



CHINA – ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS611/11.

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 4 May 2023

General

1. (1) In these proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures apply.
- (2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Panel shall be kept confidential and the documents submitted to it shall be treated as confidential. The parties and third parties shall treat as confidential information that is submitted to the Panel that the submitting party has designated as confidential.
- (2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.
- (3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. A party should endeavour to promptly provide a non-confidential summary to any Member requesting it, and if possible, within 10 days of receiving the request.
- (4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

Submissions

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.
- (2) Each party shall also submit to the Panel, before the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.
- (3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.
- (4) The Panel may invite the parties or third parties to make additional submissions during the proceedings, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) If China considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

- a. China shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. The European Union shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.
- b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.
- c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.
- d. Any request for such a preliminary ruling by the respondent before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be shared with all third parties.
- e. (2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceedings, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted pursuant to the preceding paragraph, the Panel shall accord the other party an opportunity to comment on the new evidence submitted.
6. (1) If the original language of an exhibit or portion thereof is not the working language of the Panel in these proceedings, which is English, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion in English. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission that contains the translation in question. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation.
7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by the European Union should be numbered EU-1, EU-2, etc. Exhibits submitted by China should be numbered CHN-1, CHN-2, etc. If the last exhibit in connection with the first submission was numbered EU-5, the first exhibit in connection with the next submission thus would be numbered EU-6. If a party withdraws an exhibit or leaves one or more exhibits intentionally blank, it should indicate this on the cover page that provides the number of the blank exhibit.

(2) When a party submits new exhibits, it shall provide an updated list of exhibits (in Word or Excel format) together with the corresponding submission, oral statement, or responses to questions. If a party submits an exhibit off-line (see paragraph 31(c) below) it shall, nevertheless, indicate the name of the exhibit and the exhibit number in its exhibit list.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in a submission and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit along with the date that it was accessed.

Editorial Guide

8. To facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions, which is available in the Help & Resources section of the Disputes Online Registry Application (DORA).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:
- a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.
 - b. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 22 below.

Substantive meetings

10. The Panel shall meet in closed session.
11. The parties shall be present at the meetings only when invited by the Panel to appear before it.
12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.
- (2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings and the submissions of the parties and third parties.
13. Each party shall provide to the Panel the list of members of its delegation by 5.00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.
14. A request by a party for interpretation from one WTO language to another should be made to the Panel as early as possible, preferably at the organizational stage, but no later than three weeks before the meeting, to allow sufficient time to ensure availability of interpreters.
15. The first substantive meeting of the Panel with the parties shall be conducted as follows:
- a. The Panel shall invite the European Union to make an opening statement to present its case first. Subsequently, the Panel shall invite China to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters before taking the floor.
 - b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to not more than 60 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least five working days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.

- c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions through the Panel.
 - d. The Panel may subsequently pose questions to the parties.
 - e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the European Union presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.
 - f. Following the meeting:
 - i. Each party shall submit a final written version of its opening statement by 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.
 - ii. Each party shall send in writing, within the time-frame established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.
 - iii. The Panel shall send in writing, within the time-frame established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.
 - iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel before the end of the meeting.
16. The Panel shall circulate promptly to the parties the updated version of the timetable.
17. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that China shall be given the opportunity to present its oral statement first. The party that presented its opening statement first shall present its closing statement first.

Third-party session

18. Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.
19. Each third party shall indicate to the Panel whether it intends to make an oral statement during the third-party session 10 days before this session.
20. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.
- (2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings and the submissions of the parties and third parties.
- (3) Each third party shall provide, no later than three working days before the third-party session, a list of members of its delegation who will attend the session.
21. To ensure the availability of interpreters, the third parties shall also indicate at least three weeks before the third-party session whether they intend to make their statement in a WTO language other than English, which is the language in which these panel proceedings are being conducted, and whether they would require interpretation from English to any other WTO language.

22. The third-party session shall be conducted as follows:
- a. All parties and third parties may be present during the entirety of this session.
 - b. The Panel shall first hear the oral statements of the third parties. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters before taking the floor.
 - c. Each third party should limit the duration of its statement to 15 minutes and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least five working days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.
 - d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions through the Panel to any third party for clarification on any matter raised in that third party's submission or statement.
 - e. The Panel may subsequently pose questions to any third party.
 - f. Following the third-party session:
 - i. Each third party shall submit the final written version of its oral statement, by 5.00 p.m. (Geneva time) on the first working day following the meeting.
 - ii. Each party may send in writing, within the time-frame to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.
 - iii. The Panel may send in writing, within the time-frame to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.
 - iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within the time-frame established by the Panel before the end of the meeting.

Descriptive part and executive summaries

23. The description of the arguments of the parties and third parties in the descriptive part of the Panel Report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the Report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the matter.
24. Each party shall submit two integrated executive summaries. The first integrated executive summary shall summarize the facts and arguments as presented to the Panel in the party's first written submission and its first oral statement. The first integrated executive summary may also include a summary of its responses to questions following the first substantive meeting. The second integrated executive summary shall summarize its second written submission and its second oral statement. The second integrated summary may also include a summary of its responses to the second set of questions and comments thereon following the second substantive meeting. The timing of the submission of these two integrated executive summaries shall be indicated in the timetable adopted by the Panel.
25. Each integrated executive summary to be provided by each party shall be limited to 15 pages.

26. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.
27. Each third party shall submit an executive summary of its arguments as presented to the Panel. The executive summary to be provided by each third party shall not exceed six pages. If a third party makes only a submission or statement and this does not exceed six pages in total, this shall serve as the executive summary of that third party's arguments. If a third party submits both a submission and statement and one of these does not exceed six pages, the third party shall indicate to the Panel (via the messages tab of DORA) whether it intends for that submission or statement to serve as the executive summary of its arguments. If a third party does not wish for the submission or statement to serve as its executive summary, it shall submit a separate integrated executive summary. This integrated executive summary may also include a summary of responses to questions.

Interim review

28. Following issuance of the Interim Report, each party may submit a written request to review precise aspects of the Interim Report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.
29. If no meeting is requested, each party may submit written comments on the other party's written request for review in accordance with the timetable adopted by the Panel. Such written comments shall be limited to the other party's request for review.
30. If a meeting is requested, the Panel shall consult with the parties on the timing of the meeting and of the submission of any further written comments.

Interim and Final Reports

31. The Interim Report and the Final Report (before its official circulation) shall be kept strictly confidential and shall not be disclosed.

Service of documents

32. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceedings:
 - a. All communications with the Panel shall take place via the Disputes Online Registry Application (DORA) <https://dora.wto.org>. Upload of a document to DORA shall constitute service on the Panel, the other party, and the third parties.
 - i. Submissions and exhibits shall be uploaded to the **Documents** tab in DORA by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The electronic version uploaded to DORA shall constitute the official version for the purposes of submission deadlines and the record of the dispute.
 - ii. Communications that are of a logistical nature should be made through the **Messages** tab. Parties and third parties shall not upload submissions or exhibits as attachments to a message.
 - b. The DS Registry is available to provide assistance to parties or third parties with DORA including managing their DORA accounts and how to access DORA to file or download documents. The DS Registry is also available to answer questions about the modalities of filing and to receive paper submissions as described in subparagraphs c and e. The DS Registry is located in Room 2047 of the CWR and is open from 9.30 a.m. to 12.30 p.m. and 2.30 p.m. to 5.00 p.m. The Registry can be reached at +41 22 739 5644 and via email at DSRegistry@wto.org. A DORA User Guide is available in the Help & Resources section of the application.

- c. If a document or item is in a format that cannot be submitted electronically, then the party or third party shall complete the Notice of Manual Filing (available in the Help & Resources section of DORA) and upload that Notice to DORA by 5.00 p.m. on the due date established by the Panel. The party or third party shall bring the document or item to the DS Registry by 5.00 p.m. (Geneva time) the next working day.
- d. DORA accepts many document formats. Parties and third parties shall upload submissions in both Microsoft Word and PDF format to ensure both the ability to work with the documents during the dispute and proper preservation.
- e. Each party and third party shall make an appointment with the DS Registrar to file one paper copy of all documents it submits to the Panel, including the exhibits. The DS Registrar shall stamp the documents with the date and time of the submission. If an exhibit is in a format that is impractical to submit as a paper copy, then the party may submit such exhibit in electronic format only. In this case, the cover page of the exhibit should indicate that the exhibit is only available in electronic format.
- f. The Panel shall provide the parties with the Draft Descriptive Part of the Report, the Interim Report, and the Final Report, as well as all other documents or communications issued by the Panel during the proceedings, via DORA.
- g. If any party or third party is unable to meet the 5.00 p.m. deadline because of technical difficulties in uploading documents to DORA, it shall inform the DS Registry without delay and provide the DS Registry an electronic version of all documents to be submitted to the Panel either by bringing them to the DS Registry on electronic medium or by email by 5.30 p.m. on the due date. Any email shall also be addressed to the Panel Secretary, the other party and, if appropriate, the third parties. If the file size of specific exhibits makes transmission by email impracticable (e.g. they would exceed size limits or it would require more than five email messages to transmit them), then an electronic copy of those exhibits shall be filed with the DS Registry and provided to the other party and, if appropriate, the third parties by 9.30 a.m. the next working day on an electronic medium acceptable to the recipient. In that case, the party or third party concerned shall send a notification to the DS Registrar, copying the Panel Secretary, the other party, and the third parties, as appropriate, via email, identifying the documents that cannot be transmitted by email.
- h. If a party or third party is unable to access a document filed through DORA, it shall promptly, and in any case by 5.00 p.m. on the next working day after the due date for the filing of the document, inform the DS Registrar, the Panel Secretary, and the party or third party that filed the document, of the problem. The DS Registrar shall try to identify a solution to the technical problem. Meanwhile, the party or third party that filed the document(s) shall, promptly thereafter, provide an electronic version of the relevant document(s) to the affected party or third party by email, with a copy to the DS Registry and the Panel Secretary.

Correction of clerical errors in submissions

- 33. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request shall identify the nature of the errors to be corrected and shall be made promptly following the filing of the submission in question.

Appeal arbitration

- 34. The Panel shall take note of any Agreed Procedures for Arbitration under Article 25 of the DSU that the parties may notify in this dispute.

ANNEX A-2**ADDITIONAL WORKING PROCEDURES OF THE PANEL TO FACILITATE
ARBITRATION UNDER ARTICLE 25 OF THE DSU¹****Adopted on 21 February 2025****Transmission of the Panel Report**

1. The Panel will issue the final Panel Report to the parties and provide the parties with an estimated date for circulation of the final Panel Report to Members in all three WTO languages. Upon a request to suspend the Panel proceedings for purposes of facilitating an arbitration under the Agreed Arbitration Procedures, the Panel shall transmit the final Panel Report in the three WTO languages to the parties, third parties and the pool of arbitrators.^{2,3}
2. If the final Panel Report is not yet available in all three WTO languages when the request for suspension is made, the Panel shall transmit immediately the original English language version of the final Panel Report to the pool of arbitrators. The Panel shall transmit the final Panel Report in all three WTO languages as per paragraph 1, once the translations become available.

Suspension of the Panel proceedings

3. Once the final Panel Report has been transmitted to the parties, third parties and the pool of arbitrators, the Panel will grant the request to suspend the Panel proceedings made jointly by the parties under Article 12.12 of the DSU and indicate the date the suspension takes effect.

Transmission of the Panel record

4. If a notice of recourse to Article 25 under the Agreed Arbitration Procedures (Notice of Appeal⁴) is filed, the Panel shall, once suspension of the Panel proceedings has taken effect and as soon as possible after the arbitrators have been appointed, transmit the record of the Panel proceedings to the arbitrators via the WTO Disputes On-Line Registry Application (DORA). The Panel shall consult with the third parties concerned with a view to transmitting, as part of the Panel record, the third-party submissions, third-party oral statements and third-party responses to questions.

Confidentiality of the Panel Report and the Panel record

5. Once transmitted to the parties, third parties and the pool of arbitrators, the final Panel Report in all three WTO languages remains confidential. However, in the event of the filing of a Notice of Appeal, the parties waive the confidentiality of the final Panel Report such that the party filing the Notice of Appeal, which will be circulated as an unrestricted DS document, may include the final Panel Report in all three WTO languages.⁵

¹ See paragraph 1.9 of the Panel Report and the parties' Agreed Procedures for Arbitration under Article 25 of the DSU (WT/DS611/7) (Agreed Arbitration Procedures). Through the present Additional Working Procedures of the Panel, the Panel accedes to, and operationalizes the modalities of, the parties' joint request formulated in paragraphs 4 and 19 of the Agreed Arbitration Procedures.

² Unless the parties indicate otherwise, the pool of arbitrators shall be understood to comprise all individuals identified in JOB/DSB/1/Add.12/Suppl.5, as validated in JOB/DSB/1/Add.12/Suppl.11.

³ The Panel notes that minor editorial changes may have been made between the final Panel Report as issued to parties and the English version the parties and arbitrators will receive with the French and Spanish versions. It is understood that transmission of the Final Report in the three languages of the WTO shall not constitute circulation of the Panel Report within the meaning of Article 16 of the DSU.

⁴ In the Agreed Arbitration Procedures, the parties refer to this notice as a Notice of Appeal, and accordingly, we use this term in these Additional Working Procedures.

⁵ In paragraph 5 of the Agreed Arbitration Procedures, the parties envisage that the Notice of Appeal shall include the final Panel Report in all three WTO languages.

ANNEX B

ARGUMENTS OF THE PARTIES

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ANNEX B-1**FIRST PART OF THE INTEGRATED EXECUTIVE SUMMARY
OF THE ARGUMENTS OF EUROPEAN UNION****1. INTRODUCTION**

1. A new policy introduced by China in the second half of 2020 had, and continues to have, a profound effect on the worldwide protection and enforcement of standard essential patents ("SEPs") in the field of telecommunications. Five anti-suit injunctions, issued in quick succession by the Supreme People's Court of the People's Republic of China ("SPC" or the "Supreme People's Court") and two Intermediate People's Courts, disrupted the carefully balanced system of protection and enforcement of patents laid down in the TRIPS Agreement.

2. These judicial decisions, which departed from the normal interpretation and application of the Chinese legal framework for the adoption of provisional measures in intellectual property disputes, have positioned Chinese courts as the forum of choice for implementers seeking to obtain more favourable patent licensing terms. Disregarding the rights which the TRIPS Agreement confers on the owners of patents, the anti-suit injunctions issued by Chinese courts have prohibited the holders of the relevant SEPs from exercising those rights before the courts of other WTO Members and have, as a result, raised unreasonable obstacles to a normal exploitation of the patents concerned.

3. The European Union submits that the policy introduced, maintained and implemented by China empowers and encourages Chinese courts to issue act preservation measures ("anti-suit injunctions") that prohibit patent holders from asserting their rights protected by the TRIPS Agreement in other jurisdictions. These anti-suit injunctions, which may have a worldwide and prospective scope, are imposed under the threat of daily penalties set at the maximum level allowed for under Chinese Civil Procedure Law.

2. FACTUAL ASPECTS OF THE MEASURES AT ISSUE

4. On 28 August 2020, the SPC adopted the first anti-suit injunction in SEP litigation in the *Huawei v Conversant* case. The SPC prohibited Conversant from enforcing an injunction issued on 27 August 2020 by a German court. The anti-suit injunction was based on Article 100 of China's Civil Procedure Law (now Article 103) and set a daily fine of RMB 1 million for non-compliance. On 11 September 2020, the SPC rejected Conversant's reconsideration request.

5. After this decision, in 2020, lower Chinese courts issued four more anti-suit injunctions in SEP litigation based on Article 100 of China's Civil Procedure Law.

6. On 23 September 2020, the Wuhan Intermediate People's Court (the "Wuhan Court") granted in the *Xiaomi v InterDigital* case an anti-suit injunction requesting InterDigital to withdraw a pending injunction action in India and prohibiting InterDigital to request new injunctions, the determination of FRAND terms and conditions and to enforce existing injunctions in China or other countries. The court set a daily fine of RMB 1 million for non-compliance. On 4 December 2020, the Wuhan court rejected InterDigital's reconsideration request. On 3 August 2021, the two parties settled.

7. On 28 September 2020, the Shenzhen Intermediate People's Court ("the Shenzhen court") adopted an anti-suit injunction in the *ZTE v Conversant* case which prohibited Conversant from enforcing an injunction issued on 27 August 2020 by a German court. The court set a daily fine of RMB 600 000 for non-compliance. Subsequently, ZTE and Conversant reached a global licensing agreement and on 2 November 2020 ZTE withdrew its action.

8. On 16 October 2020, the Shenzhen court granted an anti-suit injunction in the *OPPO v Sharp* case prohibiting Sharp and its affiliates from initiating new patent infringement lawsuits, and/or applying for new judicial injunctions or other similar measures in other countries. The court set a daily fine of RMB 1 million for non-compliance. On 8 October 2021, the parties settled the case.

9. On 25 December 2020, the Wuhan court granted an anti-suit injunction in the *Samsung v Ericsson* case prohibiting Ericsson from requesting injunctions, the setting of SEP licensing rates and terms or determinations that Ericsson had acted in line with its FRAND obligations in or outside China. The anti-suit injunction also prohibited Ericsson from requesting another court to require Samsung to withdraw its application for an ASI. Subsequently, Ericsson and Samsung entered into a multi-year global cross-licensing agreement covering sales from 1 January 2021. On 10 March 2021, the Wuhan court rejected Ericsson's reconsideration request.

10. High ranking officials and judicial documents called for improvements in the protection of Chinese enterprises in IP disputes, including by enacting anti-suit injunctions:

- a) Justice Luo Dongchuan, then Vice President of the SPC and President of the SPC's IP Court called for an extension of "the application of the conduct preservation system, realize the functions of anti-litigation injunction, anti-prohibition injunction and anti-injunction and form a strong countermeasure against foreign parallel litigation" in a speech before the National People's Congress (the "NPC");
- b) In July 2020, a research paper by the Guangdong High People's Court proposed to enact as soon as possible of a system of anti-suit injunctions and anti-anti-suit injunctions;
- c) In November 2020, Mr. Xi Jinping, China's President and General Secretary, said in the speech that: "We must promote the application of Chinese laws and regulations on IP abroad [...] set up systems for preventing and controlling IP risks involving foreign parties, and provide greater support to Chinese enterprises in protecting their IP overseas";
- d) the SPC's Five-year Plan for the Judicial Protection of Intellectual Property Rights (2021-2025) committed to "promote the extraterritorial application of China's relevant laws on intellectual property rights, and earnestly protect the overseas security and lawful rights and interests of our citizens and enterprises," and to "properly resolve international parallel litigation.

11. Central judicial and policital bodies have promoted the application of the decisions in *Huawei v Conversant* and other cases and have encouraged the imposition of anti-suit injunctions in future cases. Moreover, provincial bodies have also confirmed the correctness and exemplary character of these judicial decisions in their respective provinces.

12. Specifically, in 2021 and 2022, the SPC has promoted the decision in *Huawei v Conversant* as a "typical" or exemplary case in several official reports and explained that it set the judicial path for the issuance of anti-suit injunctions and achieved good legal and social effects. The SPC also described the decision in *Oppo v Sharp* as "demonstrating the clear attitude of the Chinese judicial organs, providing a strong judicial guarantee for enterprises to participate in the international market competition fairly. The transformation of 'followers of intellectual property rules' into 'leaders of international intellectual property regulations' has an important role in promoting business".

13. At provincial and local level, the Shenzhen court, the Wuhan court, the Hubei High People's Court the Guangdong High People's Court and the Guangdong Province Communist Party Political and Legal Committee have issued official reports confirming the correctness and exemplary character of the judicial decisions putting in place anti-suit injunctions.

14. The National People's Congress Standing Committee has also endorsed this policy in 2021 and 2022. According to official statements issued in 2021 and 2022, the policy will continue to be applied in the future.

15. In particular, on 21 October 2021, the SPC's president presented a report before the National People's Congress Standing Committee stating that: "We explored how to apply and improve the "anti-suit injunctions" in the standard essential patent-related disputes where parallel lawsuits are likely to occur."

16. The Standing Committee's stated in its Opinions and Suggestions on the SPC report that:

Some participants pointed out that intellectual property has become the core element of today's big country game. Western countries frequently use core technology to "choke" China, abuse "long arm jurisdiction" and infringe on the legitimate rights and interests of Chinese enterprises, which is particularly obvious in the field of 5G communication. It is urgent to strengthen the protection of independent intellectual property. In the past years, China explored and improved the application of "anti-suit injunction" in the field of standard essential patent disputes with high incidence of parallel litigation, which has achieved good results. It is suggested to continue active exploration, make full use of it, and resolutely safeguard China's sovereignty, security and development interests.

17. On 27 February 2022, the SPC presented a report outlining of the SPC IP court's first three years of activity and the implementation of the Decision setting up the SPC IP and the national IP case-appeal and trial system. The report stated that: "Focusing on the implementation of national strategies, in-depth research on major issues such as ... the establishment of an "anti-suit injunction" system with Chinese characteristics, and the maintenance of judicial sovereignty over foreign-related intellectual property rights". The Standing Committee approved this report.

18. On 8 March 2022, the Standing Committee presented a report to the NPC stating that the former "stepped up oversight of supervisory and judicial work to safeguard social fairness and justice" and heard and deliberated reports from the SPC on intellectual property and the abovementioned Decision. On 11 March 2022, the NPC fully approved the National People's Congress Standing Committee work in relation to the supervision of the SPC.

3. THE LEGAL CHARACTERIZATION OF THE MEASURES AT ISSUE

19. The European Union considers that the legal standard applicable to ascertaining the existence of an unwritten measure is met in the present case.

20. First, the anti-suit injunction policy in SEP litigation is attributable to China, the court decisions in question being acts of its judicial branch.

21. Second, the five court decisions imposing anti-suit injunctions together with other legal instruments, operate as part of a single measure in furtherance of an underlying policy to systematically impose broad anti-suit injunctions in SEP litigation.

22. The evidence shows the existence of two intertwined objectives: a) safeguarding China's judicial sovereignty and its development interests and b) securing a fair playing field for China's enterprises to compete in international markets.

23. In addition to the said objectives, the following evidence, assessed in a holistic manner, demonstrates the existence of a single unwritten measure:

- a) the SPC, the NPC's Standing Committee and the NPC have endorsed the issuance of anti-suit injunctions and encouraged Chinese courts to continue using and improving the anti-suit injunction system;
- b) the designation of four decisions as "typical cases" and their overall promotion by the SPC and the Intermediate People's Courts and the Guangdong Province Communist Party Political and Legal Committee; and
- c) the similar legal reasoning of the five decisions;

24. The evidence as whole demonstrates that the five court decisions are not separate instances of applying China's legislation on act preservation measures but part of single unwritten measure implementing an underlying policy.

25. The rejection of the anti-suit injunction request in *Lenovo v Nokia* does not undermine the existence of a policy. The court's reasoning leaves open that a request may be granted once

judgments have been issued in parallel cases. Subsequently, Chinese judicial and government bodies have endorsed and encouraged the use of anti-suit injunctions in the future.

26. Third, the precise content of the unwritten measure is to empower and encourage Chinese courts to issue anti-suit injunctions prohibiting patent owners from enforcing their patents outside China. The legal path set by the SPC in *Huawei v Conversant* to issue anti-suit injunctions in Chinese law and the endorsement by the highest bodies empowers Chinese courts to do so. Moreover, Chinese courts are not free to disregard the anti-suit injunction policy but are encouraged to follow it. The highest government and judicial bodies in China, who supervise the courts' activity, encourage Chinese courts to follow this policy to "resolutely safeguard China's sovereignty, security and development interests". The reasoning set out by the SPC in the *Huawei v Conversant* implies that an anti-suit injunction is justified every time parallel proceedings hinder the enforcement of judgements issued by Chinese courts or affect the economic interests of implementers.

27. Further, the evidence set out above, assessed as a whole, demonstrates that China's anti-suit injunction policy in SEP litigation is a norm of general and prospective application. This policy is designed to affect an unidentified number of operators, has been applied in different cases and already creates expectations among economic operators.

28. The European Union considers that, in the alternative, China's issuance of anti-suit injunctions in SEP litigation constitutes ongoing conduct. The issuance of anti-suit injunctions has repeated application. After the *Huawei v Conversant* decision, lower courts swiftly issued four anti-suit injunctions in separate cases, applying essentially the same legal reasoning. Reconsideration decisions confirmed three of the five court decisions. Four of the five decisions were promoted as typical or model cases. The evidence also shows that the issuance of anti-suit injunctions is likely to continue.

29. Finally, the European Union challenges the five individual instances of application of anti-suit injunctions. These five individual decisions have lingering effects and continue to impair benefits for the European Union under the TRIPS Agreement. The parties reached settlements after the rights of SEP owners were restricted by the anti-suit injunctions at issue.

4. CHINA'S LEGAL SYSTEM

4.1. CHINA'S JUDICIAL SYSTEM

30. NPC's Standing Committee is the only body authorized under the Constitution to interpret the laws. The Standing Committee has delegated a limited power of interpretation to the SPC. There are two types of legal interpretation in China:

- a) legislative interpretations, which remain only within the authority of the NPC Standing Committee and have the same force as laws; and
- b) application-specific interpretations issued by the Supreme People's Court (SPC), which elaborate the meaning of certain legal provisions when judicial bodies apply the law.

31. However, cases and other documents issued by courts may still have consequential effects, including *de facto* reliance upon them in future decisions.

32. Chinese law establishes a system of oversight, with the National People's Congress and its Standing Committee responsible for supervising the Supreme People's Court. Furthermore, higher courts are entrusted with the critical role of overseeing the decisions of lower-level courts. Lower courts are likely to look to and follow higher court guidance, both in the form of documents and decisions issued by the higher courts.

33. The Standing Committees of the NPC supervises the activity of the SPC also via "work reports": (i) annual working reports, which are provided as a matter of practice and which summarize the work and achievements of the previous year and introduce the work plan for the upcoming year, and (ii) special reports on specific issues, such as IP litigation. These work reports provide insight into future trends or goals of the courts.

34. The opinions and suggestions of the Standing Committee of the NPC on these reports show the close control exercised by the NPC's Standing Committee in the people's courts activity in intellectual property. The law on the supervision by the Standing Committees, requires the SCP to study and handle these opinions and suggestions and to submit a report in this respect.

4.2. LEGAL AUTHORITY CONSIDERED BY JUDGES

35. Aside from legislation adopted by the NPC, the legal authority considered by judges that is relevant to the present case consists of a) judicial interpretations, b) typical cases and c) judicial policy statements.

36. Judicial interpretations are issued by the SPC to ensure consistency in judicial practice. These interpretations of law should be followed by all lower courts in China.

37. On 26 November 2018, the SPC approved the Supreme People's Court Provisions on Act Preservation in IP Disputes which are particularly relevant in the present case.

38. The SPC and High People's Courts publish typical cases, which are intended to play an "exemplary and guiding role" for lower courts, to harmonize their decisions and make them consistent with the SPC policy.

39. In addition to the documents and cases issued by the courts, judicial policy statements, such as speeches or party publications, may also influence the judiciary and reinforce certain norms or goals of the legal system.

5. ARTICLE 1.1, FIRST SENTENCE, AND ARTICLE 28.1 OF THE TRIPS AGREEMENT

40. The interpretation of the obligation to "give effect" in Article 1.1 should take account of the objectives of the TRIPS Agreement as set out in its preamble and in Article 7 of the same Agreement. In conjunction with the obligations laid down in Article 28.1, the first sentence of Article 1.1 requires Members to refrain from adopting or applying measures that restrict, or seek to restrict, the exercise by patent owners of their exclusive rights in the territories of other Members.

41. The portfolios of SEP owners are composed of a multiplicity of patents that are national in nature and independent from the patents granted by other countries to the same invention. Patent owners can only enforce their exclusive rights against infringers in the territories of those countries where one of their patents has been obtained. For that purpose, patent owners must resort to the courts of the country or countries where they hold patents, a requirement which may naturally give rise to parallel proceedings in various jurisdictions.

42. China's anti-suit policy in SEP litigation prohibits SEP owners from resorting to courts of other WTO Members in order to enforce each and every one of their exclusive rights listed in Article 28.1 of the TRIPS Agreement.

43. The European Union submits that WTO Members should exercise restraint and refrain from empowering their courts to issue anti-suit injunctions in SEP litigation, except if they are necessary to address vexatious, oppressive, or otherwise abusive parallel litigation in other jurisdictions. China's anti-suit injunction policy in SEP litigation goes far beyond that objective. The global anti-suit injunctions issued by Chinese courts severely restrict, or seek to restrict, the rights of patent owners to resort to the courts of the countries that have granted those patents.

44. Even if China's policy could be construed as a measure to organise or streamline SEP litigation before its courts, the right to adopt or maintain such policy, to the extent it impinges on the field covered by Article 28.1 of the TRIPS Agreement, would have to be exercised reasonably and not abusively. China's policy is not targeted to address exceptional problems raised by parallel litigation, but rather to prevent parallel litigation from continuing or emerging altogether in other WTO Members. Such a measure constitutes an abuse of anti-suit injunctions in the context of SEP litigation and disrupts the carefully balanced system of protection and enforcement of patents laid down in the TRIPS Agreement.

45. China's anti-suit injunction policy in SEP litigation constitutes, "as such", a severe restriction on the exercise of the rights of the patent owners outwith China and is therefore inconsistent with China's obligations under Article 1.1 of the TRIPS Agreement in conjunction with Article 28.1 of the TRIPS Agreement.

46. In the five individual SEP disputes where anti-suit injunctions have been issued, the Chinese courts have deprived SEP owners from their right to resort to courts in other WTO Members in order to exercise their patent rights. They did so even though they failed to establish that recourse by SEP owners to courts outwith China was vexatious or oppressive in the circumstances of each case.

47. The likelihood of interference with the decisions of Chinese courts cannot justify the issuance of anti-suit injunctions prohibiting SEP owners from exercising their exclusive rights in the countries for which their patents were granted. While multiple courts may assert jurisdiction to rule on SEP disputes, only the courts of the countries for which the patents are granted are competent to rule on the validity of those patents and take action against their infringement. If SEP owners are prohibited from resorting to the courts of the countries where their exclusive rights can be enforced, they are in practice deprived of those rights.

48. As a result of the anti-suit injunctions imposed by the Chinese courts, which were sanctioned through high daily penalties in case of violation, the exercise of the exclusive rights of patent owners was restricted. The effects of those measures persist, despite the fact that the SEP disputes before Chinese courts were eventually settled after the imposition of the anti-suit injunctions. Those settlements constitute themselves lingering adverse effects of the individual measures challenged by European Union.

49. It is necessary for the Panel to rule on the consistency with the TRIPS Agreement of each individual measure identified by the European Union to clarify that Chinese courts may not continue to apply the anti-suit injunctions, nor may they reintroduce them at the request of implementers, if litigation between the parties to those SEP disputes were to resume in the future.

50. The five anti-suit injunctions issued by the Chinese courts remain within the terms of reference of the Panel. Each of these individual measures is inconsistent with China's obligations under the first sentence of Article 1.1 and Article 28.1 of the TRIPS Agreement.

6. ARTICLE 1.1, FIRST SENTENCE, AND ARTICLE 28.2 OF THE TRIPS AGREEMENT

51. The European Union contends that the unwritten measure at issue, either as a norm of general and prospective application or as ongoing conduct, constitutes a restriction on the right of patent owners to conclude licensing contracts and is inconsistent with China's obligations under Article 1.1, first sentence, of the TRIPS Agreement in conjunction with Article 28.2 of the TRIPS Agreement.

52. The role played by the Chinese courts in creating the conditions, through the adoption of anti-suit injunctions, for a prompt settlement of the SEP disputes has been emphasized in the reports submitted by those courts to the political bodies supervising their work. The European Union considers that the various statements of the Chinese courts clearly demonstrate that the settlements reached after the issuance of the anti-suit injunctions were an effect of the adoption of the challenged measures.

53. The statements made public by the Chinese courts confirm that the issuance of anti-suit injunctions in SEP disputes was intended to force SEP owners to reach settlements and sign licensing contracts with the implementers which had requested the imposition of those measures. They emphasize the role of the act preservation rulings in prompting settlements between the parties. Given the coercive effect of the anti-suit injunctions, it is not possible to establish that the SEP owners subject to those measures were able to conclude licensing contracts on terms that are in line with a normal exploitation of their patents.

7. ARTICLE 41.1, SECOND SENTENCE, OF THE TRIPS AGREEMENT

54. The European Union submits that the anti-suit injunction proceedings at issue in this dispute fall within the notion of "enforcement procedures" in Article 41.1 of the TRIPS Agreement. These proceedings are concerned with questions of patent infringement and determine whether the patent

holders can make use of the enforcement procedures provided for in Part III of the TRIPS Agreement in other territories outside China, including whether they can ask for an injunction. Moreover, anti-suit injunctions are provisional measures issued in the framework of FRAND determination disputes. These latter procedures constitute "enforcement procedures" under Article 41.1, since they aim to stop acts of infringement of intellectual property rights.

55. China's anti-suit injunction policy in SEP litigation, either as a general and prospective norm or as ongoing conduct, is inconsistent with Article 41.1, second sentence, of the TRIPS Agreement for the following reasons.

56. First, China's policy involves applying enforcement procedures in manner that creates barriers to legitimate trade. Since patent holders cannot prevent unauthorized acts of third parties regarding their patents outside China, this policy restricts trade in intangible goods (licences) and patented or licensed goods, thus creating a barrier to legitimate trade.

57. Second, China's policy is not applied so as to provide for safeguards against the abuse of enforcement procedures because:

- a) it grants worldwide anti-suit injunctions with little consideration of their impact on the enforcement procedures in other Members;
- b) it fails to ensure with a sufficient degree of certainty that the applicant's interests are violated or that such violation is imminent;
- c) it does not require security or equivalent assurance from the applicant that is sufficient to protect the defendant and to prevent abuse.

58. Furthermore, for the same reasons as above, each individual court decisions imposing anti-suit injunctions is inconsistent with Article 41.1, second sentence.

8. ARTICLE 1.1, FIRST SENTENCE, AND ARTICLE 44.1, FIRST SENTENCE, OF THE TRIPS AGREEMENT

59. China's anti-suit injunction policy in SEP litigation restricts, or seeks to restrict, the access by SEP owners to the courts of other WTO Members. This policy has the effect of protecting unlicensed implementers from enforcement procedures that permit effective action against their acts of infringement of patents.

60. In particular, China's policy prevents, or seeks to prevent, SEP owners from requesting the judicial authorities of other WTO Members to issue the injunction specified in Article 44.1 of the TRIPS Agreement. In case such an injunction has already been issued by the competent court, China's policy prohibits SEP owners from applying for its enforcement.

61. The European Union submits that China's policy, which endorses and builds upon the anti-suit injunction issued by the SPC in *Huawei v Conversant*, as well as similar or broader anti-suit injunctions issued by lower Chinese courts, undermines the authority of judicial authorities in other WTO Members to order the remedy against patent infringement specified in Article 44.1 of the TRIPS Agreement. China's policy is an unwritten measure which, either as a norm of general and prospective interest or as ongoing conduct, is "as such" inconsistent with China's obligation to give effect to that provision of the TRIPS Agreement.

62. By preventing SEP owners from obtaining or enforcing injunctions against the infringement of their patents in the territories of other WTO Members, China fails to perform in good faith its obligations under the TRIPS Agreement. China's anti-suit policy in SEP litigation interferes with the exercise by the judicial authorities of other WTO Members of their authority to order a party to desist from an infringement, inter alia to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of a patent. Thus, China's policy is inconsistent with China's obligation to give effect to Article 44. 1 of the TRIPS Agreement.

63. That measure is, "as such", inconsistent with China's obligations under Article 1.1, first sentence, of the TRIPS Agreement, in conjunction with Article 44.1 of the TRIPS Agreement. For the

same reasons, the five individual court decisions putting in place anti-suit injunctions are inconsistent with Article 1.1, first sentence, of the TRIPS Agreement, in conjunction with Article 44.1 of the TRIPS Agreement.

9. SECTION 2(A)(2) OF THE PROTOCOL ON THE ACCESSION

64. The issuance by Chinese courts of anti-suit injunctions in the five SEP litigation cases is inconsistent with China's obligations under Section 2(A)(2) of the Protocol on the Accession of the People's Republic of China ("Protocol"). China has not applied and administered its laws, regulations and other measures concerning the adoption of act preservation measures in disputes concerning intellectual property rights in a uniform, impartial and reasonable manner, in particular Articles 100 and 115 of the 2017 Civil Procedure Law, the Supreme People's Court Provisions on Act Preservation in IP Disputes, and Article 184 of the Supreme People's Court Interpretation of the Civil Procedure Law.

9.1. UNIFORM

65. The manner in which China applied and administered its legal framework in the context of SEP litigation presents the following differences when compared to the administration of the same legal framework in the context of other disputes concerning intellectual property:

- a) Act preservation measures for the protection of applicants not holding the intellectual property rights concerned are issued only in the context of SEP litigation;
- b) Anti-suit injunctions are imposed only in the context of SEP litigation; and
- c) The imposition of cumulative fines only in case of violation of the anti-suit injunctions.

66. The issuance of act preservation measures for the protection of applicants not holding the intellectual property rights involved in the SEP litigation demonstrates a breach of the obligation of uniform administration because it was not predictable that the relevant legal framework could be used for that purpose.

67. In fact, the Supreme People's Court Provisions on Act Preservation in IP Disputes was adopted with the design and purpose to protect IPR owners. The "creative" interpretation of the legal framework governing the adoption of act preservation measures which was initiated by the Supreme People's Court ruling in *Huawei v Conversant* is in contrast with that intended purpose.

9.2. IMPARTIAL

68. The fact that the five anti-suit injunctions were only granted in favour of implementers and against patent holders, and that they were only granted in disputes on standard essential patents, demonstrates that the administration of the legal framework was not carried out in an impartial manner.

9.3. REASONABLE

69. The lack of reasonableness of the five anti-suit injunction rulings in SEP litigation is shown by: (a) the application of the legal basis for the measures in an unpredictable manner; (b) the high daily penalties determined for violation of the anti-suit injunctions, lacking any equivalence with the amount of the guarantee that the applicant was required to post; and (c) the "very real risk to the interests" of the respondents resulting from their subjection to extremely high and unpredictable penalties in case of violation of the anti-suit injunctions.

70. Under Article 11 of the Supreme People's Court Provisions on Act Preservation in IP Disputes, there must be an equivalence between the amount of the guarantee posted by the applicant, and the amount of the loss that the respondent will incur during and for the duration of the act preservation measure. A daily fine, because of its daily imposition, cannot be calculated beforehand. The final amount is obtained by multiplying the amount of the daily fine per the number of days in which the fine is imposed. However, since the duration of proceedings before another court cannot

be known in advance, the total amount of the penalty is unpredictable, and can easily blow out of proportion.

9.4. CONCLUSION

71. By showing a lack of uniform, impartial and reasonable administration of the applicable legal framework, the five court decisions imposing anti-suit injunctions are individual measures inconsistent with China's obligations under Section 2(A)(2) of the Protocol.

10. ARTICLES 63.1 AND 63.3 OF THE TRIPS AGREEMENT

72. China failed to comply with its obligations under Article 63 of the TRIPS Agreement on three points. First, China breached Article 63.1 by not publishing final judicial decisions. Second, China breached Article 63.3 first sentence by refusing to supply information on its laws and regulations and final judicial decisions upon the European Union's request. Third, China breached Article 63.3 second sentence by refusing to give access to specific judicial decisions.

10.1. ARTICLE 63.1

73. There are three requirements under Article 63.1: a WTO member must publish decisions if they are: (i) final; (ii) of general application; and (iii) pertaining to the subject matter of the TRIPS Agreement.

- a) The decisions were *final* judicial decisions, as they were legally effective and final in the sense that they were not subject to further review.
- b) The decisions were *of general application*. The qualification as typical cases elevates the status of these decisions, and gives them a degree of authoritativeness to establish principles for future cases. Therefore, these decisions fall under the scope of Article 63.1 and should have been published.
- c) The decisions issuing anti-suit injunctions pertained to the subject matter of the TRIPS Agreement, as the anti-suit injunctions had a direct impact on the enforcement of intellectual property rights. They prevented the IPR holders from enforcing their rights in other jurisdictions.

74. To conclude, WTO Members are under the obligation to publish final judicial decisions of general application pertaining to the subject matter of the TRIPS Agreement. In the present case, China failed to publish at least three final judicial decision imposing anti-suit injunctions.

10.2. ARTICLE 63.3, FIRST SENTENCE

75. Article 63.3, first sentence, of the TRIPS Agreement requires WTO Members to supply laws and regulations to another Member in response to a written request.

76. The European Union's questions fell precisely under the scope of Article 63.3, first sentence, of the TRIPS Agreement, as they aimed to establish what the laws and regulations made effective by China pertaining to the subject matter of the TRIPS Agreement are.

77. China stated, in its reply to the European Union's request for information, that it is under no obligation to respond to such a request for information.

78. China's suggested interpretation would render Article 63.3 redundant, contrary to the principle of effectiveness under Article 31(1) of the Vienna Convention on the Law of Treaties. The European Union therefore requests the Panel to find that China is under an obligation to respond to the European Union's request made in writing pursuant to Article 63.3, first sentence of the TRIPS Agreement.

10.3. ARTICLE 63.3 SECOND SENTENCE

79. China did not comply with the European Union's request to be given access to specific judicial decisions that the European Union believed affected its rights under the TRIPS Agreement.

80. The second sentence of Article 63.3 is not limited to decisions of general application. In addition to requesting "information of the sort referred to in paragraph 1" under Article 63.3, first sentence, a WTO Member may *also* request to be given access to "a specific judicial decision in the area of intellectual property rights". The requested "specific judicial decision" does not need to be final nor of general application.

81. In other words, Article 63.3, second sentence, covers a much wider range of decisions than those referred to in Article 63.3, first sentence: the decisions that can be requested are not limited to those that are final and of general application.

82. Finally, although China stated in official communications that the judicial decisions concerned ought to be found on the website "China Judgments Online", the European Union failed to find them on that website.

83. Therefore, China also breached its obligation under Article 63.3, second sentence, of the TRIPS Agreement, as it did not supply the judicial decisions which the European Union had indicated it considered affected its rights under the TRIPS Agreement and had requested in writing.

11. CONCLUSIONS

84. The European Union respectfully requests the Panel to find that the Chinese measures, as set out above, are inconsistent with China's obligations under the TRIPS Agreement and the Protocol on the Accession of the People's Republic of China.

ANNEX B-2**SECOND PART OF THE INTEGRATED EXECUTIVE SUMMARY
OF THE ARGUMENTS OF EUROPEAN UNION****1. INTRODUCTION**

1. The European Union is challenging an unwritten measure attributable to China, which it has designated as "China's anti-suit injunction policy in SEP litigation". China has introduced, maintains, and implements this policy which, in the context of judicial procedures concerning the enforcement of intellectual property rights, empowers and encourages Chinese courts to prohibit patent holders from asserting their rights protected by the TRIPS Agreement in other jurisdictions. This prohibition materialises through the issuance by Chinese courts of provisional measures ("anti-suit injunctions") that forbid patent holders to commence, continue or enforce the results of any legal proceedings before any non-Chinese court and which are enforced through daily penalties in case of infringement. These anti-suit injunctions may have a worldwide and prospective scope and the daily penalties may be set at the maximum level allowed for under Chinese Civil Procedure Law.

2. This policy was first introduced by means of a decision of 28 August 2020 by China's Supreme People's Court in *Huawei v Conversant*, which set out the judicial and legal path for other courts to follow. Various reports by the Supreme People's Court have confirmed that the decision in *Huawei v Conversant* has launched an anti-suit injunction policy, which was subsequently developed further through other decisions and policy documents. China has followed an approach to policy making whereby options were explored and researched by intermediate people's court decisions, after which higher level authorities selected the typical cases that were to serve as an example for future cases.

3. The endorsement and encouragement by the Standing Committee and the National People's Congress along with the promotion of the decision in *Huawei v Conversant* and in other cases as a "typical case" for other courts to follow, confirm that the anti-suit injunction policy has come into effect on 28 August 2020 with the adoption of the decision in *Huawei v Conversant*, and has been further elaborated on, up to the February 2022 report by the Supreme People's Court to the Standing Committee summarising the main work results over the past three years and encouraging its future use. This policy is ongoing as there is no indication suggesting its withdrawal or a change in the policy.

4. The European Union submits that this policy is inconsistent with China's obligations under Article 1.1., first sentence, read in conjunction with Articles 28.1, 28.2, and 44.1 of the TRIPS Agreement, as well as with Article 41.1, first sentence, and the transparency obligations in Article 63 of the Agreement. The European Union further submits that China applied and administered its legal framework governing the adoption of act preservation measures in a manner that is inconsistent with its obligations under Section 2(A)(2) of the Protocol on the Accession of the People's Republic of China.

5. The European Union also underlines that the matter which it has brought before the Panel is the inconsistency of the measures at issue with China's obligations under the TRIPS Agreement and the Protocol of Accession. The European Union has not requested the Panel to create a positive standard for deciding, in abstract, which anti-suit injunctions are consistent with the TRIPS Agreement.

2. CHINA'S ANTI-SUIT INJUNCTION POLICY AND THE FIVE INDIVIDUAL DECISIONS ISSUING ANTI-SUIT INJUNCTIONS IN SEP LITIGATION ARE WITHIN THE TERMS OF REFERENCE OF THE PANEL

6. In its request for the establishment of a panel, the European Union described the precise content of the challenged policy as empowering Chinese courts to issue anti-suit injunctions which "prohibit patent holders from asserting their rights protected by the TRIPS Agreement in other jurisdictions ...[and]... forbid patent holders to commence, continue or enforce the results of any legal proceedings before any non-Chinese court".

7. In subsequent submissions and replies to questions, the European Union has developed and elaborated the precise content of China's anti-suit policy in standard essential patents (SEP) litigation. These developments have not departed from the description of the unwritten measure provided in the panel request. The European Union has consistently defined the challenged unwritten measure as a policy that empowers and encourages Chinese courts to protect China's interest in SEP cases by adopting anti-suit injunctions that prohibit patent holders from asserting their rights in the territories of other WTO Members.

8. The European Union considers that it is not obliged to limit itself to repeating the exact same terms that it used in the panel request throughout the proceedings. It can provide further details or clarifications about the measure at issue without placing it outside the terms of reference of the Panel.

9. Further, the five individual decisions issuing anti-suit injunctions fall within the Panel's terms of reference because they continue to produce effects vis-à-vis the involved parties, even if they are no longer in place due to the settlements have been reached between disputing parties in all cases. The European Union has also clarified that it is not the effects of those settlements, but rather those of the anti-suit injunctions, that persist. The settlements themselves constitute lingering adverse effects of the individual measures challenged by the European Union. In all five cases, Chinese courts claimed credit for the terms of the settlements reached. This shows that the anti-suit injunctions have affected the terms of the settlement agreed upon by the parties and are likely to be imposed again should litigation resume in the future.

3. THE EUROPEAN UNION HAS DEMONSTRATED THE EXISTENCE OF CHINA'S ANTI-SUIT INJUNCTION POLICY IN SEP LITIGATION

10. The European Union made a *prima facie* case that the measure exists. The assessment of the evidence is case-specific and the question of the sufficiency of the evidence adduced can only be determined by having regard to the specific measure against which a complaint is brought.

11. The challenged measure constitutes a policy empowering and encouraging Chinese courts to issue anti-suit injunctions, incorporating a spectrum of possible prohibitions. The European Union has adduced numerous official documents from the highest levels of China's judicial and political system approving anti-suit injunctions with Chinese characteristics and promoting their further use, showing that an anti-suit injunction policy in SEP litigation exists. Chinese courts have elaborated this policy through anti-suit injunctions in five cases. The Panel should assess that evidence holistically, taking into account the functioning of China's judicial and political system.

4. CHINA'S ANTI-SUIT INJUNCTION POLICY IN SEP LITIGATION IS AN UNWRITTEN MEASURE THAT CAN BE CHALLENGED "AS SUCH"

12. The European Union considers that China's unwritten policy is susceptible to an "as such" challenge, as the policy does not encompass the issuance of anti-suit injunctions which could be consistent with China's obligations under the TRIPS Agreement.

13. European Union recalls that it has described the unwritten measures as a policy that empowers *and encourages* Chinese courts to issue anti-suit injunctions at the request of implementers. The European Union has demonstrated based, on the overall evidence, that the anti-suit injunction policy in SEP litigation has a constraining effect on Chinese courts and that they are not free to disregard it. The resolute endorsement of the policy by the highest government bodies, the absence of a clear separation of powers in China and the emphasis put on the favourable outcomes of these decisions coupled with the need to safeguard China's interests, collectively show that Chinese courts are expected to issue the anti-suit injunctions requested by the implementers. It follows that, in the particular circumstances of this case, Chinese courts lack effective discretion to apply the ASI policy in a WTO-consistent manner.

14. To the European Union's knowledge, there is no policy document or other statements made by Chinese authorities which encourage Chinese courts to exercise restraint when examining requests for anti-suit injunctions submitted by implementers in SEP litigation. The unwritten policy continues to exist, and any anti-suit injunction issued pursuant to this policy was inconsistent with China's obligations under the TRIPS Agreement. That policy is therefore susceptible to be challenged

"as such" and not only "as applied" in the five individual decisions issuing anti-suit injunctions in SEP litigation.

5. CHINA'S ANTI-SUIT INJUNCTION POLICY IN SEP LITIGATION IS AN UNWRITTEN MEASURE OF GENERAL AND PROSPECTIVE APPLICATION OR, IN THE ALTERNATIVE, ONGOING CONDUCT

15. The European Union is challenging an unwritten measure, which by definition is not enshrined in a formally binding legal document. However, this does not prevent the challenged unwritten policy from being a measure of general and prospective application. Several elements speak to the continued application of the policy, and the European Union has adduced ample evidence showing the policy's constraining effects on Chinese courts and its continued endorsement.

16. Chinese courts have issued anti-suit injunctions for a sufficient period, demonstrating the repeated application of the measure. The SPC and lower courts have ordered anti-suit injunctions in five cases and confirmed these decisions in three reconsideration proceedings.

17. Further, the European Union contends that the policy is likely to be continued to be applied in the future, evidenced by a number of factors. These include the designation and promotion of several decisions imposing anti-suit injunctions as "typical cases", the Standing Committee calls for continued issuance and improvement of such decisions and the perception of the likelihood of Chinese courts continuing their conduct.

18. Claims against ongoing conduct are distinct from "as such" claims regarding a rule or norm of general and prospective application. It is inappropriate to check whether ongoing conduct is mandatory or discretionary since it may lack formal legislation or decisions. On the other hand, both the repeated application and likelihood of continued future application, necessary to prove ongoing conduct, already imply that ongoing conduct is *unlikely* to be a discretionary conduct.

6. SUBSTANTIVE CLAIMS UNDER THE TRIPS AGREEMENT

19. The European Union reiterates that it is asking the Panel to assess China's anti-suit injunction policy in SEP litigation in light of China's obligations under the TRIPS Agreement. The European Union is not requesting the Panel, nor could it, to enact a specific legal standard for assessing, in the abstract, the consistency of anti-suit injunctions with the TRIPS Agreement.

20. The European Union submits that Article 1.1, first sentence, of the TRIPS Agreement includes an obligation to refrain from adopting or applying measures that frustrate the object and purpose of the TRIPS Agreement and interfere with the protection and enforcement of intellectual property rights in the territories of other WTO Members.

21. While anti-suit injunctions are not *per se* prohibited by the TRIPS Agreement, for assessing whether those measures frustrate that Agreement's object and purpose the applicable legal standard is the principle of good faith, used by previous panels and by the Appellate Body to control the exercise of rights by states. That principle prohibits the abusive exercise by a Member of its own treaty rights, so as to avoid prejudice to the rights of other Members.

22. The anti-suit injunctions at issue denote an abusive and unreasonable exercise of the right of Chinese courts to issue anti-suit injunctions. The anti-suit injunctions issued by Chinese courts pursuant to the unwritten policy are excessively broad in scope, do not sufficiently assess the legitimacy of the patent enforcement proceedings outside China which they seek to prevent, and are not targeted at addressing exceptional problems raised by parallel litigation, but rather seek to prevent such litigation altogether in other countries. Furthermore, the injunctions deprive patent holders of their rights and violate China's obligations under the TRIPS Agreement by interfering with the established and carefully balanced system for patent protection and enforcement under the TRIPS Agreement.

6.1. ARTICLE 1.1, FIRST SENTENCE OF THE TRIPS AGREEMENT, IN CONJUNCTION WITH ARTICLES 28.1, 28.2 AND 44.1 OF THE TRIPS AGREEMENT

23. The European Union submits that the Chinese measures, namely the unwritten policy, the ongoing conduct and the individual anti-suit injunctions at issue, breach the obligation to abstain from acts that frustrate the object and purpose of the TRIPS Agreement in conjunction with Articles 28.1, 28.2 and 44.1. All anti-suit injunctions have the potential to restrict, *prima facie*, the exclusive rights of patent owners, their right to conclude licensing contracts and to resort to the jurisdictions of WTO Members in order to enforce these rights.

24. Article 1.1, first sentence, enshrines an obligation to abstain from acts that frustrate the object and purpose of the TRIPS Agreement, meaning that Members should not adopt acts or measures which would negate the rights and obligations contained in the TRIPS Agreement. The European Union does not propose an extraterritorial application of the obligations in the TRIPS Agreement, it rather considers that Members are required to refrain from taking extraterritorial measures, such as anti-suit injunctions that undermine the protection and enforcement of intellectual property rights in the territory of other Members.

25. Article 28.1 is not only concerned with ensuring that each Member accords minimum standards of patent protection within its own territory. The wording of Article 28.1 indicates that this provision is primarily concerned with ensuring that the owners of patents enjoy and are able to exercise the exclusive rights conferred on them in accordance with the TRIPS Agreement. Thus, when a Member takes measures that effectively prevent patent owners from exercising the rights that have been accorded to them by other Members, such measures can, in certain circumstances, constitute a violation of the Member's obligations under Article 28.1 of the TRIPS Agreement.

26. China's anti-suit injunction policy in SEP litigation is not intended to implement in its law the protection of patents that is required under the TRIPS Agreement. That policy and the individual anti-suit injunctions issued by Chinese courts have nonetheless significant repercussions in the exercise of the rights which patents, pursuant to the TRIPS Agreement, confer on their owners. It follows that China's policy and other measures at issue can and must be scrutinized under the legal standard of Article 28.1. The system of protection and enforcement of the rights of patent owners set up by the TRIPS Agreement would be ineffective if measures that negate or restrict those rights could altogether escape scrutiny under Article 28.1 simply because they are not measures implementing that provision.

27. Further, the anti-suit injunctions issued pursuant to the Chinese policy fundamentally alter the negotiating power of the parties, preventing SEP owners from enjoying a normal exploitation of their patents. The fact that the wording of Article 28.2 does not explicitly address anti-suit injunctions does not exclude that these or other measures adopted by Members may, in certain circumstances, restrict the right of patent owners to conclude licensing contracts.

28. The measures at issue also breach China's obligations under Article 1.1, first sentence, read in conjunction with Article 44.1 of the TRIPS Agreement. The European Union argues that Members must not only ensure that their judicial authorities have the authority to order a party to desist from an infringement of an intellectual property right. They must also refrain from adopting or maintaining in force measures which 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.

29. The effect of China's measures at issue is that SEP owners are prohibited from availing themselves of the enforcement procedures that should be available to them in the territory of the Member which has granted them a patent. Anti-suit injunctions are issued by Chinese courts in order to prevent foreign proceedings from interfering with the decisions they are requested to take, namely to determine FRAND rates of global SEP licences at the request of implementers. They disregard the exclusive jurisdiction of the court of the country which has granted the patent concerned to order a party to desist from an infringement.

30. Concluding, the European Union maintains that China's anti-suit injunction policy in SEP litigation and the five individual decisions, are inconsistent with China's obligations under Article 1.1, first sentence, of the TRIPS Agreement, in conjunction with Articles 28.1, 28.2 and 44.1 of the TRIPS Agreement.

6.2. ARTICLE 41.1, SECOND SENTENCE, OF THE TRIPS AGREEMENT

31. The European Union maintains that the anti-suit injunctions issued by Chinese courts qualify as enforcement procedures within the meaning of Article 41.1 of the TRIPS Agreement.

32. China incorrectly claims that defendants in SEP licensing disputes do not enforce their intellectual property rights and merely claim compliance with FRAND terms. Under the TRIPS Agreement, enforcement procedures are not limited to civil judicial procedures initiated by right holders or another party with legal standing. Patent holders acting as defendants also enforce their IPR, like in the disputes at hand in this case.

33. The procedures in question constitute enforcement procedures because they determine whether patent holders can make use of the enforcement procedures provided for in Part III of the TRIPS Agreement in other territories outside China, including whether they can ask for an injunction.

34. Furthermore, the anti-suit injunctions concerned were issued within SEP licensing disputes, which, according to the SPC and other courts, share characteristics of contract disputes and patent infringement disputes. The five main cases in question aimed to address instances of unlicensed use that infringed upon the rights holders' SEPs, thus permitting effective action against such infringements.

35. Article 41.1 requires Members to make available enforcement procedures so as to permit *effective action* against any act of infringement of IPR and does not necessarily entail a request to establish patent infringements. Nor does it ensure that it will bring an IPR infringement to an end.

36. The obligation in Article 41.1 second sentence is not limited to China's territory and, as indicated by case law, it entails taking into account foreign proceedings when applying anti-suit injunctions. The first sentence of Article 41.1 covers "any acts of infringement", irrespective of where those acts occurred, while the reference to barriers to legitimate trade in the second sentence covers effects outside China's territory.

37. The European Union maintains that the policy and the anti-suit injunctions at issue create barriers to legitimate trade. The individual measures prohibit patent holders from applying for enforcement of judgments of a court in the territories of other Members or from seeking judicial relief outwith China, thereby restricting trade in intangible goods (licences) as well as patented or licensed goods.

38. The challenged measures also fail to provide for safeguards against abuse. The procedures leading to all types of worldwide anti-suit injunctions imposed in this case fail to protect patent holders from abuse by implementers. Chinese courts did not consider the impact on proceedings in other Members, due to their lack of knowledge about unidentified existing injunctions or relief measures and future proceedings. For the same reasons, when issuing worldwide anti-suit injunctions Chinese courts could not ascertain with any degree of certainty that the applicants' purported interests were violated or that such a violation was imminent.

39. The prohibition to request the enforcement of an injunction by a German court, enjoined in the *Huawei v Conversant* and *ZTE v Conversant*, was unnecessary to prevent interference with the Chinese procedures. When a non-Chinese court issues an injunction potentially prompting an implementer to either leave a market or taking a license, such a scenario arises from the legitimate enforcement of patent rights provided by the TRIPS Agreement and does not imply a violation of the implementers' interests.

7. ARTICLE 63 OF THE TRIPS AGREEMENT

40. The European Union maintains that China failed to publish three final judicial decisions of general application (*OPPO v Sharp*, *ZTE v Conversant* and *Xiaomi v InterDigital Rulings 1 and 2*), made effective by China, pertaining to the subject matter of the TRIPS Agreement, thereby breaching its obligations under Article 63.1 of the TRIPS Agreement.

41. First, these three decisions are final, meaning they are effective and no longer subject to appeal. Article 63.1 does not distinguish between judicial decisions that are provisional measures

and those concerning the substance of a case. Second, these decisions are of general application, in the sense that they establish principles or criteria for future cases. Official reports have promoted these decisions as typical cases that establish rules and criteria applicable in future cases. Third, these decisions pertain to the subject matter of the TRIPS Agreement, as the anti-suit injunctions had a direct impact on the exercise and enforcement of intellectual property rights.

42. China's interpretation that Article 63.1 encompasses only judicial decisions with precedential value would devoid this provision of meaning for Members that do not have a doctrine of precedent.

43. Further, judicial decisions falling within the scope of Article 63.1 of the TRIPS Agreement must be made available in such a manner as to enable governments and rights holders to become acquainted with them. This obligation is not met where decisions are published on unofficial websites or social media accounts, like in the *OPPO v Sharp*, *ZTE v Conversant* and *Xiaomi v InterDigital* cases.

44. In relation to the information requested pursuant to Article 63.3, first sentence, the European Union considers this provision to be a self-standing provision, rather than solely a remedy in cases of non-compliance with Article 63.1. The immediate context of Article 63.3, first sentence, confirms that it is not only pertaining to information to be published under Article 63.1. Article 63.1 mandates Members to publish relevant laws and regulations, while Article 63.2 requires them to notify these laws and regulations to the Council for TRIPS, ensuring access to such information for Members. Therefore, a right limited solely to request those same laws and regulations directly from another Member under Article 63.3, first sentence, would be redundant.

45. The European Union also maintains that its request to receive information pursuant to Article 63.3, first sentence, entailed an obligation on China to supply such information and not just to provide a mere 'mailbox' to receive requests for information, with no obligation to supply such information.

46. The terms used in Article 63.3, first sentence, specifically "information of the sort", interpreted in light of the immediate context and the legislative history, indicate that the information to be supplied encompasses information on the application and administration of their national laws and regulations referenced in Article 63.1.

47. The European Union also maintains that China was required to supply information requested pursuant to Article 63.3, second sentence. The imperative formulation in the first sentence of Article 63.3 extends to the second type of request.

48. Both the literal reading and the negotiating history of the second sentence of Article 63.3 demonstrate that Members have a distinct obligation to provide decisions other than those referred to in paragraph 1. The second sentence indicates 'specific' judicial decisions without limiting them to 'final' ones. The words "may also" request indicates that this sentence establishes a separate and additional right distinct from that outlined in the first sentence. The negotiating history confirms that Article 63.3, second sentence, establishes for a separate, self-standing obligation since it was initially proposed as a distinct article.

49. The European Union's request for information indicated to China that it considered that the requested judicial decisions affected its rights under the TRIPS Agreement. The request explicitly noted that these decisions related to applications for injunctions and enforcement of injunctions in relation to standard essential patents. Furthermore, it stated that some of these decisions also contained measures relating to initiating court procedures on licence questions and royalty rates. Given the broad impact of worldwide anti-suit injunctions, the request explicitly stated that the European Union considered not only its own rights but also those of other Members were affected.

50. Finally, the European Union considers that its claim under the second sentence of Article 63.3, pertaining to the failure to supply specific judicial decisions other than final judicial decisions of general application, falls within the Panel's terms of reference. First, China's objection is submitted belatedly. Second and in any event, the panel request does not restrict the claim under Article 63.3 to decisions of general application. The fact that the panel request did not qualify the decision in the *Samsung v Ericsson* case as being of general application indicates that this claim extends beyond decisions of general application. The European Union's first written submission confirms this

understanding. Third, in view of the interlinked nature of the obligations in Article 63.3 of the TRIPS Agreement, the reference in the panel request to this provision is sufficient to cover both its sentences and meet the minimum requirements of Article 6.2 of the DSU.

8. SECTION 2(A)(2) OF THE PROTOCOL ON THE ACCESSION OF THE PEOPLE'S REPUBLIC OF CHINA

51. The European Union argues that China has not applied its laws, regulations and other measures governing the adoption of act preservation measures in disputes concerning intellectual property rights in a uniform, impartial and reasonable manner, as required under Section 2(A)(2) of China's Protocol of Accession.

52. With its claims, the European Union is not asking the Panel to evaluate whether Chinese courts acted consistently with their own domestic law or to contradict their interpretation of that law. The European Union is asking the Panel to examine whether Chinese courts, in the context of SEP litigation, have applied the legal framework for the adoption of act preservation measures in IP disputes differently from the way the same legal framework has been applied in the context of other IP litigation. Thus, even if the Supreme People's Court considers that the anti-suit injunctions ordered in SEP litigation are in line with Chinese law, this does not prevent the Panel from examining if China has complied with its obligations under Section 2(A)(2) of the Protocol.

53. The European Union has demonstrated the various ways in which these decisions departed from the normal application of the legal framework governing the adoption of act preservation measures in other IP cases.

54. The European Union has adduced ample evidence showing that the relevant legal framework's text, purpose, intention and design was to protect *IPR holders*. However, all five anti-suit injunctions issued by Chinese courts have been issued pursuant to requests made by applicants *not holding the IPR*, in the context of SEP litigation. No other anti-suit injunctions have been issued in favour of *IPR holders* or in other IP disputes. Further, there is no evidence showing that anti-suit injunctions have been issued by Chinese courts in other IP disputes outside the context of SEP litigation. Finally, the imposition of cumulative daily penalties for the violation of anti-suit injunctions has never been imposed outside the context of SEP litigation.

55. The fact that the five anti-suit injunctions were only granted in favour of implementers and against patent holders, in the sole context of SEP litigation, demonstrates that the administration of the legal framework was not carried out in an impartial manner.

56. The European Union contends that the relevant legal framework was also applied in a non-reasonable manner. This is evidenced by the application of that legal framework in an unpredictable manner, since the judicial path for the issuance of the five anti-suit injunctions in SEP litigation was created by the Supreme People's Court on the basis of legislation that was not intended for that purpose. Further, the high daily penalties determined for violation of the anti-suit injunctions are unreasonable because the equivalence between the amount of the security provided by the applicant and the amount of the loss incurred by the respondent cannot be ensured. The high daily fines also pose a very real risk to the interests of the respondents who may not be able to control the duration of judicial procedures pending outside China.

9. CONCLUSIONS

57. The European Union reiterates its request that the Panel finds that the Chinese measures at issue are inconsistent with China's obligations under the TRIPS Agreement and the Protocol on the Accession of the People's Republic of China.

ANNEX B-3**FIRST PART OF THE INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA****I. INTRODUCTION**

1. China has shown in its first written submission, opening and closing statements and during the first substantive meeting with the Panel that the European Union's claims in this dispute are manifestly unfounded, for two reasons.

2. First, the European Union has failed to identify any legally cognizable measures in this dispute. The European Union has challenged China's alleged "anti-suit injunction policy in SEP litigation" as an unwritten measure, but it has failed to articulate, let alone prove, the "precise content" of the alleged "policy". Following the first substantive meeting, China is still in the dark about what the European Union considers the precise content of the alleged unwritten ASI measure to be. While this is the key issue with the European Union's attempt to challenge the purported "policy", China has also proven that the alleged "policy" does not have "general and prospective application", nor does it constitute a measure of "ongoing conduct".

3. Moreover, as regards the five individual court decisions challenged by the European Union on an "as applied" basis, these have expired long before the establishment of this Panel. Even assuming that individual court decisions could theoretically be challenged on an "as applied" basis under the TRIPS Agreement, in this case, there is no valid justification for the Panel to make findings or recommendations in respect of these expired, case-specific measures.

4. Second, notwithstanding the absence of clearly identifiable and legally cognizable measures, the European Union's claims in respect of these purported measures are also entirely lacking in merit. As concerns the European Union's substantive claims under Articles 1.1, 28.1, 28.2, 41.1, and 44.1 of the TRIPS Agreement, each of these claims rests on the premise that Members have undertaken obligations not only in respect of the recognition and enforcement of covered intellectual property rights within their *own* territory, but also within the territory of *other* Members. The European Union's position is based on a serious misapprehension of the purpose and scope of the TRIPS Agreement, as well as a misinterpretation of the ordinary meaning of Article 1.1 of the TRIPS Agreement. Properly interpreted in accordance with customary principles of treaty interpretation, the European Union's claims under the aforementioned provisions are completely unfounded.

5. As regards the European Union's remaining claims, China has shown that the claims under China's Protocol of Accession are based on a mistaken understanding of Chinese law governing act preservation measures. Once the European Union's erroneous understanding of Chinese law is corrected, its claims under Section 2(A)(2) fall away. The European Union's transparency-related claims under Article 63 of the TRIPS Agreement are equally meritless, given that the judicial decisions in question were not "final", "of general application" or "pertaining to the subject matter of [the TRIPS] Agreement". China was therefore not obligated to publish these decisions under Article 63.1 or provide them in response to the European Union's request under Article 63.3.

II. THE EUROPEAN UNION HAS FAILED TO IDENTIFY ANY LEGALLY COGNIZABLE MEASURES IN THIS DISPUTE**A. The European Union has Failed to Prove the Existence of the Alleged Unwritten ASI "Policy"**

6. The first measure challenged by the European Union in its first written submission is an unwritten measure, namely China's alleged "anti-suit injunction policy in SEP litigation". As the European Union explains in its submission, three key elements are required to prove the existence of an unwritten measure:

- evidence that the measure is attributable to the respondent;
- evidence to demonstrate the precise content of the challenged measure; and

- evidence on the specific nature of the measure, i.e. whether it is of general and prospective application or of a different nature.¹

7. As China has argued, the European Union has failed to articulate the precise content of the alleged unwritten ASI "policy". In the absence of any clear understanding of what the European Union is challenging, China submits that this must be the end of the Panel's analysis with respect to this purported unwritten measure. Should the Panel nevertheless decide to further examine the alleged measure, the European Union has neither proven that the policy with the "aspects" it is claiming exists, nor that this policy has "general and prospective application" or constitutes a measure of "ongoing conduct".

1. The Precise Content of the Alleged "Policy" Is Not Discernible

8. The European Union claims that the "precise content" of the alleged measure is "to prohibit patent owners involved in SEP litigation in China from resorting to courts in other jurisdictions for the purpose of enforcing their exclusive rights."² Having expressly identified the "precise content" of the alleged unwritten "policy", however, the European Union then proceeds throughout its submission to identify certain "aspects" of the alleged "policy" that it claims are "unique"³:

- The "extremely broad" scope of the ASIs.⁴
- That the ASIs are insured by fines "whose amount goes beyond what it is normal practice when other types of act preservation measures are adopted in intellectual property disputes in China."⁵
- That the ASIs are not "well-targeted" or used only in "exceptional cases".⁶
- That the "policy" of issuing ASIs is not "exercised reasonably and not abusively".⁷
- That the ASIs are implemented absent a determination that foreign litigation was "vexatious or oppressive".⁸

9. The European Union appears to consider these "aspects" to be integral to the alleged "policy", because certain of the European Union's legal claims focus specifically on these "aspects" of the "policy" as the basis for why the "policy" is allegedly inconsistent with particular provisions of the TRIPS Agreement. It is also China's understanding following the delivery of the European Union's opening statement at the first substantive meeting that it is indeed *these* features or aspects in particular that make the alleged "policy" inconsistent with the legal provisions at issue. Yet these "aspects" were not identified in the European Union's panel request, nor are they part of the European Union's articulation of the "precise content" of the measure at various points in its first written submission.⁹

10. Furthermore, even assuming that the European Union has consistently and from the outset identified those "aspects", the European Union has explained nowhere what any of these aspects actually mean. Taking as an example the term "broad", during the first substantive meeting, the European Union gave alternative and inconsistent definitions of what this term pertains to. According to one of those definitions, "broad" has to do with the scope of the ASIs issued, which however is difficult to reconcile with the obvious differences in scope of the five decisions.

11. The same problem that arises with "broad" arises with each of the other "aspects" of the alleged "policy" that the European Union identifies in its first written submission. The European Union has not given any explanation of what "vexatious or oppressive", "well-targeted", "[un]reasonable"

¹ European Union's first written submission, para. 216.

² European Union's first written submission, para. 465.

³ European Union's first written submission, para. 317.

⁴ European Union's first written submission, paras. 318, 244.

⁵ European Union's first written submission, para. 319.

⁶ European Union's first written submission, para. 324.

⁷ European Union's first written submission, para. 326.

⁸ European Union's first written submission, paras. 331, 368.

⁹ European Union's first written submission, paras. 225, 282, 314, 465.

or "abusive" means. In the absence of any clarification about the meaning of these "aspects" that the European Union seems to consider integral to the unwritten "policy", it is not possible to conclude that the content of this measure has been precisely identified.

2. The European Union Has Not Demonstrated That There Is an Unwritten ASI "Policy"

12. The European Union has submitted to the Panel the following categories of evidence to prove the existence of China's alleged "policy" of "prohibit[ing] patent owners involved in SEP litigation in China from resorting to courts in other jurisdictions for the purpose of enforcing their exclusive rights":

- (i) the temporal overlaps and the similarities of the five decisions;
- (ii) the designation of some of these decisions as "typical cases" and promotion thereof; and
- (iii) the calls from the SPC and the NPC's Standing Committee to continue using and improving the anti-suit injunction system.

13. As China has demonstrated in its first written submission, none of these categories of evidence, whether looked at independently or in conjunction, proves anything about the existence of an unwritten ASI "policy" alleged by the European Union in this dispute.

14. As regards the European Union's first piece of evidence, China notes at the outset that the fact that a Member's domestic courts issue decisions that have a similar outcome after considering a similar set of factors proves nothing about the existence of a "policy" applied by that Member. This is simply what courts and tribunals in well-functioning dispute settlement systems – including at the WTO – routinely do. Any similarity between the five decisions at issue in this case was, thus, merely the result of the fact that each court sought to ascertain whether the application before it complied with the relevant requirements of the Chinese law that it was applying.

15. Notwithstanding the foregoing, China recalls that, in fact, contrary to what the European Union alleges in its first written submission, there were significant differences between the five ASI decisions at issue, including in terms of the scope of the ASIs and the factors that the courts considered in granting them. The European Union itself acknowledged the fact that the five cases were all different during the first substantive meeting.

16. Turning to the European Union's second piece of evidence, the European Union fundamentally mischaracterizes the role of "typical cases" in China's legal system throughout its submission. The European Union claims that these cases constitute a "legal authority" and that, through their designation, these cases are being "promoted" by the SPC and the Chinese courts as part of a "policy". In this respect, China has described in detail certain aspects of its legal system of relevance to this dispute in its first written submission.¹⁰ As explained therein, China is not a case law country. Other than "guiding cases", judgments of Chinese courts at all levels are not precedential, and they are not a source of law that other judges must follow.

17. However, the European Union ignores the fact that none of the ASI decisions at issue has been designated as a "guiding case" by the SPC, and focuses instead on the fact that these cases have been mentioned or summarized in "annual reports", "judgment digests" and other similar documents. The fact that a court decision is included in these types of reports or digests does not mean that it was intended to be promoted as reflecting an underlying "policy". Indeed, similar types of reports summarizing the annual work of a court or listing "significant" cases are very common in other Members, including in the European Union.

18. Even setting aside the above, China has also pointed out that the selection of the ASI cases at issue as "typical cases" happened *after* the issuance of all five ASI rulings and it could, thus, not have had an impact on any of the decisions rendered. The European Union's allegation that there is an unwritten "policy" largely depends on the designation of these cases, and given that these

¹⁰ See Section III.B of China's first written submission.

designations were made after *all* of the ASI rulings issued in 2020, the European Union has apparently put an unwritten "policy" before the Panel that has not been applied *in a single instance*.

19. The rest of the evidence relied upon by the European Union relates to the alleged "calls" from the SPC and the NPC's Standing Committee to continue using and improving the anti-suit injunction system. China strongly disagrees that there have been any such "calls" from the SPC or the NPC's Standing Committee and has addressed in detail the "evidence" that the European Union has submitted in support of its allegation in Section III.D.3 of its first written submission. As China demonstrated, none of this "evidence" put forward by the European Union is remotely relevant to establishing the existence and content of the alleged unwritten ASI "policy". In fact, many of the exhibits referenced by the European Union in support of its allegations do not even mention anti-suit injunctions and/or the handling of IP cases by courts at all, let alone express support for the alleged "policy".

3. The European Union Has Failed to Demonstrate that the Alleged "Policy" Has "General and Prospective Application" or that it is a Measure of "Ongoing Conduct"

20. China agrees with the European Union's description of the relevant legal standard to assess whether a measure at issue has "general and prospective application". As described by both parties in their submissions¹¹, a complainant must prove in this respect, at the very least, that the measure:

- affects an unidentified number of economic operators;
- has been consistently and systematically applied for an extended period of time;
- reflects a deliberate policy, going beyond the simple repetition of the application of a certain methodology to specific cases; and
- is intended to apply to future investigations.

21. The European Union has failed to demonstrate that the alleged unwritten ASI "policy" has "general and prospective application" in the sense of the above factors.

22. Most notably, the European Union has not demonstrated that the alleged ASI policy has been applied consistently and systematically for an extended period of time. The five ASI decisions that the European Union identifies were all issued between August and December 2020. Since then, no other cases have been identified and there has been at least one instance, in *Lenovo v. Nokia*, where an application for an ASI in an SEP dispute was rejected. The European Union claims that this case does not "cast doubt over the general and prospective application of the anti-suit injunctions policy",¹² but has provided no explanation for this categorical assertion.

23. Moreover, China stresses that the European Union itself acknowledged during the first substantive meeting that the "policy" has not been systematically applied, which casts serious doubts on what is after all the basis for the European Union's claim that the alleged measure has "general and prospective application".

24. In addition, for the reasons discussed in the previous section regarding the existence of the alleged "policy", the European Union has not demonstrated that the granting of ASIs by Chinese courts in SEP disputes reflects a "deliberate policy". It is also not the case that "the ASI policy initiated by the decision *Huawei v. Conversant* provides significant administrative guidance for future conduct", as the European Union alleges.¹³ The fact that courts either reference or use similar reasoning as that of another court is a common feature of legal systems worldwide, and does not prove anything about the existence of an alleged "policy".

¹¹ See China's first written submission, paras. 151-154; European Union's first written submission, paras. 245-275.

¹² European Union's first written submission, para. 267.

¹³ European Union's first written submission, para. 270.

4. The European Union Has Not Demonstrated That There Is "Ongoing Conduct"

25. Both China and the European Union have explained in their first written submissions that among the key elements that a complainant must establish to prove that an "ongoing conduct" measure exists are:

- the measure's repeated application; and
- that the measure is likely to continue to be applied in the future.¹⁴

26. The European Union in this case has manifestly failed to prove these two elements.

27. As previously discussed, the five court decisions at issue constitute five different instances where Chinese courts applied the Chinese legal provisions on act preservation measures. Each of them assessed the applicability of these provisions (and whether an ASI was warranted) based on the specific facts before it and issued ASIs of different scopes based on different reasoning. The alleged conduct has also not been repeatedly applied whenever the relevant circumstances arose, because the court in *Lenovo v. Nokia* rejected an ASI application a month after the ASI was granted in *Samsung v. Ericsson*.

28. As regards the likelihood that the alleged "conduct" will continue being applied in the future, the European Union relies on same evidence that it has referenced in support of its allegations that a "policy" exists. China has addressed this evidence at length, and explained why it is entirely irrelevant to the European Union's claims, in Section III.D of its first written submission.

B. The Five Court Decisions Have Long Since Expired and Have No Continuing Effects

29. In addition to the alleged ASI "policy", the European Union is separately challenging "as applied" the five court decisions at issue, namely *Huawei v. Conversant*; *Xiaomi v. InterDigital*; *ZTE v. Conversant*; *OPPO v. Sharp*; and *Samsung v. Ericsson*. As acknowledged by the European Union in its first written submission,¹⁵ each of these five cases has now been settled and, thus, the ASIs granted, which were provisional in nature, have now expired. This means that the measures that the European Union is challenging "as applied" all expired years before the Panel's establishment.

30. While panels are not necessarily precluded from making findings or recommendations with respect to expired measures, they should do so only when this would further the objective of securing a positive solution to the dispute.¹⁶ In relation to measures that have been withdrawn *prior* to panel establishment, panels have in the vast majority of such cases declined to make findings on the expired measure, concluding that it was not necessary for securing a positive solution to the dispute.¹⁷

31. China submits that also in this case, the Panel should decline to make findings and recommendations with respect to the measures at issue because making such findings and recommendations would not further the objective of securing a positive solution to the dispute. The individual decisions that the European Union challenges were issued between specific parties and on the basis of the specific facts and circumstances surrounding each case. Each of the five disputes was concluded after the parties reached a global licensing agreement, pursuant to which

¹⁴ See, for instance, Appellate Body Report, *US – Supercalendered Paper*, para. 5.17. See China's first written submission, para. 162; European Union's first written submission, para. 280.

¹⁵ European Union's first written submission, para. 14.

¹⁶ See, for instance, Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 - Philippines II), para. 7.468; Panel Report, *Chile – Price Band System*, para. 7.115.

¹⁷ Panel Report, *Argentina – Textiles and Apparel*, paras. 6.11-6.14; Panel Report, *US – Gasoline*, para. 6.19; Panel Report, *China – Electronic Payment Services*, paras. 7.224-7.229; Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.1648-7.1654; Panel Report, *Chile – Price Band System*, paras. 7.115 and 7.195; Panel Report, *China – Agricultural Producers*, paras. 7.82-7.92; Panel Report, *EU – Poultry Meat (China)*, para. 7.168; Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 - Philippines II), paras. 7.505-7.506.

the ASIs lapsed.¹⁸ Ruling on these cases, two years or more after they were concluded would clearly be meaningless for the parties to the disputes, who were the only ones affected, albeit temporarily, by the court decisions.

32. Moreover, the European Union has not provided any valid justification as to why the Panel should make findings on the five court decisions, other than vaguely referring to alleged "lingering adverse effects"¹⁹ of the ASIs in its first written submission. The European Union does not explain what those "lingering adverse effects" would be. However, to the extent that the European Union's position is that the ASIs granted by Chinese courts "forced" the parties involved in each dispute to reach a settlement,²⁰ and that this is the "lingering adverse effect" of the measures, China strongly disagrees with the European Union's unfounded assertion. There is no evidence whatsoever about the reasons behind the settlements reached in each case between the parties and, certainly, no evidence suggesting that the issuance of ASIs "forced" the parties to reach a settlement. These settlements were reached pursuant to negotiations between private companies, with substantial market power and experience, who had pending litigation not only in China but also other jurisdictions, including applications for AASIs.²¹ Therefore, under the European Union's theory, any of these AASIs could have been what "forced" the parties to reach a settlement.

III. THE EUROPEAN UNION'S SUBSTANTIVE CLAIMS UNDER THE TRIPS AGREEMENT ARE UNFOUNDED

A. Overview of the TRIPS Agreement

33. Before rebutting each of the European Union's substantive claims under the TRIPS Agreement, China has provided in Section IV.B of its first written submission an overview of some important principles concerning the scope, purpose, and territorial application of the TRIPS Agreement. These principles are:

- (i) The TRIPS Agreement establishes minimum standards for the recognition and enforcement of intellectual property rights that each Member must implement within its own domestic legal system. It does not purport to establish a supranational system for the recognition and enforcement of such rights;
- (ii) As a corollary of the first proposition, the TRIPS Agreement does not impose extraterritorial obligations upon Members, i.e. obligations that Members undertake in respect of other Members' domestic legal systems for the recognition and enforcement of intellectual property rights; and
- (iii) The TRIPS Agreement does not address issues of private international law that may arise in domestic legal proceedings relating to intellectual property disputes, including issues relating to the management of parallel judicial proceedings that may affect a domestic court's ability to preserve its jurisdiction and adjudicate the matter before it.

34. China considers this background to be helpful for the Panel to appreciate that the European Union's substantive claims under the TRIPS Agreement are based on a profoundly mistaken understanding of this treaty. Specifically, the essence of the European Union's claims under Articles 1.1, 28.1, 28.2, 41.1, and 44.1 of the TRIPS Agreement is that Members have undertaken obligations not only in respect of their own domestic legal systems for the recognition and enforcement of intellectual property rights, but also in respect of *other* Members' domestic legal systems for the recognition and enforcement of such rights. However, applying the above propositions in the context of each of these provisions, it can be easily concluded that the TRIPS

¹⁸ European Union's first written submission, paras. 46, 53, 66, 80 and 112.

¹⁹ European Union's first written submission, para. 299.

²⁰ See European Union's first written submission, para. 381. The European Union also claims that "the settlements reached after the issuance of the anti-suit injunctions were an effect of the adoption of the challenged measures". *Id.*, para. 382.

²¹ See Exhibit EU-15, *Ericsson v. Samsung*, United States District Court for the Eastern District of Texas, Civil Ruling issuing an anti-anti-suit injunction, 11 January 2021 and the judgment of the Regional Court of Munich in *InterDigital v. Xiaomi* (Exhibit CHN-16) and Exhibit CHN-15, *InterDigital Tech. Corp. v. Xiaomi Corp.*, 2021 DEL 889 (India).

Agreement is silent on the issues that the European Union has raised in this dispute. These are rather questions of private international law on which multilateral rules have not yet been established.

B. The European Union Has Failed to Establish a Violation of Article 1.1, First Sentence, in Conjunction with Article 28.1, of the TRIPS Agreement

35. The essence of the European Union's claim under Article 1.1, in conjunction with Article 28.1, of the TRIPS Agreement, is that China has failed to give effect to these provisions within the territory of *other* Members. Properly interpreted in accordance with accepted principles of treaty interpretation, Article 1.1 and Article 28.1 impose no such obligation upon Members.

36. Article 28.1 defines the minimum standard of patent protection that Members are required to confer under their domestic law in respect of patents issued in their territory. A Member gives effect to this obligation, as required by Article 1.1 of the TRIPS Agreement, by ensuring that its domestic law accords this negative right in respect of patents issued in its territory. Thus, in order to establish a violation of this provision, a complaining Member must demonstrate that, under the responding Member's domestic legal regime, the owner of a patent issued within the territory of that Member cannot exercise its rights described in Article 28.1.

37. The European Union has neither alleged nor demonstrated that China has failed to accord the rights required by Article 28.1 under its domestic law. Rather, the gravamen of the European Union's claim under Article 28.1 relates to an alleged "prohibition" upon a patent holder's *exercise* of its exclusive rights in countries *other than China* in respect of patents issued by countries *other than China*.

38. Neither Article 28.1 nor any other provision of the TRIPS Agreement addresses this subject. Consistent with the object and purpose of the TRIPS Agreement and the territorial scope of the TRIPS Agreement as discussed in Part B.1, Article 28.1 is concerned only with ensuring that each Member accords a minimum standard of patent protection within its own territory. It does not speak to whether and how an *in personam* order directed toward a party to litigation in Country A may affect, even if temporarily, that party's incentive to exercise patent rights that it holds in Country B. That is a question of private international law on which the TRIPS Agreement is silent.

39. The baselessness of the European Union's claim under Article 28.1, first sentence, is highlighted by the made-up caveats to this claim that it introduces in its first written submission. Specifically, the European Union appears to suggest that the issuance of ASIs in SEP-related litigation may *not* be inconsistent with Article 28.1, as the European Union understands this provision, so long as the ASI does not give rise to a "severe restriction" on the exercise of patent rights in the other country, or provided that the ASI is "well-targeted" and that the power of national courts to issue ASIs is "exercised reasonably and not abusively".²²

40. Nothing in the text of Article 28.1 provides a basis for these distinctions, nor does the European Union argue as much. It rather, follows from those statements that, in the European Union's view, Article 28.1 of the TRIPS Agreement somehow compels what is the *European Union's* preferred legal standard for the issuance of ASIs. The European Union is, in other words, inviting the Panel to find that Article 28.1 of the TRIPS Agreement embodies the European Union's preferred approach to ASIs to the exclusion of the approach that other courts have taken.

C. The European Union Has Failed to Establish a Violation of Article 1.1 of the TRIPS Agreement, First Sentence, in Conjunction with Article 28.2

41. The European Union's claim under Article 28.2 of the TRIPS Agreement is essentially the same allegation that the European Union makes in respect of Article 28.1 of the TRIPS Agreement, now focused on the alleged impact that the issuance of an anti-suit injunction has on the relative negotiating power of the SEP owner and the SEP implementer. As with its claim under Article 28.1, the European Union's claim under Article 28.2 does not relate to the obligation that this provision actually imposes. Consistent with the object and purpose of the TRIPS Agreement and its territorial scope, Articles 28.1 and 28.2 are concerned only with ensuring that each Member accords a

²² European Union's first written submission, paras. 317, 324, 326.

minimum standard of patent protection *within its own territory*. Also, the TRIPS Agreement does not address whether and how an *in personam* order directed toward a party to litigation in Country A may affect, even if temporarily, that party's incentive to exercise patent rights that it holds in Country B. That is a question of private international law on which the TRIPS Agreement is silent. That silence extends to the impact, if any, that the issuance of an ASI may have on the relative negotiating power of a patent owner and a patent licensee.

D. The European Union Has Failed to Establish a Violation of Article 41.1 of the TRIPS Agreement, Second Sentence

42. The subject matter of Article 41.1, and indeed all of Part III of the TRIPS Agreement, concerns the types of enforcement procedures that Members must make available under their domestic law to permit effective action against acts of *infringement*. It is "these procedures" that the Member must apply "in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse."

43. The European Union's first argument under Article 41.1, second sentence, rests on the premise that the relevant "enforcement procedures" in this case are the "civil judicial procedures concerning the enforcement of any intellectual property right" that China has made available to right holders as required by Article 42 of the TRIPS Agreement. More specifically, the European Union focuses its claim on the five civil cases initiated by SEP implementers in which ASIs were issued and the so-called "anti-suit injunction policy" that these cases allegedly reflect. Even if these were the relevant "procedures", neither the five cases nor the so-called "policy" constitute "enforcement procedures ... against any act of infringement" of a type specified in Part III of the TRIPS Agreement.

44. Reading Article 42 together with Article 41, it is evident that the "enforcement" procedures to which Article 42 refers are a subset of the "enforcement procedures ... *against any act of infringement*" described in Article 41. Thus, for a civil procedure to fall within the scope of Article 42, it must be one initiated "against" infringement by a right holder or another party with legal standing to enforce the relevant intellectual property right against acts of infringement.

45. None of the five ASI cases were initiated by SEP right holders as "enforcement" actions "against" infringement. Rather, these were cases in which SEP implementers sought various declarations and determinations by the court relating to the parties' inability to reach agreement on FRAND licensing terms. None of these cases involved an allegation of infringement of any intellectual property right. Moreover, the so-called "anti-suit injunction policy" allegedly maintained by China also does not involve allegations of infringement of any intellectual property right. Instead, the so-called "policy" concerns the issuance of ASIs in civil cases initiated by SEP implementers relating to FRAND licensing terms. Moreover, the mere fact that a right holder is a defendant in a civil procedure does not turn that procedure into an "action against any act of infringement". Accordingly, these procedures do not fall within the scope of Article 42 and therefore cannot provide the basis for a claim under Article 41.1, second sentence.

46. Turning to the European Union's second argument under Article 41.1, second sentence, the European Union asserts that China's measures create barriers to legitimate trade because the enforcement procedures before the Chinese courts prevent or patent owners from availing themselves of enforcement procedures *in other Members*. However, this is not a subject that Article 41.1 of the TRIPS Agreement addresses. The obligation under Article 41.1 is for Members to make "available" under their domestic law the specific "enforcement procedures" specified in Part III "so as to permit effective action against any act of infringement". It is "[t]hese procedures" – under a Member's domestic law – that the Member must apply "in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse." Members do not undertake obligations in respect of the application or implementation of the enforcement procedures maintained by *other* Members.

E. The European Union Has Failed to Establish a Violation of Article 1.1 of the TRIPS Agreement, First Sentence, in Conjunction with Article 44.1

47. As with its other claims under the TRIPS Agreement, the European Union's claim under Article 44.1 bears no relationship to the obligation that Members have undertaken pursuant to this provision. The European Union contends that, under Article 44.1, WTO Members must not only

ensure that *their* judicial authorities have the authority to order a party to desist from an infringement – i.e. the obligation actually set out in Article 44.1 – but must "also refrain from adopting or maintaining in force measures which 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*."²³

48. Once again, the European Union's interpretation is unfounded. Article 44.1 is one of the "enforcement procedures" that, pursuant to Article 41.1, Members must make "available *under their law* so as to permit effective action against any act of infringement" occurring within the territory of the implementing Member. Consistent with the object and purpose, and territorial scope of, the TRIPS Agreement does not impose extraterritorial obligations, nothing in Article 44.1 speaks to whether and how an *in personam* order directed toward a party to litigation in Country A may affect, even if temporarily, that party's incentive to exercise patent rights that it holds in Country B, including its incentives or ability to request a court in Country B to issue an order directing another party to desist from an alleged infringement taking place within that country. This is a question of private international law on which the TRIPS Agreement is silent.

49. The European Union does not contend, because it cannot, that judicial authorities in China lack "the authority to order a party to desist from an infringement" as required by Article 44.1. Chinese judicial authorities do in fact have this authority. China has therefore fulfilled its obligation to give effect to this obligation within its domestic law, as required by Article 1.1 of the TRIPS Agreement.

F. Application

50. China has demonstrated that the European Union's substantive claims under the TRIPS Agreement are based on misinterpretations of the invoked provisions. The European Union's essential claim under each provision – that the relevant provision imposes obligations upon a Member in respect of the recognition and enforcement of intellectual property rights within the territory of *other* Members – has no basis in accepted principles of treaty interpretation. The Panel must reject the European Union's claims for these reasons alone.

51. In addition to those points, China makes the following observations.

52. In respect of the so-called "unwritten policy" measure, China has demonstrated that no such measure exists. China has further demonstrated that the European Union has failed to establish any "ongoing conduct" as a measure. Thus, separate and apart from the European Union's erroneous interpretations of the relevant provisions of the TRIPS Agreement, the Panel should in any event reject the European Union's claims in respect of these non-existent measures.

53. As for the five individual court decisions that the European Union has challenged on an "as applied" basis, China recalls that these measures expired long before the establishment of this Panel and have no continuing effects. In any event, China questions whether an individual court decision could ever be found inconsistent with the TRIPS Agreement on an "as applied" basis. A Member's obligations under the TRIPS Agreement pertain to rights and procedures for the enforcement of those rights that the Member must make available within its territory. Even if the five decisions at issue had concerned the nature and extent of patent rights conferred under Chinese law – which they did not – it is not the function of a WTO panel when evaluating claims under the TRIPS Agreement to act as a court of appeal in individual cases. Rather, it is the function of a panel to evaluate whether the responding Member has put in place specific rights and procedures that the TRIPS Agreement requires, when it is alleged that the Member has failed to do so. In this context, it is hard to see how an individual court decision could itself be inconsistent with the provisions of the TRIPS Agreement.

IV. CLAIMS UNDER SECTION 2(A)(2) OF CHINA'S PROTOCOL OF ACCESSION

54. The European Union advances claims under China's Protocol of Accession exclusively in relation to the five cases in which Chinese courts issued ASIs, i.e. the court actions granting ASIs in *Huawei v. Conversant*, *Xiaomi v. Interdigital*, *ZTE v. Conversant*, *Opko v. Sharp*, and *Samsung v.*

²³ European Union's first written submission, para. 464 (emphasis added).

Ericsson. China recalls that each of the cases referenced by the European Union has now been settled and, thus, the ASIs granted by the courts in these five cases have now expired. China has nevertheless rebutted the European Union's claims under Section 2(A)(2) of China's Protocol of Accession in the event that the Panel decides to evaluate these claims.

55. The foundation of the European Union's claim under Section 2(A)(2) of China's Protocol of Accession is that the act preservation provisions of China's Civil Procedure Law did not previously permit the issuance of ASIs upon the application of implementers. However, as China detailed in its first written submission, Chinese law did in fact permit the issuance of ASIs upon the application of implementers in SEP-related litigation.

56. The ASIs issued by the Chinese courts in each of the five cases at issue were based on Article 100 of the Civil Procedure Law. China notes that nothing in this provision precludes the application of act preservation measures to IP-related disputes. China further notes that nothing in that provision states or implies that the right to apply for an act preservation measure is limited to certain types of parties (such as SEP owners). Rather, this provision generally permits courts to "order the party to *perform certain acts* or to *prohibit* the party from committing *certain acts*". Already it is evident that the act preservation measures issued in the five cases challenged by the European Union had a basis in Chinese law.

57. Unsurprisingly, the SPC Provisions interpreting Article 100 of the Civil Procedure Law as it applies in the context of IP-related disputes have provisions relating to the specific case in which the *owner* of an intellectual property right is the applicant for an act preservation measure. However, the SPC Provisions are not *limited* to that circumstance and apply more broadly to any circumstance in which an act preservation measure may be warranted in the context of an IP-related dispute. China has addressed this issue in detail in Section V.B of its first written submission, with reference to specific excerpts of the SPC Provisions.

58. The European Union's mistaken understanding of Chinese law is fatal to its claim that China has not "applied and administered" its legal framework for act preservation measures in a manner that is "uniform",²⁴ "impartial",²⁵ and "reasonable".²⁶ The European Union's key arguments in this respect are as follows.

59. First, as regards the European Union's claim that administration and application of China's legal framework in the five cases at issue was not "predictable" and therefore not "uniform", China submits that this is unfounded. China's legal framework governing act preservation measures applies broadly to any circumstance in which the execution of a judgment may become difficult or other damage may be caused to the other party concerned due to the act of one party or for other reasons. The fact that this legal framework had not been applied in this manner prior to the five cases at issue does not mean that it was not "predictable" that this legal framework could be used for this purpose. Nor is it relevant that there are allegedly no other rulings issuing anti-suit injunctions in IP disputes in China, except for the five anti-suit injunctions issued in the context of SEP litigation.²⁷ Chinese courts clearly cannot control when such cases will be presented to them.

60. Second, as regards the European Union's claim that the Chinese courts failed to administer and apply the legal framework governing act preservation measures on an "impartial" basis in the five cases at issue, this is based entirely on the proposition that Chinese law did not permit the issuance of act preservation measures at the request of implementers. As China has demonstrated, the European Union's understanding of Chinese law is mistaken. The European Union's claim of a lack of impartiality is therefore unfounded.

61. Third, the European Union cites three reasons for its claim of a lack of reasonableness: (1) Chinese law did not permit the issuance of act preservation measures in IP-related disputes upon the application of implementers; (2) an alleged lack of "proportionality" between the guarantee required by the applicant and the potential penalties incurred by the respondent for non-compliance;

²⁴ See e.g. European Union's first written submission, para. 527.

²⁵ See e.g. European Union's first written submission, para. 569.

²⁶ See e.g. European Union's first written submission, para. 576.

²⁷ European Union's first written submission, para. 555.

and (3) the alleged "risk to the interests of SEP owners" resulting from the penalties that could have been levied upon them in the event of non-compliance.

62. China has already explained that the European Union's first contention is unfounded as it is based on a misapprehension of Chinese law. As regards the second claim, the European Union's argument presupposes that Chinese law mandates a specific calculation of "equivalence" measured in terms of the number of days of non-compliance by the respondent that a security must cover. However, the European Union provides no evidentiary basis for this understanding of Chinese law and it is asking the Panel, essentially, to second-guess the types of decisions that courts around the world must make every day to secure compliance with their orders and ensure the routine administration of justice. It is not the function of WTO panels to sit in review of such determinations.

63. Finally, with regards to the European Union's third claim, as a legal matter, the European Union errs in seeking to enshrine a "very real risk to the interests of the relevant parties" as a *freestanding* basis for a finding that particular conduct was not "reasonable". Prior panel reports have examined under Article X of the GATT 1994 whether a particular administrative process poses "a very real risk of *non-uniform, partial and unreasonable administration*".²⁸ The essence of this inquiry is whether "traders are treated fairly and consistently when seeking to import from or export to a particular WTO Member."²⁹ The mere fact that a party is "at risk" of paying penalties should it choose not to comply with a court order is not evidence of "non-uniform, partial and unreasonable administration".

V. TRANSPARENCY-RELATED CLAIMS UNDER THE TRIPS AGREEMENT

64. The European Union claims that China acted inconsistently with Article 63.1 of the TRIPS Agreement by not publishing three court decisions in which ASIs were issued, namely the decision in *OPPO v. Sharp*; the decision in *ZTE v. Conversant*; and the decision in *Xiaomi v. Interdigital*. The European Union also claims that, by failing to respond to the European Union's request pursuant to Article 63.3 of the TRIPS Agreement regarding these decisions and certain other legal instruments, China acted inconsistently with the first and second sentences of Article 63.3.

65. The three court decisions were not subject to the obligation under Article 63.1 of the TRIPS Agreement, as they were not "final", did not "pertain to the subject matter of [the TRIPS Agreement]", and were not "of general application". These were preliminary procedural rulings, not "final judicial decisions", which are the only judicial decisions subject to the obligation under Article 63.1. A "final judicial decision" is one that conclusively resolves the dispute, such as a final judgment on the merits. Preliminary procedural rulings are not "final judicial decisions" and Article 63 does not prescribe transparency obligations relating to such rulings. Accordingly, China was under no obligation to publish these decisions.

66. For the same reasons, the European Union's claims under Article 63.3 of the TRIPS Agreement, first and second sentence, are equally unfounded. The European Union has failed to demonstrate that the requested information was "of the sort referred to in" Article 63.1 of the TRIPS Agreement, which is a prerequisite for China having an obligation to respond to an inquiry under Article 63.3.

VI. CONCLUSION

67. For the foregoing reasons, and for the reasons set forth in its first written submission, China respectfully requests that the Panel reject the European Union's claims under Articles 1.1, 28.1, 28.2, 41.1, 44.1, 63.1, and 63.3 of the TRIPS Agreement, as well as Section 2(A)(2) of China's Protocol of Accession.

²⁸ Panel Report, *China – Raw Materials*, para. 7.708 (emphasis added).

²⁹ Panel Report, *EC – Selected Customs Matters*, para. 7.108.

ANNEX B-4**SECOND PART OF THE INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA****I. INTRODUCTION**

1. In its second written submission, oral statements at the second substantive meeting, and responses to the Panel's questions after the second substantive meeting, China has continued to prove that the European Union's claims in this dispute are unfounded in law and in fact.

2. Crucially, the European Union has failed to identify any legally cognizable measures that could be the subject of findings by the Panel under the TRIPS Agreement. The European Union has challenged China's alleged "anti-suit injunction policy" as an unwritten measure, but the European Union has continued to shift its descriptions of the alleged "policy" throughout these proceedings. Importantly, the European Union's latest version of the so-called "policy" as one that "empowers and encourages" Chinese courts to issue ASIs when "necessary to protect China's interests" bears no relationship to the unwritten measure that the European Union described in its panel request. It, therefore, falls outside of the Panel's terms of reference.

3. Even assuming that this alleged "policy" did fall within the Panel's terms of reference, it has now become clear that this measure, as described by the European Union, is not susceptible to an "as such" challenge. Indeed, by the European Union's own characterization, the so-called "policy" does not *require* Chinese courts to issue ASIs in *any* circumstance, nor does it *preclude* Chinese courts from issuing an ASI that the European Union would consider to be consistent with the TRIPS Agreement.¹ In other words, this "policy" cannot be challenged "as such", as the European Union does not argue that its application will necessarily be inconsistent in all cases with the TRIPS Agreement.

4. In any event, even if the alleged "policy" could be challenged "as such", the European Union has provided no evidence that such a "policy" exists or that it has been applied "repeatedly" or "systematically" so as to qualify as an unwritten measure of "general and prospective application" or of "ongoing conduct". Moreover, other than the alleged "policy", the only other measures identified by the European Union are the five expired individual court decisions. However, the European Union has provided no valid basis as to why the Panel should make findings regarding those expired measures, and the European Union's references to "lingering effects" are both legally misplaced as well as factually unfounded.

5. Notwithstanding the absence of clearly identifiable and legally cognizable measures, the European Union has also failed to explain why and how the alleged measures (as currently described) violate the covered agreements. Fundamentally, it has been difficult for China throughout the proceedings to respond constructively to the European Union's claims because the European Union has failed to link its measures to its claims in any meaningful way. To the extent that it is possible to discern the European Union's asserted connections between its measures and its claims, those connections are unfounded as a matter of law.

6. As concerns the European Union's substantive claims under Articles 1.1, 28.1, 28.2, 41.1, and 44.1 of the TRIPS Agreement, these claims rest on a serious misapprehension of the purpose and scope of the TRIPS Agreement, as well as a misinterpretation of the ordinary meaning of the respective provisions. The same applies for the European Union's transparency-related claims, which clearly reveal the European Union's intention to broaden the scope of these obligations beyond the ordinary meaning of the relevant provisions. Similarly, the European Union's claims under China's Protocol of Accession are based on its mistaken view that it is the function of this Panel to act as a court of appeal on matters of Chinese law.

¹ The European Union has made it clear that it does not believe that all ASIs are inconsistent with the TRIPS Agreement. See e.g. European Union's opening statement at the second substantive meeting, para. 31; first written submission, para. 324; opening statement at the first substantive meeting, para. 52; and response to Panel question No. 17b, paras. 83-84.

II. THERE ARE NO LEGALLY COGNIZABLE MEASURES AT ISSUE

A. Introduction

7. In its panel request, the European Union challenged "as such" an unwritten "policy" which it described as "the anti-suit injunction policy maintained by China as a measure of general and prospective application **prohibiting** a party in litigation concerning SEPs in China from applying for enforcement of judgments of any non-Chinese court in the territories of other Members or from seeking any judicial relief outwith the jurisdiction of Chinese courts".² Based on the European Union's panel request, China understood the European Union's "as such" claim against the alleged unwritten "policy" to be categorical in nature, namely covering any and all ASIs issued in standard-essential patent ("SEP") litigation.

8. Subsequently, in its first and second written submissions, the European Union departed from its panel request in certain critical respects. The European Union's formulation in its first written submission suggested that it considered ASIs to be inconsistent with the identified legal provisions only if certain "aspects" were present (e.g. the issuance of ASIs by Chinese courts that, in the European Union's view, are impermissibly "broad" or not sufficiently "well-targeted").³ In its first written submission and at the first meeting, China explained that the European Union had failed to articulate the precise content of the alleged unwritten "policy".

9. In its second written submission, the European Union articulated the content of the alleged ASI "policy" as one that "empowers and encourages Chinese courts to prohibit patent holders from asserting their rights protected by the TRIPS Agreement in other jurisdictions."⁴ The European Union subsequently modified this articulation by referring to "a policy that empowers and encourages Chinese courts to protect China's interest in standard essential patent cases by adopting anti-suit injunctions that prohibit patent holders from asserting their rights in the territories of other WTO Members".⁵ These latest iterations of the alleged "policy" do not resolve the European Union's "precise content" problem, but they do raise additional issues:

- First, an alleged "policy" that "empowers and encourages" Chinese courts to issue ASIs to "protect China's interest" is firmly outside of the Panel's terms of reference (Part B);
- Second, even if this alleged "policy" were within the Panel's terms of reference, such a measure is not susceptible to an "as such challenge" (Part C);
- Third, the European Union has in any event not proven that such a "policy" that "empowers and encourages" Chinese courts to issue ASIs exists (Part D), nor has the European Union provided evidence of its "systematic" or "repeated" application (Part E).

9. As regards the European Union's other measures at issue, namely the five individual court decisions, the European Union has failed to put forward any valid reasons why the Panel should make findings on these expired measures (Part F).

B. The European Union's New Articulation of the Unwritten "Policy" Is Outside of the Panel's Terms of Reference

10. A complainant's panel request "establish[es] and delimit[s] the jurisdiction of the panel in a dispute" and "serves the due process objective of notifying the respondent and third parties of the nature of the dispute."⁶ In this case, the measure identified in the European Union's panel request was a policy **prohibiting** a party in litigation concerning SEPs in China from applying for

² European Union's panel request, p. 7 (emphasis added).

³ See e.g. European Union's first written submission, paras. 233, 244, 265-266, 289, 317, 318, 324, 326, 331, 368, 377, 443, 466.

⁴ European Union's second written submission, para. 2.

⁵ European Union's opening statement at the second substantive meeting, para. 10 and response to Panel question No. 78, para. 5.

⁶ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 786.

enforcement of judgments of any non-Chinese court in the territories of other Members or from seeking any judicial relief outwith the jurisdiction of Chinese courts".

11. Throughout the proceedings, the European Union has however made clear that it does not believe there is a policy *requiring* Chinese courts to issue ASIs.⁷ This means that the alleged "policy" identified in the European Union's panel request, which is the only one within the Panel's terms of reference in this case, *does not exist*. Rather, the European Union now insists that what it is challenging is a policy that "empowers and encourages" Chinese courts to issue ASIs when it is in China's interests. Such a policy, however, is fundamentally different from the one described in its panel request and, thus, falls outside the Panel's terms of reference.

12. During the second substantive meeting, the European Union argued that the words "empowers and encourages" should be read into the European Union's definition of the alleged "policy" in the panel request because the word "empowers" appears on page 1 of the European Union's panel request. However, the narrative contained in page 1 of the panel request also refers to other characteristics of the alleged policy (e.g. enforcement through daily penalties) which the European Union has made clear are *not* "definitional" elements of the measure.⁸ Moreover, even if the word "empowers" is selectively read into the European Union's definition of the alleged "policy", the content of the *unwritten* measure that the European Union is challenging remains entirely unclear. Indeed, the fact that Chinese courts are "empowered" to issue ASIs in SEP litigation is based on *written* measures, namely China's *written* Civil Procedure Law, which was applied in the SEP litigation context for the first time in the *written* decision of the SPC in *Huawei v. Conversant*.

13. The other significant problem with the European Union's current formulation of the "policy" is that it excludes the alleged China-specific "aspects" which have been integral to the European Union's claims in this dispute (for example, the alleged "broad" scope of the ASIs, that the ASIs were issued absent a determination that foreign litigation was "vexatious or oppressive", etc.).⁹ Since these "aspects" were not identified in the European Union's panel request, as pointed out by China several times, the European Union has tried to argue that these are not "components" of the alleged ASI "policy" but they are just "reprehensible aspects of China's policy" which the European Union has "criticized" in its submissions.¹⁰

14. However, having expressly disavowed the alleged China-specific "aspects" of the "policy" as components of the challenged measure, the European Union nonetheless continues to present the "distinctions" between Chinese court ASIs and the ASIs issued by other Member's courts as being essential to its claims.¹¹ Indeed, since the European Union has repeatedly stated that it does not consider all ASIs to be inconsistent with the TRIPS Agreement, the European Union's "as such" claims *must* logically depend on particular "elements" or "aspects" that it believes distinguish Chinese court ASIs from other ASIs. Yet, the European Union has now made quite clear that these "elements" or "aspects" are not "definitional characteristics" of the alleged "policy", meaning that there is nothing linking the European Union's alleged measure to its actual claims under the TRIPS Agreement.

15. Thus, the European Union's fundamental problem in relation to the alleged China-specific "aspects" persists. Either these "aspects" or "distinctions" are essential components of the challenged "policy" and are outside of the Panel's terms of reference because they were not in the European Union's panel request, or they are not components of the alleged "policy" and cannot be the basis for the European Union's claims.

⁷ For instance, in response to Panel question No. 8(b) regarding whether there is an "actual binding instruction" to apply the alleged ASI "policy", the European Union does not say "yes". Instead, the European Union states that courts are "*encouraged*" to follow the alleged policy multiple times throughout its submissions. See e.g. European Union's responses to Panel question No. 4, paras. 20-21; No. 8(a), paras. 30, 36-37; No. 8(b), para. 39; No. 8(c), para. 41; No. 11(a), paras. 50 and 54; No. 12(a), para. 56; No. 12(b)(i), para. 61; and European Union's second written submission, para. 21.

⁸ European Union's response to Panel question No. 78, paras. 9 and 10. See also European Union's response to Panel question No. 18, para. 90.

⁹ See e.g. European Union's first written submission, paras. 318, 331 and 368; responses to Panel question No. 12(b)(i), para. 61, No. 17(c), para. 87 and No. 7(a), para. 79.

¹⁰ European Union's responses to Panel question No. 18, para. 90 and No. 78, paras. 9 and 10.

¹¹ See e.g. European Union's second written submission, para. 70.

C. The European Union's Current Version of the Alleged Unwritten ASI "Policy" Is Not Susceptible to an "As Such" Challenge

16. Even if the European Union's current version of the unwritten ASI "policy" were within the Panel's terms of reference, this "policy" is not susceptible to an "as such" challenge. Indeed, the measure currently described by the European Union is not one that is *necessarily* inconsistent with the TRIPS Agreement whenever it is applied, which is fatal to its "as such" claim.

17. The Appellate Body has confirmed that an "as such" challenge concerns situations where a Member's conduct "will necessarily be inconsistent with that Member's WTO obligations".¹² In prior disputes where complainants have attempted to challenge a measure "as such" whose application will not necessarily be inconsistent with the covered agreements, such arguments have been rejected by both panels and the Appellate Body.¹³

18. In the current dispute, what the European Union is describing is the basis for a quintessential "as applied" claim. The European Union believes that there is an unwritten "policy" that could be applied in some instances in a WTO-inconsistent manner, or it could be applied to yield an ASI that meets the European Union's own worldview of an ASI consistent with the TRIPS Agreement.¹⁴ According to the European Union, the alleged "policy" "does not lead or encourage Chinese courts to issue well-targeted anti-suit injunctions, even though *it is perfectly conceivable* that Chinese court [sic] could issue anti-suit injunctions consistent with the TRIPS Agreement at the request of any of the parties involved in SEP litigation."¹⁵ This means that the alleged "policy" cannot be challenged "as such". Rather, as the European Union seems to appreciate, "[s]ince there is no rule in the TRIPS Agreement specifically prohibiting the issuance of anti-suit injunction", what the European Union would need to challenge is the particular instances of application of the alleged "policy" that it believes to be inconsistent with the TRIPS Agreement which "will have to be assessed on their merits, on a case-by-case basis".¹⁶

D. The "Policy" Described by the European Union Does Not Exist

19. Given the myriad problems and inconsistencies with the European Union's articulation of the unwritten "policy", it has become exceptionally difficult for China to address the existence of this alleged measure on an *arguendo* basis. The only argument that the European Union has made somewhat consistently is that the alleged "policy", whatever its content, was introduced in *Huawei v. Conversant*.¹⁷

20. However, it is clear on its face that *Huawei v. Conversant* was a single case in which the SPC applied written law to the particular facts of the ASI application at issue. The SPC did not say or suggest anything about how a *different* court might address an ASI application going forward, and it is impossible to see how it instituted an unwritten policy "to systematically impose broad ASIs".¹⁸

21. The European Union claims that, pursuant to *Huawei v. Conversant*, lower courts are "empowered and encouraged" to issue ASIs when requested by implementers without limiting these to "exceptional cases only", namely cases where the proceedings started by the patent owners in the territories of other Members are "vexatious, oppressive or otherwise abusive."¹⁹ The European Union also maintains that the decision in *Huawei v. Conversant* "empowers and encourages courts

¹² Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.

¹³ See e.g. Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.282; Appellate Body Report, *US – Carbon Steel (India)*, para. 4.483; Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.693.

¹⁴ According to the European Union, "the issuance of a well-targeted anti-suit injunction in exceptional cases may be a helpful tool to address the challenges posed by parallel litigation opposing SEP owners and implementers in various jurisdictions". European Union's first written submission, para. 324.

¹⁵ European Union's response to Panel question No. 17(a), para. 83 (emphasis added).

¹⁶ European Union's opening statement at the second substantive meeting, para. 31.

¹⁷ See e.g. European Union's second written submission, para. 3.

¹⁸ See European Union's first written submission, para. 244.

¹⁹ European Union's response to Panel question No. 17(a), para. 79.

to issue anti-suit injunctions with a worldwide scope and covering several types of proceedings", even if this is not what happened in *Huawei v. Conversant* itself.²⁰

22. The European Union's argument appears to be that because the SPC did not expressly state in *Huawei v. Conversant* that lower courts may only issue ASIs in cases "in which the proceedings started by the patent owners in the territories of other Members are themselves vexatious, oppressive or otherwise abusive", this means that the SPC established an *unwritten* "policy" under which lower courts are "empowered and encouraged" to issue ASIs of a "worldwide scope" outside of this specific context. The European Union points to *no* evidence in the actual text of the SPC's decision to support this assertion, and there is none. Indeed, courts are generally in the habit of applying the law to the facts of the case in front of them, not opining about the application of the law to different facts and circumstances in the future. This is *particularly* the case in China, which does not have a concept of *stare decisis*.

23. Since the European Union's assertion that the SPC established such a "policy" in *Huawei v. Conversant* is manifestly unfounded, China could forego a discussion of the merits of the European Union's "vexatious, oppressive or otherwise abusive" standard. Nevertheless, China has also explained why this standard (the underlying elements of which the European Union has not even attempted to define) finds no basis in any of the relevant TRIPS Agreement provisions. This standard merely represents the European Union's own preferred approach for the issuance of ASIs in SEP litigation. The European Union, however, provides no textual or other legal basis for the Panel to find that the TRIPS Agreement embodies its own legal standard.²¹

24. Finally, in its second written submission, the European Union has also referred to "numerous official documents from the highest levels of China's judicial and political system approving anti-suit injunctions with Chinese characteristics and promoting their further use" which allegedly show that "an anti-suit injunction policy in SEP litigation exists".²² The European Union then claims that "Chinese courts have *elaborated this policy* via anti-suit injunctions in five cases"²³ and, similarly, that "Chinese court [sic] follow a policy endorsed by the highest government bodies".²⁴

25. These "official documents" constitute one of the categories of 'evidence' put forward by the European Union to prove the existence of the alleged "policy". Even if one were to entirely credit the European Union's characterization of this evidence,²⁵ China has argued throughout the dispute that the European Union has a fundamental timing problem with respect to this alleged evidence as it all comes *after* the five ASI decisions were issued. The only ASIs that have ever been issued by Chinese courts were issued in 2020. It is, thus, not possible for these courts to have "followed" or "elaborated" an alleged policy "endorsed by the highest government bodies" when there is no evidence of any such endorsement that precedes a single one of the relevant decisions in 2020.

E. There Is No Evidence of "Systematic" or "Repeated" Application of the Alleged "Policy"

26. In its first written submission, the European Union faithfully recalled the Appellate Body's jurisprudence regarding the evidence necessary to demonstrate the existence of an unwritten measure of "general and prospective application" or of "ongoing conduct".²⁶ With respect to the

²⁰ European Union's response to Panel question No. 11(a), para. 53. See also European Union's response to Panel question No. 12(b)(i), para. 61.

²¹ The European Union also does not seem to appreciate that the factors that were actually considered by the Chinese courts in the five cases correspond very closely to its own "vexatious, oppressive or otherwise abusive" standard. For instance, the fact that, in *Huawei*, the Nanjing case had been filed prior to the German case is precisely the type of fact that has been considered in the context of a "vexatious or oppressive" analysis in US cases. See Exhibit CHN-3, *Microsoft Corp. v. Motorola, Inc.*, 871 F. Supp. 2d at 1100; Exhibit CHN-4, *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d at 886. Therefore, the European Union's position seems to boil down to the fact that it simply does not agree with the way specific courts in China have assessed the facts before them in particular cases.

²² European Union's second written submission, para. 9.

²³ European Union's second written submission, para. 9 (emphasis added).

²⁴ European Union's second written submission, para. 18.

²⁵ In its first written submission, China addressed in quite some detail this alleged 'evidence', showing that it is not remotely relevant to establishing the existence and content of the alleged "policy". See China's first written submission, Section III.D.3.

²⁶ See European Union's first written submission, paras. 216, 245-248 and 276-278.

former, the European Union highlighted the importance of demonstrating the "systematic application" of the alleged measure, while noting that a standard of "repeated application" had previously been articulated for measures of "ongoing conduct". Also, the European Union itself characterized the alleged "policy" in this case as one of *systematically* imposing "broad anti-suit injunctions in SEP litigation".²⁷

27. At the first substantive meeting, however, the European Union did a U-turn, explaining that its view is actually that "the measure itself is not *systematic*".²⁸ In its responses to the Panel's questions, the European Union has also argued that "[t]he fact that a measure is not applied in every possible instance does not call into question the existence of the measure".²⁹

28. The European Union's altered position on the relevance of the measure's "systematic" application is not consistent with either how the European Union itself described its unwritten measure or the prior jurisprudence that it referenced in its first written submission. Whatever the European Union's current view is of whether the alleged "policy" is "systematic", what is clear is that the European Union has not come close to demonstrating that the alleged policy has been applied "consistently and systematically for an extended period of time".³⁰ It is undisputed that only four ASIs in SEP litigation have been issued since *Huawei v. Conversant*, and they were all issued between August and December 2020. Since then, no other cases have been identified, and in *Lenovo v. Nokia*, the application for an ASI in a SEP dispute was rejected. This is unlike all the prior disputes that both the European Union and China identified in their first written submissions with respect to measures "of general and prospective application" or of "ongoing conduct". In those cases, the fact that no instance of non-application of the challenged policy or methodology could be identified was considered persuasive evidence of the existence of a measure of general and prospective application or of ongoing conduct.³¹

F. There Are No "Lingering Effects" of the Expired Measures That the European Union Is Challenging "As Applied"

29. Other than the alleged unwritten "policy", the only other measures identified by the European Union are the five individual court decisions, which are challenged "as applied". However, it remains undisputed that those decisions expired years before the Panel's establishment, and the European Union has thus far not provided any compelling reason for the Panel to rule on those expired measures.

30. In its second written submission, the European Union insists on its theory of "lingering adverse effects",³² resulting allegedly from the settlements reached between the parties in each case following the ASIs. During the second substantive meeting, China explained that the jurisprudence referred to by the European Union regarding "lingering adverse effects" of expired measures was developed in the context of the SCM Agreement, which makes specific reference to the "adverse effects" of subsidies. The European Union has not explained why or how this jurisprudence would be applicable, by analogy, to its claims under the TRIPS Agreement.

31. In any event, as regards the European Union's "coercion" theory, it is evident that the European Union does not have (and indeed *cannot* possibly have) any idea about how these settlements between private companies were reached – and what factors may have affected their negotiations. As China has pointed out, the parties at the time were subject to pending litigation not only in China but also other jurisdictions, including anti-anti-suit injunctions in two of the five cases. The European Union relies on certain statements allegedly showing that the Chinese courts "claimed

²⁷ See e.g. European Union's first written submission, para. 233; para. 244 ("the policy to systematically impose broad ASIs in SEP litigation exists distinctly from its components."); para. 266 ("The issuance by lower courts of four decisions enjoining ASIs, themselves promoted as 'typical cases', in a relatively short period of time following the decision in *Huawei v. Conversant* shows a systematic application of broad anti-suit injunctions in SEP litigation.")

²⁸ See Panel question No. 12 (emphasis added).

²⁹ European Union's response to Panel question No. 112(a), para. 121.

³⁰ See Appellate Body Report, *US – Zeroing (EC)*, para. 199; Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.132; Panel Report, *US – Countervailing Measures (China)*, paras. 7.114-7.115.

³¹ See e.g. Appellate Body Report, *US – Zeroing (EC)*, para. 199; Panel Report, *US – Countervailing Measures (China)*, para. 7.115; Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.63; Appellate Body Report, *US – Supercalendered Paper*, para. 5.47.

³² European Union's second written submission, para. 49.

credit" for the terms of the settlements reached,³³ However, whether or not Chinese courts "claimed credit" (which is, in any event, untrue) is entirely irrelevant to proving that the settlements were "forced" on the parties or that they were not "in line with a normal exploitation of the patents concerned".³⁴ This is a baseless assumption premised on the European Union's equally unsupported belief that the implementers were necessarily seeking to pay *unreasonable* royalty rates.

III. THE EUROPEAN UNION HAS FAILED TO DEMONSTRATE THE INCONSISTENCY OF ANY ALLEGED "MEASURE" WITH THE SUBSTANTIVE PROVISIONS OF THE TRIPS AGREEMENT

A. Introduction

32. While the absence of any reviewable measures in this case should normally be the end of the Panel's analysis, China has proceeded to rebut the European Union's legal claims in respect of the asserted measures on an *arguendo* basis, i.e. on the assumption that the measures exist as the European Union has variously described them.

33. It is, however, important to note the exceptional difficulty of proceeding on that basis in this case. Given the European Union's amorphous and constantly shifting characterizations of the "policy" at issue in this dispute, and given the European Union's own acknowledgement that the consistency of this alleged "policy" with the identified provisions of the TRIPS Agreement will depend upon the facts of each case,³⁵ it is difficult for the Panel and China to evaluate this alleged measure against the specific legal obligations at issue. Similarly, the European Union has made no attempt to explain why the five individual ASI determinations identified by the European Union are inconsistent with the relevant provisions of the TRIPS Agreement on an "as applied" basis, even if the Panel were to set aside the fact that these are expired measures.

34. Despite these difficulties, and for the sake of the orderly development of this case, China has elaborated in its second written submission, responses to the Panel's questions as well as during the substantive meetings on why the European Union's claims under Articles 1.1, 28.1, 28.2, and 44.1 of the TRIPS Agreement (Part B) as well as Article 41.1 of the TRIPS Agreement (Part C) are unfounded.

B. The European Union's Claims Under Articles 1.1, 28.1, 28.2, and 44.1 of the TRIPS Agreement Are Unfounded

35. Throughout the proceedings, it has become clear that the European Union's claims under Articles 1.1, 28.1, 28.2 and 44.1 of the TRIPS Agreement are based on a misguided understanding of the scope of Members' obligations under these provisions. The European Union considers that the alleged measures at issue are inconsistent with the said provisions of the TRIPS Agreements because they "restrict the rights of intellectual property owners and interfere with their protection and enforcement *in the territories of other WTO Members*" and, as such, do not "give effect to" the provisions of the TRIPS Agreement.³⁶

36. China has explained at length why the European Union's understanding of the TRIPS Agreement, and in particular the meaning of "give effect to" in Article 1.1, is mistaken. The object and purpose of the TRIPS Agreement is to reduce impediments to international trade by requiring Members to implement *in their domestic legal systems* certain minimum standards for the recognition and enforcement of intellectual property rights.³⁷ Members fulfil this obligation by "giving effect to" those standards in their domestic laws.³⁸ The TRIPS Agreement does not purport to establish a supranational system governing the recognition and enforcement of intellectual property rights across national borders, and nothing in the phrase "give effect to", properly interpreted, supports the conclusion that it does.

³³ European Union's second written submission, para. 50.

³⁴ European Union's response to Panel question No. 9(a), para. 42.

³⁵ See e.g. European Union's opening statement at the second substantive meeting, para. 31.

³⁶ European Union's response to Panel question No. 39(d), para. 157 (emphasis added).

³⁷ See e.g. China's opening statement at the first meeting of the Panel, paras. 40-52.

³⁸ See e.g. China's response to Panel question No. 42.

37. The European Union has also argued that Article 1.1 first sentence of the TRIPS Agreement reflects the principle of good faith and, as such, imposes an obligation upon Members to "abstain from acts that frustrate the object and purpose of" the TRIPS Agreement.³⁹ As China has pointed out, the principle of good faith "is not in itself a source of obligation where none would otherwise exist."⁴⁰ The TRIPS Agreement does not impose obligations governing transnational IP litigation, licensing disputes or indeed address any topic of private international law that may arise in the context of cross-border IP litigation. The principle of good faith cannot summon any such obligations into existence. Moreover, as China has also explained, ASIs are *in personam* orders directed toward individual defendants in individual cases. They do not interfere with the ability of other Members to ensure compliance with their own treaty commitments.

38. This should be the end of the European Union's claims under Articles 1.1, 28.1, 28.2, and 44.1. The European Union has not claimed that China has failed to implement within its domestic legal system the substantive protections or procedures required by these provisions. Rather, the European Union's claims under these provisions concern issues which, as the European Union acknowledged during the second substantive meeting, are not addressed by the provisions of the TRIPS Agreement. Moreover, even accepting the European Union's erroneous interpretation of these provisions, the European Union still has not explained what it is about the ASIs issued by Chinese courts that render them inconsistent with these provisions, while the ASIs issued by the courts of other Members can be "helpful tool[s] to address the challenges posed by parallel litigation" of SEP-related controversies.⁴¹

C. The European Union's Claim Under Article 41.1 of the TRIPS Agreement Is Unfounded

39. The European Union has failed to demonstrate that either the "unwritten ASI policy" or any of the five specific cases at issue involve "enforcement procedures ... against any act of infringement" in the sense of Article 41.1. Moreover, in any event, the European Union has failed to demonstrate that China has not "applied" any such "enforcement procedures" "in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse."

40. China has explained at length why neither the five ASI decisions at issue nor the so-called "policy" involve "enforcement procedures ... against any act of infringement" in the sense of Article 41.1, and therefore that provision does not apply. First, the ASIs at issue were granted pursuant to the act preservation procedure set forth in Article 100 of the Civil Procedure Law. This is a general feature of Chinese civil procedure, and not an "enforcement procedure ... against any act of infringement" that would be covered by Part III of the TRIPS Agreement.⁴² The purpose of the ASIs in each case was to preserve the court's jurisdiction against the issuance of a foreign judgment, which is a matter of private international law that has nothing to do with the enforcement of patent rights.⁴³

41. The European Union, however, appears to believe that the relevant "procedure" in this case is not the act preservation procedure under Article 100 of the Civil Procedure Law, but rather the five civil cases initiated by SEP implementers in which ASIs were issued. Even if these were the relevant "procedures", China has explained that the proceedings in which the ASIs were granted were fundamentally contractual *licensing* disputes, not "enforcement procedures ... against any act of infringement". An "enforcement procedure ... against any act of infringement" must be one that is directed "against", i.e. "in active opposition to", an alleged act of infringement and that seeks to "compel observance with" the patentee's exclusive right to prevent others not having the patentee's consent from exercising the patent.⁴⁴ That is not what SEP licensing disputes concern. In a SEP licensing dispute initiated by the implementer, the defendant-patentee's objective is to obtain what it considers to be favourable licensing terms for a license that it has already committed to provide to the implementer. The defendant-patentee is not "enforcing" a patent right "against" an alleged

³⁹ European Union's responses to Panel question No. 37, para. 146 and No. 92(b), para. 70. See also European Union's opening statement at the first meeting of the Panel, paras. 41-46.

⁴⁰ *Border and Transborder Armed Actions (Nicaragua v Honduras) (Jurisdiction and Admissibility)* [1988] ICJ Reports 69, 105, para 94. See also *In re Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* [1998] ICJ Reports 275, at 297, para 39.

⁴¹ See European Union's first written submission, para. 324.

⁴² See China's first written submission, para. 251.

⁴³ See China's response to Panel question No. 86(b).

⁴⁴ See China's responses to the Panel's questions, paras. 45-46.

act of infringement by "compelling observance with" its exclusive right to prevent others not having its consent from exercising the patent.

42. The European Union has therefore failed to establish the threshold applicability of Article 41.1 to the measures putatively at issue in this dispute, which should normally bring the Panel's assessment of this claim to an end. Even if the Panel were to proceed further with its assessment, however, it would still need to reject the European Union's claim. This is because the European Union has not established that China has failed to "apply" any enforcement procedures at issue, whatever they may be, "in such a manner as to avoid the creation of barriers to legitimate trade and to provide safeguards against their abuse."

43. Because the European Union has foresworn the position that the TRIPS Agreement categorically prohibits all ASIs, and because the European Union has acknowledged that some ASIs can be "helpful tool[s] to address the challenges posed by parallel litigation" of SEP-related controversies, it must be the European Union's position that not all ASIs necessarily "create barriers to legitimate trade" or are "abusive" within the meaning of Article 41.1, second sentence.⁴⁵ The problem is that the European Union has yet to identify with any degree of precision the circumstances in which it would consider an ASI to be in breach of the obligations contained in Article 41.1, second sentence.

44. At para. 100 of its second written submission, the European Union has listed certain features of ASIs issued by Chinese courts and claims that these features "prohibit patent holders from applying for enforcement of judgments of a court in the territories of other Members" which "restricts trade in intangible goods ... as well as patented or licensed goods."⁴⁶ This, however, would be true of any ASI issued by a Member's court on behalf of an implementer in a SEP licensing dispute. The European Union does not explain why China's ASIs at issue would result in "barriers to legitimate trade" while the ASIs issued by courts of other Members do not.

45. The same is true with respect to providing "safeguards against [the] abuse" of ASIs, assuming that these can be considered "enforcement procedures". The European Union has asserted that the ASIs at issue in this dispute were "abusive" because Chinese courts issued the ASIs "with little consideration of their impact on the enforcement procedures in other Members".⁴⁷ In the five cases at issue, Chinese courts have, in fact, taken into account considerations of international comity when issuing the ASIs.⁴⁸ Thus, even assuming that Article 41.1 requires Members to "consider" the impact of ASIs on enforcement procedures in other Members, the European Union does not make clear what it is about the "consideration" given by Chinese courts that renders these ASIs "abusive", while the "consideration" given by the courts of other Members renders their ASIs not "abusive".

IV. THE EUROPEAN UNION'S CLAIMS UNDER CHINA'S PROTOCOL OF ACCESSION ARE UNFOUNDED

46. The European Union's claims under Section 2(A)(2) of China's Protocol of Accession are exclusively on an "as applied" basis in respect of the five individual ASI decisions at issue. The European Union, however, has failed to explain why the Panel should make findings and recommendations in respect of these expired measures. Accordingly, the Panel should not have occasion to proceed to an assessment of the merits of the European Union's claims under Section 2(A)(2).

47. Even setting aside this fundamental issue, the European Union's claims under Section 2(A)(2) of China's Protocol are also unfounded in law. What the European Union asks the Panel to do under Section 2(A)(2) is evaluate whether Chinese courts acted consistently with their own domestic law. The European Union asserts that it "does not argue that the Panel should find that Chinese courts have misinterpreted or misapplied Chinese law",⁴⁹ but it has devoted most of its arguments on this subject doing precisely that.

⁴⁵ See European Union's first written submission, para. 324.

⁴⁶ European Union's first written submission, para. 101.

⁴⁷ European Union's second written submission, para. 103.

⁴⁸ China's second written submission, para. 117.

⁴⁹ European Union's response to Panel question No. 66, para. 270.

48. One of the European Union's main claims in this regard is that China's legal framework for act preservation measures allegedly "did not clearly provide for the issuance of anti-suit injunctions ... at the request of implementers",⁵⁰ even though Chinese courts held that it did and even though China has explained at length why the European Union's understanding of the relevant Chinese laws is incorrect.⁵¹ In its second written submission and responses to the Panel's questions, the European Union focuses in particular on the claim that the application of the act preservation legal framework in the ASI cases was contrary to its "design and purpose", which was allegedly to protect the interest of IPR holders.⁵² As China explained, however, the "purpose" of a law, whatever that might mean, is discerned through the process of interpreting and applying that law – which is what domestic courts do.⁵³ The European Union evidently believes that the "purpose" of China's legal framework for act preservation measures in IP disputes was *exclusively* to protect right holders, but Chinese courts held otherwise and China has further demonstrated that the European Union's interpretation of that legal framework is incorrect.

49. The European Union has also put forward a new line of argument in its responses to the Panel's questions and second written submission, claiming that the way the act preservation legal framework was applied in the context of SEP litigation is "different from the way the same relevant provisions were applied in the context of other IP litigation" and that such difference is allegedly evidence of lack of uniformity.⁵⁴ In this regard, the European Union has presented no evidence to support any alleged "difference" between how Chinese courts have applied China's legal framework for act preservation measures in SEP litigation as compared to other types of IP litigation and its claim is, thus, entirely unsubstantiated.

50. With regard to the imposition of penalties for non-compliance, the European Union asserts that "the SPC's interpretation of Article 115 of the Civil Procedure Law in *Huawei v. Conversant* did not consider the requirements of Article 184 of the SPC's Interpretation of the Civil Procedure Law," unabashedly taking the position that China's highest court misunderstood Chinese law and the judicial interpretation issued by the SPC itself.⁵⁵ As China explained in its first written submission, the SPC expressly addressed the question of daily penalties for non-compliance in its reconsideration decision, where it explained that each day of non-compliance gives rise to a separate violation, which is fully consistent with its prior interpretation under Article 184.⁵⁶

51. Finally, with regard to the European Union's arguments concerning the calculation of the amount of guarantee required from the applicant for an act preservation measure, the European Union persists in its belief that the amount of the guarantee must include "penalties for non-compliance, as they are part of the reasonable loss incurred by the respondent when the act preservation measure is made effective".⁵⁷ The European Union asserts this as if it were a foregone conclusion that the respondent will not comply or that it is somehow the respondent's "reasonable" right not to comply. In any event, the European Union does not explain why its understanding of how the amount of the guarantee should be calculated is compelled, as a matter of law, by the obligation of uniform, impartial, and reasonable administration. As with its fixation on a legal standard of "vexatious, oppressive, or otherwise abusive" for the issuance of an ASI, the European Union's views as to how the amount of a guarantee should be calculated when a party seeks and obtains an ASI represent nothing more than its own policy preferences.

V. THE EUROPEAN UNION'S TRANSPARENCY-RELATED CLAIMS UNDER THE TRIPS AGREEMENT SHOULD BE REJECTED

52. China's position in relation to the European Union's claims under Articles 63.1 and 63.3 of the TRIPS Agreement is simple. China considers that the judicial decisions that the European Union has

⁵⁰ European Union's response to Panel question No. 67(a), para. 271.

⁵¹ European Union's response to Panel question No. 67(a), para. 271. China explained in Part V.B of its first written submission (paras. 282-299) why the European Union is mistaken in its belief that China's Civil Procedure Law and the SPC Provisions concerning act preservation measures in IP disputes did not permit the issuance of act preservation measures at the request of implementers.

⁵² See e.g. European Union's second written submission, paras. 155-157.

⁵³ See China's response to Panel question No. 70, paras. 112-114.

⁵⁴ European Union's response to Panel question No. 66, para. 270. See also European Union's second written submission, para. 154.

⁵⁵ European Union's response to Panel question No. 72, para. 287.

⁵⁶ See China's first written submission, para. 304.

⁵⁷ European Union's response to Panel question No. 76(a), para. 301.

identified under each provision were not "final", were not "of general application" and did not "pertain to the subject matter of [the TRIPS Agreement]". Therefore, these decisions fall outside the scope of Article 63.1 of the TRIPS Agreement and, consequently, they are also outside the scope of Article 63.3, first and second sentence, of the TRIPS Agreement.

53. The European Union has so far made little effort to explain why the decisions at issue fulfil the conditions of Article 63.1 of the TRIPS Agreement. Most notably, as regards the requirement of having "general application", the European Union has not explained at all in what respect the three decisions in question "establish[ed] or revise[d] principles applicable in future cases."⁵⁸ In fact, what the European Union has insisted upon throughout this dispute is that an alleged ASI "policy" was introduced in *Huawei v. Conversant* and the courts after this (including in *OPPO*, *ZTE* and *Xiaomi*) simply "followed" this policy.⁵⁹ Thus, according to this view of the European Union, the decisions did not "establish or revise principles applicable in future cases" but simply followed a pre-existing "policy".

54. To not jeopardize its claims under Article 63, the European Union has emphasized that, even if not "of general application", the decisions in question "in any event" fall under the second sentence of Article 63.3 of the TRIPS Agreement⁶⁰ which, according to the European Union, covers a "much wider category of judicial decisions" than those specified in Article 63.1.⁶¹ However, the European Union's claim under the second sentence of Article 63.3 as covering a "wider" category of judicial decisions was not identified in the European Union's panel request. Section 3 of the European Union's panel request, which sets out the legal basis for its claim under Article 63.3 of the TRIPS Agreement, expressly refers to China's alleged "failure to supply information on final judicial decisions of general application pertaining to the subject matter of the TRIPS Agreement". Thus, by its terms, the European Union's claim under Article 63.3 is limited to "final judicial decisions of general application pertaining to the subject matter of the TRIPS Agreement".

55. Accordingly, the European Union's claim under the second sentence of Article 63.3, as presented in the European Union's submissions, is not within the Panel's terms of reference. In any event, China has explained in its second written submission and its responses to the Panel's questions why the European Union is mistaken in arguing that the second sentence of Article 63.3 covers a "much wider category of judicial decisions" which do not need to meet the conditions of Article 63.1, such as being of general application.⁶²

VI. CONCLUSION

56. For the foregoing reasons, and for the reasons set forth in its first and second written submissions and responses to the Panel's questions, China respectfully requests that the Panel reject the European Union's claims under Articles 1.1, 28.1, 28.2, 41.1, 44.1, 63.1, and 63.3 of the TRIPS Agreement, as well as Section 2(A)(2) of China's Protocol of Accession.

⁵⁸ China's first written submission, para. 326, referring to Panel Report, *Japan – Film*, para. 10.388.

⁵⁹ See, for instance, European Union's responses to Panel question No. 4, paras. 20-21, No. 8(b), para. 39, and No. 12(a)(i), para. 56.

⁶⁰ European Union's response to Panel question No. 58, para. 236.

⁶¹ European Union's response to Panel question No. 52, para. 200. See also European Union's opening statement at the first meeting of the Panel, para. 116.

⁶² See China's second written submission, para. 132; response to Panel question No. 53.

ANNEX C**ARGUMENTS OF THE THIRD PARTIES**

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ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. INTRODUCTION

1. These proceedings initiated by the European Union raise important questions of legal interpretation and proper application of key provisions of the TRIPS Agreement.
2. Australia's submissions have focussed on the legal standard and evidentiary threshold to establish and characterise an unwritten measure and key provisions relating to the proper interpretation of the TRIPS Agreement with respect to the requirement for Members to "give effect" to the TRIPS Agreement (Article 1.1), as well as transparency requirements (Article 63).

II. UNWRITTEN MEASURES

3. Australia observes that the elusiveness of unwritten measures is of wider systemic concern to the functioning of the rules-based order. Australia's submissions focus on two important factors in this dispute: firstly, the evidentiary threshold required to demonstrate the existence of an unwritten measure, and secondly, the legal standard to be applied in characterising it as one of "general and prospective application" or "ongoing conduct".

A. EVIDENTIARY THRESHOLD FOR UNWRITTEN MEASURES

4. Australia recalls that where a measure is not expressed in a written document, "a panel must carefully examine the concrete instrumentalities that evidence the existence of the purported measure".¹
5. Australia submits that the Panel should consider the *collective weight* of the European Union's evidence in establishing the existence and content of the unwritten measure.
6. Australia submits that if the Panel finds the evidence submitted by the European Union shows Chinese government endorsement and encouragement of the approach to issuing ASIs in SEP disputes, the Panel should consider whether this indicates an underlying policy to prohibit patent holders from asserting their IPRs in other jurisdictions.
7. If the Panel is satisfied as to the existence of such an underlying policy, then Australia submits that the Panel should consider this factor as an important element in the possible existence of an unwritten measure.

B. "GENERAL AND PROSPECTIVE APPLICATION" OR "ONGOING CONDUCT"

1. General and prospective application

8. Australia observes that a measure will have "general application" to the extent it affects an unidentified number of economic operators,² and will have "prospective application" to the extent that it applies in the future.³

¹ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.26, citing Appellate Body Report, *US – Zeroing (EC)*, para. 198. See also, Appellate Body Report, *US – Continued Zeroing*, para. 336. See also paras. 331 and 357.

² European Union's first written submission, para. 247; China's first written submission, paras. 152 and 154; and Panel Report, *US – Underwear*, para. 7.65.

³ European Union's first written submission, para. 247; China's first written submission, paras. 153-154; Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, paras.172 and 187; and *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

9. Australia recalls jurisprudence emphasising that prospective application can be demonstrated through a variety of factors, which may vary from case to case.⁴

10. Australia submits that the absence of instances of non-application of a measure⁵ is only one factor that a panel should consider, and instances of non-application do not necessarily disprove the existence of an unwritten measure of general and prospective application.

2. Ongoing conduct

11. Australia submits that where there is a "likelihood" of future application, the evidentiary threshold for establishing ongoing conduct will be met. It is clear that absolute certainty in future application is not required.

III. INTERPRETATION OF THE TRIPS AGREEMENT

12. Australia considers that the general rule of interpretation under Article 31 of the VCLT should guide the interpretation of the TRIPS Agreement.⁶

A. "GIVING EFFECT" TO THE TRIPS AGREEMENT (ARTICLE 1.1)

13. Australia considers that to "give effect" to the TRIPS Agreement in accordance with Article 1.1, it is not enough to simply give effect to IPRs in a Member's own jurisdiction. Members should also refrain from adopting or applying measures that would restrict IP owners from exercising their rights in the territories of other Members⁷ and should not undermine the authority of other Members' judicial authorities in this regard.⁸

14. Not every ASI will interfere with another Member's ability to comply with the TRIPS Agreement.⁹ It would need to be considered on a case-by-case basis to determine whether it undermined another Member's ability to comply with the TRIPS Agreement, in breach of Article 1.1.

15. Given principles of customary international law will be taken as read, particularly such a fundamental principle to treaty interpretation as the notion that an obligation is in fact an obligation, Australia considers that the first sentence of Article 1.1 is unlikely to be a simple reiteration of *pacta sunt servanda*. Further, while Australia's interpretation of the first sentence of Article 1.1 may reflect elements of the *abus de droit* doctrine, it is not essential for that doctrine to be explicitly recognised as enshrined in that sentence for its proper interpretation.

16. Australia recalls that TRIPS provides minimum standards of protection, and Members are given the freedom to implement higher standards, provided that in doing so they do not contravene the provisions of the Agreement.¹⁰

17. Australia submits that the wider context of the TRIPS Agreement's object and purpose should be considered as part of the VCLT analysis. In Australia's view, "the need to promote *effective* and adequate protection of intellectual property rights" (emphasis added) in the preamble's first recital reaffirms the need for Article 1.1 to be interpreted in a multilateral context.

18. Australia observes that Article 7 (Objectives) of the TRIPS Agreement requires a good faith balancing of rights and obligations for Members.¹¹

19. Australia submits that Article 7 requires a balance between "the need to promote effective and adequate" protection of IPRs (as per the first recital of the preamble) against a Member's rights to take measures to protect important public interests (as per Article 8).

⁴ Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.132.

⁵ Appellate Body Report, *US – Zeroing (EC)*, para. 201; China's first written submission, para.157.

⁶ Article 3.2 DSU; Appellate Body Report, *US – Gasoline*, para. 16–17.

⁷ European Union's first written submission, paras. 311–312, 322 and 375.

⁸ European Union's first written submission, paras. 463 and 464.

⁹ Korea's third-party oral statement, para. 9–11.

¹⁰ Panel Report, *China – Intellectual Property Rights*, para. 7.513; *Canada – Patent Term*, para. 6.87.

¹¹ Panel Report, *US – Section 211 Appropriations Act*, para. 8.57.

B. TRANSPARENCY IN THE TRIPS AGREEMENT (ARTICLE 63.1 AND 63.3)

20. In Australia's view, transparency is fundamental to the functioning of the multilateral trading system. As the WTO has stated, transparency in the TRIPS Agreement is required to promote predictability, compliance, and encourage co-operation.¹² Australia submits its view on two key elements to the Article 63 obligations – the scope of the obligations and the level of transparency required.

21. Australia recalls that the meaning of "final judicial decisions... of general application... pertaining to the subject matter of this Agreement", as expressed in Article 63.1 and incorporated by reference into Article 63.3, is required to determine the scope of the transparency obligations. Firstly, Australia understands the term 'final' to ordinarily mean, "not to be altered or undone". Subsequently this means that if a judicial decision has no further rights for appeal or review¹³ and pertains to the subject matter of the TRIPS Agreement, it is covered by the transparency obligations.¹⁴ Next, Australia recalls that final judicial decisions and administrative rulings will be of "general application" where it "establish[es] or revise[s] principles or criteria applicable in future cases".¹⁵

22. Australia submits that the level of transparency required for Article 63.1 is contingent on the meaning of "published" or "made publicly available...in such a manner as to enable governments and right holders to become acquainted with them". For Article 63.3, the meaning of "supply" and "be given access to or be informed in sufficient detail" must be established.

23. Australia observes that to fulfil the level of transparency required in Article 63.1 and 63.3, a Member must publish the judicial decision in full and supply the requested information with sufficient detail.

24. Australia submits that the equivalent level of transparency for judicial decisions means that full judgements with reasoning are needed to meet the requirement for Members and interested parties to become familiar with, and have adequate knowledge of, whether and how a Member's laws comply with the TRIPS Agreement.

25. Australia understands that this interpretation of the transparency obligations is also supported by the object and purpose of the TRIPS Agreement. Transparency through publication and supply of information under Article 63 assists with the desire in the first recital of the preamble to "promote effective and adequate protection of intellectual property rights" as well as "the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems".

IV. CONCLUSION

26. Australia has submitted its views on the legal standards and evidentiary threshold to establish and characterise the existence of an underlying policy to deter patent holders from asserting their IPRs in other jurisdictions. In considering whether there is a measure of general and prospective application, the Panel should consider whether that underlying policy has been systemically applied, the extent of administrative guidance that it will continue to be applied in the future, as well as whether an expectation has been created that it will be applied in future. While instances of non-application will be relevant to this consideration, this is only one factor and Australia does not consider it would necessarily disprove the existence of an unwritten measure. In terms of considering whether there is ongoing conduct, a panel need only determine whether its application is likely to continue.

¹² "three-fold" available at: https://www.wto.org/english/tratop_e/trips_e/ipenforcement_e.htm (accessed 24 August 2023).

¹³ European Union's first written submission, paras. 626-629 where it discusses the three decisions in this dispute as being final decisions.

¹⁴ European Union's first written submission, para. 617.

¹⁵ European Union's first written submission, para. 618; China's first written submission, para. 325; and Panel Report, *Japan – Film*, para. 10.388.

27. Australia has also outlined its understanding of the obligations contained in two key provisions of the TRIPS Agreement.

28. First, Article 1.1 requires that Members make operative the Agreement's provisions. Australia's view is that for the TRIPS Agreement to function "effectively", although granted freedom in their methods of implementation, Members cannot not interfere with, or undermine, the ability of other Members to uphold their own TRIPS obligations.

29. Second, under the transparency provisions in Article 63 Members must, as a matter of course, publish judicial decisions in full and if requested supply that information with sufficient detail. Transparency provisions are not simply an adjunct to the TRIPS Agreement's key obligations. Rather they are fundamental to its proper functioning.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

INTRODUCTION

1. Brazil welcomes the opportunity to present its views on the issues raised in these panel proceedings. In Brazil's view, some of the key elements of the dispute are the interpretation and application of Article 1.1 in conjunction with Article 28.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the principle of territoriality.

2. In this submission, Brazil does not take a position regarding the facts of the dispute, but will present its views on what it considers to be the proper interpretation of Article 1.1, in light of the object and purpose of flexibilities allowed to countries implementing the TRIPS Agreement *vis-à-vis* their legal systems and practices and its relationship with the principle of territoriality.

Article 1.1 of the TRIPS Agreement and the principle of territoriality.

3. In the present dispute, the European Union considers that "five anti-suit injunctions [...] disrupted the carefully balanced system of protection and enforcement of patents laid down in the TRIPS Agreement" and "have prohibited the holders of the relevant SEPs from exercising those rights before the courts of other WTO Members and have, as a result, raised unreasonable obstacles to a normal exploitation of the patents concerned."¹

4. China, in its turn, justifies those five anti-suit injunctions as being a matter of private international law so as "to preserve a court's jurisdiction in the face of parallel proceedings in another country that relate to the same subject matter" and that the TRIPS Agreement is silent on the transnational litigation of private disputes concerning the royalty rates for standard-essential patents (SEP).²

5. Article 1.1 of the TRIPS Agreement, being part of the section on nature and scope of obligations, is divided in three parts. The first sentence sets out the general obligation for Members to "give effect" to the provisions of the Agreement. The second part provides that Members "may" implement "*in their law*" more extensive protection than required by the TRIPS Agreement. This means the TRIPS Agreement establishes a set of minimum standards that allow Members to obtain and enforce certain intellectual property rights³, such as the rights conferred to patent owners (Article 28.1 of the TRIPS Agreement).

6. Finally, Article 1.1 also provides that Members "shall be free to determine the appropriate method of implementing the provisions of this Agreement *within their own legal system and practice*". This means flexibility for Members to implement the TRIPS Agreement in the manner of their own choosing, provided that it does not "contravene the provisions" of the Agreement.

7. Brazil concurs with the interpretation of the panels in *Australia — Tobacco Plain Packaging* and *China — Intellectual Property Rights* that the third sentence of Article 1.1 clarifies that the TRIPS Agreement "is not intended to harmonize laws between Members"⁴ nor to mandate specific forms of legislation⁵. In this sense, Article 1.1 has been referred as a "pedestal" on which the Dispute Settlement Body's jurisprudence rests, allowing countries to develop their own law and policies within the framework established by the Agreement⁶.

8. Brazil recognizes that differences among Members' respective legal systems and practices can be more significant in accordance with the intellectual property system. In fact, it is well-known the impact of TRIPS' broad standards on developing countries and therefore the need to leave to national

¹ European Union's First Written Submission, para. 1 and 2.

² China's First Written Submission, para. 3 and 8.

³ Panel Report, *China - Intellectual Property Rights*, para. 7.513.

⁴ Panel Report, *Australia — Tobacco Plain Packaging*, para. 7.2682.

⁵ Panel Report, *China — Intellectual Property Rights*, para. 7.602.

⁶ J. H. Reichman, "Securing compliance with the TRIPS Agreement after US vs India", (1998), *Journal of International Economic Law* 585 at, p. 596.

courts breathing room for interpretation⁷. Turning to the specific question brought before the Panel in assessing whether the issuance of anti-suit injunctions in SEP licensing disputes complies with Article 1.1 in conjunction with Article 28.1 of the TRIPS Agreement, Brazil stresses that the territorial nature of patents and patent enforcement is at the core of the intellectual property rights system and for that must be duly taken into account.

9. The principle of territoriality, although not expressly written in the TRIPS Agreement, is one of the foundational principles of International Intellectual Property Law as provided for in the Paris Convention (1967). When providing for policy space for implementation and enforcement within a Member's own legal system and practices ("Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice"), Article 1.1 of the TRIPS Agreement embodies this principle.

10. In accordance with the principle of territoriality, intellectual property rights are limited to the territory of the country where they have been granted⁸. It allows Members to tailor their national intellectual property laws to suit their level of technological and economic development. The flexibilities provided for in Article 1.1 of the TRIPS Agreement go in the same direction of permitting Members to design their intellectual property laws in a manner that does not hinder the achievement of developmental and technological objectives. Such policy space is further emphasized by the Preamble, Articles 7 and 8 (Objectives and Principles) of the TRIPS Agreement, and the Doha Declaration on the TRIPS Agreement and Public Health (2001).

11. In this context, any decision on SEPs and fair, reasonable and non-discriminatory (FRAND) licensing must always consider the perspectives of both the patent holders of the technology and the public interest, in order to achieve a fair and balanced solution. Brazil is of the view that the TRIPS Agreement is "a means for the realization of public policy objectives via the 'inducement to innovation' and the access to the results thereof by those who need them" and that "the objectives of the patent system would not be fulfilled if it only served to induce innovations to the benefit of those who control them"⁹. The flexibilities of implementation are therefore an important tool in balancing competing policy goals¹⁰.

12. In light of this reading, Brazil understands that the text of Article 1.1 in conjunction with Article 28.1 should entail an interpretation that carefully considers the territorial nature of the patent system and the overarching goal of the TRIPS Agreement to provide mutual advantage for both producers and users of patented technology.

CONCLUSION

13. Brazil appreciates the opportunity to comment on these issues in these proceedings and hopes that the viewpoints presented in this submission will prove helpful to the Panel in assessing the subject matter brought before it.

⁷ Lee Petherbridge, "Intelligent TRIPS Implementation: A Strategy for Countries on the Cusp of Development" (2001), *University of Pennsylvania Journal of International Economic Law* 1029, p. 1048.

⁸ Lydia Lundstedt, *Territoriality in Intellectual Property Law* (Stockholm University, 2016), p. 91.

⁹ C. M. Correa, *Trade-Related Aspects of Intellectual Property Rights A Commentary on the TRIPS Agreement* (Oxford University Press, 2007), p. 94.

¹⁰ Peter Van Den Bossche, *The Law and Policy of the World Trade Organization Text, Cases and Materials* (Cambridge University, 2008), p. 750.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. LEGAL STANDARD FOR UNWRITTEN MEASURES OF "GENERAL AND PROSPECTIVE APPLICATION" AND "ONGOING CONDUCT"

1. Canada notes that the scope of measures that are challengeable in WTO dispute settlement is broad¹. Although the World Trade Organization ("WTO") Understanding on the Rules and Procedures Governing the Settlement of Disputes ("DSU") does not define the term "measure", it is well established that "[i]n principle, any act or omission attributable to a WTO Member" can constitute a measure for the purposes of a dispute², including both written and unwritten measures³.

2. WTO panels and the Appellate Body (AB) have confirmed that a Member challenging an unwritten measure bears the burden of proving: (1) first, that the measure is attributable to the responding Member; and (2) second, the measure's precise content⁴. With respect to the measure's precise content, a panel's examination of that element will be informed by the complainant's description of the measure, including its constituent elements and defining characteristics⁵. The other elements of what must be proven to demonstrate the existence of an unwritten measure will depend on how the measure is characterised by the complainant⁶. A panel's assessment of whether a complainant has demonstrated the existence of an unwritten measure will be inherently fact specific.

A. Measures of "general and prospective application"

3. With respect to proving the existence of an unwritten measure that a complainant has characterized as one of "general and prospective application", the AB has explained that the complainant must demonstrate that the measure has "general and prospective application"⁷. The relevant factors that may be considered by a panel in determining the "general and prospective application" of a measure may vary from case to case. Canada submits that these factors can include whether the measure has "normative value"⁸, provides "administrative guidance"⁹, creates "expectations among the public and among private actors"¹⁰, affects "an unidentified number of economic operators"¹¹, is "intended" to apply generally and is "consistently" applied¹², or reflects a "deliberate policy"¹³.

B. Measures of "ongoing conduct"

4. If a complainant challenges an unwritten measure as one of "ongoing conduct", the AB in *Argentina – Import Measures* confirmed that the complainant will be required to provide evidence of the measure's "repeated application, and of the likelihood that such conduct will continue"¹⁴. Critically, the legal standard for demonstrating "ongoing conduct" does not require "absolute certainty" as to the future conduct it envisages. Rather, panels and the AB have confirmed that the

¹ Appellate Body Report, *US – Supercalendered Paper*, para. 5.17.

² Ibid. See also, e.g., Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

³ Appellate Body Report, *US – Supercalendered Paper*, para. 5.17.

⁴ Ibid. See also Appellate Body Reports, *Argentina – Import Measures*, para. 5.104 and 5.108.

⁵ Appellate Body Reports, *Argentina – Import Measures*, paras. 5.117-5.118 and 5.124 and *Russia – Railway Equipment*, paras. 5.234 and 5.236.

⁶ Appellate Body Reports, *US – Supercalendered Paper*, para. 5.17 and *Argentina – Import Measures*, para. 5.110.

⁷ Appellate Body Report, *US – Zeroing (EC)*, para. 198.

⁸ Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.130.

¹² Appellate Body Report, *US – Zeroing (EC)*, paras. 202 and 204.

¹³ Appellate Body Report, *US – Zeroing (Japan)*, paras. 85 and 88.

¹⁴ Appellate Body Report, *Argentina – Import Measures*, para. 5.108.

mere likelihood that the measure would be applied prospectively is sufficient to establish the existence of "ongoing conduct"¹⁵.

II. RELEVANCE OF THE WTO AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS ("TRIPS") TO DETERMINING THE EXISTENCE OF AN UNWRITTEN MEASURE

5. In Canada's view, the fact that this dispute has been brought under the WTO TRIPS Agreement should not be relevant in the Panel's assessment of whether the European Union ("EU") has met the applicable burden of proof in establishing that an unwritten measure exists in this dispute. There is no indication in the text of the WTO DSU or in WTO case law that the WTO agreement at issue plays any role in a panel's determination of whether an unwritten measure exists.

6. First, Article 3.3 of the DSU indicates that any measure attributable to a WTO Member can be a measure for the purposes of dispute settlement. This includes unwritten measures. Second, Canada's position is supported by the fact that a panel makes a determination of the existence of an unwritten measure before it considers the provisions of the WTO agreement at issue to determine whether that measure, if existent, is inconsistent or not. In *Australia – Apples*, the AB explained that the measure at issue and the claims in a dispute are two distinct elements that a complainant must identify, and cautioned against confusing these elements¹⁶.

III. TRIPS AGREEMENT

A. Article 1.1 (Nature and scope of obligations)

7. Canada agrees with Australia that the requirement in the first sentence of Article 1.1 of the TRIPS Agreement, for Members to "give effect to" the obligations in the Agreement in their domestic law, is a requirement to not only implement those obligations but to ensure that those aspects of their law are operational or functional¹⁷.

8. Canada also agrees with Australia that a Member cannot in good faith "give effect to" the obligations in the TRIPS Agreement if its own actions to implement and make operational or functional those obligations disable other Members from being able to meet their own obligations under the Agreement¹⁸. To this end, Canada draws the Panel's attention to the Panel Report in *US – Section 211 Appropriations Act*. In that Report, the panel interpreted the first sentence of Article 1.1 as meaning that "Members are to give effect to rights and obligations contained in the TRIPS Agreement and that Members are not to enact measures that would negate such rights and obligations"¹⁹.

9. Canada submits that this interpretation of Article 1.1 is consistent with the objective of the TRIPS Agreement of ensuring that measures and procedures to enforce intellectual property ("IP") rights do "not themselves become barriers to legitimate trade"²⁰. Canada also submits that any interpretation of Article 1.1 that would permit Members to impede international trade by preventing other Members from being able to meet their obligations under the TRIPS Agreement would frustrate the object and purpose of the Agreement, and should be rejected.

B. Article 41.1 (Enforcement procedures)

10. With respect to the significance of the phrase "under their law" and its relationship with the obligation in the second sentence of Article 41.1 of the TRIPS Agreement, Canada submits that, read together, the first and second sentences of Article 41.1 impose an affirmative obligation on Members to: (1) apply the enforcement procedures in Part III (Enforcement of IP Rights) of the TRIPS Agreement that are made available in their domestic law; (2) apply these procedures in a manner

¹⁵ Panel Report, *US – Orange Juice (Brazil)*, para. 7.175, citing Appellate Body Report, *US – Continued Zeroing*, para. 191.

¹⁶ Appellate Body Report, *Australia – Apples*, paras. 417 and 421.

¹⁷ Australia's third-party submission, paras. 33-34. See also, e.g., Panel Report, *Saudi Arabia – IPRs*, para. 7.210 (under appeal)).

¹⁸ Australia's third-party submission, para. 35.

¹⁹ Panel Report, *US – Section 211 Appropriations Act*, para. 8.57.

²⁰ TRIPS Agreement Preamble, first recital.

"as to avoid" the creation of barriers to legitimate trade, and (3) provide for safeguards against the abuse of the enforcement procedures that are made available in their domestic law. Canada submits that the use of the phrase "as to avoid" in Article 41.1 indicates that at least one of the purposes of the application of the procedures must be to avoid the creation of barriers to legitimate trade.

C. Article 63 (Transparency)

11. Canada considers that transparency is one of the fundamental bedrocks of the multilateral trading system. Transparency provisions in the WTO agreements, such as Article 63 of the TRIPS Agreement, seek to ensure openness from Members with respect to their domestic laws, regulations, decisions, and rulings. Canada submits that a proper interpretation of Article 63.3 of the TRIPS Agreement sets out two distinct obligations, in the first and second sentences of that provision, with which Members must comply.

1. Article 63.3, first sentence ("be prepared to supply")

12. Canada submits that the first obligation in Article 63.3 is contained in the first sentence of that provision and comprises three elements: (1) a written request for information must have been made; (2) the requested information is of the sort referred to in Article 63.1; and (3) the Member receiving the request shall "be prepared to supply" the requested information. Focusing on the third element of this obligation in its submissions, Canada agrees with the EU that the only reasonable interpretation of the phrase "be prepared to supply" in Article 63.3 is one that leads to an obligation that a Member must in fact supply the requested information, not just be ready to supply it²¹.

13. This interpretation flows from the application of the customary international law rules of treaty interpretation. WTO panels and the AB have confirmed that these rules, which include Article 31 of the Vienna Convention on the Law of Treaties ("Vienna Convention"), as enshrined in Article 3.2 of the DSU, must be followed when interpreting the WTO agreements²². Article 31(1) of the Vienna Convention requires that treaties be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, and that a treaty interpreter give full and effective meaning to treaty provisions, interpret a treaty in a harmonious and coherent manner²³, and not adopt a reading of a treaty provision that would result in reducing whole clauses or paragraphs of the treaty to redundancy or inutility²⁴.

14. To give full and effective meaning to the phrase "be prepared to supply", a treaty interpreter shall read that phrase as a separate and distinct obligation that goes beyond the requirement in Article 63.1 to publish or make publicly available laws, regulations, final judicial decisions, and administrative rulings of general application. In other words, this phrase must be read in such a manner so as to require Members to provide the information upon request. To interpret this phrase as only imposing an obligation of preparedness to supply the requested information would reduce the obligation to a duplication of that to which Members are already obligated under Article 63.1. Such an interpretation would be redundant and inutile, at odds with the general rules of treaty interpretation, and as such must be rejected.

2. Article 63.3, second sentence ("access to, or sufficient detail of")

15. Canada submits that the second obligation Members must comply with in Article 63.3 of the TRIPS Agreement is contained in the second sentence of that provision. The obligation in the second sentence comprises three elements: (1) a request must have been made to be given access to or be informed of in sufficient detail of "specific" judicial decisions or administrative rulings or bilateral agreements in the area of IP rights; (2) that request must be made in writing; and (3) the Member making the request must have reason to believe that the requested decision, ruling, or agreement affects its rights under the TRIPS Agreement.

16. Canada submits that the obligation in the second sentence of Article 63.3 is distinct from the obligation on Members to "be prepared to supply" information requested under the first sentence of Article 63.3, but builds on that obligation. Specifically, the use of the word "also" in the second

²¹ European Union's first written submission, para. 671. Canada's third-party submission, para. 12.

²² Canada's third-party submission, para. 13.

²³ Ibid, para. 14, citing Appellate Body Report, *US – Continued Zeroing*, paras. 268 and 282.

²⁴ Canada's third-party submission, para. 13, citing Appellate Body Report, *US – Gasoline*, p. 23.

sentence makes clear that a Member may request information additional to the information it may request under the first sentence. Canada considers that if the three elements in the second sentence are satisfied, a Member must provide access to, or sufficient detail of, the requested information. Canada notes that China submits that specific judicial decisions requested pursuant to the second sentence of Article 63.3 must be "final", of "general application", and "pertain to the subject matter of the TRIPS Agreement"²⁵. However, none of these conditions appears in the text of the second sentence of Article 63.3, Canada therefore considers that China's interpretation of the second sentence is erroneous and must be rejected.

3. References to "final" vs "specific" judicial decisions in Article 63.1 and 63.3

17. With respect to the references to "judicial decision(s)" in Articles 63.1 and 63.3, Canada is of the view that the scope of those references is different. Based on the ordinary meaning of the modifier "final" used in Article 63.1, that refers to decisions that mark the end of a process. In contrast, the use of the modifier "specific" in Article 63.3 suggests that that provision captures any particular judicial decision, whether final or not, that a Member believes affects its rights under the TRIPS Agreement²⁶.

18. Furthermore, Canada submits that the term "final" in the first sentence of Article 63.1 modifies only "judicial decisions" and not "administrative rulings"²⁷. This is because, in Canada's view, the TRIPS Agreement drafters intended to create a cumulative list in Article 63.1 identifying "judicial decisions" and "administrative rulings" as two separate categories of instruments for the purposes of Article 63 of the TRIPS Agreement²⁸.

²⁵ China's first written submission, para. 337.

²⁶ Canada's third-party response to the Panel question No. 11, paras. 18-20.

²⁷ Ibid, para. 24.

²⁸ Canada's third-party response to the Panel question No. 13, para. 26-27.

ANNEX C-4**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN****I. INTRODUCTION**

1. While Japan does not take any views on the specific factual aspects of this dispute, Japan has a systemic interest in ensuring a proper and consistent interpretation and application of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the "TRIPS Agreement") and the Protocol on the Accession of the People's Republic of China.

II. CHINA'S ANTI-SUIT INJUNCTION POLICY

2. Japan notes that Article 11 of the DSU provides that evidence must be considered "in its totality, which includes consideration of submitted evidence in relation to other evidence" and that "[a] particular piece of evidence, even if not sufficient by itself to establish an asserted fact or claim, may contribute to establishing that fact or claim when considered in conjunction with other pieces of evidence".¹

3. Thus, the evidence adduced by the EU must be examined collectively and holistically by the Panel when evaluating whether the required elements are substantiated with evidence. This is so, especially because the process to ascertain the existence of an unwritten measure will entail the use of secondary sources of evidence,² and also because individual pieces of evidence may reinforce and complement each other and amount to sufficient level of proof in total.

4. While China notes that "there is no reference to any 'policy' of issuing anti-suit injunctions in any of the documents [submitted by the EU]" in its rebuttal against the EU's argument on the existence of the anti-suit injunction ("ASI") policy,³ Japan considers that "[t]he label given to an instrument under municipal law...is not dispositive".⁴ The Panel should objectively and holistically assess the relevant evidence to prove the existence of the unwritten measure at issue, regardless of whether or not they are labeled as a "policy".

5. With respect to China's argument that the EU's description of the policy is not precise,⁵ Japan is of the view that the EU identifies the ASI policy in Standard Essential Patent ("SEP") litigation, and explains its broad scope, which could prohibit not just existing parallel lawsuits but also commencing any SEP lawsuits in any non-Chinese jurisdiction. The EU also provides evidence on the extremely high penalties imposed as part of the ASI policy as a sanction to ensure the effectiveness of the ASIs. Although China appears to consider those descriptions of the measure not to constitute the precise content but only identify the aspects of the measure,⁶ Japan considers that the EU's description of the content of the ASI policy is sufficiently precise at least for the measure to be susceptible to challenge in WTO dispute settlement.

6. With respect to the element of "general and prospective application", the Panel needs to consider that China's ASI policy affects not just the parties in the individual disputes where ASIs were imposed, but potentially all future SEP litigations involving any parties in dispute. In this regard, the mere fact that new ASIs have not been issued is insufficient to deny the prospective application of the measure. To the extent that the underlying policy is not withdrawn or modified, there remains the possibility that the rule or norm will be applied in the future. This is especially so if the previous cases continue to have influence as "typical" cases on subsequent cases, as claimed by the EU.⁷ If Chinese domestic courts are expected to draw guidance from such previous cases in future litigation, together with the call from the Supreme People's Court and the Standing Committee of

¹ Appellate Body Report, *US – Continued Zeroing*, para. 331.

² Appellate Body Report, *Russia – Railway Equipment*, para. 5.234.

³ China's first written submission, para. 130.

⁴ Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 593.

⁵ China's first written submission, paras. 108-121.

⁶ China's first written submission, paras. 111-112.

⁷ EU's first written submission, para. 288.

National People's Congress to promote the use of ASIs, it would not be unreasonable to assume that the policy would continue to influence new SEP litigations.

7. With respect to the element of "ongoing conduct", China appears to contend that the EU's claims fail, citing the legal standard allegedly clarified by the Appellate Body in *US – Supercalendered Paper*.⁸ However, the Appellate Body rejected the notion that a "complainant must always show repetition in a string of connected and sequential determinations in successive proceedings []" and rather emphasized that a panel must examine the evidence in light of the manner in which the complaining party had characterized the challenged measure.⁹ The Panel's examination should thus follow the manner in which the EU has characterized the challenged measure.

8. Finally, although the elements to be considered when reviewing an unwritten measure, including those mentioned above, have been discussed primarily in connection with trade remedies, unwritten measures may be susceptible to challenge under other WTO agreements, including the TRIPS Agreement. Japan highlights that the elements that a panel needs to review will depend on the specific measure being challenged and how it is described or characterized by a complainant,¹⁰ regardless of the measures' nature, be it a trade remedy measure or a TRIPS-related measure.

9. In considering Article 3.3 of the DSU, the Appellate Body stated that "any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings".¹¹ Article 64.1 of the TRIPS Agreement, in turn, provides that "[t]he provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the [DSU] shall apply to consultations and the settlement of disputes under this Agreement". Thus, Article 3.3 of the DSU applies to disputes including those on unwritten measures brought under the TRIPS Agreement. The express and limited exceptions to the application of Article XXII and XXIII of GATT 1994 and the DSU, which are set out in Articles 64.2 and 64.3 of the TRIPS Agreement, do not indicate otherwise.

10. While the TRIPS Agreement is often described as a minimum-standards agreement, this characterization would not exclude challenges to unwritten measures. Even if the implementation of obligations under the TRIPS Agreement primarily involves written rules and norms, it is still possible that a government engages in other acts or omissions that affect TRIPS-related rights, which could take the form of an unwritten policy. There is no reason to exclude such an unwritten policy that affects TRIPS-related rights from challenge under the DSU.

III. THE SECOND SENTENCE OF ARTICLE 41.1 OF THE TRIPS AGREEMENT

11. The terms "[t]hese procedures" in the second sentence of Article 41.1 refer to enforcement procedures as specified in Part III of the TRIPS Agreement so as to permit effective action against any act of infringement of intellectual property rights.

12. Through the systematic promotion of ASIs in SEP litigation, and especially given the global scope of such injunctions, China's ASI precludes SEP holders from taking legal actions against infringement possibly anywhere in the world, thereby preventing SEP holders from stopping production, sales and trade of unlicensed goods. Such a policy would create a barrier to legitimate trade, which shall be avoided under the second sentence of Article 41.1.

13. In this regard, Japan notes that the term "barriers" in the second sentence of Article 41.1 is a rather broad term that is used without any qualification. Anything that makes it difficult for somebody to do something would constitute a barrier. "[L]egitimate trade" refers to trade in goods that is not tainted by acts of infringement of intellectual property rights. Thus, what makes it difficult to prevent trade in goods that infringe intellectual property rights would constitute barriers to legitimate trade.

14. An excessively wide scope of China's ASIs, which prevent not only ongoing parallel actions, but also the initiation of any future related actions, makes the situation worse for the right holders. Importantly, unlicensed goods have lower costs due to infringing acts, which affects competition

⁸ China's first written submission, paras. 163-164.

⁹ Appellate Body Report, *US – Supercalendered Paper*, para. 5.29.

¹⁰ Appellate Body Report, *Argentina – Import Measures*, paras. 5.109-5.110.

¹¹ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

with like products that are licensed both in markets inside and outside China. Hence, as a consequence of the promotion of China's ASI policy, the competitiveness of licensed like products could be systematically undermined. China's ASI policy would create obstacles to trade in licensed goods, and thus constitutes a barrier to legitimate trade.

15. Further, Japan considers that a systematic imposition of worldwide ASIs prohibiting any type of enforcement action at any stage of the legal proceedings, including prospective legal proceedings, is unique to China's ASI policy in SEP litigations and requires the Panel to carefully review such elements of the policy. Prohibiting SEP holders from bringing any enforcement proceedings in courts outside China may serve to avoid conflicting decisions when there are parallel litigations. Yet, prohibiting any judicial relief anywhere risks going beyond the aim to avoid conflicting decisions in parallel litigations, and it lacks safeguards against abuse.

IV. SECTION 2(A)(2) OF THE PROTOCOL ON THE ACCESSION OF CHINA

16. The assessment of Section 2(A)(2) of the Accession Protocol requires a case-by-case consideration of facts relevant to the application and administration of the relevant laws and rules. Japan considers that the previous panel reports regarding Article X:3 of the GATT 1994 provide helpful guidance. In particular, the panel in *US – COOL* noted that one of the meanings of "reasonable" is "proportionate",¹² and further explained that the examination of reasonableness will require an assessment of the objective, cause or the rationale behind the measure at issue.¹³ In this case, Japan considers that the Panel should carefully review whether the manner in which the domestic rules were applied and administered is reasonable as well as the underlying ASI policy which, according to the EU, guides the application of the relevant legal framework.¹⁴

17. With respect to the magnitude of the penalties in case of violation of the ASIs that are applied in each case as a sanction to ensure the effectiveness of ASIs,¹⁵ Japan understands the EU's assertion regarding "extremely high penalties"¹⁶ in terms of whether there is any clear rationale for applying fines near to the maximum amount under the relevant law. It is highly questionable whether near maximum fines in every case without a clear rationale reflect a "reasonable" application of the relevant legal framework. Further, as the EU points out, due to the fact that the penalties accumulate daily, the overall amount of each penalty can easily run up to an extremely high amount.¹⁷ The Panel should carefully consider the facts described by the parties in this dispute and consider whether the penalties were consequences of the reasonable application of the legal framework, or rather were simply imposed to pursue the objective of the ASI policy.

18. In addition, the Panel should consider the following factors in terms of a "reasonable administration" as provided in China's Accession Protocol: (i) the potential broad coverage of China's ASIs that could prevent not only ongoing parallel actions, but also the initiation of any future related actions possibly anywhere in the world; and (ii) how interests of both parties – the right holder and the implementer – are taken into account including, *inter alia*, whether they were made aware of the court hearing related to the application of an ASI and due process was ensured in the court proceedings.

V. THE REQUIREMENT FOR TRANSPARENCY PURSUANT TO ARTICLE 63.3 OF THE TRIPS AGREEMENT

19. Article 63 is entitled "Transparency" and each of the first three paragraphs of that provision seeks to give effect to that objective. With respect to the first sentence of Article 63.3, Japan agrees that the phrase "shall be prepared to supply" describes the obligation on a WTO Member to supply the information of the kind referred to in Article 63.1, in response to a written request. Further, such obligation is set out in addition to the obligation under Article 63.1 in such a manner so as "to enable governments and right holders to become acquainted with them". By enabling Members to request those kinds of information from other Members and ensuring access to them, Article 63 facilitates

¹² Panel Report, *US – COOL*, para. 7.850.

¹³ Panel Report, *US – COOL*, para. 7.851.

¹⁴ EU's first written submission, paras. 599-602.

¹⁵ EU's first written submission, para. 319.

¹⁶ EU's first written submission, para. 575.

¹⁷ See, e.g. EU's first written submission, paras. 585-590.

mutual understanding of how judicial system concerning intellectual property rights operates in each Member's territory, thus providing predictability to secure a stable trade environment.

20. In this regard, Japan considers that the rejection of the request to supply information of the sort referred to in Article 63.1 would be inconsistent with the first sentence of Article 63.3. Furthermore, Japan considers that the second sentence of Article 63.3 setting forth an additional category of information that a Member may also request in writing should be read as imposing a requirement upon a requested Member to supply the requested information. It would be unreasonable if the requested Member could refuse to supply the requested information without valid reasons¹⁸ when the Member's right to request it is explicitly provided in the Agreement.

¹⁸ Article 63.4 of the TRIPS Agreement provides that "[n]othing in paragraphs 1, 2 and 3 shall require Members to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private".

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE REPUBLIC OF KOREA

I. Introduction

1. As an initial matter, Korea wishes to emphasize the importance of reducing all forms of distortions and impediments to international trade through ensuring appropriate protection of the intellectual property of Members in accordance with the TRIPS Agreement. Korea therefore considers that the Panel's approach to the present dispute needs to be guided by the following principles: (i) consistent with Article 7 of the TRIPS Agreement, the Agreement should be applied so as to foster trade and investment, technological innovation and the transfer and dissemination of technology; (ii) in implementing the TRIPS Agreement in accordance with its agreed objectives and principles, Members should have sufficient margin of latitude to maintain the underlying balance of rights and obligations without diminishing the legitimate scope of intellectual property rights; and, finally, (iii) the delicate balance set out in the TRIPS Agreement would be disturbed if the proper enforcement of intellectual property rights were in any way frustrated by any TRIPS Agreement-inconsistent measure.

II. Existence of an unwritten measure

2. In Korea's view, it is incumbent upon the complainants to identify the alleged unwritten measures as clearly as possible in their requests¹ and to demonstrate: (a) that the measure is attributable to the responding Member; and (b) its precise content. Moreover, to challenge an unwritten measure "as such", a complainant must also demonstrate (i) that the challenged measure is a rule or norm and (ii) that it has "general and prospective application".²

3. Korea recognizes that many of the issues in the present dispute involve questions which are factual in nature. Korea takes no position as to whether the alleged unwritten anti-suit injunctions policy exists, or whether it is inconsistent with the TRIPS Agreement or not. Having said that, in light of disagreement about the evidence relied on by the EU, Korea recalls that panels have wide latitude in admitting evidence,³ and considers that individual anti-suit injunctions can be admitted as factual evidence and have probative value, regardless of whether they are still in effect.

4. Relatedly, Korea draws the Panel's attention to WTO jurisprudence and international law on the attribution of conduct to a State. Specifically, pursuant to Article 4(1) of the International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts ("ILC Articles on State Responsibility"), as well as relevant jurisprudence, States are responsible for the acts or omissions of their executive, legislative and judicial branches. Accordingly, court decisions can be inconsistent with the General Agreement on Tariffs and Trade of 1994 ("GATT").⁴

5. As for the Members' obligations under Parts II and III of the TRIPS Agreement, Korea considers that individual judicial or administrative decisions concerning private parties are capable of being inconsistent with the TRIPS Agreement but that such cases should be individually assessed. Therefore, such decisions, including anti-suit injunctions, do not *automatically* affect the other Members' obligations under the TRIPS Agreement.

6. It is furthermore well-settled that unwritten measures different from trade remedy measures can be challenged, including under the General Agreement on Tariffs and Trade of 1947 ("GATT 1947"),⁵ as well as in WTO dispute settlement.⁶ Indicative of the fact that the TRIPS'

¹ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 792.

² Appellate Body Report, *US – Zeroing (EC)*, para. 198.

³ Panel Report, *EC – Bed Linen*, para. 6.34.

⁴ See Appellate Body Reports, *U S – Shrimp*, para. 173, and Panel Report, *Brazil – Retreaded Tyres*, para. 7.305.

⁵ GATT Panel Report, *Japan – Trade in Semi-Conductors (Japan – Semi-Conductors)*, L/6309, adopted 4 May 1988, BISD 35S/116, paras. 99, 106 and 112.

⁶ See Appellate Body Report, *Russia – Pigs (EU)*, paras. 6.2 to 6.8, and Panel Reports, *Turkey – Rice*, paras 7.18, 7.24, 7.58, and 7.61; , *Thailand – Cigarettes (Philippines)*, paras. 7.950 to 7.969, and *EC – Approval and Marketing of Biotech Products*, paras. 7.457 to 7.458, 7.1271 to 7.1272, and 7.1339.

disciplines cover unwritten measures is the language of Article 65.5, which reveals that the TRIPS Agreement is also concerned with Members' "practices".

III. Article 1.1 of the TRIPS Agreement

7. Korea notes that the first sentence of Article 1.1 sets out the obligation that Members "give effect" to the provisions of the TRIPS Agreement, meaning that TRIPS provisions are obligations where stated, as in Article 1.1. The second sentence clarifies that the provisions of the Agreement are minimum standards only. The third sentence only grants freedom to determine the appropriate method of implementation of the provisions to which they are required to give effect under the first sentence. A coherent reading of the three sentences of Article 1.1 does not permit differences in domestic legal systems and practices to justify derogations from the basic obligation to give effect to the provisions on enforcement.⁷

8. In light of the ordinary meaning of the terms in Article 1.1., Korea submits that, where a measure undermines the ability of another Member to give effect to the TRIPS Agreement, such a measure could in and of itself be TRIPS inconsistent on account of its effect in other Members.⁸

9. Similarly, under Article 4.3 of the DSU, the effective functioning of the WTO, and the maintenance of a proper balance between the Members' rights and obligations, requires that a Member who considers that any benefits accruing to it under the covered agreements are being impaired by measures taken by another Member, be such measures extraterritorial or not in their effect, is entitled to seek satisfactory settlement of the matter in accordance with the rights and obligations under the DSU, as well as under the covered agreements. Further support for this foundational tenet of the DSU is found in Article 4.2 of the DSU, which emphasizes that the DSU is concerned with measures taken within the territory of a Member, regardless of whether such measures have extraterritorial effect or not.

IV. Claims relating to transparency under articles 63.1 and 63.3 of the TRIPS Agreement

10. Concerning the judicial decisions to be published to fulfil Members' obligations under Article 63.1, Korea observes that different panels have analyzed Article X:1 of the GATT. Useful guidance on what constitutes "judicial decisions [...] of general application" is found in the *US - Countervailing and Anti-Dumping Measures (China)* panel report. The panel considered that two aspects are usefully distinguished to assess whether a law or another measure is of "general application": (i) its subject-matter or content; and (ii) the persons or entities to whom it applies, or the situations or cases in which it applies.⁹ Korea does not see any reason why the Panel should deviate from the interpretation made of the terms "judicial decisions [...] of general application" in the context of Article X:1 of the GATT 1994.¹⁰

11. However, Korea underscores that Article 63.1 varies from Article X:1 in that it refers to "*final* judicial decisions [...] of general application", which must be understood in line with the ordinary definition of the word "final". Korea submits that a *final* judicial decision incorporates the definitive determination of a matter submitted to a court – and that this particularity of Article 63.1 must be taken into account when determining in-scope judicial decisions.

12. Korea clarifies that the word "final" in Article 63.1 qualifies "administrative rulings" as well. To the extent that previous panels have considered the term "of general application" in Article X:1 of the GATT 1994 to qualify both "judicial decisions" and "administrative rulings" in the succession of terms of that provision, the term "final" must also qualify "administrative rulings". This is also confirmed by notable punctuation in Article 63.1 and the formulation used in the French language version of this provision. Additionally, if finality is required for judicial decisions, but not for administrative rulings, it would seem that this balance is lost. Further support for this interpretation is found in Article 62.5 of the TRIPS Agreement, which includes a reference to "[f]inal administrative decisions".

⁷ Panel Report, *China – Intellectual Property Rights*, para. 7.513.

⁸ This view appears to be shared by Australia. See Third Party Submission of Australia, para. 34.

⁹ Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.35.

¹⁰ See *idem*, paras. 7.35 and 7.36.

13. Korea further considers that the types of judicial decisions that are referenced in Article 63.1 and 63.3, first sentence are necessarily final judicial decisions *of general application*. This is in line with panel reports evaluating Article X:1,¹¹ and with the French and Spanish versions of Article 63.1 of the TRIPS Agreement. Thus, only final judicial decisions "of general application" must be published and can be subject to a request for information under Article 63.3, *first sentence*.

14. As to the burden on Members carrying out their transparency obligations, it is not relevant to the interpretation of Article 63.1, which is not concerned with, nor qualified by, the burden on Members to carry out their transparency obligations. Only Article 63.2 speaks to the ability of the WTO Council for Trade-Related Aspects of Intellectual Property Rights ("the TRIPS Council") to account for such a burden.

V. Conclusion

In conclusion, Korea wishes to reiterate the importance of reducing all forms of distortions and impediments to international trade through ensuring appropriate protection of the intellectual property of Members in accordance with the TRIPS Agreement. It hopes that the Panel will find its views on these matters helpful to its deliberation.

¹¹ See Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.30, referring to: Panel Reports, *EC – Selected Customs Matters*, para. 7.116, and *EC – IT Products*, paras. 7.1016 and 7.1022.

ANNEX C-6**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED KINGDOM****I. INTRODUCTION**

1. The United Kingdom welcomes the opportunity to participate as a Third Party in this dispute. The United Kingdom notes that this dispute relates to the complex area of standard essential patents ("SEP") and FRAND ("fair, reasonable and non-discriminatory") licensing and wishes, first, to provide relevant additional background information on the role of patents, technical standards, SEPs and FRAND undertakings. Next, the United Kingdom will offer observations on (i) the standards applicable to the identification of unwritten measures and (ii) the treatment of expired measures in WTO dispute settlement practice; (iii) the requirement under Article 41.1, second sentence, of the TRIPS Agreement to apply intellectual property ("IP") enforcement procedures in a manner that safeguards against abuse; (iv) characteristics of anti-suit injunctions relevant to the analysis of Article 1.1, read in conjunction of Article 44.1 of the TRIPS Agreement; and (v) the principle of transparency under Article 63 of the TRIPS Agreement.

II. OVERVIEW OF THE STANDARD ESSENTIAL PATENT ("SEP") AND FRAND LICENSING LANDSCAPE

2. The ecosystem around SEPs is complex and ever evolving. The United Kingdom wishes to provide additional factual detail in respect of SEPs and related FRAND licensing to help the Panel understand the tensions between elements of the legal and economic framework and to assist in its interpretation of the TRIPS Agreement. The sub-sections below: (A) provide an overview of technical standards, patents, SEPs and FRAND undertakings; (B) emphasise the global nature of technical standards, SEP licences and FRAND undertakings, which are in tension with the territorial nature of the underlying patents; and (C) provide an overview of the role of the courts in the SEP ecosystem and the circumstances in which anti-suit injunctions have sometimes been sought.

1.1 Technical Standards, SEPs and FRAND Undertakings

3. Standards are defined by the Organisation for Economic Co-operation and Development ("OECD") as a common set of characteristics for a particular good or service.¹ Technical standards are an agreed or established technical description of an idea, product, service, or way of doing things where that understanding needs to be shared with others.² Technical standards are used in many disciplines and sectors: they are most prevalent in the information and communications technology sector and are becoming more relevant for emerging technologies, including "Internet of Things", connected vehicles, devices and smart energy monitoring.

4. Technical standards facilitate the interoperability of goods manufactured in these industries, enabling systems and components to communicate with each other even if produced by different manufacturers. For example, mobile phones can connect to cellular networks and WiFi regardless of their make and model because they are manufactured using technologies that conform to technical standards. Technical standards are usually produced by Standard Development Organisations ("SDO"), for example, the International Telecommunication Union ("ITU") or the European Telecommunications Standards Institute ("ETSI"), with input from industry and technical experts.

5. A patent that protects technology that is essential for the implementation of a technical standard is known as a SEP. A patent holder is generally incentivised to declare their patent as essential to a standard to gain access to the market and generate royalties through the grant of licences.

6. Once a standard is set and a SEP is included as part of it, this may provide a SEP holder with an additional degree of market power, leading to competition issues, including negative consumer impacts and legal disputes, if the SEP holder abuses the exercise of that market power. For this

¹ OECD *Policy Roundtable on Standard Setting*, p. 9 (**Exhibit GBR-1**).

² UK IPO, *Standard Essential Patents and Innovation: Call for Views*, p. 4 (**Exhibit GBR-2**).

reason, the SEP holder is typically obliged to provide an irrevocable undertaking or a licensing declaration to the relevant SDO that it will licence or allow access to the patent to any implementers of the standard on FRAND terms, subject to the SDO obligations set out in its IP rights policy. This is known as the "FRAND undertaking".

7. The FRAND undertaking acts as a check and balance within the SEP ecosystem. It prevents SEP holders abusing their position to prevent potential implementers from participating in the market. It guarantees that implementers can access essential inventions at a fair price, while ensuring that the SEP holder receives a fair reward for the use of their inventions. Importantly, by granting an irrevocable undertaking to licence on FRAND terms, the SEP holder agrees to derogate from certain exclusive patent rights in return for the incorporation of its innovation into the standard. Specifically, the FRAND undertaking acts to limit the SEP holder's ability to obtain an injunction for infringement against an implementer that is willing to take a licence on FRAND terms. UK courts have characterised the FRAND undertaking as a contractual derogation from, or modification to, the general law of patents.³

8. There is little guidance on how to determine FRAND terms. FRAND terms are usually agreed in the course of commercial negotiations that may take a range of factors into account, including the licensor's opportunity cost, the cost of alternatives forgone, and cost of licensing the patent.⁴ A SEP holder is not required to offer the same FRAND terms to all implementers.⁵ Where the parties fail to agree, national courts may, in certain circumstances, be requested to determine the FRAND terms.

1.2 Global Nature of Technical Standards, FRAND Undertakings and SEP Licences

9. Many technical standards have global application. FRAND undertakings may also be global; for example, a FRAND undertaking made under the ETSI IP Rights Policy⁶ "extends to patents in the same patent family as the declared SEP, giving the implementer the right to obtain a licence for the technology covering several jurisdictions".⁷

10. Moreover, SEP holders and implementers often enter into global licences for SEPs, covering multiple national patents. Negotiating global licences is common commercial practice in the telecommunications industry where products such as mobile handsets are sold around the world and must be able to cross borders. The UK Supreme Court observed that, in this context, no rational business would seek to license products country by country if it could be avoided, in part due to the effort required to negotiate and agree so many different licences and thereafter to keep track of so many different royalty calculations and payments.⁸

11. National courts have relied on such commercial practices to find that an offer to enter into a global licence, i.e. a licence covering multiple national patents in multiple jurisdictions, can be FRAND.⁹ In contrast, an offer to enter into a single country licence might not be FRAND where a single country licences would be inefficient and contrary to industry practices.¹⁰

1.3 Use of Anti-Suit Injunctions in SEP Litigation

12. Industries that use technical standards can give rise to high levels of litigation. A single product may use hundreds or thousands of complementary SEPs. Each of these patents could be the subject of a claim for patent infringement or disputed licence terms. For example, SEP holders may seek declarations of infringement of national patents and/or injunctions against implementers that do not agree licences, while implementers may bring an action that the patent is invalid or seek a declaration of non-infringement. Claims related to validity or infringement of a patent must be

³ *Unwired Planet v Huawei* [2020] UKSC 37, para. 14 (**Exhibit EU-71**).

⁴ OECD, *Intellectual Property and Standard Setting – Background Note*, section 4.1 (**Exhibit GBR-3**).

⁵ *Unwired Planet v Huawei* [2020] UKSC 37, paras. 112-116 (**Exhibit EU-71**).

⁶ ETSI, *Intellectual Property Rights Policy*, Clause 6.2 (**Exhibit GBR-4**). Clause 6.2 of the ETSI IPR Policy that provides that the FRAND undertaking applies to all components of the same patent family, unless parts are expressly excluded.

⁷ *Unwired Planet v Huawei* [2020] UKSC 37, para. 14 (**Exhibit EU-71**).

⁸ *Unwired Planet v Huawei* [2020] UKSC 37, para. 15 (**Exhibit EU-71**) citing with approval *Unwired Planet v Huawei* [2017] EWHC 2988 (Pat), para. 544 (**Exhibit GBR-5**).

⁹ *Unwired Planet v Huawei* [2020] UKSC 37, paras. 67 and following (**Exhibit EU-71**).

¹⁰ *Unwired Planet v Huawei* [2017] EWHC 2988 (Pat), paras. 543, 544, 572 (**Exhibit GBR-5**).

brought before the national courts of the state which has granted the patent right (or in the case of a European patent, the courts of a designated state).¹¹ This may result in claims in multiple jurisdictions relating to different national patents from the same patent family.

13. An action for an injunction against infringement of a SEP may also give rise to competition law claims as a result of the SEP holder's market power.

14. In addition, national courts may, depending on the jurisdiction, be asked to determine whether the parties have complied with their FRAND obligations and/or to determine the FRAND terms, including royalty rates. Several national courts have set the terms of global FRAND licences in appropriate cases. UK courts have found that the relevant FRAND undertaking was a contractual obligation that gave the court jurisdiction to determine a global FRAND licence as part of an action for enforcement of the contractual obligation.¹²

15. It is clear therefore that SEP litigation is not confined to matters of patent law and can include actions in competition and contract law. While the courts of the State that granted the patent¹³ have exclusive jurisdiction to determine patent validity and infringement claims, there may be more than one available jurisdiction to determine global FRAND terms, giving rise to the possibility of parallel litigation. The potential for parallel litigation to set FRAND terms is a consequence of SDO policies that contemplate the possibility of global FRAND licences and the absence of any other supranational or international forum to determine such claims.¹⁴ When faced with possible parallel litigation, national courts will determine whether to hear that claim in accordance with applicable domestic conflict of laws rules (rules of private international law).

16. Notably, UK courts have, when accepting jurisdiction to determine global FRAND terms, taken steps to avoid interfering with related foreign proceedings, observing that the court's FRAND determination "should not prevent a licensee from challenging validity or essentiality of licensed patents" before the relevant national courts and that the FRAND licence can include a mechanism to deal with the outcome of foreign patent enforcement proceedings.¹⁵

17. It is in this context that anti-suit injunctions have, on rare occasions, been sought to manage parallel litigation. Applied with appropriate safeguards, anti-suit injunctions can be a reasonable and proportionate tool to prevent inconsistent FRAND judgments. For example, in the UK, the English High Court was prepared to issue an anti-suit injunction to restrain vexatious foreign proceedings that sought to obstruct, or would have had the effect of obstructing, pending proceedings before the English court in which the court was requested to make a global FRAND determination. The parties compromised their claim, however, before the application was decided.¹⁶

18. Furthermore, several national courts have issued *anti-anti-suit* injunctions to restrain a party from seeking an anti-suit injunction from a foreign court. In the UK, the English High Court issued an anti-anti-suit injunction in *IPCom v Lenovo* directing the UK defendants not to assist with a motion for an anti-suit injunction before the US courts that would have had the effect of extinguishing IPCom's right to determine the validity and infringement of its UK designated SEPs.¹⁷

19. To conclude, the United Kingdom recognises that there is a tension between patents, which are granted and enforced at the national level, and the global nature of some standards and SEP licensing practices. Furthermore, SEP litigation can involve a range of legal claims, that are not limited to the enforcement of IP rights, which can result in parallel litigation. In this regard, the United Kingdom notes that the European Union recognises in its First Written Submission that a "well-targeted anti-suit injunction in exceptional cases may be a helpful tool to address the

¹¹ *Unwired Planet v Huawei* [2020] UKSC 37, para. 2 (**Exhibit EU-71**).

¹² *Unwired Planet v Huawei* [2020] UKSC 37, paras. 14, 90 (**Exhibit EU-71**).

¹³ Or, in the case of European patent, the courts of a designated State.

¹⁴ *Unwired Planet v Huawei* [2020] UKSC 37, para. 90 (**Exhibit EU-71**).

¹⁵ *Unwired Planet v Huawei* [2017] EWHC 2988 (Pat), para. 571 (**Exhibit GBR-5**).

¹⁶ *Conversant Wireless Licensing SARL v Huawei Technologies Co Ltd*, [2018] EWHC 2549 (Ch) (**Exhibit CHN-69**).

¹⁷ *IPCom v. Lenovo*, [2019] EWHC 3030 (Pat), para. 20 (**Exhibit CHN-10**).

challenges posed by parallel litigation".¹⁸ It is against this backdrop that the present dispute must be viewed.

III. UNWRITTEN MEASURES

20. The European Union alleges that China has adopted an anti-suit injunction policy in the form of an unwritten measure.¹⁹ China argues that the European Union failed to establish the existence of an unwritten measure.²⁰

21. It is well-established that complainants can challenge a wide range of measures in WTO dispute settlement, including unwritten measures.²¹ Measures include any acts or omissions attributable to a Member.²²

22. For every challenged measure, the complainant must demonstrate, first, that the measure is attributable to the respondent, and second, the precise content of the measure.²³ Where the measure is unwritten, the complainant must also demonstrate an element of continuing or prospective application, although precisely what must be shown as part of this third element will vary depending on the nature of the measure at issue.²⁴ For example, several panels have employed "analytical tools" when characterising unwritten measures, including (i) a rule or norm of general application,²⁵ (ii) ongoing conduct²⁶ and (iii) an overarching measure.²⁷ Each of these analytical tools require evidence of similar but slightly different elements. The United Kingdom observes that analytical tools may assist the Panel, but that the Panel ultimately retains flexibility to decide what other elements are required to determine the existence of an unwritten measure. The evidentiary burden will also depend on the measure challenged and the specifics of a case.²⁸

23. With regard to the obligation to establish the "precise content" of the measure, the United Kingdom does not take a view on whether the European Union has satisfied the legal standard, but considers that to establish the precise content of an unwritten measure said to emerge from several court rulings in addition to other elements, the complainant must be able to identify features that are common to the different components of the measure, and that the application of the measure to similar fact patterns must result in similar or identical outcomes.

IV. EXPIRED MEASURES

24. With regard to the European Union's "as applied" challenges, the United Kingdom observes that the anti-suit injunctions issued by the Chinese courts which are the subject of this dispute ceased to have effect once the underlying proceedings were withdrawn following the parties' settlement.²⁹ The United Kingdom notes that, where the challenged measure has expired prior to panel establishment, the general rule is that the measure is outside the Panel's terms of reference unless a relevant exception applies.³⁰ An exception may arise where the expired measure has lingering effects and continues to nullify and impair benefits³¹ or where there is a risk that the

¹⁸ European Union's first written submission, para. 324.

¹⁹ European Union's first written submission, paras. 217, 218.

²⁰ China's first written submission, para. 73.

²¹ Appellate Body Report, *US – Supercalendered Paper*, para. 5.17.

²² Appellate Body Report, *Argentina – Import Measures*, para. 5.109; Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para 5.125; Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 794.

²³ Appellate Body Report, *US – Supercalendered Paper*, para. 5.17.

²⁴ Appellate Body Report, *Argentina – Import Measures*, para. 5.104.

²⁵ See, e.g., Appellate Body Report, *US – Zeroing (EC)*, paras. 201 to 205, in which the Appellate Body agreed that the measure at issue in that dispute had general and prospective application.

²⁶ See, e.g., Appellate Body Report, *US – Supercalendered Paper*, paras. 1.1 to 1.3 and 5.47 to 5.48, in which the unwritten measure was challenged as ongoing conduct.

²⁷ See, e.g., Appellate Body Report, *Argentina – Import Measures*, paras. 1.2, 5.117, 5.124, 5.132 and 5.146.

²⁸ Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 134.

²⁹ European Union's first written submission, paras. 345, 350, 355, 360 and 366.

³⁰ Appellate Body Report, *EC – Selected Customs Matters*, para. 184; Panel Report, *US – Renewable Energy*, Annex D-1, para. 3.32.

³¹ Appellate Body Report, *US – Upland Cotton*, para. 270.

measure will be re-introduced.³² In this scenario, it is for the complainant to demonstrate on the facts of the case that the expired measures fall within one of the exceptions to the general rule.

V. ARTICLE 41.1, SECOND SENTENCE, OF THE TRIPS AGREEMENT

25. Article 41.1 TRIPS provides as follows:

Members shall ensure that enforcement procedures as specified in this Part [Part III] are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

26. Situated in Section 1 of Part III of the TRIPS Agreement ("Enforcement of Intellectual Property Rights"), Article 41 sets out general obligations that apply to all judicial and administrative enforcement procedures specified in Part III of the Agreement. The enforcement procedures specified in Part III represent the "internationally-agreed minimum standard which Members are bound to implement in their domestic legislation".³³

27. The European Union argues that China's anti-suit injunction policy, and the five individual anti-suit injunctions, violate Article 41.1 of the TRIPS Agreement because the measures were applied in a manner that created barriers to legitimate trade and that failed to provide for safeguards against abuse.³⁴ China argues that the European Union's claims fall outside the scope of this provision.³⁵

28. The United Kingdom submits that when considering an alleged breach under Article 41.1, second sentence, the Panel must, as a preliminary matter, satisfy itself that the challenged measures are enforcement procedures specified within Part III of the TRIPS Agreement against an act of infringement of an IP right. This is because the reference to "these procedures" in Article 41.1, second sentence, refers to the "enforcement procedures" described in the first sentence, which Members must make available "so as to permit effective action against any infringement".

29. In the present case, the Panel must determine whether the anti-suit injunction policy and specific anti-suit injunctions issued by the Chinese courts are enforcement procedures against an act of IP infringement. Without expressing a view on this question, the United Kingdom notes that SEP litigation involves a range of legal claims and counterclaims that are not limited to patent infringement claims, and that, when considering this issue, the Panel must have specific regard to characterisation of the dispute and the terms of the anti-suit injunctions.

30. If the challenged measures are enforcement procedures within the scope of Article 41.1, the United Kingdom wishes to provide its views on the obligation under Article 41.1, second sentence, to apply IP enforcement procedures in a manner that provides "for safeguards against their abuse".

31. First, the United Kingdom submits that the safeguards to be applied will naturally vary depending on the type of enforcement procedure at issue. As noted above, the obligations contained in Article 41 apply to all enforcement procedures specified in Part III. Several provisions within Part III include specific safeguards relevant to the type of enforcement procedure at issue, whether civil,³⁶

³² Panel Reports, *Argentina – Textiles and Apparel*, paras. 6.12, 6.14; Panel Report, *China – Agricultural Producers*, para. 7.85, 7.88.

³³ Appellate Body Report, *US – Section 211 Appropriations Act*, para. 206.

³⁴ European Union's first written submission, paras. 438, 440 and 460.

³⁵ China's first written submission, para. 260.

³⁶ Pursuant to Article 48.1 of the TRIPS Agreement, courts must have the authority to order a party "who has abused enforcement procedures to provide to a party wrongfully enjoined or restrained adequate compensation for the injury suffered because of such abuse" as well as expenses and fees.

provisional³⁷ or border-related,³⁸ illustrating that certain safeguards are appropriate in one context, but not in another. For this reason, and in response to the European Union's argument that Article 50.3 of the TRIPS Agreement contains relevant context for the interpretation of the term "safeguard" in Article 41.1, the United Kingdom observes that the minimum standards provided for in Article 50.3 are appropriate safeguards in the context of the provisional measures but may not be applicable to all enforcement procedures covered by Article 41.

32. Second, the United Kingdom submits that safeguards should be applied in an even-handed way that protects against potential abuse by both rights holders and implementers. When interpreting Article 41.1, second sentence, in light of its context and the object and purpose of the Agreement, the United Kingdom observes that one of the objectives of the TRIPS Agreement is to 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" (emphasis added), upholding a "balance of rights and obligations".³⁹ Article 41.2 provides further context, requiring that enforcement procedures be "fair and equitable".

33. Third, the United Kingdom submits that the nature and effect of this type of relief requires heightened and robust safeguards to prevent abuse. UK courts have, for example, held that the issuance of an anti-suit injunction "always requires caution" because it indirectly interferes with the processes or potential processes of a foreign court.⁴⁰

34. Drawing from the long-standing general principles developed by UK courts in relation to anti-suit injunctions, the United Kingdom submits that adherence to the following principles safeguard against the abuse of anti-suit injunctions:

- First, an anti-suit injunction may be granted when it is necessary in the interests (or "the ends") of justice to do so.⁴¹ The interests of justice require that the court take account both of the injustice to the party seeking an injunction if the party subject to the injunction is permitted to pursue its foreign proceedings, as well as the injustice caused to the party subject to the injunction if they are not allowed to do so.⁴²
- Second, if the matter is justiciable in the domestic court and a foreign court, the party seeking an anti-suit injunction must generally show that the foreign proceeding is, or would be, vexatious or oppressive.⁴³ While the pursuit of parallel proceedings is undesirable, it is not necessarily vexatious or oppressive.⁴⁴ An injunction may also be granted if the parallel proceedings interfere with the processes, jurisdiction or judgments of a domestic court and it is in the interests of justice to issue the injunction.⁴⁵
- Third, the court must have regard to the principle of comity. Where alternative forums are available, comity requires that the domestic court "should have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which an antisuit injunction entails".⁴⁶ The stronger the connection of the foreign court with the parties and subject of a dispute, the stronger the argument against an

³⁷ Pursuant to Article 50.3 of the TRIPS Agreement, courts must have the authority to require the applicant to provide evidence establishing that they are the rights holder; that infringement has occurred or is imminent; and to order the applicant to provide security to protect the defendant and to prevent abuse. Article 50.7 of the TRIPS Agreement requires that courts have the authority to order, upon request by the defendant, appropriate compensation for injury caused by provisional measures that are revoked or lapse due to any act or omission of the applicant, or where it is subsequently found that there has been no infringement.

³⁸ Article 53.1 of the TRIPS Agreement requires that authorities have the power to "require an applicant to provide a security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to these procedures".

³⁹ Article 7 of the TRIPS Agreement.

⁴⁰ *Deutsche Bank v Highland Crusader* [2009] EWCA Civ 725, para. 50.5 (**Exhibit GBR-6**).

⁴¹ *Deutsche Bank v Highland Crusader* [2009] EWCA Civ 725, para. 50.1 (**Exhibit GBR-6**).

⁴² *Aérospatiale v Lee Kui Jak* [1987] AC 871, p. 896 (**Exhibit GBR-7**).

⁴³ *Deutsche Bank v Highland Crusader* [2009] EWCA Civ 725, para. 50.2 (**Exhibit GBR-6**).

⁴⁴ *Deutsche Bank v Highland Crusader* [2009] EWCA Civ 725, para. 50.6 (**Exhibit GBR-6**).

⁴⁵ Thomas Raphael KC, *The Anti-Suit Injunction*, para. 4.66 (**Exhibit GBR-8**); *Aérospatiale v Lee Kui Jak* [1987] AC 871, p. 893 (**Exhibit GBR-7**).

⁴⁶ *Deutsche Bank v Highland Crusader* [2009] EWCA Civ 725, para. 59 (**Exhibit GBR-6**), citing *Airbus Industrie GIE v Patel* [1999] 1 AC 119 at p. 138.

anti-suit injunction,⁴⁷ and vice versa. This potential for interference also demands that the court exercise its power with caution.⁴⁸

35. These are some of the principles applied by UK courts; ultimately, UK courts will only issue an anti-suit injunction if the court considers it appropriate to do so in all the circumstances of the case.⁴⁹

36. To conclude, the United Kingdom submits that, if an anti-suit injunction is, in the circumstances of the case, within scope of Part III of the TRIPS Agreement, it can be granted in a TRIPS-consistent manner if robust safeguards are applied.

VI. ARTICLE 1.1, FIRST SENTENCE, IN CONJUNCTION WITH ARTICLE 44.1 OF THE TRIPS AGREEMENT

37. Article 44.1 provides in relevant part that a Member's:

judicial authorities shall have the authority to order a party to desist from an infringement, inter alia to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right.

38. The European Union alleges that China has violated Article 1.1, first sentence, in conjunction with Article 44.1 of the TRIPS Agreement because China's anti-suit injunction policy and the five anti-suit injunctions prevent, or seek to prevent, other Members' judicial authorities from issuing IP infringement injunctions within their own territories.⁵⁰ China responds that it has fulfilled its obligation to give effect to Article 44.1 in its domestic law by ensuring that its judicial authorities do have such authority.⁵¹

39. The United Kingdom limits its observation to the fact that injunctions apply *in personam* to the party that is the subject of the injunction. For example, as a matter of English law, a court "may restrain a defendant over whom it has personal jurisdiction from instituting or continuing proceedings in a foreign court when it is necessary in the interests of justice to do".⁵² Importantly:

[W]here the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed *not against the foreign court but against the parties so proceeding or threatening to proceed*.⁵³

40. It follows that, as a general matter, anti-suit injunctions do not displace a foreign court's authority to hear a claim but rather restrain the party that is the subject of the injunction from applying to a foreign court, under threat of sanction of the law of the State that issued the anti-suit injunction.⁵⁴

VII. ARTICLE 63.1 AND 63.3 OF THE TRIPS AGREEMENT

41. Article 63.1 of the TRIPS Agreement provides in relevant part that:

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

⁴⁷ *Deutsche Bank v Highland Crusader* [2009] EWCA Civ 725, para. 50.5 (**Exhibit GBR-6**).

⁴⁸ *Deutsche Bank v Highland Crusader* [2009] EWCA Civ 725, para. 50.5 (**Exhibit GBR-6**); *Aérospatiale v Lee Kui Jak* [1987] AC p. 892 (**Exhibit GBR-7**).

⁴⁹ Thomas Raphael KC, *The Anti-Suit Injunction*, para. 4.05 (**Exhibit GBR-8**).

⁵⁰ European Union's first written submission, paras. 470, 471, 473 and 484.

⁵¹ China's first written submission, paras. 265, 266.

⁵² *Deutsche Bank v Highland Crusader* [2009] EWCA Civ 725, para. 50.1 (**Exhibit GBR-6**).

⁵³ *Aérospatiale v Lee Kui Jak* [1987] AC 871, p. 892 (emphasis added) (**Exhibit GBR-7**).

⁵⁴ *Aérospatiale v Lee Kui Jak* [1987] AC 871, p. 892 (**Exhibit GBR-7**), citing with approval Sir John Leach V.-C. said in *Bushby v. Munday* (1821) 5 Madd. 297, 307 ("If a defendant who is ordered by this court to discontinue a proceeding which he has commenced against the plaintiff, in some other Court of Justice, either in this country or abroad, thinks fit to disobey that order, and to prosecute such proceeding, this court does not pretend to any interference with the other court; it acts upon the defendant by punishment for his contempt in his disobedience to the order of the court; ...")

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.

42. Article 63.3 of the TRIPS Agreement provides:

Each Member shall be prepared to supply, in response to a written request from another Member, information of the sort referred to in paragraph 1. A Member, having reason to believe that a specific judicial decision or administrative ruling or bilateral agreement in the area of intellectual property rights affects its rights under this Agreement, may also request in writing to be given access to or be informed in sufficient detail of such specific judicial decisions or administrative rulings or bilateral agreements.

43. The European Union alleges that by failing to publish three decisions in which anti-suit injunctions were issued, China violated its obligation under Article 63.1.⁵⁵ The European Union further complains that China has failed to provide information in response to requests made under the first sentence and the second sentence of Article 63.3.⁵⁶ In response, China argues it is not obliged to publish the decisions, nor provide the information requested, because the decisions are not final, they do not pertain to the subject matter of the TRIPS Agreement and they are not of general application.⁵⁷

44. The principle of transparency enshrined in Article 63 of the TRIPS Agreement is a fundamental principle of WTO law and practice and promotes the predictability and stability of the trading environment.

45. With regard to the meaning of the term "final judicial decisions" referenced in Article 63.1 and incorporated into Article 63.3, the United Kingdom submits that, interpreting this term in its context, object and purpose and in light of the principle of treaty effectiveness, leads to the conclusion that the term "final judicial decisions" is not qualified by the term "of general application". China submits that Article 63.1 applies to "final judicial decisions...of general application" and that this term should be understood as judicial decisions that "establish or revise principles or criteria applicable in future cases".⁵⁸ If accepted, it would have the effect of excluding from the scope of the transparency obligation all judicial decisions from legal systems that do not have a doctrine of precedent (*stare decisis*) or recognise that judicial decisions may bind courts in future cases. A blanket exclusion of all judicial decisions from Members with such legal systems would significantly limit the scope and therefore the effectiveness of the transparency principle and cannot have been the intention of the drafters.

VIII. CONCLUSION

46. The United Kingdom hopes that its submissions will assist the Panel in its consideration of the matter before it.

⁵⁵ European Union's first written submission, paras. 645, 646.

⁵⁶ European Union's first written submission, paras. 702, 703.

⁵⁷ China's first written submission, paras. 323, 332 and 337.

⁵⁸ China's first written submission, para. 325.

ANNEX C-7**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES****I. INTRODUCTION**

1. The United States welcomes the opportunity to present its views to the Panel. In this submission, the United States will present its views on the proper legal interpretation of certain provisions of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).

II. MEASURES AT ISSUE

2. As a threshold matter, the United States understands that the EU has challenged both an unwritten measure of China concerning a "policy" relating to certain injunctions in patent disputes as well as five separate measures concerning individual instances of injunctions issued by courts in China.

3. China argues that all of the EU's claims concern measures that are outside the Panel's terms of reference, per the DSU.¹ In particular, China challenges the EU's claims of two types of measures: (1) an overall, unwritten anti-suit injunction policy of general and prospective application and, in the alternative, of ongoing conduct² and (2) "the individual instances of application of anti-suit injunctions in SEP litigation."³

4. If either set of challenged measures is outside the terms of reference – either because the measure has not been identified in the complaining party's panel request and did not form part of the matter the DSB has established the Panel to examine,⁴ or because the alleged measure is not an issue that may be challenged under the DSU⁵ – then that challenged measure and aspect of the matter is not properly before this Panel and may not be subject to findings by the Panel. Therefore, it would be appropriate to consider first whether the EU has identified a specific measure that can be challenged under the DSU in this dispute. In light of these threshold issues, the United States addresses each of the types of challenged measures below.

A. A "POLICY" OF A MEMBER AS AN UNWRITTEN MEASURE

5. As the EU recognizes, a Member challenging an unwritten measure, rather than a written measure, of another Member may face a higher evidentiary bar to demonstrate the existence of that specific measure, because the content of the measure is not set out in any legal instrument.⁶ Here, the EU is challenging an unwritten "policy" of China.

6. Specifically, the EU challenges an "anti-suit injunction policy in SEP litigation."⁷ In characterizing this unwritten "policy", the EU offers two definitions: that China's unwritten anti-suit injunction policy is an unwritten measure with general and prospective application, or, in the alternative, of ongoing conduct.⁸

¹ See China's First Written Submission ("China FWS"), para. 73.

² European Union's First Written Submission ("EU FWS"), para. 218.

³ EU FWS, para. 219.

⁴ DSU Art. 6.2 (panel request "shall identify the specific measures at issue"); Art. 7.1 (panel's terms of references established by DSB are "[t]o examine ... the matter referred to the DSB by [the complaining party] in document [requesting panel establishment]").

⁵ DSU Art. 3.3 (DSU directed to "prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member"); Art. 4.2 (consultations concern "representations made by any Member concerning measures affecting the operation of any covered agreement taken within the territory of [that Member]").

⁶ EU FWS, para. 216 (citing to *US – Continued Zeroing (AB)*, para. 198, where the Appellate Body stated that, "Particular rigour is required on the part of a panel to support a conclusion as to the existence of a 'rule or norm' that is not expressed in the form of a written document.").

⁷ See EU FWS, para. 217.

⁸ See EU FWS, para. 218.

7. According to the EU, although "[t]here is no legislation in China prohibiting a party in litigation concerning SEPs from applying for enforcement of judgments of any non-Chinese court in the territories of other Members or from seeking any judicial relief outwith the jurisdiction of Chinese courts,"⁹ there are (1) legal instruments regarding "act preservation measures" in China, (2) five individual instances of anti-suit injunctions imposed by courts in China (which the EU also challenges as separate measures on their own, as discussed below), and (3) because central bodies of China, including the Supreme Judicial Court and the NPC's Standing Committee, "promoted the application of the decision in *Huawei v. Conversant* and an anti-suit injunction policy in general," through reports, statements, and other actions, along with support of provincial bodies of China.¹⁰

8. The EU alleges that this evidence demonstrates the existence of an unwritten measure of general and prospective application because of "several factors that complement one another."¹¹ First, the EU pointed to the issuance of an injunction in the *Huawei v. Conversant* case that "applied China's Civil Procedure Law in a novel way and then was "promoted" to lower courts and highlighted in reports.¹² Second, it noted the lack of review by China's Supreme Judicial Court of anti-suit injunctions issued by lower courts along with statements by the president of the Supreme Judicial Court.¹³ Third, four courts issued anti-suit injunctions in the fall of 2020 after *Huawei v. Conversant*, where "[a]ll five decisions impose anti-suit injunctions with a far-reaching scope."¹⁴ The EU alleges that the injunctions in the five cases "are not a series of separate, unrelated cases but are part of a policy of general application to issue broad anti-suit injunctions in SEP litigation."¹⁵

9. In the alternative, the EU asserts that China has an unwritten measure concerning the imposition of anti-suit injunctions as "ongoing conduct." The EU identifies that four successive courts issued anti-suit injunctions at the end of 2020 after the injunction issued in the *Huawei v. Conversant* case and that those decisions, along with the other evidence identified in support of the unwritten measure, as well as statements of China's President and the Five-year Plan for the Judicial Protection of Intellectual Property Rights (2021-2025), indicated that "China's conduct with respect to anti-suit injunctions in the field of standard essential patents is likely to continue."¹⁶

10. In response, China asserts that the EU's claims of China having such a policy are "completely fictitious."¹⁷ China also alleges that the EU's allegations are "riddled with fundamental misconceptions about China's courts and their authority."¹⁸ Moreover, China claims that the EU's characterization of the alleged unwritten measure is so vague that it is "impossible to understand what the *European Union* considers the 'precise content' of the measure to be."¹⁹ China argues that the EU describes the policy in inconsistent ways, both as "prohibit[ing] patent owners involved in SEP litigation in China from resorting to courts in other jurisdictions for the purpose of enforcing their exclusive rights," but also as having "aspects" that are "broad" and "not well-targeted."²⁰ China also points out that courts in China have not issued anti-suit injunctions since 2020 and that at least one court has in fact declined to issue such an injunction, in the *Lenovo v. Nokia* dispute.²¹ Finally, China alleges that the courts in each of the five instances of anti-suit injunction relied on different legal bases and unique facts pertaining to each dispute.²²

11. As the complainant, the EU bears the burden of identifying and demonstrating the existence of a "specific measure."²³ Therefore, the Panel must determine whether the EU has identified a specific measure. The Panel must also determine whether the EU has shown that this measure is a "measure taken" by the responding party²⁴ and of the nature the EU argues, *i.e.*, that it has "general and prospective application." That is, what the EU characterizes as a "policy" must be an act or

⁹ See EU FWS, para. 224.

¹⁰ See EU FWS, paras. 224-242.

¹¹ EU FWS, para. 249.

¹² See EU FWS, para. 251.

¹³ See EU FWS, paras. 254-255, 258.

¹⁴ EU FWS, para. 263.

¹⁵ See EU FWS, para. 265.

¹⁶ EU FWS, para. 287.

¹⁷ See China FWS, para. 70.

¹⁸ China FWS, para. 73.

¹⁹ China FWS, para. 74 (emphasis in original).

²⁰ China FWS, para. 75.

²¹ China FWS, para. 156.

²² See China FWS, paras. 129, 133.

²³ See DSU Arts. 6.2, 7.1.

²⁴ See DSU Arts. 3.3, 4.2.

decision with some legal effect for the responding party.²⁵ If, as China argues, the cases identified by the EU are simply instances of legal application of Chinese law, and do not reflect a specific "measure" that operates as if a legal act or decision "with general and prospective application" or having "a functional life of its own," then the Panel cannot find that such a measure exists within the meaning of the DSU.

12. So-called "ongoing conduct" would not, in the view of the United States, constitute a "measure taken" by a Member that has a life of its own. Rather, "ongoing conduct" could reflect and be a manifestation of another measure that is capable of generating that conduct. But even setting that aside, it would be for a complaining party to identify and substantiate alleged "ongoing conduct" with "evidence of its repeated application, and of the likelihood that such conduct will continue."²⁶

13. Here, the Panel may wish to examine in particular, whether the EU has sufficiently explained why the existence of the unwritten measure is not undermined by the fact that all the instances identified by the EU took place over a relatively short period of time and have not been repeated since that time, or by the fact that a court in China declined to issue an anti-suit injunction, in *Lenovo v. Nokia*.²⁷

B. INDIVIDUAL INSTANCES OF INJUNCTIONS ISSUED IN PATENT DISPUTES WHERE SUCH DISPUTES HAVE BEEN SETTLED BEFORE THE TIME OF THE PANEL'S ESTABLISHMENT

14. The United States now turns to the question of whether the individual instances of injunctions issued by courts in China as challenged by the EU fall within the Panel's terms of reference.

15. Along with its claims regarding an overall, unwritten measure of China, the EU also has challenged the "individual instances of application of anti-suit injunctions in SEP litigation" by China.²⁸ These instances concern anti-suit injunctions in the following five cases, issued by courts in China from August 2020 through December 2020: (1) *Huawei v. Conversant*, (2) *Xiaomi v. InterDigital*, (3) *ZTE v. Conversant*, (4) *OPPO v. Sharp*, and (5) *Samsung v. Ericsson*.²⁹ The EU explains that "the parties to each dispute reached a settlement covering the terms for the licensing of the SEPs at stake and the discontinuation of pending litigation."³⁰ It appears to be uncontested that all five disputes were ended by settlement agreement, the last settlement occurring in 2021, and that after settlement of each dispute, the anti-suit injunctions in each case were terminated and are no longer in effect.³¹

16. Despite the injunctions no longer having legal effect, the EU argues that the individual cases are still within the terms of reference of the Panel because the "effects are alleged to be impairing the benefits accruing to the requesting Member under a covered agreement at the time of the establishment of the panel."³² The EU asserts "that the effects of the five individual measures identified [sic] the Panel request continue to impair benefits for the European Union under the TRIPS Agreement."³³ According to the EU, this impairment exists "[s]ince the settlements were reached after the rights of SEP owners were restricted by the anti-suit injunctions issued in those cases, they constitute a lingering adverse effect of the measures challenged by the European Union."³⁴

²⁵ As the panel in *US – Export Restraints* found, an alleged unwritten measure must "constitute an instrument with a functional life of its own" and "do something concrete, independently of any other instruments." *US – Export Restraints*, para 8.85 (emphasis in original).

²⁶ EU FWS, para. 221 (citing *Argentina – Import Measures (AB)*, para. 5.108).

²⁷ Compare EU FWS, para. 243 ("Even if in the *Lenovo v Nokia* case the Shenzhen Court rejected Lenovo's ASI request (although only because the proceedings outwith China were not completed) several elements following this decision show the continuing existence of the overarching measure: the SPC and the NPC Standing Committee continued to promote the anti-suit injunction policy in November 2021 and February 2022; the Wuhan Court's reconsideration ruling of 10 March 2021 in *Samsung v Ericsson* maintained the global anti-suit injunction against Ericsson; in 2022, the Hubei High Court promoted the global anti-suit injunction in *Xiaomi v InterDigital* as a typical case." (internal citation to original Exhibit EU-9, *Ericsson v Samsung*, Wuhan Intermediate People's Court, Reconsideration Decision, 10-03-21)).

²⁸ EU FWS, para. 219.

²⁹ EU FWS, para. 294.

³⁰ See EU FWS, para. 297.

³¹ See EU FWS, paras. 19, 46, 53, 66, 80, 299; China FWS, paras. 54, 178, 181, 184, 188.

³² EU FWS, para. 298.

³³ EU FWS, para. 299.

³⁴ See EU FWS, para. 299.

In support of its argument, the EU cites to the panel report in *US – Upland Cotton*, in which the panel states that "[s]ubsidies granted under expired measures may have had adverse effects at the time they were in effect, and may still have lasting adverse effects."³⁵

17. Articles 6.2 and 7.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) set out a panel's terms of reference. Under DSU Article 6.2, the "matter" to be examined by the DSB consists of "the specific measures at issue" and "brief summary of the legal basis of the complaint." Under Article 7.1, when the Dispute Settlement Body (DSB) establishes a panel, the panel's terms of reference, unless otherwise decided, are "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request. It is thus the challenged measures, as they existed at the time of the panel's establishment, when the "matter" was referred to the panel, that are properly within the panel's terms of reference and on which the panel must make findings.

18. At the time of the Panel's establishment, it is uncontested that all five individual instances of anti-suit injunctions cited by the EU were no longer in effect. That is, each court involved had lifted its injunction pursuant to resolution of a specific case. Under Article 11 of the DSU, a panel's task is to make an objective assessment of the "matter before it, including an objective assessment of . . . the applicability of and conformity with the relevant agreements," and the "matter" comprises the complaining party's measures and claims. A panel's task does not extend to making findings of conformity outside the "matter before it." Furthermore, DSU Article 19.1 provides that "[w]here a panel or the Appellate Body concludes that a measure *is inconsistent* with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement."³⁶ Panels are not authorized to make recommendations about a measure that, because it no longer exists, is no longer inconsistent with the WTO Agreement (regardless of whether it in fact ever was). Therefore, the EU's claims regarding the five instances of anti-suit injunctions will fall outside the panel's terms of reference.

19. Even aside from the measures, and not just their alleged effects, needing to be in existence when the panel is established for the panel to examine those measures as part of the "matter," the EU also would have had to identify "adverse effects" as specific measures at issue in its panel request. As noted above, Article 6.2 requires the identification of the "specific measure at issue." Here, the EU has identified the five specific anti-suit injunction cases as the measures at issue. Any separate "adverse effects" of those cases would themselves need to be specifically identified and defined in the EU's panel request as measures, and then be shown to exist at the time of the Panel's establishment.

20. We also note that, even if the "adverse effects" of the cases are properly before the Panel as measures, the EU still would need to explain how the "lingering adverse effect" or "lasting adverse effects" of settlement agreements in patent disputes are inconsistent with specific provisions of the TRIPS Agreement. The TRIPS Agreement does not contain any obligation relating to "lingering adverse effects;" nor does the term "lingering adverse effects" appear anywhere in the TRIPS Agreement.

21. The United States notes that, assuming for the purposes of argument that the EU has identified an unwritten measure properly before the Panel for its review, the unwritten measure identified by the EU does not include reference to the transparency concerns raised by the EU in its claims of breach of Articles 63.1 and 63.3 of the TRIPS Agreement by China. Accordingly, the United States assumes that claims under Article 63 only pertain to certain individual measures identified by the EU, and therefore the EU's claims under Article 63 of the TRIPS Agreement only apply to the three individual instances of anti-suit injunctions identified in the EU panel request and its submission: (1) *OPPO v. Sharp*; (2) *ZTE v. Conversant*; and (3) *Xiaomi v. InterDigital*.³⁷ In that case, if the Panel were to determine that the individual measures concerning the injunctions issued in these three cases were no longer in effect and not within the Panel's terms of reference, then the claims regarding Article 63 would similarly not be before the Panel, regardless of the existence of an overall, unwritten measure.

³⁵ See EU FWS, para. 299 (citing to *US – Upland Cotton*, para. 7.1201).

³⁶ Footnotes omitted and emphasis added.

³⁷ See EU FWS, paras. 622–646, 686–703.

III. CONCLUSION

22. The United States thanks the Panel for the opportunity to submit its views on these threshold issues raised in this dispute.
