct), attribution, precise content, and general and prospective application were the elements that the Panel was required to assess.

4.22. China's central argument in this appeal is that the Panel erred in finding that the European Union had proven "the existence of the alleged 'ASI policy' as a separately cognizable measure under the DSU without making a finding that the so-called 'policy' has normative content *distinct* from the written Chinese laws and judicial decisions that the European Union had identified as evidence of the existence and content of the 'policy.'"

4.29. As part of the appraisal of the precise content, the Panel assessed the policy objectives of the Chinese government and found that the judicial decisions where ASIs had been issued were in furtherance of broader policy considerations expressed by Chinese authorities.

4.31. The Panel further observed that "the ASI policy enable[d] an undetermined number of economic actors to request an ASI from a Chinese court in the context of SEP litigation" and was persuaded that there was "a high likelihood that the ASI policy will apply in future cases."

4.32. The Panel concluded that the ASI policy exhibits normative attributes as: "it creates expectations by public and private actors regarding the availability of ASIs in the context of SEP litigation, it is meant to be applied generally by Chinese courts and affects an undetermined number of economic operators, and there is a high likelihood of its continuation in the future." The Panel therefore found that the European Union had demonstrated that the ASI policy is a rule or norm of general and prospective application.

4.33. In our view, the analysis that the Panel undertook when determining the precise content of the measure (the ASI policy) and whether it has general and prospective application included a determination that the measure has a normative attributes, and that these normative attributes went beyond the "simple repetition of a similar legal approach by Chinese courts in different cases where ASIs were requested." In light of the European Union's articulation of the measure at issue, we do not see that the Panel was required to make a finding that the measure had "a functional life of its own" distinct from its components in order to be challenged in WTO dispute settlement.

2. Claim under Article 1.1, first sentence of the TRIPS Agreement

4.43. The European Union claims that the Panel erred in its interpretation of the first sentence of Article 1.1 of the TRIPS Agreement. Article 1.1 provides:

> Members should give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

4.44. The European Union appeals "the Panel's findings that Article 1.1, first sentence of the TRIPS Agreement merely requires WTO Members to implement the provisions of the Agreement within their domestic legal systems and does not require them to refrain from taking measures that undermine the protection and enforcement of IP rights in the territories of other Members." China responds that, "[b]y referring to Article 1.1 and misconstruing the object and purpose of the Agreement, the European Union seeks to convert specific provisions of the TRIPS Agreement that by their terms relate only to the protection and enforcement of intellectual property rights *within a Member's own territory* into a transnational obligation."

4.55. We start from the definition of the term "give effect", which is "to make operative" or "to render operative." The relevant definition of the term "operative" is "characterized by operating or working; being in operation or force." Consequently, the term "give effect" means the obligation to enact domestic legislation to implement the provisions of the TRIPS Agreement, and also the corresponding action of giving effect to the provisions of the Agreement on an ongoing basis. […W]e consider that in some cases the term "implement" could connote a singular act in which something is enacted, whereas the term "give effect" necessarily requires an active and continuing duty to ensure that the provisions of the TRIPS Agreement are made operative on an ongoing basis. While we accept that a difference in the terms used does not automatically imply a significant difference in meaning, the use of "give effect" appears to be deliberate.

4.60. The context afforded by the TRIPS Agreement also shows that the respective "national systems" of individual Members for the effective and adequate protection of IP rights within their own territories do not exist in isolation. Rather, the TRIPS Agreement provides for cooperation among Members.

4.61. In our view, it is clear from the context of the first sentence of Article 1.1 that the TRIPS Agreement seeks to establish "national systems" for the effective and adequate protection of IP in each and every Member, and that these "national systems" may interact where necessary to address trade-related aspects of IP rights. The *raison d'être* of the TRIPS Agreement is to have minimum standards for protection and enforcement of IP rights given effect through national systems in the territory of each WTO Member.

4.66. The requirement in Article 1.1, first sentence to "give effect" to the provisions of the TRIPS Agreement should also be read together with the objective set out in Article 7:

> The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

4.69. In our view, the Panel has not properly taken into account the context of Article 7 of the TRIPS Agreement, and in particular the fact that the protection and enforcement of IP rights should contribute to a balance of rights and obligations.

4.70. In our view, the territoriality of IP rights envisaged by the TRIPS Agreement coupled with the obligation for every WTO Member to have its own national system in its territory means that the "national systems" providing effective and adequate protection of IP rights in their territories cannot function if at the same time Members are allowed to frustrate the protection of trade-related IP rights granted by other

Members in their territories pursuant to their implementation of the TRIPS Agreement. […] Furthermore, the balance of rights and obligations foreseen in Article 7 would be defeated if a WTO Member prevents or frustrates the exercise of IP rights derived from the implementation of the TRIPS Agreement by another Member in that other Member's territory. The provisions of the TRIPS Agreement would be rendered inoperative if Members were allowed to frustrate other Members' implementation of their obligations under the TRIPS agreement to provide minimum standards for IP rights and provide for their effective enforcement.

4.71. [C]onsistent with the customary rules of interpretation, we consider that the ordinary meaning of the term in Article 1.1, first sentence must be interpreted in its context, particularly the three sentences of Article 1.1, and the objectives set out in Article 7. Actions that frustrate the ability of other WTO Members to protect and enforce IP rights in their own territories and which thereby upset the balance of rights and obligations embodied in the TRIPS Agreement would not be consistent with the requirement to "give effect" to the provisions of the TRIPS Agreement.

4.74. Thus, in our view, there is only one obligation in the first sentence of Article 1.1, namely, the obligation to "give effect to the provisions of th[e] Agreement" in its territory, where the corollary of the obligation is to do so without frustrating the functioning of the systems of protection and enforcement of IP rights implemented by other Members in their respective territories. We therefore find that the Panel did not properly interpret the obligation in the first sentence of Article 1.1.

3. Claim under Article 28.1, read in conjunction with Article 1.1, of the TRIPS Agreement

4.81. Article 28.1 provides:

> A patent shall confer on its owner the following exclusive rights:
>
> (a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product;
>
> (b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.

4.82. The European Union contends that "[t]he Panel erred in the interpretation of Article 1.1, first sentence, in conjunction with Article 28.1 of the TRIPS Agreement, by stating that these provisions merely require Members to ensure that, within their domestic legal systems, a patent confers on its owners the exclusive rights set forth in Article 28.1." China responds that "[c]onsistent with the object and purpose of the TRIPS Agreement and the territorial scope of the TRIPS Agreement …, Article 28.1 (whether read separately or in conjunction with Article 1.1) is concerned only with ensuring that each Member accords a minimum standard of patent protection within its own territory."

4.84. [W]e found in section 4.5 above that the proper interpretation of the term "give effect" in Article 1.1, first sentence requires WTO Members, to make operative the provisions of the TRIPS Agreement in their own national systems of IP rights protected pursuant to the implementation of the TRIPS Agreement by other WTO Members in their territories.

4.85. In the context of Article 28.1, this understanding would require an assessment of whether a Member's measure frustrates the conferral, by another WTO Member, of the patent owner's exclusive rights in that provision: in particular, the right of the patent owner to prevent third parties from certain acts without the owner's consent. These would include, e.g. the making, using, offering for sale, selling, or importing the product which is the subject matter of the patent.

4.86. We therefore disagree with the Panel's finding that the obligation in Article 28.1, read in conjunction with Article 1.1, first sentence, is limited to ensuring the patent owner's exclusive rights in each Member's domestic legal system and nothing more. Instead, we find that Article 28.1, read in conjunction with Article

1.1, first sentence, requires that Members not frustrate the patent owner's ability to exercise the exclusive rights conferred on it by another WTO Member under that provision, i.e. to prevent third parties not having the patent owner's consent from making, using, offering for sale, selling, or importing the patented product.

4.91. According to the European Union, since the essence of the exclusive rights of a patent owner is the ability to prevent third parties not having the owner's consent from practicing the acts listed in Article 28.1, the exercise by SEP holders of their exclusive rights is intrinsically restricted if they are prohibited from enforcing those rights through the courts of the countries having granted the patents concerned.

4.92. China argued that it was uncontested that patent owners in China were entitled to prevent unauthorized third parties from using a patent in the ways described in Article 28.1 and it was the responsibility of other Members, not China, to ensure that the minimum exclusive rights of a patent owner set out in Article 28 of the TRIPS Agreement were protected in their territories.

4.93. In our view, what it means to frustrate the protection and enforcement of IP rights implemented pursuant to the provisions of the TRIPS Agreement in the territory of another Member should be assessed not only in light of the particular provision at issue, but also in light of the specific circumstances of the case.

4.94. In the context of SEP litigation, the Panel observed that, while claims concerning the infringement of the subject matter of a patent must be brought before the national courts of the territory that has granted the patent right, the same is not true for contractual claims relating to licence fees and that courts in some jurisdictions will consider contractual claims concerning worldwide licences. Pursuant to conditions set out by the SSO, the SEP holder commits to provide an irrevocable undertaking or a licensing declaration to the relevant SSO that it will license or allow access to the subject matter of the patent-protected product or process to implementers of the standard on FRAND terms, which is known as a "FRAND undertaking." Implementers may raise the failure to comply with FRAND terms as a defence to proceedings brought by a SEP holder or might sue the SEP holder in another jurisdiction for abuse of dominant position or breach of its obligation to license its SEP on FRAND terms.

4.95. The exercise of the SEP holder's exclusive rights under Article 28.1 is informed by its commitment to license the SEP on FRAND terms. The purpose of this FRAND undertaking is to strike a balance between the rights and legitimate interests of the SEP holder and SEP implementer. Thus, in our view, the ASI policy would frustrate other Members' implementation of Article 28.1 to the extent that it prevents SEP holders from exercising the exclusive rights bestowed upon them by those Members under that provision pursuant to a patent granted by them in their territory, in light of the SEP holder's commitment to license the SEP subject to FRAND terms.

4.102. We understand the Panel to have confirmed that ASIs have a broad scope which includes prohibiting the filing, continuation, and enforcement of infringement claims in WTO to prevent third parties not having the patent owner's consent from making, using, offering for sale, selling, or importing the patented product.

4.104. The Panel's findings confirm that the imposition of the cumulative daily fines was a novel approach to establish fines in IP related litigation intended to ensure that SEP holders abstain from the filing, continuation, or enforcement of infringement claims in jurisdictions outside China.

4.106. Article 28.1 provides for the exclusive right to the patent owner to prevent third parties from taking certain actions without its consent. The manner in which these rights may be exercised is *inter alia* through the initiation of infringement proceedings and the issuance of a court injunction to prevent unauthorized parties from certain acts without the patent owner's consent. In the context of SEP litigation, these rights are qualified by the SEP holder's commitment to license its SEP on FRAND terms through negotiation with implementers and the possibility for both to request a court to establish the FRAND terms. In this context, and considering that the factors for granting an ASI and the policy objectives underlying the ASI policy bear no relation to the SEP holder's ability to exercise the exclusive rights conferred on it by another WTO Member by means of infringement proceedings, the ASI policy affects the patent owner's right to prevent third parties not having its consent from making, using, offering for sale, selling, or importing the patented

product.

4.107. [T]he ASI policy establishes a course of action that frustrates the exercise of the exclusive right of a patent owner to prevent the use of the subject of its patent without its consent, as conferred on it by another WTO Member under Article 28.1 of the TRIPS Agreement.

4. Claim under Article 28.2, read in conjunction with Article 1.1, of the TRIPS Agreement

4.117. Article 28.2 of the TRIPS Agreement provides:

> Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts.

4.119. Article 28.2, read in conjunction with Article 1.1, first sentence, requires each Member to give effect to the obligation to confer on patent holders the "right to conclude licensing contracts" with respect to the patent granted in its territory.

4.122. [W]e agree with the European Union's contention that the proper inquiry under Article 28.2, read in conjunction with Article 1.1, first sentence is whether the ASI policy "affect[s] not only the right of patent holders to conclude licensing contracts concerning patents granted in China, but also their right to conclude licensing contracts concerning patents granted by other countries within the same family or families of patents."

4.123. [W]e find that Article 28.2, read in conjunction with Article 1.1, first sentence, requires that Members not frustrate the patent owner's ability to exercise its "right … to conclude licensing contracts" as conferred in the territory of another WTO Member under that provision. Accordingly, the Panel erred by focusing exclusively on "whether China ensures that patent owners have the right to conclude contracts licensing patents granted in China consistent with Article 28.2," and by failing to additionally inquire into whether the ASI policy frustrates SEP holders' exercise of their "right … to conclude licensing contracts" for patents in the territories of other Members.

4.127. We […] disagree with China's view that the fact that Chinese law enshrines a right to conclude licensing contracts discharges the European Union's claim. The ordinary meaning of Article 28.2 requires that a patent owner be able to exercise its "right" to conclude a "licensing contract", i.e. that the rights bestowed on it can be exercised until it "concludes" a licence. The Panel seems to have found that the exercise of the rights under Article 28.2 is fulfilled once "the SEP owner has agreed to license its patent on [FRAND] terms." This interpretation ignores the Panel's own factual finding that a SEP holder's agreement in this regard does *not* reflect the *conclusion* of a licensing contract."

4.133. Before the Panel, the European Union argued that the obligation to "give effect" to Article 28.2 prohibits Members from adopting measures that restrict patent owners from exercising the right to conclude licence contracts. According to the European Union, the ASI policy is inconsistent with that legal standard because it prohibits patent owners from resorting to courts outside China for the purpose of enforcing their rights in those jurisdictions, thereby decisively leveraging the position of implementers in the negotiation of licencing contracts and forcing SEP holders to reach a settlement even when it conflicts with the normal exploitation of the patent. According to the European Union, "the right of patent owners 'to conclude licensing contracts' also includes the right to negotiate the terms of SEP licensing contracts free from the pressure to reach a settlement below FRAND terms which results from broad ASIs issued by Chinese courts at the request of implementers.

4.134. China argues that, even if the ASI policy were somehow covered by Article 28.2, there would be no basis to find a violation. First, for China, the arbitrators have been presented with no "means of distinguishing between the types of ASIs that are impermissibly 'broad' … as compared to the types of ASIs that do not have these supposedly impermissible effects." Second, China "observes that the European Union's suggestion that the ASIs in question 'force[d] SEP owners to reach a settlement' on terms that

prevented them 'from extracting the economic value that could be expected from the patents' finds no basis in the factual record."

4.138. [T]he legal standard to address whether the ASI policy is capable of "negating" SEP holders' "right … to conclude licensing contracts" under Article 28.2 requires an assessment as to whether the ASI policy frustrates the fulfillment of the condition on which SEP holders waive that right, namely the possibility to negotiate FRAND terms for a licence contract. We recall, in that regard, that the obligation under Article 28.2, read in conjunction with Article 1.1, first sentence, involves a Member observing the "right to protect licensing contracts" in its own territory and doing so without frustrating the implementation of the "right to conclude licensing contracts" in the territories of other Members, such as by adopting measures that effectively "negate" a patent owner's exercise of its "right" in those territories.

4.139. The European Union argues that the ASI policy leverages the position of the implementer and forces SEP owners to settle under pressure even if it conflicts with a normal exploitation of the patents. For the European Union, SEP holders must have the right to negotiate the FRAND terms of the licencing contract free from coercion. The European Union also argues that SEP holders have "committed to offer a licence to all implementers on FRAND terms" and that FRAND terms are to be established through negotiation. China responds that there is no factual basis for the proposition that SEP holders are coerced into below-FRAND outcomes, and that there is no basis for distinguishing between permissible and impermissible ASIs under Article 28.2.

4.141. Effectively, the availability of legal remedies for patent infringement is the mechanism through which SEP holders protect their rights and disincentivize infringement, due to the aforementioned "risk" to SEP implementers. The Panel found that the function of ASIs issued by Chinese courts is to remove that risk to SEP implementers in the particular context of litigation over licensing terms in China by prohibiting SEP holders from (*inter alia*) enforcing, continuing, or initiating patent infringement or any other legal proceedings in the territory where the patent is registered. It is apparent from the Panel's overview that Chinese courts themselves recognized that the issuance of ASI's would have such an effect.

4.142. In our view, these factual findings of the Panel are sufficient evidence that the ASI policy impacts the negotiating position of SEP holders by diminishing the risk that SEP implementers will face patent infringement proceedings in the territory of other WTO Members where the patent is registered.

4.144. [I]t is clear to us that a SEP holder qualifies its "right … to conclude licensing contracts" in two important ways. First, the SEP holder makes an irrevocable commitment to enter into such contracts with any entity that wishes to use its SEP. Second, the SEP holder's irrevocable commitment in this regard applies only with respect to SEP implementers that agree to pay FRAND terms, which are not pre-determined but are envisaged as being the outcome of a process of good faith negotiations between the SEP holder and SEP implementer. This is clear from the Panel's factual finding that "[w]hat terms qualify as FRAND can be different for each patent and market" and "there is no supranational or international body empowered to determine what is FRAND," which means that "[i]t is therefore for the parties to agree terms that they consider fair and reasonable, including the licence fees or royalty rates."

4.147. [T]he Panel identified five factors that typically form the grounds on which ASIs are issued by Chinese courts. The Panel's identification of these factors reveals that the courts' consideration do not include any inquiry concerning the exercise of the SEP holder's right to conclude a licensing contract under Article 28.2, in light of the SEP holder's commitment to license the SEP on FRAND terms and thereby to negotiate the terms with implementers.

4.154. The main question for us to resolve is whether the ASI policy "as such" frustrates the SEP holders exercise of their "right … to conclude licensing contracts" under Article 28.2, read in conjunction with Article 1.1, first sentence. In our view, the Panel's factual findings described above show clearly that an ASI issued under the ASI policy impacts the negotiating position of SEP holders. Moreover, the Panel found that the *availability* of legal remedies for SEP holders is the main incentive for SEP implementers to seek out a licence, since SEP implementers otherwise "risk infringing upon patent owners' rights and the attendant legal

consequences of doing so." This is significant because, through their FRAND undertaking, SEP holders conditionally waive their right under Article 28.2 to not conclude a licensing agreement, so long as SEP implementers engage in good faith negotiations over FRAND terms.

4.157. ASIs can be issued under the ASI policy without any inquiry into the SEP holder's ability to exercise the "right … to conclude licensing contracts" in light of the FRAND undertaking made in respect of that "right." The fact that some ASI decisions may reflect considerations on the negotiating process when raised by the SEP implementer does not detract from the ability for ASIs to be issued under the ASI policy without necessarily engaging in an inquiry into the SEP holder's ability to exercise its right under Article 28.2.

4.161. In our view, the availability of ASIs to SEP implementers in China […] removes a key incentive for negotiating licences, which in turn leaves a SEP holder potentially facing litigation in China and an inability to enforce its SEP rights outside China wherever its SEP is patented at risk of cumulative daily fines. It is important to recall, in this regard, that SEPs emerge as part of the process of development of a technical standard by an SSO for which the SEP holder has decided to invest in creating a patentable invention. In creating that invention, the patent owner expects that, in agreeing to an irrevocable commitment to licence to all users on FRAND terms, it will be able to negotiate the FRAND terms with SEP implementers, and will be able to prevent third parties from using its patented invention without payment of royalties by seeking injunctive relief, court-determined FRAND terms, or other legal remedies.

4.163. FRAND terms are not pre-determined but are rather the outcome of a *process of good faith negotiations* between the SEP holder and SEP implementer. […W]e consider that the ASI policy does indeed contribute to the non-fulfilment of the central condition on which a SEP holder has predicated the exercise of its "right … to conclude licensing contracts", namely on the engagement of SEP implementers in good faith negotiations to arrive at mutually-agreeable FRAND terms.

5. Claim under Article 44.1, read in conjunction with Article 1.1, of the TRIPS Agreement

4.173. In the context of Article 44.1, the above understanding on the meaning of Article 1.1, first sentence requires a Member to not frustrate the implementation by another Member of its obligation to grant to its judicial authorities the authority to order a party to desist from an infringement. When assessing the claim by the European Union that the ASI policy as such infringes Article 44.1 is the judicial authorities of a Member who must have the authority to order a party to desist from infringement. In response to a question at the arbitral hearing, the European Union acknowledged that there is nothing about an *in personam* order on a patent owner facing SEP litigation in China that *directly* affects "the authority" of the "judicial authorities" in the territory of other Members. Rather, the European Union contends that the disincentive on SEP holders to approach "judicial authorities" in other Members to obtain injunctive relief from those authorities is alone sufficient to diminish "the authority" of those authorities. The European Union therefore contends that ASIs cause an *indirect* violation of Article 44.1.

4.174. In our view, the reading proposed by the European Union does not comport with the ordinary meaning of Article 44.1, which provides clearly that the "judicial authorities" shall have the "authority to order a party to desist from an infringement, *inter alia* to prevent the entry into the channels or commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right, immediately after customs clearance of such goods." Nothing in the ASI policy nor an ASI issued therefrom affects the authority of a judicial authority of another Member. The issuance of an ASI may restrict SEP holders from requesting "judicial authorities" in other Members to exercise their "authority" in this regard, but this in no way has an effect on the "authority" of the judicial authorities of the WTO Member where the patent is registered.

6. Claim under Article 41.1 of the TRIPS Agreement

4.183. The interpretative issue before us is the scope of the term "enforcement procedures" in the first sentence of Article 41.1.

4.184. The ordinary meaning of the term "enforce" includes "the process of compelling observance of a law, regulation, etc.," and the term "procedure" includes the "formal steps to be taken in a legal action." The immediate context for the interpretation of the second sentence of Article 41.1 is the textual link to "[t]hese procedures" in the first sentence. The first sentence of Article 41.1, therefore, constrains the scope of "enforcement procedures" to those "procedures" that are "so as to *permit effective action against any act of infringement* of intellectual property rights covered by this Agreement."

4.185. As outlined by the Panel, various in Sections 2 to 5 of Part III support the interpretation that enforcement procedures are those that compel observance of the provisions of the TRIPS Agreement with a view to preventing infringement of IP rights under these provisions. […] It is clear to us that the aim of the procedures that Members are required to put in place is to enable right holders – to whom intellectual property rights are conferred by virtue of the provisions of the TRIPS Agreement – to prevent the occurrence of infringements to those rights.

4.187. This reading of the term "enforcement procedures" is confirmed by the object and purpose of the TRIPS Agreement. […T]he TRIPS Agreement envisages that Members will establish and maintain "national systems for the protection of intellectual property," and that these "national systems" will enshrine a certain set of common minimum standards for the effective and adequate protection of intellectual property rights in the territory of a given Member. In this context, we understand the enforcement procedures specified in Part III of the TRIPS Agreement as intended to ensure the observance of the minimum standards for the effective and adequate protection of intellectual property rights set out by the provisions of the TRIPS Agreement and given effect to in the territory of each Member.

4.190. As the Panel noted, "[t]he SEP litigation in China is brought by the implementer and is not addressing infringement, but rather the determination of a FRAND royalty rate under a licence agreement the right holder has agreed to conclude with the implementer" and "the action taken under the measure, the issuance of an ASI, is not against infringement." For these reasons, we agree with the Panel that "the ASI policy is not an enforcement procedure as specified in Part III so as to permit effective action against any act of infringement of IP rights."

4.196. [W]e uphold the Panel's ultimate conclusion that the European Union did not demonstrate that the ASI policy qualifies as an "enforcement procedure" under the first sentence of Article 41.1 of the TRIPS Agreement, and was therefore not within the ambit of its second sentence.

7. Claim under Article 63.1 of the TRIPS Agreement

4.208. [T]he Panel found that the new interpretation or clarification of the Civil Procedure Law and the SPC provisions on several issues concerning application of law in review of cases involving act preservation in intellectual property disputes (SPC Provisions) in Xiaomi v. InterDigital, which served as a reference for future cases, was of general application within the meaning of Article 63.1.

4.209. Article 63.1 of the TRIPS Agreement, titled "Transparency," reads as follows:

> Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them. […]"

4.213. [A] final judicial decision is of general application within the meaning of Article 63.1 if it establishes or revises principles or criteria applicable in future cases. This standard also allows for an individual inquiry into final judicial decisions, in order to ascertain their significance with respect to the subject matter covered by the TRIPS Agreement and accordingly the importance of providing transparency for WTO Members and right holders with respect to such decisions.

4.216. [W]e agree with the Panel that a decision that determines that an existing provision can be applied "in a novel fact situation" and "breaks new ground" could amount to a revision of a principle or criterion. This assessment would have to be undertaken on a case-by-case basis and informed by the transparency objective of Article 63.1 to ensure that Members and right holders are informed about laws and regulations, as well as final judicial decisions and administrative rulings of general application, within the subject matter of the TRIPS Agreement.

4.127. With respect to whether the judicial decision establishes or revises principles or criteria "applicable in future cases," the Panel noted that an interpretation or clarification of a previously established principle or criteria in a judicial decision "may be intended to serve as a reference for other courts, and therefore be considered generally applicable, whether it is a binding authority or merely persuasive" and that "[e]ven if such a final judicial decision is not formally binding, foreign governments and right holders will not necessarily be able to become acquainted with a Member's IP system if the judicial decision is not published or otherwise made publicly available."

4.220. [T]he meaning of "judicial decisions … of general application" must be assessed in light of the content and substance of the instrument, rather than its form or nomenclature. This phrase should be capable of encompassing more than those instruments formally characterized as such by a WTO Member. Otherwise, WTO Members themselves could determine which provisions would be subject to the transparency obligation in Article 63.1 merely by the labelling of those instruments. What constitutes a "degree of authoritativeness" would require a case-by-case assessment of the particular factual features of the final judicial decisions in each case.

4.224. [T]he Panel found that the scope of the ASI in Xiaomi v. InterDigital was much broader than the one in Huawei v. Conversant as it "not only enjoined InterDigital from enforcing an injunction already requested in a foreign court (in this case, the District Court of Delhi) and enjoined InterDigital to withdraw or suspend the injunctions applied for in India but also, for the first time in China, it enjoined the patent owner from applying for or enforcing injunctions anywhere in the world, and from requesting any court anywhere in the world to determine the SEP licence fee rates or licence fee disputes. Furthermore, the decision was issued in accordance with the same provisions of the Civil Procedure Law cited by the SPC in Huawei v. Conversant but it also cited specific articles of the SPC Provisions, which were not cited by the SPC in Huawei v. Conversant.

4.227. [T]he Panel rightly took into account the fact that the decision reached a novel legal conclusion that was not clear either from China's laws and regulations or from its judicial practice. Even if the availability of ASIs in the context of SEP litigation was already established in Huawei v. Conversant, the worldwide scope of the ASI in Xiaomi v. InterDigital and the supplementary legal basis relied on by the court developed a novel understanding of the application of the law. This understanding could not have been anticipated by governments and right holders and – if followed by other courts – could have important consequences for them in terms of incentives to enforce their IP rights in other jurisdictions.