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CHINA – ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

NOTIFICATION OF AN APPEAL BY THE EUROPEAN UNION UNDER ARTICLE 25 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES ("DSU"), PARAGRAPH 5 OF THE AGREED PROCEDURES FOR ARBITRATION UNDER ARTICLE 25 OF THE DSU (THE "AGREED PROCEDURES") AND RULE 20 OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following communication, dated 22 April 2025, from the delegation of the European Union, is being circulated to Members.

Pursuant to paragraph 5 of the Agreed Procedures,¹ the European Union hereby notifies the Dispute Settlement Body of its decision to initiate an arbitration under Article 25 of the DSU with regard to certain issues of law and legal interpretations covered in the Panel Report in the dispute *China — Enforcement of intellectual property rights* (WT/DS611/FR).

Pursuant to paragraph 5 of the Agreed Procedures and Rule 20(1) of the Working Procedures for Appellate Review, the European Union simultaneously files this Notice of Appeal and its Appellant Submission with China and the third parties in the panel proceedings and with the WTO Secretariat. The Notice of Appeal includes the final report of the Panel in the working languages of the WTO.

For the reasons further elaborated in its submissions to the Arbitrators, the European Union appeals and requests the Arbitrators to reverse the conclusions and related findings of the Panel containing the errors of law and legal interpretations identified below and, where appropriate, to complete the analysis on the basis of the Panel's findings and uncontested facts on the record:²

1. The Panel erred in the interpretation of Article 1.1, first sentence, of the TRIPS Agreement by determining that this provision merely requires WTO Members to implement the provisions of the Agreement within their domestic legal systems and does not require them to refrain from taking measures that undermine the protection and enforcement of IP rights in the territories of other Members.³ Accordingly, the European Union requests the Arbitrators to reverse the Panel's findings on the interpretation of Article 1.1, first sentence, of the TRIPS Agreement in paragraphs 7.217, 7.224 and 7.226 to 7.231 of the Report.
2. The Panel erred in the interpretation of Article 1.1, first sentence, in conjunction with Article 28.1 of the TRIPS Agreement, by finding that these provisions merely require Members to ensure that, within their domestic legal systems, a patent confers on its owners the exclusive rights set forth in Article 28.1 and that the European Union has not demonstrated that China's ASI policy is inconsistent with Article 28.1, whether or not read in conjunction with Article 1.1, first sentence.⁴ Accordingly, the European Union requests the Arbitrators to reverse the Panel's conclusion and related findings on the interpretation of

¹ WT/DS611/7, 4 July 2023.

² Pursuant to Rule 20(2)(d)(iii) of the *Working Procedures for Appellate Review*, which apply *mutatis mutandis* to this arbitration pursuant to paragraph 5 of the Agreed Procedures, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the European Union's ability to refer to other paragraphs of the Panel Report during the arbitration proceedings.

³ Panel Report, paras. 7.217, 7.224 and 7.226 to 7.231.

⁴ Panel Report, paras. 7.240 to 7.242 and 8.2.a.

Article 1.1, first sentence, in conjunction with Article 28.1 of the TRIPS Agreement in paragraphs 7.240 to 7.242 and 8.2.a. of the Report.

3. The Panel erred in the interpretation of Article 1.1, first sentence, in conjunction with Article 28.2 of the TRIPS Agreement by finding that these provisions only require a WTO Member to ensure that, within its domestic legal system, patent owners have the right to assign or transfer by succession their patent, as well as the right to conclude licensing contracts in respect of patents granted by that Member, and that the European Union has not demonstrated that China's ASI policy is inconsistent with those provisions.⁵ Accordingly, the European Union requests the Arbitrators to reverse the Panel's conclusion and related findings on the interpretation of Article 1.1, first sentence, in conjunction with Article 28.2 of the TRIPS Agreement in paragraphs 7.247, 7.248, 7.250 to 7.252 and 8.2.b of the Report.
4. The Panel erred in the interpretation of Article 1.1, first sentence, in conjunction with Article 44.1 of the TRIPS Agreement by finding that these provisions do not require Members to refrain from adopting or maintaining in force measures that prevent, or seek to prevent, the judicial authorities of other WTO Members from ordering a party to desist from a patent infringement in the territories of those Members and that the European Union has not demonstrated that the ASI policy is inconsistent with those provisions.⁶ Accordingly, the European Union requests the Arbitrators to reverse the Panel's conclusion and related findings on the interpretation of Article 1.1, first sentence, in conjunction with Article 44.1 of the TRIPS Agreement in paragraphs 7.260 to 7.262 and 8.2.c. of the Report.
5. The Panel erred in the interpretation and application of the second sentence of Article 41.1 of the TRIPS Agreement by finding that enforcement procedures as specified in Part III are limited to procedures launched by right holders seeking to stop, prevent, deter or remedy infringement of IP rights provided for in the TRIPS Agreement and that the second sentence of Article 41.1 is not applicable to the ASI policy.⁷ Accordingly, the European Union requests the Arbitrators to reverse the Panel's conclusion and related findings on the interpretation and application of the second sentence of Article 41.1 of the TRIPS Agreement in paragraphs 7.284 to 7.312 and 8.2.d. of the Report.
6. Should the Arbitrators reverse the Panel's erroneous legal interpretations of Article 1.1, first sentence, in conjunction with either Article 28.1, 28.2 or 44.1, and of Article 41.1 of the TRIPS Agreement, the European Union requests the Arbitrators to complete the analysis and find that China's ASI policy and the five individual ASI court decisions are inconsistent with China's obligations under those provisions.

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⁵ Panel Report, paras. 7.247, 7.248, 7.250 to 7.252 and 8.2.b.

⁶ Panel Report, paras. 7.260 to 7.262 and 8.2.c.

⁷ Panel Report, paras. 7.284 to 7.312 and 8.2.d.

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WTO AND GATT DISPUTES CITED IN THIS REPORT

Short Title	Full Dispute Title and Citation
<i>Argentina – Footwear (EC)</i>	Panel Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/R , adopted 12 January 2000, as modified by Appellate Body Report WT/DS121/AB/R, DSR 2000:II, p. 575
<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, p. 1779
<i>Argentina – Import Measures</i>	Appellate Body Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R , adopted 26 January 2015, DSR 2015:II, p. 579
<i>Argentina – Textiles and Apparel</i>	Panel Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/R , adopted 22 April 1998, as modified by Appellate Body Report WT/DS56/AB/R, DSR 1998:III, p. 1033
<i>Australia – Salmon (Article 21.5 – Canada)</i>	Panel Report, <i>Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS18/RW , adopted 20 March 2000, DSR 2000:IV, p. 2031
<i>Australia – Tobacco Plain Packaging</i>	Appellate Body Reports, <i>Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging</i> , WT/DS435/AB/R and Add.1 (Honduras) / WT/DS441/AB/R and Add.1 (Dominican Republic), adopted 29 June 2020
<i>Australia – Tobacco Plain Packaging</i>	Panel Reports, <i>Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging</i> , WT/DS435/R , Add.1 and Suppl.1 (Honduras) / WT/DS441/R , Add.1 and Suppl.1 (Dominican Republic) / WT/DS458/R , Add.1 and Suppl.1 (Cuba) / WT/DS467/R , Add.1 and Suppl.1 (Indonesia), WT/DS458/R and WT/DS467/R adopted 27 August 2018, DSR 2018:VIII, p. 3925, and WT/DS435/R and WT/DS441/R adopted 29 June 2020, as upheld by Appellate Body Reports WT/DS435/AB/R / WT/DS441/AB/R, DSR 2018:VIII, p. 3925
<i>Chile – Price Band System</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R , adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
<i>Chile – Price Band System</i>	Panel Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/R , adopted 23 October 2002, as modified by Appellate Body Report WT/DS207AB/R, DSR 2002:VIII, p. 3127
<i>China – Agricultural Producers</i>	Panel Report, <i>China – Domestic Support for Agricultural Producers</i> , WT/DS511/R and Add.1, adopted 26 April 2019, DSR 2019:VI, p. 3297
<i>China – Autos (US)</i>	Panel Report, <i>China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States</i> , WT/DS440/R and Add.1, adopted 18 June 2014, DSR 2014:VII, p. 2655
<i>China – Electronic Payment Services</i>	Panel Report, <i>China – Certain Measures Affecting Electronic Payment Services</i> , WT/DS413/R and Add.1, adopted 31 August 2012, DSR 2012:X, p. 5305
<i>China – HP-SSST (Japan) / China – HP-SSST (EU)</i>	Appellate Body Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union</i> , WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015, DSR 2015:IX, p. 4573
<i>China – Intellectual Property Rights</i>	Panel Report, <i>China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights</i> , WT/DS362/R , adopted 20 March 2009, DSR 2009:V, p. 2097
<i>China – Publications and Audiovisual Products</i>	Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, p. 261
<i>China – Raw Materials</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R , adopted 22 February 2012, DSR 2012:VII, p. 3295

Short Title	Full Dispute Title and Citation
<i>China – Raw Materials</i>	Panel Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/R , Add.1 and Corr.1 / WT/DS395/R , Add.1 and Corr.1 / WT/DS398/R , Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R , DSR 2012:VII, p. 3501
<i>Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)</i>	Panel Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear – Recourse to Article 21.5 of the DSU by Colombia / Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear – Recourse to Article 21.5 of the DSU by Panama</i> , WT/DS461/RW and Add.1, circulated to WTO Members 5 October 2018, appealed 20 November 2018
<i>Costa Rica – Avocados (Mexico)</i>	Panel Report, <i>Costa Rica – Measures Concerning the Importation of Fresh Avocados from Mexico</i> , WT/DS524/R and Add.1, adopted 31 May 2022
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Panel Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/R , adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R , DSR 2005:XV, p. 7425
<i>EC – Approval and Marketing of Biotech Products</i>	Panel Reports, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R , Add.1 to Add.9 and Corr.1 / WT/DS292/R , Add.1 to Add.9 and Corr.1 / WT/DS293/R , Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, p. 847
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R , adopted 25 September 1997, DSR 1997:II, p. 591
<i>EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)</i>	Appellate Body Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i> , WT/DS27/AB/RW2/ECU , adopted 11 December 2008, and Corr.1 / <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165
<i>EC – Chicken Cuts</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R , WT/DS286/AB/R , adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
<i>EC – Commercial Vessels</i>	Panel Report, <i>European Communities – Measures Affecting Trade in Commercial Vessels</i> , WT/DS301/R , adopted 20 June 2005, DSR 2005:XV, p. 7713
<i>EC – Fasteners (China)</i>	Panel Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R , DSR 2011:VIII, p. 4289
<i>EC – IT Products</i>	Panel Reports, <i>European Communities and its member States – Tariff Treatment of Certain Information Technology Products</i> , WT/DS375/R / WT/DS376/R / WT/DS377/R , adopted 21 September 2010, DSR 2010:III, p. 933
<i>EC – Poultry</i>	Panel Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/R , adopted 23 July 1998, as modified by Appellate Body Report WT/DS69/AB/R , DSR 1998:V, p. 2089
<i>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R , adopted 23 October 2002, DSR 2002:VIII, p. 3359
<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R , adopted 11 December 2006, DSR 2006:IX, p. 3791
<i>EC – Trademarks and Geographical Indications (Australia)</i>	Panel Report, <i>European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by Australia</i> , WT/DS290/R , adopted 20 April 2005, DSR 2005:X, p. 4603
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R , adopted 1 June 2011, DSR 2011:I, p. 7
<i>EEC – Apples (Chile I)</i>	GATT Panel Report, <i>EEC Restrictions on Imports of Apples from Chile</i> , L/5047, adopted 10 November 1980, BISD 27S/98, https://gatt-disputes.wto.org/sites/default/files/documents/GD105--/5047.pdf
<i>EU – Biodiesel (Argentina)</i>	Appellate Body Report, <i>European Union – Anti-Dumping Measures on Biodiesel from Argentina</i> , WT/DS473/AB/R and Add.1, adopted 26 October 2016, DSR 2016:VI, p. 2871

Short Title	Full Dispute Title and Citation
<i>EU – Cost Adjustment Methodologies II (Russia)</i>	Panel Report, <i>European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia (Second Complaint)</i> , WT/DS494/R and Add.1, circulated to WTO Members 24 July 2020, appealed 28 August 2020
<i>EU – Fatty Alcohols (Indonesia)</i>	Appellate Body Report, <i>European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia</i> , WT/DS442/AB/R and Add.1, adopted 29 September 2017, DSR 2017:VI, p. 2613
<i>EU – PET (Pakistan)</i>	Appellate Body Report, <i>European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan</i> , WT/DS486/AB/R and Add.1, adopted 28 May 2018, DSR 2018:IV, p. 1615
<i>EU – PET (Pakistan)</i>	Panel Report, <i>European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan</i> , WT/DS486/R , Add.1 and Corr.1, adopted 28 May 2018, as modified by Appellate Body Report WT/DS486/AB/R , DSR 2018:IV, p. 1739
<i>India – Additional Import Duties</i>	Panel Report, <i>India – Additional and Extra-Additional Duties on Imports from the United States</i> , WT/DS360/R , adopted 17 November 2008, as reversed by Appellate Body Report WT/DS360/AB/R , DSR 2008:XX, p. 8317
<i>India – Agricultural Products</i>	Panel Report, <i>India – Measures Concerning the Importation of Certain Agricultural Products</i> , WT/DS430/R and Add.1, adopted 19 June 2015, as modified by Appellate Body Report WT/DS430/AB/R , DSR 2015:V, p. 2663
<i>Indonesia – Autos</i>	Panel Report, <i>Indonesia – Certain Measures Affecting the Automobile Industry</i> , WT/DS54/R , WT/DS55/R , WT/DS59/R , WT/DS64/R , Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and Corr.4, DSR 1998:VI, p. 2201
<i>Indonesia – Chicken</i>	Panel Report, <i>Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products</i> , WT/DS484/R and Add.1, adopted 22 November 2017, DSR 2017:VIII, p. 3769
<i>Japan – Film</i>	Panel Report, <i>Japan – Measures Affecting Consumer Photographic Film and Paper</i> , WT/DS44/R , adopted 22 April 1998, DSR 1998:IV, p. 1179
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R , adopted 12 January 2000, DSR 2000:I, p. 3
<i>Korea – Pneumatic Valves (Japan)</i>	Appellate Body Report, <i>Korea – Anti-Dumping Duties on Pneumatic Valves from Japan</i> , WT/DS504/AB/R and Add.1, adopted 30 September 2019, DSR 2019:XI, p. 5637
<i>Korea – Procurement</i>	Panel Report, <i>Korea – Measures Affecting Government Procurement</i> , WT/DS163/R , adopted 19 June 2000, DSR 2000:VIII, p. 3541
<i>Mexico – Anti-Dumping Measures on Rice</i>	Panel Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/R , adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R , DSR 2005:XXIII, p. 11007
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW , adopted 21 November 2001, DSR 2001:XIII, p. 6675
<i>Peru – Agricultural Products</i>	Appellate Body Report, <i>Peru – Additional Duty on Imports of Certain Agricultural Products</i> , WT/DS457/AB/R and Add.1, adopted 31 July 2015, DSR 2015:VI, p. 3403
<i>Russia – Pigs (EU)</i>	Panel Report, <i>Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union</i> , WT/DS475/R and Add.1, adopted 21 March 2017, as modified by Appellate Body Report WT/DS475/AB/R , DSR 2017:II, p. 361
<i>Saudi Arabia – IPRs</i>	Panel Report, <i>Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights</i> , WT/DS567/R and Add.1, circulated to WTO Members on 16 June 2020, dispute terminated while appeal pending
<i>Thailand – Cigarettes (Philippines)</i>	Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/AB/R , adopted 15 July 2011, DSR 2011:IV, p. 2203
<i>Thailand – Cigarettes (Philippines)</i>	Panel Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/R , adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R , DSR 2011:IV, p. 2299
<i>Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)</i>	Panel Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Second Recourse to Article 21.5 of the DSU by the Philippines</i> , WT/DS371/RW2 and Add.1, circulated to WTO Members 12 July 2019, appealed 9 September 2019

Short Title	Full Dispute Title and Citation
<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R , adopted 5 April 2001, DSR 2001:VII, p. 2701
<i>Turkey – Rice</i>	Panel Report, <i>Turkey – Measures Affecting the Importation of Rice</i> , WT/DS334/R , adopted 22 October 2007, DSR 2007:VI, p. 2151
<i>US – 1916 Act</i>	Panel Reports, <i>United States – Anti-Dumping Act of 1916</i> , WT/DS136/R and Corr.1 (EC) / WT/DS162/R and Add.1 (Japan), adopted 26 September 2000, upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, p. 4593 / DSR 2000:X, p. 4831
<i>US – Anti-Dumping and Countervailing Duties (Korea)</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Duties on Certain Products and the Use of Facts Available</i> , WT/DS539/R and Add.1, circulated to WTO Members 21 January 2021, appealed 19 March 2021
<i>US – Anti-Dumping Methodologies (China)</i>	Appellate Body Report, <i>United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China</i> , WT/DS471/AB/R and Add.1, adopted 22 May 2017, DSR 2017:III, p. 1423
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
<i>US – Carbon Steel</i>	Panel Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/R and Corr.1, adopted 19 December 2002, as modified by Appellate Body Report WT/DS213/AB/R, DSR 2002:IX, p. 3833
<i>US – Carbon Steel (India)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R , adopted 19 December 2014, DSR 2014:V, p. 1727
<i>US – Certain EC Products</i>	Panel Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/R and Add.1, adopted 10 January 2001, as modified by Appellate Body Report WT/DS165/AB/R, DSR 2001:II, p. 413
<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R , adopted 19 February 2009, DSR 2009:III, p. 1291
<i>US – COOL</i>	Panel Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/R / WT/DS386/R , adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R, DSR 2012:VI, p. 2745
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R , adopted 9 January 2004, DSR 2004:I, p. 3
<i>US – Countervailing and Anti-Dumping Measures (China)</i>	Appellate Body Report, <i>United States – Countervailing and Anti-Dumping Measures on Certain Products from China</i> , WT/DS449/AB/R and Corr.1, adopted 22 July 2014, DSR 2014:VIII, p. 3027
<i>US – Countervailing and Anti-Dumping Measures (China)</i>	Panel Report, <i>United States – Countervailing and Anti-Dumping Measures on Certain Products from China</i> , WT/DS449/R and Add.1, adopted 22 July 2014, as modified by Appellate Body Report WT/DS449/AB/R, DSR 2014:VIII, p. 3175
<i>US – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R , adopted 20 July 2005, DSR 2005:XVI, p. 8131
<i>US – Countervailing Measures (China)</i>	Appellate Body Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/AB/R , adopted 16 January 2015, DSR 2015:I, p. 7
<i>US – Countervailing Measures (China)</i>	Panel Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/R and Add.1, adopted 16 January 2015, as modified by Appellate Body Report WT/DS437/AB/R, DSR 2015:I, p. 183
<i>US – FSC (Article 21.5 – EC II)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW2 , adopted 14 March 2006, DSR 2006:XI, p. 4721
<i>US – Gasoline</i>	Panel Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/R , adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, p. 29

Short Title	Full Dispute Title and Citation
US – Hot-Rolled Steel	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R , adopted 23 August 2001, DSR 2001:X, p. 4697
US – Lead and Bismuth II	Appellate Body Report, <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , WT/DS138/AB/R , adopted 7 June 2000, DSR 2000:V, p. 2595
US – Orange Juice (Brazil)	Panel Report, <i>United States – Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil</i> , WT/DS382/R , adopted 17 June 2011, DSR 2011:VII, p. 3753
US – Poultry (China)	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R , adopted 25 October 2010, DSR 2010:V, p. 1909
US – Ripe Olives from Spain	Panel Report, <i>United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain</i> , WT/DS577/R and Add.1, adopted 20 December 2021
US – Section 110(5) Copyright Act (Article 21.3(c))	Award of the Arbitrator, <i>United States – Section 110(5) of the US Copyright Act – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS160/12 , 15 January 2001, DSR 2001:II, p. 657
US – Section 211 Appropriations Act	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R , adopted 1 February 2002, DSR 2002:II, p. 589
US – Section 211 Appropriations Act	Panel Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/R , adopted 1 February 2002, as modified by Appellate Body Report WT/DS176/AB/R, DSR 2002:II, p. 683
US – Shrimp	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R , adopted 6 November 1998, DSR 1998:VII, p. 2755
US – Shrimp II (Viet Nam)	Panel Report, <i>United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam</i> , WT/DS429/R and Add.1, adopted 22 April 2015, upheld by Appellate Body Report WT/DS429/AB/R, DSR 2015:III, p. 1341
US – Softwood Lumber VII	Panel Report, <i>United States – Countervailing Measures on Softwood Lumber from Canada</i> , WT/DS533/R and Add.1, circulated to WTO Members 24 August 2020, appealed 28 September 2020
US – Spring Assemblies	<i>United States – Imports of Certain Automotive Spring Assemblies</i> , L/5333, adopted 26 May 1983, BISD 30S/107
US – Stainless Steel (Korea)	Panel Report, <i>United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea</i> , WT/DS179/R , adopted 1 February 2001, DSR 2001:IV, p. 1295
US – Steel and Aluminium Products (China)	Panel Report, <i>United States – Certain Measures on Steel and Aluminium Products</i> , WT/DS544/R , Add.1 and Suppl.1, circulated to WTO Members 9 December 2022, appealed 26 January 2023
US – Supercalendered Paper	Appellate Body Report, <i>United States – Countervailing Measures on Supercalendered Paper from Canada</i> , WT/DS505/AB/R and Add.1, adopted 5 March 2020
US – Supercalendered Paper	Panel Report, <i>United States – Countervailing Measures on Supercalendered Paper from Canada</i> , WT/DS505/R and Add.1, adopted 5 March 2020, as upheld by Appellate Body Report WT/DS505/AB/R
US – Tuna II (Mexico)	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/R , adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, DSR 2012:IV, p. 2013
US – Upland Cotton	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R , adopted 21 March 2005, DSR 2005:I, p. 3
US – Upland Cotton	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R , Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299
US – Wool Shirts and Blouses	Panel Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/R , adopted 23 May 1997, upheld by Appellate Body Report WT/DS33/AB/R, DSR 1997:I, p. 343
US – Zeroing (EC)	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/AB/R , adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417

MOST FREQUENTLY CITED EXHIBITS REFERRED TO IN THIS REPORT¹

Exhibit	Short Title (if applicable)	Description/Long title
EU-1b	SPC, Huawei v. Conversant	Supreme People's Court, Huawei v. Conversant, Civil Ruling issuing an anti-suit injunction, 28 August 2020
EU-2b	Wuhan Intermediate People's Court, Xiaomi v. InterDigital	Wuhan Intermediate People's Court, Xiaomi v. InterDigital, Civil Ruling issuing an anti-suit injunction, 23 September 2020
EU-3b	Shenzhen Intermediate People's Court, ZTE v. Conversant	Shenzhen Intermediate People's Court, ZTE v. Conversant, Civil Ruling issuing an anti-suit injunction, 29 September 2020
EU-4b	Shenzhen Intermediate People's Court, OPPO v. Sharp	Shenzhen Intermediate People's Court, OPPO v. Sharp, Civil Ruling issuing an anti-suit injunction, 16 October 2020
EU-5b	Wuhan Intermediate People's Court, Samsung v. Ericsson	Wuhan Intermediate People's Court, Samsung v. Ericsson, Civil Ruling issuing an anti-suit injunction, 25 December 2020
EU-6b	SPC, Huawei v. Conversant, Reconsideration Decision	Supreme People's Court, Huawei v. Conversant, Reconsideration Decision, 11 September 2020
EU-7b	Wuhan Intermediate People's Court, Xiaomi v. InterDigital, reconsideration decision	Wuhan Intermediate People's Court, Xiaomi v. InterDigital, Reconsideration Decision, 4 December 2020
EU-9b	Wuhan Intermediate People's Court, Samsung v. Ericsson, reconsideration decision	Wuhan Intermediate People's Court, Samsung v. Ericsson, Reconsideration Decision, 10 March 2021
EU-10b	SPC IP Court, Top 10 IP Cases, 2020	Intellectual Property Court of the Supreme People's Court, Report: Top 10 Typical Technology-related IP Cases of the SPC in 2020, 26 April 2021, excerpts
EU-11b	SPC, Top 10 IP Cases and 50 Typical IP Cases, 2020	Supreme People's Court, Top ten intellectual property cases and 50 typical intellectual property cases in Chinese courts in 2020, 22 April 2021
EU-12b	SPC Report on Huawei v. Conversant	Supreme People's Court, Report on Conversant v Huawei, 26 February 2021
EU-14b	<i>Chinese Journal of Applied Jurisprudence</i> , "The Construction of the Extraterritorial Applicable Legal System"	H. Shen, "The Construction for the Extraterritorial Applicable Legal System of Chinese Law and the Reform of the Jurisdiction System of Foreign-related Civil and Commercial Litigation", <i>China Applied Law</i> , Issue 5, 2020
EU-15	US District Court E.D. Texas, Ericsson v. Samsung	Ericsson v Samsung, United States District Court for the Eastern District of Texas, Civil Ruling issuing an anti-anti-suit injunction, 11 January 2021
EU-43b	Civil Procedure Law 2017	Civil Procedure Law of the People's Republic of China (2017)
EU-47b	SPC Provisions	Supreme People's Court Provisions on Several Issues concerning Application of Law in Review of Cases involving Act Preservation in Intellectual Property Disputes (2018)
EU-49b	SPC Interpretation of the Civil Procedure Law	Supreme People's Court, Interpretation on the Application of the Civil Procedure Law 2022
EU-50b	Shenzhen Intermediate People's Court, Lenovo v. Nokia	Shenzhen Intermediate People's Court, Lenovo v. Nokia, Civil Ruling issuing an anti-suit injunction, 27 January 2021
EU-57b	NPC 2021 Standing Committee opinions	National People's Congress Standing Committee, Opinions and Suggestions on the Report on IP Dispute Trials of People's Courts, 18 November 2021
EU-71	UK Supreme Court, Unwired Planet v. Huawei	Unwired Planet v Huawei; Huawei and ZTE v Conversant, UK Supreme Court, judgment in case UKSC 2018/0124, 26 August 2020
EU-73b	SPC Annual Report Summary	Supreme People's Court, Summary of the Annual Report of the Supreme People's Court on Intellectual Property Cases (2020)
EU-74b	Hubei Province Higher People's Court, 10 typical cases	Hubei Province People's High Court, An Overview of the Status of the Judicial Protection of Intellectual Property and 10 Typical Cases 2020, April 2021
EU-76	SPC IP Tribunal, Judgment Digests, 2020	Intellectual Property Court of the Supreme People's Court, Judgment Digests of the Intellectual Property Court of the Supreme People's Court 2020, 26 April 2021
EU-77b	SPC, Report on the Judicial Work of the People's Courts	Supreme People's Court, Report on the Judicial Work of the People's Courts on Intellectual Property Rights, 21 October 2021

¹ The European Union and China each provided two versions of some exhibits that were originally published in Chinese: version "a" in the original language and version "b" in English. English is an official language of the WTO and the working language of the Panel. The Panel has, therefore, systematically referred to version "b" in this Report.

Exhibit	Short Title (if applicable)	Description/Long title
EU-85	SPC, Notice on Issuing the Plan of the People's Courts on the Judicial Protection of IP Rights (2021-2025)	Supreme People's Court, Five-Year Plan of the People's Courts on the Judicial Protection of Intellectual Property Rights (2021-2025), 22 July 2021
EU-90b	Guangdong Province Higher People's Court, Top 10 Cases in 2021	Guangdong Province Higher People's Court, Report: Top 10 Province-wide Court Cases in 2021, 25 February 2022, excerpt
EU-91b	Shenzhen Intermediate Peoples's Court, Judicial Protection of IP Rights, 2021 Press Conference	Shenzhen Intermediate Court, Judicial Protection of Intellectual Property Rights: innovative Cases, Press Conference, 20 April 2021
EU-92b	Guangdong Province Political and Legal Affairs Commission of the CCCPC, Top 10 IP Cases 2020	Guangdong Province Political and Legal Affairs Commission of the CCCPC, Top Ten Intellectual Property Cases Adjudicated in Guangdong Province in 2020, 22 July 2021, excerpt
EU-96b	SPC, Report on implementation	Supreme People's Court, Report on the Implementation of the Decision of the Standing Committee of the National People's Congress on Several Issues concerning Litigation Procedures in Patent and Other Intellectual Property Cases, 27 February 2022
EU-99	NPC, China's Constitution	National People's Congress, Constitution of the People's Republic of China, last amended on 11-03-2018, official English translation, available at: http://en.npc.gov.cn.cdurl.cn/constitution.html
EU-115b	SPC, Guiding Opinions on Similar Cases	Supreme People's Court, Guiding Opinions Concerning Strengthening Search for Similar Cases to Unify the Application of Law, 27 July 2020
CHN-38	Civil Procedure Law	Civil Procedure Law of the People's Republic of China (2017 Amendment), effective as of 1 July 2017
CHN-55	SPC Provisions	Supreme People's Court Provisions on Several Issues concerning Application of Law in Review of Cases involving Act Preservation in Intellectual Property Disputes, effective as of 1 January 2019
CHN-63b	Court Rulings Granting Withdrawals in ASI cases	Court Rulings Granting Withdrawal of Complaints and Mediation Statements in the Five Cases Involving ASIs
CHN-71	SPC Interpretation of the Civil Procedure Law	SPC's Interpretation on the Application of the Civil Procedure Law (2015)
CHN-84b	SPC, Bosheng v. Lianyue	Supreme People's Court, Bosheng v. Lianyue, Civil Ruling issuing an act preservation measure, 6 November 2020
CHN-92b	Wuhan Maritime Court, Huatai v. Clipper	Wuhan Maritime Court, Huatai v. Clipper, Civil Ruling issuing an anti-suit injunction, 21 July 2017
CHN-93b	Maritime Procedure Law	Special Maritime Procedure Law of the People's Republic of China

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
AASI	Anti-anti-suit injunction
ASI	Anti-suit injunction
Berne Convention (1971)	Berne Convention for the Protection of Literary and Artistic Works (1971)
CNY	Chinese yuan (renminbi)
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU	European Union
EUR	Euro
ETSI	European Telecommunications Standards Institute
FRAND	Fair, reasonable, and non-discriminatory
GATT 1994	General Agreement on Tariffs and Trade 1994
IP	Intellectual property
NPC	National People's Congress
China's Constitution	Constitution of the People's Republic of China
China's Accession Protocol	Protocol on the Accession of the People's Republic of China, to the Marrakesh Agreement Establishing the World Trade Organization, WT/L/432
Paris Convention (1967)	Paris Convention for the Protection of Industrial Property (1967)
SEP	Standard essential patent
SPC	The Supreme People's Court of the People's Republic of China
SPC IP Tribunal	Intellectual Property Tribunal of the Supreme People's Court
SSO	Standard-setting organization
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights, as amended on 6 December 2005
US District Court E.D. Texas	United States District Court for the Eastern District of Texas
Vienna Convention	Vienna Convention on the Law of Treaties
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by the European Union

1.1. On 18 February 2022, the European Union requested consultations with China pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 64.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), and Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) with respect to the measures and claims set out below.²

1.2. Consultations were held on 6, 7, and 12 April 2022.

1.2 Panel establishment and composition

1.3. On 7 December 2022, the European Union requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.³ At its meeting on 27 January 2023, the Dispute Settlement Body (DSB) established a panel pursuant to the request of the European Union in document WT/DS611/5, in accordance with Article 6 of the DSU.⁴

1.4. The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the European Union in document WT/DS611/5 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.⁵

1.5. On 28 March 2023, the parties agreed that the panel would be composed as follows:

Chairperson: Mr Adrian MACEY

Members: Mr Matthew KENNEDY
Ms Beverley PEREIRA

1.6. Australia, Brazil, Canada, Colombia, India, Indonesia, Japan, Korea, Norway, Peru, the Russian Federation, Singapore, Switzerland, Chinese Taipei, Thailand, Ukraine, the United Kingdom, the United States, and Viet Nam notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.7. After consultation with the parties, the Panel adopted its Working Procedures⁶, and timetable on 4 May 2023.⁷

1.8. The Panel held a first substantive meeting with the parties on 31 October-1 November 2023. A session with the third parties took place on 31 October 2023. The Panel held a second substantive meeting with the parties on 5-6 March 2024. On 14 May 2024, the Panel issued the draft descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 2 December 2024. The Panel issued its Final Report to the parties on 21 February 2025.⁸

² Request for consultations by the European Union, WT/DS611/1 (European Union's consultation request).

³ Request for the establishment of a panel by the European Union, WT/DS611/5 (European Union's panel request).

⁴ DSB, Minutes of the meeting held on 27 January 2023, WT/DSB/M/475, para. 4.5.

⁵ Constitution note of the Panel, WT/DS611/6.

⁶ Working Procedures of the Panel (Annex A-1).

⁷ Following discussions with the parties, the Panel gave the complainant 6 weeks from the date of the organizational meeting (25 April 2023) to submit its first written submission and the respondent 10 weeks. Subsequent deadlines were impacted by this as well as by the parties' and Panel's availability.

⁸ On 2 November 2023 and 11 December 2024, the Panel sent communications to the DSB in accordance with Article 12.9 of the DSU estimating the date of issuance of the Final Report.

1.4 Agreed procedures for arbitration under Article 25 of the DSU

1.9. On 4 July 2023, China and the European Union notified to the DSB their mutual agreement, "pursuant to Article 25.2 of the [DSU] to enter into arbitration under Article 25 of the DSU to decide any appeal from any final panel report as issued to the parties" in this dispute.⁹ In its Working Procedures for these proceedings, the Panel took "note of any Agreed Procedures for Arbitration under Article 25 of the DSU that the parties may notify in this dispute".

2 FACTUAL ASPECTS

2.1. The European Union's claims relate to measures taken by China in the context of litigation relating to the determination of a fair, reasonable and non-discriminatory (FRAND) rate for standard essential patents (SEPs). Below the Panel sets out a description of SEPs, the requirements for their licensing, the use of anti-suit injunctions (ASIs) in parallel litigation, and relevant aspects of China's legal system.

2.2. The Panel then sets out the measures that the European Union identifies in its request for establishment of a panel, namely, (a) a policy, which in the context of judicial procedures concerning the enforcement of intellectual property (IP) rights, empowers Chinese courts to prohibit patent holders from asserting their rights protected by the TRIPS Agreement in other jurisdictions¹⁰; and (b) five specific instances of application by Chinese courts of ASIs in cases concerning SEPs in China prohibiting a party from applying for enforcement of judgments of a non-Chinese court in the territories of other Members or from seeking judicial relief outside the jurisdiction of Chinese courts. The Panel also sets out descriptions of other litigation that occurred in China that is relevant for an understanding of the legal procedures relating to the issuance of ASIs in China.

2.3. Finally, the Panel presents information with respect to the European Union's claims that China acted inconsistently with the transparency obligations in Article 63 of the TRIPS Agreement by failing to publish final judicial decisions of general application pertaining to the subject matter of the TRIPS Agreement and failing to supply information requested by the European Union.

2.1 Standard essential patents (SEPs)

2.4. 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.¹¹ These standards are used in many disciplines and sectors: they are prevalent in the information and communications technology sector and are becoming more relevant for emerging technologies. They facilitate the interoperability of goods manufactured in these sectors, enabling systems and components to communicate with each other even if produced by different manufacturers.

2.5. Particularly relevant to this case, are technical standards in the telecommunications area for features such as 3G, 4G, and 5G technology, Bluetooth, wireless connectivity, and navigation systems implemented in mobile phones manufactured by different producers.¹² A single product may involve the implementation of multiple standards.

2.6. Standard-setting organizations (SSOs) work with input from industry and technical experts to develop and maintain standards. Examples of SSOs include the International Telecommunication Union, the European Telecommunications Standards Institute (ETSI), and the International Organization for Standardization. A technical standard may require the use of numerous technologies, some of which may be patented. Patents are IP rights that protect technical inventions and prevent third parties from commercially using an invention without authorization. As patents are granted on a territorial basis, patent applicants must apply to different patent offices in each

⁹ Agreed Procedures for Arbitration under Article 25 of the DSU, WT/DS611/7.

¹⁰ The European Union's panel request also describes the ASI 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 outside the jurisdiction of Chinese courts. (European Union's panel request, p. 7).

¹¹ UK IPO, *Standard Essential Patents and Innovation: Call for Views* (Exhibit GBR-2), p. 4.

¹² Communication from the Commission: Setting out the EU approach to Standard Essential Patents, Brussels (Exhibit EU-18).

territory in which the applicant wishes to have protection.¹³ Each patent granted is independent of the patent rights granted in relation to the same invention in another Member's territory.¹⁴ An entity may, therefore, seek and receive patents for the same product or process in multiple territories including those where a product using the subject of the patent may be produced and others where it may be sold.

2.7. A patent that protects a product or process that is essential to implementing a standard is known as a standard essential patent, or a SEP. One standard can consist of thousands of technical contributions protected by patents owned by dozens or even hundreds of SEP holders. Use of the subject matter of a patented product or process requires the permission of the patent owner who may grant licences, usually entailing payment of royalties. If a particular standard requires the use of a patent-protected product or process (i.e. a SEP), a producer implementing that particular standard will need to obtain a licence to use one or more patent-protected technologies or risk infringing upon patent owners' rights and the attendant legal consequences of doing so.¹⁵

2.8. The inclusion of a patent in a standard can provide the SEP holder with significant market power over the implementer of the standard and there is the potential, therefore, for the SEP holder to abuse that power by demanding high royalties from producers implementing the standard.¹⁶ For this reason, pursuant to the conditions set out by the SSO, the SEP holder typically commits to provide an irrevocable undertaking or a licensing declaration to the relevant SSO that it will license or allow access to the subject matter of the patent-protected product or process to implementers of the standard on FRAND terms. This is known as a "FRAND undertaking".

2.2 Fair, reasonable and non-discriminatory (FRAND) licensing

2.9. When a SEP holder licenses its SEP on FRAND terms, the SEP holder receives fair and reasonable remuneration for use of the subject matter of its patent and the standard implementer is able to use the subject matter of the patent without paying excessive royalties.¹⁷ What terms qualify as FRAND can be different for each patent and market. Given the global nature of supply chains, SEP holders and implementers often enter into global licences for SEPs, but there is no supranational or international body empowered to determine what is FRAND.¹⁸ It is therefore for the parties to agree terms that they consider fair and reasonable, including the licence fees or royalty rates. It is not uncommon, however, that parties do not reach an agreement. In such a situation, where a party has already been practising a patented invention in the implementation of a standard to produce and sell merchandise, the patent owner may bring infringement proceedings in a jurisdiction where the product or process is patented. In some jurisdictions parties may also be able to bring litigation to determine the terms of the licence.¹⁹ The result is that claims could be brought simultaneously in multiple jurisdictions by the same parties relating to the production and sale of the same products.²⁰ As the litigation landscape has developed in recent years, courts have used certain tools to manage the possible effects of conflicting judgments in different jurisdictions over related sets of judicial proceedings. Of particular relevance to this dispute is the ability of parties to request national courts to grant ASIs prohibiting the other party from taking certain legal actions in other jurisdictions.

2.3 Anti-suit injunctions (ASIs)

2.10. As noted above, claims related to the validity or infringement of the subject matter of a patent must be brought before the national courts of the territory that has granted the patent right. The same is not true, however, for contractual claims relating to licence fees. Courts in some jurisdictions will consider contractual claims concerning worldwide licences.²¹ Where an implementer uses the

¹³ European Union's first written submission, para. 149; China's first written submission, para. 20.

¹⁴ European Union's first written submission, para. 152; China's first written submission, para. 20.

¹⁵ European Union's first written submission, section 4.1.1.

¹⁶ China's first written submission, para. 21. See also United Kingdom's third-party submission, paras. 5-6.

¹⁷ China's first written submission, para. 22.

¹⁸ China's first written submission, para. 23; European Union's first written submission, para. 154; United Kingdom's third-party submission, para. 10.

¹⁹ European Union's first written submission, paras. 155 and 162; China's first written submission, paras. 21-23.

²⁰ UK Supreme Court, *Unwired Planet v. Huawei* (Exhibit EU-71), para. 2.

²¹ European Union's first written submission, para. 175 and fn 151.

subject matter of a SEP prior to the conclusion of a licence agreement, the SEP holder may seek a declaration of infringement of its patent or injunctions against implementers that do not agree to their licence terms in a particular jurisdiction. An implementer could raise the failure to comply with FRAND terms as a defence in such proceedings or might sue the SEP holder in another jurisdiction for abuse of dominant position or breach of its obligation to license its SEP on FRAND terms. In such circumstances the implementer may ask the national court to determine the FRAND terms of the licence.²² This type of litigation, therefore, can go beyond the protection of the IP right and extend to issues of contract law and competition law. As will be discussed below, the European Union's claims concern litigation where implementers asked courts in the territory of production of goods using SEPs (i.e. China) to set the FRAND licensing rate for SEPs, while in parallel litigation in other territories where SEP holders also held patent rights for the same or similar technologies, the SEP holders sought injunctions to prevent the importation or use of the products in those territories.²³

2.11. An ASI is a means whereby a court can resolve issues of simultaneous litigation in different jurisdictions. Under Chinese civil procedure law an ASI is an act preservation measure, which is a type of provisional injunction.²⁴ An ASI in the context of SEP litigation is an *in personam* court order whereby a litigant is ordered to take or refrain from certain action with respect to litigation in other jurisdictions. This could include a prohibition on initiating or continuing proceedings in foreign jurisdictions regarding disputes involving the same patent families and the same or related counterparties.²⁵ The use of ASIs to prevent parallel litigation has also led to the evolution of retaliatory or anticipatory measures known as anti-anti-suit injunctions (AASIs) to prevent a respondent from seeking or enforcing ASIs that could be seen to interfere with a court's jurisdiction.

2.12. The first use of ASIs by courts to prevent litigants from commencing or continuing a proceeding in another jurisdiction can be found in fifteenth century England. By the nineteenth century, the use of such injunctions had spread to Scottish and Irish courts as well as courts in the British colonies, and even courts elsewhere. In the United States, ASIs were used to prevent parallel litigation among different courts in different states. By the close of the nineteenth century, US courts were using ASIs to apply to actions initiated in foreign jurisdictions.²⁶

2.13. The first ASI involving a SEP and FRAND terms was issued by a court in the United States in 2012.²⁷ Since then, courts in the United States as well as in other jurisdictions including India and the United Kingdom have all made use of ASIs, AASIs, or both in SEP litigation. Courts in the European Union, notably Germany, have made use of AASIs as a way to manage parallel proceedings arising from disputes that occur because of the territorial nature of patents and the global nature of the standards that may incorporate SEPs.

2.14. In the first case involving an ASI issued in the context of SEPs, *Microsoft Corp. v. Motorola, Inc.* in 2012, Microsoft alleged that Motorola breached its commitment to grant licences on FRAND terms for the use of SEPs relating to two industry standards. Six months after the suit was filed, Motorola sued Microsoft in a German court, alleging that Microsoft had infringed two of its German patents that were also essential to the same standard, and seeking an injunction prohibiting Microsoft from selling allegedly infringing products in Germany. While the German court's decision was pending, Microsoft sought and was granted an ASI in the US district court to prevent Motorola from enforcing any injunction that the German court might award.²⁸ Following an appeal in which

²² China's first written submission, paras. 23-24; see also European Union's first written submission, para. 175.

²³ European Union's first written submission, paras. 174-176.

²⁴ China's first written submission, fn. 41.

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

²⁶ J.L. Contreras and M.A. Eixenberger, "The Anti-Suit Injunction – A Transnational Remedy for Multi-Jurisdictional SEP Litigation", in Jorge L. Contreras, (ed.), *Cambridge Handbook of Technical Standardization Law – Antitrust, Competition and Patent Law* (Cambridge Univ. Press, 2017) (Exhibit CHN-2), p. 2.

²⁷ US District Court, W.D. Washington, *Microsoft Corp. v. Motorola, Inc.*, 871 F. Supp. 2d (Exhibit CHN-3).

²⁸ US District Court, W.D. Washington, *Microsoft Corp. v. Motorola, Inc.*, 871 F. Supp. 2d (Exhibit CHN-3).

the grant of the ASI was upheld, the district court subsequently determined a global FRAND licensing rate (with Motorola's consent) for Motorola's global portfolio of patents.²⁹

2.15. Courts in the European Union have also made use of AASIs. In July 2019 a German court issued an AASI preventing the enforcement of an ASI issued by a US court that had prohibited Nokia from pursuing claims against Daimler in Germany or elsewhere. The German court found that the US ASI was incompatible with German law.³⁰

2.16. A United Kingdom Supreme Court (UK Supreme Court) decision issued on 26 August 2020 in *Unwired Planet International Ltd v. Huawei* has been referenced by the parties in this dispute. This dispute concerned the ability of English courts to set global FRAND rates without the consent of both parties. The appellants were Huawei and ZTE and the respondents were Unwired Planet and Conversant. Huawei and ZTE are both Chinese telecommunications companies, and Unwired Planet is an Irish company whose business is licensing patents it has acquired to companies that make and sell telecommunications equipment. Conversant is a multinational company registered in Luxemburg. The UK Supreme Court held that in the absence of a forum selection clause or agreed-upon jurisdiction, English courts had jurisdiction to grant an injunction, unless a global licence on FRAND terms for a multinational SEP portfolio was entered into, and to determine royalty rates and other disputed terms of such a global licence, and rejected the appellants' argument that China was the more appropriate forum for the cases.³¹ The decision in this case set a precedent for the UK courts' jurisdiction to set global FRAND rates for a licence that an implementer would need to accept to avoid being subject to an injunction.

2.17. The UK Supreme Court justified the determination of global licensing rates by national courts on the grounds that SSO policies "either expressly or by implication provide for the possibility of FRAND worldwide licences when a SEP holder has a sufficiently large and geographically diverse portfolio and the implementer is active globally", but "do not provide for any international tribunal or forum to determine the terms of such licences."³² In the court's view "[a]bsent such a tribunal it falls to national courts, before which the infringement of a national patent is asserted, to determine the terms of a FRAND licence."³³

2.18. On 28 August 2020 the Supreme People's Court of China (SPC) issued an ASI in the case *Huawei v. Conversant*, which was before it on appeal from the Nanjing Intermediate People's Court. Subsequently the Shenzhen and Wuhan Intermediate People's Courts issued ASIs in four other cases (*Xiaomi v. InterDigital*, *OPPO v. Sharp*, *ZTE v. Conversant*, and *Samsung v. Ericsson*)³⁴ and the Shenzhen Intermediate People's Court denied a request for an ASI in *Lenovo v. Nokia*.³⁵ The European Union identified the five ASI decisions as measures that it is challenging in this dispute. The European Union also identified an alleged unwritten ASI policy in SEP litigation as one of the challenged measures. These will be discussed in more detail below.

2.4 Relevant aspects of China's legal system

2.19. The European Union raises claims with respect to the Chinese courts' application of various procedural measures as part of an unwritten policy regarding the issuance of ASIs in litigation involving SEPs used in manufacturing in China. An explanation of the structure of China's legal system is given below to provide a context for the assessment of these claims.

²⁹ US District Court, W.D. Washington, *Microsoft Corp. v. Motorola, Inc.*, No. C10-1823JLR, 2013 (Exhibit CHN-5).

³⁰ Munich Regional Court (Exhibit CHN-11). The lower court's decision was affirmed on appeal by the Munich Higher Regional Court.

³¹ UK Supreme Court, *Unwired Planet v. Huawei* (Exhibit EU-71), paras. 1, 61, and 90.

³² UK Supreme Court, *Unwired Planet v. Huawei* (Exhibit EU-71), para. 90. However, the court did not provide guidance on determining which national court would be the most appropriate forum for setting a global FRAND licence.

³³ UK Supreme Court, *Unwired Planet v. Huawei* (Exhibit EU-71), para. 90.

³⁴ SPC, *Huawei v. Conversant* (Exhibit EU-1b); Wuhan Intermediate People's Court, *Xiaomi v. InterDigital* (Exhibit EU-2b); Shenzhen Intermediate People's Court, *ZTE v. Conversant* (Exhibit EU-3b); Shenzhen Intermediate People's Court, *OPPO v. Sharp* (Exhibit EU-4b); Wuhan Intermediate People's Court, *Samsung v. Ericsson* (Exhibit EU-5b).

³⁵ Shenzhen Intermediate People's Court, *Lenovo v. Nokia* (Exhibit EU-50b).

2.20. Under China's Constitution, the National People's Congress (NPC) is the highest state organ with the NPC Standing Committee as the NPC's permanent body. The NPC and its Standing Committee exercise the legislative power of the state.³⁶ The NPC Standing Committee can interpret laws by adopting interpretations through the procedures set out in China's Legislation Law. These interpretations have the force of law.³⁷

2.21. The SPC is China's highest judicial organ.³⁸ The SPC may also issue judicial interpretations on the judiciary's specific application of laws and it may publish guiding cases. When adopted and issued by the SPC, judicial interpretations have legal effect, and may serve as the legal basis for judgments and rulings rendered by the people's courts.³⁹ Guiding cases can only be selected and published by the SPC. They provide principles that are expected to be referenced and followed in the adjudication of similar cases by courts of all levels.⁴⁰ In addition to guiding cases, the SPC and lower Chinese courts publish compendia of what they term "typical" or "big" cases detailing significant or major cases, including in the field of IP law. The parties dispute the role that these cases play in China's legal system and the value that other courts attach to them. This will be discussed further in section 7 of this Report.

2.22. Other adjudicatory bodies are the people's courts at various levels, and specialized people's courts (such as IP courts). The local people's courts include, in various provinces, autonomous regions and municipalities directly under the State Council, higher people's courts, intermediate people's courts and primary people's courts. Article 131 of China's Constitution states that "the people's courts shall, in accordance with the provisions of law independently exercise adjudicatory power and shall not be subject to interference from any administrative organ, social organization or individual".⁴¹

2.23. The NPC has a supervisory role over China's court system. Article 3 of China's Constitution provides that the people's courts, as adjudicatory organs of China, are supervised by the people's congresses and their standing committees, while Article 133 specifies that the SPC "shall be responsible to" the NPC and its Standing Committee.⁴² Specifically, the people's courts submit reports on their work to the corresponding people's congresses and their standing committees.⁴³ The people's congresses elect the presidents of the people's courts at the corresponding level, and the deputy presidents and certain other positions are appointed by the standing committees at the request of the elected president. Standing committees of the respective people's congresses can remove the courts' deputy or vice presidents, members of the adjudicative committees, and heads and deputy heads of the courts' divisions or tribunals.⁴⁴

2.24. Litigants may challenge the judgments and rulings of the lower courts as they relate to findings of fact or the application of the law. The Civil Procedure Law provides for trial supervision procedures either through re-trial by the original people's court or for direct review by a higher court when a judgment or ruling has been found to be erroneous. China is not a common law country and the fact that a judgment or ruling is concluded differently from prior similar cases is not a legal basis for appealing a judgment or ruling.⁴⁵ Figure 1 below shows the organizational structure of China's civil courts:

³⁶ China's first written submission, para. 83.

³⁷ China's first written submission, para. 84.

³⁸ European Union's first written submission, para. 181; China's first written submission, para. 85.

³⁹ China's first written submission, para. 85.

⁴⁰ China's first written submission, para. 96.

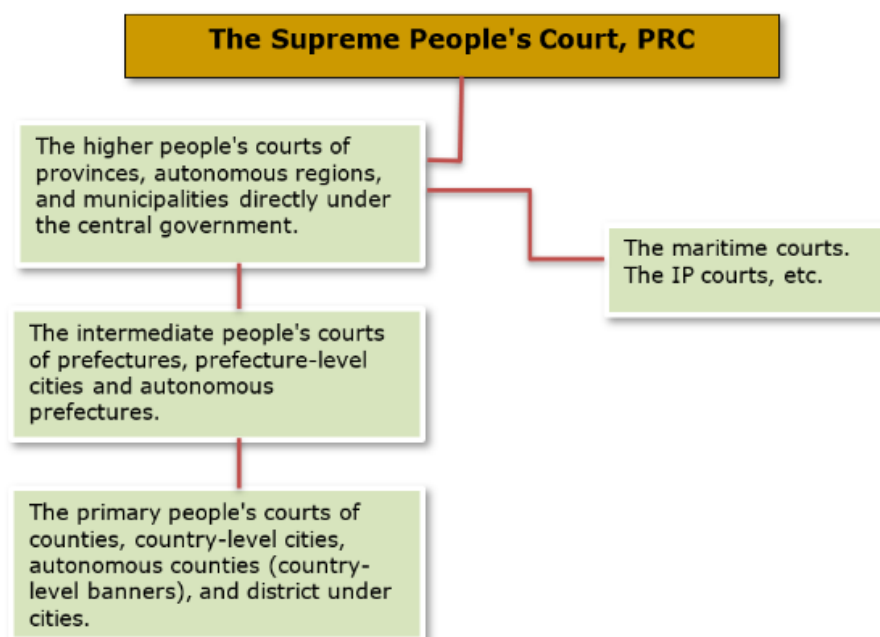
⁴¹ China's first written submission, paras. 86-87.

⁴² NPC, China's Constitution (Exhibit EU-99).

⁴³ China's first written submission, para. 91.

⁴⁴ European Union's first written submission, para. 198; see also para. 91 of China's first written submission.

⁴⁵ China's first written submission, paras. 89-90 and 93.

Figure 1: Organizational chart of the Chinese civil court system

Source: Based on China's first written submission, para. 86.

2.25. Chinese courts are also governed by statutory provisions relating to their authority and guidance from the SPC in published provisions and interpretations. Of relevance to this dispute are (a) the Patent Law of 2000⁴⁶; (b) the Civil Procedure Law⁴⁷; (c) SPC Provisions⁴⁸; and (d) SPC Interpretation of the Civil Procedure Law (2015).⁴⁹

2.26. The Civil Procedure Law has been amended five times since it was adopted. The current version came into effect in 2024.⁵⁰ The provisions relevant to the imposition of ASIs in the Civil Procedure Law in effect at the time the ASIs were issued, Articles 100 and 101, were renumbered as Articles 103 and 104, respectively, in subsequent versions of the law. The texts of the provisions, however, have not changed. To avoid confusion, in this Report, the Panel will refer to these

⁴⁶ Patent Law of the People's Republic of China 2000 (Exhibit EU-65b). In 2000 the NPC amended the pre-existing patent law to add Article 61 (now Article 72), which allowed for the adoption of provisional measures in IP disputes in line with the standards required by the TRIPS Agreement. See WTO documents IP/N/1/CHN/1 and IP/N/1/CHN/I/1.

⁴⁷ Civil Procedure Law 2017 (Exhibit CHN-38). On 30 August 2023, in a communication to the parties, the Panel noted that both parties had submitted their own translations of the Civil Procedure Law 2017 (Exhibits EU-43b and CHN-38). In a communication of 14 September 2023, the European Union confirmed that it had no objection to using China's translation. However, Exhibit CHN-38 does not contain all the provisions of the Civil Procedure Law 2017 that the Panel refers to in this Report. Accordingly, the Panel has referred to Exhibit CHN-38 where translations are available of the relevant provisions and to Exhibit EU-43b if no translation of the provision is available in China's version.

⁴⁸ SPC Provisions (Exhibit CHN-55). On 30 August 2023, in a communication to the parties, the Panel noted that both parties had submitted their own translations of the SPC Provisions (Exhibits EU-47b (revised) and CHN-55). In a communication of 14 September 2023, the European Union confirmed that it had no objection to using China's translation. However, Exhibit CHN-55 does not contain all the provisions that the Panel refers to in this Report. Accordingly, the Panel has referred to Exhibit CHN-55 where translations are available of the relevant provisions and to Exhibit EU-47b (revised) if no translation of the provision is available in China's version.

⁴⁹ SPC Interpretation of the Civil Procedure Law (Exhibit EU-49b). The Panel notes that the European Union submits the 2022 version of this legal instrument even though the 2015 version was in effect when the rulings in the five ASIs were made. As this provision did not change in numbering or content from the 2015 through the 2022 versions and China did not object to the translation, the Panel will rely on this exhibit with respect to the content of this provision. (See parties' responses to Panel question No. 1(b). See also para. 6.2 below.)

⁵⁰ See China's response to Panel question No. 1.

provisions as Articles 100 (now 103) and 101 (now 104). The Panel follows the same approach with respect to other provisions of the Civil Procedure Law whose numbering has changed.

2.27. Article 100 (now 103) concerns mid-trial act preservation measures (including ASIs):

In a case where, due to the act of one party or for other reasons, the execution of the judgment may become difficult or other damage may be caused to the other party concerned, the people's court may, at the application of such other party, make an order to preserve the assets of the party or order the party to perform certain acts or to prohibit the party from committing certain acts; where no application is filed by either party, the people's court may also order to take preservation measures when it deems necessary.

A people's court may order the applicant to provide security for taking a preservative measure and, if the applicant fails to provide security, shall issue a ruling to dismiss the application.

After accepting an application, a people's court must, if the circumstances are urgent, issue a ruling within 48 hours; and if it rules to take a preservative measure, the measure shall be executed immediately.

2.28. Article 101 (now 104) provides for pre-trial act preservation measures (including ASIs):

Any interested party whose legitimate rights and interests would, due to urgent circumstances, suffer irreparable damage without immediate application for preservation, may, before filing a lawsuit or applying for arbitration, apply to the people's court in the place where the asset to be preserved is located, the people's court at the domicile of the respondent or the people's court which has jurisdiction over the case for the adoption of preservation measures. The applicant shall provide security; if no security is provided, the application shall be rejected.

The people's court shall make a ruling within 48 hours after accepting the application; if it rules to take a preservative measure, the measure shall be executed immediately.

Where the applicant fails to institute legal proceedings or apply for arbitration in accordance with the law within 30 days after the people's court takes preservation measures, the people's court shall rescind the said measures.

2.29. In 2018, the SPC adopted the SPC Provisions. This is a binding judicial interpretation providing additional guidance on the application of Articles 100 (now 103) and 101 (now 104) in IP cases.

2.30. Article 7 of the SPC Provisions provides that:

When examining an application for act preservation, a people's court shall comprehensively consider the following factors:

1. Whether or not the applicant's request has factual and legal basis, including whether or not the validity of the intellectual property right of which protection is requested is stable;
2. Whether or not the failure to take the act preservation measure will cause irreparable harm to the lawful rights and interests of the applicant, make the judgement or ruling of the case difficult to enforce or result in any other harm;
3. Whether or not the harm caused to the applicant by failure to take the act preservation measure will exceed the harm caused to the respondent by taking the act preservation measure;
4. Whether or not the taking of the act preservation measure will harm social and public interests; and

5. Other factors that need to be considered.

2.31. Articles 11 and 12 of the SPC Provisions relate to the security to be provided in the case of act preservation measures (including ASIs):

Article 11 Where an applicant applies for act preservation, the applicant shall provide a security in accordance with the law.

The amount of security provided by the applicant shall be equivalent to the loss that the respondent may incur due to enforcement of the act preservation measures, including reasonable losses such as sales proceeds and custody expenses of the products involved in the order to stop the infringement.

Where, during the execution of act preservation measures, the respondent may suffer losses exceeding the amount of the applicant's security, the people's court may order the applicant to provide additional security in the corresponding amount. If the applicant refuses to provide such additional security, the people's court may rule to terminate or partially terminate the preservation measures.

Article 12 The act preservation measures taken by a people's court shall generally not be terminated by the security provided by the respondent, except where the applicant agrees to the termination.

2.32. Article 13 of the SPC Provisions provides that courts should apply a reasonable time-limit as regards the duration of the act preservation measures (including ASIs). It states that in determining the reasonable period of time, the court should take into account the applicant's request and the circumstances of the case, but, in general, act preservation measures should be maintained until the judgment or ruling takes effect. An applicant can request renewal of the ASI measures within seven days upon expiration of the time-limit.

2.33. After the court issues a ruling on an ASI application, either party can apply for reconsideration of the ruling within five days according to Article 108 (now 111) of the Civil Procedure Law:

Article 108 (now 111)

If the party concerned is dissatisfied with the ruling made on preservation or advance execution, he may apply for reconsideration which could be granted only once. Execution of the ruling shall not be suspended during the time of reconsideration.⁵¹

2.34. Chapter 10 of the Civil Procedure Law titled "Compulsory Measures Against Obstruction of Civil Proceedings", includes Articles 111(6) (now 114) and 115 (now 118):

Article 111 (now 114)

Where a litigation participant or any other person commits any of the following conduct, the people's court may impose a fine or detention on the litigation participant or person according to the severity of the circumstances; and if any crime is constituted, the litigation participant or person shall be subject to criminal liability in accordance with law:

...

(6) Refusing to implement any effective judgment or ruling of a people's court.

Where an entity commits any of the conduct in the preceding paragraph, the people's court may impose a fine or detention on the primary person in charge or directly liable persons of the entity; and if any crime is committed, the criminal liability shall be prosecuted in accordance with law.

⁵¹ Civil Procedure Law 2017 (Exhibit EU-43b).

Article 115 (now 118)

The amount of a fine on an individual shall be no more than RMB 100,000. The amount of a fine on an entity shall be no less than RMB 50,000 and no more than RMB 1,000,000.

The period of detention shall not be longer than 15 days.

A people's court shall deliver a detainee to a public security authority for custody. If the detainee admits and corrects his or her wrongdoing during the period of detention, the people's court may decide to discharge the detainee earlier.⁵²

2.35. Article 184 of the SPC Interpretation of the Civil Procedure Law provides:

The measure of fines or detention taken against the same act that obstructs civil litigation proceedings shall not be applied continuously. Where a new act obstructing civil litigation proceedings occurs, the competent people's court may impose a new fine or take the measure of detention again.⁵³

2.5 Alleged unwritten ASI policy in SEP litigation (ASI policy)

2.36. According to the European Union's panel request, China has introduced, maintains, and applies an unwritten measure⁵⁴, a policy that allegedly, in the context of judicial procedures concerning the licensing of IP rights, adversely affects the protection and enforcement of IP rights.⁵⁵

2.37. Specifically, the European Union claims that the policy empowers Chinese courts to prohibit patent holders from asserting their rights protected by the TRIPS Agreement in other jurisdictions. This prohibition takes form through the issuance by Chinese courts of provisional measures (ASIs) 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. According to the European Union, such penalties can be, and have been, set at the maximum level allowed for under Chinese Civil Procedure Law and they accumulate daily.

2.38. According to the European Union, this policy was first introduced by means of a decision by the SPC dated 28 August 2020 in *Huawei v. Conversant* and has been further elaborated by Chinese courts in at least four other cases where ASIs were issued. In addition, the European Union's panel request claims that the SPC has further elaborated and promoted the policy in several official and public documents issued in 2021 and 2022. According to the European Union, the NPC Standing Committee has endorsed the policy as applied in 2021 and 2022. The European Union submits that according to official statements issued in 2021 and 2022, the policy will continue to be applied in the future.

2.39. The Panel has categorized the multiple instruments and actions through which the European Union claims that China imposes and administers the alleged ASI policy, operating separately or collectively.

⁵² Civil Procedure Law 2017 (Exhibit CHN-38).

⁵³ SPC Interpretation of the Civil Procedure Law (Exhibit EU-49b).

⁵⁴ The European Union characterizes this measure as one of general and prospective application or, in the alternative, as ongoing conduct. European Union's panel request, p. 7.

⁵⁵ European Union's panel request, p. 7.

Table 1: Instruments and actions through which the European Union claims China imposes and administers the alleged ASI policy, operating separately or collectively

Category	Instruments or actions
Legal instruments	Civil Procedure Law, in particular Articles 100 (now 103), 101 (now 104), and 115 (now 118) of China's Civil Procedure Law 2017 (now 2022). SPC Interpretation of the Civil Procedure Law. SPC Provisions on Several Issues Concerning the Application of Law in the Review of Act Preservation in Intellectual Property Disputes.
Decisions of the Supreme People's Court issuing ASIs ⁵⁶	SPC ruling of 28 August 2020, in the cases between Huawei Technology Co. Ltd and Conversant Wireless Licensing, putting in place an ASI. SPC ruling of 11 September 2020, in the cases between Huawei Technology Co. LTD and Conversant Wireless Licensing reviewing and maintaining the Decision of 28 August 2020 to put in place an ASI.
Decisions of Wuhan Intermediate People's Court	Wuhan Intermediate People's Court ruling of 23 September 2020, in the case between Xiaomi and InterDigital putting in place an ASI. Wuhan Intermediate People's Court Civil ruling of 4 December 2020, in the case between Xiaomi and InterDigital reviewing and maintaining the Decision of 23 September 2020 to put in place an ASI. Wuhan Intermediate People's Court ruling of 25 December 2020, in case between Samsung and Ericsson putting in place an ASI. Wuhan Intermediate People's Court ruling of 10 March 2021, in the case between Samsung and Ericsson, reviewing and maintaining the Decision of 25 December 2020 to put in place an ASI.
Decisions of Shenzhen Intermediate People's Court	Shenzhen Intermediate People's Court ruling of 29 September 2020, in the case between ZTE and Conversant putting in place an ASI. Shenzhen Intermediate People's Court ruling of 16 October 2020, in case between OPPO and Sharp putting in place an ASI.
Designation as typical or big case	Summary of the Annual Report of the Supreme People's Court on Intellectual Property Cases (2020). Intellectual Property Court of the Supreme People's Court Report 10 typical cases of technical intellectual property in 2020. SPC, Top ten intellectual property cases and 50 "typical" intellectual property cases in Chinese courts in 2020. Adjudication guidelines as contained in the Judgment Digests of the Intellectual Property Court of the SPC (2020). Guangdong Province Higher People's Court, Top ten Intellectual Property Trial Cases in Guangdong Province in 2020. Guangdong Province China Communist Party Political and Legal Committee notice of 22 April 2021, on Guangdong Province Higher People's Court publication of Top ten intellectual property cases in Guangdong Province in 2020. Hubei Province Higher People's Court Work Report on 2021: Interpretation of Typical Cases II, published 22 January 2022.
Reports to and from the NPC Standing Committee (including Standing Committee suggestions on SPC reports)	SPC Report on People's Courts' IP trial work of 21 October 2021 at the 31st meeting of the Standing Committee of the Thirteenth National People's Congress. Standing Committee of the National People's Congress Opinions and Suggestions on the SPC "Report on People's Courts' IP trial work" of 21 October 2021, published on 18 November 2021. Standing Committee 2022 Work Report to National People's Congress. Standing Committee of the National People's Congress Opinions and Suggestions on the SPC Report Implementation Report of the Decision of the Standing Committee of the National People's Congress on Several Issues Concerning Litigation Procedures in Patent and Other Intellectual Property Cases of 27 February 2022.

2.40. The European Union's panel request also "covers other court decisions with a similar content based on these documents or any other related measures, and includes any annexes or schedules

⁵⁶ The Panel notes that although the European Union referenced the SPC rulings of 19 August 2021 in *OPPO v. Sharp* and 7 September 2022 in *OPPO v. Nokia* in its panel request, it did not pursue claims against either of these rulings in its submissions. In response to a question from the Panel, the European Union explained that these jurisdictional rulings provide "context to show that Chinese courts can and have continued to accept jurisdiction over disputes concerning the determination of terms of global SEP licences." According to the European Union, it is this jurisdiction that Chinese courts are seeking to protect when they issued the worldwide ASIs when requested by the implementers. See the European Union's response to Panel question No. 90.

to these measures and amendments, supplements, replacements, renewals, extensions or implementing measures".⁵⁷

2.6 Five ASIs issued by the Chinese courts

2.41. The European Union also challenges each of the court decisions issuing ASIs in the following five disputes: Huawei v. Conversant, Xiaomi v. InterDigital, ZTE v. Conversant, OPPO v. Sharp, and Samsung v. Ericsson. These challenges are made separately from the European Union's characterization of these decisions as evidence demonstrating the existence of the ASI policy, either as an unwritten measure of general and prospective application, or in the alternative, as ongoing conduct.

2.42. The following sets out a description relating to the five ASIs referenced by the European Union in its panel request.

2.6.1 Huawei v. Conversant

2.6.1.1 Litigation proceedings

2.43. Huawei – a major Chinese manufacturer of smartphones – brought three separate cases on 25 January 2018 before the Nanjing Intermediate People's Court seeking confirmation that it had not infringed Conversant patents in three instances for 2G, 3G, 4G standards or technical specifications and a determination of the FRAND terms for the licensing of any such valid Chinese patents.⁵⁸ Conversant is a multinational company registered in Luxembourg.

2.44. Conversant subsequently filed a case on 20 April 2018 before the Düsseldorf District Court in Germany, alleging that Huawei had infringed several of its European patents. Conversant also requested an injunction against the sale, use, or importation by Huawei into Germany of devices made using Conversant's patents that formed part of the same patent family.⁵⁹

2.45. On 16 September 2019, the Nanjing Intermediate People's Court determined the FRAND licensing rate for the patents, owned by Conversant and the royalty rates to be paid by Huawei. Conversant appealed this decision to the SPC, which accepted the three cases on 18 November 2019.⁶⁰

2.46. On 27 August 2020, the Düsseldorf District Court found that Huawei had infringed one of Conversant's patents and issued an injunction to prohibit Huawei from selling, using, importing or holding certain mobile terminal products in Germany. The judgment found that Conversant's offer of SEP licence rates to Huawei did not violate the FRAND principle.⁶¹

2.47. The same day Huawei applied to the SPC seeking an ASI ruling pursuant to Article 100 (now 103) of the Civil Procedure Law to prohibit Conversant from enforcing the Düsseldorf District Court's injunction until the conclusion of the Chinese proceedings.⁶²

2.6.1.2 Decision and reasoning given by the SPC

2.48. On 28 August 2020, the SPC issued its decision granting the ASI pursuant to Article 100 (now 103), Article 102 (now 105), Article 111(1)(6) (now 114(1)(6)), and Article 115(1) (now 118(1)) of the Civil Procedure Law.

2.49. The SPC considered Huawei's request for an ASI based on five factors: (a) the impact on Chinese courts of the application for the enforcement of judgments of extraterritorial courts; (b) the necessity of the measure; (c) the balance of interests, i.e. whether the damage to the applicant caused by failing to grant an ASI would exceed the damage caused by the ASI to the respondent;

⁵⁷ European Union's panel request, p. 10.

⁵⁸ SPC, Huawei v. Conversant (Exhibit EU-1b).

⁵⁹ SPC, Huawei v. Conversant (Exhibit EU-1b), pp. 3 and 5.

⁶⁰ SPC, Huawei v. Conversant (Exhibit EU-1b), p. 4.

⁶¹ SPC, Huawei v. Conversant (Exhibit EU-1b), pp 5-6.

⁶² SPC, Huawei v. Conversant (Exhibit EU-1b), p.2.

(d) the effect of the ASI on the public interest; and (e) whether the ASI would accord with the principle of international comity.

2.50. Concerning the first factor, the SPC found that the litigants in the Chinese and German proceedings were basically the same, and the two cases overlapped to some degree. The SPC then held that allowing Conversant to enforce the German injunction would cause interference with the hearing of the appeals in the three cases in China and likely render the hearing and judgment of the appeals in the three cases meaningless.⁶³

2.51. As regards the second factor, the SPC held that enforcement of the foreign injunction would cause irreparable harm to Huawei. This was because if the injunction were enforced, Huawei and its German affiliates would have only two options: they would be forced either to withdraw from the German market or to accept Conversant's licence rate offer and reach a settlement with Conversant, thereby requiring Huawei to forgo the opportunity to pursue legal remedies in the Chinese courts in the three cases. As to the first option, the market losses and the lost business opportunities that Huawei and its German affiliates would experience due to exiting the German market could not be compensated by money after the fact.⁶⁴

2.52. In considering the third factor, the SPC held that the potential harm to Huawei outweighed the harm suffered by Conversant. While Huawei would be forced to withdraw from the German market or accept the licence rate offer and lose the possibility to seek legal relief through Chinese courts, the suspension of Conversant's enforcement rights would not affect Conversant's other litigation rights in Germany as the decision was a first instance judgment and not a final judgment. The SPC also commented that Conversant was the SEP right holder and its core interest in pursuing the German litigation was to obtain monetary compensation.⁶⁵

2.53. As regards the fourth factor, whether the ASI would harm the public interest, the SPC commented that as the requested ASI would only affect the three cases in China and the case in Germany, all of which mainly involved Huawei and Conversant, there was no harm to the public interest.⁶⁶

2.54. Lastly, in its discussion of the principle of international comity, the SPC noted that the three cases in China were accepted in January 2018 before the German case commenced in April 2018. The court held that the ASI would not affect the subsequent trial in the German case nor detract from the legal validity of the final German judgment, and that therefore the impact on the German court trial and the judgment would be moderate.⁶⁷

2.55. This was the first case where a Chinese court issued an ASI in the context of SEP litigation. The ASI issued by the SPC against Conversant prohibited Conversant from enforcing the German court decision until the SPC had reached its own decision in the pending proceedings in China. The ASI stated that "Conversant shall not apply for the enforcement of the first-instance injunction judgment made by the Düsseldorf District Court of the Federal Republic of Germany (the 'Düsseldorf Court') on August 27, 2020, before the court's final judgment on the three cases."⁶⁸

2.56. The SPC also noted that a bank guarantee of CNY 19.7 million was issued as security for Huawei's act preservation application, and set a cumulative fine in case of violation of its ruling at the rate of CNY 1 million per day.⁶⁹

2.6.1.3 Reconsideration proceedings

2.57. On 2 September 2020, Conversant filed a reconsideration application with the SPC. On 11 September 2020, the SPC issued a ruling rejecting the application and maintaining the ASI.⁷⁰

⁶³ SPC, Huawei v. Conversant (Exhibit EU-1b), p. 7.

⁶⁴ SPC, Huawei v. Conversant (Exhibit EU-1b), p. 8.

⁶⁵ SPC, Huawei v. Conversant (Exhibit EU-1b), pp. 8-9.

⁶⁶ SPC, Huawei v. Conversant (Exhibit EU-1b), pp. 9-10.

⁶⁷ SPC, Huawei v. Conversant (Exhibit EU-1b), p. 10.

⁶⁸ SPC, Huawei v. Conversant (Exhibit EU-1b), p. 10.

⁶⁹ SPC, Huawei v. Conversant (Exhibit EU-1b), pp. 3 and 11.

⁷⁰ SPC, Huawei v. Conversant, reconsideration decision (Exhibit EU-6b). p. 16.

2.58. In its ruling, the SPC analysed six points: (a) whether the impact of the ASI on the judgment of the German court was beyond the "appropriate extent"; (b) the impact on the Chinese trial proceedings of the three cases if Conversant applied for provisional enforcement of the German court's first instance judgment; (c) whether Huawei would have faced irreparable harm had the ASI not been granted; (d) whether the original ruling granting the ASI weighed the interests of the parties unevenly; (e) whether the conditions for removing the ASI were met in the three cases; and (f) whether it was illegal that the original ruling calculated the fines in case of non-compliance on a daily basis.

2.59. With regard to the first point, the SPC held that it had granted the ASI in accordance with Chinese law and that the three cases were neither subject to, nor violated, German law. Furthermore, the SPC had respected the principle of international comity as it only suspended Conversant's application to enforce the first instance judgment of the German court.⁷¹

2.60. As to the second point, regarding the fact that the SPC disagreed with Conversant that because Huawei was requesting confirmation of non-infringement the Chinese judgments would contain nothing to enforce and, therefore it would be unnecessary to prevent Conversant from enforcing the German court's judgment, the SPC held that the relevant issues in ordering preservation measures are to ensure that future judgments can be enforced and that the applicant's rights and interests as determined by the judgment can ultimately be realized. The SPC was of the view that whether the content of the judgment can be directly enforced is not something that needs to be considered when determining whether the actions the applicant is seeking to prevent may make it difficult to enforce the judgment in the case. The SPC noted, moreover, that the Chinese court judgments would determine the royalty rate of the SEPs involved and that this would be binding and enforceable on both parties. The SPC stated that if Conversant applied for enforcement of the German court's judgment, Huawei might be forced to reach a settlement with Conversant to pay a higher royalty rate than that determined by the Nanjing Intermediate People's Court under the pressure of preventing the serious consequences of withdrawal from the German market. The SPC also noted partial overlap between the trial content of the Chinese cases and that of the German proceedings. The SPC reasoned that the injunction issued by the German court was based on the premise that Conversant's licence fee offer was FRAND. Finally, in response to an argument raised by Conversant, the SPC concluded that nothing in the ASI ruling conflicted with its jurisdictional ruling in ZTE v. Conversant that parallel proceedings being conducted abroad would not affect the jurisdiction of Chinese courts.⁷² The SPC clarified that its ruling on jurisdiction did not address the substantive legal issues or whether there would be a substantial negative impact on domestic litigation because of the overlap with international parallel proceedings.

2.61. On the third point, whether Huawei would suffer irreparable harm, the court held that if the German court judgment was implemented, Huawei would either be forced to withdraw from the German market or accept to pay Conversant the rate it demanded, which the Nanjing court had already determined was not FRAND. This could mean Huawei losing both litigation and economic interests in both Germany and China. The SPC also commented that as long as Conversant did not apply for provisional enforcement of the German court judgment, Huawei would not have been prohibited from selling, using, importing or holding certain mobile terminal products in Germany.⁷³ The SPC also considered that the EUR 2.4 million security that Conversant had provided to the German court was not enough to cover the damages that Huawei might incur.⁷⁴

2.62. With regard to the issue of the balance of interests between the two parties, the SPC held, among other things, that it had been correct in its comparison between the potential damage to Huawei's interests and to those of Conversant. The SPC reaffirmed its finding that the damage to Huawei if preservation measures were not taken would exceed the damage to Conversant caused by taking preservation measures.⁷⁵

⁷¹ SPC, Huawei v. Conversant, reconsideration decision (Exhibit EU-6b), pp. 6-7.

⁷² See para. 2.94 below.

⁷³ SPC, Huawei v. Conversant, reconsideration decision (Exhibit EU-6b), p. 10.

⁷⁴ SPC, Huawei v. Conversant, reconsideration decision (Exhibit EU-6b), p. 11.

⁷⁵ SPC, Huawei v. Conversant, reconsideration decision (Exhibit EU-6b), p. 12.

2.63. On the fifth point, the SPC ruled that the security Conversant paid to the German court for the potential damage to Huawei from enforcement of the German injunction was not a sufficient basis to lift the ASI, absent Huawei's agreement.⁷⁶

2.64. In its analysis of the last point – whether imposing fines for non-compliance on a daily basis violated Chinese law – the court found that the imposition of such fines was consistent with Article 115 (now 118) of the Civil Procedure Law. The SPC held that an act preservation measure that prohibits the respondent from performing certain acts is special in nature and it targets future conduct requiring the respondent not to perform certain acts or change the existing status quo. If the respondent were to violate the ASI, it would constitute an "active and deliberate violation". The SPC also found a one-time violation of a ruling was distinguishable from "continuous violations of the ruling and continuous changes in the status quo".⁷⁷ The SPC reasoned that when acts of obstructing civil litigation continue to occur on a daily basis the punishment shall be determined in a daily manner.⁷⁸ The SPC found that the daily fine was commensurate with the possible consequences of the breach of the ASI in the three cases.⁷⁹ As noted previously, the SPC found that enforcement of the German court's first instance judgment might seriously harm Huawei's interests in the German market and force Huawei to give up the opportunity to seek relief in the Chinese courts, and would have made it difficult or even meaningless to enforce the judgment in the three cases. By contrast, enforcement of the German court's first instance decision, could provide Conversant with a significant advantage in subsequent licence fee negotiations between the two parties.⁸⁰ The SPC concluded, therefore, that the adoption of a daily fine was suitable relative to the gravity of the violation and the consequences of damage that a deliberate breach may cause and was necessary to maintain the legal effect of the ASI.⁸¹

2.6.1.4 Settlement

2.65. During the hearing of the three cases, Huawei applied for withdrawal on the grounds that it had reached a settlement with Conversant. On 2 November 2020, the SPC approved the application to withdraw the three cases.⁸²

2.6.2 Xiaomi v. InterDigital

2.6.2.1 Litigation proceedings

2.66. On 9 June 2020, Xiaomi – a Chinese designer and manufacturer of consumer electronics – filed an action against InterDigital – a US company – before the Wuhan Intermediate People's Court. Xiaomi requested that the court determine, in accordance with FRAND terms, the licence rate for certain SEPs concerning 3G and 4G technology owned by InterDigital.

2.67. On 28 July 2020, Xiaomi informed InterDigital that it had requested the Wuhan Intermediate People's Court to determine the dispute between the parties on the FRAND licence rate.⁸³

2.68. On 29 July 2020, InterDigital filed an infringement action against Xiaomi before the Delhi District Court in India requesting injunctions prohibiting Xiaomi from producing and selling certain wireless communication terminal products (mobile phone products) in India.⁸⁴

2.69. On 4 August 2020, Xiaomi applied for an ASI before the Wuhan Intermediate People's Court requesting injunctions to require InterDigital to withdraw or suspend the injunctions requested in the Delhi District Court and prohibit InterDigital from seeking similar injunctions in any other country.⁸⁵

⁷⁶ SPC, Huawei v. Conversant, reconsideration decision (Exhibit EU-6b), p. 14.

⁷⁷ SPC, Huawei v. Conversant, reconsideration decision (Exhibit EU-6b), p. 14.

⁷⁸ SPC, Huawei v. Conversant, reconsideration decision (Exhibit EU-6b), p. 14.

⁷⁹ SPC, Huawei v. Conversant, reconsideration decision (Exhibit EU-6b), p. 14.

⁸⁰ SPC, Huawei v. Conversant, reconsideration decision (Exhibit EU-6b), p. 15.

⁸¹ SPC, Huawei v. Conversant, reconsideration decision (Exhibit EU-6b), p. 15.

⁸² Court Rulings Granting Withdrawals in ASI cases (Exhibit CHN-63b).

⁸³ Wuhan Intermediate People's Court, Xiaomi v. InterDigital (Exhibit EU-2b), p. 6.

⁸⁴ Wuhan Intermediate People's Court, Xiaomi v. InterDigital (Exhibit EU-2b), p. 6.

⁸⁵ Wuhan Intermediate People's Court, Xiaomi v. InterDigital (Exhibit EU-2b), pp. 2-3.

2.6.2.2 Decision and reasoning given by the Chinese court

2.70. On 23 September 2020, before the Delhi District Court had rendered its decision, the Wuhan Intermediate People's Court issued its decision granting the ASI in accordance with the provisions of Article 100 (now 103), Article 102 (now 105), paragraph 1(6) of Article 111 (now 114), paragraph 1 of Article 115 (now 118), and paragraph 1(4) of Article 154 (now 157) of the Civil Procedure Law and Article 3(1), Article 4, Article 6(6), Article 7, Article 10(3), (4), and Article 13 of the SPC Provisions.⁸⁶

2.71. The Wuhan Intermediate People's Court examined four factors: (a) the subjective intent of the respondents in initiating parallel proceedings; (b) the impact on the Chinese proceedings of any injunctions applied for in those parallel proceedings; (c) the harm caused to the applicant if the ASI were not granted; and (d) the balance of interests, i.e. the damage to the applicant caused by failing to issue an ASI as compared to the damage to the respondent caused by granting the ASI, as well as the effect of the ASI on the public interest.

2.72. With regard to the subjective intent of the respondents in initiating parallel proceedings, the court determined that the purpose of the proceedings filed by InterDigital in India was to exclude the jurisdiction of the Wuhan Intermediate People's Court and to "neutralize the case", consequently "causing interference and obstruction" to the hearing of the case in China.⁸⁷

2.73. As for the impact on the Chinese proceedings of any injunctions applied for in the parallel proceedings, the court stated that the application by the respondents for an injunction against the applicants in India would likely lead to a ruling that conflicted with the ruling in China. The court added that this would not only affect the conclusion of the SEP licensing negotiations between the applicants and the respondents, but also make it difficult to enforce the Chinese court's judgment, arguably abusing the right to relief in SEP litigation.⁸⁸

2.74. In considering the harm caused to the applicant if the ASI were not granted, the court found that the temporary and permanent injunctions applied for by the respondents in India would inevitably affect the operation of the applicants and their affiliates in the market of India. The court held that this would severely harm the interests of the applicants, and the damage would be difficult to repair.⁸⁹

2.75. With regard to the balance of interests and the effect of the ASI on the public interest, the court held that the purpose of issuing the ASI was to prevent the respondents from abusing the injunctive relief procedure to hinder the court's hearing of the case and ensure the enforcement of the court's ruling on the global FRAND licence rate disputed by the parties. The court stated that, except for the delay to the respondent's rights to relief, the ASI would not affect the SEPs held and managed by the respondents and would not cause them any substantial damage. The court added that the ASI would not affect or harm the public interest, without expounding on this point further.⁹⁰

2.76. The ASI issued by the Wuhan Intermediate People's Court against InterDigital required, among other things, that the company immediately withdraw or suspend the temporary injunction applied for in the Indian court, and not to apply for any further injunctions in other jurisdictions.⁹¹

2.77. The Wuhan Intermediate People's Court provided for a fine in case of non-compliance at the rate of CNY 1 million per day. The Wuhan Intermediate People's Court ordered that the security of CNY 10 million provided by Xiaomi for the act preservation application be frozen.⁹²

2.6.2.3 Reconsideration proceedings

2.78. On 25 September 2020, InterDigital filed a reconsideration request with the Wuhan Intermediate People's Court claiming, among other things, that the ASI granted violated the principle

⁸⁶ Wuhan Intermediate People's Court, *Xiaomi v. InterDigital* (Exhibit EU-2b), p. 10.

⁸⁷ Wuhan Intermediate People's Court, *Xiaomi v. InterDigital* (Exhibit EU-2b), p. 7.

⁸⁸ Wuhan Intermediate People's Court, *Xiaomi v. InterDigital* (Exhibit EU-2b), p. 8.

⁸⁹ Wuhan Intermediate People's Court, *Xiaomi v. InterDigital* (Exhibit EU-2b), p. 8.

⁹⁰ Wuhan Intermediate People's Court, *Xiaomi v. InterDigital* (Exhibit EU-2b), p. 8.

⁹¹ Wuhan Intermediate People's Court, *Xiaomi v. InterDigital* (Exhibit EU-2b), p. 10.

⁹² Wuhan Intermediate People's Court, *Xiaomi v. InterDigital* (Exhibit EU-2b), p. 11.

of international comity.⁹³ On 29 September 2020, InterDigital filed an application for an AASI in the Delhi High Court. On 9 October 2020, the Delhi High Court issued the AASI.⁹⁴ The Wuhan Intermediate People's Court held a public hearing of the reconsideration case on 16 October 2020. On 4 December 2020, the Wuhan Intermediate People's Court rejected the request and upheld the original ASI.⁹⁵

2.79. In its report the court considered that there were three arguments central to the case: (a) whether the ASI complied with the conditions under Chinese law for act preservation; (b) whether the ASI complied with the principle of international comity in the context of FRAND terms in SEP litigation; and (c) whether the penalty provisions in the ASI were lawful. The court noting that InterDigital had failed to respond to certain reminders regarding the submission of evidence, held that the ASI issued complied with Chinese law. The court addressing the principle of international comity held, among other things, that this principle "is inseparable from addressing the jurisdiction of the competent court handling rate-setting disputes and the reasonableness of such jurisdiction". The court commented that any mechanism for resolving rate-setting for the SEP dispute primarily relies on FRAND terms and that these rules need to be observed by both parties to any SEP licensing negotiations and further that they require respect and acceptance of the courts handling SEP licensing rate-setting disputes.⁹⁶ In response to InterDigital's argument that the amount of the penalty clause exceeded the upper limit the court held that:

[T]he penalty clause provided for under this ASI targets the future conduct of the reconsideration petitioner, which has sufficient time to fulfill its obligations with respect to the prohibited behavior under the instructions of this ASI. If it disregards the performance of its obligations imposed by this ASI, its behavior amounts to proactive and willing violations of the law. And its conduct qualifies as intentional or malicious law-breaking activities, which are at odds with the very purpose of this ASI. A continuation of such conduct should be deemed as separate illegal behaviors, which are subject to daily fines on an accumulative basis. The circumstances of this case are different from the circumstances provided for under Article 115 of the Civil Procedure Law of the People's Republic of China, where daily fines shall not be continuously applied. The penalty clause of this ASI is not unlawful.⁹⁷

2.6.2.4 Settlement

2.80. On 3 August 2021, InterDigital issued a press release announcing that it had concluded a multi-year, worldwide, non-exclusive, royalty bearing licence with Xiaomi. The licence covered Xiaomi's cellular-enabled mobile devices using InterDigital's SEPs related to cellular wireless (including 3G, 4G and 5G), Wi-Fi and HEVC video technology.⁹⁸

2.81. Xiaomi applied for withdrawal of the case on 31 October 2021 on the grounds that it had reached a comprehensive settlement with InterDigital and had signed a licensing agreement on 30 July 2021. On 11 November 2021, the Wuhan Intermediate People's Court granted the withdrawal of the case and consequently the ASI was dissolved.⁹⁹

2.6.3 ZTE v. Conversant

2.6.3.1 Litigation proceedings

2.82. On 17 January 2018, ZTE – a Chinese technology company – filed a lawsuit against Conversant before the Shenzhen Intermediate People's Court. The case concerned the same patents

⁹³ Wuhan Intermediate People's Court, *Xiaomi v. InterDigital*, reconsideration decision (Exhibit EU-7b).

⁹⁴ Delhi High Court, *InterDigital v. Xiaomi* (Exhibit CHN-15), para. 3.

⁹⁵ Wuhan Intermediate People's Court, *Xiaomi v. InterDigital*, reconsideration decision (Exhibit EU-7b), pp. 3 and 17.

⁹⁶ Wuhan Intermediate People's Court, *Xiaomi v. InterDigital*, reconsideration decision (Exhibit EU-7b), p. 14.

⁹⁷ Wuhan Intermediate People's Court, *Xiaomi v. InterDigital*, reconsideration decision (Exhibit EU-7b), p. 16.

⁹⁸ Global Newswire, *InterDigital signs licensing agreement with Xiaomi*, available at: <https://www.globenewswire.com/news-release/2021/08/03/2273347/0/en/InterDigital-signs-licensing-agreement-with-Xiaomi.html> (Exhibit EU-107), 3 August 2021.

⁹⁹ Court Rulings Granting Withdrawals in ASI cases (Exhibit CHN-63b).

covering mobile terminal products as those considered in *Huawei v. Conversant*. ZTE sought a determination of the FRAND terms for the licensing of any such valid Chinese patents.

2.83. On 20 April 2018, Conversant filed a lawsuit with the Düsseldorf District Court, in Germany, against ZTE over the infringement of SEP rights. On 27 August 2020, the Düsseldorf Court found that ZTE had infringed one of Conversant's patents and issued an injunction to prohibit ZTE from selling, using, importing or holding certain mobile terminal products in Germany. The judgment found that Conversant's offer of SEP licence rates to ZTE did not violate the FRAND principle. This injunction could be provisionally enforced once Conversant provided EUR 700,000 in security.¹⁰⁰

2.84. On 28 August 2020, ZTE filed an application for an ASI with the Shenzhen Intermediate People's Court requesting that the court prevent Conversant from enforcing the Düsseldorf Court's injunction over the infringement of SEP rights before the final judgment in the case had been made.¹⁰¹

2.6.3.2 Decision and reasoning given by the Chinese court

2.85. On 29 September 2020, the Shenzhen Intermediate People's Court issued its decision granting the ASI in accordance with the provisions of Article 100 (now 103), Article 102 (now 105), paragraph 1(6) of Article 111 (now 114)(1)(6), and paragraph 1 of Article 115 (now 118(1)) of the Civil Procedure Law.¹⁰²

2.86. The Shenzhen Intermediate People's Court examined five factors: (a) the impact on the Chinese case of the application for the enforcement of the German judgment; (b) the necessity of the ASI measure; (c) the balance of interests, i.e. whether the damage to the applicant caused by failing to grant an ASI would exceed the damage caused by the ASI to the respondent; (d) the effect of the ASI on the public interest; and (e) whether the ASI would accord with the principle of international comity.

2.87. The court reasoned that the enforcement of the German judgment would render the trial and execution of any judgment in the case before the Chinese court meaningless since the parties were virtually the same and the subject matter of the two cases in part coincided.¹⁰³

2.88. With regard to the necessity of the measure, the court found that once Conversant applied for enforcement of the Düsseldorf Court's injunction, ZTE would have only two options: either withdraw from the German market or accept Conversant's offer and then reach a settlement with Conversant. The court held that the former option would result in market losses and lost business opportunities that would be difficult to compensate after the fact while accepting the second option would mean accepting a rate that was more than 10 times higher than that which had been determined in the *Huawei* case – which involved a company that the court considered comparable to ZTE – and reaching a settlement with Conversant. The court considered that both these options would cause irreparable harm to ZTE.¹⁰⁴

2.89. In considering the balance of interests between the parties, the court determined that granting the ASI would cause limited damage to Conversant because its main interest is to obtain financial compensation whereas suspending execution of the Düsseldorf provisional judgment would not affect Conversant's other litigation rights and interests in Germany. Consequently, the court considered that the damage to ZTE caused by not granting an ASI would exceed the damage to Conversant caused by granting the ASI and so weighed in favour of granting the ASI.¹⁰⁵ The Shenzhen Intermediate People's Court also noted that ZTE had provided a security of CNY 6 million.¹⁰⁶

¹⁰⁰ Shenzhen Intermediate People's Court, *ZTE v. Conversant* (Exhibit EU-3b), pp 3-4.

¹⁰¹ Shenzhen Intermediate People's Court, *ZTE v. Conversant* (Exhibit EU-3b), p. 1.

¹⁰² Shenzhen Intermediate People's Court, *ZTE v. Conversant* (Exhibit EU-3b), p. 11.

¹⁰³ Shenzhen Intermediate People's Court, *ZTE v. Conversant* (Exhibit EU-3b), p. 5.

¹⁰⁴ Shenzhen Intermediate People's Court, *ZTE v. Conversant* (Exhibit EU-3b), pp 5-6.

¹⁰⁵ Shenzhen Intermediate People's Court, *ZTE v. Conversant* (Exhibit EU-3b), p. 6.

¹⁰⁶ Shenzhen Intermediate People's Court, *ZTE v. Conversant* (Exhibit EU-3b), p. 7.

2.90. Concerning whether the ASI would harm the public interest, the court considered that the case primarily affected the interests of ZTE and Conversant and so would not affect the public interest.¹⁰⁷

2.91. With regard to the issue of international comity, the court held that the case in China had been accepted in January 2018 prior to the proceedings in Germany, which had been accepted in April 2018. The court further held that prohibiting Conversant from applying for enforcement of the Düsseldorf Court's injunction before the final judgment in the Chinese case was made would not affect any subsequent German litigation nor impair the legal effect of a German judgment. As the ASI would only suspend the execution of the Düsseldorf Court's injunction, the court considered this impact to be minimal.¹⁰⁸

2.92. The ASI issued by the Shenzhen Intermediate People's Court prohibited Conversant from enforcing the Düsseldorf District Court's injunction against ZTE following its finding that ZTE had infringed Conversant's European patent.¹⁰⁹

2.93. The fine for non-compliance was set at CNY 600,000 per day.

2.6.3.3 Appeal on jurisdiction

2.94. On 18 January 2019, the Shenzhen Intermediate People's Court rejected Conversant's objection that the case was not suitable for the court's jurisdiction. On 21 August 2020 the SPC rejected Conversant's appeal request and determined that the court had jurisdiction over the case.¹¹⁰

2.6.3.4 Settlement

2.95. On 30 October 2020, after reaching a global settlement on FRAND rates with Conversant¹¹¹, ZTE filed an application with the Shenzhen Intermediate People's Court for withdrawal of the case. On 2 November 2020, the court granted the request.¹¹²

2.6.4 OPPO v. Sharp

2.6.4.1 Litigation proceedings

2.96. On 30 January 2020, Sharp – a Japanese electronics business – filed a patent infringement lawsuit against OPPO – a Chinese manufacturer of consumer electronics – with the Tokyo District Court in Japan claiming that certain OPPO mobile telephones sold in Japan infringed its Japanese patent, which concerned Wi-Fi technology.

2.97. On 20 February 2020, OPPO filed a lawsuit against Sharp before the Shenzhen Intermediate People's Court requesting the court to confirm that Sharp had violated the FRAND principle during the negotiation process and to determine the licensing conditions of certain Wi-Fi related SEPs, 3G related SEPs, and 4G related SEPs.¹¹³ The court accepted the case on 25 March 2020.¹¹⁴

2.98. On 6 and 9 March 2020 Sharp filed two more patent infringement cases with the Tokyo District Court.¹¹⁵

2.99. Also on 6 March 2020, Sharp filed a patent infringement lawsuit against OPPO with the Munich District Court in Germany, claiming that certain mobile phones produced and sold by OPPO infringed

¹⁰⁷ Shenzhen Intermediate People's Court, ZTE v. Conversant (Exhibit EU-3b), p. 6.

¹⁰⁸ Shenzhen Intermediate People's Court, ZTE v. Conversant (Exhibit EU-3b), p. 7.

¹⁰⁹ Shenzhen Intermediate People's Court, ZTE v. Conversant (Exhibit EU-3b), p. 7.

¹¹⁰ Shenzhen Intermediate People's Court, ZTE v. Conversant (Exhibit EU-3b), p.3.

¹¹¹ Du/Liu, Shenzhen Court Issues Anti-suit Injunction in ZTE and Conversant SEP Licensing Dispute, China Justice Observer (Exhibit EU-72b), 20 June 2021.

¹¹² Court Rulings Granting Withdrawals in ASI cases (Exhibit CHN-63b).

¹¹³ Shenzhen Intermediate People's Court, OPPO v. Sharp (Exhibit EU-4b), pp. 3-4.

¹¹⁴ Shenzhen Intermediate People's Court, OPPO v. Sharp (Exhibit EU-4b), p. 4.

¹¹⁵ Shenzhen Intermediate People's Court, OPPO v. Sharp (Exhibit EU-4b), pp. 3 and 5.

its patent rights. In addition, on the same date, Sharp filed two other patent infringement cases with the Mannheim District Court in Germany concerning LTE 4G wireless technology.¹¹⁶

2.100. On 1 April 2020, Sharp filed a lawsuit against the exclusive agent of OPPO in Chinese Taipei, requesting that it pay compensation for use of the subject matter of certain patents related to LTE technologies.¹¹⁷

2.101. On 14 October 2020, the Shenzhen Intermediate People's Court held a hearing on OPPO's request for an ASI in private due to the involvement of confidential business information.¹¹⁸

2.6.4.2 Decision and reasoning given by the Chinese court

2.102. On 16 October 2020, the Shenzhen Intermediate People's Court issued a judgment finding that it had jurisdiction to hear the case.¹¹⁹

2.103. On the same day, the Shenzhen Intermediate People's Court issued its decision granting an ASI in accordance with Article 100 (now 103), Article 115(1) (now 118), and Article 154(1)(4) (now 157) of the Civil Procedure Law and Article 7 and Article 10 of the SPC Provisions.¹²⁰

2.104. The Shenzhen Intermediate People's Court noted that Article 7 of the SPC Provisions provides for a court to take into account the following factors when reviewing an application for an act preservation measure: (a) whether the applicant's request has a factual basis and a legal basis, including whether the validity of the claimed IP right is stable; (b) whether not taking act preservation measures would cause irreparable damage to the applicant's legitimate rights and interests or cause the judgment of the case to be difficult to enforce, etc; (c) the balance of interests, i.e. whether the damage to the applicant caused by failing to grant an ASI would exceed the damage caused by the ASI to the respondent; (d) the effect of the ASI on the public interest; and (e) other factors that should be considered.¹²¹ The Shenzhen Intermediate People's Court also noted that OPPO had provided a security of CNY 9 million.

2.105. The court turned first to whether an ASI was necessary. In regard to this question, the court found that the core dispute between the parties was a SEP licensing and royalty rate dispute, which was covered by the scope of the Chinese litigation. The court noted that Sharp had filed multiple infringement lawsuits in Japan, Germany, and Chinese Taipei and that the court believed they might initiate new lawsuits or apply for new injunctions to affect the court proceedings and which might force OPPO to accept non-FRAND licensing conditions under pressure of injunction before the court had issued its final ruling, which would cause OPPO the irreparable loss of its legal rights. Moreover, OPPO's products might be banned in those countries where Sharp had applied for injunctions meaning that its market share would be quickly taken up by other competitors resulting in huge economic losses and irreparable damages from lost market shares.¹²² The court, concluded, therefore that the ASI was necessary.

2.106. In weighing up the balance of interests between OPPO and Sharp the court held that the parties' dispute could be resolved if the court determined the global licensing conditions for SEPs owned by Sharp covering OPPO's terminal products, including the licence rate that OPPO needed to pay to implement those patents. Given that the court would determine the global royalty rate, the court considered that Sharp would not be disadvantaged by not being able to instigate new litigation as a result of the ASI, whereas on the other hand, OPPO would suffer large economic losses and be deprived of its right to seek judicial relief if the ASI was not granted.¹²³

2.107. In its consideration on whether the ASI would harm the public interest, the court held that the proceedings mainly concerned OPPO's and Sharp's interests and that granting an ASI would help to avoid wasting additional judicial resources and improve the chance of a final resolution.

¹¹⁶ Shenzhen Intermediate People's Court, OPPO v. Sharp (Exhibit EU-4b), pp. 3 and 5-6.

¹¹⁷ Shenzhen Intermediate People's Court, OPPO v. Sharp (Exhibit EU-4b), p. 6.

¹¹⁸ Shenzhen Intermediate People's Court, OPPO v. Sharp (Exhibit EU-4b), pp. 2 and 11.

¹¹⁹ See SPC, OPPO v. Sharp, Ruling on Jurisdiction (Exhibit EU-8b), p. 5.

¹²⁰ Shenzhen Intermediate People's Court, OPPO v. Sharp (Exhibit EU-4b), p. 11.

¹²¹ Shenzhen Intermediate People's Court, OPPO v. Sharp (Exhibit EU-4b), p. 7.

¹²² Shenzhen Intermediate People's Court, OPPO v. Sharp (Exhibit EU-4b), pp. 7-8.

¹²³ Shenzhen Intermediate People's Court, OPPO v. Sharp (Exhibit EU-4b), pp. 9-10.

In addition, the court considered that it did not benefit the development of the global communications industry if the two parties were endlessly tied up in litigation procedures with one party perhaps being forced to accept non-FRAND licensing conditions. The court therefore concluded that not granting an ASI in this case would harm the public interest.¹²⁴

2.108. The court concluded that the international judicial comity principle should also be considered when taking act preservation measures, including whether it is conducive to improving judicial efficiency, the convenience of the forum of jurisdiction, and whether it respects the sovereignty of other countries. On this issue, the court found that the ASI would respect this principle because it would not interfere with any existing judicial proceedings but would only prevent Sharp from filing new cases and injunction requests. Furthermore, the court considered that the ASI would be "conductive to resol[ving] the disputes between the two parties ... and improve international judicial efficiency".¹²⁵

2.109. The ASI issued by the Shenzhen Intermediate People's Court prohibited Sharp from initiating new patent infringement lawsuits, or applying for new judicial injunctions or other similar relief measures against OPPO with the judicial authorities of any other country before the final judgment had been issued.¹²⁶

2.110. The fine for non-compliance was set at a rate of CNY 1 million per day.¹²⁷

2.6.4.3 Appeal on jurisdiction

2.111. Sharp appealed to the SPC against the jurisdictional ruling on 16 October 2020 on the grounds that similar cases were already ongoing in other jurisdictions.¹²⁸ On 19 August 2021, the SPC rejected the appeal finding that the Chinese court did have jurisdiction in this case.¹²⁹

2.6.4.4 Settlement

2.112. Following the SPC's rejection of Sharp's appeal on jurisdiction, a settlement was reached between OPPO and Sharp. OPPO filed an application for withdrawal of the case with the Shenzhen Intermediate People's Court on 29 September 2021. OPPO was granted leave to withdraw the case the same day and consequently the ASI was dissolved.¹³⁰

2.113. On 8 October 2021, OPPO released a press statement announcing that OPPO and Sharp had reached a cross-licensing and collaboration agreement covering global patent licences and implementation of communications technology standards for their end products.¹³¹

2.6.5 Samsung v. Ericsson

2.6.5.1 Litigation proceedings

2.114. During 2014, Samsung – a Korean company known for, among other things, information technology and consumer electronics – and Ericsson – a Swedish provider of telecommunications equipment and related services to mobile and fixed network operators – entered a cross-licence agreement with regard to 2G, 3G, and 4G SEPs. This licence was due to expire at the end of 2020. In January 2020, the two parties began their licensing negotiations, however they were unable to reach agreement.¹³²

¹²⁴ Shenzhen Intermediate People's Court, OPPO v. Sharp (Exhibit EU-4b), p. 10.

¹²⁵ Shenzhen Intermediate People's Court, OPPO v. Sharp (Exhibit EU-4b), pp. 10-11.

¹²⁶ Shenzhen Intermediate People's Court, OPPO v. Sharp (Exhibit EU-4b), p. 11.

¹²⁷ Shenzhen Intermediate People's Court, OPPO v. Sharp (Exhibit EU-4b), p. 10.

¹²⁸ SPC, OPPO v. Sharp, Ruling on Jurisdiction (Exhibit EU-8b), p. 3.

¹²⁹ SPC, OPPO v. Sharp, Ruling on Jurisdiction (Exhibit EU-8b), pp. 7 and 10.

¹³⁰ Court Rulings Granting Withdrawals in ASI cases (Exhibit CHN-63b).

¹³¹ OPPO press release, "OPPO signs a patent licensing agreement with Sharp to end global litigation" (Exhibit EU-86), 8 October 2021.

¹³² Wuhan Intermediate People's Court, Samsung v. Ericsson (Exhibit EU-5b), p. 4.

2.115. On 7 December 2020, the Wuhan Intermediate People's Court accepted a dispute filed by Samsung. The case related to global licensing terms, and in particular, the licence royalties, to be paid for 4G and 5G SEPs owned by Ericsson.¹³³

2.116. Ericsson sued Samsung in the United States District Court for the Eastern District of Texas (US District Court E.D. Texas) on 11 December 2020 requesting the court to confirm that Ericsson's licence term offer to Samsung complied with the FRAND principle. Ericsson notified Samsung of its complaint on the same day.¹³⁴

2.117. Three days later, on 14 December 2020, Samsung filed an application for an ASI with the Wuhan Intermediate People's Court against Ericsson, requesting the court to order Ericsson to refrain from seeking injunctions, enforcing any injunctions obtained, initiating new suits or requests for other courts to rule on licensing terms, and to withdraw or suspend any such requests already made.¹³⁵

2.118. On 25 December 2020, the Wuhan Intermediate People's Court issued the ASI.¹³⁶ Ericsson received notice that the ASI had been issued on the same day.¹³⁷

2.6.5.2 Decision and reasoning given by the Chinese court

2.119. The Wuhan Intermediate People's Court issued an ASI pursuant to Article 100 (now 103), Article 102 (now 105), and Article 154(1)(4) (now 157) of the Civil Procedure Law and Article 3(1), Article 4, Article 7, and Article 13 of the SPC Provisions.¹³⁸

2.120. The Wuhan Intermediate People's Court explained that it would analyse the request for an act preservation measure from the following aspects: (a) whether the respondent's act results in any circumstance that would make the judgment of this case difficult to enforce; (b) whether the applicants' legitimate rights and interests would be irreparably damaged if act preservation measures were not taken; (c) whether the damage caused to the applicants by not taking act preservation measures exceeded that caused to the respondent by taking act preservation measures; (d) whether the adoption of act preservation measures impaired social public interests and the global order of civil litigation; and (e) whether the applicants had provided effective guarantees for the application of act preservation.¹³⁹

2.121. In its discussion of the relevant factors, the court commented that if it did not issue an ASI, any judgment it might make would lose significance if other relevant injunctions were implemented by Ericsson, based on a foreign court's ruling. Further, if the court did not issue an ASI there might be overlaps or conflicts between its trial scope and judgment and cases filed later in other courts, which would prevent the execution of the Wuhan Intermediate People's Court's judgment.¹⁴⁰

2.122. The court also considered whether Samsung's interests would be irreparably harmed if it did not grant the ASI. The court held that that if the two parties failed to reach a new licensing agreement, Samsung might be at risk of further legal proceedings taken by Ericsson if it continued to make and sell the relevant products. In particular, an injunction might result in loss of market share to Samsung given the relatively short lifecycle of the products at issue. The court considered that this would cause irreparable harm to Samsung.¹⁴¹

2.123. As to the balance of interests between the parties caused by granting an ASI, the court considered that Samsung's production and sales activities would be adversely affected or even forced to stop if an ASI was not granted. On the other hand, preventing Ericsson from seeking judicial relief

¹³³ Wuhan Intermediate People's Court, Samsung v. Ericsson (Exhibit EU-5b), p. 2.

¹³⁴ US District Court E.D. Texas, Ericsson v. Samsung (Exhibit EU-15), p. 3; see also Wuhan Intermediate People's Court, Samsung v. Ericsson (Exhibit EU-5b), p. 4. Ericsson averred that it had not been notified of the Wuhan litigation filed by Samsung on 7 December 2020 when it had filed suit in the United States (Exhibit EU-15), pp. 2-3.

¹³⁵ Wuhan Intermediate People's Court, Samsung v. Ericsson (Exhibit EU-5b), p. 3.

¹³⁶ Wuhan Intermediate People's Court, Samsung v. Ericsson (Exhibit EU-5b), p. 8.

¹³⁷ US District Court E.D. Texas, Ericsson v. Samsung (Exhibit EU-15), p. 5.

¹³⁸ Wuhan Intermediate People's Court, Samsung v. Ericsson (Exhibit EU-5b), pp. 7-8.

¹³⁹ Wuhan Intermediate People's Court, Samsung v. Ericsson (Exhibit EU-5b), p. 5.

¹⁴⁰ Wuhan Intermediate People's Court, Samsung v. Ericsson (Exhibit EU-5b), p. 5.

¹⁴¹ Wuhan Intermediate People's Court, Samsung v. Ericsson (Exhibit EU-5b), p. 6.

against Samsung would not lead to a fundamental loss of such rights. On the contrary, if the court ruled on the licensing terms, Ericsson stood to gain from the payments that would be made by Samsung notwithstanding the ASI. The court consequently concluded that the impact on Samsung of not granting an ASI would be greater than the impact on Ericsson of granting an ASI.¹⁴²

2.124. In its consideration of the public interest, the court found that the ASI would not detrimentally affect the public interest as consumers could continue to have access to the Ericsson's products as there would be no sales ban or supply shortage. However, without the ASI, Samsung might be restricted by Ericsson from manufacturing, leading to a shortage in the market for consumers.¹⁴³

2.125. On the matter of the global order of civil litigation, the court noted that it was the first court to accept the dispute, and that by solving the dispute it would help eliminate unnecessary lawsuits and jurisdictional conflicts caused by multiple lawsuits regarding the same issue by the applicant and the respondent in different countries and territories.¹⁴⁴ Finally, the court also recognized, in relation to the fifth factor, the security provided by the applicant for its act preservation application.

2.126. The Wuhan Intermediate People's Court prohibited Ericsson from requesting before any other courts anywhere, an injunction against Samsung based on its 4G and 5G patents concerned in the dispute, enforcing existing injunctions, and requesting decisions on licence questions anywhere in the world. It also prohibited Ericsson from seeking an AASI requesting any other courts either in China or elsewhere to order Samsung to withdraw its application for an ASI until the Wuhan Intermediate People's Court's judgment on the merits became effective. The court determined that penalties for non-compliance would be set in the event of violation in accordance with the Civil Procedure Law.¹⁴⁵

2.6.5.3 AASI issued by the US court

2.127. On 28 December 2020, Ericsson requested and was granted an emergency *ex parte* temporary restraining order in the US District Court E.D. Texas against Samsung pending the court's decision on the granting of a preliminary injunction. On 11 January 2021, the US District Court E.D. Texas issued an AASI at the request of Ericsson.¹⁴⁶

2.6.5.4 Reconsideration proceedings

2.128. Ericsson applied for reconsideration of the original judgment on 30 December 2020. On 10 March 2021, the Wuhan Intermediate People's Court rejected the request and upheld the original ruling.¹⁴⁷

2.129. The court discussed 11 points of dispute in its reconsideration decision: (a) whether the court with jurisdiction should handle the reconsideration decision; (b) whether the original adjudication violated Chinese law on handling foreign parallel proceedings and domestic-related proceedings; (c) whether the original adjudication violated due process by not holding a hearing; (d) the relationship between the obligations discussed in the original adjudication and Samsung's claim; (e) whether the obligations specified in the original adjudication were erroneous, ill-defined, or unenforceable; (f) whether the examination criteria used in the original adjudication were inconsistent; (g) whether paragraph 1 of Article 7 of the SPC Provisions was applicable to the dispute; (h) whether Samsung would suffer irreparable damage if no act preservation measure was taken; (i) whether it would be difficult to enforce the decision in the case if no act preservation measure was taken; (j) whether adopting an act preservation measure would result in a significant imbalance between the parties; and (k) whether adopting an act preservation measure would harm the public or others' legitimate interests.¹⁴⁸ In its reply to point (g), Samsung argued that the original

¹⁴² Wuhan Intermediate People's Court, Samsung v. Ericsson (Exhibit EU-5b), p. 6.

¹⁴³ Wuhan Intermediate People's Court, Samsung v. Ericsson (Exhibit EU-5b), pp. 6-7.

¹⁴⁴ Wuhan Intermediate People's Court, Samsung v. Ericsson (Exhibit EU-5b), p. 7.

¹⁴⁵ Wuhan Intermediate People's Court, Samsung v. Ericsson (Exhibit EU-5b), p. 8.

¹⁴⁶ US District Court E.D. Texas, Ericsson v. Samsung (Exhibit EU-15), pp. 5 and 15.

¹⁴⁷ Wuhan Intermediate People's Court, Ericsson v. Samsung, reconsideration decision (Exhibit EU-9b), p. 16.

¹⁴⁸ Wuhan Intermediate People's Court, Ericsson v. Samsung, reconsideration decision (Exhibit EU-9b), p. 7.

adjudication, in accordance with the criteria for ASIs determined in the SPC ruling in *Huawei v. Conversant*, analysed one by one the factors for consideration in issuing an ASI.¹⁴⁹

2.130. The court found each of Ericsson's grounds for reconsideration to be unfounded. With respect to point (g), concerning the applicability of paragraph 1 of Article 7 to the case, the court considered "relevant judicial practices" concerning disputes over SEP royalties and quoted the SPC ruling in *Huawei v. Conversant*.¹⁵⁰ In reaching its conclusion on this point, the court specifically noted that the way it was handled in the original adjudication did not conflict with the view supporting the SPC ruling in *Huawei v. Conversant*.¹⁵¹

2.131. The court also noted that Samsung and Ericsson were important players in the international telecommunications industry and held a great number of patents, including 4G and 5G SEPs. In light of this, the court said, it expected both parties to resolve relevant disputes over the implementation of patent licences through negotiation. However, if the parties were unable to achieve consensus on licensing terms through negotiation, the court's adjudication "can also provide a solution for both parties to resolve the dispute".¹⁵²

2.6.5.5 Settlement

2.132. On 7 May 2021, Ericsson released a press statement announcing that it had signed a multi-year agreement with Samsung on global patent licences between the two companies, including patents relating to all cellular technologies. The cross-licence agreement covered sales of network infrastructure and handsets from 1 January 2021.¹⁵³

2.133. On 2 June 2021, during the trial proceedings in the Wuhan Intermediate People's Court, Ericsson and Samsung informed the court that they had reached a settlement agreement with the signing of a Patent Licence Agreement on 7 May 2021. The court accepted the agreement on 7 June 2021 and the ASI was consequently dissolved.¹⁵⁴

2.7 Other relevant litigation in China

2.134. In the course of the proceedings before the Panel, several other legal proceedings that took place in China have been mentioned by the parties in addition to the five disputes in which ASIs were issued. These proceedings include one case where an ASI was requested and not granted in SEP litigation, one decision where an act preservation measure (not an ASI) was issued in a case involving IP rights, and one decision issuing an act preservation measure in Wuhan's Maritime Court. Because these decisions are relevant to the arguments of the parties, the Panel provides some basic factual information about them below.

2.7.1 Lenovo v. Nokia

2.7.1.1 Litigation proceedings

2.135. On 18 September 2019 Nokia – a Finnish multinational telecommunications, information technology, and consumer electronics company – filed a lawsuit concerning SEP infringement against Lenovo – a Chinese company and one of the world's largest producers of personal computers – in the Munich Regional Court, Germany. On the same date, Nokia filed an additional six lawsuits against Lenovo in the Munich Regional Court, the Mannheim Regional Court and the Düsseldorf Regional Court concerning SEP infringement.

¹⁴⁹ Wuhan Intermediate People's Court, *Ericsson v. Samsung*, reconsideration decision (Exhibit EU-9b), p.5.

¹⁵⁰ Wuhan Intermediate People's Court, *Ericsson v. Samsung*, reconsideration decision (Exhibit EU-9b), pp. 11-12.

¹⁵¹ Wuhan Intermediate People's Court, *Ericsson v. Samsung*, reconsideration decision (Exhibit EU-9b), p. 5.

¹⁵² Wuhan Intermediate People's Court, *Ericsson v. Samsung*, reconsideration decision (Exhibit EU-9b), p. 15.

¹⁵³ Ericsson press release, *Ericsson and Samsung sign global patent licence agreement* (Exhibit EU-70), (7 May 2021).

¹⁵⁴ Court Rulings Granting Withdrawals in ASI cases (Exhibit CHN-63b).

2.136. On 25 September 2019, Nokia filed a lawsuit in the United States District Court for the Eastern District of North Carolina (United States) against eight Lenovo affiliated companies.

2.137. On 19 October 2019, Nokia filed a SEP infringement lawsuit against Lenovo, this time in the Delhi High Court.

2.138. On 2 July 2020, Nokia filed a lawsuit against Lenovo in Brazil in a court in Rio de Janeiro claiming that Lenovo had infringed one of its SEPs.

2.139. On 30 September 2020, the Munich Regional Court made a first instance judgment finding that Lenovo had infringed one of Nokia's European patents and prohibiting Lenovo from selling, using or importing the infringing products. On 2 October 2020, Lenovo applied to the Munich Higher Regional Court for temporary suspension of the injunction issued by the Munich Regional Court in Nokia v. Lenovo. On 30 October 2020, the Munich Higher Regional Court suspended the enforcement of the temporary injunction on the grounds that the decision might not be tenable.

2.140. On 26 November 2020, Lenovo requested an ASI in the Shenzhen Intermediate Court against Nokia concerning SEP licensing.¹⁵⁵

2.7.1.2 Decision and reasoning given by the Chinese court

2.141. On 27 January 2021, the Shenzhen Intermediate Court rejected Lenovo's request for an ASI against Nokia pursuant to Article 100(1) (now 103(1)) and Article 154(1)(4) (now 157(1)(4)) of the Civil Procedure Law.

2.142. The court reasoned that as court cases in Germany, India, Brazil, and the United States were all still pending, it was possible that Lenovo would prevail in cases, or that the two parties may yet resolve their disputes through mediation. The court noted that an ASI was not appropriate in these circumstances as there was no foreign court judgment or decision that could be enforced by Nokia.¹⁵⁶

2.7.2 Bosheng v. Lianyue

2.7.2.1 Litigation proceedings

2.143. On 5 November 2020, Lianyue – a Chinese company – filed an application with the SPC for act preservation against Bosheng – a Chinese company – and Tmall – an e-commerce platform – requesting that the sales link to allegedly patent-infringing products on Tmall be restored until the final judgment on the products took effect.¹⁵⁷

2.144. Bosheng – the patent holder – accused Lianyue of selling infringing products on an e-commerce platform. The first instance judgment ordered the e-commerce platform to remove the infringing products, and Lianyue appealed to the SPC. During the appeal, the patent at issue was nullified by the China National Intellectual Property Administration, after which Lianyue applied to the SPC for an act preservation measure ordering the e-commerce platform to reinstate the sales link to the previously removed products.

2.7.2.2 Decision and reasoning given by the Chinese court

2.145. On 6 November 2020, the SPC issued the act preservation measure requested by Lianyue, the implementer, in accordance with Articles 100 (now 103) and 102 of the Civil Procedure Law, and Articles 7 and 11 of the SPC Provisions.¹⁵⁸

2.146. In its judgment, the SPC noted that e-commerce platforms have the legal obligation upon a *prima facie* showing of infringement to take action to prevent the infringement. However, if the sellers can show that the circumstances are such that they would suffer irreparable damage to their

¹⁵⁵ Shenzhen Intermediate People's Court, Lenovo v. Nokia (Exhibit EU-50b).

¹⁵⁶ Shenzhen Intermediate People's Court, Lenovo v. Nokia (Exhibit EU-50b).

¹⁵⁷ SPC, Bosheng v. Lianyue (Exhibit CHN-84b), p. 4.

¹⁵⁸ SPC, Bosheng v. Lianyue (Exhibit CHN-84b), p. 18.

legitimate interests, the seller can apply for act preservation to restore the sales link, such was the situation here.¹⁵⁹

2.147. The SPC took into account the following factors in considering its decision: (a) whether the applicant's request has both factual and legal bases; (b) whether refusing to restore the sales link would cause irreparable damage to the applicant; (c) whether the damage to the patent holder by restoring the sales link would exceed the damage to the alleged infringing party by not restoring the link; (d) whether restoring the sales link would harm public interests; and (e) any other circumstances that should be considered.¹⁶⁰

2.148. The SPC noted that the validity of the patent was uncertain and that restoring the sales link would allow Lianyue to take advantage of important shopping days. Accordingly, the SPC ordered the e-commerce platform to restore immediately the sales link of Lianyue's product.¹⁶¹

2.149. China confirmed that the amount of any potential fine for non-compliance was not set out *ex ante* in the judgment of the SPC, but that "under Article 111 (now Article 114) of the Civil Procedure Law, Chinese courts have the authority to impose fines and take other actions for violation of their rulings. The design of fines, whether stated *ex ante* or determined *ex post* (after the violation has occurred), is within the discretion of the judges."¹⁶²

2.7.3 Huatai v. Clipper

2.7.3.1 Legal proceedings in China

2.150. On 2 June 2017, Huatai – a Chinese insurance company – applied to the Wuhan Maritime Court for maritime pre-trial preservation measures against Clipper – a Greek chartering company – in a dispute involving a cargo claim under a bill of lading. Huatai requested the arrest of the ship concerned. The court granted the application the same day and arrested the ship, which was anchored in a Chinese port.¹⁶³

2.151. On 8 June 2017, Huatai sued Clipper in the Wuhan Maritime Court for compensation for losses and legal costs in its dispute over the bill of lading. On the following day, the Wuhan Maritime Court accepted the case and served a summons and other documents on Clipper.

2.152. Clipper then applied to the Hong Kong High Court for an injunction asserting that there was a valid arbitration clause in the case. On 29 June 2017 the Hong Kong High Court found in favour of Clipper and issued an injunction ordering Huatai to withdraw the Chinese legal proceedings and prohibiting Huatai from initiating any other legal proceedings in China with regard to the bill of lading.¹⁶⁴

2.7.3.2 Decision and reasoning by the Chinese court

2.153. On 21 July 2017, the Wuhan Maritime Court issued a decision holding that Clipper had accepted its jurisdiction because Clipper had raised no objection to it within the relevant time-period after receiving the summons. The court consequently held that Clipper's application to the Hong Kong High Court for an injunction violated Huatai's legitimate rights and interests.¹⁶⁵

2.154. The Wuhan Maritime Court, pursuant to Article 51 and Article 57 of the Special Maritime Procedure Law of the People's Republic of China,¹⁶⁶ issued a maritime injunction, which had the

¹⁵⁹ SPC, Bosheng v. Lianyue (Exhibit CHN-84b), p. 10.

¹⁶⁰ SPC, Bosheng v. Lianyue (Exhibit CHN-84b), p. 11.

¹⁶¹ SPC, Bosheng v. Lianyue (Exhibit CHN-84b), p. 19.

¹⁶² China's response to Panel question No. 93(b).

¹⁶³ Wuhan Maritime Court, Huatai v. Clipper (Exhibit CHN-92b), p. 2.

¹⁶⁴ Wuhan Maritime Court, Huatai v. Clipper (Exhibit CHN-92b), p. 3.

¹⁶⁵ Wuhan Maritime Court, Huatai v. Clipper (Exhibit CHN-92b), p. 3.

¹⁶⁶ Special Maritime Procedure Law of the People's Republic of China (Exhibit CHN-93b). China explains that this law is the equivalent of the Civil Procedure Law in the maritime field. See China's response to Panel question No. 94.

effect of an AASI, ordering Clipper to apply immediately for withdrawal of the Hong Kong High Court injunction.

2.155. No specific penalty in case of non-compliance was set forth in the maritime injunction but China notes that "according to Article 59 of the Special Maritime Procedure Law of China, if the respondent refuses to comply with the maritime injunction order, the maritime court may impose a fine or detention in accordance with the gravity of the situation ... and that [t]he provision also stipulates the amount of the fine and the period of detention."¹⁶⁷ China further explains that "Judges may either include the penalties in the judgment or impose them after the violation occurs."¹⁶⁸

2.8 Transparency

2.156. The European Union challenges, under Article 63.1 of the TRIPS Agreement, China's alleged failure to publish final judicial decisions of general application, made effective by China pertaining to the subject matter of the TRIPS Agreement. The European Union also challenges China's alleged failure to supply information requested by the European Union pursuant to Article 63.3 of the TRIPS Agreement. This section will describe the facts that are relevant to the European Union's transparency claims.

2.8.1 Publication of final judicial decisions of general application

2.157. The SPC promulgated the Provisions on the Publication of Judgments on the Internet by the People's Courts in July of 2016.¹⁶⁹ Article 2 provides for a unified platform for courts across the country to publish judgment documents, which is titled "China Judgments Online". Article 3 lists the judgment documents made by people's courts that shall be published on the internet, which include criminal, civil and administrative judgments and criminal, civil and administrative rulings.¹⁷⁰ The China Judgments Online website is available at <https://wenshu.court.gov.cn/>.

2.158. On 25 February 2021, China Judgments Online published the SPC redetermination ruling of 11 September 2020 in *Huawei v. Conversant* and the ruling of 2 November 2020 approving the withdrawal of the cases also in *Huawei v. Conversant*. On the following day China Judgments Online published the SPC decision of 28 August 2020 in *Huawei v. Conversant* issuing the ASI.¹⁷¹ Further details on how the decisions in other cases were made available to the public in either full text or summary form are set out in the timeline below.¹⁷²

2.8.2 The European Union's request for information pursuant to Article 63.3 of the TRIPS Agreement

2.159. On 6 July 2021, the European Union sent an official written request for information to China pursuant to Article 63.3 of the TRIPS Agreement¹⁷³:

¹⁶⁷ China's response to Panel question No. 95.

¹⁶⁸ China's response to Panel question No. 95.

¹⁶⁹ Communication from China, Response to the European Union's Request for Information Pursuant to Article 63.3 of the TRIPS Agreement, Communication, 7 September 2021, IP/C/W/683.

¹⁷⁰ SPC, Provisions on the Publication of Judgment Documents by the People's Courts on the Internet (Exhibit EU-25), 8 August 2016.

¹⁷¹ Publication of *Huawei v. Conversant* in China Judgments Online (Exhibit CHN-85).

¹⁷² See also China's response to Panel question No. 60.

¹⁷³ IP/C/W/682. (fns omitted)

REQUEST FOR INFORMATION PURSUANT TO ARTICLE 63.3 OF THE TRIPS AGREEMENT**COMMUNICATION FROM THE EUROPEAN UNION TO CHINA**

1. The European Union would like to note that it welcomes and appreciates China's ongoing efforts to strengthen its intellectual property rights system and its willingness to inform Members about its domestic developments. The European Union has for over ten years supported China's efforts through the IP Key project and remains committed to continue cooperating in the future to mutual benefit on further improvements.

2. In the interest of further transparency the European Union would like to request some information regarding a number of recent judicial decisions and regulations relating to patents. The European Union has noted that in four court cases decisions were taken relating to application for and enforcement of injunctions in relation to standard essential patents. Some of these decisions also contain measures relating to initiating court procedures on licence questions and royalty rates. These decisions appear to give a new interpretation to existing laws and regulations, and also have led to new regulations being proclaimed. Further detail on these measures is given below. In the annex are questions for clarification the European Union would like to ask China on these measures. This is a request pursuant to Article 63.3 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement").

3. The European Union noted two cases in the Supreme People's Court report on 2020 landmark decisions: the first case, *Conversant v Huawei*, was reported as China's first decision putting in place a so called "anti-suit injunction" and the first for setting daily fines. The decision is stated as barring the holder of a European patent from enforcing a court decision of a Member State of the European Union relating to that patent. That decision reportedly addressed litigation relating to standard essential patents in numerous WTO Members. The decision is put forward as a model for China's approach to anti-suit injunctions and daily fines of rightholders. The European Union would like to understand better this decision and the underlying approach.

4. The European Union also noted the Supreme People's Court qualified the *Conversant v Huawei* case as a "typical case" (典型案件) and published "adjudication guidelines" based on the case. Further clarification of the impact of that qualification and the status of these guidelines would be welcome.

5. The second landmark case the Supreme People's Court reported involved *OPPO vs Sharp*. The decision is reported as barring the holder of a European patent from enforcing a court decision of a Member State of the European Union relating to that patent, and forcing the patent holder to withdraw the case from before that court. This case is reported as being the first worldwide "anti-suit injunction" and dealing with "anti-anti-suit injunctions" in other jurisdictions. It is portrayed by the Supreme People's Court as of great significance in China becoming a "guide of international intellectual property rules." The European Union would therefore welcome further information on the reasoning and application of that decision.

6. The third case the European Union is aware of is *Xiaomi v InterDigital*. The website of Wuhan city government reports that on 23 September 2020 the Wuhan Intermediate People's Court ruled that InterDigital should immediately withdraw or suspend the patent licence rate ruling and injunction against Xiaomi in India, and could not apply for patent licence rate ruling and injunction against Xiaomi in any court in the world. In case of violation of the ruling, a fine of RMB 1 million per day will be imposed.

7. The fourth case is *Samsung v Ericsson* before Wuhan Intermediate People's Court. Online documents from a case between Ericsson and Samsung before a US Court indicate that the Wuhan court imposed an anti-suit injunction similar to that of InterDigital on Ericsson. According to the US judgment the Wuhan court forbade Ericsson to apply to any court to rule on questions relating to licences, rates, and whether its conduct was compatible with a FRAND commitment. Ericsson was prohibited to apply for or enforce an injunction for the patents at issue in the case in Wuhan, or

get another court to issue an order forcing Samsung to withdraw its application for an anti-suit injunction. Non-compliance with these requirements would expose Ericsson to serious penalties.

8. It is especially important that Members and right holders can acquaint themselves with those decisions that are identified as typical, example cases. As the European Union understands the official website where Chinese judgements are published is "China judgements online." However, upon research only the *Conversant v Huawei* case decisions were found on that website. Therefore the European Union would like to request China to clarify if and where the decisions in the other three cases can be found and provide these.

9. This is a case of some urgency as shown by the fact that some Courts adopted these provisional measures *inaudita altera parte*. Therefore European Union requests China to provide its answers eight weeks after receipt of this Communication. The European Union looks forward to receiving China's reply on the questions on these measures in the annex. The European Union would welcome the opportunity to have a further exchange on this topic in the Council for TRIPS. Availing of the opportunity the Council offers for an in-depth exchange will enable a better understanding of affected WTO Members concerning these matters.

ANNEX

QUESTIONS TO CHINA ON SEVERAL MEASURES PERTAINING TO THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

I. Text of court decisions

A) The European Union would like to ask if China could provide all decisions taken so far in the following cases. To the extent more decisions were taken pertaining to the subject matter China is requested to provide all of these. For example in *OPPO v Sharp* the Supreme People's Court noted there was a decision on the injunction and then it appears a follow up decision on its implementation. Press articles also reported another decision on jurisdiction.

1 - *OPPO v Sharp* - Shenzhen Intermediate Court

2 - *Xiaomi v InterDigital* - Wuhan Intermediate People's Court of Hubei Province

3 - *Samsung v Ericsson* - Wuhan Intermediate People's Court of Hubei Province

B) The European Union would also like to ask if China could clarify which decisions are published on the website "China judgements online." What are the selection criteria? Are there specific timelines foreseen for publication after adoption of a case?

II. Supreme People's Court typical case status

The Supreme People's Court in its annual report on 2020 presented the *Conversant Huawei* case as a "typical case" (典型案例).

The Supreme People's Court IP tribunal also classified the case as a "typical technology case" in its report on the 2020 intellectual property cases in the field of technology.

Could China clarify what is the status of a typical case? Are lower courts bound to follow these?

Could China clarify what is the status of a typical technology case? Is there a difference in status between a typical case and a typical technology case? What is the impact of a case being both a typical case and a typical technology case?

III. Supreme People's Court "big" case status

The Supreme People's Court in an annual report on 2020 presented ten cases as a "big" IP case (大知识产权案件). These ten cases include the SPC *Conversant v Huawei* case and a decision by the Shenzhen Intermediate Court in *OPPO v Sharp*. These "big" cases are presented next to 50 "typical case" (典型案件).

Could China clarify what is the status of a "big" case? Is it different from a "typical" case? As *Conversant v Huawei* is also classified as a "typical" case does that change the status? Are lower courts bound to follow these "big" cases?

Why did the SPC choose these cases as "big" or "typical" cases?

IV. Supreme People's Court IP Tribunal adjudication guidelines

Based on the typical case of *Conversant Huawei* the Supreme People's Court IP Tribunal published adjudication guidelines for deciding on an anti suit injunction and daily penalties.

Could China clarify what is the status of these adjudication guidelines? Are lower courts bound to follow these?

V. Guidance on act preservation measures - status

The Supreme People's Court has adopted Provisions on Act Preservation Measures in intellectual property disputes which have been applied in the two decisions by the Wuhan court on anti-suit injunctions.

Could China clarify what is the status of these Provisions? Are lower courts bound to follow these?

How do these Provisions relate to the adjudication guidelines mentioned above? Is there a hierarchy between these norms?

VI. China civil procedure law

The anti-suit injunctions are described as "act preservation measures" under article 100 of the China civil procedure law, and the European Union understands they are provisional measures in terms of Article 44 TRIPS.

Could China clarify what is the status of these "act preservation measures"? For example the time during which these can remain in place? If we understand correctly they will be in place for the duration of the case. If there is an appeal would they remain in place?

VII. Jurisdiction

The Supreme People's Court report on *OPPO v Sharp* noted *OPPO* requested the Shenzhen intermediate court to set a worldwide licence rate for *Sharp's* standard essential patents.

Could China clarify what the Shenzhen court gave as a legal basis for it to have jurisdiction to set worldwide licence rates?

VIII. Scope of anti-suit injunctions

A) The Supreme People's Court reported that both in the case of *Conversant v Huawei* and in *OPPO v Sharp* the anti-suit injunction blocked enforcement of an injunction in the European Union based on a patent issued by a Member State of the European Union.

Could China clarify for both of these cases what was the legal basis for the courts to block enforcement of an injunction in the European Union based on a patent issued by a Member States of the European?

B) There is a note on the Wuhan government website describing an anti-suit injunction Xiaomi obtained prohibited InterDigital from applying for an injunction in any court worldwide or to request any court worldwide to decide on questions relating to the licence or royalty rates for its standard essential patents.

Could China clarify what was the legal basis for the Wuhan Intermediate Court to put in place a worldwide prohibition for applying for an injunction and for seizing a court to decide on questions relating to the licence for standard essential patents, including royalty rates?

2.8.3 China's response to the European Union's request for information

2.160. On 7 September 2021, China replied to the European Union's request for information pursuant to Article 63.3 of the TRIPS Agreement¹⁷⁴:

RESPONSE TO THE EUROPEAN UNION'S REQUEST FOR INFORMATION PURSUANT TO ARTICLE 63.3 OF THE TRIPS AGREEMENT

COMMUNICATION FROM CHINA

1. The Government of China always attaches great importance to IPR protection and will further improve IPR legislation and enforcement in accordance with the WTO rules and China's WTO accession commitments. China will also continue making its notifications to the WTO in a timely manner. Meanwhile, China maintains contacts with other WTO Members including the European Union, in various forms and at different levels, with an aim to sharing information and strengthening cooperation in the field of IPR.

2. China has taken note of the request for information by the European Union pursuant to Article 63.3 of the TRIPS Agreement. Despite the fact that there is no such obligation under the TRIPS Agreement for China to respond, China still has made its best efforts to provide the following information in the spirit of good faith, cooperation and transparency.

3. With a view to implementing the open trial principle, promoting judicial justice and improving judicial credibility, the Supreme People's Court of China promulgated the Provisions on the Publication of Judgments on the Internet by the People's Courts in July 2016, which prescribes the types of documents and publication time on the "China Judgments Online". The Provisions can be found at the following website: <http://www.court.gov.cn/fabu-xiangqing-25321.html>.¹⁷⁵

4. It should be pointed out that the "typical" cases, "typical technology cases" and "big" cases mentioned in the EU communication are cases for reference and have no legal effect of general application. These cases and adjudication guidelines extracted from these cases serve to timely summarize the trial experiences, strengthen publicity of the rule of law and provide references for judicial practices and legal education.

5. China and the European Union have established the China-EU IP Working Group, and China stands ready to have further discussions through such existing bilateral channel.¹⁷⁶

¹⁷⁴ IP/C/W/683.

¹⁷⁵ (Fn added by the Panel) The Panel notes that this link resolves to an error message (attempts made to access the link on 15 November 2024 and 11 February 2025).

¹⁷⁶ IP/C/W/683.

2.9 Timeline

2.161. The Panel provides in table format below a timeline of the events relevant to the European Union's presentation of the measures at issue as well as to the transparency claims. The events in this timeline are based on evidence presented by the parties to the Panel in exhibits, as well as clarifications provided by the parties.

Table 2: Timeline of events

Date	Litigation	Other events
2018		
17 January	ZTE files a lawsuit against Conversant in China before the Shenzhen Intermediate People's Court seeking a determination of FRAND royalty conditions. (ZTE v. Conversant)	
25 January	Huawei files three cases before the Nanjing Intermediate People's Court seeking a determination of patent non-infringement and FRAND royalty conditions. (Huawei v. Conversant)	
20 April	Conversant files a lawsuit against Huawei and its German affiliates for infringement of SEPs in the Düsseldorf District Court (Germany). (Conversant v. Huawei) Conversant files a lawsuit against ZTE and its German affiliates for infringement of SEPs in the Düsseldorf District Court (Germany). (Conversant v. ZTE)	
12 December		SPC promulgates the SPC Provisions.
2019		
1 January		SPC Provisions enter into force.
16 September	Nanjing Intermediate People's Court issues a judgment in Huawei v. Conversant on patent non-infringement and FRAND royalty conditions.	
18 September	Nokia files a lawsuit against Lenovo Germany and Lenovo Group concerning SEP infringement in the Munich Regional Court (Germany) and six additional lawsuits against Lenovo in the Munich Regional Court, the Mannheim Regional Court and the Düsseldorf Regional Court concerning SEP infringement.	
25 September	Nokia files a lawsuit in the United States District Court for the Eastern District of North Carolina (United States) against eight Lenovo affiliated companies, including Lenovo (USA), Lenovo Beijing, and Lenovo Shenzhen.	
19 October	Nokia files a SEP infringement lawsuit against Lenovo Group and Lenovo India in the Delhi High Court (India).	
18 November	SPC accepts the appeal by Conversant against the judgment of the Nanjing Intermediate People's Court. (Huawei v. Conversant)	
2020		
30 January	Sharp files a patent infringement lawsuit before the Tokyo District Court (Japan) against OPPO Japan Co., Ltd. claiming that some OPPO mobile phones sold by OPPO Japan infringed a Japanese patent.	
20 February	OPPO files a lawsuit against Sharp before the Shenzhen Intermediate People's Court requesting the court to determine global licensing conditions in accordance with FRAND principles on the applicants' intelligent terminal products regarding Wi-Fi related SEPs.	

Date	Litigation	Other events
6 March	Sharp files an infringement lawsuit against OPPO in a Tokyo District Court (Japan) alleging infringement of a Japanese patent. Sharp files a patent infringement lawsuit against OPPO with a Munich District Court (Germany), claiming that certain mobile phones produced and sold by OPPO infringed its patent rights. Sharp files two other patent infringement lawsuits against OPPO with the Mannheim District Court (Germany) alleging infringement of some European patents.	
9 March	Sharp files another lawsuit alleging infringement of a Japanese patent in the Tokyo District Court (Japan) raising the same claim as the lawsuit it filed three days earlier.	
25 March	Shenzhen Intermediate People's Court accepts the case of OPPO v. Sharp.	
1 April	Sharp files a lawsuit against SAMOA Global Co., Ltd, OPPO's sole agent in Chinese Taipei before the Intellectual Property Court in New Taipei City alleging patent infringement.	
9 June	Xiaomi files a case against InterDigital before the Wuhan Intermediate People's Court seeking a determination of a global rate for SEPs owned by InterDigital and implemented by Xiaomi. (Xiaomi v. InterDigital)	
18 June		<i>IP Court News</i> publishes a news article titled "Deputy Luo Dongchuan suggested the enactment of a special trial law for intellectual property litigation".
July		Guangdong Province Higher People's Court Intellectual Property Tribunal publishes a paper titled "Research on Legal Issues of Standard Essential Patents in the Communications Field".
2 July	Nokia files a SEP infringement lawsuit against Lenovo Brazil in a court in Rio de Janeiro (Brazil).	
29 July	InterDigital files a patent infringement lawsuit before the Delhi District Court (India) against Xiaomi and its multiple affiliated companies requesting, in the alternative to the infringement claims, to adjudicate the global royalty rate-setting dispute between the two parties. It also files requests for a temporary and permanent injunction preventing Xiaomi and its affiliates from producing and selling some wireless communication terminal products in India.	
4 August	Xiaomi requests an ASI against InterDigital before the Wuhan Intermediate People's Court requesting the court to order InterDigital to withdraw or suspend the injunctions requested in the Delhi District Court and to prohibit InterDigital from seeking other similar injunctions in any other country.	
26 August	United Kingdom Supreme Court issues judgment in <i>Unwired Planet v. Huawei</i> , <i>Huawei v. Conversant</i> , and <i>ZTE v. Conversant</i> .	

Date	Litigation	Other events
27 August	Düsseldorf District Court renders a judgment of first instance issuing an injunction and finding that ZTE and its German affiliates infringed a Conversant European patent. It prohibited ZTE and its German affiliates from providing, selling, using or importing or owning relevant mobile terminal products with UMTS function in Germany. (Conversant v. ZTE) Düsseldorf District Court renders a first instance judgment issuing an injunction and concluding that Huawei Technology and its German affiliates infringed a Conversant European patent, ordering Huawei Technology and its German affiliates to be prohibited from providing, selling, using, or importing or holding related mobile terminals for the above-mentioned purposes, and to be prohibited from providing or delivering mobile phones and tablets with UMTS standard functions to customers, among others. (Conversant v. Huawei). The SEP licence rate offered by Conversant was more than 10 times the rate set by the Nanjing Intermediate People's Court. Huawei applies to the SPC for an ASI requesting the court to order that the respondent Conversant must not apply for enforcement of the injunction issued by the Düsseldorf District Court before the SPC's final judgment on the three cases pending before it. (Huawei v. Conversant)	
28 August	ZTE files a request for an ASI against Conversant before the Shenzhen Intermediate People's Court requesting the court to order Conversant not to apply for the execution of the stop infringement judgment made by the Düsseldorf District Court (Germany). (ZTE v. Conversant) SPC issues an ASI ordering Conversant to not apply for the enforcement of the Düsseldorf District Court's injunction judgment before the SPC's final judgment on the three cases before it. The SPC also provided for a fine in case of non-compliance of CNY 1 million per day. (Huawei v. Conversant)	
2 September	Conversant files a request for reconsideration before the SPC for the ASI issued on 28 August 2020. (Huawei v. Conversant)	
11 September	SPC issues ruling rejecting Conversant's reconsideration request and maintaining the ASI. (Huawei v. Conversant)	
23 September	Wuhan Intermediate People's Court issues the ASI requested by Xiaomi against InterDigital, ordering InterDigital to withdraw immediately or suspend the temporary injunction applied for in the Delhi District Court (India) and to not apply for any further injunctions in other jurisdictions, among other prohibitions. The court provided for a fine in case of non-compliance of CNY 1 million per day.	
25 September	InterDigital files a request before the Wuhan Intermediate People's Court to reconsider the decision issuing the ASI.	
26 September		<i>IP Economy</i> publishes in its WeChat Account an item titled "Wuhan Intermediate Court Makes Ruling on the Dispute over FRAND Rates between Xiaomi and InterDigital (Text of the Ruling Attached)".

Date	Litigation	Other events
29 September	Shenzhen Intermediate People's Court grants the ASI requested by ZTE, ordering Conversant not to apply for enforcement of the Düsseldorf District Court's judgment before the final judgment in that dispute. The court provided for a fine in case of non-compliance of CNY 600,000 per day. (ZTE v. Conversant)	
29 September	InterDigital files an application for an AASI in the Delhi High Court.	
30 September	The Munich Regional Court (Germany) issued a judgment ordering Lenovo to stop infringing a European patent. The court found that Lenovo Germany infringed Nokia's European patent, and ordered that Lenovo Germany be prohibited from providing, selling, using or importing or possessing Lenovo's infringing products, among others.	
2 October	Lenovo applies to the Munich Higher Regional Court (Germany) for temporary suspension of the injunction issued by the Munich Regional Court.	
9 October	Delhi High Court grants AASI requested by InterDigital. (Xiaomi v. InterDigital)	
13 October	Lenovo Beijing and Lenovo Shenzhen file a lawsuit against Nokia Beijing and Nokia relating to non-compliance with FRAND terms and determination of FRAND rates before the Shenzhen Intermediate People's Court.	
14 October	Shenzhen Intermediate People's Court holds a private hearing on the request for an ASI by OPPO.	
16 October	Shenzhen Intermediate People's Court issues decisions: one on jurisdiction and another granting the ASI requested by OPPO, prohibiting Sharp and its affiliates from initiating new patent infringement lawsuits, and/or applying for new judicial injunctions or other similar relief measures against OPPO and its affiliates with the judiciary authorities in other countries or regions before the final judgment of that case is delivered. The court provided for a fine in case of non-compliance of CNY 1 million per day.	
20 October	The Munich Higher Regional Court (Germany) rejects Lenovo's application for suspension of execution of the judgment by the Munich Regional Court while an application to increase the security deposit is pending.	
30 October	The Munich Higher Regional Court suspends the judgment of the Munich Regional Court. (Lenovo v. Nokia). ZTE files an application with the Shenzhen Intermediate People's Court for withdrawal of the case in ZTE v. Conversant.	
2 November	Shenzhen Intermediate People's Court approves ZTE's application to withdraw the case. (ZTE v. Conversant). SPC approves Huawei's application to withdraw the three pending cases. (Huawei v. Conversant).	
26 November	Lenovo Beijing and Lenovo Shenzhen request an ASI before the Shenzhen Intermediate People's Court. (Lenovo v. Nokia)	
30 November		President Xi Jinping makes a speech titled "Stepping Up Intellectual Property Rights Protection to Stimulate Innovative Vigor for Fostering a New Development Dynamic" at the 25th group study session of the Political Bureau of the 19th Communist Party of China Central Committee.

Date	Litigation	Other events
4 December	Wuhan Intermediate People's Court issues ruling rejecting InterDigital's request for reconsideration of the ASI issued.	
7 December	Samsung files a lawsuit against Ericsson before the Wuhan Intermediate People's Court relating to royalty rates for SEPs. SPC accepts Sharp's appeal from the Shenzhen Intermediate People's Court decision on jurisdiction.	
11 December	Ericsson and its wholly owned US subsidiary sue Samsung Co., Ltd. and its US subsidiary in the US District Court E.D. Texas (United States), requesting the court to confirm that Ericsson's quotation complied with the FRAND principles and that Ericsson's negotiations with the applicants complied with FRAND commitments and the ETSI Intellectual Property Rights Policy.	
14 December	Samsung files a request before the Wuhan Intermediate People's Court for an ASI against Ericsson requesting, among other things, the court to prohibit the respondent from seeking temporary or permanent injunctive relief against the applicants.	
21 December		<i>Chinese Journal of Applied Jurisprudence</i> publishes an article by Judge Shen Hongyu of the SPC titled "The Construction of the Extraterritorial Applicable Legal System of Chinese Law and the Reform of the Jurisdiction System of Foreign-Related Civil and Commercial Litigation".
24 December		The SPC sends message via its WeChat account titled "The Seven Typical Cases and China Made the First Anti-Suit Injunction in IPR Field".
25 December	Wuhan Intermediate People's Court grants the ASI requested by Samsung, prohibiting Ericsson to seek temporary injunctive relief, permanent injunctive relief or administrative measures against Samsung in China or other countries and regions, among other prohibitions. The court determined that the penalty in case of non-compliance would be set according to the Civil Procedure Law.	
26 December		The SPC sends message via its WeChat account on "Introduction of the Seven Typical Cases".
27 December		<i>IPR Daily</i> reports on the SPC's announcements on top seven typical cases.
30 December	Ericsson applies to the Wuhan Intermediate People's Court for reconsideration of the ASI issued on 25 December 2020.	<i>IP Economy</i> issues a press release titled "Wuhan Intermediate Court Makes Ruling on the Dispute over FRAND Rates between Samsung and Ericsson (Text of the Ruling Attached)".
2021		
11 January	US District Court E.D. Texas issues an AASI at the request of Ericsson. (Samsung v. Ericsson)	
27 January	Shenzhen Intermediate People's Court rejects Lenovo's request for an ASI against Nokia.	
31 January		<i>Qiushi Journal</i> publishes President Xi Jinping's speech of 30 November 2020.

Date	Litigation	Other events
25 February		China Judgments Online publishes SPC rulings dated 11 September 2020 (redetermination ruling) and 2 November 2020 (withdrawal of the cases) in Huawei v. Conversant.
26 February		"Judgment Digests of the Intellectual Property Court of the Supreme People's Court (2020)" extract 46 "adjudication rules" from 55 typical cases, including two such rules from Huawei v. Conversant regarding factors to consider when issuing ASIs, and daily penalties. The SPC mentions Huawei v. Conversant (original ruling and reconsideration decision) in "Top 10 Typical Technology-related IP Cases of the SPC IP Tribunal in 2020". China Judgments Online publishes the SPC ASI ruling in Huawei v. Conversant.
10 March	Wuhan Intermediate People's Court issues its reconsideration decision on the ASI in Samsung v. Ericsson rejecting Ericsson's request and upholding the original ruling.	
20 April		Hubei Province Higher People's Court includes Xiaomi v. InterDigital (original ruling and reconsideration decision) in a report titled "Top 10 Typical IP Cases of Hubei Courts in 2020". Shenzhen Intermediate People's Court includes ZTE v. Conversant (ASI ruling) and OPPO v. Sharp (ruling on jurisdiction) in a post in its official WeChat Account "Judicial Protection of Intellectual Property Rights in Shenzhen: innovative cases".
22 April		SPC includes OPPO v. Sharp (original ruling) as part of "Top 10 intellectual property cases and 50 typical intellectual property cases in Chinese courts in 2020". Guangdong Province Higher People's Court includes ZTE v. Conversant (original ruling) in its report on "Top ten intellectual property cases adjudicated in Guangdong province in 2020".
26 April		SPC mentions Huawei v. Conversant (original ruling) as a typical case in the "Annual Report of the Supreme People's Court on Intellectual Property Cases (2020)". The summary of the Annual Report lists 63 issues of "certain guiding significance" extracted from 55 typical cases, including two such issues from Huawei v. Conversant regarding factors to consider when issuing ASIs, and daily penalties.

Date	Litigation	Other events
7 May	Ericsson releases a press statement announcing that it had signed a multi-year agreement with Samsung on global patent licences between the two companies, including patents relating to all cellular technologies.	
2 June	During trial proceedings in the Wuhan Intermediate People's Court, Ericsson and Samsung informed the court that they had reached a settlement agreement	
7 June	The Wuhan Intermediate People's Court accepts the settlement agreement and dissolves the ASI. (Samsung v. Ericsson)	
5-6 July		The European Union sends a request for information pursuant to Article 63.3 to China on 5 July. The Council for TRIPS circulated the European Union's request as document IP/C/W/682 the next day.
29 July	Public hearing held in the underlying proceedings in Xiaomi v. InterDigital.	
30 July	Xiaomi and InterDigital reach a comprehensive settlement and sign a licensing agreement.	
3 August		InterDigital issues a press release announcing that it had concluded a multi-year, worldwide, non-exclusive, royalty bearing licence with Xiaomi.
8 August		South China Institute for Intellectual Property publishes an article by Judge Zhu Jianjun of the Shenzhen Intermediate People's Court titled "Conflicts and Countermeasures between standard essential patent injunction and anti-injunction".
19 August	SPC issues ruling upholding the Shenzhen Intermediate People's Court's decision on jurisdiction to set a global FRAND rate. (OPPO v. Sharp)	
7 September		Council for TRIPS circulates China's response to the European Union's request for information pursuant to Article 63.3 (IP/C/W/683).
29 September	OPPO files an application for withdrawal of the case with the Shenzhen Intermediate People's Court. The Court grants leave to withdraw the case and consequently the ASI is dissolved.	
8 October	OPPO releases a press statement announcing that OPPO and Sharp had reached a cross-licensing and collaboration agreement covering global patent licences and implementation of communications technology standards for their end products.	
21 October		President of the SPC presents a report titled "Report on people's courts' IP trial work" at the 13th National People's Congress Standing Committee 31st session.
31 October	Xiaomi applies for withdrawal of the case on the grounds that it had reached a comprehensive settlement with InterDigital and had signed a licensing agreement on 30 July 2021.	
11 November	Wuhan Intermediate People's Court accepts Xiaomi's request to withdraw the case and consequently the ASI in that dispute is dissolved.	
18 November		NPC Standing Committee provides its "Opinions and suggestions on the report on intellectual property trial work of the people's courts".

Date	Litigation	Other events
24 December		The Propaganda Office of the Political Department of Wuhan Intermediate People's Court releases an article on "Protecting Intellectual Property Rights and Building a Fortress for Innovations", where it referred to the Samsung v. Ericsson case as an example of improvement in conducting trials.
2022		
22 January		Hubei Province Higher People's Court publishes Work Report on 2021: Interpretation of Typical Cases II.
18 February		The European Union requests consultations with China.
25 February		The Guangdong Province Higher People's Court's includes OPPO v. Sharp in a report titled "Top 10 Provincial-Wide Court Cases in 2021".
27 February		President of the SPC presents the "Report on implementation inspection of 'Decision on several issues concerning litigation procedures in patent and other IP cases'" at the 13th National People's Congress Standing Committee 33rd session.
8 March		The NPC Standing Committee issues a report to the NPC titled "Decision of the Fifth Session of the 13th National People's Congress on the Work Report of the Standing Committee of the National People's Congress".
11 March		The NPC adopts the Standing Committee's report "Decision of the Fifth Session of the 13th National People's Congress on the Work Report of the Standing Committee of the National People's Congress".
22 March		The SPC publishes the SPC 2022 Interpretation on the Application of the Civil Procedure Law.
7 December		European Union requests the establishment of a panel.
28 December		The SPC includes Lenovo v. Nokia in a report titled "Excellent Trial Documents of Cases Involving Intellectual Property Rights in Technology and Monopoly Cases in 2021".

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. The European Union requests the Panel to find that China's measures are inconsistent with its obligations under the TRIPS Agreement and the Protocol on the Accession of the People's Republic of China.

3.2. Specifically, the European Union requests that the Panel find that:

- a. China's anti-suit injunction policy in SEP litigation, either as a general and prospective norm or as ongoing conduct, is as such a measure inconsistent with China's obligations under Article 1.1, first sentence, of the TRIPS Agreement, in conjunction with Article 28.1 of the TRIPS Agreement;

- b. The five judicial decisions issuing anti-suit injunctions in SEP disputes are measures inconsistent with China's obligations under Article 1.1, first sentence, of the TRIPS Agreement, in conjunction with Article 28.1 of the TRIPS Agreement;
- c. China's anti-suit injunction policy in SEP litigation, either as a general and prospective norm or as ongoing conduct, is as such a measure 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;
- d. The five judicial decisions identified above, issuing anti-suit injunctions in SEP disputes, are measures 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;
- e. China's anti-suit injunction policy in SEP litigation, either as a general and prospective norm or as ongoing conduct, is as such a measure inconsistent with China's obligations under Article 41.1, second sentence, of the TRIPS Agreement;
- f. The five judicial decisions identified above, issuing anti-suit injunctions in SEP disputes, are measures inconsistent with China's obligations under Article 41.1, second sentence, of the TRIPS Agreement;
- g. China's anti-suit injunction policy in SEP litigation, either as a general and prospective norm or as ongoing conduct, is as such a measure inconsistent with China's obligations under Article 1.1, first sentence, of the TRIPS Agreement, in conjunction with Article 44.1, first sentence, of the TRIPS Agreement;
- h. The five judicial decisions identified above, issuing anti-suit injunctions in SEP disputes, are measures inconsistent with China's obligations under Article 1.1, first sentence, of the TRIPS Agreement, in conjunction with Article 44.1, first sentence, of the TRIPS Agreement;
- i. China applied and administered its legal framework governing the adoption of act preservation measures (e.g. ASIs) 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;
- j. The failure to publish final judicial decisions of general application pertaining to the subject matter of the TRIPS Agreement is inconsistent with China's obligations under Article 63.1 of the TRIPS Agreement;
- k. The failure to supply the information requested in writing by the European Union and to give it access to recent judicial decisions pertaining to the subject matter of the TRIPS Agreement is inconsistent with China's obligations under Article 63.3 of the TRIPS Agreement.

3.3. The European Union further requests, pursuant to Article 19.1 of the DSU, that the Panel recommends that China bring its measures into conformity with the TRIPS Agreement and the Protocol on the Accession of the People's Republic of China.¹⁷⁷

3.4. China argues that the European Union has failed to demonstrate both the existence and the precise content of the alleged ASI policy. Accordingly, China submits that the only remaining measures are five individual court decisions that expired prior to the establishment of the Panel, and which do not meet the criteria that panels have applied to determine whether to make findings in respect of expired measures. According to China, in the absence of any legally cognizable measures, there is no basis for the Panel to assess the European Union's legal claims in respect of the asserted measures.

3.5. China further submits that even if the Panel were to identify one or more measures that it could evaluate, the European Union's legal claims lack merit. According to China, the European Union's claims under the TRIPS Agreement are based on misinterpretations of the identified provisions of

¹⁷⁷ European Union's first written submission, paras. 704-705.

that Agreement. China also submits that the European Union's claims under Section 2(A)(2) of China's Protocol of Accession are based on a misconception of Chinese law concerning ASIs. China further contends that the European Union's transparency-related claims under Article 63 of the TRIPS Agreement are based on the mistaken assertion that the court decisions in question were final judicial decisions of general application. Thus, according to China, even if there were legally cognizable measures that were properly before the Panel, the European Union has failed to demonstrate any WTO inconsistency.

3.6. Consequently, China requests the Panel to 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.¹⁷⁸

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 23 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Australia, Brazil, Canada, Japan, Korea, the United Kingdom, and the United States are reflected in their executive summaries, provided in accordance with paragraph 26 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, C-5, C-6, and C-7). Colombia, India, Indonesia, Norway, Peru, the Russian Federation, Singapore, Switzerland, Chinese Taipei, Thailand, Ukraine, and Viet Nam did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 2 December 2024, the Panel issued its Interim Report to the parties. On 20 December 2024, the European Union and China submitted written requests for review of precise aspects of the Interim Report. On 15 January 2025, the European Union submitted comments on China's requests for review. In accordance with Article 15.3 of the DSU, this section of the Report addresses the parties' requests for review of precise aspects of the Report made at the interim review stage. The Panel notes that the numbering of certain footnotes has changed in the Final Report compared with the Interim Report. Footnote references in this section identify the numbering in the Interim Report, with the numbering in the Final Report indicated in parentheses.

6.2. The European Union and China both requested the Panel to correct what they described as clerical errors in the Interim Report. China also requested the Panel to review the following aspects of the Interim Report: (i) certain alleged factual errors; (ii) the findings and conclusions in section 7.2; (iii) certain findings regarding the existence of the ASI policy; and (iv) certain findings in relation to Article 63.1 of the TRIPS Agreement. The European Union disagrees with certain of China's requests for review. The Panel addresses each set of requests in turn.

6.3. With respect to what the parties described as clerical errors, the European Union suggested revisions to paragraphs 2.158 and 7.305, and China suggested adjustments to Table 1, paragraphs 2.48, 2.51, 2.141, 7.87, 7.317, 7.327, and 7.512, and footnotes 950 (now 964), 961 (now 975), 986 (now 1000), 1023 (now 1037), and 1072 (now 1086). With the exception of China's requests regarding Table 1, paragraph 7.512, and footnote 1023 (now 1037) the Panel made relevant adjustments to these paragraphs and footnotes. The Panel also made minor edits for clarity and accuracy in paragraphs 2.11-2.12, 2.17, 2.30-2.31, 2.36, 2.52, 2.56, 2.58, 2.60, 2.66, 2.69, 2.79, 2.85, 2.114, 2.126, 2.129, 2.131, 2.143, 2.145, 2.147, 2.161, 3.5, 7.1, 7.3, 7.7, 7.10, 7.14, 7.17, 7.57, 7.59-7.62, 7.64, 7.66, 7.74, 7.112-7.114, 7.137, 7.143-7.146, 7.152-7.153, 7.155, 7.157-7.159, 7.161, 7.162, 7.164, 7.167-7.168, 7.176, 7.187, 7.189, 7.203, 7.209, 7.213-7.214, 7.218, 7.221, 7.225, 7.229, 7.236, 7.238, 7.242, 7.245, 7.248, 7.250, 7.254, 7.255, 7.258, 7.261, 7.264, 7.267-7.269, 7.271-7.272, 7.274, 7.277, 7.280, 7.283, 7.287, 7.289-7.291, 7.293-7.295, 7.297-7.308, 7.310, 7.315, 7.318-7.319, 7.322-7.323, 7.326, 7.329, 7.331-7.333, 7.336, 7.340, 7.346, 7.352, 7.354, 7.360, 7.361, 7.363, 7.373-7.374, 7.376, 7.382, 7.385-7.386, 7.388, 7.406-7.409, 7.415, 7.418, 7.423-7.424, 7.427, 7.430, 7.435, 7.451, 7.484-7.486, 7.488-7.489,

¹⁷⁸ China's first written submission, paras. 339-341.

7.492-7.493, 7.496, 7.499-7.500, 7.502, 7.507-7.508, 7.520-7.521, 7.539, 7.541, 7.548, 7.550, 7.558, and 8.5, Tables 2 and 5, headings 7.2.1.2.2, 7.2.3.1, and 7.6, and footnotes 35, 49, 53, 54, 65, 69-71, 73-81, 85, 87, 95, 148-152, 310, 357-358, 364, 370-371, 380, 399-400, 417, 435, 445, 453, 495, 500, 506, 523, 526, 529-533, 570, 582, 626, 661, 665, 760, 825, 875, 881, 887-888, 895, 899, 902 and 974 of the Final Panel Report, and deleted fn 852 of the Interim Report.

6.4. Regarding Table 1, the Panel notes China's request to revise the reference to "Top ten intellectual property cases" to instead refer to "Ten big intellectual property cases". As noted by the European Union, however, the language the Panel used accords with the English translation of Exhibit EU-11 and China did not object to this translation. The Panel recalls that paragraph 6(2) of the Panel's Working Procedures requires any objection to the accuracy of a translation to be raised promptly in writing and accompanied by an explanation of the grounds for the objection. The Panel therefore declines China's request.

6.5. Regarding paragraph 7.512 and footnote 1023 (now 1037) thereto, the Panel notes China's request to use China's translation of the SPC Interpretation of the Civil Procedure Law as adopted in 2014 (Exhibit CHN-71), rather than the European Union's translation of that legal instrument as amended in 2022 (Exhibit EU-49). The SPC Interpretation as adopted in 2014 is the version that was in effect at the time of the issuance of the ASIs at issue in this dispute. At the same time, it is uncontested that the relevant provision, Article 184, "remained the same throughout the amendments to the SPC's Interpretation of the Civil Procedure Law".¹⁷⁹ Although China has requested that the Panel rely on its translation of Article 184, China has not objected to the accuracy of the European Union's translation of this provision. In making its request, China noted that the Panel had referred to Exhibit CHN-71 in paragraph 2.25. As Article 184 did not change when the SPC's Interpretation was amended, the Panel considers it appropriate to refer to the European Union's translation. For the sake of consistency and clarity, the Panel has adjusted paragraph 2.35 and footnote 49 (now 1037) to paragraph 2.25.

6.6. Regarding what it describes as factual errors, China requests the Panel to review Figure 1 and paragraphs 2.10, 2.88, 2.130, 7.89, 7.95-7.99, 7.130, 7.141, and 7.151. The European Union objects to China's requests with respect to paragraphs 2.10, 2.130, 7.141, and 7.151. Bearing in mind both parties' comments, the Panel made certain adjustments to improve the clarity and accuracy of paragraphs 2.10, 2.88, 2.130, 7.89, 7.95-7.96, 7.99, 7.130, 7.141 and 7.151.

6.7. With respect to Figure 1, the Panel has made the adjustment requested by China. The Panel has also adjusted the description of the NPC's supervisory role in paragraph 2.23.

6.8. Regarding paragraphs 7.97-7.98, the Panel acknowledges that the language used to summarize some of the factors relied upon by the courts in *Xiaomi v. InterDigital*, *OPPO v. Sharp*, and *Samsung v. Ericsson* was not the same as that used by the courts in their decisions. The Panel has revised relevant parts of paragraphs 7.97-7.98, as well as paragraphs 2.71-2.75, to clarify how the courts addressed the same substantive considerations.

6.9. Regarding section 7.2 of the Report, China requests the Panel to review and reconsider its findings and conclusions in this section relating to the existence of the ASI policy. China notes that it is well established (and during the proceedings the parties agreed) that to demonstrate the existence of an unwritten measure like the ASI policy the complainant must show that the measure is distinct from its constituent parts. China notes that in section 7.2 the Panel does not refer to such jurisprudence. Moreover, China considers that in the absence of a Panel finding that the European Union demonstrated the precise content of the ASI policy as distinct from relevant written laws and the court decisions interpreting and applying those laws, the Panel failed to substantiate its conclusion that the European Union demonstrated the precise content and existence of the ASI policy. China submits that the alleged policy objectives of the measure fail to prove any distinct content because (i) the European Union bore the burden of proof and failed to make any such assertion regarding the policy objectives; and (ii) the Panel's findings regarding the alleged policy objectives in any event do not demonstrate that the measure is distinct from how Chinese courts have interpreted and applied written Chinese law in written decisions. China also submits that any endorsement and promotion that the ASI policy received from certain Chinese governmental institutions does not add any normative content to the meaning of the written Chinese law as

¹⁷⁹ China's response to Panel question No. 1(b), para. 4. See also European Union's response to Panel question No. 1(b).

established by Chinese courts in written judicial decisions. China thus submits that this alleged endorsement and promotion does not provide a basis to conclude that the ASI policy has a precise content distinct from written Chinese laws as interpreted and applied by Chinese courts. China also argues that the novel factual situation facing the courts does not endow the alleged ASI policy with any content distinct from the written Chinese law and written Chinese judicial decisions. China requests the Panel to limit itself to arguments and evidence put forward by the European Union in assessing this request, as this was the party that bore the burden of proving the existence of the ASI policy.

6.10. The European Union argues that China's request for review of section 7.2 deliberately misinterprets the European Union's arguments and is contrary to Article 15.2 of the DSU because it is not limited to precise aspects of the Interim Report. In the European Union's view, the Panel understood the European Union's arguments and carefully examined all supporting evidence, and China attempts to find fault with the Panel's assessment because China disagrees with the Panel's findings and conclusions.

6.11. The Panel recalls that in section 7.2 the Panel first assesses the precise content of the alleged ASI policy, based on the European Union's panel request and subsequent submissions, and concludes that the ASI policy – as identified and challenged by the European Union – is one that empowers Chinese courts to impose a range of possible prohibitions at the request of implementers in the context of SEP litigation, which can be enforced through the imposition of cumulative daily fines, and which is elaborated and promoted by the SPC and endorsed by the NPC Standing Committee.¹⁸⁰ The ASI policy as defined by the European Union does include within it certain written instruments, most notably the court decisions granting ASIs based on certain provisions of the Civil Procedure Law and the SPC Provisions. These are not, however, the entirety of the measure as identified and challenged by the European Union, which also includes the promotion by the SPC and endorsement by the NPC Standing Committee. In its analysis in section 7.2 the Panel assesses all relevant evidence and arguments presented by the European Union as well as rebuttal arguments and evidence from China to determine whether the European Union had substantiated the existence of each aspect of the precise content of the ASI policy.¹⁸¹ Contrary to China's assertion, the Panel directly addressed the issue of whether the similarities across the court decisions granting ASIs were better explained by the application of written laws or by an unwritten policy. In section 7.2.3.1.1.2 below, the Panel notes that even if those decisions were based on pre-existing written laws, the courts' reasoning and outcomes cannot be explained by the prior understanding of the availability of act preservation measures under Chinese Civil Procedure Law. Also, in section 7.2.3.1.4 the Panel expressly notes that it was not any one element that the European Union raised but how those elements all worked together in a particular manner to achieve a particular objective¹⁸² that demonstrated the existence of the ASI policy as a measure distinct from its constituent parts. In light of China's comments, the Panel has added a sentence to paragraph 7.153 acknowledging that this approach is in accordance with the approach taken by previous panels and the Appellate Body. The Panel otherwise declines China's request to reconsider the findings and conclusions in section 7.2, including the conclusion that the European Union met its burden of demonstrating the existence of the ASI policy.

6.12. Turning to China's request to review certain specific findings concerning the existence of the ASI policy, China first requests the Panel to revise its findings in paragraphs 7.29-7.30 that the aspects raised by the European Union in its submissions were not an integral part of the alleged ASI policy challenged by the European Union. China argues that the European Union explicitly stated that those aspects are important, form part of the alleged ASI policy, and a policy lacking those aspects would not be the policy it challenged in this dispute. The European Union considers that the Panel fully understood the European Union's arguments and that in its interim review request China seeks to distort the meaning of those arguments. The Panel, having examined the totality of the European Union's arguments, and not certain statements in isolation, concluded that the "aspects" identified by China constituted legal arguments rather than part of the European Union's factual

¹⁸⁰ See para. 7.63 below.

¹⁸¹ Even if a measure is unwritten, proof of the existence of that measure may reside in written legal instruments. To find otherwise would impose an unreasonable burden of proof on a complainant seeking to demonstrate the existence of an unwritten measure.

¹⁸² The Panel also notes that the European Union expressly referred to the goals and objectives pursued by the ASI policy in paragraphs 101, 103, 199, and 234 of its first written submission, and in its response to Panel question No. 13.

description of the ASI policy. The Panel is satisfied that its findings in paragraphs 7.29-7.30 accurately explain the Panel's reasoning. The Panel therefore declines China's request.

6.13. China disagrees with the Panel's finding in paragraph 7.82 that the "closeness in the timing" of the decisions cannot solely be attributed to the timing of the litigants' requests. In China's view, the temporal proximity of the ASI rulings can only be attributed to the timing of the requests, because Chinese courts can only issue ASIs at the request of private parties and must make such rulings within a reasonably short period. The European Union considers that the Panel's finding is entirely justified by the arguments and evidence submitted to it. In the interest of clarity, however, the Panel has revised paragraphs 7.82-7.84.

6.14. China disagrees with the Panel's findings in paragraphs 7.83, 7.85, 7.89, 7.91, 7.102, 7.104, 7.105, 7.106, and 7.156 that there were doubts, or it was uncertain, whether China's act preservation regime could be relied on for the issuance of ASIs to address parallel foreign litigation. China also objects to the Panel's findings that the SPC interpreted the Civil Procedure Law in a novel way thereby clarifying or establishing that Chinese courts have the legal authority to issue ASIs in SEP litigation, as well as the Panel's view that this was not derived from the prior understanding of the law. China notes that the Civil Procedure Law does not limit the types of acts that may be subject to act preservation measures; in China there is no system of *stare decisis*; and prior to *Huawei v. Conversant* an ASI was issued in the field of maritime law on the basis of a mechanism similar to the general act preservation mechanism under the Civil Procedure Law. The European Union considers that China attempts to minimize the body of evidence clearly showing that, before the issuance of the SPC decision in *Huawei v. Conversant*, it was uncertain whether Article 100 (now 103) of China's Civil Procedure Law provided the legal authority for courts to issue ASIs in SEP litigation. For the European Union, the Panel's conclusion in paragraph 7.156 is supported by the evidence. In the Panel's view, the reasons for these findings are thoroughly explained throughout section 7 and China's interim review request evinces no new argumentation that suggests any error in the Panel's reasoning. The Panel has nevertheless clarified the language of footnote 356 (now 363) to paragraph 7.87, addressing the maritime injunction granted by the Wuhan Maritime Court, as well as section 2.7.3 above. Additionally, in the interest of clarity, the Panel adjusted paragraphs 7.89-7.91 and 7.95-7.108-1.

6.15. China disagrees with the Panel's finding in paragraph 7.103 that the factors applied by these courts to assess whether to grant a particular request for an ASI do not entirely correspond with either the Civil Procedure Law or Article 7 of the SPC Provisions. China considers that both the Civil Procedure Law and the SPC Provisions allow a degree of flexibility for courts to consider whether to grant a particular request. China also submits that Article 7.1 of the SPC Provisions has a broad scope, in light of the word "include". With respect to those decisions that did not rely on the SPC Provisions, the SPC Provisions contain detailed rules on certain specific legal issues, and not all cases would need to touch upon those specific legal issues. The European Union considers that the Panel's finding is based on its attentive reading of the Civil Procedure Law and Article 7 of the SPC Provisions, together with the reasoning underlying each of the relevant court decisions and is fully substantiated. The Panel considers that the fact that the relevant written legal instruments provide flexibility for courts to interpret and devise relevant extensions of the factors does not negate the conclusion that the court decisions created a novel legal path, particularly adapted to the context of SEP litigation. This remains true notwithstanding that such novel legal path is based on existing laws and regulations. The Panel emphasizes that the finding in paragraph 7.103 is not that this novel legal path contradicts, or is inconsistent with, the Civil Procedure Law or Article 7 of the SPC Provisions. However, at least some of the factors applied by the courts to assess requests for ASIs in SEP litigation are not explicitly set out in these written legal instruments. The Panel therefore declines China's request to revise paragraph 7.103.

6.16. China strongly disagrees with the Panel's conclusions in paragraphs 7.127-7.129 and footnote 454 regarding the value attached to "typical cases" as compared to other types of cases, including those designated as "excellent trial documents". China reiterates the arguments already submitted in its submissions that an "excellent trial document" holds exactly the same value as cases designated as "typical", and neither constitutes a "guiding case". The European Union considers that the Panel inquired into the value of the different designations and concluded, on the basis of the evidence submitted to it, that the decisions that are recipients of an award for excellent trial documents do not carry the same weight as decisions designated as a typical case. The Panel is aware of China's views on this issue and has already addressed those arguments in paragraphs 7.127-7.132. In the interest of accuracy, the Panel has adjusted paragraph 7.130 (and corrected a

clerical error in paragraph 7.129). The Panel otherwise declines China's request to revise paragraphs 7.127-7.129.

6.17. Turning to Article 63.1 of the TRIPS Agreement, China disagrees with the Panel's articulation of the legal standard under that provision, set forth in paragraph 7.383, as well as the Panel's application of that legal standard in paragraph 7.389. China submits that the legal standard articulated in paragraph 7.383 is overly subjective and impractical because it obligates WTO Members to publish or make publicly available any final judicial decision that another WTO Member considers a reference for domestic courts. The European Union considers that the Panel's approach is balanced and relevant, and does not depend on other Members' assessment. In the Panel's view, Members must exercise their judgment as to whether a final judicial decision satisfies the relevant criteria such that it is required to be published or made publicly available. The Panel also notes the parallels between the legal standards under Article 63.1 of the TRIPS Agreement and Article X:1 of the GATT 1994¹⁸³ and sees no indication that the standard under Article X:1 is overly subjective or impractical. The Panel declines China's request to revise paragraph 7.383.

6.18. Regarding the Panel's application of the legal standard under Article 63.1 in paragraph 7.389, China considers that the court in *Xiaomi v. InterDigital* applied existing law to the specific facts and circumstances of that case, resulting in the issuance of an ASI with a broader scope than those issued in previous cases. In China's view, this does not amount to the establishment of principles or criteria such that the decision in that dispute can be said to be of general application. The European Union submits that the decision in that case indeed established principles or criteria through a new interpretation or clarification because the worldwide scope of ASIs was unprecedented and not provided for in the Civil Procedure Law, and such principle was meant to be applicable in future cases. In the Panel's view, even though the court cited existing legal provisions as the source for its authority to grant an ASI with worldwide scope in *Xiaomi v. InterDigital* this does not suffice to conclude that the decision did not establish principles or criteria that are applicable in future cases. To the contrary, by clarifying the scope and contours of the existing law in an unprecedented way, the court in *Xiaomi v. InterDigital* established an approach to be applied in similar future cases. The Panel therefore declines China's request to revise paragraph 7.389.

6.19. China also disagrees with the Panel's findings in paragraphs 7.408-7.410 that, to comply with Article 63.1 of the TRIPS Agreement, relevant final judicial decisions must be published on China Judgments Online. In China's view, Article 63.1 does not require publication via the internet or on a specific website and, if adopted, such a standard would impose an unfair burden on WTO developing country Members. The European Union submits that China itself created the expectation that such decisions would be published on China Judgments Online – in particular, Article 2 of the SPC Provisions on the Publication of Judgments on the Internet by the People's Republic of China indicates that China Judgments Online is the unified platform for courts across the country to publish judgment documents. The Panel notes that the legal standard under Article 63.1, as articulated by the Panel in paragraph 7.407, does not impose any specific burden on Members with respect to the manner of publication or making publicly available, except to do so in a place where WTO Member governments and their right holders would reasonably expect to find the relevant measures. In applying that standard to the facts of this case, the Panel concluded in paragraphs 7.408-7.410 that China Judgments Online is the place where governments and right holders expect to find relevant decisions. The Panel declines China's request to revise these findings.

7 FINDINGS

7.1 Order of analysis

7.1. The Panel begins by addressing whether one of the challenged measures, the ASI policy, is within the Panel's terms of reference, the precise content of the challenged measure, and whether it has been shown to exist. The Panel will then turn to the European Union's claims under the TRIPS Agreement. First, those regarding Article 1.1 in conjunction with Articles 28.1, 28.2, and 44.1 as well as with respect to Article 41.1. Second, those relating to the European Union's claims that China has failed to comply with its transparency obligations under the TRIPS Agreement. Finally, the Panel will examine the European Union's claims under China's Accession Protocol concerning the five

¹⁸³ See para. 7.379 below.

individual ASI decisions including China's argument that the Panel should not make findings on these measures because they have expired.

7.2 The ASI policy challenged by the European Union

7.2. In this section the Panel will address: (a) whether and, if so, in which terms the European Union identified the ASI policy in its panel request and whether that complied with the relevant provisions of the DSU; (b) how the European Union defined the precise content of the policy; and (c) whether the European Union has substantiated the existence of the ASI policy as an unwritten measure of either general and prospective application or ongoing conduct that was attributable to China.

7.2.1 Whether the European Union properly identified the ASI policy in its panel request

7.3. In accordance with Article 7.1 of the DSU, the panel request governs the terms of reference of a panel and delimits the scope of its jurisdiction. Article 6.2 sets out two substantive requirements that a complainant must satisfy in its panel request: (a) the identification of the specific measures at issue; and (b) the provision of a brief summary of the legal basis of the complaint sufficient to present the problem clearly.¹⁸⁴ A panel request also pursues a due process objective, by providing the respondent and third parties with sufficient notice regarding the nature of the complainant's case, and enabling them to respond accordingly.¹⁸⁵ When a panel examines a panel request for consistency with Article 6.2 of the DSU, it must scrutinize the panel request carefully and objectively, not examining parts of the request in isolation¹⁸⁶ but rather "as a whole and in light of the attendant circumstances".¹⁸⁷

7.4. With respect to the requirement to adequately identify the challenged measures, Members have certain flexibilities in how they identify measures in panel requests. Parties are not required to identify measures solely by reference to a particular written form, but may also identify a measure by its substance, for example by providing a narrative description of the nature of the measure, so that what is referred for adjudication by a panel may be discerned from the panel request.¹⁸⁸

7.5. When a complainant raises for the first time in its submissions specific aspects of a respondent's measure that were not identified in its panel request, those aspects are not necessarily outside a panel's terms of reference.¹⁸⁹ However, a panel may conclude that if a panel request identified a specific legal instrument and specific aspects thereof, the complainant had thereby notified the respondent that its claim concerned only those particular aspects set forth in the panel request, and not any other aspects.¹⁹⁰

7.6. Panels and the Appellate Body have also examined situations where complainants sought to include in a panel's terms of reference new or amended measures that were not specifically referenced in the panel request. In those instances, panels have reasoned that if a measure was

¹⁸⁴ Appellate Body Report, *US – Carbon Steel*, paras. 125-126.

¹⁸⁵ The Appellate Body has found that due process is "inherent in the WTO dispute settlement system" (Appellate Body Report, *Chile – Price Band System*, para. 176) and "fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings" (Appellate Body Report, *Thailand – H-Beams*, para. 88. See also Appellate Body Reports, *Korea – Pneumatic Valves (Japan)*, para. 5.4 (referring to Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.12; *EC and certain member States – Large Civil Aircraft*, para. 640; *US – Countervailing Measures (China)*, para. 4.6; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6).

¹⁸⁶ Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.31.

¹⁸⁷ Appellate Body Report, *US – Carbon Steel*, para. 127.

¹⁸⁸ Panel Report, *China – Publications and Audiovisual Products*, para. 7.17 referring to Panel Reports, *Argentina – Footwear (EC)*, para. 8.40 and *EC – Approval and Marketing of Biotech Products*, para. 7.47 and Appellate Body Report, *US – Continued Zeroing*, para. 168.

¹⁸⁹ Panel Reports, *EC – Trademarks and Geographical Indications*, para. 7.2 (finding that to comply with Article 6.2 of the DSU, a panel request need not identify the "'specific aspects' of the ... 'specific measures'").

¹⁹⁰ Panel Report, *China – Publications and Audiovisual Products*, paras. 7.93-7.104 (referring to Appellate Body Report on *US – Carbon Steel*, para. 171).

closely connected to or in essence remains the same as an identified measure, it could be included in the panel's terms of reference even if it was not specifically identified in the panel request.¹⁹¹

7.7. Although none of the situations raised before prior panels is identical to that before this Panel, these cases demonstrate a common understanding of the importance of carefully considering the responding Member's due process rights when addressing these issues. The Panel is therefore of the view that when examining whether new or different descriptions of a challenged measure cause aspects of the measure – or indeed the measure in its entirety – to fall outside the Panel's terms of reference, the close connection test is applicable. The Panel therefore will apply the close connection test, *mutatis mutandis*, in determining whether China received adequate notice in the panel request of the measure challenged by the European Union.¹⁹²

7.8. The Panel recalls the distinction between claims and arguments. On the one hand, claims set forth the complainant's view that the respondent's measure has violated, or nullified or impaired, the benefits arising from an identified provision of a particular agreement. On the other hand, a complainant advances arguments to demonstrate that the respondent's measure does indeed infringe upon the identified provision.¹⁹³ A panel request need only provide the "legal basis of the complaint", that is, the claims underlying a complaint.¹⁹⁴ The arguments in support of the claims may be set out and progressively clarified in the submissions through the course of the proceedings.¹⁹⁵ However, defects in a panel request cannot be cured in a party's subsequent submissions during the panel proceedings¹⁹⁶; those submissions may be consulted only to confirm the meaning of the words used in the panel request and as part of the assessment of whether the respondent's ability to defend itself was prejudiced.¹⁹⁷

7.9. Before assessing China's terms of reference objections, the Panel first considers the European Union's procedural objection that China's requests for jurisdictional rulings were untimely.

7.10. The European Union argues that China's requests did not comply with paragraph 4(1)(a) of the Panel's Working Procedures, which requires that preliminary ruling requests be made at the earliest possible opportunity and in any event no later than a party's first written submission. With respect to the ASI policy, China presented its terms of reference objection in footnote 134 of its first written submission. China further clarified that it was not asking for a preliminary ruling, but rather requesting a ruling in the Panel's Final Report that the entire ASI policy was outside of the Panel's terms of reference because the content of the measure was different from that in the panel request.¹⁹⁸ For that reason, the Panel considers that paragraph 4(2), which states that the procedure in paragraph 4(1) 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", is the applicable provision of the Working Procedures. On this basis, China's requests were timely. The Panel also notes that when fundamental questions of jurisdiction

¹⁹¹ The Panel notes that previous cases have found that a panel may review measures that bear a close connection to measures described in the panel request. See Panel Reports, *US – Steel and Aluminium Products (China)*, para. 7.16; *US – Ripe Olives from Spain*, para. 7.14; *Russia – Pigs (EU)*, para. 7.160; *US – Carbon Steel*, para. 8.11; *India – Agricultural Products*, paras. 7.78-7.80; *EC – Fasteners (China)*, para. 7.38; *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10, subpara. 27; and *Japan – Film*, paras. 10.8-10.9. Similarly, previous panels and Appellate Body reports have considered whether the measure remains in essence the same as that identified in the panel request. See Appellate Body Report, *Chile – Price Band System*, paras. 135-139. See also Appellate Body Reports, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 190-191; 383-384; *EC – Selected Customs Matters*, para. 184; *EC – Chicken Cuts*, paras. 156-161; Panel Reports, *US – Ripe Olives from Spain*, para. 7.14; *Indonesia – Chicken*, paras. 7.84-7.85; and *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 7.524.

¹⁹² See e.g. Panel Report, *Japan – Film*, para. 10.8.

¹⁹³ Appellate Body Report, *Korea – Dairy*, para. 139.

¹⁹⁴ Appellate Body Reports, *Korea – Pneumatic Valves (Japan)*, para. 5.6 (referring to Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.14; *Korea – Dairy*, para. 139; *US – Countervailing Measures (China)*, para. 4.9). See also Appellate Body Reports, *EC – Bananas III*, paras. 141-143, *US – Lead and Bismuth II*, paras. 72-73, and Panel Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, paras. 7.16-7.17.

¹⁹⁵ Appellate Body Report, *EC – Bananas III*, para. 141.

¹⁹⁶ Appellate Body Report, *US – Carbon Steel*, para. 126 (referring to Appellate Body Report, *EC – Bananas III*, para. 143).

¹⁹⁷ Appellate Body Report, *US – Carbon Steel*, para. 127 (referring to Appellate Body Report, *Korea – Dairy*, para. 127; Appellate Body Report, *Thailand – H-Beams*, para. 95).

¹⁹⁸ China's response to Panel question No. 79, paras. 29-35.

arise, a panel is under an obligation to review such issues regardless of whether a party has raised them in a timely manner or at all.¹⁹⁹ For these reasons, the Panel rejects the European Union's argument that China failed to comply with the Working Procedures and also that any such failure would obviate the need for the Panel to ensure that it has proper jurisdiction over the European Union's claims. The Panel, therefore, proceeds to examine China's objections.

7.2.1.1 Summary of the parties' arguments

7.11. China argues that the European Union has submitted various iterations of the precise content of the ASI policy throughout the proceedings and that this has created a number of incompatible interpretations of what the European Union considers is the precise content, all of which differ from the measure as set out in the panel request.²⁰⁰

7.12. In particular, China argues that the European Union introduced aspects of the ASI policy in its first written submission that were not in the panel request and that this could "be viewed as a terms of reference issue, given that these apparently integral 'aspects' of the alleged measure were not identified in the European Union's panel request, and thus fall outside of the Panel's terms of reference".²⁰¹ China argues that the aspects that fall outside the scope of the Panel's terms of reference are (a) the "extremely broad" scope of the ASIs; (b) that the ASIs are ensured 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"; (c) that the ASIs are not "well-targeted" or used only in "exceptional cases"; (d) that the "policy" of issuing ASIs is not "exercised reasonably and not abusively"; and (e) that the ASIs are implemented absent a determination that foreign litigation was "vexatious or oppressive".²⁰² China argues that the manner in which the European Union has developed its claims in its first written submission suggests that the European Union "believes that the alleged policy concerns *only* the issuance of ASIs that the European Union considers to be overly 'broad', not sufficiently 'well-targeted', etc" and that if this were the case, the alleged unwritten measure would fall outside the Panel's terms of reference.²⁰³

7.13. China recalls that the Appellate Body has explained that complainants are expected to "identify [unwritten] measures in their panel requests as clearly as possible"²⁰⁴, and submits that the measure the European Union identified in its panel request "is not *the measure* that the European Union is now challenging".²⁰⁵ According to China, "[t]he precise content of *that* measure remains a mystery, but whatever it is, it is outside of the Panel's terms of reference."²⁰⁶ According to China, the policy that the European Union is attempting to challenge, has different "definitional characteristics" that depend on "amorphous 'aspects'" that were not identified in the panel request.²⁰⁷

7.14. China explains that the European Union's identification of the ASI policy in its panel request would have been sufficient if the European Union's "problem" was that China maintains an alleged "policy" of general and prospective application prohibiting parties in SEP litigation from taking certain actions, as described on page seven of its panel request.²⁰⁸ China argues that because the European Union admits that Chinese courts are not *required* to issue ASIs, the alleged "policy" described in its panel request does not exist.²⁰⁹ In addition, China maintains that there is no unwritten "policy" that "empowers" Chinese courts to issue ASIs because that "empowerment" is based entirely on written measures and that accordingly, the alleged "policy" that the European Union identified in its panel request, with or without the "empowers" formulation, does not exist.²¹⁰

¹⁹⁹ Appellate Body Reports, *US – 1916 Act*, para. 54; *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.

²⁰⁰ China's second written submission, paras. 15-23.

²⁰¹ China's first written submission, fn 134 to para. 119.

²⁰² China's first written submission, para. 111 (referring to European Union's first written submission, paras. 318, 319, 324, 326, 331, and 368).

²⁰³ China's opening statement at the first meeting of the Panel, para. 21. (emphasis original)

²⁰⁴ China's response to Panel question No. 79, para. 35 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 792).

²⁰⁵ China's response to Panel question No. 79, para. 35. (emphasis original)

²⁰⁶ China's response to Panel question No. 79, para. 35. (emphasis original)

²⁰⁷ China's response to Panel question No. 81, para. 38.

²⁰⁸ China's response to Panel question No. 79, para. 29.

²⁰⁹ China's response to Panel question No. 79, para. 30.

²¹⁰ China's response to Panel question No. 79, para. 30.

7.15. China argues that the ultimate definition of the ASI policy that the European Union settles on is not consistent with the panel request. In this connection, China disagrees with the European Union's statement that it "consistently defined" the ASI policy as "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."²¹¹ China submits that neither the terms "encourages" or "protect China's interest[s]" appear in the European Union's panel request and both fundamentally change the meaning of the alleged ASI policy.²¹²

7.16. China claims that what the European Union is trying to challenge is an unwritten measure other than that which it identified in its panel request, and that this is the context in which the parties and the Panel have been discussing "specific aspects"²¹³ of the alleged "policy".²¹⁴ China submits that the discussion on the "specific aspects" creates confusion as it suggests that there is a similarity with the fact pattern in *EC – Trademarks and Geographical Indications*, which reasoned that to comply with Article 6.2 of the DSU a panel request need not identify the "specific aspects" of a challenged measure insofar as the measure itself is specifically identified.²¹⁵ China argues that in contrast to that case, where the content of the specific measure at issue was written and undisputed, in this case "the precise content is *unknown*".²¹⁶

7.17. The European Union submits that, in accordance with Article 6.2 of the DSU, the panel request must only "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly", and that during the first stage of panel proceedings, the complainant must set out its "case in chief, including a full presentation of the facts on the basis of submission of supporting evidence".²¹⁷ The European Union responds that while it might have used different terminology when describing the precise content of the ASI policy, its description of this measure as used throughout the proceedings has been consistent and in accordance with the measure properly identified in its panel request.²¹⁸ While the European Union acknowledges that, subsequent to its panel request, it has "developed and elaborated upon its description of the precise content of the unwritten measure at issue" in its submissions to the Panel, it contends that this is expected during panel proceedings.²¹⁹

7.18. The European Union also notes that China is focusing on one specific paragraph on page seven of its panel request while eliding over statements the European Union made on page one.²²⁰ The European Union argues that a reading of its panel request as a whole will demonstrate that it described the precise content of the challenged policy as empowering Chinese courts to issue ASIs that "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".²²¹

7.19. The European Union accepts that a complainant is required to explain fully and clarify the precise content of the unwritten measure that it considers inconsistent with the covered agreements. However, it argues that no provision of the DSU obliges the complainant to limit itself, during panel proceedings, to repeating the same choice of words used to identify the challenged measure in its panel request. The European Union argues that for these purposes, "it can use a variety of words that carry a similar meaning, and which will allow the Panel to better grasp the precise content of the measure at issue, provided that the measure so referenced remains the same".²²² The

²¹¹ China's comments on the European Union's response to Panel question No. 78, para. 3 (quoting European Union's response to Panel question No. 78, para. 5, (in turn quoting European Union's opening statement at the second meeting of the Panel, para. 10)).

²¹² China's comments on the European Union's response to Panel question No. 78, para. 4.

²¹³ See para. 7.12 for a description of the "specific aspects".

²¹⁴ China's response to Panel question No. 79, para. 31.

²¹⁵ China's response to Panel question No. 79, para. 31; Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.2.

²¹⁶ China's response to Panel question No. 79, para. 32.

²¹⁷ European Union's opening statement at the second meeting of the Panel, para. 6 (referring to Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 149).

²¹⁸ European Union's opening statement at the second meeting of the Panel, paras. 4, 5, and 9.

²¹⁹ European Union's opening statement at the second meeting of the Panel, para. 5.

²²⁰ European Union's comments on China's response to Panel question No. 78.

²²¹ European Union's opening statement at the second meeting of the Panel, para. 4 (referring to the European Union's panel request, p. 1).

²²² European Union's opening statement at the second meeting of the Panel, para. 8.

European Union submits that this is what it has done in the present dispute, even if it uses different terminology when referring to the precise content in its subsequent submissions to the Panel.²²³

7.2.1.2 Panel's analysis

7.20. China's arguments raise two questions. First, whether the aspects China objects to are included within the ASI policy as identified in the European Union's panel request and are, therefore, within the Panel's terms of reference. Second, whether the concepts of "encouragement" and "necessary to protect China's interests" are within the Panel's terms of reference. The Panel proceeds by assessing each issue in turn.²²⁴

7.2.1.2.1 The measure identified in the panel request

7.21. Section 1.1 of the panel request describes a "policy which, in the context of judicial procedures concerning the enforcement of intellectual property rights, empowers Chinese courts to prohibit patent holders from asserting their rights protected by the TRIPS Agreement in other jurisdictions".²²⁵ The panel request goes on to state that this prohibition "materializes" through the issuance of ASIs "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". The panel request also states that the policy was first introduced with *Huawei v. Conversant*²²⁶ and that it has been further elaborated by Chinese courts in at least four other cases where ASIs were issued.²²⁷ The panel request states that some provincial legal and political bodies have "confirmed the correctness and exemplary character of those judicial decisions"²²⁸, and that the SPC has further "elaborated and promoted" the policy in official and public documents issued in 2021 and 2022, while the NPC Standing Committee has "endorsed the policy as applied in 2021 and 2022".²²⁹

7.22. After providing a summary of the challenged five ASI decisions, the panel request, under the subheading "Worldwide anti-suit injunctions approved of by the SPC", states that the SPC "has confirmed that Chinese courts can put in place worldwide, prospective anti-suit injunctions", with a fine of "1 million RMB daily ... not limited to specific scope, conditions or circumstances related to the concrete cases submitted to the court in question".²³⁰

7.23. Page seven of the panel request states that the measures at issue under Part 1 of the panel request are:

- a. China's ASI policy "as a measure of general and prospective application"²³¹ prohibiting a party in SEP litigation 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"²³²;
- b. "the continued issuance" by Chinese courts of ASIs in "successive cases" relating to SEPs, "prohibiting a party from applying for enforcement of judgments of a non-Chinese court in the territories of other Members or from seeking judicial relief outwith the jurisdiction of Chinese courts"²³³; and
- c. the court decisions imposing ASIs.²³⁴

²²³ European Union's opening statement at the second meeting of the Panel, para. 9.

²²⁴ The Panel also notes China's argument (see section 7.2.2.1) that the measure referred to in European Union's submissions is not the same measure as that identified in its panel request. The Panel addresses this issue in section 7.2.2.2 below.

²²⁵ European Union's panel request, p. 1.

²²⁶ European Union's panel request, p. 1.

²²⁷ European Union's panel request, p. 2.

²²⁸ European Union's panel request, p. 2.

²²⁹ European Union's panel request, p. 2.

²³⁰ European Union's panel request, p. 4.

²³¹ European Union's panel request, p. 7.

²³² European Union's panel request, p. 7.

²³³ European Union's panel request, p. 7.

²³⁴ European Union's panel request, p. 7.

7.24. Section 1.2 of the panel request sets out the legal instruments through which China allegedly imposes and administers these measures, "operating separately or collectively".²³⁵ The section concludes by stating that the panel request "also covers other court decisions with a similar content" based on the legal instruments mentioned in the panel request, "or any other related measures, and includes any annexes or schedules to these measures and amendments, supplements, replacements, renewals, extensions or implementing measures".²³⁶

7.25. The Panel notes that in China's view the reference, on the first page of the panel request, to Chinese courts being "empower[ed]", should not be read into the definition of the ASI policy as it "completely changes the meaning of the alleged 'policy' that is identified as a measure on page [seven] of the European Union's panel request".²³⁷ While China appears to focus only on page seven when presenting this argument, the Panel cannot ignore the rest of the text of the panel request, including that found on page one. The European Union structured its panel request beginning on page one, section 1.1, under the subheading "Description of the measure", with a general description of the ASI policy as a policy that empowers Chinese courts to take certain actions. The Panel considers that the opening paragraph of that section presents the main characteristics of the measure, including the concept of "empowerment". These characteristics are further elaborated in the subsequent parts of the panel request. For instance, the panel request describes the decision in *Huawei v. Conversant* as establishing that Article 100 of the Civil Procedure Law "allows a Chinese court to adopt a provisional measure prohibiting a party from applying for enforcement of judgments of a non-Chinese court".²³⁸ Similarly, on page four the panel request states that the SPC confirmed "that Chinese courts *can* put in place worldwide, prospective anti-suit injunctions".²³⁹

7.26. These statements elaborate on the description of the ASI policy found on page one and expand on the term "empower[ment]" as it appears on this page. Although the description of the ASI policy set out on page seven does not directly refer to the term "empowerment", but only refers to "the anti-suit injunction policy maintained by China ... prohibiting a party in litigation", accepting China's interpretation of the panel request would require the Panel to disregard the previous six pages, where the term "empowers" is not only introduced upfront but is also elaborated upon. The panel request, read as a whole, indicates that the European Union identified and challenged a measure defined as a policy that empowers courts to impose certain prohibitions. The Panel therefore disagrees with China's arguments in this regard and sees no conflict between the descriptions of the ASI policy on page one and on page seven. China also submits that during the Panel proceedings the European Union raised and challenged, for the first time, certain aspects of the alleged measure that were not identified in the European Union's panel request and "thus fall outside of the Panel's terms of reference."²⁴⁰ In China's view, this case is unlike the situations in previous disputes where some aspects of a measure were considered within a panel's terms of reference while others were not.²⁴¹ For China, the entire alleged ASI policy not only falls outside the Panel's terms of reference – it simply does not exist.²⁴²

7.28. Section 3 of the European Union's first written submission sets out the factual aspects of the measures at issue while section 5 contains the European Union's description of the legal characterization of the measures. The paragraphs of the European Union's first written submission that China argues contain the "aspects" that allegedly expand the scope of the measure are in section 6. This section relates to the European Union's claim that the ASI policy is inconsistent with Article 1.1 in conjunction with Article 28.1 of the TRIPS Agreement. Moreover, the paragraphs of the European Union's first written submission that China argues contain the fourth such aspect, that the ASIs are implemented absent a determination that foreign litigation was "vexatious or oppressive",

²³⁵ European Union's panel request, p. 7.

²³⁶ European Union's panel request, p. 10.

²³⁷ China's response to Panel question No. 78, para. 19.

²³⁸ European Union's panel request, p. 2. (emphasis added)

²³⁹ European Union's panel request, p. 4. (emphasis added)

²⁴⁰ China's first written submission, fn 134 to para. 119. See para. 7.12 for a description of the aspects.

²⁴¹ China's response to Panel question No. 81, paras. 36-37 distinguishing the present dispute from the fact pattern in *EC – Trademarks and Geographical Indications (Australia)*.

²⁴² China's response to Panel question No. 81, para. 38.

is contained in section 6.3 which relates to the claims regarding individual ASI decisions, not the ASI policy.²⁴³

7.29. The "extremely broad" scope of the ASIs²⁴⁴ can be understood as the European Union explaining why it considers that the alleged authority that the Chinese courts are empowered with under the ASI policy is inconsistent with the TRIPS Agreement. The European Union's contention that ASIs are enforced through fines "whose amount goes beyond what ... is normal practice"²⁴⁵ is an explanation of how, in its view, the penalties that Chinese courts are empowered to impose when issuing an ASI demonstrate an inconsistency with the TRIPS Agreement. Similarly, the European Union alleges that ASIs issued under the policy are not "well-targeted" or used only in "exceptional cases".²⁴⁶ The Panel understands this to be an argument in support of the European Union's view that Chinese courts have the authority, under the ASI policy, to issue an ASI imposing a wide variety of prohibitions in a broad number of circumstances, and that this is inconsistent with the identified provisions of the TRIPS Agreement. The Panel notes that the European Union argued that, "the right to adopt or maintain [the ASI] 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."²⁴⁷ For the Panel, this is simply part of the European Union's argumentation with respect to how such a measure could be consistent with the identified provisions of the TRIPS Agreement. The Panel does not see this as the European Union arguing that this aspect is an integral part of the measure it is challenging. Finally, the European Union's statement that the individual ASIs were granted absent a determination that foreign litigation was "vexatious or oppressive"²⁴⁸, relate to its challenges against the ASI decisions as separate measures and do not relate to its claims against the ASI policy.

7.30. The Panel therefore does not consider that these aspects form part of the challenged measure, but rather constitute arguments as to how the challenged measure as identified in the panel request is inconsistent with the TRIPS Agreement.

7.31. The Panel recalls that Article 6.2 of the DSU only requires a complainant to set out in its panel request the challenged measure and the legal basis for the complaint and not its arguments as to how the challenged measure is WTO inconsistent. The Panel, therefore, finds that there was no requirement for the European Union to include these arguments in its panel request.

7.32. In light of the above, the Panel finds that the European Union's panel request adequately identifies the ASI policy, in the terms discussed in paragraph 7.21.

²⁴³ China's first written submission, para. 111 (referring to European Union's first written submission, paras. 331 and 368). To recall, the European Union argues that:

In none of the five cases identified by the European Union where Chinese courts have issued anti-suit injunctions was it established that the SEP owner's exercise of their exclusive rights before the courts competent to enforce their patents was vexatious or oppressive. Rather, the prohibition to commence, continue or enforce the results of infringement proceedings before the courts of other WTO Members was based on the consideration that the decisions of those courts could conflict with the final judgements to be issued by the Chinese courts which had accepted jurisdiction to determine FRAND rates and licensing terms at the request of the implementers. (European Union's first written submission, para. 331)

In the five 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.

(European Union's first written submission, para. 368)

²⁴⁴ China's first written submission, para. 111 (referring to European Union's first written submission, para. 318).

²⁴⁵ China's first written submission, para. 111 (referring to European Union's first written submission, para. 319).

²⁴⁶ China's first written submission, para. 111 (referring to European Union's first written submission, para. 324).

²⁴⁷ European Union's first written submission, para. 326.

²⁴⁸ China's first written submission, para. 111 (referring to European Union's first written submission, paras. 331, 368).

7.2.1.2.2 Whether the concepts of "*encouragement*" and "*necessary to protect China's interests*" are within the Panel's terms of reference

7.33. As noted in paragraph 7.15 above, China submits that neither the concepts "encourages" nor "necessary to protect China's interest[s]" appear in the European Union's panel request and both fundamentally change the meaning of the alleged ASI policy²⁴⁹ thereby falling outside the Panel's terms of reference. The Panel will consider each element in turn.

7.2.1.2.2.1 Encouragement of Chinese courts to issue ASIs

7.34. The Panel notes that the concept of "encouragement" is not included in the description of the measure that the Panel found to be within its terms of reference in section 7.2.1.2.1 above nor in the language of the panel request. The lack of an express reference is not in and of itself sufficient to exclude the term "encouragement" as a part of the ASI policy from the Panel's terms of reference. It is therefore necessary to consider whether there is a close connection between the concept of encouragement and the measure identified in the panel request.

7.35. One of the subheadings in the panel request refers to worldwide ASIs "approved of by the SPC". Under this same subheading, the panel request notes that in 2020 the SPC selected a decision by an intermediate people's court granting an ASI as one of the 2020 top 10 typical IP cases and adds that this decision "was in line with its interpretation of the Civil Procedure Law and policy".²⁵⁰

7.36. These statements point to an understanding by the European Union in its panel request that it considered the ASI policy to have been developed and advanced by the SPC, and endorsed by the NPC, and that Chinese courts should apply this policy in the future. These statements, as well as the remainder of the language in the panel request, support an understanding of the term "endorsement" as indicating that Chinese courts *can* appropriately issue ASIs under existing Chinese law.

7.37. Although similarities exist between the terms "encouragement", on the one hand, and "promotion" or "endorsement" on the other, they are not synonyms. A statement that the NPC promotes or endorses the ASI policy is qualitatively different from a statement that the ASI policy encourages Chinese courts to issue ASIs. The European Union's references to the ASI policy as *encouraging* courts to take certain actions are more properly understood as applying to the results of the court's deliberations rather than the legal basis for, or the factors considered when reaching, their decisions. The Panel does not find support for the conclusion that, pursuant to the measure identified in the panel request, Chinese courts are *encouraged* to issue ASIs as argued by the European Union. The Panel therefore considers that this concept is not closely connected to the measure falling within its terms of reference.

7.2.1.2.2.2 Necessary to protect China's interests

7.38. The Panel notes that the concept of ASIs being issued when they are necessary to protect China's interests is not included in the description of the measure that the Panel found to be within its terms of reference in section 7.2.1.2.1 above nor in the language of the panel request. When elaborating upon the conditions under which Chinese courts have granted and would grant ASIs under the ASI policy, the European Union introduces in its submissions the idea that courts will grant ASIs when it is "necessary to protect China's interests". The narrative portions of the panel request refer generally to the authority of Chinese courts to grant ASIs and suggests that courts applied factors stemming from Chinese legal instruments when deciding to grant the ASIs. Those factors do not necessarily involve assessing China's interests. Subheading 1.1.1 of the panel request, titled "Four anti-suit injunctions issued by Intermediate People's Courts", describes four of the five ASI decisions at issue and provides indications of the explanations that the courts gave for granting the ASIs. The panel request, and the court decisions, make particular reference to China's Civil Procedure Law and the SPC Provisions. The Panel understands that these references were meant to describe what the courts did, but the European Union did not indicate that the courts decided to grant the ASIs pursuant to the ASI policy because the ASIs were necessary to protect China's interests. The Panel does not find any reference to an expectation that ASIs would be issued when "necessary

²⁴⁹ China's comments on the European Union's response to Panel question No. 78, para. 4.

²⁵⁰ European Union's panel request, pp. 4-5.

to protect China's interests".²⁵¹ There was thus no way of knowing that the measure identified in the panel request included the concept that protecting China's interests was part of the criteria for issuing ASIs pursuant to the ASI policy. The Panel is thus unable to find that this concept is closely connected to the measure within its terms of reference.

7.2.1.2.2.3 Conclusion on "encouragement" and "necessary to protect China's interests"

7.39. The Panel recalls that when addressing questions as to whether a claim or measure is within its terms of reference, a Panel assesses whether the ability of the respondent to defend itself was prejudiced, such as by having inadequate notice of the measure being challenged. In the circumstances of the present dispute, the Panel finds that the European Union's references relating to "encouragement" and "necessary to protect China's interests" lack a close connection to the measure that was identified in the panel request. Consequently, China did not have adequate notice that these concepts were part of the measure being challenged by the European Union. In the Panel's view, that lack of adequate notice may thus have prejudiced China's ability to defend itself in the course of the proceedings.

7.40. The Panel, therefore, considers that the European Union's references in its submissions to the ASI policy as encouraging the granting of ASIs, as well as its references to ASIs being granted when necessary to protect China's interests, are not within the Panel's terms of reference.

7.2.2 Precise content of the ASI policy

7.2.2.1 Summary of the parties' arguments

7.41. The European Union argues in its first written submission that the court decisions at issue in this dispute granting ASIs, together with the support and approval of the SPC and the NPC Standing Committee, set out the precise content of the ASI policy.²⁵² The European Union reiterates this point in its first opening statement when it states that "China's official documents, together with other items of evidence, show China has put in place, maintains, and implements a policy which prohibits patent holders from asserting their rights in any other jurisdiction."²⁵³ The European Union then submits that the policy "empowers Chinese courts to systematically impose anti-suit injunctions prohibiting enforcement in the territories of other WTO Members, whenever it is in China's national interest".²⁵⁴

7.42. With respect to the policy empowering Chinese courts, the European Union points to various documents from the SPC, the NPC and its Standing Committee. Throughout its submissions the European Union links the term "empower" with the term "encourage", joining them together with the conjunction "and".²⁵⁵ The European Union argues that the SPC, the NPC, and the NPC Standing Committee have "empowered and encouraged Chinese courts to issue" ASIs with a "favourable outcome" for implementers, with "endorsement and encouragement by the highest government

²⁵¹ The Panel notes that China has also contested the inclusion of the concept of "not limited to exceptional cases only" in the precise content of the ASI policy that was identified in the panel request. The Panel found in paras. 7.27 above that references to the absence of a determination that foreign litigation was "vexatious, oppressive or otherwise abusive" are more adequately understood to be arguments on why the ASI policy is inconsistent with the provisions of the TRIPS Agreement and not aspects of the measure. The Panel thus does not deem it necessary to further assess whether this concept is part of the precise content of the ASI policy.

²⁵² European Union's first written submission, para. 225; see also European Union's second written submission, para. 28.

²⁵³ European Union's opening statement at the first meeting of the Panel, para. 34.

²⁵⁴ European Union's opening statement at the first meeting of the Panel, para. 34.

²⁵⁵ See e.g. European Union's response to Panel question No. 11, para. 50 (the SPC, the NPC and its standing committee have empowered and encouraged Chinese courts to issue such decisions to safeguard China's interests.); and 17(a), para. 79 (The content of China's policy is to empower and encourage Chinese courts to issue anti-suit injunctions whenever these act preservation measures are requested by implementers and are in the interest of China.); European Union's opening statement at the second meeting of the Panel, para. 4 ("The unwritten measure is a policy which 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".)

bodies"²⁵⁶, who have "emphasized their advantages and encouraged their imposition in the future".²⁵⁷

7.43. The European Union argues that the five court decisions imposing ASIs in SEP litigation, 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".²⁵⁸ During the first substantive meeting the European Union stated that while the five ASIs were applied systematically between August and December 2020, the measure itself is not systematic.²⁵⁹

7.44. The European Union submits that the ASI policy was first introduced on 28 August 2020 in the SPC decision in *Huawei v. Conversant*, where according to the European Union, the SPC established that Article 100 (now 103) of the Civil Procedure Law allowed a Chinese court to adopt an ASI as a provisional measure.²⁶⁰ The European Union argues that this decision set out the judicial and legal path for other Chinese courts to follow as it "empowered and encouraged other courts to adopt anti-suit injunctions in SEP litigation" and "set out factors to consider and the legal reasoning" that was later followed by other courts when issuing decisions granting requests for ASIs.²⁶¹ In response to the Panel's questions, the European Union acknowledges that the ASIs in *Huawei v. Conversant* and *ZTE v. Conversant* only targeted injunctions against infringement issued in Germany. According to the European Union the term "broad" refers not to the scope of a particular ASI, but rather to the legal reasoning underpinning the decisions and the broad range of conduct an ASI can address.²⁶² The European Union argues that the decision in *Huawei v. Conversant* sets out "broad reasoning" for the issuance of ASIs in SEP litigation, which has been relied upon and further elaborated by lower courts who issued worldwide ASIs covering several types of proceedings.²⁶³ The European Union argues that the authority granted to the courts to grant ASIs is, therefore, not limited and that the scope of each individual ASI will vary depending on the implementer's request.²⁶⁴ The European Union also submits that the ASI policy does not limit the authority of the courts to issuing ASIs in exceptional cases only, such as those where "the proceedings started by the patent owners in the territories of other Members are themselves vexatious, oppressive or otherwise abusive".²⁶⁵

7.45. China, for its part, argues that the European Union has created significant confusion on the definition and contours of the precise content of the ASI policy by introducing a number of incompatible and inconsistent statements.²⁶⁶ According to China there are three possible but incompatible interpretations of the precise content, which all differ from that set out in the panel request and further compound the lack of clarity on the precise content of the ASI policy.²⁶⁷ The table below presents a summary of these three possible interpretations according to China:

²⁵⁶ European Union response to Panel question No. 11(a), para. 50.

²⁵⁷ European Union response to Panel question No. 11(a), para. 50.

²⁵⁸ European Union's first written submission, paras. 233, 244.

²⁵⁹ See Panel question No. 12(a)(i).

²⁶⁰ European Union's second written submission, para. 3; response to Panel question No. 4.

²⁶¹ European Union's second written submission, paras. 4-5; response to Panel question No. 4.

²⁶² European Union's response to Panel question No. 11(a), para. 53.

²⁶³ European Union's response to Panel question No. 11(a), para. 53. See also European Union's second written submission, paras. 9 and 31.

²⁶⁴ European Union's second written submission, para. 32.

²⁶⁵ European Union's responses to Panel question No. 17(a), para. 87.

²⁶⁶ China's second written submission, section II.B.

²⁶⁷ China's second written submission, para. 16.

Table 3: China's description of three possible interpretations of the European Union's definition of the precise content of the ASI policy

Interpretation 1	Interpretation 2	Interpretation 3
The existence of a particular characteristic in ASIs issued by Chinese courts makes them inconsistent with the TRIPS Agreement. ²⁶⁸	All ASIs issued by Chinese courts are inconsistent with the TRIPS Agreement, regardless of the existence of specific "aspects". China submits that under this second possibility, the European Union's claim would mean that ASIs issued by other Members' courts would also be inconsistent with the TRIPS Agreement. ²⁶⁹	Chinese courts are enabled to " <i>potentially</i> " ²⁷⁰ issue WTO-inconsistent ASIs while at the same time claiming that "any and all ASIs issued by Chinese courts on behalf of implementers in the context of SEP litigation are inconsistent with the TRIPS Agreement". ²⁷¹ China argues that according to the European Union, its claims would even cover "ASIs where the European Union has no problem with the court's actual reasoning in a given case, or the form of the resulting ASI" ²⁷² , including those that are identical to ASIs issued by other Members' courts. According to the European Union, these ASIs would nevertheless be WTO inconsistent ²⁷³ because the policy does not limit Chinese courts to issuing ASIs in exceptional cases where the judicial proceedings "started by the patent owners in the territories of other Members are themselves vexatious, oppressive or otherwise abusive". ²⁷⁴ At the same time, the European Union's claims would not extend to an understanding that ASIs issued by other Members' courts would also be inconsistent with the TRIPS Agreement.

7.46. China also argues that these changing iterations make it impossible for the European Union to sustain its as such challenge to the ASI policy.²⁷⁵ China notes that, as the European Union accepts, the alleged ASI policy does not prevent Chinese courts from rejecting an ASI application or issuing WTO-consistent ASIs such as those under the European Union's "exceptional cases" standard.²⁷⁶ China points to Appellate Body and prior panel decisions for the principle that the mere fact that the application of a measure in some circumstances could lead to WTO inconsistency is insufficient to establish a *prima facie* case that the measure is WTO inconsistent as such.²⁷⁷ According to China, this supports its conclusion that unless the European Union can demonstrate that the application of the ASI policy would always lead to WTO-inconsistent ASIs being issued, the ASI policy cannot be challenged as such.²⁷⁸

7.47. China submits that *Huawei v. Conversant* was a single case in which the SPC applied the written law to the particular facts of the ASI application at issue, that the SPC did not say or suggest how a different court might address an ASI application going forward, and that it is impossible to see how it instituted an unwritten policy "to systematically impose broad ASIs".²⁷⁹ China also points

²⁶⁸ China's second written submission, para. 15.

²⁶⁹ China's second written submission, para. 15.

²⁷⁰ China's second written submission, para. 18. (emphasis original)

²⁷¹ China's second written submission, para. 17 (referring to European Union's response to Panel question No. 17a).

²⁷² China's second written submission, para. 18 (referring to European Union's response to Panel question No. 17(b)).

²⁷³ China's second written submission, para. 18.

²⁷⁴ China's second written submission, para. 17 (quoting European Union's response to Panel question No. 17(a)).

²⁷⁵ China argues that based on the European Union's panel request, China understood the European Union's as such claim against the alleged ASI policy to be *categorical* in nature because it understood the European Union's argument to be that *all* ASIs (including those adopted by other Members) are *per se* inconsistent with the provisions of the TRIPS Agreement cited in the European Union's panel request. (China's second written submission, para. 12. (emphasis original))

²⁷⁶ China's second written submission, paras. 26 and 35.

²⁷⁷ China's second written submission, paras. 37-41 (referring to Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.231). See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.483; and Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.693).

²⁷⁸ China's second written submission, para. 35.

²⁷⁹ China's second written submission, para. 60 (referring to European Union's first written submission, para. 244).

to the European Union's response to the Panel's questions acknowledging that the ASI issued in *Huawei v. Conversant* did not have a "broad scope"²⁸⁰ and argues that this is inconsistent with the European Union's argument that the ASI policy "empowers and encourages courts to issue anti-suit injunctions with a worldwide scope and covering several types of proceedings".²⁸¹

7.48. On the issue of when the ASI policy came into effect, China argues that the European Union's attempts at clarification have only created more confusion. China recalls that at the first substantive meeting the European Union stated that the measure came into effect in 2020 with the SPC decision in *Huawei v. Conversant*.²⁸² China submits that there is no basis for this assertion²⁸³ and that this argument contradicts the European Union's position that the measure has been applied multiple times given that the evidence submitted by the European Union dates from after all the five ASIs were issued.²⁸⁴ China submits that the European Union has chosen to reconcile this by now asserting that this evidence serves to confirm that the alleged policy was introduced in *Huawei v. Conversant*.²⁸⁵

7.2.2.2 Panel's analysis

7.49. In this section the Panel will (a) address China's contention that the European Union's various statements on the definition of the precise content of the ASI policy are inconsistent and incompatible with each other and with the measure identified in the panel request, and (b) present its understanding of the European Union's description of the precise content of the ASI policy.

7.2.2.2.1 Alleged incompatible and inconsistent iterations by the European Union in setting out the precise content

7.50. China recalls the reasoning of the panel in *US – Softwood Lumber VII* that the precise content of an unwritten measure must be discernible and "remain the same across ... different facts and circumstances".²⁸⁶ China maintains that the content of the alleged unwritten measure challenged by the European Union is neither discernible nor precise,²⁸⁷ because the European Union has, during the proceedings, presented a number of incompatible and inconsistent interpretations of what it considers the precise content is, all of which differ from that contained in the panel request.²⁸⁸

7.51. The European Union acknowledges that, subsequent to its panel request, it has "developed and elaborated upon its description of the precise content" of the ASI policy in its submissions to the Panel, and explains that this is to be expected during panel proceedings.²⁸⁹ According to the European Union, no provision of the DSU obliges the complainant to limit itself, during panel proceedings, to repeat the same choice of words used to identify the challenged measure in its panel request, and that for these purposes "it can use a variety of words that carry a similar meaning, and which will allow the Panel to better grasp the precise content of the measure at issue, provided that the measure so referenced remains the same".²⁹⁰

7.52. The Panel notes that while there is no disagreement between the parties that the European Union has indeed presented various formulations or phrasings of the precise content of the ASI policy²⁹¹, the parties disagree on what this means for the status of the European Union's

²⁸⁰ China's second written submission, para. 61 (referring to European Union's response to Panel question No. 11(a)).

²⁸¹ China's second written submission, para. 62 (referring to European Union's response to Panel question No. 11(a)).

²⁸² The European Union reiterated this position in its written answers and in its second written submission. (European Union's second written submission, paras. 3 and 7; response to Panel question No. 4).

²⁸³ China's second written submission, para. 28.

²⁸⁴ China's second written submission, paras. 48-50.

²⁸⁵ China's second written submission, paras. 48-50 (referring to European Union's response to Panel question No. 4).

²⁸⁶ China's first written submission, para. 116 (referring to Panel Report, *US – Softwood Lumber VII*, para. 7.757).

²⁸⁷ China's first written submission, section III.C.

²⁸⁸ China's second written submission, paras. 15-18.

²⁸⁹ European Union's opening statement at the second meeting of the Panel, para. 5.

²⁹⁰ European Union's opening statement at the second meeting of the Panel, para. 8.

²⁹¹ See paragraph 7.42 above for different statements on the precise content of the ASI policy submitted by the European Union.

case. China's arguments present three issues for the Panel to address: (a) whether the European Union's statements on the precise content are inconsistent and incompatible to such an extent that the European Union cannot demonstrate the precise content of the ASI policy; (b) whether the precise content of the ASI policy as set out and developed in the European Union's submissions comports with the measure within the Panel's terms of reference, as set out in section 7.2.1.2.1 above; and (c) whether China's due process rights have been prejudiced in its ability to know the case it has to defend.

7.53. A review of the European Union's statements describing the ASI policy indicates the existence of a common thread that the European Union references in its description of the precise content of the ASI policy. The European Union consistently refers to the ASI policy as one that empowers²⁹² Chinese courts to impose a range of possible prohibitions²⁹³ at the request of implementers²⁹⁴ in the context of SEP litigation. This policy can be enforced through the imposition of cumulative daily fines²⁹⁵, and is elaborated and promoted by the SPC while the NPC Standing Committee endorsed it. For the Panel, this common thread reflects the most salient characteristics of the precise content of the ASI policy and indicates what the European Union believes to be its core.

7.54. The Panel is also aware that the European Union mentions other elements in some, but not all, of its submissions. For instance, the European Union refers to the concept of the ASI policy as not only empowering but also encouraging²⁹⁶ Chinese courts to issue ASIs. The European Union also uses the terms "endorsement"²⁹⁷, "promotion"²⁹⁸, "support"²⁹⁹, and "instructions"³⁰⁰ when referring to the relationship between the NPC Standing Committee and the SPC and the courts with respect to the granting of ASIs and the ASI policy. The Panel asked the European Union to clarify the relationship between these terms and, particularly, to confirm whether the European Union's position was that there were legally binding instructions for Chinese courts to apply the ASI policy³⁰¹, stemming either from the NPC Standing Committee, the SPC, or the ASI policy itself, and whether Chinese courts were required to always grant an ASI under the ASI policy if requested by an implementer. According to the European Union, the legal framework governing the supervision of the people's courts work by the SPC, the NPC, and its Standing Committee, implies that these institutions can guide Chinese courts and that the opinions and suggestions expressed during deliberation by the Standing Committee are not merely consultative, as people's courts are required to "study and handle" them and have to submit a written report to the Standing Committee.³⁰² The

²⁹² European Union's first written submission, paras. 12, 108, 115, and 128; opening statement at the first meeting of the Panel, para. 34; responses to Panel question Nos. 4, 8(a) and (c), 11(a), 12(b), 16(a) and (c), and 78; second written submission, paras. 2, 5, 9, and 29; opening statement at the second meeting of the Panel, para. 10; closing statement at the second meeting of the Panel, para. 2.

²⁹³ The description of the prohibitions includes "forbid[ing] the patent holders to commence, continue or enforce the results of any legal proceedings before any non-Chinese court". (European Union's first written submission, para. 232). "[P]rohibiting SEP holders from commencing, continuing, or enforcing the results of any legal proceedings before courts outwith China". (European Union's first written submission, para. 108.). And "prohibit[ing] 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". (European Union's first written submission, para. 225).

²⁹⁴ European Union's first written submission, paras. 108 and 318; second written submission, para. 38.

²⁹⁵ European Union's first written submission, paras. 12, 232, and 560; second written submission, para. 2.

²⁹⁶ European Union's first written submission, subheading 3.6, paras. 320 and 377; responses to Panel question Nos. 4, 8(a) and (b), 11(a), 12(a) and (b), 13(b), 17, 18, 25, 37, 78, and 97; second written submission, paras. 2, 5-7, 9, 13, 21-26, 29, 41, 45, and 72; opening statement at the second meeting of the Panel, paras. 4, 10, 20, and 25; closing statement at the second meeting of the Panel, para. 2. The Panel recalls that, as found in section 7.2.1.2.1-7.2.1.2.2 above the concept of encouraging Chinese courts to issue ASIs is not within its terms of reference.

²⁹⁷ European Union's first written submission, subheadings 3.7, 3.8, paras. 4, 15, 108, 109, 257, 320, 470; second written submission, paras. 6, 7, 24, 25, 45; responses to Panel question Nos 4, 8, 11, 12, 13, 18, 30, 78, 100, and 109; opening statement at the first meeting of the Panel, paras. 13, 15, and 30; opening statement at the second meeting of the Panel, paras. 23 and 25.

²⁹⁸ European Union's first written submission, paras. 130 and 235; second written submission, paras. 6, 7, 9, 38, and 46; responses to Panel question Nos 4, 8, 11, 12, 98, 101, and 112; opening statement at the second meeting of the Panel, para. 24 and 61.

²⁹⁹ European Union's first written submission, paras. 4, 123, 125, 225, 254, 255, 274, 289, 320, 323, 378, and 443; second written submission, paras. 13 and 28; responses to panel question Nos. 11 and 78.

³⁰⁰ European Union's first written submission, paras. 203 and 239.

³⁰¹ European Union's response to Panel question No. 8.

³⁰² European Union's response to Panel question No. 8.

European Union then argues that Chinese courts are not free to disregard the ASI policy as they are encouraged to apply it, while at the same time recognizing that an ASI may not be issued in all cases where an implementer requests one.³⁰³

7.55. At times, the European Union has shifted its emphasis, attempted to clarify, or sought to narrow the understanding of certain terms in response to arguments from China or questions from the Panel. For example, the European Union qualifies its position from the first written submission that the ASI policy results in Chinese courts "systematically impos[ing] broad ASIs in SEP litigation"³⁰⁴ by arguing subsequently that the policy itself is not systematic and that the reference to broad ASIs concerns the legal reasoning underpinning their issuance and not the scope of the prohibitions therein. Similarly, the European Union initially used a range of terminology ("support", "promote", "encourage", "instruct") interchangeably. The European Union acknowledges, however, that despite its use of the term "instruct" there are no binding instructions on Chinese courts on how to treat a request for an ASI. The European Union has also combined statements about the precise content of the ASI policy with arguments relating to the objectives of the policy or the way the policy is inconsistent with the TRIPS Agreement. In that regard, the Panel observes that following its first written submission the European Union's recitations of the content of the ASI policy indicate that, under the ASI policy, Chinese judges issue ASIs when "necessary to protect China's interest[s]".³⁰⁵ The European Union also describes the policy by contrasting it with what the European Union views would be an appropriate use of an ASI – i.e. well-targeted ASIs limited to exceptional cases only where the parallel litigation was vexatious, oppressive, or abusive.³⁰⁶

7.56. The Panel agrees that consistency and clarity in the description of an unwritten measure are important to ensure that the respondent can pin down the challenged measure and not have to adjust its pleadings during the proceedings to respond to shifting descriptions of the measure.³⁰⁷ Additionally, the Panel is not of the view that the requirement in Article 6.2 of the DSU to identify the specific measure implies that a complainant must identify the precise content of an unwritten measure *in the panel request*. However, while a complainant may use different terminology to elaborate on the precise content of the measure identified in the panel request, this cannot result in a situation where, through shifting descriptions of the measure, it is redefined into something that was not identified in the panel request and would therefore be outside the Panel's terms of reference.³⁰⁸

7.57. Although the European Union's argumentation was not a model of clarity, and exhibited some inconsistencies, the Panel is not of the view that the differences and shifts in that argumentation rise to the level of incompatible and irreconcilable definitions. The Panel does not consider that it is unable to pin down what the European Union submits is the precise content of the ASI policy or that China has had to adjust its pleadings to reply to the measure.

7.58. Except for the references to the ASI policy as encouraging courts to issue ASIs and statements that courts would do so when necessary to protect China's interests³⁰⁹, the European Union's identification of the core elements of the ASI policy has been consistent from the panel request

³⁰³ European Union's response to Panel question No. 8. The European Union accepts that Chinese courts will not necessarily grant in all circumstances requests for ASIs submitted by implementers in SEP litigation. (European Union's response to Panel question No. 100). The European Union addresses the existence of a decision (*Lenovo v. Nokia*) whereby the Shenzhen Intermediate People's Court rejected a request for an ASI because legal proceedings outside China had not yet resulted in an action (such as an injunction) that would conflict with the Chinese's court's jurisdiction. To the European Union, this decision does not invalidate the existence of the policy in light of actions taken subsequent to that decision such as actions by the NPC Standing Committee and SPC in November 2021 and February 2022, the Wuhan Intermediate People's Court's ruling in the reconsideration decision in *Samsung v. Ericsson* in March 2021, and the 2022 designation of *Xiaomi v. InterDigital* as a typical case by the Hubei Province Higher People's Court. (See European Union's first written submission, paras. 243 and 267-268).

³⁰⁴ European Union's first written submission, para. 244. See also European Union's responses to Panel question Nos. 11 and 12; China's second written submission, section II.D.

³⁰⁵ European Union's responses to Panel question Nos. 11(a), 12, and 78; opening statement at the second meeting of the Panel, para. 10 (referring to European Union's opening statement at the first meeting of the Panel, paras. 33-34); closing statement at the second meeting of the Panel, para. 2.

³⁰⁶ European Union's responses to Panel question No. 17(a).

³⁰⁷ Panel Report, *Russia – Tariff Treatment*, para. 7.302.

³⁰⁸ Panel Report, *Russia – Tariff Treatment*, para. 7.302.

³⁰⁹ As noted in para. 7.32 the Panel found that the description of ASI policy containing these elements is not within its terms of reference.

onwards. The additional points mentioned in the preceding paragraphs are not inconsistent or incompatible with that definition. The different statements the European Union submits on the precise content of the ASI policy are reconcilable with the core definition of the precise content that the European Union has referenced throughout the proceedings. In the Panel's view, the European Union has presented and set out³¹⁰ its definition of the precise content of the ASI policy. Moreover, the Panel recalls that China's position throughout has been that no ASI policy exists and that, if one did, the cited provisions of the TRIPS Agreement do not address the issuance of ASIs. China's arguments regarding the existence of a policy and its compatibility with the TRIPS Agreement did not change in response to any of the European Union's clarifications. Thus, China's due process rights have not been impinged.

7.59. The Panel also recalls China's argument that the changing iterations to the precise content make it impossible for the European Union to sustain its as such challenge against the ASI policy³¹¹, because if, pursuant to the European Union's position, the ASI policy could be applied in a WTO-consistent way, then it cannot be challenged as such.³¹² The European Union submits that all the ASIs issued pursuant to the ASI policy are inconsistent with China's obligations under the TRIPS Agreement. According to the European Union, even if a Chinese court granted an ASI that on the face of it satisfied the European Union's own standards, it would nevertheless be inconsistent with the TRIPS Agreement if issued pursuant to the ASI policy.³¹³ The European Union argues, therefore, that the ASI policy is susceptible to being challenged as such.³¹⁴

7.60. Although the European Union's formulation of the ASI policy as empowering, but not necessarily requiring, courts to issue ASIs acknowledges that there are different possible outcomes in the application of the ASI policy, the Panel does not understand that the European Union agrees that the ASI policy could be applied in a WTO-consistent way. Moreover, while China formulates this as an issue of precise content, the Panel sees this issue rather as a question of whether the European Union has demonstrated the inconsistency of this measure with the cited provisions of the TRIPS Agreement. The Panel will thus address this issue, as necessary, in the context of determining whether the ASI policy is inconsistent with the provisions invoked by the European Union, in the event that the Panel finds the ASI policy exists.³¹⁵

7.61. In light of the above-mentioned considerations, the Panel disagrees with China that the European Union's different statements during the proceedings on the precise content of the ASI policy constitute incompatible and inconsistent interpretations of the policy's precise content. The European Union does introduce in its statements on the precise content elements that fall outside of the Panel's terms of reference, particularly those relating to whether the ASI policy encourages Chinese courts to issue ASIs and whether courts would do so when necessary to protect China's interests. The European Union's statements on the precise content, however, reflect an understanding consistent with the measure the European Union identified in its panel request. In the Panel's view, the European Union has therefore adequately set out the precise content of the alleged ASI policy.

7.2.2.2.2 Description of the precise content

7.62. According to China, it would not be possible for the Panel to evaluate whether the evidence cited by the European Union substantiates the existence of the policy "without knowing what the

³¹⁰ The Panel will address whether the European Union has substantiated the precise content of the ASI policy in section 7.2.3.1 below.

³¹¹ China argues that based on the European Union's panel request, China understood the European Union's as such claim against the alleged ASI policy to be *categorical* in nature because it understood the European Union's argument to be that *all* ASIs (including those adopted by other Members) are *per se* inconsistent with the provisions of the TRIPS Agreement cited in the European Union's panel request. (China's second written submission, para. 12. (emphasis original))

³¹² China's second written submission, paras. 26 and 35.

³¹³ European Union's response to Panel question No. 17(b).

³¹⁴ European Union's opening statement at the second meeting of the Panel, para. 21.

³¹⁵ The Panel's approach is supported by previous statements by the Appellate Body, where it rejected the notion that non-mandatory measures cannot be challenged as such and that panels are obliged, as a preliminary jurisdictional matter, to examine whether the challenged measure is mandatory. (Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 89. See also Panel Report, *US – Countervailing Measures (China)*, para. 7.107.)

contours of that unwritten 'policy' actually are".³¹⁶ In this regard, the Panel's understanding of the precise content of the policy will be derived from the Panel's findings in sections 7.2.1.2.1, 7.2.1.2.2, and 7.2.2.2.1 above relating to the identification of the measure and its precise content, as well as the clarifications and elaborations that the European Union has introduced in response to questions and comments. The Panel also recalls that the European Union has presented the ASI policy as a composite measure featuring numerous parts that, although different in nature, allegedly work together to form a single unwritten measure.³¹⁷

7.63. With the above considerations in mind, the precise content of the ASI policy, as set out by the European Union, is one that empowers³¹⁸ Chinese courts to impose a range of possible prohibitions³¹⁹ at the request of implementers³²⁰ in the context of SEP litigation, which can be enforced through the imposition of cumulative daily fines³²¹, and which is elaborated and promoted by the SPC and endorsed by the NPC Standing Committee. The "five court decisions imposing ASIs ... and the support of the SPC and the NPC Standing Committee for these court decisions set out the precise content" of this measure.³²² These are the main elements that the European Union will need to demonstrate in its submissions, through evidence and arguments. The Panel will take into account the clarifications the European Union has provided with respect to whether the ASI policy is broad and systematic.³²³ It will also take into account the importance of the SPC decision in *Huawei v. Conversant* on the putting in place of the ASI policy³²⁴, setting out the judicial and legal path for other Chinese courts to follow by "empower[ing] ... other courts to adopt anti-suit injunctions in SEP litigation", and setting out the "factors to consider and the legal reasoning" that was later followed by the other court decisions at issue in this dispute imposing ASIs.³²⁵

7.64. The Panel also considers it important to present its understanding of the concepts of *policy* and *empowerment* – two basic elements of the precise content of the ASI policy. By defining the challenged measure as a policy, the Panel understands the European Union to be referring to a principle or course of action taken by China pursuing one or several policy objectives. This principle or course of action is purportedly demonstrated mainly through court decisions and statements and official documents by different organs of the Chinese Government, all of which, operating together, allegedly make up the policy being challenged by the European Union.

7.65. When referring to empowerment, the Panel understands the European Union to refer to a measure that not only provides for a general legal authority for Chinese courts to take certain actions, i.e. granting ASIs to implementers in the context of SEP litigation, but that also provides guidance on how to use this authority, for instance, by setting out the factors that courts may use. Considering the European Union's clarifications on the matter, the Panel understands that this empowerment does not mandate a specific outcome. In other words, the fact that Chinese courts are empowered, through the ASI policy, to grant ASIs does not mean they are required to do so each time one is requested.³²⁶

³¹⁶ China's first written submission, para. 120.

³¹⁷ European Union's comments on China's response to Panel question No. 78.

³¹⁸ European Union's first written submission, paras. 12, 108, 115, and 128; opening statement at the first meeting of the Panel, para. 34; responses to Panel question Nos. 4, 8(a) and (c), 11(a), 12(b), 16(a) and (c), and 78; second written submission, paras. 2, 5, 9, and 29; opening statement at the second meeting of the Panel, para. 10; and closing statement at the second meeting of the Panel, para. 2.

³¹⁹ The description of the prohibitions includes "forbidd[ing] the patent holders to commence, continue or enforce the results of any legal proceedings before any non-Chinese court". (European Union's first written submission, para. 232). "[P]rohibiting SEP holders from commencing, continuing, or enforcing the results of any legal proceedings before courts outwith China". (European Union's first written submission, para. 108.) And "prohibit[ing] 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". (European Union's first written submission, para. 225).

³²⁰ European Union's first written submission, paras. 108 and 318; and second written submission, para. 38.

³²¹ European Union's first written submission, paras. 12, 232, and 560; and second written submission, para. 2.

³²² European Union's first written submission, para. 225.

³²³ European Union response to Panel question No. 11.

³²⁴ European Union's first written submission, para. 21; response to Panel question No. 4; and second written submission, para. 3.

³²⁵ European Union's response to Panel question No. 4; second written submission, paras. 4-5.

³²⁶ See section 7.2.2.2.1 above.

7.2.3 Whether the European Union has demonstrated the existence of the ASI policy

7.66. Under Article 11 of the DSU, the Panel has a duty to conduct an objective assessment of the matter before it, including an objective assessment of the facts of the case. Article 3.2 of the DSU provides that Members may challenge in WTO dispute settlement any measure taken by a Member. The concept of a measure has commonly been understood to mean any act or omission attributable to a Member.³²⁷ There is no requirement in WTO dispute settlement that a measure must be expressed in a written form. At the same time, a challenge against an unwritten measure may present certain issues because, as China does here, the respondent may challenge "the very existence and the precise contours of the alleged measure".³²⁸ A panel must not lightly assume the existence of an unwritten measure, but rather must apply a high evidentiary burden and evaluate and weigh "the concrete instrumentalities that evidence the existence of the purported measure" with particular rigour.³²⁹

7.67. In the past, panels have required evidence (a) that the alleged measure is attributable to the responding Member; (b) of the precise content; and (c) of the specific nature.³³⁰ Both the European Union and China agree that these are the three main elements to demonstrate that an unwritten measure exists.³³¹

7.68. The European Union alleges that "China has introduced, maintains, and implements a policy which, in the context of judicial procedures concerning the enforcement of intellectual property rights, empowers Chinese courts to prohibit patent holders from asserting their rights protected by the TRIPS Agreement in other jurisdictions".³³² The European Union argues that this measure is an unwritten measure legally characterized as a rule or norm of general and prospective application, or, in the alternative, ongoing conduct.³³³ China denies the measure exists.³³⁴

7.69. The application of the first element of this analytical framework is uncontested by the parties. The European Union alleges that the ASI policy is generally a measure developed by China's judicial and political authorities granting Chinese courts the authority to take certain actions, which would include issuing the five individual ASIs in this dispute, as well as actions and statements of other Chinese Government entities, which respond to policy objectives in the area of SEP litigation. Acts or omissions attributable to a Member include those of any government entity, including legislative, executive, or judicial branches, as well as regional or local authorities.³³⁵ China does not dispute that if the ASI policy exists as the European Union characterizes it, it would be attributable to China.³³⁶ The Panel, therefore, finds that if this measure exists it would be attributable to China and does not consider it necessary to further address this element in its analysis below.

7.70. The Panel's analysis of the remainder of these elements will be informed by how the European Union characterizes the ASI policy³³⁷ and the high evidentiary threshold required in determining the existence of an unwritten measure such as the ASI policy.³³⁸ Although the evidentiary burden is high, when the existence of an unwritten measure cannot be established solely

³²⁷ See e.g. Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 81; *Russia – Railway Equipment*, para. 5.78; and *US – Supercalendered Paper*, para. 5.17. See also Panel Reports, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.23 and *Saudi Arabia – IPRs*, para. 7.48.

³²⁸ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 792.

³²⁹ Panel Report, *Indonesia – Chicken*, para. 7.656 (referring to Appellate Body Reports, *Argentina – Import Measures*, para. 5.108). See also Panel Reports, *Russia – Tariff Treatment*, paras. 7.283, 7.338, and 7.341; *Russia – Railway Equipment*, para. 7.946; *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.25 and Appellate Body Report, *US – Zeroing (EC)*, paras. 196 and 198.

³³⁰ Panel Report, *Indonesia – Chicken*, para. 7.656. See also Appellate Body Report, *US – Zeroing (EC)*, para. 198; Appellate Body Reports, *Argentina – Import Measures*, paras. 5.104- 5.108.

³³¹ European Union's first written submission, para. 216; China's first written submission, para. 110 (both referring to Panel Report, *Indonesia – Chicken*, para. 7.656).

³³² European Union's panel request, p. 1. See also section 7.2.2.2 for a description of what the European Union presents is the precise content of the ASI policy.

³³³ European Union's first written submission, paras. 217-218.

³³⁴ China's first written submission, section III.D.

³³⁵ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

³³⁶ See China's first written submission, para. 109.

³³⁷ Appellate Body Reports, *Argentina – Import Measures*, para. 5.108. See also Panel Report, *Russia – Tariff Treatment*, para. 7.341.

³³⁸ Appellate Body Report, *US – Zeroing (EC)*, para. 198.

by relying on the text of a legal instrument, it can be established based on other, often circumstantial, evidence and arguments.³³⁹

7.71. With regard to the second element, the Panel will assess the European Union's arguments on the elements that form the ASI policy, i.e. its precise content, as well as how it allegedly operates. On the basis of this definition of the precise content, the Panel will assess the parties' evidence and arguments to determine whether the European Union has demonstrated that the ASI policy exists.

7.72. The Panel will assess the nature of the ASI policy in line with the third element outlined above. The European Union has argued that the ASI policy as an unwritten measure is a rule or norm of general and prospective application or, in the alternative, ongoing conduct. China considers that the European Union has failed to demonstrate that the alleged unwritten measure constitutes a rule or norm of general and prospective application, or ongoing conduct.³⁴⁰

7.73. Following the analytical framework discussed in paragraph 7.67 above, the Panel will first assess whether the European Union has substantiated the precise content of the ASI policy, through evidence and argumentation. It will then address the parties' arguments on the specific nature of the ASI policy.

7.2.3.1 The European Union's substantiation of the precise content

7.74. The European Union points to three broad categories of evidence that it argues demonstrate the precise content and existence of the ASI policy: (a) the temporal overlaps and the similarities of the five decisions; (b) the relevance of the designation of some of these decisions as typical cases, or other types of designation, and their promotion by the SPC and regional government bodies; and (c) the alleged calls from the SPC and the NPC Standing Committee to continue using and improving the ASI policy.³⁴¹ The Panel understands the European Union's position to be that none of these sets of arguments presenting different elements, on their own, is sufficient to substantiate the precise content or establish the existence of the ASI policy; it is only once they are taken together that they evidence the precise content and existence of the ASI policy.

7.75. China, for its part, argues that the European Union has fabricated the ASI policy for the purpose of this dispute based on mischaracterizations of the Chinese legal system.³⁴² China argues that there is no unwritten policy of applying ASIs in SEP litigation, but rather five individual instances in which judges applied the written law to the particular facts before them, and issued ASIs that varied significantly from case to case.³⁴³

7.76. Although the European Union argues that the various elements it raises operate together to form a single measure, for the sake of clarity the Panel will assess the arguments for each category of evidence separately before conducting an overall assessment of the totality of the evidence to determine whether the European Union has substantiated the precise content of the ASI policy.

7.2.3.1.1 Temporal overlaps and similarities of the five ASI decisions

7.2.3.1.1.1 Summary of the parties' arguments

7.77. The European Union argues that the SPC decision in *Huawei v. Conversant* put in place the ASI policy.³⁴⁴ The European Union notes that after this decision on 28 August 2020 (11 September 2020 reconsideration decision), the other four decisions in *Xiaomi v. InterDigital* (23 September 2020 original decision, 4 December 2020 reconsideration decision); *ZTE v. Conversant* (29 September 2020); *OPPO v. Sharp* (16 October 2020); and *Samsung v. Ericsson* (25 December 2020 original

³³⁹ European Union's first written submission, para. 220. The Panel notes that the Appellate Body has commented on how evidence that may initially appear to be of little or no probative value, when viewed in isolation, could form part of an overall picture when placed beside another piece of evidence of the same nature, i.e. when assessing the totality of the evidence on a panel's record. (Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 154).

³⁴⁰ China's first written submission, paras. 155 and 170.

³⁴¹ European Union's first written submission, para. 235.

³⁴² China's first written submission, para. 72.

³⁴³ China's first written submission, para. 72.

³⁴⁴ European Union's first written submission, para. 21.

decision, 10 March 2021 reconsideration decision) were all issued in quick succession.³⁴⁵ According to the European Union, while each case concerned different parties, different SEPs, and different circumstances, each court granted the ASI requested by the applicant based on a similar reasoning to that in *Huawei v. Conversant*.³⁴⁶ According to the European Union, the following legal instruments govern the adoption of act preservation measures in Chinese law: Articles 100 (now 103) and 101 (now 104) of the Civil Procedure Law and the SPC Provisions.³⁴⁷ Regarding the decision of 27 January 2021 in *Lenovo v. Nokia* not to grant an ASI, the European Union submits that this case does not cast doubt on the existence of the ASI policy as it was neither promoted nor presented as a typical case.³⁴⁸

7.78. The European Union also argues that the variation in the scope of the ASIs is explained by the differences in the ASI requests filed by implementers in that some requests are broader than others. The European Union argues that regardless of the differences in scope, the central element is that Chinese courts have granted those requests following the path laid down by the SPC in *Huawei v. Conversant*.³⁴⁹

7.79. China argues 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 an unwritten policy applied by that Member. For China, the courts' consideration of similar factors when reaching their decisions is logically the result of the fact that each court sought to ascertain whether the application for act preservation before it complied with the relevant requirements of the Chinese law that it was applying, namely Article 100 (now 103) of China's Civil Procedure Law.³⁵⁰ According to China, the evidence demonstrates that in each of the six ASI rulings issued between August 2020 and January 2021 the different courts considered the relevant facts in light of the applicable law and they did not simply grant ASIs based on an alleged "policy" to do so.³⁵¹

7.80. China submits that in each of the five cases at issue, the courts assessed relevant factors on the basis of the specific facts before it and that none of the courts referenced an underlying practice or policy of issuing ASIs in their decisions.³⁵² China also argues that the European Union glosses over significant differences among the five Chinese courts decisions.³⁵³ China submits that the scope of the ASIs varied significantly and while the courts in all five cases broadly assessed similar factors, the reasoning in the decisions also varied.³⁵⁴

7.81. Regarding the temporal overlaps, China argues that the courts do not control when ASI applications are submitted to them and that while the rejection of the ASI request in *Lenovo v. Nokia* was only one month after the ASI was granted in *Samsung v. Ericsson*, the European Union attributes no significance to this temporal overlap. China also submits that while emphasizing the closeness in time of the five affirmative ASI decisions issued in the fall of 2020, the European Union does not address the fact that no ASIs have been issued by a Chinese court since December 2020.³⁵⁵

7.2.3.1.1.2 Panel's analysis

7.82. On the question of temporal overlaps and similarities, the Panel understands that what the European Union refers to is the fact that the ASI decisions were issued over a short period of time and in quick succession, all featuring a similar legal approach to address the novel issue of ASIs in

³⁴⁵ European Union's first written submission, para. 236.

³⁴⁶ European Union's first written submission, para. 236.

³⁴⁷ European Union's first written submission, para. 224.

³⁴⁸ European Union's response to Panel question No. 12(a)(iii).

³⁴⁹ European Union's response to Panel question No. 12(a)(ii).

³⁵⁰ China's first written submission, para. 127.

³⁵¹ China's first written submission, para. 134.

³⁵² China's first written submission, para. 129.

³⁵³ China's first written submission, para. 131.

³⁵⁴ China's first written submission, para. 131. China also claims that the court in *OPPO v. Sharp* specifically found that concerns about the effect of the ASI on international comity were unfounded because none of Sharp's pending litigation would be affected by the ASI. In contrast, China submits that the court in *Lenovo v. Nokia* rejected an ASI application on the grounds that the ASI was to preclude the initiation of new cases and the enforcement of future injunctions because no injunctions had yet been issued in Nokia's ongoing litigation in foreign jurisdictions. (China's first written submission, para. 131).

³⁵⁵ China's first written submission, para. 134.

SEP litigation.³⁵⁶ The Panel notes that pursuant to Article 100 (now 103) of the Civil Procedure Law, a court would grant an ASI in response to a request submitted by a litigant – in these particular cases, an implementer. The Panel notes that the timing of the filing of requests for ASIs was determined by the implementers, generally in response to actions taken in the courts of other jurisdictions by the SEP owners. The Panel also notes, however, the closeness in the dates of the decisions by several Chinese courts to interpret Article 100 (now 103) of the Civil Procedure Law in novel ways to permit not only the granting of ASIs when faced with these requests, but also the potential application of cumulative daily fines. The Panel finds it salient that several courts granted these requests over a short period of time and in quick succession.

7.83. The broader temporal context in which the events surrounding the ASI policy took place will therefore be a factor in the Panel's assessment of the precise content and existence of this measure. In this connection, the Panel notes that Article 100 (now 103) of the Civil Procedure Law, which provides for a form of preliminary injunction available during civil litigation, was already in force prior to the issuance of the five ASIs. Moreover, the SPC Provisions entered into force in early 2019. These provisions elaborate on the application of Articles 100 (now 103) and 101 (now 104) in IP cases, including setting out factors that courts should take into account when considering applications for act preservation measures.³⁵⁷

7.84. The Panel understands that while a legal regime on act preservation measures already existed, there were doubts as to whether that regime could be extended to cover requests for ASIs to address parallel foreign IP litigation, or whether new legislation – in addition to that already existing – was required. For instance, in June 2020 Deputy Luo Dongchuan, the then vice president of the SPC and President of the SPC's IP Tribunal, pointed to "a lack of anti-suit injunction and anti-injunction mechanism, which not only makes it difficult to form countermeasures in international competition, but also cannot build a home field advantage for dispute resolution". Deputy Luo Dongchuan, as part of a proposal to formulate a "special trial law for intellectual property litigation" suggested to "[e]xtend the application of the [act] conduct preservation system, realize the functions of anti-litigation injunction, anti-prohibition injunction and anti-injunction, and form a strong countermeasure to foreign parallel litigation".³⁵⁸ Similarly, in July 2020, the Guangdong Province Higher People's Court IP Tribunal published a book titled *Research on Legal Issues of Standard Essential Patents in the Communications Field*. The book's chapter on jurisdiction in foreign-related SEP disputes states that "[a]t present, China has neither legislation nor judicial practice on anti-suit injunction[s]" and that "[d]ue to the lack of anti-suit injunction legislation in China, most domestic courts remain silent on anti-suit injunctions issued by foreign courts". The chapter concludes by recommending that "China should research and establish a system of anti-suit injunctions and anti-anti-suit injunctions in legislation as soon as possible to protect the legitimate rights and interests of parties".³⁵⁹

7.85. From this context, it appears that before the issuance of the SPC decision in *Huawei v. Conversant*, it was uncertain whether Article 100 (now 103) of China's Civil Procedure Law provided the legal authority for courts to issue ASIs to address the issue of parallel foreign litigation in IP litigation.

7.86. Beginning in the second half of 2020, implementers in China started filing requests for ASIs in the context of SEP litigation. Xiaomi filed the first known request for an ASI on 4 August 2020, followed by Huawei on 27 August 2020, ZTE on 28 August 2020, OPPO sometime around early October 2020³⁶⁰, and Samsung on 14 December 2020. These requests were all made in the context of ongoing litigation in Chinese courts on FRAND rate determinations, and infringement proceedings

³⁵⁶ See European Union's first written submission, para. 236.

³⁵⁷ The factors are: (1) whether the applicant's request has both a factual and legal basis, including whether or not the validity of the intellectual property right of which protection is requested is stable, makes the judgment or ruling of the case difficult to enforce, or results in any other harm, (2) whether or not the failure to take the act preservation measure will cause irreparable harm to the lawful rights and interests of the applicant, (3) whether or not the harm caused to the applicant by failure to issue the act preservation measure will exceed the harm caused to the respondent by issuing the act preservation measure, (4) whether or not the issuance of the act preservation measure will harm social and public interests, and (5) other factors that need to be considered. (SPC Provisions (Exhibit CHN-55), Article 7).

³⁵⁸ IP Court News (Exhibit EU-54b), pp. 1-4.

³⁵⁹ Intellectual Property Tribunal of the High People's Court of Guangdong Province, *Research on Legal Issues of Standard Essential Patents in the Communications Field*, July 2020 (Exhibit EU-93b).

³⁶⁰ The date when OPPO filed the request is not on the Panel record.

being brought in other jurisdictions by the patent owners.³⁶¹ The parallel sets of proceedings dealt with similar patent families, sometimes with overlapping parties.

7.87. The SPC – China's highest adjudicatory body³⁶² – issued the first judicial decision in China granting an ASI under the Civil Procedure Law³⁶³ on 28 August 2020. Shortly thereafter, the Shenzhen and Wuhan Intermediate People's Courts issued ASIs in the context of other SEP litigation, upon the requests of ZTE, Xiaomi, OPPO, and Samsung, while the Shenzhen Intermediate People's Court denied a request from Lenovo. The Wuhan Intermediate People's Court³⁶⁴ issued an ASI in *Xiaomi v. InterDigital* on 23 September 2020³⁶⁵ approximately one month after the SPC decision in *Huawei v. Conversant*. The Shenzhen Intermediate People's Court³⁶⁶ issued an ASI in *ZTE v. Conversant* six days later on 29 September 2020. The Wuhan Intermediate People's Court issued an ASI in *OPPO v. Sharp* on 16 October 2020, approximately two weeks after that. The Wuhan Intermediate People's Court issued another ASI in *Samsung v. Ericsson* two months later, on 25 December 2020.

7.88. The issuance of these five ASI decisions by three courts took place over a four-month period between August and December 2020. Within this brief period, all these decisions interpreted the Civil Procedure Law as providing the authority to grant ASIs and, in four cases, as permitting cumulative daily fines for continuing non-compliance with an act preservation measure.³⁶⁷

7.89. The SPC decision granting the ASI in *Huawei v. Conversant* clarified that Chinese judges do have the legal authority to issue ASIs pursuant to Article 100 (now 103) of the Civil Procedure Law, thus resolving previous doubts. The SPC decision presented relevant factors for courts to analyse when considering these requests, set out the legal basis that courts could rely on, as well as interpreted the available fines for non-compliance with act preservation measures (which now included ASIs) in a new way such that fines could be levied for each day that a party was not in compliance³⁶⁸ with the court's ruling. The SPC decision in *Huawei v. Conversant* may reflect the beginning of a policy, defined as a principle or course of action, as to how Chinese courts could deal with foreign parallel litigation. As discussed further below, some of the subsequent decisions referred to the SPC Provisions as an additional legal basis and broadened the type of conduct that could be prohibited by the ASIs, in addition to those already covered by the SPC in *Huawei v. Conversant*.

7.90. There is evidence before the Panel that the policy on ASIs, first expressed in *Huawei v. Conversant* and further elaborated through the subsequent ASI decisions, was not necessarily intended to be the end of the development of a mechanism for dealing with parallel SEP litigation. For instance, in December 2020, Judge Shen Hongyu of the SPC IP Tribunal in a paper³⁶⁹ recommended the establishment of a "limited anti-suit injunction and anti-anti-suit injunction system" independent from Article 100 (now 103) of the Civil Procedure Law as this provision is "too principled" and "the application in judicial practice is barely satisfactory".³⁷⁰ However, this paper also noted that, as the revision of the Civil Procedure Law may take time, and "the essence of the anti-suit injunction is to order the parties to perform certain actions or prohibit them from performing certain actions", ASIs can be "realized by referring to the [act] preservation system and anti-anti-

³⁶¹ See para. 2.16 and section 2.7 above.

³⁶² European Union's first written submission, para. 181; China's first written submission, para. 85.

³⁶³ In 2017 the Wuhan Maritime court had granted a maritime injunction that had the effect of an AASI under a special maritime procedure law. (See section 2.7.3 above.) However, prior to *Huawei v. Conversant* no Chinese court had ever granted an ASI under the Civil Procedure Law, either in IP or in any other litigation.

³⁶⁴ Wuhan is the capital city of Hubei province.

³⁶⁵ The Panel notes that Xiaomi requested an ASI from the Wuhan Intermediate People's Court several weeks prior to Huawei's request to the SPC, but the court issued its decision after *Huawei v. Conversant*.

³⁶⁶ Shenzhen is a city in Guangdong province.

³⁶⁷ According to China, prior to the SPC's decision in *Huawei v. Conversant*, no Chinese court had previously interpreted and applied Article 115 of the Civil Procedure Law to impose cumulative daily penalties for violation of a court order. (See China's response to Panel question No. 63(a)).

³⁶⁸ The European Union refers to them as cumulative daily fines.

³⁶⁹ The paper is titled "The Construction of the Extraterritorial Applicable Legal System of Chinese Law and the Reform of the Jurisdiction System of Foreign-Related Civil and Commercial Litigation".

³⁷⁰ *Chinese Journal of Applied Jurisprudence*, "The Construction of the Extraterritorial Applicable Legal System" (Exhibit EU-14b), p. 18.

suit injunction functions" set out in Article 100 (now 103) of the Civil Procedure Law, before such new system is put in place.³⁷¹

7.91. The above analysis lends support to the notion that the timing of the issuance of the ASI decisions points to the creation of a legal path to address requests for ASIs in SEP litigation. The five decisions issuing ASIs may be seen as the expression of a policy, defined as a principle or course of action, clarifying that Chinese courts had the legal authority to address these types of requests, by setting out the factors to take into account and the form and substance of the ASIs.

7.92. Turning to the European Union's arguments on the alleged similarities among the different ASI decisions, the Panel begins by noting that the cases at issue have inherent differences relating to the parties³⁷², the claims presented, the factual circumstances pertaining to the issues in each dispute, and the ultimate outcome.³⁷³ The Panel also notes that, in general terms, a court applying the same set of legal criteria or standards to similar facts should reach similar results. However, the specific legal reasoning of courts dealing with similar facts and legal standards may vary because of differences in the factual circumstances, the legal argumentation presented to the court, and because each court may weigh and balance the legal standards to be applied differently.

7.93. For these reasons, in conducting its assessment of the European Union's arguments, the Panel will focus primarily on whether there are relevant similarities among: (a) the sources relied upon for the courts' legal authority to issue an ASI (legal basis); (b) the factors applied by the courts to evaluate the requests, to determine whether the standard for granting an ASI had been satisfied (factors); and (c) the reasoning behind the application of a cumulative daily fine for non-compliance.

7.94. The European Union argues that the similarities in the legal basis and factors are explained by the fact that the courts were acting in accordance with the *unwritten* ASI policy. China maintains that these decisions simply reflect courts applying the *written* legal framework on act preservation measures to the cases before them.

7.95. Regarding the sources relied upon for the court's authority to grant an ASI, the Panel notes as follows:

- a. In *Huawei v. Conversant*, the SPC concluded that "Huawei Technology's application for act preservation has [a] factual and legal basis, which is approved by the court" and cited Article 100 (now 103), Article 102 (now 105), Article 111(1)(6) (now 114) and Article 115(1) (now 118) of the Civil Procedure Law as support for this conclusion.³⁷⁴

³⁷¹ *Chinese Journal of Applied Jurisprudence*, "The Construction of the Extraterritorial Applicable Legal System" (Exhibit EU-14b), p. 18. The Panel understands that the reference to "act preservation system" is to Article 100 (now 103) of the Civil Procedure Law.

³⁷² Other than in *Huawei v. Conversant* and *ZTE v. Conversant*, which both had the same respondent, i.e. *Conversant*.

³⁷³ In this connection, the Panel notes that each of the ASIs imposed different types of prohibitions with varying scopes. For instance, the ASI in *Huawei v. Conversant* prohibited *Conversant* from enforcing the German court decision until the SPC had reached its own decision in the pending proceedings in China; in *Xiaomi v. InterDigital*, *InterDigital* was ordered to immediately withdraw or suspend the temporary injunction applied for in the Indian court, and not to apply for any further injunctions in other jurisdictions; in *ZTE v. Conversant*, the Shenzhen Intermediate People's Court prohibited *Conversant* from enforcing the Düsseldorf District Court's injunction against *ZTE*; in *OPPO v. Sharp*, the ASI prohibited *Sharp* from initiating new patent infringement lawsuits, or applying for new judicial injunctions or other similar relief measures against *OPPO* with the judicial authorities of any other country before the final judgment had been issued; in *Samsung v. Ericsson*, the ASI prohibited *Ericsson* from requesting before any other courts anywhere, an injunction against *Samsung* based on its 4G and 5G patents concerned in the dispute, enforcing existing injunctions, and requesting decisions on licence questions anywhere in the world. It also prohibited *Ericsson* from seeking an AASI requesting any other courts either in China or elsewhere to order *Samsung* to withdraw its application for an ASI until the Wuhan Intermediate People's Court's judgment on the merits became effective. (SPC, *Huawei v. Conversant* (Exhibit EU-1b), p. 10; Wuhan Intermediate People's Court, *Xiaomi v. InterDigital* (Exhibit EU-2b), p. 10; Shenzhen Intermediate People's Court, *ZTE v. Conversant* (Exhibit EU-3b), p. 7; Shenzhen Intermediate People's Court, *OPPO v. Sharp* (Exhibit EU-4b), p. 11; and Wuhan Intermediate People's Court, *Samsung v. Ericsson* (Exhibit EU-5b), p. 8).

³⁷⁴ SPC, *Huawei v. Conversant* (Exhibit EU-1b), p. 10.

- b. In *ZTE v. Conversant*, the Shenzhen Intermediate People's Court issued its decision granting an ASI, citing Article 100 (now 103), Article 102 (now 105), Article 111(1)(6) (now 114) and Article 115(1) (now 118) of the Civil Procedure Law.³⁷⁵
- c. In *Xiaomi v. InterDigital* (which was issued before *ZTE*), the Wuhan Intermediate People's Court issued its decision granting an ASI, citing the provisions of Article 100 (now 103), Article 102 (now 105), Article 111(1)(6) (now 114), Article 115(1) (now 118), and Article 154(1)(4) (now 157) of the Civil Procedure Law and Article 3(1), Article 4, Article 6(6), Article 7, Article 10(3), (4), and Article 13 of the SPC Provisions.³⁷⁶
- d. In *OPPO v. Sharp*, the Shenzhen Intermediate People's Court issued its decision granting an ASI, citing Article 100 (now 103), Article 115(1) (now 118), and Article 154(1)(4) (now 157) of the Civil Procedure Law and Article 7 and Article 10 of the SPC Provisions.³⁷⁷
- e. In *Samsung v. Ericsson*, the Wuhan Intermediate People's Court issued its decision granting an ASI, citing Article 100 (now 103), Article 102 (now 105), and Article 154(4)(4) (now 157) of the Civil Procedure Law and Article 3(1), Article 4, Article 7³⁷⁸, and Article 13 of the SPC Provisions.³⁷⁹
- f. In *Lenovo v. Nokia*, the Shenzhen Intermediate People's Court rejected Lenovo's request for an ASI against Nokia citing Article 100 (now 103) and Article 154(1)(4) (now 157) of the Civil Procedure Law.

7.96. The above reveals that all five ASI decisions after *Huawei v. Conversant*, including the decision in *Lenovo v. Nokia* not to grant an ASI, cited Article 100 (now 103) of the Civil Procedure Law as the main legal basis for the authority to grant ASIs. The Panel notes that while the decisions in *Huawei v. Conversant* and *ZTE v. Conversant* relied solely on the Civil Procedure Law (namely Article 100 (now 103), Article 102 (now 105), Article 111(1)(6) (now 114) and Article 115(1) (now 118)) to support the granting of the ASI, the other three court decisions granting ASIs additionally cite the SPC Provisions as the legal basis.³⁸⁰ Among the group of cases that relied upon the SPC Provisions there are variations as to the actual articles that were cited.

7.97. Regarding the factors applied by the courts to evaluate the requests to determine whether the standard for granting an ASI had been satisfied, the Panel notes as follows:

- a. In *Huawei v. Conversant*, the SPC began its analysis by noting that Huawei's application to prohibit Conversant from enforcing the Düsseldorf Court judgment corresponded in nature to an application for an act preservation measure.³⁸¹ The SPC went on to state that when requesting an act preservation measure prohibiting the enforcement of judgments of extraterritorial courts, the following five factors should be taken into account: (a) the impact on Chinese courts of the application for the enforcement of judgments of extraterritorial courts; (b) the necessity of the ASI, i.e. whether failure to grant the ASI would cause irreparable damage to the applicant's legitimate rights and interests or render the judgment difficult to enforce; (c) the balance of interests, i.e. whether the damage to the applicant caused by failing to grant an ASI would exceed the damage caused by the ASI to the respondent; (d) the effect of the ASI on the public interest; and (e) whether the ASI would accord with the principle of international comity and other factors.³⁸² In its

³⁷⁵ Shenzhen Intermediate People's Court, *ZTE v. Conversant* (Exhibit EU-3b), p. 7.

³⁷⁶ Wuhan Intermediate People's Court, *Xiaomi v. InterDigital* (Exhibit EU-2b), p. 10.

³⁷⁷ Shenzhen Intermediate People's Court, *OPPO v. Sharp* (Exhibit EU-4b), p. 11.

³⁷⁸ The Panel notes that in the reconsideration decision, on the issue of whether Article 7.1 of the SPC Provisions shall apply to the examination of the act preservation application at hand, the Wuhan Intermediate People's Court held that "the examination factors provided for in Paragraph 1 of Article 7 mainly apply to disputes over IP infringements, so these factors shall not be directly applied to the examination of act preservation application in this Case". (Wuhan Intermediate People's Court, *Samsung v. Ericsson*, reconsideration decision (Exhibit EU-9b), p. 12)

³⁷⁹ Wuhan Intermediate People's Court, *Samsung v. Ericsson* (Exhibit EU-5b), pp. 7-8.

³⁸⁰ The Panel notes that in its reconsideration decision, the SPC mentions Article 12 of the SPC provisions when addressing the guarantee provided by the respondent. (SPC, *Huawei v. Conversant*, reconsideration decision (Exhibit EU-6b), p. 15).

³⁸¹ SPC, *Huawei v. Conversant* (Exhibit EU-1b), p. 6.

³⁸² SPC, *Huawei v. Conversant* (Exhibit EU-1b), pp. 6-7.

decision, the SPC noted that the applicant had provided a bank guarantee of CNY 19.7 million as security for the act preservation application.³⁸³

- b. In *ZTE v. Conversant*, the Shenzhen Intermediate People's Court similarly relied on five factors to assess whether to grant the ASI: (a) the impact on Chinese courts of the application for the enforcement of judgments of extraterritorial courts; (b) the necessity of the ASI; (c) the balance of interests, i.e. whether the damage to the applicant caused by failing to grant an ASI would exceed the damage caused by the ASI to the respondent; (d) the effect of the ASI on the public interest; and (e) whether the ASI would accord with the principle of international comity.³⁸⁴ The court also noted that the applicant had provided a security of CNY 6 million.³⁸⁵
- c. In *Xiaomi v. InterDigital*, the Wuhan Intermediate People's Court examined: (a) the subjective intent of the respondents in initiating parallel proceedings; (b) the impact on the Chinese proceedings of any injunctions applied for in those parallel proceedings; (c) the harm caused to the applicant if the ASI were not granted; and (d) the balance of interests (i.e. the damage to the applicant caused by failing to issue an ASI as compared to the damage to the respondent caused by granting the ASI) as well as the effect of the ASI on the public interest.³⁸⁶ The court also noted that the applicant had submitted a guarantee for foreseeable damage, in compliance with the law.³⁸⁷ In its reconsideration decision, the court assessed *inter alia* whether granting the ASI violated the principle of international comity or had undesirable international consequences.³⁸⁸ This court relied on similar factors to those used in *Huawei v. Conversant*, while not expressly referring to the reasoning set out by the SPC or using identical language.
- d. In *OPPO v. Sharp*, the Shenzhen Intermediate People's Court noted that the application for an act preservation measure should be reviewed under the relevant rules of China's Civil Procedure Law and the SPC Provisions.³⁸⁹ In applying the legal test, the court assessed: (a) whether the ASI was necessary, including the impact on the applicant if the ASI were to be denied; (b) the balance of interests, i.e. whether the damage to the applicant caused by failing to grant an ASI would exceed the damage caused by the ASI to the respondent; (c) the effect of the ASI on the public interest; and (d) the compatibility of granting the ASI with the principle of international judicial comity.³⁹⁰ The court also noted that OPPO had provided a security of CNY 9 million.³⁹¹
- e. In *Samsung v. Ericsson*, the Wuhan Intermediate People's Court explained that pursuant to China's Civil Procedure Law and the SPC Provisions, it would assess the request for an act preservation measure using the following factors: (a) whether the respondent's act results in any circumstance that would make the judgment of the case difficult to enforce; (b) whether the applicant's legitimate rights and interests would be irreparably damaged if act preservation measures were not taken; (c) the balance of interests, i.e. whether the damage caused to the applicants by not taking act preservation measures exceeded that caused to the respondent by taking act preservation measures; (d), whether the adoption of act preservation measures impaired social public interests and the global order of civil litigation; and (e) whether the applicants had provided effective guarantees for the application of act preservation.³⁹²
- f. In *Lenovo v. Nokia*, the Shenzhen Intermediate People's Court reasoned that as the cases at issue in the extraterritorial courts were all pending, there was no extraterritorial court judgment or decision that could be enforced by the respondent through application and

³⁸³ SPC, *Huawei v. Conversant* (Exhibit EU-1b), p. 3.

³⁸⁴ Shenzhen Intermediate People's Court, *ZTE v. Conversant* (Exhibit EU-3b), pp. 5-7.

³⁸⁵ Shenzhen Intermediate People's Court, *ZTE v. Conversant* (Exhibit EU-3b), p. 7.

³⁸⁶ Wuhan Intermediate People's Court, *Xiaomi v. InterDigital* (Exhibit EU-2b), pp. 7-8.

³⁸⁷ Wuhan Intermediate People's Court, *Xiaomi v. InterDigital* (Exhibit EU-2b), p. 9.

³⁸⁸ Wuhan Intermediate People's Court, *Xiaomi v. InterDigital*, reconsideration decision (Exhibit EU-7b), pp. 14-17.

³⁸⁹ Shenzhen Intermediate People's Court, *OPPO v. Sharp* (Exhibit EU-4b), p. 6.

³⁹⁰ Shenzhen Intermediate People's Court, *OPPO v. Sharp* (Exhibit EU-4b), pp. 7-11.

³⁹¹ Shenzhen Intermediate People's Court, *OPPO v. Sharp* (Exhibit EU-4b), p. 2.

³⁹² Wuhan Intermediate People's Court, *Samsung v. Ericsson* (Exhibit EU-5b), pp. 4-5.

therefore the court would not grant the requested ASI in accordance with the legal norms of act preservation.³⁹³

7.98. The above analysis reveals that all courts that issued an ASI applied at least five factors that addressed the same substantive considerations, either in the original decision or in the reconsideration decision, although these factors were sometimes presented using slight variations in language or combined with other factors in the court's analysis. These substantive considerations were (a) the impact on Chinese courts of the application for the enforcement of judgments of extraterritorial courts, (b) the necessity of the ASI (i.e. the harm caused to the applicant if the ASI were not granted), (c) the balance of interests (i.e. whether the damage caused to the applicants by not taking act preservation measures exceeded that caused to the respondent by taking act preservation measures), (d) the effect of granting the ASI on the public interest, and (e) the compatibility of the ASI with the principle of international comity or a similar consideration.³⁹⁴ In addition, although *Samsung v. Ericsson* was the only case where the court considered the adequacy of the security as a factor in deciding whether to grant the ASI, in all five cases the courts took note that a security had been provided by the applicant.

7.99. The Shenzhen Intermediate People's Court in *ZTE v. Conversant* and *OPPO v. Sharp* additionally discussed a factor relating to whether the applicant's request had a factual basis and a legal basis, including whether the validity of the claimed IP right was stable. The court in *ZTE v. Conversant* addressed this factor by noting that there was a pending administrative case of patent confirmation.³⁹⁵ In *OPPO v. Sharp* although the court mentioned that this factor would be part of those that it would use, the court does not appear to have substantially relied on it.³⁹⁶

7.100. Regarding the reasoning behind the decisions to apply a cumulative daily fine for non-compliance with an act preservation measure, the Panel notes as follows:

- a. Article 184 of the SPC Interpretation on the Application of the Civil Procedure Law states that the "measure of fines or detention taken against the same act that obstructs civil litigation proceedings shall not be applied continuously".³⁹⁷
- b. In *Huawei v. Conversant*, the SPC cited Article 115(1) (now 118(1)) of the Civil Procedure Law, which provides that the fine for an entity can be no more than CNY 1 million.³⁹⁸ The court indicated that in case of violation of the decision a fine of CNY 1 million should be imposed on a cumulative daily basis. The original SPC decision did not provide reasoning for this method of calculation of the fine. The SPC reconsideration decision, however, reasoned that an act preservation measure that prohibits the respondent from performing certain acts is special in nature and targets future conduct requiring the respondent not to perform certain acts or change the existing status quo. According to the SPC, if the respondent were to violate the ASI, it would constitute an "active and deliberate violation". The SPC also found that a one-time violation of a ruling was distinguishable from "continuous violations of the ruling and continuous changes in the status quo".³⁹⁹ The SPC reasoned that when acts of obstructing civil litigation continue to occur on a daily basis, the punishment shall be determined in a daily manner.⁴⁰⁰ The SPC held, therefore, that the fines were consistent with Article 184 of the SPC Interpretation on the Application of the Civil Procedure Law. China confirmed to the Panel that no Chinese court has ever

³⁹³ Shenzhen Intermediate People's Court, *Lenovo v. Nokia* (Exhibit EU-50b), p. 7.

³⁹⁴ While the other decisions or reconsideration decisions explicitly take international comity into account, in *Samsung v. Ericsson* the Wuhan Intermediate People's Court noted the argument of the applicant that the granting of an ASI would "not undermine the principle of international comity", and in its analysis the court assessed the impact of the ASI on "the global order of civil litigation". (Wuhan Intermediate People's Court, *Samsung v. Ericsson* (Exhibit EU-5b), pp. 2 and 7). Under this heading, the court assessed considerations that were taken into account by other courts when looking at the compatibility of granting the ASI with the principle of international comity (e.g. which court had accepted the dispute first and the potential to assist the parties to the dispute in concluding the licence negotiations).

³⁹⁵ Shenzhen Intermediate People's Court, *ZTE v. Conversant* (Exhibit EU-3b), p. 5.

³⁹⁶ This factor was not discussed in either *Xiaomi v. InterDigital* or *Samsung v. Ericsson*.

³⁹⁷ SPC, Interpretation on the Application of the Civil Procedure Law (Exhibit EU-49b), Article 184.

³⁹⁸ The European Union indicated that CNY 1 million is approximately EUR 143,159. See European Union's first written submission, para. 454.

³⁹⁹ SPC, *Huawei v. Conversant*, reconsideration decision (Exhibit EU-6b), p. 14.

⁴⁰⁰ SPC, *Huawei v. Conversant*, reconsideration decision (Exhibit EU-6b), p. 14.

before applied cumulative daily fines (or indicated that such fines would be applied) in the event of violation of a court order.⁴⁰¹

- c. The Panel also takes note of a Report published by the SPC on its website five months after the reconsideration decision in *Huawei v. Conversant*, in which the SPC describes the dispute "in detail".⁴⁰² The Report states that "[t]his case was the first time that the 'daily penalty' punishment method is applied in intellectual property litigation, which ensures that the act preservation measures are effectively respected and implemented by the parties within the legal framework".⁴⁰³ In describing why the "per day penalty" was applied, the Report notes the same two reasons set out in the SPC's reconsideration decision (i.e. that the behaviour constituted a "continuous violation" and that "the intensity of compulsory measures to obstruct civil proceedings needs to be commensurate with the possible consequences of obstructing civil litigation"⁴⁰⁴). In addition, the Report identifies a third and fourth reason for the SPC to impose cumulative daily fines. As a third reason, the Report states that "the daily penalty method is in line with international practice", with reference to courts in the United Kingdom, United States, Germany, France, and "other Western countries". The fourth reason articulated in the Report is that "in the process of building a complete legal defense system ... [t]oo low punishment will become a technical shortcoming of the anti-suit injunction ruling". The Report notes that "[c]ompared with hundreds of millions of license fees, even a maximum fine of one million yuan per case will not be able to form a deterrent at all".⁴⁰⁵
- d. In *ZTE v. Conversant*, the Shenzhen Intermediate People's Court cited Article 115(1) (now 118(1)) of the Civil Procedure Law and held that if there was a failure to comply with the ASI, a fine of CNY 600,000 per day should be imposed for every day of non-compliance. The court, however, did not provide the legal reasons for this method of calculation of the fine.
- e. In *Xiaomi v. InterDigital*, the Wuhan Intermediate People's Court cited Article 115(1) (now 118(1)) of the Civil Procedure Law and held that if InterDigital violated the ruling, a fine of CNY 1 million per day would be imposed. In its reconsideration decision, the Wuhan Intermediate People Court explained that the penalty clause provided for in the ASI targeted the future conduct of InterDigital and that if it were to disregard the obligations imposed by the ASI, its behaviour would amount to "proactive and willing violations of the law". The court went on to state that continuing such conduct would be deemed as separate illegal behaviours, and would be subject to daily fines on a cumulative basis. The court also noted that the "circumstances of this case are different from the circumstances provided for under Article 115 of the Civil Procedure Law ... where daily fines shall not be continuously applied" and concluded that the penalty clause of this ASI was not unlawful.⁴⁰⁶
- f. In *OPPO v. Sharp*, the Shenzhen Intermediate People's Court cited Article 115(1) (now 118(1)) of the Civil Procedure Law and established a fine of CNY 1 million per day in the event of failure to comply with the ASI. The court did not provide legal reasons supporting this method of calculation of the fine.
- g. In *Samsung v. Ericsson*, the court did not provide for the imposition of a fine for non-compliance, but stated that such fines would be established in the event of violation in accordance with the Civil Procedure Law.⁴⁰⁷

7.101. Based on the above review of the referenced court decisions, the Panel concludes that there is probative and substantial evidence demonstrating the existence of significant similarities across the decisions. Although there are some variations in how each court approached these elements,

⁴⁰¹ See China's response to Panel question No. 63(a). The Panel notes that the SPC had the option to not explicitly indicate in advance the type of penalties that would be imposed.

⁴⁰² SPC Report on *Huawei v. Conversant* (Exhibit EU-12b), p. 1.

⁴⁰³ SPC Report on *Huawei v. Conversant* (Exhibit EU-12b), p. 1.

⁴⁰⁴ SPC Report on *Huawei v. Conversant* (Exhibit EU-12b), p. 6.

⁴⁰⁵ SPC Report on *Huawei v. Conversant* (Exhibit EU-12b), p. 6.

⁴⁰⁶ Wuhan Intermediate People's Court, *Xiaomi v. InterDigital*, reconsideration decision (Exhibit EU-7b), p. 16.

⁴⁰⁷ Wuhan Intermediate People's Court, *Samsung v. Ericsson* (Exhibit EU-5b), p. 8.

these do not detract from the conclusion that each court's overall approach is similar. The Panel now turns to the question of what best explains these similarities: the *unwritten* ASI policy, as argued by the European Union, or the application of *written* legal norms, as argued by China.

7.102. As noted previously, all the court decisions relied upon Article 100 (now 103) of the Civil Procedure Law, and some also referred to the SPC Provisions, as the source of their legal authority to issue ASIs in the context of SEP litigation. Even though the main legal authority to grant ASIs was ultimately found in the Civil Procedure Law, the evidence shows that such authority was uncertain prior to the SPC decision in *Huawei v. Conversant*. What became clear in *Huawei v. Conversant*, and was later confirmed by the ensuing five ASI decisions, is that Chinese courts can use the provisions on act preservation measures in the Civil Procedure Law to address requests for ASIs in the context of SEP litigation. As noted above, courts in different provinces and at different levels in the judicial hierarchy were receiving requests for ASIs and hearing arguments on their legality concurrently. All the courts chose to interpret Article 100 (now 103) of the Civil Procedure Law in the same novel manner. These circumstances lend credence to the notion that there was a common understanding among Chinese courts, not derived from any prior interpretation of the law, to make use of the provisions of the Civil Procedure Law as the basis for granting ASIs.

7.103. The Panel also notes that the similarities in the courts' decisions cannot be explained merely by reference to the text of the Civil Procedure Law or the SPC Provisions. In several instances, the courts did not assess all the factors set out in the legal bases that they cited. For instance, in *Xiaomi v. InterDigital* and *OPPO v. Sharp* the courts did not assess the first factor set out in Article 7 of the SPC Provisions⁴⁰⁸ (although the court in *OPPO v. Sharp* included that factor when describing the test under Article 7), and in *Samsung v. Ericsson*, the Wuhan Intermediate People's Court expressly dismissed the relevance of that factor.⁴⁰⁹ In other cases, the courts considered factors not explicitly mentioned in the legal bases that they cited. For instance, consideration of international comity is not a factor set out in Article 7, although in all five cases this (or a similar consideration) was taken into account by the relevant court. The Panel also notes that in *Huawei v. Conversant* and *ZTE v. Conversant* the courts' analyses resembled the factors set out in Article 7 but their decisions did not cite the SPC Provisions.

7.104. The way the courts addressed the imposition of fines for non-compliance further supports the view that these decisions did not merely apply a pre-existing *written* legal framework. No Chinese court had ever before applied cumulative daily fines in the event of violation of a court order.⁴¹⁰ The courts interpreted and applied the existing legal framework (Article 115 of the Civil Procedure Law and Article 184 of the SPC Interpretation on the Application of the Civil Procedure Law) in a novel and unprecedented manner. Specifically, in light of the circumstances in which the ASIs were granted, the courts considered each day of non-compliance with the order to be a separate violation. Under this interpretation, for each day of continuing violation a court can impose anew the maximum fine that may be imposed on an entity such as a corporation (CNY 1 million), thus resulting in the application of cumulative daily fines.⁴¹¹

⁴⁰⁸ The factor set out in Article 7.1 is whether there are factual and legal bases for the issuance of an act preservation measure, including whether the validity of the intellectual property right for which protection has been requested is stable.

⁴⁰⁹ The Wuhan Intermediate People's Court's discussion of the factors set out in Article 7 of the SPC Provisions included the following:

The reason advanced by Ericsson for a reconsideration, which states that the original adjudication lacks a factual basis and a legal basis is untenable. Ericsson has totally misinterpreted Paragraph 1 of Article 7 of the Provisions on Act Preservation. This is not a patent infringement case, and what the Court needs to rule on are the licensing terms of SEPs involved in this Case, so there is no need to judge the possibility of winning the case. (Wuhan Intermediate People's Court, *Samsung v. Ericsson*, reconsideration decision (Exhibit EU-9b), p. 5)

⁴¹⁰ See China's response to Panel question No. 63(a). The Panel notes that the SPC had the option to not explicitly indicate in advance the type of penalties that would be imposed.

⁴¹¹ Article 115 (now 118) of the Civil Procedure Law sets a maximum fine on an entity such as a corporation at CNY 1,000,000. (Civil Procedure Law 2017 (Exhibit CHN-38)). Article 184 of the SPC Interpretation of the Civil Procedure Law provides:

The measures of fine and detention against the same obstruction of civil procedures shall not be applied continuously. Where a new obstruction of civil procedures occurs, the people's court may impose the measures of fine and detention again.

7.105. The Panel observes, therefore, that the decision in *Huawei v. Conversant* was not simply the application of pre-existing legal provisions to a particular set of circumstances. The SPC interpreted the Civil Procedure Law in a novel way as providing the authority to issue ASIs in SEP litigation and set out the factors for courts to apply when assessing these types of requests. The SPC also applied a new way of determining fines for non-compliance with act preservation measures. This decision, thus, created a new legal path within China's legal system for the issuance of ASIs in the context of SEP litigation and the penalties for non-compliance with such orders.

7.106. As noted in paragraphs 7.96-7.101 above, the intermediate people's courts in each of the five court decisions after *Huawei v. Conversant* based their decisions at least on Article 100 (now 103) of the Civil Procedure Law and applied similar factors in their reasoning. Some decisions referred to additional provisions for the legal authority and there was also some variation in the use of the factors. For the Panel, this points to the courts applying the law and the factors according to the particular circumstances of each case. *Huawei v. Conversant*, thus, can be seen as an initial reference point of a policy, defined as a principle or course of action, on ASIs that was further elaborated upon in the subsequent decisions. This resulted in the issuance of five ASIs with different scopes in terms of the range of acts enjoined. In four out of five decisions the issuing court also indicated that it was reserving the right to impose cumulative daily fines if the ASI was not complied with.⁴¹² The various ASI decisions, therefore, set out the overall legal basis for granting ASIs, factors to be applied, the broad range of prohibitions the courts could impose, as well as the ability to impose cumulative daily fines for non-compliance.

7.107. In the Panel's view, the issuance of the ASIs over a short period of time and in quick succession, and the significant similarities among the courts' decisions to issue those ASIs, point to the creation of a new legal path to address requests for ASIs in SEP litigation. These similarities (with respect to both the assessment of whether to issue the ASI as well as with respect to the imposition of penalties for non-compliance) cannot be explained merely by reference to the text of the relevant legal instruments. In short, the court decisions granting ASIs in the five cases do not appear to be an assortment of unrelated applications of a pre-existing legal framework to a novel set of circumstances.

7.108. The Panel will assess the relevance of these temporal overlaps and similarities to the substantiation of the precise content and existence of the ASI policy in the overall assessment in section 7.2.3.1.4 below.

7.2.3.1.2 Designation of some court decisions as typical cases and promotion of cases by superior courts and other institutions

7.2.3.1.2.1 Summary of the parties' arguments

7.109. The European Union argues that "the SPC and other courts hailed the court decisions granting ASIs as 'typical cases' that other courts must treat with relatively greater deference"⁴¹³ and that the SPC described *Huawei v. Conversant* as a top 10 IP case⁴¹⁴ and a "typical technology case"⁴¹⁵ which "initially established the judicial practice path of China's 'anti-suit injunction'".⁴¹⁶ The European Union argues that both the Shenzhen court⁴¹⁷ and the Guangdong Province Higher People's Court⁴¹⁸ stated that *ZTE v. Conversant* "serves as a model for other cases" and that those courts

(SPC Interpretation of the Civil Procedure Law (Exhibit CHN-71)). The reasoning of each court, if any, in support of its determination of the fines to be applied is described in paragraph 7.95 above.

⁴¹² The Panel notes that the amount of the fine varied according to the specific monetary value of the individual case. The court in *Samsung v. Ericsson* also decided not to announce in advance the potential penalties for non-compliance with the ASI.

⁴¹³ European Union's first written submission, para. 237.

⁴¹⁴ European Union's first written submission, para. 237 (referring to SPC, Top 10 IP Cases and 50 Typical IP Cases, 2020 (Exhibit EU-11b)).

⁴¹⁵ European Union's first written submission, para. 237 (referring to SPC IP Tribunal, Top 10 IP Cases, 2020 (Exhibit EU-10b)).

⁴¹⁶ European Union's first written submission, para. 237 (referring to SPC, Top 10 IP Cases and 50 Typical IP Cases, 2020 (Exhibit EU-11b)).

⁴¹⁷ European Union's first written submission, para. 238 (referring to Shenzhen Intermediate People's Court, Judicial Protection of IP Rights, 2021 Press Conference (Exhibit EU-91b), p. 3).

⁴¹⁸ European Union's first written submission, para. 238 (referring to Guangdong Province Political and Legal Affairs Commission of the CCCPC, Top 10 IP Cases 2020 (Exhibit EU-92b)).

emphasized the importance of *OPPO v. Sharp*, and that the Hubei Province Higher People's Court similarly promoted the global ASI in *Xiaomi v. InterDigital* as a typical case noting that it "provides a useful practice for China to use anti-suit injunctions in cross-border civil lawsuits to maintain its own jurisdiction".⁴¹⁹ In its arguments, the European Union refers to various reports and digests issued by Chinese courts that identify certain of the cases in which ASIs were granted as being "typical" IP cases.⁴²⁰ The European Union also argues that because lower courts and their judges are supervised by the higher courts and there is a higher risk of reversal if the higher court disagrees with their judgments, lower courts are likely to look to and follow higher court guidance.⁴²¹

7.110. The European Union also argues that the SPC Guiding Opinions on Similar Cases requires courts to retrieve similar cases in several circumstances, and that the list of similar cases includes those designated as typical cases.⁴²² According to the European Union, the retrieval of similar cases by Chinese courts is either discussed or becomes part of a special retrieval report. The European Union argues that courts are required to summarize and publicize when they retrieve similar cases in their jurisdiction, and have to report to the judicial administration department of the people's court at the next higher level on this matter.⁴²³ The European Union also responds to China's argument that the designation as typical cases was done after the issuance of all five ASI decisions⁴²⁴ by clarifying that it is not arguing that this designation had an impact on the decisions rendered in the second half of 2020, but rather that this is important because it provides guidance for future cases.⁴²⁵

7.111. China explains that Chinese courts may select difficult, complex, and novel cases, among others, as typical cases and publish them only for research and reference purposes by courts and the general public.⁴²⁶ China argues that the European Union mischaracterizes the role of typical cases in China's legal system⁴²⁷ as China is not a case law country. According to China, there is no concept of *stare decisis* under Chinese law, and other than guiding cases, judgments and rulings made by Chinese courts at all levels are not precedential and are therefore not a source of law that other judges are required to follow.⁴²⁸ Further, China notes that none of the court decisions imposing ASIs referenced by the European Union have been designated as guiding cases.⁴²⁹ China also notes that similar types of reports summarizing the annual work of a court or listing "significant" or "major" cases are very common in other Members.⁴³⁰ China submits that the selection of the cases as typical cases was done *after* the issuance of all five ASI rulings, and thus their designation could not have had an impact on any of the decisions rendered.⁴³¹

7.112. In response to the European Union's argument that lower courts are likely to follow higher court guidance to avoid the risk of reversal⁴³², China contends that this argument is baseless as, according to Articles 170, 198, and 200 of China's Civil Procedure Law, the grounds for an appellate court to reverse a decision, remand a case back to a lower court, or retry a case, are mistakes made in ascertaining the facts and applying the law, or a serious violation of legal procedures.⁴³³ For China,

⁴¹⁹ European Union's first written submission, para. 238 (referring to Hubei Province Higher People's Court, 10 typical cases (Exhibit EU-74b)).

⁴²⁰ European Union's first written submission, paras. 110-114 and 130-139.

⁴²¹ European Union's first written submission, para. 195.

⁴²² European Union's response to Panel question No. 19 (referring to SPC, Guiding opinions on Similar Cases (Exhibit EU-115b)).

⁴²³ European Union's response to Panel question No. 19 (referring to SPC, Guiding Opinions on Similar Cases (Exhibit EU-115b)).

⁴²⁴ China's first written submission, para. 144.

⁴²⁵ European Union's response to Panel question No. 19.

⁴²⁶ China's response to Panel question No. 21.

⁴²⁷ China's first written submission, para. 135.

⁴²⁸ China's first written submission, para. 136.

⁴²⁹ China's first written submission, para. 140.

⁴³⁰ China's first written submission, para. 141.

⁴³¹ China's first written submission, para. 144. For China, since the European Union's allegation that there is an unwritten policy largely depends on the designation of these cases and given that these designations were made after *all* of the ASI rulings were issued in 2020, the European Union is challenging an unwritten policy before the Panel that has not been applied in a single instance. (China's first written submission, para. 144).

⁴³² China's first written submission, para. 137 (referring to European Union's first written submission, para. 195).

⁴³³ China's first written submission, para. 138.

the fact that a lower-level court makes a decision that is different from prior similar cases decided by the higher courts does not constitute an error.⁴³⁴

7.113. In response to the Panel's request to clarify the statement that "'typical' and 'big cases' ... reflect[] the judicial ideology, reasoning and methods of the IP Tribunal"⁴³⁵, China asserts that it should not be inferred that cases dealing with a similar subject matter, factual situation, or resulting in similar outcomes, included in these types of lists, reflect a particular "judicial ideology".⁴³⁶ According to China, "judicial ideology", which might also be translated as "judicial philosophy", refers to the "view of the judges during adjudication of individual cases, and therefore only concerns that specific case without any effect of general application or any guiding effect on other cases".⁴³⁷ Finally, on *Lenovo v. Nokia* being designated as an excellent trial document, China comments that cases designated as such are also a type of typical case and that the selection criteria include the relative difficulty, complexity and novelty with the purpose of such selection being research and reference by courts and the general public.⁴³⁸

7.2.3.1.2.2 Panel's analysis

7.114. At the outset, the Panel observes that China's legal system is not one in which court decisions – other than those designated as guiding cases (指导性案例) by the SPC – have precedential value.⁴³⁹ Notwithstanding the fact that decisions designated as typical (or model⁴⁴⁰) cases (典型案例) do not have precedential value, the question remains as to whether that designation imbues them with a particular value or importance within China's legal system such that they may influence and become references for courts dealing with similar factual and legal issues and provide indications on how Chinese courts may address future requests to grant ASIs in SEP litigation. The Panel considers that court decisions may have such value or importance even in legal regimes where judicial decisions are not a source of law.

7.115. As a secondary step in its analysis, the Panel will assess how its findings on whether these court decisions influence and serve as a reference for other courts impacts the assessment of the precise content, and ultimate existence, of the ASI policy. In particular, whether the designation as typical cases, or otherwise, is probative of the existence of a broader policy on ASIs, not limited to the cases raised in this dispute.

7.116. The Panel will thus (a) discuss the designations that the ASIs at issue received and (b) analyse the implications, if any, these designations might have for future cases dealing with requests to grant ASIs in the context of SEP litigation.

7.117. The six⁴⁴¹ court decisions involving requests for ASIs were included in several reports that outlined their conclusions and highlighted their importance in the field of IP litigation in China. The following table presents the reports in which these decisions were included and the different designations they received:

⁴³⁴ China's first written submission, para. 138.

⁴³⁵ China's response to Panel question No. 20. See also China's first written submission, para. 101.

⁴³⁶ China's response to Panel question No. 20(a).

⁴³⁷ China's response to Panel question No. 20(a).

⁴³⁸ China's response to Panel question No. 33.

⁴³⁹ China's first written submission, para. 136; section III.B.3.

⁴⁴⁰ While the parties have used both the terms *typical case* and *model case* to refer to the original Chinese term (典型案例), the Panel will use *typical case* to harmonize the terminology.

⁴⁴¹ The Panel has included *Lenovo v. Nokia* in this list as it was a case dealing with a request to grant an ASI in the context of SEP litigation and where the quality of the judicial decision was recognized by the SPC, as discussed below.

Table 4: Designation as a typical case, other type of designation, or inclusion in a judicial digest⁴⁴²

ASI decision ⁴⁴³	Type of designation	Document title ⁴⁴⁴	Exhibit/Designating body
Huawei v. Conversant	Top 10 typical case	Top 10 Typical Technology-related IP cases of the Intellectual Property Court of the Supreme People's Court in 2020	Exhibit EU-10b/SPC
	Top 10 case	Top 10 intellectual property cases and 50 typical intellectual property cases in Chinese courts in 2020	Exhibit EU-11b/SPC
	Typical case from which two "adjudication rules" were extracted	Judgment Digests of the Intellectual Property Court of the Supreme People's Court (2020)	Exhibit EU-76/SPC Exhibit EU-60/SPC
	Typical example from which two issues of "guiding significance" were extracted	Summary of the Annual Report of the Supreme People's Court on Intellectual Property Cases (2020)	Exhibit EU-73b/SPC
Xiaomi v. InterDigital	Top 10 typical case	Hubei courts' top ten typical cases of judicial protection of intellectual property rights (2020)	Exhibit EU-74b/Hubei Province Higher People's Court
	Typical case	Work Report of the Higher People's Court of Hubei Province: Interpretation II of Typical Cases	Exhibit EU-102b/Hubei Province Higher People's Court
ZTE v. Conversant ⁴⁴⁵	Top 10 IP case Typical case	Top ten intellectual property cases adjudicated in Guangdong province in 2020	Exhibit EU-26b/ Guangdong Province Higher People's Court
	Top 10 IP case Typical case	Top ten intellectual property cases adjudicated in Guangdong province in 2020	Exhibit EU-92b/Guangdong Province Political and Legal Affairs Commission of the CCCPC
OPPO v. Sharp	Top 10 case	Top 10 intellectual property cases and 50 typical intellectual property cases in Chinese courts in 2020	Exhibit EU-11b/SPC
	Top 10 case Typical case	Top Ten Province-wide Court Cases in 2021 (Guangdong)	Exhibit EU-90b/ Guangdong Province Higher People's Court
Samsung v. Ericsson	None	-	-
Lenovo v. Nokia	Excellent Trial Document	List of Prize Winners for Excellent Trial Documents in Cases Involving Intellectual Property Rights in Technology and Monopoly Cases in 2021	Exhibit CHN-70b/SPC IP Tribunal

7.118. Huawei v. Conversant was included in four different lists designating it as a typical, or top 10 case, presenting the core reasoning featured in this decision as well as its significance and importance in issues relating to IP rights in China. The report of the SPC IP Tribunal on Top 10 typical technology-related IP cases in 2020 highlights that, for the first time, the SPC issued an ASI in the field of IP and applied a cumulative daily fine. It goes on to state that this decision set out the conditions and factors to be considered for issuing an ASI which, by its nature, falls within the

⁴⁴² China's response to Panel question No. 32.

⁴⁴³ The Panel understands that the judicial decisions that were designated as a typical case, or received other type of designation, are the original rulings granting the ASI requests, except for Huawei v. Conversant and Xiaomi v. InterDigital whose reconsideration decisions were also included in some lists. (China's response to Panel question No. 91).

⁴⁴⁴ This column reflects the actual titles as set out in the relevant exhibits.

⁴⁴⁵ This decision was also designated as a "case with judicial innovation" by the Shenzhen Intermediate People's Court in "Judicial Protection of IP Rights, 2021 Press Conference". (Exhibit EU-91b).

category of an act preservation measure, and that the judicial practice of the IP Tribunal in these cases may also help improve China's ASI mechanism and protect the legitimate rights and interests of the parties.⁴⁴⁶

7.119. The SPC IP Tribunal 2020 Judgment Digests – a list including 46 adjudication rules extracted from 55 typical cases selected from a total of 2,787 technology-related IP cases from the SPC – presents the factors set out in *Huawei v. Conversant* and suggests that "[i]n case of any application for act preservation that prohibits the application for enforcement of an extraterritorial court ruling, the people's court shall comprehensively consider [these] factors while making its decision".⁴⁴⁷

7.120. The SPC Report on Top 10 IP cases and 50 typical IP cases in Chinese courts in 2020 also notes how *Huawei v. Conversant* was the first decision granting an ASI in the context of SEP litigation. It discusses the factors applied in this decision, noting that it was the first time the daily fine system was explored and that it "initially established the judicial practice path of China's 'anti-suit injunction'".⁴⁴⁸ This report elaborates on the purpose of this list and explains that it is meant to give "full play to the exemplary and guiding role of typical cases" and that this list of typical cases "is hereby printed and distributed for reference by people's courts at all levels in the trial of intellectual property rights".⁴⁴⁹

7.121. *Huawei v. Conversant* was also included in the SPC 2020 Summary of the Annual Report on IP Cases, which selected 55 typical examples from IP cases concluded by the SPC in 2020, referencing a "conclusion of 63 issues of certain guiding significance in the application of law to reflect the trial philosophy and judgment methods in handling new, difficult, and complicated IP cases".⁴⁵⁰ This summary discusses the factors used by the SPC in *Huawei v. Conversant* when determining whether to grant the requested ASI and highlights the fact that it was the first case imposing cumulative daily fines in the context of act preservation measures.

7.122. The other court decisions granting the ASIs at issue are similarly mentioned, although to a lesser extent, in other lists (as explained in the table above), which highlight and indicate their importance.

7.123. For instance, *Xiaomi v. InterDigital* is summarized in a report by the Hubei Province Higher People's Court, which mentions that this case "has a significant effect on the participation of Chinese mobile phone manufacturers in international competition and has received much attention from Chinese wireless communications producers and SEP patent practitioners and law professionals".⁴⁵¹ Of note is a reference to the fact that the court in *Xiaomi v. InterDigital* took into account "the judicial interpretation by the SPC regarding a review on the act preservation request and the relevant provisions of China's Civil Procedure Law on the penalties for obstructing civil proceedings".⁴⁵²

7.124. *ZTE v. Conversant* was designated as a top 10 IP case in 2020 by the Guangdong Province Higher People's Court and the Guangdong Province Political and Legal Affairs Commission of the CCCPC and described by both as a typical case.⁴⁵³

⁴⁴⁶ SPC IP Tribunal, Top 10 IP Cases, 2020 (Exhibit EU-10b).

⁴⁴⁷ SPC IP Tribunal, Judgment Digests, 2020 (Exhibit EU-76).

⁴⁴⁸ SPC, Top 10 IP Cases and 50 Typical IP Cases, 2020 (Exhibit EU-11b), pp. 4-5.

⁴⁴⁹ SPC, Top 10 IP Cases and 50 Typical IP Cases, 2020 (Exhibit EU-11b), p. 2.

⁴⁵⁰ SPC Annual Report Summary (Exhibit EU-73b), p. 3.

⁴⁵¹ Hubei Province Higher People's Court, 10 typical cases (Exhibit EU-74b), pp. 4-5.

⁴⁵² Hubei Province Higher People's Court, 10 typical cases (Exhibit EU-74b), pp. 4-5. The Panel also notes the following statements contained in this summary.

The ruling of an anti-suit injunction and its review decision in this SEP dispute have provided in-depth analysis of and argumentation for the rules on, for instance, case filing and jurisdiction, parallel proceedings, court review criteria and international comity. The present case serves as a concrete and practical example for improving China's injunction and anti-suit injunction rules in intellectual property rights disputes.

(Hubei Province Higher People's Court, 10 typical cases (Exhibit EU-74b), p. 5)

⁴⁵³ Guangdong Province Higher People's Court, Report: Top 10 IP cases adjudicated in Guangdong province in 2020: *ZTE v. Conversant*, 22 April 2021 (Exhibit EU-26b), p. 3; Guangdong Province Political and Legal Affairs Commission of the CCCPC, Top 10 IP Cases 2020 (Exhibit EU-92b), p.4.

7.125. OPPO v. Sharp was designated as a top 10 case by the SPC⁴⁵⁴ and the Guangdong Province Higher People's Court.⁴⁵⁵ The Guangdong Province Higher People's Court also described OPPO as a typical case.⁴⁵⁶

7.126. Samsung v. Ericsson, in contrast, received no designation nor was it included in any type of list or judicial digest.

7.127. Regarding Lenovo v. Nokia, the Panel notes that the SPC IP Tribunal included this decision in a list of recipients of an excellent trial document award. The exhibit attesting to this inclusion presents a table of the various recipients of this prize, but does not indicate the criteria used in deciding the award, particularly whether it was because of substantive reasoning or because of the manner in which the judges prepared the file. There are also no indications that Chinese courts should consider these decisions because of their legal analysis. This stands in contrast to the documents designating the other decisions as typical cases, or other types of designations, where there are indications on the importance of the substantive analysis contained in those decisions, as well as language pointing to the fact that courts should take them into consideration in future disputes. Therefore, the Panel notes that inclusion in the list of recipients of an excellent trial document award is not of the same nature, and does not appear to carry the same implications, as the designations and mentions that the other four ASIs at issue received.

7.128. The above-referenced documents present unambiguous language indicating the importance of the designated decisions, as well as the fact that they should be regarded as references or examples for Chinese courts when addressing requests to grant ASIs in the context of SEP litigation. Beginning with Huawei v. Conversant, it is noteworthy that the SPC itself regards this decision as containing important "adjudication rules" and that "the people's court shall comprehensively consider [the factors set out in Huawei v. Conversant]"⁴⁵⁷ when dealing with disputes involving "application[s] for act preservation that prohibits the application for enforcement of an extraterritorial court ruling".⁴⁵⁸ The SPC also drew attention to the "exemplary and guiding role of typical cases" and that these lists are meant to offer "reference [to] people's courts at all levels in the trial of intellectual property rights".⁴⁵⁹ While not all of the decisions received the same degree of promotion as a typical case, as evidenced in the discussion above, they all serve as references or examples indicating how Chinese courts may deal with requests for ASIs in the context of SEP litigation.

7.129. The Panel notes China's arguments that court decisions that have received these designations are not sources of law and do not provide a legal basis for the resolution of future cases.⁴⁶⁰ The Panel acknowledges that these decisions are not sources of law within China. The evidence before the Panel and the language found in each of the designating documents discussed above, however, indicate that these decisions are to be viewed as points of reference or examples as to how a court could address requests for an ASI in the context of SEP litigation. The Panel considers that this points to a high likelihood that the legal bases relied upon and factors applied to address these types of requests in the decisions that received these designations will influence how Chinese courts address requests for ASIs in the future. These decisions will, therefore, provide indications for future cases dealing with similar issues, even if they are not legally binding upon Chinese courts.

7.130. This conclusion is confirmed by a review of the SPC Guiding Opinions on Similar Cases, whose purpose is to "unify the application of laws and enhance judicial credibility".⁴⁶¹ As confirmed by China, Chinese courts are required, under certain circumstances, to retrieve cases that are similar to the case at hand in terms of the basic facts, core disputed issues, and application of law.⁴⁶² According to Article 4 of the SPC Guiding Opinions on Similar Cases, "the retrieval generally includes guiding cases issued by the SPC, typical cases issued by the SPC, and reference cases issued by the higher people's court of the province, and any cases in which the decisions of the people's court at

⁴⁵⁴ SPC, Top 10 IP Cases and 50 Typical IP Cases, 2020 (Exhibit EU-11b).

⁴⁵⁵ Guangdong Province Higher People's Court, Top 10 Cases in 2021 (Exhibit EU-90b).

⁴⁵⁶ Guangdong Province Higher People's Court, Top 10 Cases in 2021 (Exhibit EU-90b), p. 2.

⁴⁵⁷ SPC IP Tribunal, Judgment Digests, 2020 (Exhibit EU-76).

⁴⁵⁸ SPC IP Tribunal, Judgment Digests, 2020 (Exhibit EU-76).

⁴⁵⁹ SPC, Top 10 IP Cases and 50 Typical IP Cases, 2020 (Exhibit EU-11b), p. 2.

⁴⁶⁰ China's response to Panel question No. 20(b).

⁴⁶¹ SPC, Guiding Opinions on Similar Cases (Exhibit EU-115b), p. 1.

⁴⁶² China's reply to Panel question No. 106.

the next higher level and [the SPC] have become effective".⁴⁶³ Pursuant to Article 9 of these regulations, if the similar case is a guiding case the court shall refer to and follow that case. If, however, the similar case is not a guiding case, it may serve as a reference for taking a decision but the court is not obliged to follow it.⁴⁶⁴ The importance of this retrieval system and of the designation as typical cases has been explored by the SPC in a report on judicial work at the 31st Session of the NPC Standing Committee, stating that efforts had been made to address the problem of "no uniform judicial criteria" and, particularly, that the SPC had strengthened the guidance on IPR-related cases, established case-based guidance systems consisting of guiding judgment, bulletin cases and typical cases, and issued guidance to strengthen the retrieval of similar cases.⁴⁶⁵

7.131. In summary, the Panel concludes that the existence of the retrieval system, along with the narrative descriptions explaining why these cases were selected as typical cases, indicates that these decisions will influence how Chinese courts address requests for ASIs in the future. Although Chinese courts are not legally obliged to follow these decisions, the evidence indicates that Chinese courts are likely to rely on the same legal bases and apply the same factors when faced with similar factual circumstances. The Panel thus finds that the four⁴⁶⁶ ASI decisions in *Huawei v. Conversant*, *Xiaomi v. InterDigital*, *ZTE v. Conversant*, and *OPPO v. Sharp* are references or examples providing indications for Chinese courts on how to address requests for ASIs in SEP litigation.

7.132. By including these decisions in different judicial reports and digests, designating them as a typical case or otherwise, and by giving an important focus to the legal reasoning featured in these decisions, the SPC and certain provincial Chinese courts have promoted the way these decisions dealt with issues relating to ASIs in SEP litigation.

7.2.3.1.3 Calls from the SPC and the NPC Standing Committee to continue using and improving the ASI policy

7.2.3.1.3.1 Summary of the parties' arguments

7.133. The European Union argues that the SPC and the NPC Standing Committee steer China's ASI policy by requesting courts to "perfect ... the application" of ASIs.⁴⁶⁷ The European Union also submits that these institutions are "entitled to give instructions to courts as they control the courts' activity by various means", and that the SPC has the power to review the decisions of lower courts, and is responsible to the NPC Standing Committee and is required to consider its opinions.⁴⁶⁸ The European Union also asserts that the SPC president has called the ASI policy an "ASI system with Chinese characteristics" and that a former vice president of the SPC and the Guangdong Province Higher People's Court called for the introduction of an ASI system before the SPC decision in *Huawei v. Conversant*.⁴⁶⁹ The European Union thus contends that the evidence before the Panel demonstrates that China's highest government and judicial bodies have endorsed the ASIs issued, and encouraged their issuance in the future⁴⁷⁰, and that these court decisions are not separate instances of applying China's legislation on act preservation measures but part of a single measure implementing an underlying policy.⁴⁷¹

7.134. The European Union sets its claims within the context of the Chinese legal system, arguing that although China's Constitution provides that the people's courts shall independently exercise their judicial power without being subject to interference from any government bodies⁴⁷², in practice

⁴⁶³ SPC, Guiding Opinions on Similar Cases (Exhibit EU-115b), Article 4.

⁴⁶⁴ SPC, Guiding Opinions on Similar Cases (Exhibit EU-115b), Article 9.

⁴⁶⁵ SPC, Report on the Judicial Work of the People's Courts (Exhibit EU-77b), p. 8.

⁴⁶⁶ *Samsung v. Ericsson* is not included as it did not receive any designation nor was mentioned in any type of list. *Lenovo v. Nokia* is similarly not included as the Panel considers that being included in the list of recipients of an award for excellent trial documents is not of the same nature, and does not carry the same implications, as being designated as a typical case, or other type of case.

⁴⁶⁷ European Union's first written submission, para. 240.

⁴⁶⁸ European Union's first written submission, para. 239; response to Panel question No. 8.

⁴⁶⁹ European Union's first written submission, para. 241.

⁴⁷⁰ European Union's first written submission, section 3.7; response to Panel question No. 8.

⁴⁷¹ European Union's first written submission, para. 242.

⁴⁷² European Union's first written submission, para. 196 (referring to NPC, China's Constitution (Exhibit EU-99)).

the judiciary's independence is constrained both by the people's congresses⁴⁷³ and by the Chinese Communist Party.⁴⁷⁴ The European Union argues that according to the Law on Supervision by the Standing Committee, people's courts are required to submit reports that cover problems raised by the Standing Committee during inspections, or in the suggestions, criticisms and opinions expressed by deputies to the people's congresses.⁴⁷⁵ The European Union further argues that the opinions expressed during deliberations by the Standing Committee are sent to the people's court for "study and handling"⁴⁷⁶ and are not merely consultative; courts are required to submit a written report to the Standing Committee after such "study and handling".⁴⁷⁷

7.135. China argues that the European Union has not properly represented the respective roles of the people's congresses, the NPC Standing Committee, and the SPC. China provides a detailed explanation of its legal system in its first written submission.⁴⁷⁸ China argues that under the Law on Supervision by the Standing Committee, the supervision of standing committees over courts does not include any interference with the adjudication of individual cases.⁴⁷⁹ China submits that the NPC Standing Committee's supervision over the SPC does not affect the outcome of specific cases, and that neither the SPC nor the NPC Standing Committee is entitled to "give instructions" to a court with respect to the outcome of a case. According to China, there is therefore no means of "controlling" the courts' activity by the SPC or the NPC Standing Committee, as alleged by the European Union.⁴⁸⁰ China disagrees that there have been "calls" from the SPC and the NPC Standing Committee to continue using and improving the ASI policy⁴⁸¹ and argues that the European Union's conclusions are entirely unfounded.⁴⁸² Similarly, China argues that the supervision of the people's courts by the people's congresses "does not interfere with or constrain the people's courts' adjudication of individual cases, which is done independently, based on the relevant facts and the applicable law."⁴⁸³

7.136. China also argues that the European Union mischaracterizes, misrepresents, and misinterprets some of the internal Chinese Government documents and statements by officials that it relies upon in seeking to prove its case.⁴⁸⁴

7.2.3.1.3.2 Panel's analysis

7.137. The Panel notes that there are two main issues relating to whether the SPC and the NPC Standing Committee have endorsed, supported, or steered the alleged ASI policy: (a) whether these two governmental bodies have, in fact, expressed endorsement or support for the alleged ASI policy by issuing statements; and, if so, (b) whether those statements steer Chinese courts to apply the ASI policy given the relationship between the NPC and its Standing Committee, the SPC, and other Chinese courts. The Panel will assess the evidence submitted by the European Union on the first point before turning to address the issue of the relationship between these various Chinese Government bodies.

⁴⁷³ European Union's first written submission, paras. 196–197 (quoting Law on Supervision by the Standing Committee (Exhibit EU-56) and referring to Civil Enforcement through the Courts (Exhibit EU-37)) (noting that Article 5 of the Law on Supervision by the Standing Committee provides that the standing committees of the People's congresses at all levels shall supervise the work of, among others, people's government and people's courts. The European Union also notes that the people's congresses' authority over the courts includes the authority to elect and remove court presidents and that "beyond local control of judicial appointments and removals, local governments also control local judicial salaries and court finances".)

⁴⁷⁴ European Union's first written submission, para. 196.

⁴⁷⁵ European Union's response to Panel question No. 8 (referring to Law on Supervision by the Standing Committee (Exhibit EU-56), Articles 8-9 and 14).

⁴⁷⁶ European Union's response to Panel question No. 8 (referring to Law on Supervision by the Standing Committee (Exhibit EU-56), Articles 8-9 and 14).

⁴⁷⁷ European Union's response to Panel question No. 8 (referring to Law on Supervision by the Standing Committee (Exhibit EU-56), Article 14).

⁴⁷⁸ China's first written submission, paras. 83-92.

⁴⁷⁹ China's first written submission, para. 146 (referring to Law on Supervision by the Standing Committee (Exhibit EU-56)).

⁴⁸⁰ China's first written submission, para. 146.

⁴⁸¹ China's first written submission, para. 145.

⁴⁸² China's first written submission, para. 146.

⁴⁸³ China's first written submission, para. 92 (referring to Organic Law of the People's Courts (Exhibit CHN-37), Article 6).

⁴⁸⁴ China's first written submission, para. 147.

7.138. The parties disagree on the content and implications of certain statements by the SPC and the NPC Standing Committee relating to the SPC's work on IP litigation and ASIs in China. The European Union mainly relies on five documents to support its position: two reports from the SPC to the NPC Standing Committee and three reports and decisions from the NPC Standing Committee and the NPC. These documents can be described as a series of "special work reports", deliberations and opinions on these reports, and decisions taken by the NPC, all touching upon the subject of IP litigation in China. China's main objection is the lack of connection between the statements in those documents and the alleged ASI policy.

7.139. China clarified the status of these documents under its legal regime.⁴⁸⁵ As explained by China, Article 8 of the Law on Supervision by the Standing Committee requires that standing committees select important issues that have a bearing on the overall situation of reform, development and stability, and which are of immediate interest to the Chinese people, and to hear and deliberate on special work reports of the people's courts, among others. China describes these special work reports as reports prepared by the people's courts summarizing their work on a designated topic. According to Article 14 of the referenced law, during deliberation the Standing Committee will express opinions on the special work report, which are for "study and handling" by the people's court. If it deems necessary, the Standing Committee may adopt a resolution on the special work report. If such a resolution is adopted, the people's court shall, among other things, report to the Standing Committee on its implementation of the resolution. In addition, China also clarified that, pursuant to Article 69 of China's Constitution, the NPC Standing Committee shall report on its work to the NPC.⁴⁸⁶

7.140. The Panel considers first the SPC Report on the Judicial Work of the People's Courts on IP rights of 21 October 2021 – a special work report under Article 8 of the Law on Supervision by the Standing Committee. The report states that the SPC "explored how to apply and improve the 'anti-suit injunctions' in the standard and necessary patent-related disputes where parallel lawsuits are likely to occur".⁴⁸⁷ Given the period covered by this report, the Panel observes that the references to exploring how to apply ASIs in the context of SEP litigation point to the SPC decision in *Huawei v. Conversant* and the related work carried out by the SPC in this regard. The Panel considers that this report attests to the SPC seeking a means of dealing with the novel issue of ASIs in the context of SEP litigation.

7.141. The NPC Standing Committee's Opinions and Suggestions of 18 November 2021 on the above-referenced SPC Report⁴⁸⁸ indicate (without qualifying the number of members of the committee expressing this opinion) that "[i]n the past few years China has explored and improved the application of the 'anti-suit injunction' in the field of standard-essential patent disputes, where parallel litigation is highly prevalent, and there have been very good results."⁴⁸⁹ The Opinions and Suggestions document recommends continuing to "actively explore and make good use of this system to resolutely safeguard our sovereignty, security and development interests".⁴⁹⁰ The Panel notes that pursuant to Article 14 of the Law on Supervision by the Standing Committee, opinions "expressed during deliberation by the component members of the standing committee shall be sent to", *inter alia*, the people's courts "for study and handling".⁴⁹¹ The Panel therefore considers that these opinions (though not rising to the level of a "resolution" under Article 14 of the referenced law, as clarified by China) endorse (i.e. express support and approval for) the work conducted by the SPC on ASIs in the context of SEP litigation.⁴⁹²

⁴⁸⁵ China's response to Panel question No. 113 (referring to Law on Supervision by the Standing Committee (Exhibit EU-56)).

⁴⁸⁶ China's response to Panel question No. 113.

⁴⁸⁷ SPC, Report on the Judicial Work of the People's Courts (Exhibit EU-77b), p. 8.

⁴⁸⁸ These are opinions expressed in the deliberations referred to in Article 14 of the Law on Supervision by the Standing Committee.

⁴⁸⁹ NPC 2021 Standing Committee opinions (Exhibit EU-57b), p. 5.

⁴⁹⁰ NPC 2021 Standing Committee opinions (Exhibit EU-57b), p. 5.

⁴⁹¹ Article 14, Law on Supervision by the Standing Committee (Exhibit EU-56).

⁴⁹² China's response to Panel question No. 113 (referring to Law on Supervision by the Standing Committee (Exhibit EU-56), Article 14). The Panel emphasizes that, in its understanding, this endorsement by the NPC Standing Committee does not constitute any *formal* approval or validation. However, given that the Opinions and Suggestions document is circulated to the people's courts for study and handling, and in the absence of any contrary views expressed in that document, it is clear that the NPC Standing Committee showed support for the SPC's work on ASIs in SEP litigation.

7.142. In the SPC Report⁴⁹³ of 28 February 2022 on the implementation of the NPC Standing Committee decision on issues concerning litigation procedures in patent and other IP cases⁴⁹⁴, the SPC reported on several issues concerning litigation procedures in patent and other IP cases over a three-year period (which included the year the SPC issued its decision in *Huawei v. Conversant*). This report attests to the fact that the SPC conducted research into the construction of an ASI system with Chinese characteristics. In particular, it explains that the SPC conducted in-depth studies on such important issues as the construction of "an 'anti-suit injunction' system with Chinese characteristics" (中国特色"禁诉令"制度), and the "maintenance of judicial sovereignty over foreign-related intellectual property rights":

Focusing on the implementation of national strategies, we have conducted in-depth studies on such important issues as the revision of the Patent Law and the patent linkage system for pharmaceuticals, the construction of an "anti-suit injunction" system with Chinese characteristics, and the maintenance of judicial sovereignty over foreign-related intellectual property rights.⁴⁹⁵

7.143. China argues that the reference to "in-depth studies" alludes to internal discussions on the novel legal issue of ASIs raised by the decision in *Huawei v. Conversant* and that there were no written studies conducted on the topic.⁴⁹⁶ China also maintains that the reference to "the construction of an 'anti-suit injunction' system with Chinese characteristics" meant handling disputes between parties in accordance with Chinese law, including the issuance of ASIs⁴⁹⁷, and that, in any event, the "'anti-suit injunction' system with Chinese characteristics" has not been constructed.⁴⁹⁸

7.144. The Panel considers that the references to an ASI system with Chinese characteristics relates to the work done by the SPC on this issue through its decision in *Huawei v. Conversant*. As discussed in section 7.2.3.1.1.2 above, the SPC clarified for the first time that China's legal regime on act preservation measures could be used to address requests from implementers for ASIs. The decision also introduced the legal basis and factors to be used when dealing with these types of requests, which were also referred to by the other courts in their decisions granting the ASIs, as well as a novel method of calculation of the penalties for non-compliance which three of the four decisions issuing ASIs after *Huawei v. Conversant* also utilized.

7.145. Given the subject matter of the SPC report, the Panel would find it difficult to conclude on the sole basis of the reference there to an ASI system with Chinese characteristics that this system extends beyond the SPC's research and related work⁴⁹⁹ on the decision in *Huawei v. Conversant*. That being said, such reference was included in a section detailing the work focused on the implementation of national strategies by the Chinese Government in the field of international IP litigation.⁵⁰⁰ These references by the SPC to a national development and IP strategy indicate how the work carried out on ASIs, including through its decision in *Huawei v. Conversant*, was done in a context of broader policy considerations expressed by the Chinese Government in the field of international IP litigation.

7.146. The NPC Standing Committee Report of 8 March 2022 – a work report of the NPC Standing Committee under Article 69 of China's Constitution⁵⁰¹ – states that the NPC Standing Committee heard and deliberated on the previously mentioned SPC reports on the adjudication of IP cases and on the implementation of the Standing Committee decision on issues regarding litigation procedures

⁴⁹³ SPC, Report on implementation (Exhibit EU-96b).

⁴⁹⁴ "Decision of the Standing Committee of the National People's Congress on Several Issues Concerning Litigation Procedures in Patent and Other Intellectual Property Cases". (SPC, Report on implementation (Exhibit EU-96b), p. 1).

⁴⁹⁵ SPC, Report on implementation (Exhibit EU-96b), p. 10.

⁴⁹⁶ China's response to Panel question No. 22.

⁴⁹⁷ China's response to Panel question No. 22.

⁴⁹⁸ China's response to Panel question No. 22.

⁴⁹⁹ The Panel understands that this related work includes the SPC Report on *Huawei v. Conversant*, published by the SPC on its website on 26 February 2021, in which the SPC describes the dispute "in detail". (SPC Report on *Huawei v. Conversant* (Exhibit EU-12b), p. 1).

⁵⁰⁰ SPC, Report on implementation (Exhibit EU-96b), p. 10.

⁵⁰¹ China's response to Panel question No. 113.

for cases involving patents and other IP rights.⁵⁰² Apart from endorsing these SPC reports, the work report does not contain any additional discussion on ASIs in the context of SEP litigation in China.

7.147. The Decision of the Fifth Session of the 13th National People's Congress on the Work Report of the Supreme People's Court from 11 March 2022, provides that the NPC heard and deliberated the work report of the NPC Standing Committee from 8 March 2022 and that the session fully affirmed the work of the NPC Standing Committee in 2021, agreed to the major tasks proposed in the report for 2022, and decided to approve the report.⁵⁰³ Similar to the NPC Standing Committee report, this decision appears to endorse the previously mentioned SPC reports but does not contain any additional statements on ASIs in SEP litigation.

7.148. The aforementioned documents and reports demonstrate that the SPC has conducted work relating to the creation of an ASI system and that this work has been endorsed by the NPC and its Standing Committee. Statements such as those that China has explored and improved the application of ASIs in SEP litigation⁵⁰⁴, that the SPC explored how to apply and improve ASIs in SEP litigation where parallel litigation is likely to occur⁵⁰⁵, or that the SPC "conducted in-depth studies on such important issues as ... the construction of an 'anti-suit injunction' *system* with Chinese characteristics, and the maintenance of judicial sovereignty over foreign-related intellectual property rights"⁵⁰⁶ point to active judicial work by the SPC to address this novel issue. The NPC Standing Committee's recommendation to actively explore and make good use of this judicial development⁵⁰⁷ reflects general support and endorsement of the work conducted by the SPC relating to ASIs in SEP litigation.

7.149. The Panel notes China's argument that the references to an ASI system with Chinese characteristics and the active explorations and in-depth studies that the SPC has conducted in this area do not refer to what the European Union challenges as the ASI policy. The European Union argues that the ASI policy is a composite set of actions allegedly taken by China, including but not limited to those taken by the SPC. In the Panel's view, while these documents do not provide direct evidence of the NPC endorsing the other decisions by the intermediate people's courts that granted the other ASIs at issue, they reflect three key components of this policy, i.e. the work conducted by the SPC on ASIs, the SPC decision in *Huawei v. Conversant*, and the endorsement by the NPC and its Standing Committee of this work. Therefore, even if these statements or the ASI system do not necessarily refer to the entirety of what the European Union is challenging as the ASI policy, they evidence important parts of the precise content of the ASI policy. They also show that the NPC and its Standing Committee sanctioned the legal path introduced through *Huawei v. Conversant*.

7.150. Turning to the issue of whether the NPC Standing Committee and the NPC steer China's judicial policy, the Panel notes that an important point of contention between the parties relates to the interpretation and effects of the Law on Supervision by the Standing Committee.⁵⁰⁸ The European Union's argument implies that it does not take issue necessarily with the supervision as set out in the law, but rather on how it is applied in practice.⁵⁰⁹ The European Union clarifies that it is not arguing that either the NPC Standing Committee or the NPC had issued legally binding instructions for Chinese courts to apply the ASI policy but rather that they have endorsed and encouraged the ASIs issued by the SPC and the lower courts.⁵¹⁰ As set out in the discussion above, the Panel is persuaded that the SPC has elaborated and promoted its legal approach on how to

⁵⁰² Report on the work of the NPC Standing Committee by Chairman Li (Exhibit EU-88), p. 14.

⁵⁰³ Decision of the Fifth Session of the 13th NPC (Exhibit EU-62b), p. 2. The Panel also notes that the Opinions and Suggestions on the Implementation Report of the Decision of the NPC Standing Committee on Several Issues Concerning Litigation Procedures in Patent and Other Intellectual Property Case, from 25 March 2022, provides that the participants generally agreed with the special report of the SPC, that they hoped that the practical experience would be carefully summarized, and that the "specialized trial system of intellectual property rights with Chinese characteristics would be further improved to better serve the national development strategy". (NPC 2022 Standing Committee opinions (Exhibit EU-63b), p. 2).

⁵⁰⁴ NPC 2021 Standing Committee opinions (Exhibit EU-57b), p. 5.

⁵⁰⁵ SPC, Report on the Judicial Work of the People's Courts (Exhibit EU-77b), p. 8.

⁵⁰⁶ SPC, Report on implementation (Exhibit EU-96b), p. 10. (emphasis added)

⁵⁰⁷ NPC 2021 Standing Committee opinions (Exhibit EU-57b), p. 5.

⁵⁰⁸ European Union's first written submission, para. 197 (referring to Law on the supervision by the Standing Committee (Exhibit EU-56)); China's first written submission, para. 146 (referring to Law on Supervision by the Standing Committee (Exhibit EU-56)).

⁵⁰⁹ European Union's first written submission, para. 196 (referring to NPC, China's Constitution (Exhibit EU-99)).

⁵¹⁰ European Union's responses to Panel question No. 8, para. 30.

address ASIs in SEP litigation and that the NPC and its Standing Committee have endorsed it.⁵¹¹ These documents do not, however, demonstrate that the NPC and its Standing Committee steer judicial practice in China nor that they have given instructions to courts with respect to the outcome of specific cases. In any event, and in light of the European Union's clarification of its arguments, the Panel is not called upon to reach such a conclusion and will, therefore, not continue to address this issue.

7.151. The Panel therefore finds that, based on the evidence and arguments before the Panel, the NPC and its Standing Committee have endorsed the approach taken by the SPC when dealing with issues of international parallel litigation in the context of SEP litigation. This endorsement consists in approval of the interpretation that Article 100 (now 103) of the Civil Procedure Law, and generally China's legal framework on act preservation measures, can be applied to assess and grant requests for ASIs in SEP litigation, and the possibility of imposing cumulative daily fines to secure compliance. The endorsement covers the legal basis and factors set out in *Huawei v. Conversant*. Although the NPC Standing Committee did not specifically refer to the decisions of the lower courts that had granted ASIs, the Panel notes that, as found above⁵¹², those decisions used a similar legal basis for their actions and adopted similar factors to analyse the requests as those that featured in the SPC decision in *Huawei v. Conversant*. The Panel will assess the relevance of this endorsement of the legal approach for the substantiation of the precise content of the ASI policy below.

7.2.3.1.4 Overall assessment of the European Union's substantiation of the precise content

7.152. The Panel recalls that, pursuant to the European Union's definition of the precise content of the ASI policy⁵¹³, the evidence and arguments need to demonstrate the precise content of a policy that empowers Chinese courts to impose a range of possible prohibitions at the request of implementers in the context of SEP litigation, which can be enforced through the imposition of cumulative daily fines, and which is elaborated and promoted by the SPC and endorsed by the NPC Standing Committee. In this vein, the European Union has asserted that the "five court decisions imposing ASIs ... and the support of the SPC and the NPC Standing Committee for these court decisions set out the precise content" of this measure.⁵¹⁴

7.153. In the preceding sections, the Panel assessed each of the three sets of evidence and arguments submitted by the European Union purporting to show the precise content of the ASI policy separately. The evidence presented by the European Union has probative value and weighs in favour of the European Union's position in certain, but not all, areas.⁵¹⁵ No one piece of evidence definitively establishes the precise content of the ASI policy. The existence of the ASI policy as a single measure which operates distinctly from its parts, pursuant to a shared objective, is shown once the entirety of the arguments and evidence submitted by the European Union is assessed as a whole. This accords with the approach taken by previous panels and the Appellate Body when assessing the

⁵¹¹ In any event, in the analysis of the documents referenced by the European Union in this section the Panel is unable to find any instructions directed to the SPC and other Chinese courts to construct and keep applying the alleged ASI policy. While the Panel observes the endorsement by the NPC and its Standing Committee to the legal approach taken by the SPC in dealing with the novel issue of ASIs in SEP litigation, and suggestions to keep exploring this area, it is not evident that these institutions are instructing Chinese courts to follow a particular approach, but rather to keep applying the manner in which they have been disposing of these issues, using China's legal framework on act preservation measures.

⁵¹² See section 7.2.3.1.1 above.

⁵¹³ See section 7.2.2.2.2 above.

⁵¹⁴ European Union's first written submission, para. 225.

⁵¹⁵ In particular, the Panel found that the European Union has demonstrated (a) the existence of similarities between the decisions granting the ASIs regarding the legal basis relied upon and the factors applied. These similarities point to the interpretation of the Civil Procedure Law and the SPC Provisions as providing the authority for courts to issue ASIs, and the possibility of imposing cumulative daily fines to secure compliance (section 7.2.3.1.1); (b) that the ASI decisions that were designated as typical, or other type of designation, serve as reference points for future Chinese courts dealing with issues of ASIs in SEP litigation (section 7.2.3.1.2 above); and that (c) the NPC and its Standing Committee have endorsed the legal approach taken by the SPC when dealing with issues of international parallel litigation in the context of SEP litigation, and that this endorsement consists in the approval and validation of the interpretation that Article 100 (now 103) of the Civil Procedure Law can be applied in assessing requests to grant ASIs in SEP litigation (section 7.2.3.1.3).

existence of an unwritten measure.⁵¹⁶ The significance of individual pieces of evidence, thus, may become clear only when viewed together with the totality of the evidence as part of a holistic evaluation.⁵¹⁷ The Panel, therefore, will conduct an overall assessment of whether the evidence demonstrates the precise content of the ASI policy, making use of its findings and conclusions in previous sections.

7.154. The Panel considers it appropriate to assess the events and evidence the European Union argues demonstrate the precise content of the ASI policy in a manner that takes into account how the various elements work together. The temporal context has already been summarized in the timeline of events in section 2.9 above and discussed, to some extent, in section 7.2.3.1.1.2 above.

7.155. Starting as early as 2018, the period leading up to the issuance of the SPC decision in *Huawei v. Conversant* saw the initiation of most of the underlying legal proceedings that eventually led to the granting of the five ASIs. These proceedings were initiated in China as well as in other Members, including Brazil, Germany, India, Japan, the United States, and Chinese Taipei, and involved issues such as the setting of FRAND royalty rates and alleged IP infringement. This prompted a question in China's legal community as to whether the existing legal framework within China was suitable to deal with this novel issue. As discussed above when assessing the temporal overlaps and similarities of the ASI decisions⁵¹⁸, before the issuance of the SPC decision in *Huawei v. Conversant*, it was uncertain whether Article 100 (now 103) of China's Civil Procedure Law provided the legal authority for courts to issue ASIs to address the issue of parallel foreign litigation in IP litigation.

7.156. The Panel concluded above that the SPC decision granting the ASI in *Huawei v. Conversant* resolved these doubts by clarifying that the existing legal framework on act preservation measures provided general authority for Chinese courts to issue ASIs in the context of SEP litigation. In particular, *Huawei v. Conversant* clarified that Article 100 (now 103) of the Civil Procedure Law provided such authority to Chinese courts. It set out the legal basis that courts could rely on and presented factors to use in determining whether to grant these requests. Additionally, the SPC interpreted Article 115(1) (now 118) of the Civil Procedure Law in such a manner that each day of non-compliance with an act preservation measure in the form of an ASI constitutes a separate violation, allowing for up to the maximum level of fines to be levied for each day (which the European Union refers to as cumulative daily fines).

7.157. The requests for ASIs in the second half of 2020 were the first instances where Chinese courts were called upon to address the issue of ASIs in SEP litigation. These requests and the decisions granting the ASIs were based on novel legal interpretations on the existence and scope of authority in Chinese law to grant these types of measures as well as the fines for non-compliance with the resulting court orders. The courts, through these decisions, took a novel approach with respect to the tools available to them to address the issue of parallel litigation in the context of SEP litigation, as well as the method of calculation of fines for non-compliance with court orders. The intermediate people's courts in both Shenzhen and Wuhan adopted a similar approach to that of the SPC in *Huawei v. Conversant* and broadened the types of prohibitions that the courts were willing to order. Although each decision had its own particularities, each one confirmed that Chinese courts are empowered to address these types of issues and to issue ASIs if they consider them to be warranted.

7.158. On 27 January 2021, the Shenzhen Intermediate People's Court denied a request for an ASI in *Lenovo v. Nokia* on the basis that the legal proceedings in other jurisdictions were still pending, and that an ASI was not appropriate in those circumstances as there was no foreign court judgment or decision that could be enforced by Nokia that would interfere with the Chinese court's exercise of its jurisdiction.⁵¹⁹ In this decision, the Shenzhen Intermediate People's Court did not conclude that it had no authority to grant an ASI, but rather simply concluded that an ASI was not yet necessary because all of the parallel court proceedings in other jurisdictions were still pending.⁵²⁰ The Panel considers, therefore, that this decision does not undermine the European Union's position that the

⁵¹⁶ See e.g. Appellate Body Report, *Argentina – Import Measures*, para. 5.108; and Panel Reports, *US – Export Restraints*, para. 8.85; *China – Publications and Audiovisual Products*, para. 7.214; and *US – COOL*, para. 7.50.

⁵¹⁷ See Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 150-154.

⁵¹⁸ See section 7.2.3.1.1.2 above.

⁵¹⁹ Shenzhen Intermediate People's Court, *Lenovo v. Nokia* (Exhibit EU-50b).

⁵²⁰ Shenzhen Intermediate People's Court, *Lenovo v. Nokia* (Exhibit EU-50b).

ASI policy empowers Chinese courts to grant an ASI with a range of potential prohibitions when requested by an implementer, following the legal path set out in *Huawei v. Conversant* and the other ASI decisions.

7.159. There remains, however, the issue as to whether the lower courts were aware of the SPC decision in *Huawei v. Conversant* such that they followed and relied upon the legal path set out therein. The Panel is aware that the SPC decision in *Huawei v. Conversant* had not been published when the intermediate people's courts in Wuhan and Shenzhen granted the other four ASIs and rejected the request in *Lenovo v. Nokia*.

7.160. The Panel finds that there is evidence before it supporting the view that the Wuhan Intermediate People's Court was aware of *Huawei v. Conversant* when issuing the ASIs in *Xiaomi v. InterDigital* and *Samsung v. Ericsson*. First, in outlining the significance of the decision in *Xiaomi v. InterDigital*, the Hubei Province Higher People's Court affirmed that the Wuhan Intermediate People's Court took into account "the judicial interpretation by the Supreme People's Court regarding a review on the act preservation request and the relevant provisions of China's Civil Procedure Law on the penalties for obstructing civil proceedings".⁵²¹ Second, the Wuhan Intermediate People's Court also referenced the SPC decision in *Huawei v. Conversant* in the reconsideration decision in *Samsung v. Ericsson*.⁵²² The court cited "relevant judicial practices" concerning disputes over SEP royalties and quoted the SPC ruling in *Huawei v. Conversant*.⁵²³ In reaching its conclusion on this point, the court specifically referred to the fact that the way the ASI request was handled in the original adjudication did not conflict with the view supporting the SPC ruling in *Huawei v. Conversant*.⁵²⁴ Furthermore, three of the five judges who served on the Wuhan court in *Xiaomi v. InterDigital* also served in *Samsung v. Ericsson*.

7.161. Similarly, there is evidence supporting the view that the Shenzhen Intermediate People's Court was likely to have been aware of *Huawei v. Conversant* when issuing its ASIs. The *ZTE v. Conversant* litigation involved the same defendant – *Conversant* – who was the subject of the ASI granted by the SPC in *Huawei v. Conversant* on 28 August 2020. *ZTE's* request for an ASI was filed with the Shenzhen court on the same day the SPC issued the ASI in *Huawei v. Conversant* and the decision expressly refers to *Huawei v. Conversant* as litigation related to the case.⁵²⁵ Furthermore, two of the three judges who served on the Shenzhen court in *ZTE v. Conversant* also served in *Lenovo v. Nokia*.

7.162. The Panel, thus, finds that the Wuhan Intermediate People's Court had actual knowledge, while the Shenzhen Intermediate People's Court was likely to have been aware of the SPC decision

⁵²¹ Hubei Province Higher People's Court, 10 typical cases (Exhibit EU-74b), pp. 4-5. The Panel notes the following statements contained in this summary:

The ruling of an anti-suit injunction and its review decision in this SEP dispute have provided in-depth analysis of and argumentation for the rules on, for instance, case filing and jurisdiction, parallel proceedings, court review criteria and international comity. The present case serves as a concrete and practical example for improving China's injunction and anti-suit injunction rules in intellectual property rights disputes.

(Hubei Province Higher People's Court, 10 typical cases (Exhibit EU-74b), p. 5).

⁵²² The Wuhan Intermediate People's Court discussion on the factors it used contained the following reference to the SPC decision in *Huawei v. Conversant*:

The original adjudication, in accordance with the criteria for ASIs determined in the *Huawei v. Conversant* case ruled by the Supreme People's Court, analysed the factors for consideration in issuing an ASI one by one. The analytical framework concerned is perfectly consistent with that of the Supreme People's Court and meets the requirements of relevant laws and the Provisions on Act Preservation, so no factor for consideration is missed out in this Case.

(Wuhan Intermediate People's Court, *Samsung v. Ericsson*, Reconsideration decision (Exhibit EU-9b), p. 5)

⁵²³ Wuhan Intermediate People's Court, *Ericsson v. Samsung*, reconsideration decision (Exhibit EU-9b), pp. 11-12. In its comments on the Draft Descriptive Part, China noted that the court referred to the SPC's decisions in *Huawei v. Conversant* "to address the argument advanced by Samsung that the SPC in that case did not consider the possibility of winning the case." China's comments on the Draft Descriptive Part, p. 19. A reference to the SPC decision in *Huawei v. Conversant* is listed in a recitation of Samsung's arguments on p. 5 as well as in the section of the court's reasoning. The Panel notes that, although the court's decision was issued on 10 March 2021, after the SPC decision in *Huawei v. Conversant* was published on 26 February 2021, the court held a hearing with the parties on 29 January 2021 prior to the publication of the SPC decision.

⁵²⁴ Wuhan Intermediate People's Court, *Ericsson v. Samsung*, reconsideration decision (Exhibit EU-9b), p. 5.

⁵²⁵ Shenzhen Intermediate People's Court, *ZTE v. Conversant* (Exhibit EU-3b), p. 4.

in *Huawei v. Conversant*, and they generally followed the SPC's legal approach, albeit with some differences when granting requests for ASIs in SEP litigation. The most reasonable explanation for the similarities between the decisions, particularly in light of their novelty, is that the lower courts knew of the SPC decision. Indeed, it is unlikely that the significant degree of replication of the SPC's novel legal approach was a mere coincidence. The courts' reiteration of the view that the existing act preservation measure regime in the Civil Procedure Law provides authority to issue ASIs (in five cases), and their repeated setting of cumulative daily fines (in four cases), in a short period of time, indicates that a policy exists on how to address requests for ASIs.

7.163. Based on this analysis, as well as the totality of the evidence and arguments before the Panel, the Panel concludes that these decisions are an expression of the ASI policy, as a principle or course of action, whereby Chinese courts are empowered to issue ASIs in the context of SEP litigation.

7.164. Turning to whether the NPC and its Standing Committee endorsed that ASI policy, the Panel recalls that from late 2020 up until the end of 2022, the SPC and provincial courts, promoted these decisions and agreed with the way these courts addressed the issues of ASIs in SEP litigation through the designation as typical cases, or other types of designations. Similarly, the NPC and its Standing Committee endorsed the way the SPC handled issues relating to ASIs in SEP litigation, particularly its decision in *Huawei v. Conversant*.⁵²⁶ The question remains whether the NPC Standing Committee's endorsement of the SPC's work on ASIs extends to a broader measure, i.e. the ASI policy.

7.165. The Panel concluded in section 7.2.3.1.3.2 above that the endorsement expressed by the NPC and its Standing Committee was limited to the work conducted by the SPC on ASIs, while noting that the lower courts applied the same general approach (legal basis, factors, and fines) in their decisions. It is reasonable to conclude, therefore, that the NPC and its Standing Committee's endorsement of the work conducted by the SPC in matters relating to ASIs in SEP litigation also extends to these other decisions.

7.166. In addition, the Panel notes evidence before it demonstrating that the work carried out by the SPC on ASIs in SEP litigation, the decisions of the intermediate people's courts that granted ASIs, and the actions and statements by China's judiciary and the NPC Standing Committee were taken in the context of broader policy considerations expressed by the Chinese Government. In particular, there is evidence pointing to policy objectives within China relating to IP rights, the rights and interests of Chinese citizens and enterprises, international parallel IP litigation, and ASIs.

7.167. For instance, the NPC Standing Committee opinions and suggestions in its report on the IP trial work of the people's courts from 18 November 2021⁵²⁷ stated that:

Some participants pointed out that intellectual property rights have become a core element of today's great power games. Western countries frequently use their core technologies to "choke" China, abuse "long-arm jurisdiction" and infringe on the legitimate rights and interests of Chinese enterprises, which is particularly evident in the field of 5G communications. There is an urgent need to strengthen the protection of independent intellectual property rights. In the past few years, China has explored and improved the application of the "anti-suit injunction" in the field of standard-essential patent disputes, where parallel litigation is highly prevalent, and there have been very good results. It is recommended that we continue to actively explore and make good use of this system to resolutely safeguard our sovereignty, security and development interests.⁵²⁸

7.168. The SPC has also made statements indicating the existence of general policy objectives guiding its work on ASIs. In a report from the SPC to the NPC Standing Committee, the SPC linked

⁵²⁶ Therefore, even if some representatives of China's legal community appear not to have been fully satisfied with this approach or under the impression that further steps were necessary, such as the enactment of a legislation on the subject, (*Chinese Journal of Applied Jurisprudence*, "The Construction of the Extraterritorial Applicable Legal System" (Exhibit EU-14b), p. 18), the SPC, and the NPC together with its Standing Committee were satisfied with the outcome of the judicial developments.

⁵²⁷ The Panel notes these statements came after the ASI decisions were issued.

⁵²⁸ NPC 2021 Standing Committee opinions (Exhibit EU-57b), p. 4.

its work on ASIs to the implementation of national strategies and the maintenance of Chinese judicial sovereignty:

Fourthly, judicial protection for the implementation of the national innovation-driven development strategy and intellectual property strategy was further strengthened. By adjudicating a series of major intellectual property rights and monopoly disputes in accordance with the law, we demonstrated our clear attitude of protecting scientific and technological innovation and safeguarding fair competition, and vigorously served a high level of scientific and technological self-reliance and self-improvement. Focusing on the implementation of national strategies, we have conducted in-depth studies on such important issues as the revision of the Patent Law and the patent linkage system for pharmaceuticals, the construction of an "anti-suit injunction" system with Chinese characteristics, and the maintenance of judicial sovereignty over foreign-related intellectual property rights.⁵²⁹

7.169. This same report provides that "[s]ome of the results have been adopted by legislation, some have been incorporated into major national plans, *and some have been transformed into judicial interpretations and judicial policies.*"⁵³⁰

7.170. Similarly, in the Plan of the People's Courts for the Judicial Protection of IP Rights (2021–2025) the SPC indicates that, looking to the future, addressing issues arising in the context of parallel litigation is one of the SPC's goals. Notably, in Article XVI, titled "Deepening the international cooperation and competition mechanism for IP", the SPC states that:

We should improve the trial of cases involving foreign IP, properly hear major IP disputes relating to international trade, and protect the legitimate rights and interests of Chinese and foreign property right owners in accordance with the law on an equal footing. Extraterritorial application of Chinese laws should be promoted to protect the security and legitimate rights and interests of Chinese citizens and enterprises in foreign countries. International judicial cooperation and coordination should be strengthened and international parallel litigations be handled properly to maintain national security in the field of IP. The IP-related judicial cooperation with other countries should be strengthened and the sharing of knowledge be promoted actively. Furthermore, we should actively participate in the global governance of IP-related justice and improve relevant international regulations and standards through judicial adjudication.⁵³¹

7.171. The SPC issued the above plan for "conscientious implementation" by China's judiciary.⁵³² This included the considerations expressed therein relating to the protection of the security and legitimate rights and interests of Chinese citizens and enterprises in foreign countries, and international parallel litigation in the field of IP.

7.172. Considering the totality of the evidence, as well as its understanding of the relationship between the NPC, the SPC, and the rest of China's judiciary, the Panel is persuaded that these policy objectives were to be implemented by Chinese courts at all levels. Furthermore, the Panel is persuaded that the ASIs issued by the intermediate people's courts as well as the designation of some of these decisions as typical cases, or other types of designations, were in furtherance of these policy objectives.

7.173. The Panel is aware that these documents postdate the SPC decision in *Huawei v. Conversant* as well as the granting of the four other ASIs. While it may be true that an elaboration of these policy objectives may have only come after the issuance of the ASI decisions at issue, the Panel is of the view that the concerns that these policy objectives reflect were already present when the

⁵²⁹ SPC, Report on implementation (Exhibit EU-96b), p. 10.

⁵³⁰ SPC, Report on implementation (Exhibit EU-96b), p. 10. (emphasis added)

⁵³¹ SPC, Notice on Issuing the Plan of the People's Courts on the Judicial Protection of IP Rights (2021–2025) (Exhibit EU-85), Article XVI.

⁵³² The plan was addressed to the Higher People's Courts of all provinces, autonomous regions and municipalities directly under the Central People's Government, the Military Court of the People's Liberation Army and the Production and Construction Corps Branch of the Higher People's Court of Xinjiang Uygur Autonomous Region. See the SPC, Notice on Issuing the Plan of the People's Courts on the Judicial Protection of IP Rights (2021–2025) (Exhibit EU-85), p.1.

courts granted the ASIs in 2020. Moreover, these policy objectives have now been fully expressed in official documents from the Chinese Government and continue to be valid and relevant.

7.174. The Panel, therefore, finds that China's Government has set out specific policy objectives with respect to international parallel litigation in the field of IP, the necessity of safeguarding China's sovereignty and development interests, and the protection of the interests of Chinese citizens and enterprises in foreign countries.⁵³³ The Panel also finds that the SPC decision in *Huawei v. Conversant*, the granting of the four other ASIs, and the designation of some of the cases as typical were all responsive to these policy objectives.

7.175. These considerations lead the Panel to conclude that the endorsement that the NPC and its Standing Committee expressed for the work conducted by the SPC on ASIs also extends to the other court decisions granting ASIs. Therefore, the Panel concludes that there is sufficient evidence before it demonstrating that the NPC and its Standing Committee have endorsed the ASI policy.

7.176. Finally, the Panel is aware that since 2022 no implementers have requested, and consequently no courts have granted, ASIs in SEP litigation. There have also been no additional statements or pronouncements by Chinese Government officials and authorities on the matter of ASIs in SEP litigation in China, at least in the evidence before the Panel. Nor have there been retractions, modifications, or new legislation on special IP procedural law or an independent ASI system under provisions of the Civil Procedure Law. The absence of any type of activity on this matter indicates to the Panel that the *status quo* of the developments presented between 2020 and 2022 is maintained, in the sense that Chinese courts retain the authority, pursuant to Chinese law and the ASI policy, to grant requests from implementers for an ASI in SEP litigation. Moreover, taking such a course of action has been sanctioned, and endorsed, by the NPC and its Standing Committee, and promoted by the SPC and provincial courts.

7.177. Considering the totality of the evidence and argumentation discussed above, the Panel finds that the European Union has substantiated the precise content of the ASI policy.

7.2.3.2 Specific nature

7.178. The Panel recalls that the third element with respect to proving the existence of an unwritten measure is its specific nature. An unwritten measure may be a rule or norm of general and prospective application, ongoing conduct, or other type of unwritten measure.⁵³⁴ The European Union argues that the ASI policy is a rule or norm of general and prospective application or, in the alternative, is ongoing conduct. The Panel turns to assess the parties' arguments in this regard.

7.2.3.2.1 Summary of the parties' arguments

7.2.3.2.1.1 The ASI policy as a rule or norm of general and prospective application

7.179. The European Union submits that several factors that complement one another show that China's ASI policy is a rule or norm of general and prospective application.⁵³⁵ The European Union submits that a measure may be found to have general and prospective application if it reflects a deliberate policy, going beyond the mere repetition of the application of that measure in specific

⁵³³ SPC, Report on implementation (Exhibit EU-96b), p. 10.

⁵³⁴ Panel Report, *Indonesia – Chicken*, para. 7.656 (referring to Appellate Body Reports, *Argentina – Import Measures*, para. 5.108). See also Panel Reports, *Russia – Tariff Treatment*, paras. 7.283, 7.338, and 7.341; *Russia – Railway Equipment*, para. 7.946; and Appellate Body Report, *US – Zeroing (EC)*, para. 198. The Panel notes that prior panels and the Appellate Body have considered whether other types of unwritten measures, such as practices or programmes, existed. In that context the Appellate Body noted that:

The scope of measures that can be challenged in WTO dispute settlement is therefore broad. As a general proposition, we do not exclude the possibility that concerted action or practice could be susceptible to challenge in WTO dispute settlement. Nor do we consider that a complainant would necessarily be required to demonstrate the existence of a rule or norm of general and prospective application in order to show that such a measure exists.

(Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 794). The European Union, however, has chosen to characterize the ASI policy as either a rule or norm of general and prospective application or ongoing conduct.

⁵³⁵ China's first written submission, para. 146 (referring to European Union's first written submission, para. 249).

instances.⁵³⁶ The European Union also argues that where prospective application is not sufficiently clear from the constitutive elements of the rule or norm, it may be demonstrated through several factors, including the existence of an underlying policy that the rule or norm implements; proof of systematic application of the challenged rule or norm; the extent to which the rule or norm provides administrative guidance for future conduct; and the expectations it creates among economic operators that the rule or norm will be applied in the future.⁵³⁷

7.180. In supporting its position that the ASI policy has general and prospective application, the European Union submits similar arguments to those it presented in the context of the substantiation of the precise content of the ASI policy.⁵³⁸ These include: the fact that the SPC in *Huawei v. Conversant* applied China's Civil Procedure Law in a novel way⁵³⁹; that between 28 August and 25 December 2020 Chinese courts granted five ASIs in SEP litigation following similar reasoning⁵⁴⁰; that the SPC qualified the decision in *Huawei v. Conversant* as a "top 10 intellectual property" case⁵⁴¹ and a "typical technology case"⁵⁴² and that typical cases are the means by which the SPC seeks to harmonize the decisions of Chinese courts to be consistent with SPC policy⁵⁴³; and that the SPC and the NPC Standing Committee have expressed their support for the continued application of ASIs in a variety of documents.⁵⁴⁴

7.181. According to the European Union, these elements show that the five ASI decisions are not a series of separate, unrelated cases but are part of a policy of general application to issue broad ASIs in SEP litigation.⁵⁴⁵ The European Union argues that the issuance by lower courts of four decisions granting ASIs, which have also been promoted as typical cases, in a relatively short period of time following the SPC decision in *Huawei v. Conversant* shows a systematic application of broad ASIs in SEP litigation. The European Union acknowledges one case, *Lenovo v. Nokia*, where the Shenzhen court rejected an ASI request because parallel proceedings launched by Nokia were still pending.⁵⁴⁶ The European Union submits that this case does not cast doubt over the general and prospective application of the ASI policy because the Shenzhen court left open the possibility of granting ASIs.⁵⁴⁷ The European Union also points out that this case was not promoted as a typical case.⁵⁴⁸

7.182. China submits that the European Union failed to demonstrate that the challenged ASI policy has general and prospective application⁵⁴⁹ and that the factors⁵⁵⁰ set out in previous disputes dealing

⁵³⁶ European Union's first written submission, para. 249 (referring to Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.34).

⁵³⁷ European Union's first written submission, para. 248 (referring to Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.132; Appellate Body Report, *US – Zeroing (EC)*, paras. 198, 201 and 204-205).

⁵³⁸ European Union's first written submission, paras. 251-266.

⁵³⁹ European Union's first written submission, para. 251 (referring to SPC Annual Report Summary (Exhibit EU-73b)).

⁵⁴⁰ European Union's first written submission, para. 263.

⁵⁴¹ European Union's first written submission, para. 251 (referring to SPC, Top 10 IP Cases and 50 Typical IP Cases, 2020 (Exhibit EU-11b)).

⁵⁴² European Union's first written submission, para. 251 (referring to SPC IP Tribunal, Top 10 IP Cases, 2020 (Exhibit EU-10b)).

⁵⁴³ European Union's first written submission, para. 254.

⁵⁴⁴ European Union's first written submission, paras. 256-258.

⁵⁴⁵ European Union's first written submission, para. 265.

⁵⁴⁶ European Union's first written submission, para. 267 (referring to Conflicts and Countermeasures in SEP Injunctions (Exhibit EU-64b)).

⁵⁴⁷ European Union's first written submission, para. 268 (referring to Conflicts and Countermeasures in SEP Injunctions (Exhibit EU-64b)).

⁵⁴⁸ European Union's first written submission, paras. 267-268.

⁵⁴⁹ China's first written submission, para. 155.

⁵⁵⁰ China argues that the European Union identifies the same or similar factors in its submission. (European Union's first written submission, paras. 245-275).

with unwritten measures, such as *US – Zeroing (EC)*⁵⁵¹, *US – Anti-Dumping Methodologies (China)*, and *US – Countervailing Measures (China)*⁵⁵², have not been complied with.

7.183. China submits three main arguments to support its contention that the ASI policy does not exist. First, China argues that the European Union has not demonstrated that the ASI policy has been applied consistently and systematically for an extended period of time.⁵⁵³ According to China, the five specific instances of Chinese courts granting ASIs that the European Union challenges all occurred between August and December 2020 and, 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.⁵⁵⁴ China argues that this is unlike previous disputes where the existence of a measure of general and prospective application was, among other things, based on the fact that no instance of non-application of the challenged policy or methodology could be identified.⁵⁵⁵ Second, China argues that the European Union has not demonstrated that the granting of ASIs by Chinese courts in SEP disputes reflects a "deliberate policy", going beyond the simple repetition of conduct in a handful of cases.⁵⁵⁶ Third, China reiterates its arguments that the fact that lower courts either referenced or used similar reasoning as that used in a higher court decision, in this case *Huawei v. Conversant*, is a common feature of legal systems worldwide that does not prove anything about the existence of an alleged policy.⁵⁵⁷

7.184. Responding to the European Union's argument regarding *Lenovo v. Nokia*⁵⁵⁸, China argues that the European Union's arguments are irrelevant as they fail to explain why – if there is an ASI "policy" in SEP disputes in China as the European Union is alleging – the Shenzhen court refused to grant a requested ASI in a SEP case. China considers that this case demonstrates that the granting of ASIs by courts in China entails a case-by-case assessment and is not guaranteed in all instances pursuant to an alleged "policy".⁵⁵⁹ China also argues that the European Union's position that there is an unwritten "policy" largely depends on the five court decisions granting ASIs being designated as typical cases. For China, given that these designations were made after *all* the court decisions granting the ASIs were issued, the European Union is challenging an unwritten "policy" that has not been applied in a single instance.⁵⁶⁰

7.2.3.2.1.2 The ASI policy as ongoing conduct

7.185. The European Union submits that, in the alternative, China's ASI policy constitutes ongoing conduct.⁵⁶¹ The European Union argues that the Appellate Body has explained that to prove the existence of an ongoing conduct measure, a complainant must clearly establish that the alleged measure is attributable to the responding Member, its precise content, its repeated application, and that it is likely to continue to be applied in the future.⁵⁶² The European Union refers to the panel in

⁵⁵¹ China refers to the following factors: (1) the fact that the zeroing methodology was invariably applied for an extended period of time; (2) that instances of non-application had not been identified; (3) that it was part of a standard programme; and (4) that it reflected a "deliberate policy". (China's first written submission, para. 151 (referring to Appellate Body Report, *US – Zeroing (EC)*, paras. 199-204).).

⁵⁵² China refers to the following factors: (1) affects an unidentified number of economic operators; (2) has been consistently and systematically applied for an extended period of time; (3) reflects a deliberate policy, going beyond the simple repetition of the application of a certain methodology to specific cases; and (4) is intended to apply to future investigations. (China's first written submission, paras. 151-155 (referring to Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.130; and Panel Report, *US – Countervailing Measures (China)*, paras. 7.114-7.117)).

⁵⁵³ China's first written submission, para. 156 (referring to 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).

⁵⁵⁴ China's first written submission, para. 156.

⁵⁵⁵ China's first written submission, para. 157 (referring to 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).

⁵⁵⁶ China's first written submission, para. 159.

⁵⁵⁷ China's first written submission, para. 160.

⁵⁵⁸ China's first written submission, para. 158 (referring to European Union's first written submission, para. 267).

⁵⁵⁹ China's first written submission, para. 158.

⁵⁶⁰ China's first written submission, para. 144.

⁵⁶¹ European Union's first written submission, para. 279.

⁵⁶² European Union's first written submission, para. 277 (referring to Appellate Body Report, *US – Supercalendered Paper*, para. 5.17; Appellate Body Reports, *Argentina – Import Measures*, paras. 5.104-5.105 and 5.107-5.108).

US – Orange Juice (Brazil) to submit that ongoing conduct is defined as "conduct that is currently taking place and is likely to continue in the future".⁵⁶³

7.186. The European Union submits similar arguments as those presented in the context of the substantiation of the precise content of the ASI policy⁵⁶⁴ in support of its position that the ASI policy can be characterized as ongoing conduct. These arguments include: the fact that the lower courts imposed ASIs in a continuous manner following the decision by the SPC in *Huawei v. Conversant*⁵⁶⁵, that they followed the reasons set out by the SPC in *Huawei v. Conversant*⁵⁶⁶; and that "the continued application of these injunctions in the field of SEPs was significant enough that the SPC described them as the 'judicial practice path' of China's 'anti-suit injunction' and 'anti-suit injunction system with Chinese characteristics' that was promoted by the SPC and the NPC Standing Committee."⁵⁶⁷

7.187. The European Union argues that China's conduct with respect to ASIs in the field of SEPs is likely to continue because the designation of several decisions imposing ASIs as typical cases means that they will serve as a model for other cases.⁵⁶⁸ The European Union submits that the existence of an ASI system to be applied in the future is corroborated by other documents. These include a speech by China's President Xi Jinping that, according to the European Union, encouraged the promotion of Chinese IP laws abroad and called for greater support for Chinese enterprises in protecting their IP overseas.⁵⁶⁹ The European Union also refers to the SPC's Five-year Plan for the Judicial Protection of IP Rights (2021-2025).⁵⁷⁰

7.188. China argues that the European Union has failed to prove the likelihood that the alleged conduct will continue being applied in the future as the issuance of five ASIs in 2020 is insufficient for this purpose.⁵⁷¹ China submits that the European Union relies on the same arguments used to demonstrate the precise content of the alleged measure⁵⁷² and that for the same reasons that they were unavailing in that context, these arguments and evidence are also unavailing for demonstrating that the alleged ongoing conduct is likely to be continued going forward.⁵⁷³

7.189. China argues that to demonstrate ongoing conduct the European Union must demonstrate four factors: (a) that the alleged measure is attributable to the responding Member; (b) its precise content; (c) its repeated application; and (d) that it is likely to continue to be applied in the future.⁵⁷⁴ China contends that the European Union has failed to demonstrate that China's alleged conduct satisfies these elements. China submits that the five court decisions constitute five different instances where Chinese courts applied the Chinese legal provisions on act preservation measures. For China, each court assessed the applicability of these provisions based on the specific facts before it and issued ASIs of different scopes based on different reasoning.⁵⁷⁵ China argues that 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*.⁵⁷⁶ China notes that the ASI was rejected in *Lenovo v. Nokia* by the same court that issued the ASIs in *ZTE v. Conversant* and *OPPO v. Sharp*, and that the cases were all decided within a five-month period. China argues that the only explanation for the rejection of the ASI in *Lenovo v. Nokia* is that the court independently assessed the relevant factors and, in view of the

⁵⁶³ European Union's first written submission, para. 278 (referring to Panel Report, *US – Orange Juice (Brazil)*, paras. 7.175-7.176).

⁵⁶⁴ European Union's first written submission, paras. 281-283.

⁵⁶⁵ European Union's first written submission, para. 284.

⁵⁶⁶ European Union's first written submission, para. 284.

⁵⁶⁷ European Union's first written submission, para. 284.

⁵⁶⁸ European Union's first written submission, paras. 287-288.

⁵⁶⁹ European Union's first written submission, para. 291 (referring to President Xi Jinping 2020 Speech (Exhibit EU-66b)).

⁵⁷⁰ European Union's first written submission, para. 291 (referring to SPC, Notice on Issuing the Plan of the People's Courts on the Judicial Protection of IP Rights (2021-2025) (Exhibit EU-85)).

⁵⁷¹ China's first written submission, para. 169.

⁵⁷² China's first written submission, para. 169 (referring to European Union's first written submission, paras. 289-291).

⁵⁷³ China's first written submission, para. 169.

⁵⁷⁴ China's first written submission, paras. 162-163 (referring to Appellate Body Report, *US – Supercalendered Paper*, para. 5.17; *Argentina – Import Measures*, para. 5.108 and Panel Report, *US – Supercalendered Paper*, paras. 7.328-7.239).

⁵⁷⁵ China's first written submission, para. 165.

⁵⁷⁶ China's first written submission, para. 166.

specific circumstances of that case, considered that an ASI was not appropriate.⁵⁷⁷ China also argues that the conduct alleged by the European Union is also not "currently" ongoing because no ASIs in SEP litigation have been issued since the end of 2020.⁵⁷⁸

7.2.3.2.2 Panel's analysis

7.190. The European Union characterizes the ASI policy as an unwritten measure, with the specific nature of a rule or norm of general and prospective application (rule or norm), or in the alternative, ongoing conduct.⁵⁷⁹ China argues that it is neither and that the ASI policy does not exist. The Panel begins by examining the standard against which to assess the ASI policy when determining its specific nature. It will then assess whether the European Union has demonstrated that the ASI policy is a rule or norm of general and prospective application.

7.2.3.2.2.1 Legal standard for determining whether an unwritten measure is a rule or norm of general and prospective application

7.191. As noted in paragraphs 7.179-7.182 above, in presenting their arguments on whether the ASI policy is a rule or norm or in the alternative ongoing conduct, both parties largely rely on the analysis in trade remedy disputes that have dealt with challenges to unwritten measures.⁵⁸⁰ China further suggests that the Panel can only find that the ASI policy is a rule or norm of general and prospective application if it has, "at the [very] least"⁵⁸¹, the same characteristics as other types of unwritten measures featured in previous disputes.⁵⁸²

7.192. The Panel recalls that nothing in the WTO covered agreements distinguishes different measures as a rule or norm or ongoing conduct. These concepts are meant to be helpful analytical tools and "are not always useful or appropriate to define the elements that must be substantiated for purposes of proving the existence and nature of a measure at issue."⁵⁸³ They should not be applied in a mechanistic and rigid manner.⁵⁸⁴ The evidence that must be adduced to demonstrate the existence of an unwritten measure, including its specific nature, is "to be ascertained in light of the specific measure challenged and how it is described by a complainant in a given case".⁵⁸⁵

7.193. Under Article 11 of the DSU, the Panel has a duty to conduct an objective assessment of the matter before it, including an objective assessment of the facts of the case. The Panel can be guided – but is not bound – by the types of factors and evidence that parties in previous disputes used to prove that other measures were rules or norms or ongoing conduct. The evidence and factors that would demonstrate that an unwritten measure is a rule or norm of general and prospective

⁵⁷⁷ China's first written submission, para. 166.

⁵⁷⁸ China argues that the panel in *US – Orange Juice (Brazil)* described "ongoing conduct" as "conduct that is *currently* taking place and is likely to continue in the future". (Panel Report, *US – Orange Juice (Brazil)*, para. 7.176 (emphasis added)).

⁵⁷⁹ The Panel notes if it finds that the ASI policy is a rule or norm of general and prospective application, it will not go on to make finding on the alternative argument that this measure is ongoing conduct. The Panel also notes that previous cases dealing with unwritten measures have left open the possibility that a measure may be of a different specific nature, such as "concerted action" or of another type of nature. See Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 794.

⁵⁸⁰ European Union's first written submission, paras. 216, 245-249; China's first written submission, paras. 110, 162-169. China also argues that the Appellate Body report in *US – Zeroing (EC)* took into account that instances of non-application of the alleged unwritten policy had not been identified. (China's first written submission, para. 151 (referring to Appellate Body Report, *US – Zeroing (EC)*, paras. 199-204)).

⁵⁸¹ China's first written submission, para. 154.

⁵⁸² These factors are whether the European Union has proven that the unwritten measure (1) affects an unidentified number of economic operators; (2) has been consistently and systematically applied for an extended period of time; (3) reflects a deliberate policy, going beyond the simple repetition of the application of a certain methodology to specific cases; and (4) is intended to apply to future investigations. (China's first written submission, paras. 151-154 (referring European Union's first written submission, paras. 245-275. See also Appellate Body Report, *US – Zeroing (EC)*, paras. 199-204; Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.130; and Panel Report, *US – Countervailing Measures (China)*, paras. 7.114-7.117)).

⁵⁸³ Appellate Body Report, *Argentina – Import Measures*, para. 5.109. See also Appellate Body Report, *US – Continued Zeroing*, para. 179.

⁵⁸⁴ Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.711.

⁵⁸⁵ Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.703. See also Appellate Body Report, *Russia – Railway Equipment*, para. 5.234.

application will vary⁵⁸⁶ depending on the type of measure involved as well as the way the complainant has sought to present and demonstrate the existence of the unwritten measure.⁵⁸⁷ The Panel will, therefore, rather than seeking to impose a construct based on the types of unwritten measures challenged in the past, take into account the specific characteristics of the ASI policy as the European Union describes it with a view to ascertaining the elements that it must demonstrate.

7.194. The determination of whether the ASI policy is a *rule or norm* involves establishing whether it exhibits normative attributes, similar to those of a written measure, including whether it is part of China's legal system, provides references on how courts will address requests for ASIs in the context of SEP litigation, or creates expectations among public and private actors in this respect.⁵⁸⁸ Whether the ASI policy has *general and prospective application* involves determining whether it is intended to be generally applied, affecting an unidentified number of economic operators⁵⁸⁹, and whether there is a high likelihood, regardless of whether it is mandatory, that it will continue to exist and be applied in the future.⁵⁹⁰ Evidence of prior application of a measure is not required in circumstances where there is other evidence demonstrating a high likelihood of future application. To require such evidence of prior application, in every case and regardless of the available evidence, would differentiate between a complainant's ability to challenge measures that are written and those that are unwritten based on whether the measure had previously been applied.⁵⁹¹

7.2.3.2.2.2 Whether the European Union has demonstrated that the ASI policy is a rule or norm of general and prospective application

7.195. The Panel notes that most of the European Union's evidence in support of its position that the ASI policy is a rule or norm of general and prospective application closely tracks what the European Union submits in the context of demonstrating the precise content of the ASI policy.

7.196. The Panel has already addressed many of these points in its analysis in section 7.2.3.1 above. The Panel will not repeat its analysis here. However, the Panel recalls that the European Union has demonstrated: (a) the precise content of the ASI policy including the interpretation of the Civil Procedure Law and the SPC Provisions as providing the authority for courts to issue ASIs and provide for the imposition cumulative daily fines for non-compliance; (b) that the ASI decisions that were designated as typical, or given another type of designation, serve as reference points providing indications or examples for future cases dealing with issues of ASIs in SEP litigation; and (c) that the ASI policy was endorsed by the NPC and its Standing Committee, and promoted by the SPC and provincial courts.

7.197. The Panel finds, therefore, that the European Union has demonstrated the existence of a policy, going beyond a simple repetition of a similar legal approach by Chinese courts in different cases where ASIs were requested. This policy reflects objectives expressed by the Chinese Government and has been implemented through the court decisions granting the ASIs and through

⁵⁸⁶ Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.133.

⁵⁸⁷ Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.123 (referring to Appellate Body Reports, *Argentina – Import Measures*, paras. 5.108 and 5.110).

⁵⁸⁸ See Appellate Body Reports, *US – Anti-Dumping Methodologies (China)*, para. 5.129; *US – Oil Country Tubular Goods Sunset Reviews*, para. 187.

⁵⁸⁹ Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.130 (referring to Appellate Body Report, *EC – Poultry*, para. 113).

⁵⁹⁰ See Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.157 (referring to Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 172 and 187; *US – Corrosion-Resistant Steel Sunset Review*, para. 82).

⁵⁹¹ The Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* noted that measures must be able to be challenged "as such" precisely to allow for dispute settlement even prior to the application of a given measure. In particular, the Appellate Body noted that:

[B]ecause the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade. This objective would be frustrated if instruments setting out rules or norms inconsistent with a Member's obligations could not be brought before a panel once they have been adopted and irrespective of any particular instance of application of such rules or norms. (Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82)

Similarly, the panel in *Turkey – Pharmaceutical Products (EU)* reasoned that evidence of specific instances of application was not required for an "as such" claim against a rule or norm in the way it might have relevance for establishing ongoing conduct. (Panel Report, *Turkey – Pharmaceutical Products (EU)*, para. 7.323.)

statements and documents from China's judiciary and the NPC and its Standing Committee. The Panel further notes that this policy has been endorsed by the NPC and its Standing Committee and has been promoted by the Chinese judiciary, indicating that the ASI policy exhibits normative attributes and thus is part of China's legal system. This creates an understanding among Chinese courts and private actors that courts are empowered to issue ASIs in the context of SEP litigation, as well as an awareness of how requests for ASIs will be assessed and possible outcomes of those requests.

7.198. The Panel also notes that while an individual ASI will be addressed to a particular litigant or litigants, the ASI policy enables an undetermined number of economic actors to request an ASI from a Chinese court in the context of SEP litigation. Additionally, given that all but one of the decisions granting ASIs have been designated as typical cases, and that these have become references or examples for Chinese courts dealing with similar issues in the future, the Panel is persuaded that there is a high likelihood that the ASI policy will apply in future cases. These considerations support the Panel's view that the ASI policy is a rule or norm of general and prospective application.

7.199. The parties have raised, however, two points that the Panel has not yet addressed as regards the general and prospective application of the policy: (a) whether there have been instances of application of the ASI policy, given that by the time the five court decisions granting the ASIs were issued not all of the elements that support the existence of the ASI policy had come into effect; and (b) the refusal to issue an ASI in *Lenovo v. Nokia*.

7.200. On the first point, China argues that the European Union's position that there is an unwritten policy depends on the five court decisions granting ASIs being designated as typical cases. China submits that, given that these designations were made after all the court decisions granting the ASIs were issued, the European Union is challenging an unwritten "policy" that has not been applied in a single instance.⁵⁹² The Panel understands China's position to be that additional instances where courts granted ASIs in SEP litigation are needed, and that those instances need to come after the other elements that support the existence of the ASI policy (such as the designation of certain cases as typical cases and the endorsement by the NPC and its Standing Committee) were expressed.

7.201. The Panel disagrees with China's position. The five instances where ASIs have been granted by Chinese courts are sufficient to demonstrate the specific nature of the ASI policy as a rule or norm of general and prospective application. Even acknowledging that some of the elements that support the existence of this policy came after these court decisions were issued, these decisions reflect the policy and how it operates in practice. The policy, as a principle or course of action, whereby Chinese courts are empowered to issue ASIs in the context of SEP litigation, is sufficiently manifested and evidenced through these decisions. The fact that this policy was sanctioned, endorsed, and promoted by China through actions that took place after these decisions were issued does not mean that the substantive content of the policy (i.e. that courts are empowered to issue ASIs with a broad range of prohibitions) has not been applied and evidenced through the relevant court decisions. While additional instances where ASIs were granted after these other events took place could have further confirmed the nature of the ASI policy as a rule or norm of general and prospective application, the Panel is persuaded that these instances of application of the policy are sufficient.

7.202. In this context, had the ASI policy been, for instance, a law enacted by China's legislature, such a measure would exist independently of whether implementers had made use of it and courts had granted ASIs pursuant to it. Similarly, and in the context of this case, the fact that no ASIs have been granted since the five ASI decisions were issued does not mean that Chinese courts could not presently grant an ASI if requested by an implementer pursuant to the ASI policy. Indeed, China confirmed that Chinese courts can presently grant ASIs.⁵⁹³ The Panel notes that evidence exists attesting to the precise content of the policy, as well as the likelihood that it will be applied in the future if similar circumstances arise. Consequently, there is no requirement to provide evidence of instances of ASIs being granted after all the elements of the ASI policy came into effect to demonstrate that it is a rule or norm of general and prospective application. The granting of ASIs in the five decisions, even if part of the expression and elaboration of the ASI policy, is sufficient evidence to support this characterization of the measure.

⁵⁹² China's first written submission, para. 144.

⁵⁹³ See China's responses to Panel question Nos. 26 and 97.

7.203. On the second point, that the Shenzhen court denied a request for an ASI in *Lenovo v. Nokia*, the Panel observes that this decision is fully consistent with the description of the ASI policy as one that empowers Chinese courts, but does not oblige them, to issue ASIs in SEP litigation. In that case, and after conducting its independent assessment, the Shenzhen court concluded that an ASI was not necessary at that time, as there were not yet any competing court judgments in other jurisdictions that would affect the Chinese court's ability to resolve the dispute. The court stated that its ruling was in accordance with Article 100 (now 103) as well as Article 154 (now 157) of the Civil Procedure Law. In the Panel's view, this case confirms the fact that Chinese courts are empowered to issue ASIs and that they have a legal basis and factors through which they can assess these types of requests, even if ultimately the court did not grant the ASI. *Lenovo v. Nokia*, thus, does not disprove the existence of the ASI policy, nor does it evidence an instance of non-application of the ASI policy, but rather it is an instance of application of the policy albeit with the result that the request was denied.

7.204. In summary, the Panel is persuaded that the ASI policy exhibits normative attributes as it creates expectations by public and private actors regarding the availability of ASIs in the context of SEP litigation, it is meant to be applied generally by Chinese courts and affects an undetermined number of economic operators, and there is a high likelihood of its continuation in the future. There have been instances of application, while the ASI policy was being developed between 2020 and 2022, that serve as evidence of its existence. The Panel is of the view that if an implementer were to file a request for an ASI in the context of SEP litigation before a Chinese court, the court would be empowered to address the request, have a legal basis and factors for assessing the circumstances of that case, and potentially grant it together with the imposition of cumulative daily fines to enforce it in the event of non-compliance.

7.205. Based on the foregoing analysis, the Panel finds that the European Union has demonstrated that the ASI policy is a rule or norm of general and prospective application. Having found this, it is not necessary for the Panel to address the European Union's argument that the ASI policy can alternatively be characterized as ongoing conduct.

7.2.3.3 Conclusion on the existence of the ASI policy

7.206. In light of the above, the Panel finds that the European Union has provided sufficient evidence and argumentation to demonstrate the existence of the ASI policy and that its specific nature is that of a rule or norm of general and prospective application.

7.3 Consistency of the ASI policy with the TRIPS Agreement

7.3.1 General interpretative issues relating to Article 1.1 of the TRIPS Agreement

7.207. The European Union claims that China is acting inconsistently with Article 1.1, first sentence read in conjunction with Articles 28.1, 28.2, and 44.1 of the TRIPS Agreement. China argues that the European Union's claims are based on a "mistaken understanding of the scope, purpose, and territorial application" of the TRIPS Agreement.⁵⁹⁴ The Panel considers it appropriate first to interpret the terms of Article 1.1, first sentence.

7.208. Article 1.1 of the TRIPS Agreement provides that:

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

7.3.1.1 Summary of the parties' and relevant third parties' arguments

7.209. The European Union argues that the obligation to "give effect to" the provisions of the TRIPS Agreement in Article 1.1, first sentence contains a broader and more general obligation than

⁵⁹⁴ China's first written submission, para. 195.

that contained in the third sentence, which requires WTO Members to implement TRIPS obligations within their own legal systems.⁵⁹⁵ According to the European Union this more general obligation "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".⁵⁹⁶ The European Union considers that Article 1.1, first sentence creates a "rule of restraint", and submits that its substantive claims based on Article 1.1, first sentence would not, as China asserts, "create obligations for Members 'in respect of conduct within the territory of other Members'".⁵⁹⁷ The European Union argues that Members may not adopt measures that restrict or seek to restrict the exercise of IP rights in the territories of other Members, or that prevent or seek to prevent the judicial authorities of other WTO Members from ordering a party to desist from a patent infringement. The European Union considers that this interpretation gives meaning to Article 1.1, first sentence and avoids rendering it redundant.⁵⁹⁸ The European Union also refers to International Law Commission (ILC) discussions regarding the drafting of Article 26 of the Vienna Convention on the Law of Treaties (Vienna Convention) and the findings of the panel in *US – Section 211 Appropriations Act* and the Appellate Body in *US – Shrimp*.⁵⁹⁹

7.210. China submits that the TRIPS Agreement is "concerned with ensuring that Members implement certain minimum standards of recognition and enforcement within their domestic legal systems"⁶⁰⁰ and "the phrase 'shall give effect to' in Article 1.1 refers to Members' obligations to effect whatever changes to their domestic laws are necessary to satisfy the agreement's minimum standards".⁶⁰¹ As support for its interpretation, China refers to the context of the second and third sentences of Article 1.1⁶⁰² and the object and purpose of the TRIPS Agreement.⁶⁰³ China also refers to the arbitrator's finding in *US – Section 110(5) Copyright Act (Article 25)* that the first sentence of Article 1.1 of the TRIPS Agreement provides "that Members 'must ... implement *in their domestic law* the protection required by the TRIPS Agreement'".⁶⁰⁴ China argues, therefore, that Article 1.1, first sentence is a restatement of the principle of *pacta sunt servanda*, which makes clear that TRIPS obligations "are to be given effect by Members within their respective jurisdictions".⁶⁰⁵ China submits that issues such as jurisdiction, choice of law, and recognition of foreign judgments are issues of private international law, which are not governed by the TRIPS Agreement. In China's view, the TRIPS Agreement is "concerned exclusively with the maintenance of certain minimum standards of intellectual property protection and enforcement within the territory of each WTO Member" and does not establish a supranational system for recognition and enforcement of IP rights.⁶⁰⁶

⁵⁹⁵ European Union's first written submission, para. 306.

⁵⁹⁶ European Union's second written submission, para. 61 (referring to European Union's responses to Panel question Nos. 37 and 42, paras. 144, 145 and 167). See also *ibid.* paras. 63-64.

⁵⁹⁷ European Union's opening statement at the first substantive meeting, para. 53 (quoting China's first written submission, para. 206); second written submission, para. 64.

⁵⁹⁸ European Union's opening statement at the first substantive meeting, paras. 46-47.

⁵⁹⁹ Regarding the drafting history of Article 26 of the Vienna Convention, the European Union argues that some members of the ILC "felt that there would be advantage in also stating that a party must abstain from acts calculated to frustrate the object and purpose of the treaty", however, the ILC "considered that this was clearly implicit in the obligation to perform the treaty in good faith and preferred to state the *pacta sunt servanda* rule in as simple a form as possible." (European Union's opening statement at the first substantive meeting, para. 40 (referring to Excerpt of Draft Articles on the Law of Treaties with commentaries 1966 (Exhibit EU-110), Article 23)). The European Union further considers that the panel in *US – Section 211 Appropriations Act* confirmed that Article 1.1 of the TRIPS Agreement "is not a mere reminder of the obligation to comply with the other obligations in the TRIPS Agreement". (*Ibid.* para. 42 (referring to Panel Report, *US – Section 211 Appropriations Act*, para. 8.57)). The European Union considers that a similar idea was expressed by the Appellate Body in *US – Shrimp*. (*Ibid.* para. 45 (referring to Appellate Body Report, *US – Shrimp*, para. 158)).

⁶⁰⁰ China's opening statement at the first substantive meeting, para. 45. (emphasis original)

⁶⁰¹ China's response to Panel question No. 42, para. 40 (referring to D. Gervais, *The TRIPS Agreement: Drafting History and Analysis*, 5th edn, 2021) (Exhibit CHN-72), para. 3.31 (quoting G.H.C. Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property* (WIPO, 1969), p. 208).

⁶⁰² China's first written submission, paras. 202-203.

⁶⁰³ China's second written submission, para. 101. (emphasis original)

⁶⁰⁴ China's first written submission, para. 202 (quoting Award of the Arbitrator, *US – Section 110(5) Copyright Act (Article 25)*, fn 36 to para. 3.15 (emphasis added by China)).

⁶⁰⁵ China's first written submission, para. 209 (quoting Carlos M. Correa, *Trade-Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (Oxford University Press, 2023) (Exhibit CHN-64), p. 21).

⁶⁰⁶ China's first written submission, paras. 213-220.

7.211. With respect to the third parties, Australia argues that pursuant to Article 1.1 of the TRIPS Agreement, Members "must ensure their implementation of TRIPS provisions does not interfere with, or undermine, the ability of other Members to uphold their own TRIPS obligations".⁶⁰⁷ Australia considers that Article 1.1, first sentence requires Members "to actively make the substantive provisions operational", and that "[f]or the TRIPS Agreement to be rendered operative, the provisions must also be effective between Members".⁶⁰⁸ Australia argues that this interpretation is based on the principle of *pacta sunt servanda*.⁶⁰⁹ Canada and Korea agree with Australia that Article 1.1, first sentence prohibits Members from undermining the ability of other Members to implement the provisions of the TRIPS Agreement.⁶¹⁰ The United Kingdom also considers that, "[f]or the purpose of this dispute, ... it is sufficient for the Panel to assess, for each of the provisions invoked before it, whether the challenged measures ... are capable of interfering with another Member's ability to give effect to that obligation, having particular regard to the terms of the ASIs and the proper characterisation of the underlying dispute and causes of action, and the particular elements of each of the provisions invoked."⁶¹¹ Australia, Korea, and the United Kingdom note that ASIs primarily aimed at preventing private parties engaged in legal proceedings from seeking redress in foreign jurisdictions may not necessarily undermine other Members' ability to implement their TRIPS obligations.⁶¹²

7.212. Brazil argues that Article 1.1, first sentence establishes a general obligation on Members to give effect to the provisions of the Agreement, while the second sentence indicates that the TRIPS Agreement sets forth minimum standards to be implemented in their domestic legal systems.⁶¹³ Brazil submits that the interpretation of Articles 1.1 and 28.1 should take into account "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".⁶¹⁴

7.3.1.2 Panel's analysis

7.213. Article 1.1, first sentence of the TRIPS Agreement states that "Members shall give effect to the provisions of this Agreement". The plain meaning of the phrase "give effect to" is to "make operative" or "put into force".⁶¹⁵ The Panel considers this understanding to be supported by the French and Spanish texts of the TRIPS Agreement, which use the terms "*donneront effet aux*" and "*aplicarán*" respectively.

7.214. The other sentences of Article 1.1 provide immediate context for the interpretation of the first sentence. The second sentence of Article 1.1 indicates that "Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement". The third sentence of Article 1.1 indicates that Members have the freedom "to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice". All three sentences of Article 1.1 complement and inform one another. While the first sentence imposes an obligation on Members to give effect to the provisions of the TRIPS Agreement, the second and third sentences confirm the freedoms afforded to Members to go beyond the minimum standards contained in the provisions of the TRIPS Agreement, and to determine the manner in which they give effect to those provisions.

7.215. In this respect, the Panel observes that the second sentence refers to Members' implementation of the protection required by the TRIPS Agreement "in their law", and the third sentence refers to implementation of the TRIPS Agreement by Members "within their own legal system and practice". Thus, the context provided by the second and third sentences indicates that the obligation in the first sentence to "give effect to" the provisions of the TRIPS Agreement imposes

⁶⁰⁷ Australia's third-party submission, para. 35.

⁶⁰⁸ Australia's third-party response to Panel question No. 3, paras. 1-2.

⁶⁰⁹ Australia's third-party response to Panel question No. 8, para. 5.

⁶¹⁰ Canada's third-party response to Panel question No. 5, paras. 7-8; Korea's third-party statement, paras. 8 and 13.

⁶¹¹ United Kingdom's third-party response to Panel question No. 6, para. 8.

⁶¹² Australia's third-party response to Panel question No. 3, para. 3; Korea's third-party statement, para. 9; and United Kingdom's third-party response to Panel question No. 6, para. 9.

⁶¹³ Brazil's third-party submission, para. 5.

⁶¹⁴ Brazil's third-party submission, para. 12.

⁶¹⁵ *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Oxford University Press, 1993), Vol. 1, p. 786, definition of "effect".

a duty on Members to implement the provisions of the TRIPS Agreement within their domestic legal systems while confirming some flexibility in implementation.

7.216. Turning to the other provisions of the TRIPS Agreement, the Panel observes that the substantive provisions of the TRIPS Agreement essentially articulate minimum standards of protection and enforcement of IP rights. Such IP rights are explicitly identified as "private rights".⁶¹⁶ Numerous provisions in the TRIPS Agreement demarcate the minimum availability and scope of those private rights. While some such provisions explicitly indicate that Members shall take steps to ensure that IP owners are able to acquire, protect or enforce their rights⁶¹⁷, other provisions are not couched in such language and simply refer to the exclusive rights that shall be available to the IP owner.⁶¹⁸

7.217. The language of Article 1.1, first sentence requiring Members to "give effect to" the provisions of the TRIPS Agreement might be understood as requiring Members to implement, make effective, or make operative the provisions of the TRIPS Agreement. This obligation to "give effect to" the provisions of the TRIPS Agreement includes those provisions setting out the minimum standards of protection and enforcement of private IP rights and is not limited to those provisions explicitly directing Members to take action. This does not mean that in the absence of Article 1.1, first sentence such provisions would not impose an obligation of implementation. Certainly, however, Article 1.1, first sentence removes any doubt. Thus, the broader context of the TRIPS Agreement suggests that Article 1.1, first sentence, at a minimum, serves to dispel any possible ambiguity in this respect. It follows that Article 1.1, first sentence is not *inutile*, even if it merely contains an obligation on Members to implement the TRIPS Agreement provisions in their domestic legal systems.⁶¹⁹

7.218. The TRIPS Agreement prescribes minimum standards to make available protection and enforcement procedures that generally require Members to take positive action through the adoption of laws and regulations, taking into account the particularities of their domestic legal systems. The obligation to put those standards in place in Members' domestic legal systems is not contingent: it depends only on the relevant date of application under Part VI of the TRIPS Agreement and subsequent decisions of the Council for TRIPS⁶²⁰ or protocols of accession. This contrasts with many provisions of other covered agreements, which prohibit conduct rather than mandate certain action. Additionally, Article 1.1, first sentence of the TRIPS Agreement can be contrasted with the general obligation in Article XVI:4 of the WTO Agreement, which provides that "[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." Article 1.1, first sentence indicates that beyond ensuring that existing measures are in conformity with the covered agreements, Members may need to adopt additional measures to ensure that the prescribed minimum standards are implemented in their domestic legal systems.

7.219. The Panel finds confirmation of this understanding in Article 67 of the TRIPS Agreement, which contextually informs Article 1.1, first sentence. Article 67 indicates that to facilitate developing and least developed country Members' implementation of the TRIPS Agreement, developed country Members shall provide, on request and subject to mutually agreed terms and conditions, technical and financial cooperation. Such cooperation "shall include assistance in *the preparation of laws and regulations* on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse".⁶²¹ Thus, Article 67 confirms that the means by which Members must "give effect to" the provisions of the TRIPS Agreement, within the meaning of Article 1.1, first sentence, may include preparing and adopting laws and regulations implementing the provisions of the TRIPS Agreement within their domestic legal systems.

7.220. The Panel finds further confirmation of this understanding in Article 25 of the Paris Convention for the Protection of Industrial Property (1967) (Paris Convention (1967)) and Article 36 of the Berne Convention for the Protection of Literary and Artistic Works (1971)

⁶¹⁶ Fourth recital of the preamble to the TRIPS Agreement.

⁶¹⁷ See e.g. Articles 22.2, 23.1, 25.1, and 41.1 of the TRIPS Agreement.

⁶¹⁸ See e.g. Articles 16.1, 26.1, and 28.1 of the TRIPS Agreement.

⁶¹⁹ See European Union's opening statement at the first substantive meeting, para. 46; China's first written submission, para. 209.

⁶²⁰ See IP/C/73 and IP/C/88.

⁶²¹ Emphasis added.

(Berne Convention (1971)). These provisions are sufficiently similar to Article 1.1, first sentence of the TRIPS Agreement in their terms, context, and object and purpose that they are directly relevant to its interpretation.⁶²² Article 25(2) of the Paris Convention (1967) provides that "at the time a country deposits its instrument of ratification or accession, it will be in a position under its domestic law to *give effect to the provisions* of this Convention".⁶²³ Article 36(2) of the Berne Convention (1971) states that "at the time a country becomes bound by this Convention, it will be in a position under its domestic law to *give effect to the provisions* of this Convention".⁶²⁴ These provisions use the specific language of "to give effect to" to impose an obligation on the parties to each Convention to implement its provisions in their domestic legal systems. This further confirms that Article 1.1, first sentence requires Members to implement the provisions of the TRIPS Agreement within their domestic legal systems.

7.221. The Panel notes that paragraphs (b) and (c) of the second recital of the preamble to the TRIPS Agreement recognize, among other things, the need for "the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights" and "effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems". The second recital of the preamble thus indicates that the TRIPS Agreement is, among other things, aimed at ensuring that Members adopt minimum protection and enforcement standards. Such object and purpose of the TRIPS Agreement supports the notion that Article 1.1, first sentence requires Members to implement the provisions of the TRIPS Agreement within their domestic legal systems.

7.222. Having considered all of the above, the Panel determines that Article 1.1, first sentence of the TRIPS Agreement requires that Members implement the provisions of the TRIPS Agreement within their domestic legal systems.

7.223. The European Union argues that, in addition to this domestic implementation obligation, Article 1.1, first sentence *further* requires Members to avoid taking measures that undermine the object and purpose of the TRIPS Agreement. Certain third parties also argue that, in addition to imposing that domestic implementation obligation, Article 1.1, first sentence also requires Members to refrain from undermining other Members' efforts to implement the provisions of the TRIPS Agreement.

7.224. Nothing in the text or context of Article 1.1, first sentence, read in light of the object and purpose of the TRIPS Agreement, indicates that Article 1.1, first sentence imposes any such additional obligation. Neither the European Union nor those third parties arguing for any such

⁶²² These Conventions share important linkages to the TRIPS Agreement – the subject matter and content of both Conventions overlap in essential aspects with parts of the TRIPS Agreement, and numerous substantive provisions of the Paris and Berne Conventions are incorporated directly into the TRIPS Agreement by reference. The Panel notes the European Union's view that these Conventions "do not deal with the trade related aspects of intellectual property rights, which is the subject matter of the TRIPS Agreement". (European Union's response to Panel question No. 117, para. 131). The fact that the scope of a treaty may extend beyond that of another treaty does not imply that there can be no overlap in subject matter. The Panel also notes that the "subject matter" of the TRIPS Agreement is indicated by a list of broad aspects of IP rights set out in parentheses in Article 63.1 of the TRIPS Agreement. (See para. 7.400 below).

⁶²³ Emphasis added. Article 25(1) of the Paris Convention (1967) provides that "[a]ny country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention". The WIPO Guide to the Application of the Paris Convention (1967) explains that the "measures necessary to ensure the application" of the Paris Convention (1967) "will be, in the first place, the legislative measures necessary to carry out the obligations of the Convention and, in the second place, the administrative measures necessary in connexion with such legislation or with provisions of the Convention which are considered 'self-executing' in the State concerned." (G.H.C. Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property* (BIRPI, 1969), p. 209). The Guide elaborates that Article 25(2) of the Paris Convention (1967) requires each party to the Convention, at the moment of ratification or accession to the Convention, to "be in a position, *under its domestic law*, to *give effect to the provisions of the Convention*, which means that at that time all measures referred to above ... *must already have been taken*". (Ibid. (emphasis original)).

⁶²⁴ Emphasis added. The WIPO Guide to the Berne Convention (1971) states, regarding Article 36(2), that "a country which becomes bound must be in a position under the domestic law to give effect to the Convention's provisions". The Guide elaborates that "[s]ince each country is bound to take the necessary steps to ensure the Convention's application, this might be thought to go without saying. But it seemed wise to say explicitly that the necessary legislation must already be in force by the time the obligations of the Convention were undertaken." (C. Masouyé, *Guide to the Berne Convention for the Protection of Literary and Artistic Works* (Paris Act 1971) (WIPO, 1978), para. 36.3).

additional obligation have sought to substantiate their understanding through the application of customary rules of interpretation.⁶²⁵ Rather, they have couched their arguments in terms of the principle of good faith, which they consider informs the obligation in Article 1.1, first sentence.

7.225. Specifically, the European Union refers to the negotiating history of Article 26 of the Vienna Convention.⁶²⁶ The European Union also refers to the panel's findings in *US – Section 211 Appropriations Act*, which according to the European Union indicate that Article 1.1, first sentence is "a safeguard against abuse in a plural system of territorial IP protection" because "Article 7 of the TRIPS Agreement ... enshrines the principle of good faith".⁶²⁷ The European Union considers that a "similar idea" was expressed by the Appellate Body in *US – Shrimp* in concluding that "[o]ne application of the principle of good faith prohibits the abusive exercise by a Member of its own treaty rights, so as to avoid prejudice to the rights of other Members."⁶²⁸ The third parties advancing the view that Article 1.1, first sentence obliges Members not to undermine the ability of other Members to implement the TRIPS Agreement also refer to the principle of good faith and the findings by the panel in *US – Section 211 Appropriations Act* and the Appellate Body in *US – Shrimp*.⁶²⁹

7.226. Article 26 of the Vienna Convention concerns the principle of *pacta sunt servanda* and states that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." The Panel recognizes that the principle of good faith in the implementation of international law is pervasive. As expressed in the context of WTO law, one "must assume that Members of the WTO will abide by their treaty obligations in good faith, as required by the principle of *pacta sunt servanda* articulated in Article 26 of the Vienna Convention".⁶³⁰ That principle of good faith, however, is ostensibly an expectation and requirement of WTO Members – it is not a principle of interpretation that requires the covered agreements to be interpreted in a manner that accommodates obligations or requirements that exceed the ordinary meaning of a given provision, as read in its context, and in light of the object and purpose of the agreement.

7.227. In several disputes, panels and the Appellate Body have concluded that specific provisions of the WTO covered agreements articulate or reflect the principle of good faith in a particular manner. The Panel notes, for instance, the European Union's reference to the Appellate Body's findings in *US – Shrimp*. In that dispute, the Appellate Body referred to a specific application of the principle of good faith, known as "abuse of rights" or "*abus de droit*". The Appellate Body stated that the doctrine of *abus de droit* "prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably'".⁶³¹ The Appellate Body did not, however, find the existence of a general rule of *abus de droit* that operates in WTO law. Rather, the Appellate Body considered that

⁶²⁵ With respect to the object and purpose of the TRIPS Agreement, the Panel notes that the European Union's interpretation of Article 1.1, first sentence is that it prohibits the adoption of measures that contradict the object and purpose of the TRIPS Agreement. The Panel notes that customary rules of interpretation of public international law require the Panel to determine the ordinary meaning of a treaty *in light of* its object and purpose. That does not mean that specific provisions of a treaty must necessarily be interpreted to prohibit measures that contradict or undermine the object and purpose of that treaty. Whether such an obligation exists can only be determined by applying the customary rules of interpretation to discern the precise scope and content of a given provision. As stated, the Panel's application of the customary rules of interpretation to interpret Article 1.1, first sentence reveals no indication of any such obligation.

⁶²⁶ European Union's opening statement at the first substantive meeting, paras. 40-41 (quoting Yearbook of the International Law Commission, Vol. II (1966), p. 211 (Exhibit EU-110)). The Panel notes that no party or third party has argued that the negotiating history of the TRIPS Agreement includes any discussion or contemplation of Article 1.1, first sentence as capturing the type of obligation espoused by the European Union and certain third parties in these proceedings.

⁶²⁷ European Union's opening statement at the first substantive meeting, paras. 43-44 (referring to Panel Report, *US – Section 211 Appropriations Act*, para. 8.57).

⁶²⁸ European Union's opening statement at the first substantive meeting, para. 45 (referring to Appellate Body Report, *US – Shrimp*, para. 158).

⁶²⁹ See Australia's third-party response to Panel question No. 4, Canada's third-party response to Panel question No. 5; and Korea's third-party response to Panel question No. 5.

⁶³⁰ Appellate Body Report, *EC – Sardines*, para. 278.

⁶³¹ Appellate Body Report, *US – Shrimp*, para. 158 (referring to B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), Chapter 4; Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed, Vol. I (Longman's, 1992), pp. 407-410; *Border and Transborder Armed Actions Case*, (1988) I.C.J. Rep. 105; *Rights of Nationals of the United States in Morocco Case*, (1952) I.C.J. Rep. 176; *Anglo-Norwegian Fisheries Case*, (1951) I.C.J. Rep. 142).

a specific provision of WTO law (the *chapeau* of Article XX of the GATT 1994) was an expression of the principle of good faith.⁶³²

7.228. Likewise, Articles 3.7 and 3.10 of the DSU have been interpreted to express the principle of good faith in WTO dispute settlement.⁶³³ Paragraph 2 of Annex II to the Anti-Dumping Agreement has been interpreted as "another detailed expression of the principle of good faith".⁶³⁴ The non-violation remedy expressed in Article XXIII:1(b) of the GATT 1994 has been interpreted to reflect a "further development of the principle of *pacta sunt servanda*".⁶³⁵ In none of these instances did a panel or the Appellate Body rely on the principle of good faith to infer a particular interpretation – to the contrary, by applying customary rules of interpretation the interpreter concluded that these provisions articulated or reflected the principle in certain ways.

7.229. The Panel's interpretation of Article 1.1, first sentence of the TRIPS Agreement does not indicate that this provision imposes any additional obligation relating to the object and purpose of the TRIPS Agreement or implementation of the TRIPS Agreement by other WTO Members. Moreover, other WTO covered agreements do not contain explicit obligations that are worded in a manner similar to Article 1.1, first sentence of the TRIPS Agreement. In the Panel's view, the principle of *pacta sunt servanda* applies to the implementation of those other agreements just as much as it applies to the TRIPS Agreement. This suggests that Article 1.1, first sentence stands for something other than *pacta sunt servanda*. Indeed, the Panel's interpretation of Article 1.1, first sentence shows that this provision reflects the specific nature of the TRIPS Agreement in the WTO system and, as such, clarifies and sets forth an unambiguous obligation on Members to ensure that within their legal systems there exist the measures necessary to implement the provisions of the Agreement. Such an obligation cannot be equated with the principle of *pacta sunt servanda*.

7.230. The Panel recognizes that the principle of *pacta sunt servanda* is relevant to Members' implementation of their obligations under the TRIPS Agreement. For instance, the panel in *US – Section 211 Appropriations Act* found that Article 7 of the TRIPS Agreement articulates a "form of the good faith principle". Based on that observation, that panel further considered that Article 1.1, first sentence requires Members "to give effect to rights and obligations contained in the TRIPS Agreement and ... not to enact measures that would negate such rights and obligations".⁶³⁶ This Panel agrees that if a Member were to enact measures that negated the minimum standards of protection and enforcement that the TRIPS Agreement requires it to implement *within its domestic legal system*, that would indeed be contrary to the obligation to give effect to the provisions of the TRIPS Agreement. That, however, does not imply that Article 1.1, first sentence also imposes obligations *vis-à-vis* another Member's implementation of the TRIPS Agreement. Moreover, the implementation obligation in Article 1.1, first sentence must be read in light of the other provisions of the TRIPS Agreement (i.e. the provisions that are to be given effect).⁶³⁷

7.231. In summary, the Panel considers that Article 1.1, first sentence of the TRIPS Agreement requires Members to implement the provisions of the TRIPS Agreement within their own domestic legal systems. The Panel sees no basis to conclude that Article 1.1, first sentence contains any additional obligation relating to the object and purpose of the TRIPS Agreement or implementation of the TRIPS Agreement by other WTO Members.

7.3.2 Whether the ASI policy is inconsistent with Article 1.1 in conjunction with Article 28.1 of the TRIPS Agreement

7.232. Article 1.1, first sentence of the TRIPS Agreement states: "Members shall give effect to the provisions of this Agreement."

⁶³² Appellate Body Report, *US – Shrimp*, para. 158 ("[t]he chapeau of Article XX is, in fact, but one expression of the principle of good faith").

⁶³³ Appellate Body Report, *Peru – Agricultural Products*, para. 5.25 ("a Member's compliance with its good faith obligations under Articles 3.7 and 3.10 of the DSU should be ascertained on the basis of actions taken in relation to, or within the context of, the rules and procedures of the DSU").

⁶³⁴ Appellate Body Report, *US – Hot-Rolled Steel*, para. 101.

⁶³⁵ Panel Report, *Korea – Procurement*, para. 7.93.

⁶³⁶ Panel Report, *US – Section 211 Appropriations Act*, para. 8.57.

⁶³⁷ In addition, the Panel notes that the panel in *US – Section 211 Appropriations Act* concluded that Article 7 of the TRIPS Agreement, and not Article 1.1, first sentence, embodies the principle of *pacta sunt servanda*.

7.233. Article 28.1 of the TRIPS Agreement states:

1. A patent shall confer on its owner the following exclusive rights:

(a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing⁶ for these purposes that product;

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

⁶ This right, like all other rights conferred under this Agreement in respect of the use, sale, importation or other distribution of goods, is subject to the provisions of Article 6.

7.3.2.1 Summary of the parties' arguments

7.234. The European Union submits that Article 28.1 of the TRIPS Agreement confers on the owner of a patent the right to prevent third parties not having the owner's consent from making, using, offering for sale, selling, or importing a product that is the subject matter of a patent or that is obtained directly by a patented process.⁶³⁸ The European Union argues that the obligation to "give effect to" Article 28.1 prohibits Members from adopting measures that restrict patent owners from exercising these rights in the territories of other Members, to the extent that such measures "disrupt the carefully balanced system of protection and enforcement of patents laid down in the TRIPS Agreement"⁶³⁹; "frustrate" the TRIPS Agreement's "object and purpose and interfere with the protection and enforcement of intellectual property rights in the territories of other WTO Members"⁶⁴⁰; "interfere with the application" of the provisions of the TRIPS Agreement "in the territory of other Members"⁶⁴¹; or "unduly restrict the exercise by SEP owners of their exclusive rights and interfere with the protection and enforcement of patents in the territories of other Members".⁶⁴² The European Union considers that this legal standard is "clearer" when Article 28.1 is read in conjunction with Article 1.1, first sentence of the TRIPS Agreement, however the European Union "does not exclude that an obligation to refrain from taking measures that undermine compliance with the obligations laid down in Articles 28.1, 28.2 and 44.1 of the TRIPS Agreement is implicit in those Articles themselves".⁶⁴³

7.235. According to the European Union, China's ASI policy is inconsistent with that legal standard because it deters patent owners from exercising their rights in jurisdictions outside China because they risk implementers seeking ASIs from Chinese courts, which will force them to either halt the litigation in the foreign jurisdiction or pay heavy daily penalties in China.⁶⁴⁴ The European Union comments that although ASIs "in exceptional cases may be a helpful tool to address the challenges posed by parallel litigation" in multiple jurisdictions, China's ASI policy "goes far beyond that objective"⁶⁴⁵ and constitutes a severe restriction on the exercise of SEP owners' rights under Article 28.1.⁶⁴⁶ According to the European Union, even if the ASI policy is intended to streamline litigation, "to the extent it impinges on the field covered by Article 28.1 of the TRIPS Agreement, [it] would have to be exercised reasonably and not abusively".⁶⁴⁷ According to the European Union, the characteristics of the ASI policy indicate that it is not intended to address exceptional circumstances, but rather to prevent parallel litigation altogether, thereby abusing ASIs and

⁶³⁸ European Union's first written submission, para. 307.

⁶³⁹ European Union's first written submission, para. 311.

⁶⁴⁰ European Union's response to panel question No. 37, para. 144. See also European Union's first written submission, para. 311; second written submission, paras. 61 and 63.

⁶⁴¹ European Union's second written submission, para. 60.

⁶⁴² European Union's second written submission, para. 64.

⁶⁴³ European Union's response to Panel question No. 39, para. 154.

⁶⁴⁴ European Union's first written submission, paras. 323-324; opening statement at the first substantive meeting, para. 42; second written submission, para. 69.

⁶⁴⁵ European Union's first written submission, para. 324.

⁶⁴⁶ European Union's first written submission, paras. 317-319.

⁶⁴⁷ European Union's first written submission, para. 326.

disrupting "the carefully balanced system of protection and enforcement of patents laid down in the TRIPS Agreement".⁶⁴⁸

7.236. China considers that the European Union's interpretation of these provisions is based on an erroneous interpretation of Article 1.1, first sentence of the TRIPS Agreement.⁶⁴⁹ According to China, under Article 28.1, Members must ensure that patent owners, within their territory, have "a negative right to prevent third parties not having the owner's consent from making use of the patent in the ways described" and, pursuant to Article 1.1, a Member must give effect to this provision by "ensuring that its domestic law accords this negative right in respect of patents issued in its territory".⁶⁵⁰ China argues that "the drafters of the TRIPS Agreement did not hide in [Article 1.1, first sentence] a contrary intention to establish a supranational system of private international law to govern the litigation of intellectual property rights across national borders".⁶⁵¹

7.237. China submits that it is uncontested that patent owners in China are entitled to prevent unauthorized third parties from using a patent in the ways described in Article 28.1⁶⁵² and it is the responsibility of other Members, not China, to ensure that the minimum exclusive rights of a patent owner set out in Article 28 of the TRIPS Agreement are protected in their territories.⁶⁵³ China also argues that the European Union has failed to explain what it is about the ASIs issued by Chinese courts that is inconsistent with the TRIPS Agreement while ASIs issued by the courts of other Members are not.⁶⁵⁴ China further observes that an *in personam* order directed to a party to litigation in China does not modify the nature of the rights conferred by a patent in the territory of another Member – "[a]t the very most, it affects the incentive of that one party to exercise those rights ... albeit on a temporary basis", however "[t]his is not a subject that Article 28 addresses".⁶⁵⁵ China considers that this is not an issue addressed by Article 28.1, but rather concerns private international law (on which the TRIPS Agreement is silent).⁶⁵⁶ In China's view, the European Union's claim is not a request to clarify existing provisions of the TRIPS Agreement, but rather is a request to add rights and obligations to the TRIPS Agreement, contrary to Article 3.2 of the DSU.⁶⁵⁷

7.3.2.2 Panel's analysis

7.238. The Panel has addressed the interpretation of Article 1.1, first sentence above and concluded that this provision requires Members to implement the provisions of the TRIPS Agreement within their own domestic legal systems. The Panel has further concluded that Article 1.1, first sentence contains no additional obligations relating to the object and purpose of the TRIPS Agreement or implementation of the TRIPS Agreement by other WTO Members.⁶⁵⁸

7.239. Article 28 of the TRIPS Agreement is within Section 5 of Part II of that Agreement. Part II of the TRIPS Agreement sets out "minimum standards concerning the availability, scope and use of intellectual property rights".⁶⁵⁹ Section 5 of Part II is titled "Patents" and comprises Articles 27 to 34. Article 28 is titled "Rights Conferred". Paragraph 1 of Article 28 sets out the exclusive rights that a patent confers on its owner.⁶⁶⁰

7.240. The Panel understands that Article 1.1, first sentence read in conjunction with Article 28.1 requires Members⁶⁶¹ to ensure that, within their domestic legal systems, a patent confers on its

⁶⁴⁸ European Union's first written submission, para. 326.

⁶⁴⁹ China's opening statement at the second meeting, para. 42.

⁶⁵⁰ China's first written submission, para. 223. See also China's second written submission, para. 101; opening statement at the first substantive meeting, para. 51.

⁶⁵¹ China's opening statement at the first substantive meeting, para. 51. See also *ibid.* paras. 43-52.

⁶⁵² China's first written submission, para. 226.

⁶⁵³ China's opening statement at the first substantive meeting, para. 49. See also China's first written submission, para. 227.

⁶⁵⁴ China's first written submission, para. 229-235; second written submission, paras. 99 and 103.

⁶⁵⁵ China's opening statement at the first substantive meeting, para. 49.

⁶⁵⁶ China's first written submission, para. 228.

⁶⁵⁷ China's first written submission, para. 235.

⁶⁵⁸ See paras. 7.222 and 7.231 above.

⁶⁵⁹ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.714.

⁶⁶⁰ These are the substantive rights that a patent confers on the owner rather than those listed in paragraph 56 of the Appellate Body Report in *Canada – Patent Term*. See also para. 7.233 above.

⁶⁶¹ From the relevant date of application of the TRIPS Agreement. (See Part VI of the TRIPS Agreement and subsequent Council for TRIPS decisions (IP/C/73; IP/C/88)).

owner the exclusive rights set forth in Article 28.1.⁶⁶² Those rights are independent of patents obtained for the same invention in the territories of other Members, in accordance with Article 4*bis* of the Paris Convention (1967), which is incorporated into the TRIPS Agreement through Article 2.1 thereof. In that respect, it is important to emphasize that the territorial nature of patent rights means that the exclusive rights identified in Article 28.1 are only valid within the territory of the granting Member. There is, therefore, no basis to interpret these provisions as addressing patent owners' rights in the territories of other WTO Members.

7.241. The Panel notes the European Union's view that its interpretation of the legal obligation arising under Article 1.1, first sentence read in conjunction with Article 28.1 might be "implicit" in Article 28.1 itself.⁶⁶³ The Panel understands that Article 1.1 constitutes relevant context informing the meaning of the obligation arising under Article 28.1, even in a situation where Article 1.1, first sentence is not directly invoked by a complainant in framing its claim.⁶⁶⁴ Thus, the Panel's analysis of the European Union's claim would be unchanged even if the European Union's claim had been brought solely under Article 28.1.

7.242. The European Union does not allege that patents granted in China fail to confer the exclusive rights set forth in Article 28.1⁶⁶⁵, but rather focuses on the ability of owners of patents granted by other Members to enforce those patents in the territories of those other Members. The Panel notes that issues of enforcement of IP rights are addressed under Part III of the TRIPS Agreement. Moreover, in light of the legal standard under Article 28.1, the Panel considers that the European Union has not demonstrated that the ASI policy is inconsistent with Article 28.1, whether or not read in conjunction with Article 1.1, first sentence.⁶⁶⁶

7.3.3 Whether the ASI policy is inconsistent with Article 1.1 in conjunction with Article 28.2 of the TRIPS Agreement

7.243. Article 1.1, first sentence of the TRIPS Agreement states: "Members shall give effect to the provisions of this Agreement."

7.244. Article 28.2 provides that "[p]atent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts."

7.3.3.1 Summary of the parties' arguments

7.245. The European Union argues that pursuant to Article 28.2 of the TRIPS Agreement, SEP owners are entitled to license their SEPs on FRAND terms. The European Union considers that, to give effect to that provision pursuant to Article 1.1, first sentence of the TRIPS Agreement, WTO Members must refrain from adopting or applying measures that restrict, or seek to restrict, the exercise of that right.⁶⁶⁷ The European Union considers that China's ASI policy encourages Chinese courts to issue broad ASIs that restrict, or seek to restrict, patent owners from taking effective action against infringement when licensing negotiations break down, which, in the European Union's view, is an integral element of the normal exploitation of patents. For this reason, the European Union alleges that China acts inconsistently with the obligation to give effect to Article 28.2.⁶⁶⁸ According

⁶⁶² See European Union's first written submission, para. 311; China's first written submission, para. 223.

⁶⁶³ European Union's response to Panel question No. 39, para. 154. See also European Union's second written submission, para. 64.

⁶⁶⁴ See e.g. Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1827 and fn 4211 thereto, para. 7.1980 and fn 4447 thereto, para. 7.2023 and fn 4508 thereto, and para. 7.2099 and fn 4613 thereto; Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.587.

⁶⁶⁵ To the extent this is contested, the Panel observes that the European Union has not demonstrated that owners of patents granted in China are restricted from exercising the exclusive rights set forth in Article 28.1.

⁶⁶⁶ The Panel recalls that its assessment of the ASI policy's consistency with Article 1.1, first sentence in conjunction with Article 28.1 of the TRIPS Agreement is based on applying its interpretation of the TRIPS Agreement to the measure the European Union identified in its panel request. (See para. 7.206 above). As the Panel has disagreed with the European Union on the nature of the obligations in Article 1.1, first sentence in conjunction with Article 28.1 of the TRIPS Agreement, the Panel's findings would be unchanged even if the measure included the additional aspects the European Union alleged during the course of the proceedings. (See section 7.2.1.2 on what aspects of the ASI policy are within the Panel's terms of reference).

⁶⁶⁷ European Union's first written submission, paras. 374-377; second written submission, paras. 73-74.

⁶⁶⁸ European Union's first written submission, paras. 378-394.

to the European Union, the possibility for implementers to obtain broad ASIs "was intended to force SEP owners to reach settlements and sign licensing contracts with the implementers" at below FRAND royalty rates, and that "[g]iven the coercive effect of the [ASIs], it is not possible to establish that the SEP owners ... were able to conclude licensing contracts on terms that are in line with a normal exploitation of their patents."⁶⁶⁹ The European Union considers, therefore, that a settlement reached with an implementer after an ASI has been imposed on the SEP owner cannot be deemed to be in line with a normal exploitation of its patents.⁶⁷⁰ Because the activities of SEP owners and implementers involved in SEP litigation in China have a global scale, the European Union's claim concerns the ability for SEP owners to conclude licensing contracts in line with the normal exploitation of their patents both within China and in the territories of other Members.⁶⁷¹

7.246. Noting that Article 28.2 requires that patent owners shall "have the right to assign, or transfer by succession, the patent and to conclude licensing contracts", China submits that it is uncontested that patent owners under Chinese law have those rights. Consequently, China submits that it has given effect to Article 28.2, in accordance with Article 1.1.⁶⁷² In China's view, Article 28.2 does not govern the effect of a measure on the negotiating power of a SEP owner and SEP licensee, nor does it govern the terms of a SEP licence.⁶⁷³ China notes that the European Union's interpretation of Article 28.2 appears to shield ASIs issued at the request of a patent owner, instead of a patent licensee, biasing Article 28.2 in favour of patent owners.⁶⁷⁴ China further observes that the European Union argues both that any restriction on the ability of a patent owner to enforce its exclusive rights outside China is inconsistent with Article 28.2, and that Article 28.2 is only violated if the ASI is "broad".⁶⁷⁵ China considers that the European Union has not articulated an interpretative basis for its caveat regarding "broad" ASIs.⁶⁷⁶ China also considers that there is no evidence that the ASIs affected the licence negotiations in a manner contrary to the normal exploitation of the patent.⁶⁷⁷

7.3.3.2 Panel's analysis

7.247. The Panel recalls its interpretation in section 7.3.1 above that Article 1.1, first sentence of the TRIPS Agreement requires Members to implement the provisions of the TRIPS Agreement within their own domestic legal systems. Article 28.2 of the TRIPS Agreement states that "[p]atent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts". Thus, Article 1.1, first sentence read in conjunction with Article 28.2 of the TRIPS Agreement requires Members to ensure that, *within their domestic legal systems*, patent owners have the right to assign or transfer by succession their patent, as well as the right to conclude licensing contracts.

7.248. The European Union's claim concerns the conclusion of licensing contracts regarding patents granted both in other Members *and* in China.⁶⁷⁸ Regarding patents granted in other Members, the Panel has concluded, contrary to the European Union's position, that Article 1.1, first sentence does not contain additional obligations relating to the object and purpose of the TRIPS Agreement or implementation of the TRIPS Agreement by other WTO Members.⁶⁷⁹ Therefore, what remains to be assessed with respect to the European Union's claim under Article 28.2 of the TRIPS Agreement is

⁶⁶⁹ European Union's first written submission, para. 393.

⁶⁷⁰ European Union's second written submission, para. 74 (referring to European Union's responses to Panel question Nos. 9(b) and 29). The European Union also notes various statements by Chinese courts indicating that the ASIs which were issued directly influenced the settlements reached by the parties involved. (European Union's first written submission, paras. 382-392; second written submission, para. 75; response to Panel question No. 27, para. 107).

⁶⁷¹ European Union's response to Panel question No. 121.

⁶⁷² China's first written submission, para. 237.

⁶⁷³ China's first written submission, paras. 239 and 241. China notes that in SEP disputes the patent holder has committed to licensing the patent, and the issue in dispute is the terms of the licence. (China's first written submission, para. 241).

⁶⁷⁴ China's first written submission, para. 243.

⁶⁷⁵ China's first written submission, para. 242 (quoting European Union's first written submission, para. 377).

⁶⁷⁶ China's first written submission, para. 242.

⁶⁷⁷ China's first written submission, para. 244.

⁶⁷⁸ European Union's response to Panel question No. 121.

⁶⁷⁹ See para. 7.231 above.

whether China ensures that patent owners have the right to conclude contracts licensing patents granted in China consistent with Article 28.2.

7.249. In this respect, the European Union does not argue that owners of patents granted in China cannot conclude licensing contracts. The European Union acknowledges that SEP owners are entitled to license their SEPs on FRAND terms, but considers that the ASIs issued pursuant to the ASI policy affect the terms of the negotiation of those licences in a manner that is inconsistent with the normal exploitation of the patents, and thus inconsistent with the obligation to give effect to Article 28.2.⁶⁸⁰ China, for its part, considers that Article 28.2 does not govern the effect of a measure on the negotiating power of a patent owner and licensee, nor does it govern the terms of a licence of a SEP, where the patent owner has already committed to offer a licence on FRAND terms.⁶⁸¹

7.250. In considering the European Union's claim as it relates to patents granted within China, the Panel recalls that the ASI policy empowers Chinese courts to grant requests for ASIs submitted in the context of SEP litigation, that prohibit SEP owners from seeking to take anti-infringement or other legal actions⁶⁸² in courts outside China.⁶⁸³ The Panel also recalls that typically when a patent is accepted by an SSO as essential to a standard, the patent owner commits to offer a licence to all implementers on FRAND terms. SEP litigation arises when the SEP owner and an implementer cannot agree on the royalty rate for the licence. In such cases, a court may be called upon to determine the FRAND terms of the licence.

7.251. The possibility that a court might be called upon to determine what constitutes FRAND terms does not change the fact that the SEP owner has agreed to license its patent on such terms. SEP litigation in China, and requests for ASIs as part of those proceedings, are predicated on the rights of a SEP owner and an implementer to enter into a licensing contract for the use of the subject matter of the relevant patent granted in China. That a court may impose provisional measures while litigation is pending before it does not negate the SEP holder's right to license the patent. Indeed, the outcome of each of the cases at issue in this dispute was a settlement between the parties that entailed the conclusion of a licensing agreement that covered the patents granted in China. The Panel considers, therefore, that nothing in this dispute indicates that the owners of patents granted in China lack the right to conclude licensing contracts.

7.252. For these reasons, the Panel considers that the European Union has failed to demonstrate that China's ASI policy is inconsistent with Article 1.1, first sentence read in conjunction with Article 28.2 of the TRIPS Agreement.⁶⁸⁴

7.3.4 Whether the ASI policy is inconsistent with Article 1.1 in conjunction with Article 44.1 of the TRIPS Agreement

7.253. Article 1.1, first sentence of the TRIPS Agreement states: "Members shall give effect to the provisions of this Agreement."

7.254. Article 44 of the TRIPS Agreement is titled "Injunctions" and Article 44.1 states:

The judicial authorities shall have the authority to order a party to desist from an infringement, *inter alia* to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right, immediately after customs clearance of such goods. Members are not obliged to accord such authority in respect of protected subject matter acquired or ordered by a

⁶⁸⁰ See e.g. European Union's first written submission, para. 374; second written submission, paras. 73–74.

⁶⁸¹ China's first written submission, paras. 239 and 241.

⁶⁸² Including asking a court in another jurisdiction to determine the FRAND rate.

⁶⁸³ See e.g. paras. 2.55, 2.76, 2.92, and 2.109 above.

⁶⁸⁴ As in the context of the European Union's claim under Article 1.1, first sentence in conjunction with Article 28.1 of the TRIPS Agreement, the Panel's findings in respect of the European Union's claim under Article 1.1, first sentence in conjunction with Article 28.2 would be unchanged even if the ASI policy as challenged by the European Union included the additional aspects the European Union alleged during the course of the proceedings. (See section 7.2.1.2 on what aspects of the ASI policy are within the Panel's terms of reference).

person prior to knowing or having reasonable grounds to know that dealing in such subject matter would entail the infringement of an intellectual property right.

7.3.4.1 Summary of the parties' arguments

7.255. The European Union submits that Article 1.1, first sentence in conjunction with Article 44.1 of the TRIPS Agreement contains not only an obligation on Members to ensure that their judicial authorities have the authority to order a party to desist from an infringement of an IP right, but also an obligation on Members to refrain from adopting or maintaining in force measures that prevent, or seek to prevent, the judicial authorities of other WTO Members from ordering a party to desist from a patent infringement in the territories of those Members.⁶⁸⁵ According to the European Union, allowing the courts of one Member to issue ASIs that prohibit SEP owners from obtaining or enforcing in the courts of other Members injunctions against the infringement of patents valid in the territories of those Members could frustrate the object and purpose of the TRIPS Agreement and run contrary to the principle of good faith performance of the Agreement.⁶⁸⁶

7.256. The European Union claims that the ASI 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 Agreement⁶⁸⁷ effectively protecting unlicensed implementers from enforcement procedures against their acts of patent infringement.⁶⁸⁸ The European Union argues that the issuance of broad ASIs by Chinese courts at the request of unlicensed implementers, pursuant to the ASI policy, prevents SEP owners, under the threat of high penalties, from commencing, continuing, or enforcing the results of infringement proceedings of their patents before the courts of other WTO Members.⁶⁸⁹ According to the European Union, the ASI policy, therefore, undermines the authority of other Members' judicial authorities to order the remedy against patent infringement specified in Article 44.1 of the TRIPS Agreement.⁶⁹⁰ The European Union also argues that through this measure, China fails to perform in good faith its obligations under the TRIPS Agreement.⁶⁹¹ For these reasons, the European Union claims that the alleged ASI policy is as such inconsistent with Article 1.1, first sentence in conjunction with Article 44.1.⁶⁹²

7.257. China argues that the European Union's claim that Article 1.1, first sentence and Article 44.1 impose obligations not only in respect of recognition and enforcement of IP rights within a Member's own territory, but also in respect of recognition and enforcement of IP rights within the territory of other Members, has no basis in accepted principles of treaty interpretation.⁶⁹³ China argues that even accepting the European Union's erroneous interpretation, the European Union is unable to explain what it is about the ASIs issued by Chinese courts that render them inconsistent with these provisions while at the same time the ASIs issued by the courts of other Members are not.⁶⁹⁴

7.258. China argues that 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.⁶⁹⁵ China submits that the Appellate Body has interpreted the enforcement procedures specified in Part III as forming "an internationally-agreed minimum standard which Members are bound to implement *in their domestic legislation*".⁶⁹⁶ China notes that it is uncontested that judicial authorities in China have the authority to order a party to desist from an infringement, as required by Article 44.1, which is all

⁶⁸⁵ European Union's second written submission, para. 112 (quoting European Union's first written submission, para. 464).

⁶⁸⁶ European Union's second written submission, para. 114 (referencing European Union's first written submission, para. 471 and opening statement at the first meeting of the Panel, paras. 82-83).

⁶⁸⁷ European Union's first written submission, para. 468.

⁶⁸⁸ European Union's first written submission, para. 467.

⁶⁸⁹ European Union's first written submission, para. 466.

⁶⁹⁰ European Union's first written submission, para. 470.

⁶⁹¹ European Union's first written submission, para. 471.

⁶⁹² European Union's second written submission, para. 116.

⁶⁹³ China's first written submission, para. 270.

⁶⁹⁴ China's second written submission, para. 99 (referring to European Union's first written submission, para. 324).

⁶⁹⁵ China's first written submission, para. 267. (italics added by China)

⁶⁹⁶ China's first written submission, para. 267 (referring to Appellate Body Report, *US – Section 211 Appropriations Act*, para. 206 (italics added by China)).

China was required to do to give effect to this provision within its domestic law, as required by Article 1.1 of the TRIPS Agreement.⁶⁹⁷

7.259. China notes, moreover, that the ASIs issued by Chinese courts are not addressed to the courts of any other Member nor do they purport to affect any other court's jurisdiction. China comments that the ASIs are *in personam* orders aimed at a party to litigation within China. China continues that Article 44.1 does not contain any obligation with respect to whether and how such an order may affect, even temporarily, that party's incentives to exercise the patent rights that it holds in another Member, including its incentives to request a court in that other Member to issue an order directing another party to desist from an alleged infringement taking place within that Member's territory.⁶⁹⁸

7.3.4.2 Panel's analysis

7.260. The European Union's claim under Article 1.1, first sentence in conjunction with Article 44.1 is premised on the same interpretive position it put forward regarding the obligations in Articles 28.1 and 28.2. That position is that the obligation to "give effect to" the provisions of the TRIPS Agreement in Article 1.1, first sentence requires Members to refrain from adopting or maintaining in force measures that prevent, or seek to prevent, the judicial authorities of other WTO Members from ordering a party to desist from a patent infringement in the territories of those Members.⁶⁹⁹

7.261. In light of the Panel's interpretation of Article 1.1 in section 7.3.1 above, the Panel sees no legal basis to conclude that Article 1.1, first sentence read in conjunction with Article 44.1 imposes such obligations on Members. Consequently, the Panel finds that the European Union has failed to substantiate its claim under these provisions.⁷⁰⁰ Although the Panel has found that the European Union has failed to substantiate its claim, the Panel notes that it was appropriate for the European Union to bring this claim under Part III of the TRIPS Agreement given that it concerns actions related to the enforcement of IP rights.

7.262. The European Union is not challenging the ASI policy as inconsistent with Article 44.1 on the grounds that China has not provided its own judicial authorities with the authority to issue injunctions ordering a party to desist from an IP infringement in China.⁷⁰¹ Consequently, the Panel does not deem it necessary to continue with the assessment of the European Union's claim under these provisions.

7.3.5 Whether the ASI policy is inconsistent with Article 41.1 of the TRIPS Agreement

7.263. Article 41.1 is in Section 1 "General Obligations" in Part III of the Agreement, which covers enforcement of IP rights. It provides that:

Members shall ensure that enforcement procedures as specified in this Part 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.

7.264. Article 41.1 contains two obligations: the obligation for Members to make enforcement procedures available under their law, and the obligation for Members not to apply these procedures

⁶⁹⁷ China's first written submission, para. 265.

⁶⁹⁸ China's first written submission, para. 267.

⁶⁹⁹ European Union's second written submission, para. 112 (quoting European Union's first written submission, para. 464).

⁷⁰⁰ As in the context of the European Union's claims under Article 1.1, first sentence in conjunction with Articles 28.1 and 28.2 of the TRIPS Agreement, the Panel's findings in respect of the European Union's claim under Article 1.1, first sentence in conjunction with Article 44.1 would be unchanged even if the ASI policy as challenged by the European Union included the additional aspects the European Union alleged during the course of the proceedings. (See section 7.2.1.2 on what aspects of the ASI policy are within the Panel's terms of reference).

⁷⁰¹ European Union's response to Panel question No. 37.

in a manner that creates barriers to legitimate trade and to provide for safeguards against their abuse.

7.265. The European Union's claim is made under the second sentence.

7.3.5.1 Summary of the parties' arguments

7.266. The European Union first submits that the ASI policy includes enforcement procedures within the meaning of Article 41.1 because (a) "[e]very anti-suit injunction imposed by the Chinese courts prohibits the enforcement of intellectual property rights covered by the TRIPS Agreement"⁷⁰²; and (b) civil procedures where IP right holders are defendants, such as ASI proceedings in SEP litigation can, in certain circumstances, be considered enforcement procedures to take action against infringement of IP rights within the meaning of Article 41.1, first sentence.⁷⁰³ According to the European Union, therefore, China is obliged to apply those procedures in accordance with the second sentence of Article 41.1.

7.267. The European Union submits that requests for an ASI in the context of SEP litigation are enforcement procedures to take action against infringement of IP rights within the meaning of Article 41.1, first sentence of the TRIPS Agreement because they are concerned with questions of patent infringement and whether patent holders can make use of the enforcement procedures provided for in Part III of the TRIPS Agreement in territories outside China.⁷⁰⁴ The European Union also argues that FRAND determination procedures, even if brought by SEP implementers, constitute enforcement procedures under Article 41.1, as the ultimate outcome of the litigation is a licence that brings an end to any infringement of IP rights. In the European Union's view this means that the issuance of an ASI as a constituent part of the overall litigation qualifies as an enforcement procedure to take action against any act of infringement of IP rights within the meaning of Article 41.1, first sentence.⁷⁰⁵

7.268. The European Union maintains that a proceeding can be considered an enforcement procedure so as to permit an action against any act of infringement of IP rights even where a right holder is the defendant if (a) the defendant establishes that it is the patent holder; (b) the patent is valid; and (c) the patent holder requests the court to find that its patent is infringed.⁷⁰⁶ The European Union finds support for its interpretation in the references in Articles 41.3, 41.4, and certain sentences of Article 42 to parties to enforcement proceedings in general and not to right holders or complainants. The European Union argues that although Article 42 creates an obligation to make enforcement procedures available to right holders this "does not necessarily mean that only procedures initiated by right holders can be 'enforcement procedures'".⁷⁰⁷ The European Union considers that lawsuits that can settle situations of patent infringement and in which patent holders are defendants constitute an "enforcement procedure" within the meaning of Article 41.1.⁷⁰⁸ At the same time, the European Union acknowledges that procedures with respect to the validity of a patent may rather fall under Part IV, but notes that those procedures are governed by the general principles set out in paragraphs 2 and 3 of Article 41 by virtue of their incorporation into Article 62.⁷⁰⁹ The European Union also refers to Articles 4 and 4*quater* of the Paris Convention (1967), which are incorporated into the TRIPS Agreement by Article 2.1 of that Agreement and which also relate to the acquisition of patent rights.

⁷⁰² European Union's first written submission, para. 424.

⁷⁰³ European Union's first written submission, paras. 400 and 426.

⁷⁰⁴ European Union's response to Panel question No. 43; second written submission, paras. 79 and 85.

⁷⁰⁵ European Union's response to Panel question No. 43; second written submission, para. 87.

⁷⁰⁶ European Union's response to Panel question No. 44. The European Union notes the Appellate Body's finding that "the term 'right holders' includes not only right owners but any persons who claim to have legal standing to assert rights, both complainants and defendants." (European Union's first written submission, para. 400 (quoting Appellate Body Report, *US – Section 211 Appropriations Act*, para. 217)). The European Union also notes the panel's conclusion in *Saudi Arabia – IPRs* that a copyright licensee can be considered a right holder within the meaning of Article 42. (European Union's first written submission, para. 400 (referring to Panel Report, *Saudi Arabia – IPRs*, para. 7.190)).

⁷⁰⁷ European Union's response to Panel question No. 44; second written submission, para. 83.

⁷⁰⁸ European Union's response to Panel question No. 44.

⁷⁰⁹ European Union's response to Panel question No. 44.

7.269. The European Union notes that the SPC has itself concluded that SEP litigation shares some characteristics with patent infringement disputes.⁷¹⁰ The European Union highlights that ASI applicants were using the relevant SEPs and were seeking litigation to set FRAND rates to bring to an end a period of unlicensed use – i.e. infringement. According to the European Union, the ASIs therefore relate to the enforcement of IP rights.⁷¹¹

7.270. With respect to the requirements in the second sentence of Article 41.1 that a Member avoid creating barriers to legitimate trade through the application of its enforcement procedures and to provide for safeguards against their abuse, the European Union argues that this extends to the effect of the application of enforcement procedures even if those effects occur outside the territory of the Member in question.⁷¹²

7.271. The European Union goes on to argue that China has acted inconsistently with the second sentence of Article 41.1 because its application of enforcement procedures in SEP litigation creates barriers to legitimate trade and fails to provide for safeguards against their abuse.⁷¹³

7.272. The European Union submits that the ASI policy creates barriers to legitimate trade because the ASIs restrict trade in intangible goods (licences) as well as patented or licensed goods.⁷¹⁴ The European Union argues that any measure that blocks justifiable or normal international trade would constitute a barrier to legitimate trade.⁷¹⁵ Relying on the context of Article XX of the GATT 1994 and Article 2.3, second sentence of the Agreement on the Application of Sanitary and Phytosanitary Measures, the European Union submits that to prove that China's measures are not applied in a manner so as to avoid the creation of barriers to legitimate trade it is sufficient to prove that they create barriers to legitimate trade.⁷¹⁶ In the circumstances of this dispute, the European Union argues that intangible goods such as licences are legitimate trade within the meaning of Article 41.1, and the fact that patent holders cannot prevent unauthorized acts of third parties regarding their patents means that legitimate trade in licences and patented or licensed goods is likely to be restricted and a barrier to trade created in both intangible and tangible goods.⁷¹⁷ The European Union also argues that the lower costs for unlicensed producers gives those goods a competitive advantage over higher-cost licensed products, thereby creating a barrier to legitimate trade.⁷¹⁸

7.273. Based on dictionary definitions and the context of other provisions in Part III of the TRIPS Agreement, the European Union concludes that "[t]he obligation to provide for safeguards against the abuse of enforcement procedures is not automatically discharged through the creation of a formal written legal instrument providing for such safeguards."⁷¹⁹ The European Union argues that because the ASI policy goes beyond the protection of IP in China and prevents proper enforcement of patents in other Members, it restricts the rights of patent owners and does not safeguard against abuse.⁷²⁰

7.274. The European Union notes that Article 50.3 of the TRIPS Agreement identifies certain safeguards against abuse in the context of provisional measures. The European Union then infers that to satisfy Article 41.1, second sentence Members must, in issuing provisional measures

⁷¹⁰ European Union's first written submission, para. 427 (quoting SPC, *OPPO v. Sharp*, ruling on jurisdiction (Exhibit EU-8b)).

⁷¹¹ European Union's first written submission, paras. 426 and 428.

⁷¹² European Union's second written submission, para. 93. The European Union finds support for its understanding from the preamble to the TRIPS Agreement and Article 7, and a GATT Panel Report. (European Union's second written submission, paras. 93-95 (referring to GATT Panel Report, *US – Spring Assemblies*, paras. 65-66)).

⁷¹³ European Union's first written submission, para. 460.

⁷¹⁴ European Union's second written submission, paras. 100-101.

⁷¹⁵ European Union's first written submission, para. 405.

⁷¹⁶ European Union's first written submission, paras. 438 and 414 (referring to Panel Reports, *Argentina – Hides and Leather*, fn 566 to para. 11.312; *US – Animals*, para. 7.575). The European Union notes that any measure resulting in arbitrary or unjustifiable discrimination would constitute a disguised restriction on international trade.

⁷¹⁷ European Union's first written submission, paras. 430-431. Specifically, the European Union argues that because of the ASIs, each of the right holders (Conversant, Sharp, InterDigital, and Ericsson) was unable to prevent the applicant (Huawei, ZTE, OPPO, and Samsung, respectively) from infringing its patent (both in China and outside) and importing infringing goods into various territories.

⁷¹⁸ European Union's first written submission, paras. 433-437.

⁷¹⁹ European Union's first written submission, para. 419.

⁷²⁰ European Union's first written submission, para. 440.

(a) satisfy themselves with a sufficient degree of certainty that the applicant's rights are being infringed or such infringement is imminent; and (b) order the applicant to provide a security sufficient to protect the defendant and prevent abuse.⁷²¹ Specifically, the European Union considers that the ASI policy fails to provide safeguards against abuse by (a) issuing worldwide ASIs with little consideration of their impact on enforcement procedures in other Members, (b) failing to ensure with a sufficient degree of certainty that the applicant's interests were violated or that such violation is imminent, and (c) not requiring security or equivalent assurance from the applicant that is sufficient to protect the defendant from abuse.⁷²²

7.275. China argues that Part III of the TRIPS Agreement, including Article 41.1, is limited to requiring Members to make available enforcement procedures under their domestic law to prevent infringement of IP rights within their territory.⁷²³ China therefore considers that a claim under Article 41.1 must either allege that a Member has failed to (a) make available under its domestic law an enforcement procedure specified in Part III, inconsistently with the first sentence; or (b) apply those procedures in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse, inconsistently with the second sentence.⁷²⁴ China considers that the European Union's claims fall outside the scope of the second sentence of Article 41.1 because the European Union has not challenged an enforcement procedure that falls within the meaning of the first sentence.⁷²⁵

7.276. China argues that a "relevant 'civil procedure' must be one that is designed to 'compel observance' with a covered intellectual property right 'in active opposition to' an alleged act of infringement of that right".⁷²⁶ China also argues that under Article 42 of the TRIPS Agreement an enforcement proceeding can only be initiated by an IP right holder (or another party with legal standing to enforce the relevant IP right) against acts of infringement.⁷²⁷ China disagrees with the European Union's assertion that a procedure where the right holder is a defendant can fall within the scope of Article 41.1.⁷²⁸ China points to various provisions of Part III of the TRIPS Agreement (for example Articles 48.1, 50.3, and 53.1) in support of its view.⁷²⁹ China submits that the European Union's claim does not relate to any potential abuse by right holders of proceedings against parties accused of infringement, but rather that "the European Union seeks to convert a provision that was designed to protect accused infringers from 'abuse' of enforcement procedures by right holders into a provision designed to protect right holders in a type of civil proceeding that is not within the scope of Part III of the TRIPS Agreement".⁷³⁰

7.277. China notes that the legal basis for issuing the ASIs – Article 100 (now 103) of the Civil Procedure Law – is a general feature of Chinese civil procedure that was used in five instances to enjoin a party from initiating or continuing litigation in other jurisdictions. According to China, this is not an enforcement procedure against an act of infringement of a type specified in Part III of the TRIPS Agreement.⁷³¹ China emphasizes that none of the five cases in which ASIs were issued was initiated by SEP right holders as enforcement actions against acts of infringement. China argues that these were contractual licensing disputes where the right holder's objective was to secure an appropriate FRAND rate, not "enforcement procedures ... against any act of infringement" of a covered IP right.⁷³² China argues that "in SEP licensing disputes, the right holder does not and cannot seek to exercise its exclusive right to prevent an implementer from practicing the patent or patents

⁷²¹ European Union's first written submission, para. 420.

⁷²² European Union's first written submission, paras. 440-459.

⁷²³ China's first written submission, paras. 246-247. As support for this interpretation, China refers to Articles 42, 44-47, 51-52, and 61 of the TRIPS Agreement. (China's first written submission, paras. 247-248 and 253).

⁷²⁴ China's first written submission, para. 249.

⁷²⁵ China's first written submission, paras. 250-260.

⁷²⁶ China's response to Panel questions, section 3.2.

⁷²⁷ China's first written submission, para. 253.

⁷²⁸ China's first written submission, para. 256. China argues that a "procedure 'made available to right holders' to 'enforce' intellectual property rights is a procedure put at the right holder's disposal to initiate whenever it considers the procedure necessary to compel observance with its intellectual property rights". For China, "[b]eing a defendant in a licensing dispute initiated by a prospective licensee is not a procedure of this type". (China's second written submission, para. 111).

⁷²⁹ China's response to Panel question No. 45, paras. 58-65.

⁷³⁰ China's response to Panel question No. 45.

⁷³¹ China's first written submission, para. 251.

⁷³² China's first written submission, para. 256; China's response to Panel question No. 42, para. 41; second written submission, para. 105.

altogether" – rather, the proceedings concern only patents that must be licensed and the FRAND terms for the use of those patents.⁷³³ China argues that, even if the implementer's manufacture or sale of a standard-compliant product prior to entering a licence agreement with the right holder could be considered an infringement, that could not "convert a civil judicial proceeding initiated by the implementer to enforce a FRAND licensing commitment into a civil judicial procedure initiated by the right holder to enforce a covered intellectual property right".⁷³⁴ As a factual matter, China further notes that, even if one were to accept the European Union's position, none of the five cases at issue is related to the patent holder asking the court to declare its patent valid and to establish an infringement of its patent.⁷³⁵

7.278. China highlights that the alleged ASI policy as challenged by the European Union does not involve allegations of infringement of any IP right but rather concerns the issuance of ASIs in civil cases initiated by SEP implementers relating to FRAND licensing terms.⁷³⁶ China argues that the right to obtain a non-exclusive licence on FRAND terms is not an IP right covered by the TRIPS Agreement.⁷³⁷

7.279. China also objects to the European Union's interpretation of the obligations on Members in Article 41.1, second sentence to apply domestic enforcement procedures in such a manner as to avoid the creation of barriers to legitimate trade and provide for safeguards against their abuse.⁷³⁸ China argues that Article 41.1 second sentence does not cover situations where procedures in one Member disincentivize a right holder from having recourse to enforcement procedures in another Member against alleged acts of infringement in the territory of that Member⁷³⁹, but rather that the obligation is limited to the procedures made available under the Member's own law.⁷⁴⁰ China reiterates that these cases are not about enforcement of IP rights against acts of infringement, but dealing with managing parallel proceedings in multiple jurisdictions, which is a question of private international law that lies outside the scope of the TRIPS Agreement.⁷⁴¹

7.280. China considers that the European Union is requesting the Panel to invent rights and obligations that have no basis in the text of the TRIPS Agreement.⁷⁴² China notes that under the European Union's own interpretation some ASIs issued in SEP-related litigation *might* be consistent with Article 41.1 if certain conditions are met. According to China there is no basis in Article 41.1 for making such distinctions between ASIs as they all prevent or seek to prevent patent owners from availing themselves of enforcement procedures in other Members.⁷⁴³

7.3.5.2 Panel's analysis

7.281. The Panel recalls its finding in section 7.2.2 above that the ASI policy empowers Chinese courts to issue ASIs in the context of SEP litigation. Prohibitions under an ASI may include enjoining right holders from enforcing foreign injunctions or seeking redress for infringement in foreign jurisdictions or China with respect to the same patent families as those that are the subject of Chinese litigation concerning the FRAND terms for SEP licences.

7.282. Although it makes no claims under the first sentence, the European Union recognizes that the obligation in the second sentence is only applicable if the relevant procedures fall within the

⁷³³ China's response to Panel question No. 42, para. 41.

⁷³⁴ China's response to Panel question No. 50, para. 72. See also China's second written submission, paras. 108-110.

⁷³⁵ China's second written submission, para. 107 (referring to the European Union's response to Panel question No. 44(b)). China notes that the defendant's response to each lawsuit is not to prevent the implementer's exercise of the patent or patents, but rather to determine the appropriate FRAND rate making this a licensing rather than an infringement issue. (China's response to Panel question No. 44(b)).

⁷³⁶ China's first written submission, para. 254.

⁷³⁷ China's response to Panel question No. 44(a).

⁷³⁸ China's first written submission, paras. 261-262.

⁷³⁹ China's first written submission, paras. 257-258.

⁷⁴⁰ China notes that the phrase "under their law" in Article 41.1, first sentence confirms that the procedures that Members must apply in a manner to avoid creating barriers to legitimate trade and safeguard against their abuse are those within their own domestic legal system designed to address acts of infringement. (China's response to Panel question No. 48).

⁷⁴¹ China's first written submission, para. 259.

⁷⁴² China's first written submission, para. 261.

⁷⁴³ China's first written submission, paras. 262-263. See also China's second written submission, para. 114.

scope of the first sentence of Article 41.1. The European Union claims that the ASI policy includes enforcement procedures within the meaning of Article 41.1. The European Union then goes on to argue that the five ASI decisions reflect the application of the ASI policy, which was carried out in a manner inconsistent with Article 41.1, second sentence. China, for its part, argues that even if the ASI policy exists, it is not an enforcement procedure within the meaning of Article 41.1 because the ASI measures are requested by an implementer rather than a right holder and they do not address infringement.

7.283. The Panel will begin by considering the meaning of "enforcement procedures as specified in [Part III]" and then apply this understanding to the ASI policy to determine whether it falls within the scope of the obligation in the second sentence of Article 41.1.

7.3.5.2.1 Enforcement procedures as specified in Part III

7.284. Article 41.1 contains terms limiting its coverage to the enforcement procedures⁷⁴⁴ specified in Part III of the TRIPS Agreement. Part III is, therefore, immediate and relevant context for determining what types of measures fall within the scope of Article 41.1 first and second sentences. Part III is titled "Enforcement of Intellectual Property Rights" and comprises five sections. Article 41.1 is situated in Section 1: General Obligations. The other sections of Part III contain specific obligations regarding different types of enforcement procedures, including their respective remedies: Section 2: Civil and Administrative Procedures and Remedies; Section 3: Provisional Measures; Section 4: Special Requirements Related to Border Measures; and Section 5: Criminal Procedures.

7.285. The main point of contention between the two parties is whether a civil judicial procedure, such as a request for an ASI, where the right holder is the defendant could be considered an enforcement procedure as specified in Part III. The table below presents provisions in Part III that inform an understanding of this issue (emphasis added):

Table 5: Nature of enforcement procedures in Part III

Provision	Relevant language
42 Fair and equitable procedures	Members shall <u>make available to right holders civil judicial procedures</u> concerning the enforcement of any intellectual property right covered by this Agreement. Defendants shall have the right to written notice ...
44.1 Injunctions	The judicial authorities shall have the authority to order a party to <u>desist from an infringement, inter alia</u> to prevent the entry into the channels of commerce in their jurisdiction of imported goods that <u>involve the infringement of an intellectual property right</u> .
45 Damages	45.1 The judicial authorities shall have the authority to <u>order the infringer to pay the right holder damages ...</u> 45.2 The judicial authorities shall also have the authority to <u>order the infringer to pay the right holder expenses</u> , which may include appropriate attorney's fees.
46 Other remedies	<u>In order to create an effective deterrent to infringement</u> , the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to <u>avoid any harm caused to the right holder</u> , or, unless this would be contrary to existing constitutional requirements, destroyed.
47 Right of information	Members may provide that the judicial authorities shall have the authority, <u>unless this would be out of proportion to the seriousness of the infringement, to order the infringer to inform the right holder</u> of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution.

⁷⁴⁴ A review of the dictionary definitions of both enforcement and procedure leads to a conclusion that an enforcement procedure is an established or prescribed way of enforcing or compelling the fulfilment of a law or obligation. ("Enforcement" is defined as "[t]he (forcible) exaction of payment; the process of compelling observance of a law, regulation, etc."; "procedure" is defined as "[t]he formal steps to be taken in a legal action; the mode of conducting judicial proceedings" and "[a] particular mode or course of action, a proceeding". (*The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Oxford University Press, 1993), Vol. 1, p. 820 and Vol. 2, p. 2363)).

Provision	Relevant language
48.1 Indemnification of the defendant	The judicial authorities shall have the authority <u>to order a party at whose request measures were taken and who has abused enforcement procedures to provide to a party wrongfully enjoined or restrained</u> adequate compensation for the injury suffered because of such abuse. The judicial authorities shall also have the authority <u>to order the applicant to pay the defendant expenses</u> , which may include appropriate attorney's fees.
50.1(a) Provisional measures	The judicial authorities shall have the authority to order prompt and effective provisional measures: (a) <u>to prevent an infringement of any intellectual property right</u> from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance;
50.2 Provisional measures	The judicial authorities shall have the authority to adopt provisional measures <i>inaudita altera parte</i> where appropriate, in particular where <u>any delay is likely to cause irreparable harm to the right holder</u> , or where there is a demonstrable risk of evidence being destroyed.
50.3 Provisional measures	The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty <u>that the applicant is the right holder</u> and that the <u>applicant's right is being infringed</u> or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.
50.6 Provisional measures	<u>Without prejudice to paragraph 4, provisional measure taken on the basis of paragraphs 1 and 2 shall, upon request by the defendant, be revoked or otherwise cease to have effect if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period ...</u>
50.7 Provisional measures	Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or <u>where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right</u> , the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.
51 Suspension of release by customs authorities	Members shall, in conformity with the provisions set out below, adopt procedures (footnote omitted) <u>to enable a right holder</u> , who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods (footnote omitted) may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods.
52 Application	Any <u>right holder initiating the procedures under Article 51</u> shall be required to provide adequate evidence to satisfy the competent authorities that, under the laws of the country of importation, there is <i>prima facie</i> <u>an infringement of the right holder's intellectual property right</u> and to supply a sufficiently detailed description of the goods to make them readily recognizable by the customs authorities.
53.1 Security or equivalent assurance	The competent authorities shall have the authority <u>to require an applicant to provide a security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse</u> . Such security or equivalent assurance shall not unreasonably deter recourse to these procedures.
53.2 Security or equivalent assurance	...Payment of such security shall not prejudice any other remedy available to the right holder, it being understood <u>that the security shall be released if the right holder fails to pursue the right of action within a reasonable period of time</u> .
55 Duration of suspension	If, within a period not exceeding 10 working days after the applicant has been served notice of the suspension, the customs authorities have not been informed that proceedings leading to a decision on the merits of the case have been <u>initiated by a party other than the defendant</u> , or that the duly empowered authority has taken provisional measures prolonging the suspension of the release of the goods, the goods shall be released, provided that all other conditions for importation or exportation have been complied with ...
56 Indemnification of the importer and of the owner of the goods	Relevant authorities shall have the authority to <u>order the applicant</u> to pay the importer, the consignee and the owner of the goods appropriate compensation for any injury caused to them through the wrongful detention of goods or through the detention of goods released pursuant to Article 55.
57 Right of inspection and information	Without prejudice to the protection of confidential information, Members shall provide the competent authorities the authority <u>to give the right holder sufficient opportunity to have any goods detained by the customs authorities inspected in order to substantiate the right holder's claims</u> . The competent authorities shall also have authority to give the importer an equivalent opportunity to have any such goods inspected.

Provision	Relevant language
58(a) and (b) <i>Ex officio action</i>	Where Members require competent authorities to act upon their own initiative and to suspend the release of goods in respect of which they have acquired <i>prima facie</i> evidence <u>that an intellectual property right is being infringed</u> : (a) the competent authorities may at any time <u>seek from the right holder</u> any information that may assist them to exercise these powers; (b) <u>the importer and the right holder shall be promptly notified</u> of the suspension. Where the importer has lodged an appeal against the suspension with the competent authorities, the suspension shall be subject to the conditions, <i>mutatis mutandis</i> , set out at Article 55;
59 Remedies	Without prejudice <u>to other rights of action open to the right holder</u> and subject to the <u>right of the defendant</u> to seek review by a judicial authority, competent authorities shall have the authority to order the destruction or disposal of <u>infringing goods</u> in accordance with the principles set out in Article 46.
61 Criminal procedures	Members shall provide for criminal procedures and penalties to be applied at least in cases of <u>wilful trademark counterfeiting or copyright piracy</u> on a commercial scale. Remedies available shall include imprisonment and/or monetary fines <u>sufficient to provide a deterrent</u> , consistently with the level of penalties applied for crimes of corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the <u>infringing goods</u> and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in <u>other cases of infringement of intellectual property rights</u> , in particular where they are committed wilfully and on a commercial scale.

7.286. With respect to civil judicial procedures in Section 2, Article 42, first sentence expressly obliges Members to make those procedures available "to right holders". The European Union does not consider this to mean that only procedures initiated by right holders can be "enforcement procedures".⁷⁴⁵ China, for its part, argues that a careful review of the procedures in Part III in their context will demonstrate that they all relate to actions that a right holder must be empowered to take under domestic law to prevent infringement of its covered IP right within the territory of the Member.⁷⁴⁶

7.287. With respect to the question as to who can be the object of an enforcement action, the Panel notes that Articles 44 through 48 deal with the remedies that Members must ensure their judicial authorities can provide. These remedies can only be understood if the right holder is the initiator of the proceedings. Article 44.1 provides for injunctions to order a party to desist from an infringement. Article 45 provides for the judicial authorities to order an infringer to pay damages and expenses to the right holder. Article 46 provides for other remedies in order to create an effective deterrent to infringement. It is illogical to presume that a user, who may be infringing an IP right, would initiate action for which the only remedies are orders directed at it to cease its activities, to pay the right holder, and to have its goods disposed of or destroyed. As the measures that could be taken under the procedures are all those directed at the user, the only logical conclusion is that the user, not the right holder, is the defendant.

7.288. A review of the provisional measures in Section 3 also supports a conclusion that the defendant in an enforcement procedure is the user while the initiator is the right holder and that those procedures are actions against IP infringement. Article 50.1 provides for provisional measures to prevent an infringement and to preserve evidence in regard to the alleged infringement while Article 50.2 requires that judicial authorities have the authority to adopt such provisional measures *inaudita altera parte* in particular where any delay is likely to cause irreparable harm to the right holder. Article 50.3 requires that when issuing provisional measures the judicial authorities shall have the authority to satisfy themselves that the applicant is the right holder and that its right is being infringed or that infringement is imminent.

7.289. Similarly, the special requirements on border measures in Section 4 stipulate that Members must adopt procedures to enable a right holder to apply to the competent authorities for the suspension of release of infringing goods into free circulation (Article 51) and must require the right holder initiating such procedures to supply the evidence and information of the kind prescribed

⁷⁴⁵ European Union's response to Panel question No. 44.

⁷⁴⁶ China's first written submission, para. 247.

(Article 52). It is clear that the potential infringer could not initiate these procedures against the right holder.⁷⁴⁷

7.290. While competent authorities may act upon their own initiative (Article 58), there is no mention of rights of action open to the user (importer) against the right holder. Indeed, the understanding that it is the user and not the right holder that is the defendant is bolstered by an examination of the enforcement procedures that may be brought by the competent authorities rather than the right holder. Article 58 provides that competent authorities may bring *ex officio* proceedings when they have acquired *prima facie* evidence that an IP right is being infringed.

7.291. Additionally, Article 61 in Section 5 requires governments to apply criminal procedures and penalties at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. These enforcement procedures are also aimed at stopping, preventing, or deterring infringement of an IP right and do not contemplate the right holder being the defendant.

7.292. All of these provisions logically flow from an understanding that the party potentially subject to enforcement proceedings is an alleged unauthorized user of IP-protected subject matter and not the right holder. These provisions would make little sense if the right holder were the defendant in the action.

7.293. This reading is borne out by the architecture of the TRIPS Agreement. Part II prescribes minimum standards of protection of IP, which confer exclusive rights on owners, while Part III sets out the means to enforce those rights against infringement.⁷⁴⁸

7.294. The European Union seeks to rely on a finding of the Appellate Body in *US – Section 211 Appropriations Act* for the premise that right holders can be defendants. However, the Panel recalls that in the context of that dispute the Appellate Body was simply noting that the concept of who can assert a right, and therefore, be considered a right holder under the TRIPS Agreement might extend to someone who *purports* to be an owner of an IP right who could in certain circumstances be a defendant.⁷⁴⁹ No panel has concluded that an enforcement procedure as specified in Part III of the TRIPS Agreement can be initiated by an applicant who does not purport to be a right holder. The Panel does not preclude the possibility that in the process of a single proceeding initiated by an implementer a right holder might seek to enforce its IP rights, such as by filing a cross-complaint claiming infringement. The Panel cannot agree with the European Union, however, that a procedure filed by a third party to invalidate a patent could be an enforcement procedure as specified in Part III within the meaning of Article 41.1, first sentence.

7.295. The European Union also points to the references to the "parties" to a proceeding (rather than to "right holders") in Articles 41.3 and 41.4 as well as in Article 42. Articles 41.3 and 41.4 refer to providing both parties the decision on the merits of a case and to providing either party the right to appeal final administrative decisions and the legal aspects of initial judicial decisions on the merits. Meanwhile the third and fourth sentences of Article 42 refer to the rights of parties with respect to independent legal counsel and the ability to substantiate their claims and present evidence, but is explicit that the procedures must be available to right holders.

7.296. The Panel is not convinced that these references alone – or others to the rights of both parties in the conduct of enforcement procedures⁷⁵⁰ – support a view that an enforcement procedure can be one where the right holder is the defendant. The fact that a provision of Part III requires a Member to protect the rights of a defendant within a procedure does not mean that the right to initiate an action is intended to be available to either party. Likewise, the provisions in Part III prescribing relief for defendants who have been subjected to abusive actions⁷⁵¹ do not add other types of procedures to the scope of enforcement procedures. Indeed, their existence supports a

⁷⁴⁷ The Panel notes, moreover, that a suspension is only automatically lifted after 10 days if no proceedings on the merits of the case have been initiated by "a party other than the defendant" in the suspension proceedings under Article 55. The provision on the request for destruction of goods is framed in the context of being without prejudice to other rights of action open to the right holder and the right of the defendant to seek judicial review (Article 59).

⁷⁴⁸ Panel Report, *China – Intellectual Property Rights*, paras. 7.172–7.173.

⁷⁴⁹ The Appellate Body in *US – Section 211 Appropriations Act*, para. 217.

⁷⁵⁰ Such as Article 43 which deals with technical issues with respect to access to evidence for all sides.

⁷⁵¹ See e.g. Articles 48.1, 53.1, 53.2, 55, and 56 of the TRIPS Agreement, as discussed in para. 7.299 below.

conclusion that the defendant in the enforcement procedures specified in Part III is not the right holder.

7.297. The first sentence of Article 41.1 expressly declares the purpose of the procedures that Members shall make available, which is to "permit effective action against any act of infringement of intellectual property rights" covered by the TRIPS Agreement. Relevant to the present dispute is the fact that any act falling within the scope of patent rights covered by the TRIPS Agreement with respect to the subject matter of the patent and undertaken without the consent of the right holder and outside the scope of an applicable limitation or exception is *a priori* an act of infringement.⁷⁵²

7.298. This does not mean that users of IP (and other third parties) do not also have rights in the context of enforcement. These are recognized first, in the general obligation in the second sentence of Article 41.1 (safeguards against abuse) and the general obligation in Article 41.2 that procedures concerning the enforcement of IP rights shall be fair and equitable, and then, in numerous specific obligations. This is consistent with the objectives of the protection and enforcement of IP rights set out in Article 7 of the TRIPS Agreement, which should contribute to a balance of rights and obligations.

7.299. For example, Article 48.1 provides for the indemnification of the defendant if a party at whose request measures were taken has abused enforcement procedures. Articles 50.3 and 50.7 also contain elements with respect to protecting a defendant from abuse of provisional measures. Article 50.7 refers to the authority to order compensation for injury to the defendant. Article 55 provides that a suspension shall not exceed 10 working days unless a party other than the defendant has initiated proceedings to obtain a decision on the merits. Under Article 56, relevant authorities must have the authority to order the applicant to compensate the importer, the consignee and the owner of the goods for injury through wrongful detention of goods. These provisions while requiring Members to provide effective due process in their domestic systems for enforcement of IP rights presuppose that the right holder is the initiator of the proceeding. This leads to the logical conclusion that the abuse of enforcement procedures that Members must safeguard against in the second sentence of Article 41.1 are abuses by right holders when making use of the procedures that the Member has made available to them pursuant to the obligation in the first sentence.

7.300. The TRIPS Agreement does not exclude the possibility of Members having procedures that address the concerns of IP users, among others. For example, the Panel notes that Article 8.2 of the TRIPS Agreement states that "[a]ppropriate measures ... may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology", but these would not be enforcement procedures against acts of infringement as specified in Part III. The European Union itself notes that procedures seeking to revoke or invalidate a patent would more properly fall under Part IV. The Panel finds the provision in the text of Article 62.4 that those procedures will be governed by paragraphs 2 and 3 of Article 41 elucidating. If these types of procedures were enforcement procedures as specified in Part III, there would be no need to specify that they were governed by parts of Article 41 or to refer only to certain parts of Article 41 and not others. The types of procedures described in Article 62.4 were plainly not intended to fall within the scope of the obligations in Article 41.1. The Panel notes that users may also avail themselves of other available legal or administrative procedures. If a user chooses to do so, however, that does not transform those proceedings into an enforcement procedure specified in Part III within the meaning of Article 41.1, first sentence.

7.301. Having reviewed the text in its context and in light of its object and purpose, the Panel confirms that enforcement procedures as specified in Part III permit a right holder (or the government) to seek to stop, prevent, deter or remedy infringement of IP rights provided for in the TRIPS Agreement where the defendant is an alleged unauthorized user of IP-protected subject matter and not the right holder. Having reached a conclusion regarding enforcement procedures as specified in Part III, the Panel now turns to the question of whether the ASI policy is such a procedure.

⁷⁵² Panel Report, *China – Intellectual Property Rights*, para. 7.173. The Panel notes that this finding was taken in the context of copyright protection but considers it equally applicable to the other categories of IP, including patents, that are covered by the TRIPS Agreement.

7.3.5.2.2 Whether the ASI policy is an enforcement procedure as specified in Part III

7.302. Before applying the legal standard set out above, the Panel takes note of China's argument that because the issuing of ASIs is governed by a provision of its general Civil Procedure Law regarding act preservation measures, the ASI policy cannot be aimed at counteracting, preventing, or deterring infringement.⁷⁵³ Article 41.5 of the TRIPS Agreement states that Members are not required "to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general". As it is entitled to do under Article 41.5, China has opted to use the Civil Procedure Law as the mechanism for implementing civil procedures and remedies, including provisional measures under the TRIPS Agreement and has confirmed this in its notification to the Council for TRIPS.⁷⁵⁴ It would be incongruous for the TRIPS Agreement to allow Members to use procedures already existing in their general legal systems to satisfy the obligation to have IP enforcement procedures, notify such to the Council for TRIPS and then exempt those very same procedures from their TRIPS obligations in dispute settlement because they are not dedicated IP laws. The Panel, therefore, does not accept China's argument as to why the ASI policy would not be an enforcement procedure as specified in Part III.

7.303. The Panel recalls its conclusion above that under the ASI policy, Chinese courts are empowered to issue ASIs in the context of SEP litigation.⁷⁵⁵ The European Union notes that in each of the five cases in which ASIs were issued, courts outside China had either already issued injunctions or parallel infringement proceedings were pending when Chinese courts were presented with requests for ASIs. For the European Union, this means that the procedures before the Chinese courts were aimed at ending a situation of unlicensed use that infringed the right holders' SEPs. The European Union argues that the ASI policy is an action taken against infringement in the sense that infringement will end when the litigation is concluded and the parties either agree on a FRAND royalty rate or one is determined by the court.⁷⁵⁶ The Panel notes, however, that the challenged measure, which the European Union contends falls within the scope of the obligation in the second sentence of Article 41.1 (i.e. the ASI policy), is not the SEP litigation (or the ability of SEP implementers to ask a Chinese court to set a FRAND royalty rate). In this respect, the European Union acknowledges that the two are separate but related procedures when it argues that the ASI is an enforcement procedure (at one point specifically arguing that it is a provisional measure under Article 50.3 of the TRIPS Agreement) while maintaining that the SEP litigation is a civil procedure under Article 42.⁷⁵⁷

7.304. The context of the underlying litigation is relevant to, but not determinative of, the Panel's analysis as to whether the ASI policy is an enforcement procedure as specified in Part III. It is true that the ultimate result of the litigation should be the conclusion of a licence, and thus an end to any infringement. In the specific context of a SEP, it is relevant that the right holder has already made a commitment to license the SEP to all comers on FRAND terms. The European Union is correct that the SPC recognized, in its rulings on jurisdiction, that SEP litigation has some similarity to a procedure to address infringement. The SPC concluded, however, that SEP litigation is more in the nature of a contract dispute and that the core issues in each type of dispute are different.⁷⁵⁸

7.305. With respect to the request for the ASI itself, the Panel cannot agree that it is a provisional measure under Article 50 of the TRIPS Agreement. ASIs are provisional but Article 50.3 is part of a set of procedures in Section 3. The safeguards against abuse referred to in that article apply to the two types of provisional measures provided for in Article 50.1, which are (a) injunctions to prevent infringement of an IP right, and (b) orders to preserve evidence of alleged infringement. They do

⁷⁵³ China's first written submission, para. 251. As a factual matter, the Panel notes that in the court decisions in the Xiaomi, OPPO, and Samsung cases, reference was also made to the SPC Provisions.

⁷⁵⁴ See IP/N/1/CHN/1, which lists the Civil Procedure Law twice, as implementing civil and administrative procedures and remedies, as well as provisional measures. See also IP/N/1/CHN/2.

⁷⁵⁵ As noted previously the ASIs may impose a broad range of prohibitions such as enjoining the enforcement, continuation, or filing of infringement claims in jurisdictions outside China and can be enforced through the imposition of cumulative daily fines.

⁷⁵⁶ European Union's second written submission, para. 87.

⁷⁵⁷ European Union's first written submission, paras. 400 and 420.

⁷⁵⁸ SPC decision, *OPPO v. Sharp* (Exhibit EU-8b), p. 7 and p. 9; SPC decision, *OPPO v. Nokia* (Exhibit EU-13b), p. 6; see also United Kingdom's third-party submission, para. 14 referring to paras. 14 and 90 of UK Supreme Court decision in *Unwired Planet*.

not apply to provisional measures in general.⁷⁵⁹ Even under the European Union's expansive reading of what an enforcement procedure as specified in Part III is, which the Panel has rejected above, there is no way that a procedure where the applicant is producing potentially infringing goods could be within the scope of provisional measures under Article 50.3.⁷⁶⁰

7.306. Moreover, the Panel recalls that the European Union itself argues extensively that the purpose and effect of the ASI policy is not to provide procedures for acting against infringement, but rather to provide procedures whereby an implementer may request a Chinese court to prevent the right holder from seeking judicial redress for infringement in another territory. Indeed, the Panel understands the European Union's argument to be that the ASI policy creates barriers to legitimate trade because by prohibiting a right holder from taking actions to enforce its patent in other jurisdictions, the ASIs issued by Chinese courts allow trade in allegedly infringing goods to continue, which may depress trade in non-infringing goods in those jurisdictions.

7.307. The European Union argues that a procedure where the right holder is the defendant can, nevertheless, be an enforcement procedure if through the legal proceeding the right holder is seeking to vindicate its patent and thus its legal entitlement to the exclusive rights thereunder. The Panel understands that the ASI policy is aimed at empowering Chinese courts with the necessary legal tools to address potential conflicts between litigation before them over SEP royalty rates and proceedings brought in other jurisdictions, through the issuance of ASIs.⁷⁶¹ Moreover, as a factual matter, the Panel notes that in none of the proceedings where ASIs were granted were the implementers seeking to invalidate a patent held by the defendant.⁷⁶²

7.308. In summary, the Panel has concluded that an enforcement procedure as specified in Part III permits a right holder (or the government) to seek to stop, prevent, deter, or remedy an infringement of IP rights provided for in the TRIPS Agreement. The SEP litigation in China is brought by the implementer and is not addressing infringement, but rather the determination of a FRAND royalty rate under a licence agreement the right holder has agreed to conclude with the implementer. Under the ASI policy, Chinese courts are able to issue ASIs in response to an action brought by an implementer not the right holder. Moreover, the action taken under the measure, the issuance of an ASI, is not against infringement; indeed, the European Union itself argues that the ASI prevents right holders from taking actions against infringement in other jurisdictions. For these reasons, the Panel concludes that the ASI policy is not within the scope of Article 41.1, first sentence.

7.309. As noted in paragraph 7.284 above, a procedure is only subject to the obligation in the second sentence of Article 41.1 if it falls within the scope of the type of procedures identified in the first sentence. The Panel has concluded that the ASI policy is not an enforcement procedure as specified in Part III so as to permit effective action against any act of infringement of IP rights. The Panel has determined, therefore, that the obligation in the second sentence of Article 41.1 is not applicable to the ASI policy.⁷⁶³ The Panel, thus, will not proceed further with an analysis of the European Union's claim under this provision.

7.4 The European Union's claims concerning the five individual ASI court decisions

⁷⁵⁹ The panel in *China – Intellectual Property Rights* reached a similar conclusion with respect to Article 59, which forms part of a set of procedures in Section 4 and must be understood in that context. See Panel Report, *China – Intellectual Property Rights*, para. 7.215

⁷⁶⁰ Similarly, a request for an ASI from a SEP implementer seeking to enjoin a right holder from taking certain actions cannot be a request for an injunction within the meaning of Article 44 because such proceedings are to order a party to desist from an infringement. The Panel is aware that China notified the "property preservation" provisions of the Civil Procedure Law as its implementing measure under Article 50 (See IP/N/1/CHN/1, p. 5 and IP/N/1/CHN/2). This does not mean, however, that any measure taken under Article 100 (now 103) of the Civil Procedure Law is a provisional measure under Article 50 of the TRIPS Agreement. As noted above, the measure would have to be one of the two measures described in Article 50.1, which do not include ASIs.

⁷⁶¹ See section 7.2.2 above.

⁷⁶² The Panel understands that the State Intellectual Property Office made a review decision that the rights to one of the relevant Chinese patents were wholly invalid. Conversant appealed this decision to the Beijing Intellectual Property Court. Those proceedings were distinct from the proceedings to determine a FRAND royalty rate that were on appeal to the SPC when Huawei requested an ASI. (See SPC, *Huawei v. Conversant*, (Exhibit EU-1b), p. 6).

⁷⁶³ The Panel recalls that under Article 11 of the DSU the Panel will make an objective assessment of the matter before it which includes not only the facts, but also the applicability of the covered agreements.

7.310. In addition to the ASI policy as a whole, the European Union also challenges the decisions to grant ASIs in five specific instances (Huawei v. Conversant, ZTE v. Conversant, OPPO v. Sharp, Xiaomi v. InterDigital, and Samsung v. Ericsson) as individual measures that are, in and of themselves, inconsistent with Article 1.1, first sentence in conjunction with Articles 28.1, 28.2, and 44.1 of the TRIPS Agreement, and Article 41.1 of the TRIPS Agreement.

7.311. China, for its part, has maintained that the five individual ASI decisions expired well before the Panel's establishment and thus the Panel should not make findings and recommendations on them.⁷⁶⁴

7.312. The Panel, therefore, will first determine whether it should make findings on the five individual ASI court decisions.

7.4.1 Whether the Panel should make findings on the issuance of the five individual ASIs

7.313. The five individual ASIs were identified in the European Union's request for consultations and establishment of a panel⁷⁶⁵ and, consequently, fall within the Panel's terms of reference.⁷⁶⁶

7.314. The European Union requested consultations on 18 February 2022 and requested the establishment of a panel on 7 December 2022. The Panel was established on 27 January 2023. As the table below demonstrates, the ASIs in question all ceased to have any legal effect between the parties to the litigation in China well before the Panel was established.

Table 6: Dissolution of the five challenged ASIs

ASI	Dissolution date
Huawei v. Conversant	2 November 2020
Xiaomi v. InterDigital	11 December 2021
ZTE v. Conversant	2 November 2020
OPPO v. Sharp	29 September 2021
Samsung v. Ericsson	7 June 2021

7.315. According to China, this should be sufficient to end the Panel's analysis of the five individual ASIs. China rests its arguments firmly on the fact that, in its view, panels should not make findings or recommendations with respect to measures that no longer existed at the time of the establishment of the Panel if the measures do not meet the criteria established by prior panels for doing so. China has, therefore, requested that the Panel not examine these five ASIs.

7.4.1.1 Summary of the parties' arguments

7.316. China notes that all five of the disputes where ASIs were issued were settled and that, therefore the ASIs, which were provisional in nature, all expired years before panel establishment. China does not dispute that a panel can make findings or recommendations with respect to expired measures but argues that it may only do so if such a panel ruling would contribute to a positive solution to the dispute.⁷⁶⁷ China submits that it has demonstrated that these five ASIs do not satisfy the criteria that panels have previously applied to determine whether making findings or recommendations in respect of an expired measure would further the objective of securing a positive solution to the dispute.⁷⁶⁸ In any event, China submits that it is not the function of a dispute settlement panel when evaluating claims under the TRIPS Agreement to act as a court of appeal in individual cases. Individual court decisions may provide evidence concerning the content and meaning of a Member's domestic law.⁷⁶⁹

7.317. China notes that panels have looked at various factors in determining whether to rule on expired measures but focuses its arguments on the timing of the measures' withdrawal. China argues

⁷⁶⁴ China's first written submission, paras. 172-173.

⁷⁶⁵ WT/DS611/1 and WT/DS611/5.

⁷⁶⁶ WT/DS611/6, para. 2.

⁷⁶⁷ China's first written submission, paras. 172-173, China's second written submission, para. 90 and fn 84.

⁷⁶⁸ China's first written submission, paras. 174 and 280.

⁷⁶⁹ China's first written submission, para. 273, fn 278; China's opening statement at the first meeting, paras. 54-56.

that in the "vast majority" of cases where the measure expired *prior* to establishment of a panel, panels have declined to make findings.⁷⁷⁰ China distinguishes the present situation from one where the measures expired or were withdrawn after panel establishment, which might raise the risk of Members withdrawing a measure to evade panel scrutiny.⁷⁷¹ However, in response to a question from the Panel, China argues that "nothing in either the TRIPS Agreement or the DSU guarantees Members that they will have the ability to challenge provisional measures in dispute settlement".⁷⁷² In China's view, expired provisional measures could provide evidence that a Member's domestic legal framework does not conform to the requirements of Part III, Section 3 of the TRIPS Agreement, but they could not themselves be challenged.⁷⁷³

7.318. In addition to the temporal aspect, China also maintains that if the Panel were to make findings on these five ASIs that would not contribute to a positive solution to the dispute. China notes that each of the ASIs was issued in litigation between specific parties and on the basis of the specific facts and circumstances surrounding each case and they were dissolved after the litigating parties concluded settlements. China argues that findings or recommendations from the Panel would "be meaningless for the parties to the disputes, who were the only ones affected, albeit temporarily, by the court decisions".⁷⁷⁴

7.319. The European Union argues that although the settlements may have ended the litigation between the parties, they continue to impair the benefits accruing to the European Union at the time of the establishment of the panel.⁷⁷⁵ According to the European Union, the settlements do not remove the impairment of the European Union's benefits because they were the result of the conduct that gave rise to the breach.⁷⁷⁶ The European Union, argues that "since the settlements were reached after the right of SEP owners were restricted by the anti-suit injunctions issued in those cases, they constitute a lingering adverse effect of the measures".⁷⁷⁷ According to the European Union, "the licensing terms ultimately agreed by the parties necessarily reflect that imbalance in bargaining power, thus leading SEP owners to settle for below FRAND royalties".⁷⁷⁸ In support of this conclusion, the European Union refers to statements by Chinese courts made regarding the relationship between the issuance of the ASIs and the ultimate settlements.⁷⁷⁹ The European Union argues that the injunctions preventing anti-infringement actions necessarily remove the SEP owners' leverage and put prospective licensees in a position of strength in licensing negotiations.⁷⁸⁰

7.320. In its second written submission, the European Union notes that the settlements reached not only brought the Chinese litigation to an end, but they also brought the foreign infringement proceedings to an end, as the settlements were global in nature. In the European Union's view "the benefits accruing to the European Union thereby remain impaired, as the courts have been denied the possibility to assess the essential questions relating to European Union patents."⁷⁸¹ According to the European Union, pursuant to Article 3.8 of the DSU, the Panel must presume that the alleged breaches of WTO obligations have an adverse impact on the European Union and it is up to China to rebut the charge.⁷⁸²

7.321. The European Union contends, moreover, that it is necessary for the Panel to rule on the five individual ASIs to "clarify that Chinese courts may not continue to apply the anti-suit injunctions,

⁷⁷⁰ China's first written submission, para. 174 referring to Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines II*).

⁷⁷¹ China's first written submission, paras. 174-175.

⁷⁷² China's response to Panel question No. 105 (The Panel asked: "Is it China's position that WTO panels are precluded from making findings on provisional measures that will *necessarily* expire prior to the establishment of a panel?")

⁷⁷³ China's response to Panel question No. 105.

⁷⁷⁴ China's first written submission, para. 176.

⁷⁷⁵ European Union's first written submission, para. 298.

⁷⁷⁶ European Union's response to Panel question No. 28(b).

⁷⁷⁷ European Union's first written submission, paras. 299-300.

⁷⁷⁸ European Union's response to Panel question No. 9(a).

⁷⁷⁹ European Union's response to Panel question No. 28(c), second written submission, para. 48. See also SPC, Top 10 IP Cases and 50 Typical IP cases, 2020 (Exhibit EU-11b) (which stated regarding the Huawei decision that "[t]he ruling in this case led the parties to finally reach a global settlement agreement...").

⁷⁸⁰ European Union's response to Panel question No. 29, para. 115.

⁷⁸¹ European Union's second written submission, para. 51.

⁷⁸² European Union's response to Panel question No. 28(a).

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".⁷⁸³

7.322. The European Union asserts that because the judicial and political authorities in China have "extolled the virtues of the anti-suit injunction system with Chinese characteristics, implementers will be tempted to avail themselves of that possibility in case of a dispute with SEP owners and the courts are encouraged to grant anti-suit injunctions, including worldwide and prospective injunctions".⁷⁸⁴ The European Union argues that Panel findings will therefore aid in preventing such reintroduction and in securing a positive solution to the dispute.⁷⁸⁵

7.323. China disputes both that the five ASIs have lingering effects and that they could be reintroduced. China notes that as the ASIs are not in place the SEP owners are no longer prevented from instituting or resuming infringement proceedings in other jurisdictions.⁷⁸⁶ China argues that the European Union has not demonstrated any lingering effects, but rather based its arguments on simplistic assumptions that the ASIs have a coercive effect and that the implementers were all proposing to pay unreasonable rates.⁷⁸⁷ Moreover, China argues that the prior panel and Appellate Body reports referring to lingering effects as a basis for ruling on measures that expired prior to panel establishment are inapposite as they dealt with the specific context of the economic impact of subsidies, which is entirely different from the present situation.⁷⁸⁸ China also argued during the second substantive meeting that, pursuant to that jurisprudence, whatever effects that do linger from an expired measure would themselves have to be WTO inconsistent.

7.324. Finally, with respect to the risk of reintroduction, China notes that the European Union's analysis relies on its conclusions that Chinese courts are encouraged to grant ASIs whenever SEP implementers request them, a point that China denies.⁷⁸⁹

7.4.1.2 Panel's analysis

7.325. The Panel, before determining whether to address the European Union's claims under the TRIPS Agreement against the five individual ASIs, will first determine the appropriate criteria for evaluating whether to make findings and recommendations regarding expired measures and then apply those criteria to the five ASI decisions with respect to the European Union's claims under the TRIPS Agreement.

7.326. A measure properly identified in a panel request is within a panel's jurisdiction whether it has expired or not⁷⁹⁰ but the DSU is silent on the question as to whether a panel can or should make findings and recommendations on measures that have expired.⁷⁹¹ The Appellate Body has clarified that it is part of a panel's exercise of its inherent powers "to assess objectively whether the 'matter' before it, within the meaning of Article 7.1 and Article 11 of the DSU, has been fully resolved or still requires to be examined following the expiry of the measure at issue" is part of the exercise of its inherent powers.⁷⁹²

7.327. This question has been considered by numerous panels and the Appellate Body in prior disputes with differing results. The Appellate Body has reasoned that "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel."⁷⁹³ The concept of "existence" is, however, not always straightforward.⁷⁹⁴ Although it had not been the usual practice of GATT panels to "rule on measures that, at the time the panel's terms of reference were fixed, were not and would not become effective"⁷⁹⁵, a large distinction between GATT times

⁷⁸³ European Union's first written submission, para. 300.

⁷⁸⁴ European Union's response to Panel question No. 25.

⁷⁸⁵ European Union's first written submission, para. 300.

⁷⁸⁶ China's first written submission, para. 178.

⁷⁸⁷ China's second written submission, paras. 92-93.

⁷⁸⁸ China's first written submission, paras. 179-186.

⁷⁸⁹ China's second written submission, para. 94.

⁷⁹⁰ Panel Reports, *China – Agricultural Producers*, para. 7.82, *Chile – Price Band System*, para. 7.115.

⁷⁹¹ Appellate Body Reports, *China – Raw Materials*, para. 263.

⁷⁹² Appellate Body Report, *EU – PET (Pakistan)*, para. 5.19.

⁷⁹³ Appellate Body Report, *EC – Chicken Cuts*, para. 156.

⁷⁹⁴ Panel Report, *EC – Commercial Vessels*, para. 8.4.

⁷⁹⁵ Panel Report, *US – Gasoline*, para. 6.19.

and today is the existence of the DSU.⁷⁹⁶ Article 3.3 of the DSU sets out the general objective of prompt settlement of disputes and connects the words "prompt settlement", not to "existing" measures or measures "currently in force", but to "measures taken" by a Member, which means measures taken in the past.⁷⁹⁷

7.328. When determining whether to examine measures that expired prior to panel establishment, prior WTO panels have not applied a hard-and-fast rule, but rather have been guided by the general objective of securing a positive solution to the particular dispute.⁷⁹⁸ In some instances, panels have declined to make any findings on the challenged measure; in others, panels have made findings but refrained from making any recommendation; and in other circumstances, panels have made both findings and recommendations.⁷⁹⁹

7.329. Prior WTO panels have looked at the specific circumstances of a given case to determine whether it was appropriate to address claims relating to expired measures.⁸⁰⁰ These circumstances included, among others, the timing of the expiry of a measure⁸⁰¹, whether a measure was included in the terms of reference⁸⁰², reintroduction of the same measure or adoption of another measure that may give rise to certain of the same, or materially similar, WTO inconsistencies by the respondent⁸⁰³, and whether the effects of a measure continued to impair the benefits for a Member under a covered agreement.⁸⁰⁴ The Appellate Body has also emphasized that a party should not be able to use the expiry of a measure as a tool for shielding measures from scrutiny.⁸⁰⁵ None of these considerations is decisive in and of itself, and they do not necessarily exhaust the range of circumstances that panels may take into account when deciding how to exercise their discretion in respect of withdrawn or expired measures.⁸⁰⁶

7.330. China, relying on the reasoning of prior panels, argues that the trend in panel practice in this area leans heavily against making any findings on measures that expired prior to panel establishment.⁸⁰⁷ A trend, if one exists⁸⁰⁸ does not mean that *when* the measure expired (pre- or post- panel establishment) is dispositive of a panel's evaluation of whether making findings or recommendations on that measure would be appropriate. The timing of the expiry of the measure is only one of many factors that a panel should consider when determining whether findings or

⁷⁹⁶ Although there is no one specific provision of the DSU governing this question, it relates to Articles 3.3, 3.4, and 3.7 of the DSU.

⁷⁹⁷ See Panel Report, *China – Agricultural Producers*, para. 7.83. See also Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.182 (referring to Appellate Body Reports *US – Upland Cotton* and *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*). In this case the Appellate Body was looking at the question of whether it should rule on a measure that expired prior to the filing of the notice of appeal.

⁷⁹⁸ Panel Report, *Chile – Price Band System*, paras. 7.115 and 7.195.

⁷⁹⁹ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.468.

⁸⁰⁰ Panel Report, *China – Electronic Payment Services*, para. 7.224.

⁸⁰¹ Panel Report, *EU – PET (Pakistan)*, para. 7.13 and fn 35.

⁸⁰² Panel Reports, *Turkey – Rice*, para. 7.180; *US – Wool Shirts and Blouses*, para. 6.2; and *Indonesia – Autos*, para. 14.9.

⁸⁰³ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.491. See also Panel Reports, *India – Additional Import Duties*, paras. 7.69-7.70; *Argentina – Textiles and Apparel*, para. 6.14; *China – Electronic Payment Services*, para. 7.228.

⁸⁰⁴ Panel Reports, *Indonesia – Autos*, para. 14.206, *US – Upland Cotton*, para. 7.1201, *EC – Poultry*, paras. 250-252, and *Costa Rica – Avocados (Mexico)*, para. 7.47.

⁸⁰⁵ Appellate Body Report, *EU – PET (Pakistan)*, para. 5.39.

⁸⁰⁶ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.468.

⁸⁰⁷ China's first written submission, para. 174 quoting Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.469.

⁸⁰⁸ In reviewing the relevant cases, the Panel notes that in the cases where the relevant measure(s) expired before the establishment of the panel there were eight cases where no findings or recommendations were made (Panel Reports, *Argentina – Textiles and Apparel*, paras. 6.12-6.15; *Chile – Price Band System*, para. 7.115; *China – Agricultural Producers*, paras. 7.80 and 7.92; *China – Electronic Payment Services*, paras. 7.224-7.229, *EC – Approval and Marketing of Biotech Products*, paras. 7.1648-7.1654; *EC and certain member states – Large Civil Aircraft*, para. 7.116 (in this case the parties had agreed *ex ante* that the measures at issue had to exist prior to the establishment of the panel); *EU – Poultry Meat (China)*; and *US – Gasoline*, para. 6.19, and five where findings or recommendations were made (Panel Reports, *Costa Rica – Avocados (Mexico)*, paras. 7.47-7.56, *US – Certain EC Products*, para. 7.1, *US – Upland Cotton*, paras. 7.122 and 7.128; Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.62-7.67; GATT Panel Report, *EEC – Apples (Chile I)*, para. 2.4.)

recommendations would be appropriate. It does not, however, determine the jurisdiction of a panel with regard to that measure.⁸⁰⁹

7.331. Indeed, in those cases where a panel declined to make findings on measures that had expired prior to panel establishment, panels pointed not only to the timing of the expiry, but to a lack of claims of potential reintroduction⁸¹⁰ or that the issues with the challenged measure(s) were dealt with elsewhere.⁸¹¹

7.332. In those cases where panels elected to examine measures that expired prior to their establishment, the potential for reintroduction and the consideration that the effects of the measures could still be felt in relation to the operation of the covered agreements were particularly relevant.⁸¹² This was also true for panels deciding whether to examine measures that expired after their establishment, but before the panel issued its report.⁸¹³

7.333. It is important to recall that WTO dispute settlement does not operate like a domestic judicial system and does not contain specific rules on mootness or ripeness. There is no statute of limitations in the DSU. Members may challenge measures that are one week old or that have been in place for decades. The timing of when to bring a dispute is left to the complainant and may be informed by a variety of factors, including, but not limited to, whether the measure is still legally in force. The fact that a Member may initiate a WTO dispute whenever it considers that any benefits accruing to it are being impaired by measures taken by another Member, pursuant to Article 3.3 of the DSU, "implies that that Member is entitled to a ruling by a WTO panel".⁸¹⁴ A panel must, however, ensure that it limits its findings and recommendations to those that will help secure a positive solution to the dispute.

7.334. In summary, the Panel has jurisdiction over the five individual ASIs. The Panel as part of its inherent authority retains the flexibility to decide not to rule on those measures if doing so would not aid in securing a positive solution to the dispute. In determining whether to exercise its jurisdiction over the five individual ASIs the Panel will be guided by all relevant factors, not only the fact that the measures expired prior to the Panel's establishment.

7.335. In this section, the Panel will determine whether it should make findings on the five individual ASIs with respect to the European Union's claims under the TRIPS Agreement. The question whether

⁸⁰⁹ Panel Report, *China – Agricultural Producers*, para. 7.82.

⁸¹⁰ Panel Reports, *China – Electronic Payment Services*, para. 7.228 and *Argentina – Textiles and Apparel*, paras. 6.12-6.14. The Panel notes that in several of the discussions on reintroduction the issue was not the reintroduction of the measure *vis-à-vis* the traders that were affected by the original measure, but that the type of measure could be imposed again. For example, the panel in *US – Gasoline* noted that one of the reasons for the GATT panel in *EEC – Apples I* to go ahead and examine a measure that expired before its establishment was because it was a seasonal measure and there remained a prospect of its reintroduction. See Panel Report, *US – Gasoline*, para. 6.19. There could be no way for that panel to know whether a reintroduced measure would apply to exactly the same growers, exporters, and importers of apples as the one that expired before the panel's establishment.

⁸¹¹ Panel Reports, *US – Gasoline*, para. 6.19 and *China – Electronic Payment Services*, para. 7.228.

⁸¹² The GATT Panel in *EEC – Apples I* (GATT Panel) noted that the measure was seasonal (GATT Panel Report, *EEC – Apples I*. In *Thailand – Cigarettes (Philippines)* the panel found it useful to look at the expired measure because of the unwritten nature of Thailand's methodology for determining certain costs that VAT would apply to, such that the method used in the expired measures could be used to determine the amounts in the newer versions of the measures. (Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.59-7.67). Similarly, the panel in *Costa Rica – Avocados* decided to make findings with respect to a procedural manual, that although repealed, continued to have an effect on the challenged measures because it was the tool used to guide Costa Rica in the adoption of the challenged measures. (Panel Report, *Costa Rica – Avocados (Mexico)*, paras. 7.47 and 7.53).

⁸¹³ In *EC – Approval and Marketing of Biotech Products*, the panel decided to make findings on the EC's expired general moratorium on the approval of biotech products because there remained a possibility of its reintroduction and such findings would therefore help, in the panel's view, to secure a positive solution to the dispute. (Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.1311-7.1312). Similarly, in *US – Poultry (China)*, the panel proceeded to make findings on an expired measure, in particular, because the respondent had not conceded its WTO inconsistency and given the annual nature of legislation in question, the measure could easily be reimposed. (Panel Report, *US – Poultry (China)*, para. 7.55).

⁸¹⁴ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 52. (emphasis omitted), followed by Appellate Body Report, *EU – PET (Pakistan)*, para. 5.24.

the Panel should make findings on the five individual ASIs with respect to the European Union's claims under China's Accession Protocol will be dealt with in section 7.6.1 below.

7.336. The European Union argues that the five individual ASIs have lingering effects because they coerced the ultimate settlement agreements, which were detrimental to the right holders as "the SEP owners were under pressure to accept below FRAND royalty rates".⁸¹⁵ The European Union also argues that the five individual ASIs (in addition to the ASI policy) have created a chilling effect whereby right holders will be more likely to refrain from bringing infringement actions in Europe or other jurisdictions and settle for fear of facing an ASI from a Chinese court with cumulative daily fines.⁸¹⁶

7.337. The Panel notes that the European Union's claims under the TRIPS Agreement challenging the five individual ASIs are brought under the same provisions of that Agreement as the European Union's claims regarding the ASI policy. Both sets of claims are premised on the same interpretations of Articles 1.1, 28.1, 28.2, 41.1, and 44.1 of the TRIPS Agreement in support of a finding of inconsistency.⁸¹⁷ Moreover, the European Union identified the five individual ASIs as integral parts of the ASI policy.⁸¹⁸ The reasoning in those decisions is dealt with extensively by the Panel in section 7.2.3.1.1.2 above.

7.338. A duplicative analysis of these measures against the same interpretative framework presented by the European Union and already rejected by the Panel would not aid in securing a positive solution to the dispute.⁸¹⁹ The Panel, therefore, declines to make findings with respect to the consistency of the five individual ASIs with the cited provisions of the TRIPS Agreement.

7.339. The Panel, therefore, moves on to the final claims of the European Union under the TRIPS Agreement, with respect to whether China acted consistently with the transparency obligations therein.

7.5 The European Union's claims under the transparency provisions of the TRIPS Agreement

7.340. Transparency is a fundamental feature of the multilateral trading system as embodied in the WTO agreements. The WTO system ensures transparency through various mechanisms including publication, notification, direct interchange between Members, and the work of various WTO bodies. These mechanisms enable Members and economic actors to better understand the conditions imposed by Members governing trade in goods, services, and IP. The transparency obligations in the TRIPS Agreement are contained in Article 63, one of two provisions in Part V – Dispute Prevention and Settlement, the other being Article 64 on Dispute Settlement.

⁸¹⁵ European Union's first written submission, paras. 299, 333, and section 7.3; second written submission, paras. 47-51; and response to Panel question No. 28.

⁸¹⁶ European Union's opening statement at the first meeting of the Panel, para. 60, response to Panel question Nos. 27, 28, and 29.

⁸¹⁷ With regard to Article 1.1, first sentence in conjunction with Article 28.1 of the TRIPS Agreement, compare European Union's first written submission, paras. 313-327 with *ibid.* paras. 344, 349, 354, 359, 365, and 367-368. See also European Union's second written submission, paras. 56-72. With regard to Article 1.1, first sentence in conjunction with Article 28.2 of the TRIPS Agreement, compare European Union's first written submission, paras. 376-380 with *ibid.* paras. 384, 386, 388, 390, and 392-394. See also European Union's second written submission, paras. 73-78. With regard to Article 41.1, second sentence of the TRIPS Agreement, see generally European Union's first written submission, paras. 421-460. See also European Union's second written submission, paras. 79-110. (Indeed, in the context of this claim, the Panel notes that the European Union's arguments in its first written submission regarding the individual ASIs and the ASI policy are not even structurally differentiated but consist of a single set of arguments that seeks to simultaneously demonstrate the inconsistency of both the ASI policy and the individual ASIs.) Regarding Article 1.1, first sentence in conjunction with Article 44.1 of the TRIPS Agreement, compare European Union's first written submission, paras. 465-472 with *ibid.* paras. 475, 477, 479, 481, and 483-484. See also European Union's second written submission, paras. 111-116.

⁸¹⁸ European Union's first written submission, para. 232.

⁸¹⁹ The Panel notes that its decision not to examine the individual decisions rests on the fact that the European Union has presented identical claims against the ASI policy and each of these decisions and that the European Union has argued that these five ASI decisions are part of the ASI policy, which the Panel has already made findings on in section 7.3 above. The Panel's decision does not imply a view as to whether an individual judicial decision can demonstrate an inconsistency with TRIPS obligations.

7.341. Article 63 provides that:

1. Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them. Agreements concerning the subject matter of this Agreement which are in force between the government or a governmental agency of a Member and the government or a governmental agency of another Member shall also be published.

2. Members shall notify the laws and regulations referred to in paragraph 1 to the Council for TRIPS in order to assist that Council in its review of the operation of this Agreement. The Council shall attempt to minimize the burden on Members in carrying out this obligation and may decide to waive the obligation to notify such laws and regulations directly to the Council if consultations with WIPO on the establishment of a common register containing these laws and regulations are successful. The Council shall also consider in this connection any action required regarding notifications pursuant to the obligations under this Agreement stemming from the provisions of Article 6ter of the Paris Convention (1967).

3. 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.

4. Nothing 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.

7.342. The first three paragraphs of Article 63 embody the mechanisms of publication, notification, and direct interchange between Members.⁸²⁰ They reflect a scheme for making information available to relevant stakeholders. They must be understood as part of a regime on transparency that was negotiated by Members to ensure the availability of information while at the same time not creating onerous burdens on Members.⁸²¹ In the context of the TRIPS Agreement, Article 63.1 only requires the publication of certain types of measures: laws and regulations, final judicial decisions and administrative decisions of general application, and bilateral agreements. Similarly, Article 63.3 limits the scope of the type of information that a Member may request.⁸²²

7.343. The European Union's claims are made under Articles 63.1 and 63.3 only. The Panel will address each claim in turn.

⁸²⁰ The practice of circulating requests and responses in the Council for TRIPS additionally serves to assist the Council in its review of the operation of the TRIPS Agreement. See e.g. Guide to the TRIPS Agreement, Appendix 1 Guide to Transparency Under TRIPS, available at https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/app1_e.pdf. In the present case, both the European Union's request for information and China's response were circulated in the Council, as documents IP/C/W/682 and IP/C/W/683 respectively.

⁸²¹ For the negotiating history, see, for example, statements recorded in MTN.GNG/NG11/13, para. 11 (importance of transparency) 16 August 1999, as well as MTN.GNG/NG11/17, paras. 34-35, 23 January 1990, and MTN.GNG/NG11/18, paras. 24-25 (avoidance of undue burden) 27 February 1990. See also Article 63.2, which specifically refers to the Council minimizing the burden on Members in carrying out the notification obligation such as by exploring the possibility of a common registry with WIPO. The Panel notes that in recent years the WTO has developed an online e-TRIPS Submission System to facilitate TRIPS notifications.

⁸²² The Panel notes that the scope of those limitations is an active point of disagreement between the parties, which the Panel will address in more detail below. The reference here is merely to note that the drafters of the TRIPS Agreement did not intend for Members to be obliged to provide any and all information to another Member simply because that Member asked for it pursuant to Article 63.3.

7.5.1 Whether China failed to publish final judicial decisions of general application

7.344. As noted above, Article 63.1 of the TRIPS Agreement provides, relevantly, that final judicial decisions of general application made effective by a Member pertaining to the subject matter of the TRIPS Agreement, shall be published, or where 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.

7.345. The European Union claims that China acted in a manner inconsistent with Article 63.1 of the TRIPS Agreement because it failed to publish the Shenzhen Intermediate People's Court decisions issuing ASIs in *OPPO v. Sharp*⁸²³ and *ZTE v. Conversant*⁸²⁴, and the Wuhan Intermediate People's Court decision issuing an ASI in *Xiaomi v. InterDigital* and its reconsideration decision in that same case.⁸²⁵ The European Union maintains that these decisions are final judicial decisions of general application, made effective by China pertaining to the subject matter of the TRIPS Agreement.⁸²⁶

7.346. China contends that the European Union has failed to demonstrate that China acted inconsistently with Article 63.1 of the TRIPS Agreement because the decisions issuing ASIs identified by the European Union were neither final nor of general application, nor did they pertain to the subject matter of the TRIPS Agreement. In China's view, therefore, these decisions fall outside the scope of Article 63.1.⁸²⁷

7.5.1.1 Summary of the parties' and third parties' arguments

7.347. The European Union argues that the decisions issuing ASIs in *OPPO v. Sharp*⁸²⁸, *ZTE v. Conversant*⁸²⁹, and *Xiaomi v. InterDigital*⁸³⁰ are final judicial decisions of general application, made effective by China pertaining to the subject matter of the TRIPS Agreement, and China was therefore required to publish them in such a manner as to enable governments and right holders to become acquainted with them.⁸³¹ The European Union notes that none of these judicial decisions was available on China Judgments Online.⁸³²

7.348. The European Union submits that the term "final" must be interpreted on the basis of its ordinary meaning, which is "not to be altered or undone"⁸³³, and that the decisions at issue are final because they were not subject to any further review.⁸³⁴ According to the European Union, after a court issues a decision granting an ASI, either party can apply for reconsideration, but there is no possibility for appeal once the reconsideration decision is issued. Thus, for the European Union, the decisions at issue were, or became after reconsideration, final.⁸³⁵ The European Union adds that Article 63.1 does not distinguish between judicial decisions that are provisional measures and those

⁸²³ Shenzhen Intermediate People's Court, *OPPO v. Sharp* (Exhibit EU-4b).

⁸²⁴ Shenzhen Intermediate People's Court, *ZTE v. Conversant* (Exhibit EU-3b).

⁸²⁵ Wuhan Intermediate People's Court, *Xiaomi v. InterDigital* (Exhibit EU-2b) and Wuhan Intermediate People's Court, *Xiaomi v. InterDigital*, reconsideration decision (Exhibit EU-7b). The Panel notes that, in response to panel question No. 136, the European Union clarified that its claim under Article 63.1 included the reconsideration decision in *Xiaomi v. InterDigital*.

⁸²⁶ European Union's first written submission, paras. 603, 622, 645-646; opening statement at the first meeting of the Panel, para. 108; second written submission, paras. 117 and 127.

⁸²⁷ China's first written submission, paras. 323 and 332; and second written submission, paras. 127 and 136.

⁸²⁸ Shenzhen Intermediate People's Court, *OPPO v. Sharp* (Exhibit EU-4b).

⁸²⁹ Shenzhen Intermediate People's Court, *ZTE v. Conversant* (Exhibit EU-3b).

⁸³⁰ Wuhan Intermediate People's Court, *Xiaomi v. InterDigital* (Exhibit EU-2b). The European Union has clarified that this claim also included the reconsideration decision of the Wuhan Intermediate People's Court in *Xiaomi v. InterDigital* (Exhibit EU-7b).

⁸³¹ European Union's first written submission, paras. 604-610, 623-624; and second written submission, paras. 127 and 139.

⁸³² European Union's first written submission, paras. 642 and 645; second written submission, para. 126.

⁸³³ European Union's first written submission, paras. 616-617, (referring to Merriam-Webster Online Dictionary, definition of "final" (Exhibit EU-32)).

⁸³⁴ European Union's opening statement at the first meeting of the Panel, para. 107; and second written submission, para. 121.

⁸³⁵ European Union's first written submission, paras. 626-629.

concerning the substance of the case, and that the temporary nature of the decisions does not change the fact that they are final.⁸³⁶

7.349. The European Union, relying on a prior panel interpretation of Article X:1 of the GATT 1994, submits that judicial decisions are of general application when they establish or revise principles or criteria applicable in future cases.⁸³⁷ The European Union argues that the decisions issuing the ASIs at issue are of general application because they were selected by the SPC and provincial higher people's courts to be mentioned in official Chinese Government publications and considered as typical or model cases or as reference for judicial practice. For the European Union, the qualification as typical cases elevated these decisions and gave them a degree of authoritativeness to establish principles for future cases. The European Union adds that the publications promoting the typical cases specify their significance as giving rules and criteria applicable in future cases.⁸³⁸

7.350. The European Union argues that China has put forward an interpretation of Article 63.1 that would result in excluding from the scope of the transparency obligations all judicial decisions of WTO Members that do not have a doctrine of precedent. In the European Union's view, this would go against the principles of treaty interpretation and would render Article 63.1 meaningless.⁸³⁹ The European Union adds that the rejection of a proposal to limit the publication to judicial decisions with precedential value during the negotiation of the TRIPS Agreement shows that the obligation to publish was not intended to be limited to cases having precedential value. For the European Union, the negotiating history confirms that the judicial decisions do not need to have precedential value to be of general application.⁸⁴⁰

7.351. The European Union maintains that the decisions issuing ASIs were made legally effective by China, as they were immediately enforceable the day they were issued.⁸⁴¹

7.352. The European Union argues that the relevant judicial decisions issuing ASIs pertain to the subject matter of the TRIPS Agreement because they were taken in the context of IP rights enforcement proceedings and pertain, among other things, to the availability, enforcement, and prevention of the abuse of IP rights.⁸⁴² For the European Union, the ASIs had a direct impact on the enforcement of IP rights, as they prohibited IP right holders from enforcing their rights in other jurisdictions.⁸⁴³

7.353. The European Union argues that the relevant judicial decisions issuing ASIs were not published in such a manner as to enable governments and right holders to become acquainted with them.⁸⁴⁴ The European Union submits that, according to the SPC provisions on publication of judgments, China Judgments Online is the official website where all court judgments are supposed to be posted, but the decisions at issue were not posted on that website.⁸⁴⁵ The European Union adds that, even where a decision is not posted on such website, certain information must be posted, and this information cannot be found for the decisions at issue.⁸⁴⁶

7.354. The European Union maintains that not any manner of publication would satisfy the requirement under Article 63.1 but only those modes of publication that would supply knowledge of the decisions that is adequate, so as to know them in a "more or less complete" way.⁸⁴⁷ For the

⁸³⁶ European Union's second written submission, para. 121.

⁸³⁷ European Union's first written submission, para. 618 (referring to Panel Report, *Japan – Film*, para. 10.388); second written submission, para. 122.

⁸³⁸ European Union's first written, submission, paras. 631-640; second written submission, para. 123.

⁸³⁹ European Union's opening statement at the first meeting of the Panel, para. 107; and second written submission, para. 119.

⁸⁴⁰ European Union's second written submission, para. 123 (referring to Communication from Switzerland, Draft Amendment to the General Agreement on Tariffs and Trade on the Protection of Trade-Related Intellectual Property Rights, MTN.GNG/NG11/W/73, 10 May 1990.

⁸⁴¹ European Union's first written submission, para. 630; and second written submission, para. 121.

⁸⁴² European Union's first written submission, para. 625.

⁸⁴³ European Union's opening statement in the first meeting of the Panel, para. 107. See also European Union's second written submission, para. 124.

⁸⁴⁴ European Union's first written submission, paras. 641 and 644.

⁸⁴⁵ European Union's first written submission, paras. 642 and 645; second written submission, para. 126.

⁸⁴⁶ European Union's first written submission, paras. 642 and 643.

⁸⁴⁷ European Union's second written submission, para. 125 (referring to Panel Report, *EC – IT Products*, para. 7.1086); second written submission, para. 125.

European Union, publication of the decisions at issue on unofficial websites or social media accounts does not meet the requirements of Article 63.1, as China needs to make them available through an appropriate medium that would supply traders and governments with adequate knowledge.⁸⁴⁸

7.355. China maintains that the decisions identified by the European Union were neither final nor of general application nor did they pertain to the subject matter of the TRIPS Agreement, thus falling outside the scope of the publication obligation in Article 63.1 of the TRIPS Agreement.⁸⁴⁹

7.356. China contends that a final judicial decision is one that conclusively resolves the dispute, such as a final judgment on the merits or a dismissal of the complaint on other grounds.⁸⁵⁰

7.357. China argues that the relevant judicial decisions issuing ASIs are preliminary procedural rulings and not final judicial decisions on the merits. For China, the fact that act preservation rulings are not subject to appeal following reconsideration does not change their character as preliminary procedural rulings.⁸⁵¹

7.358. China agrees that final judicial decisions are of general application when they establish or revise principles or criteria applicable in future cases.⁸⁵² China argues, however, that the relevant judicial decisions issuing ASIs are not of general application because they were three intermediate courts applying existing legal standards for the issuance of act preservation measures to the facts of each case, and they have no degree of authoritativeness in the sense of establishing or revising principles or criteria applicable in future cases. China adds that those decisions could not have established or revised principles applicable in future cases because China is not a case law country and has no concept of *stare decisis*.⁸⁵³

7.359. China maintains that the type of judicial system of each Member should be taken into account in assessing whether a decision is of general application. For China, measures of general application are those addressing situations of rulemaking, rule interpretation or rule clarification, and in systems like China, where there is no rulemaking through judicial decisions, only judicial decisions that amount to situations of rule interpretation or rule clarification should be considered of general application. According to China, under its legal system, guiding cases would usually meet that description.⁸⁵⁴ China submits that typical cases are not selected as guiding cases and do not have any binding or guiding effect on other courts or other cases. China argues that these cases are selected and published so that people's courts may refer to them as they deem appropriate and so that the legal profession and the general public may refer to them for educational and research purposes.⁸⁵⁵

7.360. China contends that the relevant judicial decisions issuing ASIs do not pertain to the subject matter of the TRIPS Agreement because they are not related to any of the issues of IP protection regulated under the Agreement. According to China, the judicial decisions issuing ASIs pertain to whether the applicant demonstrated a need for a provisional act preservation measure under China's Civil Procedure Law, and the underlying proceedings (for the determination of FRAND rates) pertain to the determination of licence terms for the relevant patents in accordance with FRAND principles, which is not a matter regulated under the TRIPS Agreement. Furthermore, China argues, neither the ASI proceedings nor the underlying proceedings pertain to the enforcement and prevention of the abuse of IP rights because the TRIPS Agreement only deals with enforcement procedures that WTO Members must make available under their domestic law to permit action against acts of infringement.⁸⁵⁶

7.361. China maintains that the only way in which it can be argued that the ASIs pertain to the enforcement of IP rights is to argue that these decisions may temporarily affect the incentives of

⁸⁴⁸ European Union's second written submission, para. 126.

⁸⁴⁹ China's first written submission, para. 323; second written submission, para. 127.

⁸⁵⁰ China's first written submission, para. 324.

⁸⁵¹ China's first written submission, para. 324.

⁸⁵² China's first written submission, para. 325 (referring to Panel Report, *Japan – Film*, para. 10.388).

⁸⁵³ China's first written submission, paras. 326 and 331.

⁸⁵⁴ China's response to panel question No. 144, paras. 166-168 (referring to Panel Report, *US – Countervailing and Anti-Dumping Duties*, paras. 7.35-7.36).

⁸⁵⁵ China's first written submission, para. 327; and response to panel question No. 143, para. 165.

⁸⁵⁶ China's first written submission, para. 324; response to Panel question No. 62, paras. 94-96; and response to question No. 132, paras. 142-144.

patent holders to have recourse to enforcement procedures available under the law of other Members. For China, this is an issue of private international law on which the TRIPS Agreement is silent, as it does not impose disciplines relating to the application or implementation of enforcement procedures maintained by other Members. China argues that, in any event, the issuance of ASIs does not itself have any impact on the availability and application of enforcement procedures in other WTO Members because whether patent holders opt to utilize enforcement procedures is a decision taken by private actors, which might be influenced by a number of considerations.⁸⁵⁷

7.362. In response to the Panel's questions, China explains that those decisions were published through official WeChat accounts or reports by the respective courts.⁸⁵⁸ China also states that it takes no position on whether this form of publication would comply with the manner of publication specified in Article 63.1. China, instead, maintains that it was under no obligation to publish the identified decisions.⁸⁵⁹

7.363. Australia considers that if a judicial decision is not subject to further rights of appeal or review and pertains to the subject matter of the TRIPS Agreement, it is covered by the transparency obligations, regardless of whether a Member has a civil or common law system. In Australia's view, the decision need not be legally binding, but only have a degree of authoritativeness issued by certain judicial bodies.⁸⁶⁰ Australia also considers that Article 63.1 requires that the judicial decision be generally available through an appropriate medium rather than simply be made publicly available.⁸⁶¹ Moreover, Australia argues that it is not enough that a Member only publish some or partial decisions because full judgments with reasoning are needed for Members and interested parties to become familiar with them.⁸⁶² In Australia's view, therefore, a Member must publish the judicial decision in full.⁸⁶³

7.364. Canada is of the view that the term "final" refers to judicial decisions that mark the end of a process.⁸⁶⁴ Similarly, Korea considers that a final judicial decision is one that concludes an action or proceeding or the result of the judicial process, or, in other words, incorporates the definitive determination of a matter submitted to a court.⁸⁶⁵ Korea observes that the panel interpretations of the notion of judicial decisions of general application in the context of Article X:1 of the GATT 1994 provide useful guidance and sees no reason for the Panel to deviate from such an interpretation of the same term as used in Article 63.1 of the TRIPS Agreement.⁸⁶⁶

7.365. The United Kingdom is of the view that the term "final judicial decisions" is not qualified by the term "of general application", and that if Article 63.1 applied only to judicial decisions that establish or revise principles or criteria applicable in future cases, it could have the effect of excluding all judicial decisions from legal systems that do not have a doctrine of precedent or that do not recognize that judicial decisions may bind courts in future cases. According to the United Kingdom, such exclusion would significantly limit the scope and thus the effectiveness of the transparency principle and could not have been the intention of the drafters.⁸⁶⁷

⁸⁵⁷ China's response to Panel question No. 62, para. 97; and response to Panel question No. 132, para. 144.

⁸⁵⁸ China's response to Panel question No. 60, para. 93; and response to Panel question No. 138, para. 152.

⁸⁵⁹ China's response to Panel question No. 138, para. 153.

⁸⁶⁰ Australia's third-party submission, para. 53 (referring to Panel Report, *EC – IT Products*, para. 7.1027); response to Panel question No. 10, para. 9.

⁸⁶¹ Australia's third-party submission, para. 55 (referring to Panel Report, *EC – IT Products*, para. 7.1084).

⁸⁶² Australia's third-party submission, para. 57.

⁸⁶³ Australia's third-party submission, para. 56 (referring to Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.27).

⁸⁶⁴ Canada's response to Panel question No. 11, paras. 20-21 (referring to Oxford English Dictionary, definition of "final" (Exhibit CAN-2), paras. 1.a and 2.a).

⁸⁶⁵ Korea's third-party statement, para. 18 (referring to Merriam-Webster online dictionary, definition of "final").

⁸⁶⁶ Korea's third-party statement, paras. 14-17 (referring to Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*), paras. 7.35-7.36.

⁸⁶⁷ United Kingdom's third-party submission, para. 45; third-party statement, paras. 22-23; and responses to Panel question No. 10, para. 16.

7.5.1.2 Panel's analysis

7.366. This claim concerns decisions issuing ASIs in three cases and a reconsideration decision upholding one of them. The claim does not concern the SPC's decision issuing an ASI in Huawei v. Conversant or the reconsideration decision in that same case, which were published on China Judgments Online on 26 and 25 February 2021, respectively, and also in the relevant judgments digest at that time.⁸⁶⁸ Nor does the European Union's claim concern Samsung v. Ericsson, which was not designated a typical case.

7.367. Based on the language of Article 63.1, and the specific circumstances of this dispute, to establish that China acted in a manner inconsistent with that provision, the European Union must demonstrate that:

- a. the decisions are within the scope of Article 63.1 because they: (a) are final judicial decisions; (b) are of general application; (c) are made effective by China; and (d) pertain to the subject matter of the TRIPS Agreement; and
- b. China failed to publish or make publicly available those decisions within the scope in such a manner as to enable governments and right holders to become acquainted with them.

7.5.1.2.1 Final judicial decisions

7.368. The Panel notes that the obligation under Article 63.1 applies to "final judicial decisions". Each of the measures at issue under this claim was issued by a court in the process of civil litigation and is therefore "judicial". Although China consistently refers to them as "rulings" it does not dispute that they constitute judicial decisions within the meaning of Article 63.1. The Panel notes that a judicial ruling is a court's "decision" on a matter presented in a lawsuit, which could refer to a decision on the merits (also often referred to as the judgment), and which can be final or non-final. A ruling could also refer to a court's decision on a party's motion or application on a procedural matter (such as a request for an injunction), which could also be final or non-final. A judicial ruling is a type of judicial decision and, therefore could fall within the scope of the publication obligation in Article 63.1 if it is final and of general application.

7.369. The parties disagree on the interpretation of a "final" judicial decision within the meaning of Article 63.1 and its application to the judicial decisions at issue. The Panel notes that the ordinary meanings of the term "final" include "leaving nothing to be looked for or expected; ultimate" and "[p]utting an end to something, *spec.* to uncertainty or conflict; not to be altered; conclusive".⁸⁶⁹ The question for the Panel is whether a "final judicial decision" in Article 63.1 refers only to a decision at the end of a legal proceeding that provides a conclusive resolution of the dispute between the parties, notably a decision on the merits, or whether a "final judicial decision" can also refer to a procedural decision made at a preliminary stage that provides a conclusive resolution of the particular issues that it addresses.

7.370. The context within the TRIPS Agreement shows that when the drafters wished to refer to "decision[s] on the merits of a case", they did so explicitly. This phrase is used in several instances in Part III (in Articles 41.3, 41.4, 50.6, and 55) but not in Article 63.1, which instead refers to "final judicial decisions". There is no reason to believe that the drafters of the TRIPS Agreement intended to equate final judicial decisions in Article 63.1 with decisions on the merits.

7.371. The stated purpose of the obligation in Article 63.1 is "to enable governments and right holders to become acquainted" with measures pertaining to a range of broad aspects of IP rights. The obligation covers not only laws, regulations, and bilateral agreements, but also final judicial decisions and administrative rulings that are of general application. The purpose and coverage of the obligation indicate that it is designed to create an updated reference source regarding each

⁸⁶⁸ The SPC IP Tribunal published Judgment Digests on 26 February 2021 that, among other things, extracted two adjudication rules from Huawei v. Conversant regarding factors to consider when issuing ASIs and the setting of daily penalties. An English translation of the Judgment Digests was published online on 26 April 2021. (Judgment Digests of the Intellectual Property Court of the Supreme People's Court (2020) (Exhibit EU-60)).

⁸⁶⁹ *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Oxford University Press, 1993), Vol. 1, p. 950.

Member's IP system.⁸⁷⁰ Provisional measures and the way in which a Member makes them available are an integral part of a Member's IP system, as reflected in Section 3 of Part III of the TRIPS Agreement. Within a given system, a judicial decision may serve as a reference regarding the authority to adopt certain types of provisional measures, regardless of the stage of a legal proceeding at which it was made, provided that it is conclusive as to the issues that it addresses. Such a judicial decision can be an important reference for governments and right holders, even though it is not a decision on the merits of the underlying dispute.

7.372. In view of the above considerations, the Panel finds that "final" judicial decisions in the context of Article 63.1 refer to judicial decisions that are final as to the issues that they address, in the sense that they are no longer subject to review. In this context, "final" judicial decisions are not limited to decisions on the merits or to decisions taken latest in time in a legal proceeding.

7.373. Turning to the measures at issue, the Panel recalls that this claim concerns the following decisions:

- a. the Shenzhen Intermediate People's Court's decision to issue an ASI in ZTE v. Conversant⁸⁷¹;
- b. the Wuhan Intermediate People's Court's decision to issue an ASI in Xiaomi v. InterDigital⁸⁷² and its reconsideration decision in the same case⁸⁷³; and
- c. the Shenzhen Intermediate People's Court's decision to issue an ASI in OPPO v. Sharp.⁸⁷⁴

7.374. The Panel notes that the English translations of the decisions as well as of Chinese legal texts relevant to this claim also use the term "ruling" to refer to actions taken by Chinese courts. The Panel understands that there is no substantive difference between the terms "ruling" and "decision", and they have been used interchangeably by the parties.⁸⁷⁵ As Article 63.1 refers to final judicial decisions, the Panel will refer to these as "decisions" hereinafter, to avoid confusion.

7.375. The Panel notes that ASIs are act preservation measures issued under China's Civil Procedure Law.⁸⁷⁶ According to Article 108 (now 111) of that law, after a court issues a decision granting an act preservation measure, either party can apply for reconsideration of such decision within five days. The execution of the decision is not suspended during the time of reconsideration, and a reconsideration can only be granted once.⁸⁷⁷ Article 154 (now 157) of China's Civil Procedure Law gives a right to appeal certain types of decisions, but act preservation measures are not among them.⁸⁷⁸

7.376. The decisions issuing ASIs in ZTE v. Conversant and OPPO v. Sharp were not subject to a request for reconsideration. The other decision issuing an ASI in Xiaomi v. InterDigital was subject to a request for reconsideration that was rejected 70 days after it was filed. Based on its content, the Panel considers that the decision on reconsideration is not a stand-alone decision but rather complements the reasoning in the decision issuing the ASI without restating the order. Consequently, the decision issuing the ASI in that case must be read together with the reconsideration decision. Therefore, according to China's Civil Procedure Law, all three decisions issuing ASIs that are the subject of the European Union's claim under Article 63.1 were final with regard to the issues that they addressed.

7.377. Based on the above, the Panel finds that the judicial decision issuing an ASI in ZTE v. Conversant, the judicial decision issuing an ASI in Xiaomi v. InterDigital, read together with the

⁸⁷⁰ The interests of the private parties to the legal proceeding in which a judicial decision is made are addressed in Article 41.3.

⁸⁷¹ Shenzhen Intermediate People's Court, ZTE v. Conversant (Exhibit EU-3b).

⁸⁷² Wuhan Intermediate People's Court, Xiaomi v. InterDigital (Exhibit EU-2b).

⁸⁷³ Wuhan Intermediate People's Court, Xiaomi v. InterDigital, reconsideration decision (Exhibit EU-7b).

⁸⁷⁴ Shenzhen Intermediate People's Court, OPPO v. Sharp (Exhibit EU-4b).

⁸⁷⁵ See e.g. the discussions in section 7.2.3 above on the existence of the ASI policy and section 7.4.1 above on whether the Panel should examine the European Union's claims against these decisions as individual measures even though they expired prior to the Panel's establishment.

⁸⁷⁶ China does not dispute this. (See e.g. China's first written submission, para. 286).

⁸⁷⁷ Civil Procedure Law 2017 (Exhibit EU-43b).

⁸⁷⁸ Civil Procedure Law 2017 (Exhibit EU-43b).

reconsideration decision in that same case, and the judicial decision issuing an ASI in *OPPO v. Sharp* are all "final" judicial decisions within the meaning of Article 63.1 of the TRIPS Agreement.

7.5.1.2.2 Of general application

7.378. The Panel observes that the obligation under Article 63.1 of the TRIPS Agreement applies to final judicial decisions "of general application".

7.379. The text of Article 63.1 of the TRIPS Agreement contains language parallel to that in Article X:1 of the GATT 1994, in which the phrase "of general application" qualifies "judicial decisions and administrative rulings" but without the word "final". Given the similarities between their respective contexts and stated purposes, the Panel considers that prior interpretation of this phrase in Article X:1 can be instructive in the interpretation of the same phrase in Article 63.1. Notably, the panel in *Japan – Film* explained that, inasmuch as the obligation in Article X:1 applies to all administrative rulings "of general application", it should also extend to those made in individual cases that "establish or revise principles or criteria applicable in future cases".⁸⁷⁹ The Panel considers that the same applies to the final judicial decisions covered by Article 63.1 of the TRIPS Agreement.

7.380. The parties agree that a final judicial decision is of general application within the meaning of Article 63.1 if it establishes or revises principles or criteria applicable in future cases.⁸⁸⁰ However, the parties disagree as to which type of final judicial decision has this effect within China's legal system and whether such a decision must have precedential value.

7.381. The Panel emphasizes that its task here is to determine whether each of the relevant ASI decisions, taken individually, is of general application in the context of the transparency obligation in Article 63.1 of the TRIPS Agreement.⁸⁸¹ In contrast, the Panel's analysis in section 7.2.3.2 above determined whether the ASI policy — as a whole — is a rule or norm of general and prospective application.

7.382. In the present case, the content of each final judicial decision at issue concerns the availability of a remedy under China's general law of civil procedure (i.e. an act preservation measure) in a specific situation (i.e. actual or potential parallel litigation regarding a SEP in China and elsewhere), where the measure has the nature of an ASI. The content of each final judicial decision at issue under this claim also concerns the determination of a potential fine for non-compliance. Although each decision was addressed individually to specific parties, individual final judicial decisions are not excluded *a priori* from the scope of the obligation in Article 63.1 of the TRIPS Agreement if they establish or revise principles or criteria regarding a general remedy applicable in future cases concerning other parties in a similar situation.

7.383. The Panel distinguishes two aspects of its assessment: (a) the establishment or revision of principles or criteria in given individual cases, and (b) their applicability in future cases. As regards (a), the Panel will assess whether the final judicial decisions at issue establish principles or criteria, whether they revise principles or criteria, such as by new interpretation or clarifications, or whether they merely reiterate previously established principles or criteria.⁸⁸² In the Panel's view, a decision that determines that an existing provision can be applied in a novel fact situation breaks new ground and amounts to a revision of a principle or criteria. As regards (b), the Panel will, as necessary, assess whether any new or revised principles or criteria are meant to be applicable in future cases. An interpretation or clarification of a previously established principle or criteria in a judicial decision may be intended to serve as a reference for other courts, and therefore be considered generally applicable, whether it is a binding authority or merely persuasive. Even if such a final judicial decision is not formally binding, foreign governments and right holders will not necessarily be able to become

⁸⁷⁹ Panel Report, *Japan – Film*, para. 10.388. (emphasis added)

⁸⁸⁰ European Union's first written submission, para. 618 and second written submission, para. 122 (referring to Panel Report, *Japan – Film*, para. 10.388); China's first written submission, para. 325 (referring to Panel Report, *Japan – Film*, para. 10.388).

⁸⁸¹ The Panel recalls that, in section 7.4.1.2 above, the Panel concluded that it would not make findings with respect to the European Union's claims under the TRIPS Agreement against the five individual ASI decisions. Although the Panel is examining the content of those decisions to determine whether they are of general application, the findings here relate solely to whether China was obliged to publish them, in the context of Article 63.1.

⁸⁸² See generally Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 7.35-7.36.

acquainted with a Member's IP system if the judicial decision is not published or otherwise made publicly available.⁸⁸³

7.384. The Panel finds confirmation of this last point in the drafting history of the TRIPS Agreement. The composite draft text of 12 June 1990 contained both the term "of general application" and the term "of a precedential value" in square brackets.⁸⁸⁴ Subsequent drafts maintained the phrase "of general application" while the phrase "of a precedential value" was removed, which suggests that precedential value in the sense of binding authority was not intended to be a requirement.⁸⁸⁵

7.385. The SPC has noted that *Huawei v. Conversant* was the first case of an act preservation measure issued in China in the nature of an ASI (specifically, an anti-enforcement injunction) and that the case explored the daily fine system for the first time.⁸⁸⁶ The Panel concluded in paragraphs 7.102 to 7.107 above that evidence before the Panel demonstrates that *Huawei v. Conversant* set out a new legal path for the issuance of ASIs in the context of SEP litigation, and the penalties for non-compliance with such orders, that was not derived from any prior interpretation of the law.⁸⁸⁷ The intermediate people's courts in *ZTE v. Conversant*, *Xiaomi v. InterDigital*, and *OPPO v. Sharp*, each put forward a similar legal approach to that articulated in the SPC decision in *Huawei v. Conversant* and the reconsideration decision in the same case (made on 28 August 2020 and 11 September 2020, respectively). The Panel will, therefore, examine the ASI decisions of the intermediate people's courts to determine whether these decisions established or revised principles or criteria through new interpretations or clarifications beyond what the SPC set out in *Huawei v. Conversant*.⁸⁸⁸

7.386. With respect to the decision issuing an ASI in *ZTE v. Conversant*, the Panel observes that:

- a. this was the first ASI issued by the Shenzhen Intermediate People's Court (on 29 September 2020), being granted in the wake of the SPC decision in *Huawei v. Conversant*;
- b. the decision enjoined *Conversant* from enforcing an injunction issued by the Düsseldorf District Court against *ZTE* to prevent infringement of its European patent, as the SPC decision had done as regards *Huawei* with respect to the same patent family that was at issue in the *Huawei* case;
- c. the decision provided for a fine in case of non-compliance calculated on a cumulative daily basis, as did the SPC decision in *Huawei v. Conversant*;
- d. the decision was issued in accordance with the same provisions of the Civil Procedure Law as the SPC decision in *Huawei v. Conversant*.

7.387. In the Panel's view, the record does not show that the Shenzhen Intermediate People's Court decision established or revised principles or criteria. Rather, it appears to have applied an interpretation already enunciated by the SPC in *Huawei v. Conversant* to a situation with similar

⁸⁸³ The Panel notes that the Panel in *EC – IT Products* referred to the concept of a "degree of authoritativeness" to determine whether an instrument could be considered a law, regulation, judicial decision, or administrative ruling at all. See Panel report, *EC – IT Products*, paras. 7.1027-7.1029. In the present case, the Panel has already determined that the measures are final judicial decisions.

⁸⁸⁴ GATT document MTN.GNG/NG11/W/12/Rev.1, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods – Compilation of Written Submissions and Oral Statements – Prepared by the Secretariat – Revision, 5 February 1988; restricted GATT document No. 1404, Composite Draft Text, 12 June 1990.

⁸⁸⁵ This means that Members with judicial systems without binding precedent are not excused from publication but will have to determine on a case-by-case basis whether a particular decision should be published depending on its significance.

⁸⁸⁶ SPC, Top 10 IP Cases and 50 Typical IP Cases, 2020 (Exhibit EU-11b), case II.

⁸⁸⁷ The Panel notes that although the SPC decision in *Huawei v. Conversant* was published on China Judgments Online several months after it was handed down, China has not contended that it published that decision because it was required to do so under Article 63.1 of the TRIPS Agreement. The Panel, therefore, makes no inference as to the status of the other decisions as being final and of general application from the fact that the decision in *Huawei v. Conversant* was published.

⁸⁸⁸ The Panel recalls its findings in section 7.2.3.1.1.2 above that there were some differences between the SPC decision in *Huawei v. Conversant* and the subsequent decisions of the intermediate people's courts issuing ASIs.

facts. Accordingly, the Panel does not find that the decision issuing the ASI in ZTE v. Conversant established or revised principles or criteria applicable in future cases.

7.388. Turning to the decision of the Wuhan Intermediate People's Court to issue an ASI in Xiaomi v. InterDigital, the Panel observes that:

- a. Xiaomi applied for the ASI prior to the SPC's decision in Huawei v. Conversant;
- b. although this was the first ASI issued by the Wuhan Intermediate People's Court in the context of SEP litigation (on 23 September 2020), it too was issued in the wake of the SPC decision in Huawei v. Conversant;
- c. the scope of the ASI was much broader than the one in Huawei v. Conversant. It not only enjoined InterDigital from enforcing an injunction already requested in a foreign court (in this case, the District Court of Delhi) and enjoined InterDigital to withdraw or suspend the injunctions applied for in India but also, for the first time in China, it enjoined the patent owner from applying for or enforcing injunctions anywhere in the world, and from requesting any court anywhere in the world to determine the SEP licence fee rates or licence fee disputes;
- d. the decision provided for a fine in case of non-compliance calculated on a cumulative daily basis, as did the SPC decision in Huawei v. Conversant;
- e. the decision was issued in accordance with the same provisions of the Civil Procedure Law⁸⁸⁹ cited by the SPC in Huawei v. Conversant but it also cited specific articles of the SPC Provisions, which were not cited by the SPC in Huawei v. Conversant;
- f. the reconsideration decision confirmed that the ASI issued in this case met the conditions of eligibility for act preservation measures under Article 100 (now 103) of China's Civil Procedure Law and the SPC Provisions. In particular, the reconsideration decision confirmed that the global scope of the ASI was not inappropriate, and provided a reasoned explanation for the setting of a cumulative daily fine.⁸⁹⁰

7.389. The availability of a worldwide ASI is not expressly articulated in the Civil Procedure Law, the SPC Provisions, or China's legal practice, other than in two subsequent decisions.⁸⁹¹ The scope of the conduct covered by the ASI in Xiaomi v. InterDigital, and the decision's citation of the SPC Provisions, neither of which was discussed in the SPC decision in Huawei v. Conversant, indicate that the decision issuing the ASI in Xiaomi v. InterDigital, read together with the reconsideration decision in the same case, established principles or criteria through a new interpretation or clarification. It is difficult to see how governments or right holders can become acquainted with the availability of this broad remedy that could affect incentives with respect to the enforcement of their IP rights without the decisions in Xiaomi v. InterDigital being published or made publicly available, even where limited information on such decisions has been made available.

7.390. The value of this new interpretation or clarification as a reference for Chinese courts in other lawsuits was recognized by the Hubei Province Higher People's Court in its overview of juridical protection of IP and top 10 typical cases of Hubei courts in 2020, which listed Xiaomi v. InterDigital as one of the 10 top (or big) typical (or model) cases (十大典型案例).⁸⁹² The case was also included as a typical (or model) case in the Hubei Province Higher People's Court Work Report on Interpretation of Typical Cases, in which that court described its typical (or model) significance as follows:

[T]he case provides a useful practice for China to use anti-suit injunctions in cross-border civil lawsuits to maintain its own jurisdiction, and to ensure the smooth progress of global business activities of enterprises through judicial decisions, greatly

⁸⁸⁹ It also referred to Article 154(1)(4) (now 157), regarding the requirement of writing.

⁸⁹⁰ Wuhan Intermediate People's Court, Xiaomi v. InterDigital, reconsideration decision (Exhibit EU-7b), p. 12.

⁸⁹¹ OPPO v. Sharp (considered below) and Samsung v. Ericsson (not at issue under this claim).

⁸⁹² Hubei Province Higher People's Court, 10 typical cases (Exhibit EU-74b).

*improving the ability of Chinese courts to participate in the formulation of international standard rules for judicial protection of intellectual property rights.*⁸⁹³

7.391. That description of the case's significance has not been overruled or replaced by subsequent actions as far as the Panel is aware. Based on the foregoing analysis, the Panel finds that the new interpretation or clarification of the Civil Procedure Law and SPC Provisions in *Xiaomi v. InterDigital*, which serves as a reference for future cases, is of general application within the meaning of Article 63.1 of the TRIPS Agreement.

7.392. The Panel observes the following with respect to the decision issuing an ASI in *OPPO v. Sharp*:

- a. this was the second ASI issued by the Shenzhen Intermediate People's Court (on 16 October 2020), following the same court's decision in *ZTE v. Conversant*, and other court decisions in *Huawei v. Conversant* and *Xiaomi v. InterDigital*;
- b. the scope of the ASI was similar to that issued in *Xiaomi v. InterDigital*, albeit expressed in more general terms. It enjoined Sharp from initiating new patent infringement lawsuits, and/or applying for new judicial injunctions or similar relief against OPPO and its affiliates in the courts of other countries or regions, based on all patents, parts of patents or a certain patent involved in this case. The decision was narrower than *Xiaomi* in two respects: it did not enjoin Sharp from bringing other lawsuits within China, and it did not prohibit Sharp from initiating litigation in other jurisdictions to obtain a determination of SEP licence fee rates;
- c. the decision provided for a fine in case of non-compliance calculated on a cumulative daily basis, as did the decisions in the three previous cases;
- d. the decision was issued in accordance with provisions of China's Civil Procedure Law and the SPC Provisions that had been cited in previous decisions.⁸⁹⁴

7.393. In the Panel's view, the Shenzhen court did not establish or revise principles or criteria in this case, rather, it appears to have applied criteria already enunciated by itself, the SPC, or the Wuhan court. Accordingly, the Panel finds that the decision issuing an ASI in *OPPO v. Sharp* did not establish or clarify principles applicable in future cases.

7.394. In summary, the Panel finds that:

- a. the decisions issuing ASIs in *ZTE v. Conversant* and *OPPO v. Sharp* did not establish or revise principles or criteria and are therefore not "of general application" within the meaning of Article 63.1 of the TRIPS Agreement; and
- b. the decision issuing an ASI in *Xiaomi v. InterDigital*, read together with the reconsideration decision in the same case, established principles or criteria through a new interpretation or clarification, which serves as a reference for future cases such that it is "of general application" within the meaning of Article 63.1 of the TRIPS Agreement.

7.395. The Panel will now continue its examination of whether the decision in *Xiaomi v. InterDigital* satisfies the remaining elements that define the scope of Article 63.1.

7.5.1.2.3 Made effective by a Member

7.396. The Panel observes that the obligation in Article 63.1 applies to final judicial decisions of general application that have been "made effective" by a Member.

7.397. It is not disputed that the decision issuing an ASI in *Xiaomi v. InterDigital* was made by a Chinese court pursuant to, among other things, Article 100 (now 103) of the Civil Procedure Law,

⁸⁹³ Hubei Province Higher People's Court, Work Report 2021: Interpretation of Typical Cases II, 22-01-2022 (Exhibit EU-102), p. 3. (emphasis added)

⁸⁹⁴ Shenzhen Intermediate People's Court, *OPPO v. Sharp* (Exhibit EU-4b), p. 11.

and that the decision itself stated that it was made "with immediate effect".⁸⁹⁵ Execution of the decision was not suspended during the reconsideration, pursuant to Article 108 (now 111) of the Civil Procedure Law. The request for reconsideration was rejected and the decision issuing the ASI must be read together with the reconsideration decision.⁸⁹⁶

7.398. Based on the above, the Panel finds that the decision issuing an ASI in *Xiaomi v. InterDigital*, read together with the reconsideration decision in the same case, was "made effective" by China.

7.5.1.2.4 Pertaining to the subject matter of the TRIPS Agreement

7.399. The obligation in Article 63.1 applies to, among other things, final judicial decisions of general application made effective by a Member "pertaining to the subject matter of the TRIPS Agreement". The parties disagree whether the judicial decisions issuing ASIs pertained to the subject matter of the TRIPS Agreement.

7.400. The ordinary meaning of the term "pertaining to" is "to relate to; to refer to".⁸⁹⁷ One thing may relate to another in different ways and in different degrees. In the present case, the judicial decision at issue sets out on its face what it pertains to.

7.401. The "subject matter" of the TRIPS Agreement is indicated by a list of aspects of IP rights set out in parentheses in Article 63.1. The list is illustrative as it only includes availability, scope, acquisition, enforcement, and prevention of the abuse of IP rights, omitting other aspects that are also addressed in the Agreement, such as maintenance and certain matters affecting use.⁸⁹⁸ The subject matter of the Agreement, as stated in its title, may collectively be referred to as trade-related aspects of intellectual property rights. Enforcement of IP rights is part of that subject matter, as is the right to conclude patent licensing contracts, which is specifically addressed in Article 28.2.

7.402. The scope of the obligation in Article 63.1 is not limited to measures that pertain to the implementation of the provisions of the TRIPS Agreement; rather, the scope extends to measures that pertain to the underlying subject matter of the Agreement. The obligation is not limited to the way in which that subject matter is addressed in the TRIPS Agreement but includes certain bilateral agreements. This scope is consistent with the purpose of the obligation, which is wider than the notification obligation for laws and regulations under Article 63.2. The obligation to be published or made publicly available creates an updated reference source for foreign governments and right holders regarding each Member's IP system whereas notification is intended to assist the Council for TRIPS in its review of the operation of the Agreement. Accordingly, the obligation in Article 63.1 also applies to measures addressing matters that are not necessarily rights and obligations under the Agreement as long as they pertain to its subject matter. Therefore, final judicial decisions of general application regarding these broad aspects of IP rights (whether or not they concern issues specified in the TRIPS Agreement) must be published or made publicly available under Article 63.1.

7.403. The Panel notes that the decision issuing an ASI in *Xiaomi v. InterDigital*, read together with the reconsideration decision in the same case (a) ordered the patent holder concerned to withdraw or suspend injunctions already requested against infringement in a foreign jurisdiction, and (b) enjoined them from applying for additional injunctions against infringement in China and other countries or regions. While this decision did not enforce IP rights against acts of infringement, it addressed the enforcement of IP rights by another party. It is irrelevant to this assessment that an ASI may operate *in personam* or that it is issued under a law not dedicated exclusively to IP or that this decision partly addressed enforcement in foreign jurisdictions. The decision pertained to the enforcement of IP rights, which is part of the subject matter of the TRIPS Agreement. Further, the same decision also enjoined patent right holders not to request courts in China and other countries

⁸⁹⁵ See Wuhan Intermediate People's Court, *Xiaomi v. InterDigital* (Exhibit EU-2b), p. 11. The Panel notes that the decision is no longer in effect having been dissolved when the parties notified the court of their settlement (Court Rulings Granting Withdrawal of Complaints and Mediation Statements (Exhibit CHN 63b)). The Panel's analysis of whether China is obliged to publish the decision in *Xiaomi v. InterDigital* pursuant to Article 63.1 is distinct from any analysis of that decision under other provisions of the TRIPS Agreement. The Panel recalls its decision in section 7.4.1.2 above that findings on the European Union's claims with respect to the compliance of this decision with the claimed provisions of the TRIPS Agreement were not necessary.

⁸⁹⁶ See para. 7.376 above.

⁸⁹⁷ *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Oxford University Press, 1993), Vol. 1, p. 2173.

⁸⁹⁸ See fn 3 of the TRIPS Agreement.

or regions to determine SEP licence fee rates or licence fee disputes. In this respect, the decision pertained to the right to conclude patent licensing contracts, which is also part of the subject matter of the TRIPS Agreement.

7.404. Based on the above, the Panel finds that the decision issuing an ASI in *Xiaomi v. InterDigital*, read together with the reconsideration decision in the same case, is a final judicial decision of general application made effective by China pertaining to the subject matter of the TRIPS Agreement.

7.5.1.2.5 Shall be published or made publicly available

7.405. The Panel notes that final judicial decisions of general application pertaining to the subject matter of the TRIPS Agreement must 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".

7.406. The facts, which China provided in response to questioning from the Panel, show that some information was made public with respect to the decisions in *Xiaomi v. InterDigital*. First, on 26 September 2020 (three days after the ASI was issued), the IP Economy (知产财经) multimedia reporting platform posted to its WeChat account a report in Chinese with a title that has been translated as "Wuhan Intermediate Court Makes Ruling on the Dispute over FRAND Rates between Xiaomi and InterDigital".⁸⁹⁹ The report contained a summary of the court's decision issuing the ASI and attached the text of that decision.⁹⁰⁰ Second, on 28 April 2021, the Hubei Province Higher People's Court published on its website an overview of the status of the judicial protection of IP and top 10 typical cases of 2020. This overview contained a summary of the *Xiaomi v. InterDigital* case in Chinese and cited the decision issuing an ASI and the reconsideration decision but did not provide the texts.⁹⁰¹ China does not contend that either of these information channels satisfies the obligation in Article 63.1. Nor does China argue that publication was not practicable. Rather, China relies on its position that there was no obligation to publish the decision in *Xiaomi v. InterDigital*.

7.407. The Panel notes that Article 63.1 uses the word "shall", indicating a treaty obligation, for which Members are responsible *vis-à-vis* other Members. Unlike Article X:1 of the GATT 1994, Article 63.1 of the TRIPS Agreement provides for an alternative when publication is not practicable, i.e. that of making publicly available. However, even with this additional flexibility, either method must be accomplished "in such a manner as to enable governments and right holders to become acquainted" with the measure in question. The text of Article 63.1 itself shows that simply making measures publicly available is insufficient. As to what is an acceptable manner of publishing or making publicly available, the phrase "in such a manner as to enable ... to become acquainted" is an expression of purpose. The verb "supply" is not used, unlike in Article 63.3, and there is no duty actively to acquaint anyone. Rather, the responsibility of the Member publishing or making publicly available is to enable foreign governments and right holders to become acquainted with measures for themselves. In the Panel's view, a manner that enables them to do so requires that the place of publication or making publicly available be one where WTO Member governments and their right holders would reasonably expect to find the relevant measures, in a format that they can reasonably be expected to access.⁹⁰² In addition, Article 63.1 only requires that the language of publication be a national language, although Members are free to publish or make publicly available translations of such measures.

7.408. The Panel recalls that China Judgments Online is the official website where China publishes judicial decisions of the people's courts at all levels. Article 2 of the SPC Provisions on the Publication of Judgments on the Internet by the People's Courts provides that China Judgments Online is the unified platform for courts across the country to publish judgment documents. The Panel also recalls that Article 3(2) of those provisions includes, among the judgments that shall be published on the

⁸⁹⁹ WeChat Account of *IP Economy*, "Wuhan Intermediate Court Makes Ruling on the Dispute over FRAND Rates between Xiaomi and InterDigital (Text of the Ruling Attached to the page)" (Exhibit CHN-80b).

⁹⁰⁰ Although Exhibit CHN-80b states that the full text of the decision can be found attached, the full text of the decision was not available in the document. The reconsideration decision was not issued until later.

⁹⁰¹ Hubei Province Higher People's Court, 10 typical cases (Exhibit EU-74b), p. 17. The overview also indexed the case in English at p. 114.

⁹⁰² Certain panels have referred to the concept of making instruments "generally available through an appropriate medium" to contrast "publication" from "making publicly available". The first of these panels specifically noted that the context in Article 63.1 of the TRIPS Agreement is different. (See Panel Report, *Chile – Price Band System*, para. 7.127. See also Panel Reports, *EC – IT Products*, paras. 7.1083-7.1084).

internet, criminal, civil, administrative and enforcement decisions. Civil decisions are referred to as "民事裁定书", which is how the decision issuing the ASI and the reconsideration decision in *Xiaomi v. InterDigital* are titled.⁹⁰³ In the Panel's view, this confirms that China Judgments Online is the appropriate place where governments and right holders expect to find those decisions.

7.409. China confirmed the above understanding in its response to Question I.B of the European Union's request for information pursuant to Article 63.3 of the TRIPS Agreement. China explained that, "with a view to implementing the open trial principle, promoting judicial justice and improving judicial credibility", the SPC had promulgated the Provisions on the Publication of Judgments on the Internet by the People's Courts in July 2016, which prescribe the types of documents and time of publication on China Judgments Online.⁹⁰⁴

7.410. The Panel notes that the decision issuing an ASI in *Xiaomi v. InterDigital*, read together with the reconsideration decision in the same case, was not published on China Judgments Online. In the Panel's view, given the failure to publish the decision at issue on that website, governments and right holders were unable to become acquainted with it. China used other channels to provide information to the public on this decision, but they were not China Judgments Online. While those channels may have been available to those knowledgeable about the Wuhan Intermediate People's Court in China, that is not where WTO Member governments and their right holders could have expected to find information on final judicial decisions of general application in China pertaining to the subject matter of the TRIPS Agreement.

7.411. Based on the above, the Panel finds that the decision issuing an ASI in *Xiaomi v. InterDigital*, read together with the reconsideration decision in the same case, was not published or made publicly available in such a manner as to enable governments and right holders to become acquainted with it.

7.5.1.3 Conclusion on Article 63.1 of the TRIPS Agreement

7.412. The Panel has found that:

- a. the judicial decisions issuing ASIs in *ZTE v. Conversant* and *OPPO v. Sharp* are final judicial decisions, but not of general application, and therefore not within the scope of Article 63.1;
- b. the decision issuing an ASI in *Xiaomi v. InterDigital*, read together with the reconsideration decision in the same case:
 - i. is a final judicial decision of general application made effective by China pertaining to the subject matter of the TRIPS Agreement, and thereby subject to the obligation in Article 63.1; and
 - ii. was not published or made publicly available in such a manner as to enable governments and right holders to become acquainted with it.

7.413. The Panel thus concludes that China has failed to comply with Article 63.1 of the TRIPS Agreement.

⁹⁰³ SPC, Provisions on the Publication of Judgment Documents by People's Courts on the Internet, 8 August 2016 (Exhibit EU-25b).

⁹⁰⁴ Communication from China, Response to the European Union's Request for Information Pursuant to Article 63.3 of the TRIPS Agreement, Communication, 7 September 2021, IP/C/W/683, paras. 3-4.

7.5.2 Whether China failed to be prepared to supply information on request

7.5.2.1 Summary of the parties' and third parties' arguments

7.414. The European Union claims that China acted in a manner inconsistent with Article 63.3, first sentence because it failed to supply, in response to a written request from the European Union, information of the sort referred to in Article 63.1.⁹⁰⁵

7.415. The European Union maintains that its July 2021 request asked for "information of the sort referred to in Article 63.1" because it asked for information on laws and regulations and on final judicial decisions of general application, made effective by China pertaining to the subject matter of the TRIPS Agreement. The European Union argues that information of the sort referred to in Article 63.1 cannot be exclusively equated to that which has already been published under Article 63.1, and thus encompasses information relating to the application and administration of a Member's laws and regulations, as confirmed by a proposal during the negotiation of the TRIPS Agreement. For the European Union, a right limited solely to requesting the laws and regulations directly from another Member would be redundant.⁹⁰⁶ The European Union adds that its questions fell precisely under the scope of Article 63.3, first sentence, as they were aimed at establishing what the laws and regulations made effective by China pertaining to the subject matter of the TRIPS Agreement were.⁹⁰⁷

7.416. The European Union submits that the phrase "shall be prepared to supply" describes the obligation on a Member to supply the requested information. The European Union submits that Article 63.3, first sentence creates an independent obligation, additional to the obligations under Articles 63.1 and 63.2. For the European Union, while Articles 63.1 and 63.2 require, respectively, publication and notification of laws, regulations and decisions, Article 63.3 makes it possible for Members to complement this knowledge by receiving information on request.⁹⁰⁸

7.417. China submits that it did not have an obligation to be prepared to supply the requested information because the European Union's July 2021 request concerned issues outside the scope of Article 63.1.⁹⁰⁹

7.418. China contends that the requested information does not qualify as information of the sort referred to in Article 63.1 because the European Union was not asking China to supply any of the instruments of the type described in Article 63.1, but rather to provide additional information about the meaning and scope of these instruments. China argues that Article 63.3, first sentence does not provide a Member with a licence "to pose essay questions to another Member concerning the operation of its domestic legal system", as the European Union did by posing such broad questions. For China, there is no obligation on Members to respond to such types of requests for clarifications about their domestic legal system.⁹¹⁰ On the information requested on judicial decisions, China maintains that the decisions are not final judicial decisions of general application pertaining to the subject matter of the TRIPS Agreement.⁹¹¹

7.419. China submits that the obligation of the phrase "shall be prepared to supply" is not an absolute obligation to provide the requested information but rather an obligation to be willing to or to make reasonable efforts to share relevant information. For China, this type of obligation, like Article 69, is subject to a different and lower standard than other obligations which are categorical

⁹⁰⁵ European Union's first written submission, paras. 648, 660 and 702-703; and second written submission, para. 128.

⁹⁰⁶ European Union's second written submission, paras. 135-136. (referring to Communication from Japan, Main Elements of a Legal Text for TRIPS, MTN. GNG/NG11/W/74, of 15 May 1990, Article 4.3); and response to Panel question No. 134, para. 177.

⁹⁰⁷ European Union's first written submission, paras. 686-697; opening statement in the first meeting with the Panel, paras. 110-111; second written submission, para. 128; and response to Panel question No. 140, paras. 193-196.

⁹⁰⁸ European Union's first written submission, paras. 667-675; second written submission, paras. 130-133.

⁹⁰⁹ China's first written submission, para. 334; and response to Panel question No. 57, para. 89.

⁹¹⁰ China's first written submission, para. 336; response to Panel question No. 57, paras. 86 and 88; and second written submission, para. 135.

⁹¹¹ China's second written submission, para. 336; and response to Panel question No. 57, para. 87.

in nature, to avoid this becoming too burdensome for the Member that is requested to provide the relevant information.⁹¹²

7.420. Among the third parties, Korea considers that the kind of information covered by Article 63.3, first sentence is the same information that is described by Article 63.1, so any findings concerning the scope of information covered by Article 63.1 should be extended to Article 63.3.⁹¹³

7.421. Canada and Japan are both of the view that the phrase "be prepared to supply" connotes an obligation to supply the requested information.⁹¹⁴ For Canada, an interpretation that gives rise to an obligation of preparedness to supply the requested information but not to provide it would reduce the obligation to a duplication of that under Article 63.1.⁹¹⁵ Japan considers that Article 63.3 contributes to further ensuring transparency because, by enabling Members to request information from other Members and ensuring access to it, the provision facilitates mutual understanding of how the judicial system concerning IP rights operates in each Member's territory, thus providing predictability to secure a stable trade environment.⁹¹⁶

7.5.2.2 Panel's analysis

7.422. Based on the language of this provision, to establish that China failed to comply with Article 63.3, first sentence, the European Union must demonstrate both that:

- a. it made a request to China in writing for information of the sort referred to in Article 63.1; and
- b. China failed to be prepared to supply that information in response to such written request.

7.423. It is undisputed that the European Union sent China a written request for information that was circulated in the Council for TRIPS on 6 July 2021 (IP/C/W/682) and that China sent a reply circulated in the Council for TRIPS on 7 September 2021 (IP/C/W/683).⁹¹⁷ The parties disagree as to whether those parts of the request that went unanswered concerned information of the sort referred to in Article 63.1. The Panel will begin by assessing the sort of information that may be requested under this provision, then assess whether the request the European Union sent sought information of the sort referred to in Article 63.1. Then, the Panel will assess, as necessary, whether China failed to be prepared to supply such information.

7.5.2.2.1 Information of the sort referred to in Article 63.1

7.424. A request for information under Article 63.3, first sentence is limited to information of the sort referred to in Article 63.1 (that shall be published or made publicly available, as considered above). It is helpful to recall that Article 63.1 refers to the following sort of information: (a) types of measure (namely, laws and regulations, and final judicial decisions and administrative rulings of general application, as well as certain bilateral agreements), pertaining to (or concerning) (b) types of subject matter (namely, the availability, scope, acquisition, enforcement and prevention of the abuse of IP rights⁹¹⁸).

7.425. Reading its terms in context, Article 63.3, first sentence provides for a request for "information", not information "in sufficient detail" (unlike the second sentence), nor explanation or justification (unlike questions posed in initial reviews of implementing legislation under Article 63.2⁹¹⁹). Requests under the first sentence do not need to be based on any particular concern,

⁹¹² China's response to Panel question No. 57. paras. 90-92; and response to Panel question No. 146, para. 172.

⁹¹³ Korea's oral statement in the meeting with the Panel, para. 20.

⁹¹⁴ Canada's third-party submission, paras. 12-19; and oral statement in the meeting with the Panel, paras. 4-7 and Japan's third-party submission, para. 19.

⁹¹⁵ Canada's third-party submission, paras. 12-19; and oral statement in the meeting with the Panel, paras. 4-7.

⁹¹⁶ Japan's third-party submission, para. 19.

⁹¹⁷ The two communications are set out in section 2.8 above.

⁹¹⁸ This list is illustrative of the subject matter of the Agreement, as noted at para. 7.422 above.

⁹¹⁹ See Note by the WTO Secretariat on Procedures for the Notification and Review of Legislation, JOB(99)/6928. Introductory statements made, the questions posed, and the responses given in the reviews are recorded in the IP/Q/, IP/Q2/, IP/Q3/ and IP/Q4/ document series.

such as monitoring the operation of the Agreement, and they do not need to specify a particular measure.

7.426. The provisions in Article 63.3 are based on a recognition that a Member's compliance with Article 63.1 does not guarantee that Members and their right holders have, by virtue of publication, all the relevant information of the sort referred to in that paragraph. This could occur because of various factors. For example, Members are free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice, which may vary considerably from one legal system to another as regards matters such as which decisions are "of general application".⁹²⁰ Members have no obligation to put in place a separate judicial system for the enforcement of IP rights⁹²¹, which means that IP law decisions and rulings may be published or made publicly available through general legal publications and court registries. Further, publishing or making publicly available is required to be in a national language, not necessarily a WTO official language.⁹²² In the Panel's view, a request for information under Article 63.3, first sentence enables Members to obtain information additional to that provided under Article 63.1 through the obligation to publish or make publicly available. Article 63.3, first sentence thus supplements the obligation in Article 63.1 by providing an additional avenue for Members to gain access to certain information.

7.427. In view of the above, the Panel finds that "information of the sort referred to in paragraph 1", as used in Article 63.3, first sentence, encompasses information on the types of measures that another Member makes effective pertaining to (or concerning) a particular trade-related aspect of IP rights, including a brief description of their nature (such as their finality and general application) and relevance. Requests for elaborate explanations or interpretations thus fall outside the scope of Article 63.3, first sentence because such requests go beyond "information of the sort referred to in paragraph 1".

7.428. The Panel finds confirmation for this interpretation in the drafting history of the TRIPS Agreement. During the negotiations, a proposal was made for Members to "provide information as promptly and as comprehensively as possible concerning application and administration of their laws and regulations" related to the protection of IP rights.⁹²³ This broad language was not accepted, which reflects the concern to strike a balance between transparency and placing an excessive burden on the Member adopting particular measures.⁹²⁴ The agreed language in the final version of the first sentence is limited to "information of the sort referred to in paragraph 1", which refers only to types of measures pertaining to (or concerning) types of subject matter of the Agreement.

7.429. Having explained what sort of information can be requested under Article 63.3, first sentence, the Panel now turns to assess what information the European Union requested, and whether that information falls within the scope of that provision.

7.5.2.2.2 Whether the information the European Union requested falls within the scope of Article 63.3, first sentence

7.430. The European Union's July 2021 request for information comprised five pages, the different parts of which the European Union, in its submissions to the Panel, has characterized as follows:

- a. First part of the communication (pages 1 and 2⁹²⁵). The European Union argues that certain paragraphs in the first part of its communication were requests for information on final judicial decisions of general application made under Article 63.3, first sentence; and

⁹²⁰ Further, in the context of Article X:1 of the GATT, for example, Members are not necessarily required to publish relevant laws, regulations, judicial decisions and administrative rulings of general application in their entirety. Rather, Article X:1 requires publication that ensures that those who need to be aware of certain laws, regulations, judicial decisions and administrative rulings of general application can become acquainted with them. See Panel Report, *EC – IT Products*, para. 7.1015.

⁹²¹ See Article 41.5 of the TRIPS Agreement.

⁹²² Article 63.3 provides a mechanism for a Member to receive information in a WTO official language.

⁹²³ Communication from Japan, Main Elements of a Legal Text for TRIPS, MTN.GNG/NG11/W/74, 15 May 1990, Article 4.3.

⁹²⁴ See para. 7.342 above.

⁹²⁵ Pages 1 to 3 in the French and Spanish versions.

b. Annex (pages 3 to 5⁹²⁶):

- i. Question I.A. The European Union argues that this was a request for specific judicial decisions under Article 63.3, second sentence;
- ii. Questions I.B to IV. None of the European Union's claims under Article 63.3 concerns these questions⁹²⁷; and
- iii. Questions V to VIII. The European Union argues that these were requests for information on laws and regulations made under Article 63.3, first sentence.⁹²⁸

7.431. The Panel will consider the claim regarding the first part of the communication and then turn to Questions V to VIII in the Annex. The claim regarding Question I.A will be considered separately in section 7.5.3 below.

7.5.2.2.2.1 First part of the communication

7.432. The European Union has identified language contained in two paragraphs of the first part of its communication that it characterizes as requests for information regarding two final judicial decisions of general application. Originally, it identified the two decisions as those in *Huawei v. Conversant* and *OPPO v. Sharp*, but later it identified them as those in *OPPO v. Sharp* and *Xiaomi v. InterDigital*.⁹²⁹ The Panel sets out the referenced paragraphs below.

7.433. First, the European Union originally argued that it requested further information to understand better the SPC's judicial decisions in the case of *Huawei v. Conversant*.⁹³⁰ Paragraph 3 of the first part of the communication requesting information includes the following statements:

The European Union noted two cases in the Supreme People's Court report on 2020 landmark decisions: the first case, *Conversant v. Huawei*, was reported as China's first decision putting in place a so called "anti-suit injunction" and the first for setting daily fines. ... The European Union would like to understand better this decision and the underlying approach.⁹³¹

7.434. Second, the European Union argues that it requested information on the judicial decision in *OPPO v. Sharp*.⁹³² Paragraph 5 of the first part of the communication includes the following statements:

The second landmark case the Supreme People's Court reported involved *OPPO vs Sharp*. The decision is reported as barring the holder of a European patent from enforcing a court decision of a Member State of the European Union relating to that patent, and forcing the patent holder to withdraw the case from before that court. ... The European Union would therefore welcome further information on the reasoning and application of that decision.

7.435. In response to questioning from the Panel, the European Union submitted that it requested information on the judicial decision in *Xiaomi v. InterDigital*.⁹³³ In its comments on the draft descriptive part of the panel report, it identified two specific paragraphs of the communication as relevant. Of the two, paragraph 6 is particularly relevant and reads as follows:

⁹²⁶ Pages 4 to 6 in the French and Spanish versions.

⁹²⁷ The Panel notes that paragraphs 3 and 4 of China's reply (see section 2.8.3 above) relate to the issues raised in these questions.

⁹²⁸ European Union's first written submission, para. 687; and response to Panel question No. 58.

⁹²⁹ European Union's response to Panel question No. 61; and second written submission paras. 128 and 139.

⁹³⁰ European Union's first written submission, para. 693.

⁹³¹ Fns omitted.

⁹³² European Union's first written submission, para. 694.

⁹³³ European Union's response to Panel question No. 61; and second written submission paras. 128 and 139.

The third case the European Union is aware of is *Xiaomi v. InterDigital*. The website of Wuhan city government reports that on 23 September 2020 the Wuhan Intermediate People's Court ruled that InterDigital should immediately withdraw or suspend the patent license rate ruling and injunction against Xiaomi in India, and could not apply for patent license rate ruling and injunction against Xiaomi in any court in the world. In case of violation of the ruling, a fine of RMB 1 million per day will be imposed.

7.436. The Panel notes that the above paragraphs are not in the Annex to the European Union's request for information. They are found in the first part of the communication, below paragraph 2, which introduces the recent judicial decisions and regulations relating to patents and includes the following statement:

Further detail on these measures is given below. In the annex are questions for clarification the European Union would like to ask China on these measures.

7.437. The final paragraph of the first part of the communication (paragraph 9) includes the following statement:

The European Union looks forward to receiving China's reply on the questions on these measures in the annex.

7.438. The Annex is titled "Questions to China on several measures pertaining to the enforcement of intellectual property rights" and contains a list of questions numbered I to VIII. The list includes questions that specifically reference the cases introduced in the first part of the communication quoted above, i.e. *Huawei v. Conversant* (Questions II, III, IV, and VIII.A), *OPPO v. Sharp* (Questions III, VII, and VIII.A), and *Xiaomi v. InterDigital* (Question VIII.B).

7.439. Reading the first part of the European Union's request together with its Annex, the Panel construes paragraphs 3, 5, and 6 of the communication as background information and introductions to the questions that the European Union posed in the Annex. The Panel does not understand the specific paragraphs of the communication to be requests for information – rather, they indicate that the questions are in the Annex.

7.440. The Panel takes note that paragraph 8 of the first part of the communication refers to the publication on China Judgments Online of the decisions in *Huawei v. Conversant* and ends with the statement that "the European Union would like to request China to clarify if and where the decisions in three other cases [i.e. *OPPO v. Sharp*, *Xiaomi v. InterDigital*, and *Samsung v. Ericsson*] can be found and provide these". This appears to be an introduction to Question I, in which the European Union asks China to provide all the decisions in those same three cases and asks which decisions are published on China Judgments Online. In any case, the European Union does not allege that the first part of the communication contained any request under Article 63.3, first sentence for any information regarding the judicial decisions in *Samsung v. Ericsson*.

7.441. Based on the above, the Panel finds that the European Union has failed to demonstrate that it requested China in writing to supply information via these paragraphs in the first part of its communication, in accordance with Article 63.3, first sentence.

7.5.2.2.2.2 Questions V to VIII of the Annex

7.442. Question V of the European Union's request for information is titled "Guidance on act preservation measures – status" and reads as follows:

The Supreme People's Court has adopted Provisions on Act Preservation Measures in intellectual property disputes which have been applied in the two decisions by the Wuhan Intermediate People's Court on anti-suit injunctions.

Could China clarify what is the status of these Provisions? Are lower courts bound to follow these?

How do these Provisions relate to the adjudication guidelines mentioned above? Is there a hierarchy between these norms?

7.443. This request for information concerns the SPC Provisions (and the adjudication guidelines (or rules) referenced in Question IV, to which China replied). The legal nature of the SPC Provisions may be unclear to a foreign national, as they constitute a regulation (规定) but they are issued by a judicial authority. The measure clearly pertains to an aspect of IP rights, specifically, provisional enforcement measures. Question V in effect sought a basic description of the type of measure that the SPC Provisions are. The Panel recalls, as discussed in paragraph 7.427 above, that this is information of the sort referred to in Article 63.1. Such information can be requested both where the requesting Member has identified a measure, but does not know its type, as well as where the requesting Member identifies a particular aspect of IP rights but does not know the measures that pertain to it. Accordingly, the Panel finds that Question V requested information of the sort referred to in Article 63.1 and therefore within the scope of Article 63.3, first sentence.

7.444. Question VI of the European Union's request for information is titled "China civil procedure law" and reads as follows:

The anti-suit injunctions are described as "act preservation measures" under article 100 of the China civil procedure law, and the European Union understands they are provisional measures in terms of Article 44 TRIPS.

Could China clarify what is the status of these "act preservation measures"? For example the time during which these can remain in place? If we understand correctly they will be in place for the duration of the case. If there is an appeal would they remain in place?

7.445. The Panel observes that the European Union had access to China's Civil Procedure Law at the time of its request for information, and that an earlier version of that law was also notified to the Council for TRIPS under Article 63.2.⁹³⁴ Any questions about how China's Civil Procedure Law operates could have been addressed during the consideration of China's responses to questions 12 and 13 of the Checklist of Issues on Enforcement during the review of China's legislation in the Council for TRIPS.⁹³⁵ Although the Council for TRIPS' review of China's implementing legislation is complete and there is no standing review procedure, Members may always ask follow-up questions by putting them on the regular Council for TRIPS meeting agenda. Question VI sought an explanation of the application of Article 100 (now 103) of that law regarding the status and duration of provisional measures in case of an appeal. Question VI was not aimed at describing which law, regulation, or final judicial decision of general application China makes effective pertaining to any aspect of IP rights, but rather sought information about the application of act preservation measures under Article 100 (now 103) of China's Civil Procedure Law. Therefore, it did not seek information of the sort referred to in Article 63.1, and is not within the scope of Article 63.3, first sentence.

7.446. As regards the remaining questions, Question VII of the European Union's request for information is titled "Jurisdiction" and reads as follows:

The Supreme People's Court report on OPPO v. Sharp noted OPPO requested the Shenzhen Intermediate People's Court to set a worldwide licence rate for Sharp's standard essential patents.

Could China clarify what the Shenzhen Intermediate People's Court gave as a legal basis for it to have jurisdiction to set worldwide licence rates?⁹³⁶

7.447. Question VIII of the European Union's request for information is titled "Scope of anti-suit injunctions". Question VIII.A reads as follows:

⁹³⁴ IP/N/1/CHN/1.

⁹³⁵ See Note by the WTO Secretariat on Procedures for the Notification and Review of Legislation, JOB(99)/6928. Introductory statements made, the questions posed, and the responses given in the reviews are recorded in the IP/Q/, IP/Q2/, IP/Q3/ and IP/Q4/ document series.

⁹³⁶ This question does not seek clarification of the decision issuing the ASI in OPPO v. Sharp but, rather a decision on jurisdiction made by the same court in the same case on the same day, which was under appeal to the SPC at the time. See the SPC decision on jurisdiction (Exhibit EU-81).

The Supreme People's Court reported that both in the case of *Conversant v. Huawei* and in *OPPO v. Sharp* the anti-suit injunction blocked enforcement of an injunction in the European Union based on a patent issued by a Member State of the European Union.

Could China clarify for both of these cases what was the legal basis for the courts to block enforcement of an injunction in the European Union based on a patent issued by a Member State of the European Union?

7.448. Question VIII.B reads as follows:

There is a note on the Wuhan government website describing an anti-suit injunction Xiaomi obtained prohibited InterDigital from applying for an injunction in any court worldwide or to request any court worldwide to decide on questions relating to the licence or royalty rates for its standard essential patents.

Could China clarify what was the legal basis for the Wuhan Intermediate People's Court to put in place a worldwide prohibition for applying for an injunction and for seizing a court to decide on questions relating to the licence for standard essential patents, including royalty rates?

7.449. Questions VII and VIII seek clarification of the legal bases for judicial decisions in three specific cases (*Huawei v. Conversant*, *OPPO v. Sharp*, and *Xiaomi v. InterDigital*) to (a) have jurisdiction to set worldwide licence rates, (b) block enforcement of an injunction in the European Union based on an EU member State patent; and (c) put in place a worldwide prohibition with regards to applying for an injunction and for seizing a court to decide on questions relating to the licence for SEPs, including royalty rates. The European Union has not disputed China's characterization of these questions as broad. The European Union acknowledges in the request that it had found the published decisions in *Huawei v. Conversant* (see paragraph 8) and that it knew that the decision in *Xiaomi v. InterDigital* applied the SPC Provisions (see Question V). The rationale behind *Huawei v. Conversant* was set out in the published decisions, and the rationale behind *Xiaomi v. InterDigital* was set out in the decisions that should have been published in accordance with Article 63.1 (see paragraphs 7.412 to 7.413 above). Accordingly, these questions were not requests for citations to laws or regulations or other information on the types of measures made effective by another Member and pertaining to the TRIPS Agreement, including a brief description of their nature and relevance. In the Panel's view, Questions VII and VIII seek explanations or justifications of the rationale behind the referenced judicial decisions. As such, they are not aimed at eliciting the sort of information referred to in Article 63.1 and are therefore not within the scope of Article 63.3, first sentence.

7.450. Based on the above, the Panel finds that, in Question V (but not in Questions VI to VIII), the European Union requested China in writing to provide information of the sort referred to in Article 63.1 of the TRIPS Agreement.

7.5.2.2.3 Shall be prepared to supply such information.

7.451. The Panel now turns to the question of whether China failed to be prepared to supply information in response to Question V of the European Union's request for information. The parties disagree as to whether the phrase "shall be prepared to supply" creates an absolute obligation or rather an obligation to make reasonable efforts to share relevant information.

7.452. The Panel notes that Article 63.3, first sentence provides that a Member "shall be prepared to supply" the requested information. The use of the word "shall" indicates that this is an obligation. However, the text does not read "shall supply" and the inclusion of the phrase "be prepared to" must be given due weight. The ordinary meaning of the phrase "to be prepared to do something" is "to be ready ...; be mentally inclined or willing" to do something.⁹³⁷ Read in context and in light of the object of the whole of Article 63 to facilitate transparency, for a Member to be willing to supply

⁹³⁷ *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Oxford University Press, 1993), Vol. 2, p. 2337.

information in response to a request it would do so in all normal circumstances, subject to the exception set out in Article 63.4.⁹³⁸

7.453. The Panel does not consider that an obligation to "be prepared to supply" merely requires reasonable efforts.⁹³⁹ That is not the ordinary meaning of the terms used. The context shows that where the drafters of the TRIPS Agreement intended to create obligations to make efforts, they used phrases such as "shall attempt to" as in Article 63.2 and "shall seek to" as in Article 68 (two obligations borne by the Council, not individual Members). They did not use such terms in Article 63.3.

7.454. Having determined the ordinary meaning of Article 63.3, first sentence, the Panel now turns to analysing the European Union's request for information. The Panel recalls its finding that Question V, regarding the SPC Provisions, requested information of the sort referred to in Article 63.1 of the TRIPS Agreement. China was therefore obliged to be prepared to supply that information. However, China did not supply that information, maintaining that there was no obligation under the TRIPS Agreement for it to respond.⁹⁴⁰ China's reply confirmed its unwillingness to respond to Question V. The fact that China provided responses to certain other questions does not offset its failure to be prepared to supply certain information of the sort referred to in Article 63.1.⁹⁴¹

7.455. Based on the above, the Panel finds that China failed to be prepared to supply, on request from another Member, information of the sort referred to in Article 63.1 of the TRIPS Agreement.

7.5.2.3 Conclusion on Article 63.3, first sentence of the TRIPS Agreement

7.456. The Panel has found that, with respect to the information requested in Question V, but not Questions VI, VII, VIII, or the first part of the communication, the European Union requested China in writing to supply information of the sort referred to in Article 63.1 of the TRIPS Agreement. The Panel has also found that China failed to be prepared to supply that information. The Panel concludes, therefore, that China acted in a manner inconsistent with Article 63.3, first sentence of the TRIPS Agreement.

7.5.3 Whether China was required to give access to specific judicial decisions

7.457. The European Union claims that China acted in a manner inconsistent with Article 63.3, second sentence because it failed to give access, after such access had been requested in writing, to specific judicial decisions in the area of IP rights, which the European Union had indicated it had reason to believe affected its rights under the TRIPS Agreement.⁹⁴²

7.458. China submits that the specific judicial decisions requested by the European Union were not final judicial decisions of general application pertaining to the subject matter of the TRIPS Agreement, so China did not have to supply such decisions.⁹⁴³ China later argued that the European Union's claim falls outside the Panel's terms of reference.⁹⁴⁴

7.459. The Panel will first address China's terms of reference objection.

⁹³⁸ The Panel considers this understanding to be supported by the French and Spanish texts of the TRIPS Agreement, which use the terms "*devra être prêt à*" and "*estará dispuesto a*" respectively.

⁹³⁹ Cf. China's response to Panel question No. 141.

⁹⁴⁰ Communication from China, Response to the European Union's Request for Information Pursuant to Article 63.3 of the TRIPS Agreement, Communication, 7 September 2021, IP/C/W/683.

⁹⁴¹ See Panel Report, *Canada – Patent Term*, paras. 6.97-6.99 reasoning that instances of non-compliance cannot be offset with instances of compliance.

⁹⁴² European Union's first written submission, paras. 647-649, 660-661 and 700-703; opening statement in the first meeting, para. 118; and second written submission, paras. 150-151.

⁹⁴³ China's first written submission, para. 337.

⁹⁴⁴ China's response to Panel question No. 142(a); and comments on the European Union's response to Panel question No. 142(b).

7.5.3.1 Terms of reference objection

7.5.3.1.1 Summary of the parties' arguments

7.460. During the second substantive meeting, China raised a terms of reference objection with respect to the European Union's claim under Article 63.3, second sentence. China submits that the European Union's panel request was limited to China's failure to supply information on final judicial decisions of general application pertaining to the subject matter of the TRIPS Agreement. China argues that the panel request did not identify any claim against a wider category of decisions subject to a separate obligation under Article 63.3, second sentence. According to China, the European Union's claim under the second sentence, therefore, falls outside the Panel's terms of reference.⁹⁴⁵ China adds that it is acceptable for a complainant to raise terms of reference issues at any time during the proceedings, and that the Panel must take those into account because panels have a duty to consider issues that go to the root of their jurisdiction.⁹⁴⁶

7.461. The European Union contends that China's argument is submitted belatedly, as China was required to submit any request for a preliminary ruling at the earliest possible opportunity and no later than in its first written submission. For the European Union, in any event, its claim under the second sentence falls within the Panel's terms of reference for the following reasons: (a) the panel request refers to the request for information on judicial decisions and to the request of the text of judicial decisions, and the European Union did not qualify *Samsung v. Ericsson* as being of general application, so its claim was not limited to the first sentence; (b) the information available at the time did not yet allow the European Union to conclude that certain decisions ought to be qualified as being of general application, so they were primarily requested as specific judicial decisions; (c) the European Union's first written submission made clear how the information requested was to be qualified (laws and regulations, final judicial decisions of general application and specific judicial decisions); and (d) in view of the interlinked nature of the obligations in Article 63.3, the reference to the obligations in Article 63.3 was sufficient to meet the minimum requirements of Article 6.2 of the DSU.⁹⁴⁷

7.5.3.1.2 Panel's analysis

7.462. As regards the timing of China's objection, the Panel notes that China only articulated its objection during the second substantive meeting.⁹⁴⁸ The Panel recalls its finding in paragraph 7.10 above that procedural objections that do not take the form of a request for a preliminary ruling fall under paragraph 4(2) of the Panel's Working Procedures and were not required to be made at the latest in China's first written submission. The Panel finds, therefore, that although the objection was made at a very late stage in the proceedings, it was not untimely. Moreover, even if the Panel were to accept that China's objection was out of time, the Panel cannot rule on a matter on which it does not have jurisdiction and must, therefore, satisfy itself that it has the authority to proceed.⁹⁴⁹

7.463. The Panel recalls that Article 6.2 sets out two substantive requirements that a complainant must satisfy in its panel request: (a) the identification of the specific measures at issue; and (b) the provision of a brief summary of the legal basis of the complaint sufficient to present the problem clearly.⁹⁵⁰ China's objection here relates to the second requirement.

7.464. With respect to the second requirement, a panel request need only provide the "legal basis of the complaint", that is, the claims underlying a complaint.⁹⁵¹ The arguments in support of the claims may be set out and progressively clarified in the submissions through the course of the

⁹⁴⁵ China's response to Panel question No. 142(a); comments on the European Union's response to Panel question No. 142(b).

⁹⁴⁶ China's comments on the European Union's response to Panel question No. 142(b).

⁹⁴⁷ European Union's response to Panel question No. 142(b).

⁹⁴⁸ China's response to Panel question No. 142.

⁹⁴⁹ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.

⁹⁵⁰ Appellate Body Report, *US – Carbon Steel*, para. 125.

⁹⁵¹ Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.6 (referring to Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.14; *Korea – Dairy*, para. 139; *US – Countervailing Measures (China)*, para. 4.9). See also Appellate Body Reports, *EC – Bananas III*, paras. 141-143, *US – Lead and Bismuth II*, paras. 72 and 73, and *US – Anti-Dumping Measures on Oil Country Tubular Goods*, paras. 7.16-7.17.

proceedings.⁹⁵² However, defects in a panel request cannot be cured in a party's subsequent submissions during the panel proceedings.⁹⁵³ The parties' submissions may be consulted only to confirm the meaning of the words used in the panel request and as part of the assessment of whether the respondent's ability to defend itself was prejudiced.⁹⁵⁴

7.465. The main factor in determining whether a panel request complies with Article 6.2 of the DSU is whether it presents the problem clearly. Such determinations are done on a case-by-case basis reading the panel request as a whole and in light of the attendant circumstances. The identification of the provision claimed to have been violated is always necessary and a minimum prerequisite but may not alone be sufficient to comply with the requirements of Article 6.2. When a provision contains not one single, distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged.⁹⁵⁵

7.466. The Panel is of the view that if the European Union was intending to bring two separate claims with respect to two distinct obligations with different scopes of application, one under the first sentence of Article 63.3 and the other under the second sentence, its panel request should have clearly specified that this was the case. The European Union's panel request, however, refers to Article 63.3 in general and does not specifically mention whether its claim is with respect to the first sentence, the second sentence, or both. Nothing in the text of the panel request indicates that the European Union was bringing a claim under the second sentence of Article 63.3.⁹⁵⁶

7.467. The panel request contains, as the title for the description of its claim under Article 63.3, "China's failure to supply information on final judicial decisions of general application pertaining to the subject matter of the TRIPS Agreement".⁹⁵⁷ This same phrase is repeated in the penultimate paragraph of the panel request.⁹⁵⁸ This language corresponds to the language contained in the first sentence of Article 63.3 and not the second sentence. The section of the panel request titled "Legal basis of the claim" again refers to Article 63.3 in general. The narrative portion of that section notes that the European Union believes China acted inconsistently with Article 63.3 because it "failed to provide a complete description of the measures that it applies".⁹⁵⁹

7.468. The European Union refers in its panel request to its request for information pursuant to Article 63.1 of the TRIPS Agreement. As with the panel request, the request for information also refers to Article 63.1 in general. All questions are set out in an Annex titled "Questions to China on several measures pertaining to the enforcement of intellectual property rights". The phrases "pertaining to" and "enforcement" of IP rights track the language of Article 63.1 and therefore relate to the first sentence of Article 63.3 which covers the provision of information of the sort referred to in paragraph 1.

7.469. It is only in its first written submission that the European Union presents its claims as two separate violations – one of the first sentence and one of the second sentence. This is the first time the European Union uses the phrase "specific judicial decisions".⁹⁶⁰ This shift goes beyond a mere clarification of the claims as they were presented in the panel request. As noted above, a party's submissions may not cure a defect in the panel request.

⁹⁵² Appellate Body Report, *EC – Bananas III*, para. 141.

⁹⁵³ Appellate Body Report, *US – Carbon Steel*, para. 127 (referring to Appellate Body Report, *EC – Bananas III*, para. 142).

⁹⁵⁴ Appellate Body Report, *US – Carbon Steel*, para. 127 (referring to Appellate Body Report, *Korea – Dairy*, para. 127; Appellate Body Report, *Thailand – H-Beams*, para. 95).

⁹⁵⁵ Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.6.

⁹⁵⁶ The Panel notes that the text of Article 63.3, second sentence contains the word "also" when referring to the ability to request specific judicial decisions. The parties and the third parties agree that this indicates some relationship between the first and second sentences. The Panel is of the view that the mere presence of the word "also" in the second sentence is not sufficient for a responding party to be put on notice that the complaining party intended to make claims under the first and second sentences of Article 63.3 as separate and distinct obligations.

⁹⁵⁷ European Union's panel request, p. 11.

⁹⁵⁸ European Union's panel request, p. 12.

⁹⁵⁹ European Union's panel request, p. 12.

⁹⁶⁰ European Union's first written submission, paras. 648-649.

7.470. Based on the above, the Panel concludes that the European Union's claim under Article 63.3, second sentence is outside its terms of reference. The Panel cannot, therefore, proceed with the analysis of the European Union's claim.

7.6 The European Union's claims under China's Accession Protocol

7.6.1 Whether the Panel should make findings on the European Union's claims against the issuance of the five ASIs under China's Accession Protocol

7.6.1.1 Summary of the parties' arguments

7.471. As noted above, the European Union's main arguments as to why the Panel should make findings on the five ASIs even though they expired prior to the Panel's establishment are that they have lingering effects and that there is a potential for reintroduction. The European Union, in its responses to the Panel's questions and in its second written submission, also argues that there is a continued nullification and impairment of its rights, within the meaning of Article 3.8 of the DSU, so long as China has not explicitly disavowed the five ASIs, but rather simply allowed them to expire on their own terms.⁹⁶¹

7.472. China argues that the European Union has not demonstrated that the expired ASIs have any lingering effects as this concept is limited to situations involving prohibited export subsidies and the ability to demonstrate serious prejudice under the Agreement on Subsidies and Countervailing Measures (SCM Agreement). China does not see how such jurisprudence is apposite to the present situation.⁹⁶² China also avers that whatever effects that do linger from an expired measure would themselves have to be WTO inconsistent.⁹⁶³ Finally, China argues that, as provisional measures adopted in litigation between two specific parties that have now settled their differences, there is no likelihood of reintroduction of the specific ASIs in question and that a panel cannot assume such a risk.⁹⁶⁴

7.6.1.2 Panel's analysis

7.473. As noted in section 7.4.1 above, the Panel has jurisdiction over the five ASIs. The Panel has discretion not to rule on those measures if doing so would not aid in securing a positive solution to the dispute. The Panel decided in section 7.4.1.2 that ruling on the five ASIs with respect to claims under the TRIPS Agreement would not aid in securing a positive solution to the dispute. The Panel noted that it had already dealt with the same legal claims with respect to the ASI policy (of which the five ASI decisions are an integral part), such that any findings on the five ASIs would be duplicative. The European Union makes no claims under China's Accession Protocol with respect to the ASI policy. The Panel will, therefore, make a separate determination as to whether findings on the five ASIs with respect to the European Union's claims under China's Accession Protocol would aid in securing a positive solution to the dispute.

7.474. In determining whether to make findings on the five ASIs the Panel will be guided by all relevant factors and not only the fact that the measures expired prior to the Panel's establishment. Relevant factors examined by prior panels and the Appellate Body have included, among others, the timing of the expiry of a measure⁹⁶⁵, whether a measure is included in the terms of reference⁹⁶⁶, the possibility of reintroducing the same or a materially similar measure⁹⁶⁷, whether the effects of a measure continued to impair the benefits for a Member under a covered agreement⁹⁶⁸, whether the

⁹⁶¹ European Union's second written submission, para. 51, response to Panel question No. 28(a).

⁹⁶² China's first written submission, paras. 179-180; second written submission, paras. 91-93.

⁹⁶³ China's responses to Panel questions during the second meeting.

⁹⁶⁴ China's first written submission, paras. 183-185 (referring to Panel Reports, *Argentina – Textiles and Apparel*, para. 6.14; *China – Electronic Payment Services*, para. 7.228); second written submission, paras. 94-95.

⁹⁶⁵ Panel Report, *EU – PET (Pakistan)*, para. 7.13 and fn 35.

⁹⁶⁶ Panel Reports, *Turkey – Rice*, para. 7.180; *US – Wool Shirts and Blouses*, para. 6.2; and *Indonesia – Autos*, para. 14.9.

⁹⁶⁷ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.468. See also Panel Reports, *India – Additional Import Duties*, paras. 7.69-7.70; *Argentina – Textiles and Apparel*, para. 6.14; and *China – Electronic Payment Services*, para. 7.228.

⁹⁶⁸ Panel Reports, *Indonesia – Autos*, para. 14.206; *US – Upland Cotton*, para. 7.1201; *EC – Poultry*, paras. 250-252; and *Costa Rica – Avocados (Mexico)*, para. 7.47.

expiry of a measure could be used as a tool for shielding it from scrutiny.⁹⁶⁹ None of these considerations is decisive in and of itself, and they do not necessarily exhaust the circumstances that panels may take into account when deciding how to exercise their discretion in respect of measures that are no longer in force when the panel is established.⁹⁷⁰

7.475. China is correct that the concept of "lingering effects" was first raised in the context of actionable subsidies, but that does not mean that a panel's ability to examine measures that expired prior to its establishment is limited to measures challenged under Articles 5 and 6 of the SCM Agreement. Panels examining measures outside the context of serious prejudice have looked at measures that expired before their establishment because they continued to influence an existing measure or could influence a new measure in the future⁹⁷¹ or simply because the complainant averred that there were "certain lingering effects".⁹⁷²

7.476. With respect to the potential for reintroduction, the Panel is of the view that the focus of the analysis must be on the risk of repetition of the allegedly WTO-inconsistent conduct in other circumstances, not just with respect to the same economic actors that were affected by the measure in the past. If there is a risk that the allegedly WTO-inconsistent conduct could be repeated, despite the expiry of the measure that is within the Panel's terms of reference, findings may serve to aid in securing a positive solution to the dispute. The Panel, therefore, does not agree with China that the fact that the same ASIs are unlikely to be reintroduced is dispositive of this question. The Panel will examine not only whether a court in China would re-issue the ASIs that have already been dissolved in these five cases, but whether the same reasoning in these decisions could be reintroduced in similar circumstances.⁹⁷³

7.477. The Panel notes that in the present case, although the measures expired when the cases were withdrawn, the legal basis for and reasoning in the decisions issuing the five ASIs have not been retracted or overruled.⁹⁷⁴ Four of the five cases have been designated or held out by the SPC or by a higher people's court as a reference point for courts dealing with similar circumstances.⁹⁷⁵

⁹⁶⁹ Appellate Body Report, *EU – PET (Pakistan)*, para. 5.39.

⁹⁷⁰ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.468.

⁹⁷¹ Panel Reports, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.471; *Costa Rica – Avocados (Mexico)*, para. 7.47. That panel went on to note that "panels have the authority to make findings on measures that were no longer in force when the panel was established if the effects of those measures continue to be felt". (Panel Report, *Costa Rica – Avocados (Mexico)*, para. 7.53).

⁹⁷² Panel Report, *EC – Poultry*, paras. 250-252 (holding that would not reject a claim on the way the European Communities allocated import licences on the grounds of mootness because the complainant claimed that there were certain lingering effects.)

⁹⁷³ This is consistent with the reasoning of the panel in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)* that "due regard should be given to the likelihood of reintroduction of the same measure or adoption of another measure that may give rise to certain of the same, or materially similar, WTO inconsistencies by the respondent." (See Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.491. See also para. 7.468).

⁹⁷⁴ The panel in *US – Poultry (China)* noted that panels have decided to make rulings on expired measures where the respondent Member had not conceded the WTO inconsistency of the measure and the repealed measure could be easily reimposed. That panel determined that it would make a finding on a measure that expired two days before the respondent's first written submission was due because to do otherwise might deprive the complainant of "any meaningful review of the consistency" of the respondent's actions with its WTO obligations, "while allowing the repetition of the potentially WTO- inconsistent conduct". (See Panel Report, *US – Poultry (China)*, para. 7.55).

⁹⁷⁵ See section 7.2.3.1.2 above, where the Panel discusses the different designations of the ASI decisions. For instance, in *Huawei v. Conversant*, the SPC itself regards the case as setting out important "adjudication rules" and comments that "the people's court shall comprehensively consider [the factors set out in *Huawei v. Conversant*]" when dealing with disputes involving "application[s] for act preservation that prohibits the application for enforcement of an extraterritorial court ruling". (Exhibit EU-76b). The SPC also noted how *Huawei v. Conversant* was the first decision granting an ASI in the context of SEP litigation, it discussed the factors applied in this decision, noted how it was the first time the daily fine system was explored and how it "initially established the judicial practice path of China's 'anti-suit injunction'". (SPC, Top 10 IP Cases and 50 Typical IP Cases, 2020 (Exhibit EU-11b)). The SPC also promoted the "exemplary and guiding role of typical cases" and the list of Top 10 Cases and 50 Typical IP Cases is meant to offer "reference [to] people's courts at all levels in the trial of intellectual property rights". (SPC, Top 10 IP Cases and 50 Typical IP Cases, 2020 (Exhibit EU-11b)). A report by the Hubei Province Higher People's Court summarizes *Xiaomi v. InterDigital* mentioning that this case "has a significant effect on the participation of Chinese mobile phone manufacturers in international competition and has received much attention from Chinese wireless communications producers and SEP patent practitioners and law professionals". (Hubei Province Higher

China has a system where courts retrieve similar cases to ensure that they are aware of prior practice and to assist in unifying the application of the law in China.⁹⁷⁶ China has confirmed that the legal provisions those decisions rely upon and interpret are also still in effect and that litigants may request ASIs in the future under those provisions.⁹⁷⁷ The European Union's claims under China's Accession Protocol relate to the application of the Civil Procedure Law and the SPC Provisions, which is governed by China's obligations under Section 2(A)(2) of its Accession Protocol. How Chinese courts will respond to requests for ASIs, therefore, directly relates to the operation of Section 2(A)(2) and thus the five ASIs could continue to have effects on the operation of a covered agreement.

7.478. Finally, the Panel also recalls that the ASIs are procedural measures adopted in the context of ongoing litigation to preserve the *status quo* while a decision on the merits is pending.⁹⁷⁸ The Panel cannot agree with China that there is no right to challenge provisional measures under the DSU. Article 3.3 of the DSU provides that Members may challenge any measure taken by another Member that it considers impairs any benefits accruing to it directly or indirectly under the covered agreements. If those measures were provisional there is a possibility, as was the case here, that they may expire before dispute settlement proceedings can commence. China is correct that not all provisional measures will necessarily dissolve or expire before a panel can be established⁹⁷⁹, but a significant portion may. To have panels systematically decline to exercise their jurisdiction over such measures because they have expired would be "providing a tool for shielding measures from scrutiny by a panel".⁹⁸⁰ This Panel declines to act in such a manner.

7.479. In light of the considerations above, the Panel concludes that findings on the five ASIs with respect to the European Union's claims under Section 2(A)(2) of China's Accession Protocol would aid in securing a positive solution to the dispute. The Panel will, therefore, proceed with an evaluation of whether the European Union has demonstrated that the five ASIs are inconsistent with Section 2(A)(2) of China's Accession Protocol.

7.6.2 Whether the issuance of the five ASIs was consistent with China's Accession Protocol

7.480. The Panel understands, and it is uncontested by the parties, that China's Accession Protocol, including Section 2(A)(2), imposes binding commitments capable of being enforced through WTO dispute settlement.⁹⁸¹ The Panel proceeds with its analysis on that basis.

7.481. Part I of China's Accession Protocol is titled "General Provisions". Within Part I, Section 2 is titled "Administration of the Trade Regime". Under Section 2, subsection (A) is titled "Uniform Administration". Paragraph 2 of Section 2(A) reads:

China shall apply and administer in a uniform, impartial and reasonable manner all its laws, regulations and other measures of the central government as well as local regulations, rules and other measures issued or applied at the sub-national level (collectively referred to as "laws, regulations and other measures") pertaining to or affecting trade in goods, services, trade-related aspects of intellectual property rights ("TRIPS") or the control of foreign exchange.

People's Court, 10 typical cases (Exhibit EU-74b)). ZTE v. Conversant is similarly designated as a top 10 case in Guangdong Province and as one of five cases with judicial innovation in the field of IP by the city-level Shenzhen Intermediate People's Court in 2020. (Exhibits EU-26b and EU-91b). OPPO v. Sharp was designated as a top 10 case by the SPC and the Guangdong Province Higher People's Court. (Exhibits EU-11b and EU-90b).

⁹⁷⁶ See SPC, Guiding Opinions on Similar Cases (Exhibit EU-115b)).

⁹⁷⁷ China's response to Panel question No. 26.

⁹⁷⁸ The Panel recalls its conclusion in paragraph 7.371 above that in the context of Article 63.1 "final judicial decisions" are those that are final as to the issues that they address, in the sense that they are no longer subject to review. In this context, "final" judicial decisions are not limited to decisions on the merits or to decisions taken the latest in time in a legal proceeding. Therefore, the fact that these decisions granted provisional measures that were only effective during the pendency of the litigation, does not mean that they were not final judicial decisions.

⁹⁷⁹ China's response to Panel question No. 105.

⁹⁸⁰ Appellate Body Report, *EU – PET (Pakistan)*, para. 5.39.

⁹⁸¹ See e.g. Panel Report, *China – Autos (US)*, para. 7.740.

7.482. The European Union argues that in issuing ASIs in the five cases concerning SEPs, Chinese courts applied and administered China's legal framework governing the adoption of act preservation measures in IP litigation in a manner inconsistent with Section 2(A)(2) of China's Accession Protocol.⁹⁸² The European Union raises nine grounds for concluding that China acted inconsistently with the requirements under Section 2(A)(2): three arguments in support of its claim that China did not administer its laws, regulations or other measures *uniformly*⁹⁸³; one argument in support of its claim that China did not administer its laws, regulations or other measures *impartially*⁹⁸⁴; and five arguments in support of its claims that China did not administer its laws, regulations or other measures *reasonably*.⁹⁸⁵ Although certain of these different arguments relate to similar factual aspects of the ASI decisions, each argument constitutes an independent ground in support of the European Union's claims under Section 2(A)(2).

7.483. China submits that many of the European Union's arguments under Section 2(A)(2) of China's Accession Protocol are based on misinterpretations of Chinese law and inappropriately entail asking the Panel to review and overturn Chinese courts' interpretation of Chinese law.⁹⁸⁶ China also considers that certain of the European Union's arguments are based on a mischaracterization of the appropriate legal standard under Section 2(A)(2) of China's Accession Protocol.⁹⁸⁷ China further argues that the European Union has failed to substantiate its factual and legal assertions.⁹⁸⁸

7.484. The Panel observes that measures challenged under Section 2(A)(2) must be, or concern, the application or administration of a law, regulation or other measure that is both attributable to China and that must pertain to or affect trade in goods, services, trade-related aspects of IP rights, or control of foreign exchange. As a factual matter, the ASI decisions challenged by the European Union were issued by Chinese courts, at the request of a party to the litigation, pursuant to Article 100 (now 103) of China's Civil Procedure Law, read together with the SPC Provisions.⁹⁸⁹ In four of the five ASI decisions, the court also indicated that in the event the ASI were to be violated, cumulative daily fines would be applied, pursuant to Articles 111 (now 114) and 115 (now 118) of the Civil Procedure Law.⁹⁹⁰

7.485. The Panel first notes that Chinese courts are organs of the Chinese state such that the ASI decisions at issue are attributable to China.⁹⁹¹ Second, the ASIs were issued pursuant to Articles 100 (now 103), 111 (now 114) and 115 (now 118) of the Civil Procedure Law, and in accordance with various provisions of the SPC Provisions.⁹⁹² Third, as described in detail in section 7.5.1.2.4 above,

⁹⁸² European Union's first written submission, para. 485.

⁹⁸³ See para. 7.488 below.

⁹⁸⁴ See para. 7.522 below.

⁹⁸⁵ See para. 7.532 below.

⁹⁸⁶ China's first written submission, paras. 288-299, 306, 308, and 313-318; second written submission, paras. 121-123.

⁹⁸⁷ China's first written submission, para. 319; response to Panel question Nos. 67(b) and 148.

⁹⁸⁸ China's first written submission, paras. 301-306; second written submission, paras. 122 and 124.

⁹⁸⁹ See European Union's first written submission, paras. 32, 35, 47, 49, 54, and 67; China's first written submission, para. 286; SPC, Huawei v. Conversant, (Exhibit EU-1b), p. 10; SPC, Huawei v. Conversant, reconsideration decision (Exhibit EU-6b), p. 6; Wuhan Intermediate People's Court, Xiaomi v. Inter Digital (Exhibit EU-2b), p. 10; Wuhan Intermediate People's Court, Xiaomi v. Inter Digital, reconsideration decision (Exhibit EU-7b), pp. 11 and 17; Shenzhen Intermediate People's Court, ZTE v. Conversant (Exhibit EU-3b), p. 7; and Shenzhen Intermediate People's Court, OPPO v. Sharp (Exhibit EU-4b), pp. 3, 6 and 10; Wuhan Intermediate People's Court, Samsung v. Ericsson (Exhibit EU-5b), p. 7. Article 100 (now 103) of the Civil Procedure Law provides that in civil litigation, at the request of a party or on the motion of the court itself, the court may in certain circumstances order a party to perform certain acts or prohibit a party from committing certain acts. (Article 100 (now 103) of the Civil Procedure Law (Exhibit CHN-38)).

⁹⁹⁰ SPC, Huawei v. Conversant, (Exhibit EU-1b), pp. 10-11; SPC, Huawei v. Conversant, reconsideration decision (Exhibit EU-6b), pp. 14-15; Wuhan Intermediate People's Court, Xiaomi v. Inter Digital (Exhibit EU-2b), p. 11; Shenzhen Intermediate People's Court, ZTE v. Conversant (Exhibit EU-3b), p. 6; and Shenzhen Intermediate People's Court, OPPO v. Sharp (Exhibit EU-4b), p. 10. In Samsung v. Ericsson, the Wuhan Intermediate People's Court found that in the event of violation of the ASI, "the Court w[ould] impose penalties in accordance with the provisions of Chapter X of the Civil Procedure Law of the People's Republic of China." (Wuhan Intermediate People's Court, Samsung v. Ericsson (Exhibit EU-5b)), p. 8. See also European Union's first written submission, para. 561)). Article 111 (now 114) of the Civil Procedure Law provides that if a party refuses to comply with judgments or orders of the court, fines may be imposed. Article 115 (now 118) of the Civil Procedure Law imposes monetary limits on the amount of a fine that might be imposed. (Articles 111 and 115 of the Civil Procedure Law 2017 (Exhibit CHN-38)).

⁹⁹¹ See e.g. Panel Report, *US – Tuna II (Mexico)*, para. 7.20.

⁹⁹² See section 2.6 above. See also para. 7.95 above.

the Panel considers that the decision issuing an ASI in *Xiaomi v. InterDigital*, read together with the reconsideration decision in the same case, pertain to the subject matter of the TRIPS Agreement, namely trade-related aspects of IP rights.⁹⁹³ Specifically, these decisions pertain to enforcement of IP rights and the right to conclude a patent licensing agreement. For the same reasons expressed above regarding *Xiaomi v. InterDigital*, the Panel considers that the ASI decisions, together with the relevant reconsideration decisions, in *Huawei v. Conversant*, *ZTE v. Conversant*, *OPPO v. Sharp*, and *Samsung v. Ericsson* also pertain to trade-related aspects of IP rights, within the meaning of Section 2(A)(2).

7.486. With respect to these three observations, the Panel notes that China does not contest that the issuing of the five individual ASIs falls within the scope of Section 2(A)(2) of China's Accession Protocol.⁹⁹⁴ The Panel thus finds that the issuance of ASIs in these five individual cases (including the relief granted and the fines, if any, to be imposed for non-compliance) are attributable to China and constitute application and administration of China's laws, regulations and other measures pertaining to or affecting trade-related aspects of IP rights, within the scope of Section 2(A)(2).

7.487. The European Union claims that the Chinese courts' issuance of each ASI, and in four such decisions the potential imposition of cumulative daily fines in the event of violation of the ASI, was not a uniform, impartial, or reasonable application and administration of China's laws, regulations and other measures. The language of Section 2(A)(2) indicates that the requirements of uniform, impartial, and reasonable administration and application are not cumulative – to demonstrate an inconsistency with Section 2(A)(2) of China's Accession Protocol it would suffice for the European Union to show that the application or administration of relevant measures fails in only one of these respects. Indeed, the European Union raises distinct arguments under Section 2(A)(2) with respect to each requirement: "uniform"; "impartial"; or "reasonable". The Panel will address each requirement in turn.

7.6.2.1 Whether Chinese courts applied Chinese laws, regulations or other measures in a "uniform" manner

7.6.2.1.1 Summary of the parties' arguments

7.488. The European Union argues that the obligation of uniform administration in Section 2(A)(2) requires China to ensure that its measures are applied consistently and predictably.⁹⁹⁵ The European Union argues that China's issuance of ASIs was not uniform because (a) Chinese courts transformed a legal framework intended to protect patent holders into a tool for the protection of implementers⁹⁹⁶; (b) Chinese courts have only issued ASIs in IP litigation in the context of SEP litigation, meaning that the application of the legal framework is not uniform in the field of IP disputes⁹⁹⁷; and (c) the application of cumulative daily fines for violation of the ASI is unprecedented and prohibited under Chinese law, showing a lack of uniform application in SEP litigation as compared to other civil litigation.⁹⁹⁸ In support of these arguments, the European Union points to the uncontested facts that the five ASIs were only issued in favour of implementers and against patent

⁹⁹³ The Panel notes that Section 2(A)(2) does not refer to the subject matter of the TRIPS Agreement, but more broadly refers to "trade-related aspects of intellectual property rights". The Panel also recalls that the subject matter of the TRIPS Agreement may collectively be referred to as trade-related aspects of IP rights. Thus, a measure that is found to be "pertaining to" the subject matter of the TRIPS Agreement within the meaning of Article 63.1 of the TRIPS Agreement is necessarily also a measure "pertaining to" trade-related aspects of intellectual property rights within the meaning of Section 2(A)(2) of China's Accession Protocol.

⁹⁹⁴ See European Union's first written submission, paras. 32, 35, 47, 49, 54, and 67; China's first written submission, para. 286.

⁹⁹⁵ European Union's first written submission, paras. 500-505 (referring to Panel Reports, *US – COOL*, para. 7.876; *Argentina – Hides and Leather*, para. 11.67-11.68 and 11.83; *China – Raw Materials*, para. 7.693; and *Thailand – Cigarettes (Philippines)*, para. 7.886). See also European Union's response to Panel question No. 148.

⁹⁹⁶ European Union's first written submission, paras. 525 and 527-554; opening statement at the first substantive meeting, paras. 90-97; response to Panel question No. 68(a); and second written submission, paras. 154-161.

⁹⁹⁷ European Union's first written submission, paras. 525 and 555-558; response to Panel question No. 66; and second written submission, paras. 154 and 162.

⁹⁹⁸ European Union's first written submission, paras. 525 and 559-564; response to Panel question Nos. 63(a) and 72; and second written submission, paras. 154 and 163-164.

holders, ASIs have never been issued in non-SEP-related IP cases in China, and daily fines have never been imposed in non-SEP-related IP cases in China.⁹⁹⁹

7.489. China submits that the European Union's arguments essentially request the Panel to assess whether Chinese courts acted inconsistently with Chinese law.¹⁰⁰⁰ China also argues that the European Union is mistaken "as a matter of law in suggesting that the requirements of 'reasonable' and 'uniform' administration allow a panel to second guess a Member's adherence to its own domestic law".¹⁰⁰¹ China submits that Chinese law previously permitted the issuance of ASIs at the request of implementers, and the fact that the law had not been previously applied in that way does not imply that it was not predictable.¹⁰⁰² China notes that "[i]f and when a party to an IP dispute other than a SEP dispute applies for the issuance of an ASI, the Chinese court will make its ruling based on the facts of each case in accordance with the law."¹⁰⁰³ China also argues that the European Union misinterprets Chinese law in its assertions regarding the calculation of fines.¹⁰⁰⁴

7.6.2.1.2 Panel's analysis

7.490. The Panel first addresses the applicable legal standard in assessing whether the application or administration of a relevant measure is "uniform" within the meaning of Section 2(A)(2). The Panel then addresses the European Union's three arguments alleging that China's application of ASIs in these cases was not uniform: (a) that it was contrary to the purpose of China's legal framework governing act preservation measures in IP disputes; (b) that ASIs have only been applied in the context of SEP litigation as compared to other IP litigation; and (c) that cumulative daily fines for violation of an act preservation measure have only ever been applied in China in four of the individual ASIs granted by Chinese courts.

7.6.2.1.2.1 Legal standard of "uniform" application and administration

7.491. The Panel recalls that Section 2(A)(2) of China's Accession Protocol requires that "China shall apply and administer in a uniform ... manner" all relevant laws, regulations and other measures. The adjective "uniform" has several definitions, including: "[o]f one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times"; "[o]f the same form, character, or kind as another or others; conforming to one standard, rule, or pattern; alike, similar"; and "[i]n agreement with, matching with".¹⁰⁰⁵ In short, the plain meaning of "uniform" indicates a lack of variation or difference in relation to things of the same character.

7.492. Section 2(A)(2) textually resembles Article X:3(a) of the GATT 1994. Both provisions require Members' administration of certain measures to be "uniform, impartial and reasonable".¹⁰⁰⁶ The Panel agrees with the parties that prior interpretation of Article X:3(a) may, therefore, be useful and relevant to the interpretation of Section 2(A)(2).¹⁰⁰⁷ In that context, the term "uniform" has been "defined as 'of one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times'".¹⁰⁰⁸ The requirement of uniform administration in Article X:3(a) "requires that Members ensure that their laws are applied consistently and

⁹⁹⁹ European Union's opening statement at the first substantive meeting, para. 89.

¹⁰⁰⁰ China's second written submission, paras. 121-123.

¹⁰⁰¹ China's response to Panel question No. 67(b), para. 107 (referring to Panel Reports, *US – Stainless Steel (Korea)*, para. 6.50; *US – Hot-Rolled Steel*, para. 7.267). (emphasis omitted) China notes that it is the function of courts to interpret domestic law to determine whether and how that law applies to novel circumstances, and the "courts' rulings in these situations (including any review of those rulings by higher courts) establish the *meaning* of the Member's domestic law as it applies in that circumstance". (China's response to Panel question No. 67(b), para. 108. (emphasis original)) China submits that Section 2(A)(2) "concerns the *administration* of domestic laws, not their meaning". (European Union's response to Panel question No. 67(b)), para. 109 (emphasis original)

¹⁰⁰² China's first written submission, para. 301.

¹⁰⁰³ China's first written submission, para. 302.

¹⁰⁰⁴ China's first written submission, paras. 303-304.

¹⁰⁰⁵ *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Oxford University Press, 1993), Vol. 2, p. 3488.

¹⁰⁰⁶ Article X:3(a) of the GATT 1994 provides that "[e]ach Member shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article."

¹⁰⁰⁷ See parties' responses to Panel question No. 65.

¹⁰⁰⁸ Panel Reports, *US – COOL*, para. 7.876. See also Panel Reports, *Colombia – Textiles (Article 21.5 – Colombia)* / *Colombia – Textiles (Article 21.5 – Panama)*, para. 7.360.

predictably".¹⁰⁰⁹ However, the requirement of uniformity in application does not require that all products must be treated identically, as there can be variations in products that might require differential treatment.¹⁰¹⁰ Similarly, the uniformity requirement "must be understood to mean uniformity of treatment in respect of persons *similarly situated*".¹⁰¹¹ Thus, "absolute uniformity" is not required under Article X:3(a).¹⁰¹²

7.493. The Panel therefore considers that, like Article X:3(a) of the GATT 1994, the requirement in Section 2(A)(2) of China's Accession Protocol of uniform application and administration requires consistent application of relevant legal instruments and measures to similar facts or circumstances, while tolerating some degree of variation when facts or circumstances are dissimilar. The question whether such variations are consistent with the requirement of uniform application would need to be examined on a case-by-case basis.

7.494. The Panel also notes the European Union's argument that predictability is an element of uniformity, based on the statement by the panel in *Argentina – Hides and Leather* that uniform administration requires relevant measures to be "applied consistently and predictably".¹⁰¹³ China disagrees that predictability is an element of uniform administration.¹⁰¹⁴ In the Panel's view, the way that previous panels have used the word "predictable" in describing the legal standard of uniform administration under Article X:3(a) of the GATT 1994 does not denote a legal standard different from that articulated above.¹⁰¹⁵ Courts or administrative tribunals will often be faced with situations or circumstances that require the application of legal instruments to novel and unforeseen circumstances. Additionally, methodologies and approaches taken to resolve certain issues may vary over time in a manner that is reasonably or tolerably different. In such circumstances, it may be the case that courts and tribunals apply certain domestic legal instruments in a way that might not have been foreseen or predicted by the parties, but which is nonetheless consistent with the application of those legal instruments under similar facts or circumstances. Indeed, the Panel understands that previous panels' use of the term "predictable" was intended to reinforce such an understanding of the legal standard as requiring consistent application in similar circumstances.

7.495. Based on the foregoing, the Panel finds that the requirement of uniform application and administration in Section 2(A)(2) of China's Accession Protocol requires that China apply relevant laws, regulations, or other measures consistently in similar situations, although some degree of variation may be consistent with that obligation based on specific facts or circumstances. The Panel will therefore assess the European Union's arguments that China applied its laws, regulations or other measures in a non-uniform manner inconsistently with Section 2(A)(2) of China's Accession Protocol by applying this legal standard to the evidence and arguments presented by the parties.

7.6.2.1.2.2 Purpose of China's legal regime governing act preservation measures in IP disputes

7.496. The European Union first argues that Chinese courts failed to apply China's laws, regulations and other measures in a uniform manner because, by issuing ASIs in IP litigation at the request of implementers rather than right holders, Chinese courts acted "in contradiction with the design and

¹⁰⁰⁹ Panel Report, *Argentina – Hides and Leather*, para. 11.83.

¹⁰¹⁰ Panel Report, *Argentina – Hides and Leather*, para. 11.84.

¹⁰¹¹ Panel Report, *US – Stainless Steel (Korea)*, para. 6.51. (emphasis added)

¹⁰¹² Appellate Body Report, *EC – Selected Customs Matters*, para. 212.

¹⁰¹³ European Union's first written submission, para. 505.

¹⁰¹⁴ China states that "[p]redictability" is not an element of 'uniform' administration, at least not as the European Union has used the term 'predictable' in this dispute." (China's response to Panel question No. 148, para. 174).

¹⁰¹⁵ In *Argentina – Hides and Leather*, the panel stated that "[u]niform administration requires that Members ensure that their laws are applied consistently and predictably". (Panel Report, *Argentina – Hides and Leather*, para. 11.83). Subsequent panels, in summarizing the legal standard, have referred to this statement by the panel in *Hides and Leather* as support for a legal standard of consistency and predictability. (Panel Reports, *US – COOL*, para. 7.876; *Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)*, para. 7.360). The Panel understands that the word "predictably" was used by the panel in *Argentina – Hides and Leather* to complement the word "consistently" – it did not intend to equate the obligation of "uniform" application with an obligation of "predictable" application. Although predictable application might be useful to a respondent in demonstrating that its measures were applied uniformly, application that was not *strictu sensu* predictable does not necessarily run afoul of the obligation of uniform application. As noted above, Members, through their courts and administrative organs, have a margin of flexibility to adapt and adjust to novel or unforeseen situations.

purpose of the 2018 SPC Provisions on Act Preservation in IP Disputes".¹⁰¹⁶ The European Union considers that Chinese courts "applied and administered a tool that was intended to protect the interests of patent holders and have transformed it into a tool for the protection of the interests of implementers".¹⁰¹⁷ For the European Union, the issuance of ASIs to protect the interests of applicants not holding the IP 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".¹⁰¹⁸

7.497. China argues that the "foundation" of the European Union's arguments is its view that China's Civil Procedure Law did not previously permit the issuance of ASIs at the request of implementers.¹⁰¹⁹ China submits that contrary to the European Union's understanding, "Chinese law did in fact permit the issuance of ASIs upon the application of implementers in SEP-related litigation".¹⁰²⁰ China submits that the European Union's arguments essentially assert that Chinese courts "misinterpreted and misapplied Chinese law".¹⁰²¹ China also submits that an allegation that a Member's courts "have misinterpreted and misapplied their own law is a serious one", requiring "extraordinary evidence", which the European Union has not adduced.¹⁰²²

7.498. The Panel notes that the European Union's argument concerning China's alleged transformation of the purpose of its legal framework governing act preservation measures in IP disputes rests on the European Union's assumption that the legal standard of uniform application, within the meaning of Section 2(A)(2) of China's Accession Protocol, requires "predictable" application. As indicated above, the use of this term by prior panels describing the legal standard under Article X:3(a) of the GATT 1994 was intended to reinforce their understanding of the legal standard as requiring consistent application in similar circumstances.¹⁰²³ In this dispute, however, the European Union refers to the notion of "predictability" as a way to assess whether the Chinese courts' application of China's legal regime governing act preservation in IP disputes is compatible with, or supported by, the purpose of that legal regime. For the European Union, a lack of predictability (in the sense that the application of a certain legal regime contradicts the purposes of that regime) denotes a lack of uniformity in application.¹⁰²⁴

7.499. Putting aside the fact that Chinese courts are substantially better placed to determine the purpose and meaning of Chinese law than the Panel, the European Union's approach is difficult to reconcile with the legal standard of uniform application as articulated above. This is because the assessment of uniformity requires an examination of whether China applies its relevant laws, regulations, or other measures *consistently in similar situations* (i.e. regardless of the original purpose of the relevant legal regime being applied). Thus, the European Union's reliance on the notion of predictability to assert that Chinese courts applied China's legal regime governing act preservation measures in IP disputes in a manner that was incompatible with the purpose of that legal regime is inapposite.

7.500. It is inevitable that in any legal system courts and tribunals will be faced with novel factual circumstances against which they must determine whether and how to apply certain laws, regulations or other measures. As stated, the obligation of uniformity in application and administration requires that when courts or tribunals apply a legal standard to a certain problem or situation they must apply it consistently in similar circumstances. That obligation cannot preclude courts and tribunals from developing or adapting the legal standard to be applied to novel factual circumstances. Moreover, the obligation of uniformity in application accommodates reasonable variations in application at least insofar as those variations are warranted by the factual circumstances or are otherwise objectively justifiable. In short, an obligation to apply relevant legal instruments uniformly does not preclude courts and tribunals from developing and adapting the relevant legal tests and standards to be applied.

¹⁰¹⁶ European Union's second written submission, para. 155.

¹⁰¹⁷ European Union's first written submission, para. 532.

¹⁰¹⁸ European Union's first written submission, para. 527.

¹⁰¹⁹ China's first written submission, para. 282 (referring to the European Union's first written submission, paras. 527, 532, 569, and 576).

¹⁰²⁰ China's first written submission, para. 283. See also *ibid.* paras. 286-298.

¹⁰²¹ China's first written submission, para. 284.

¹⁰²² China's first written submission, para. 285.

¹⁰²³ See para. 7.494 and fn 1015 above.

¹⁰²⁴ European Union's first written submission, paras. 527-554.

7.501. With this in mind, it is unnecessary for the Panel to address in detail the European Union's contention that the application of China's legal regime governing act preservation in IP disputes was incompatible with, or unsupported by, the original purpose of that legal regime. The requests for ASIs in the five cases challenged by the European Union were the first five instances in which Chinese courts had ever been presented with the question of whether an implementer in SEP litigation could request – and be granted – an ASI. In the context of this argument, the European Union has not: (a) pointed to any comparator against which the Panel could assess a lack of uniformity; (b) sought to demonstrate that any differences in the legal bases relied upon or the way each court applied the relevant factors bases demonstrates a lack of uniformity; or (c) argued that the Shenzhen Intermediate Court's denial of a request for an ASI in *Lenovo v. Nokia* demonstrates any lack of uniformity. Rather, this particular argument raised by the European Union focuses entirely on the alleged *purpose* of the relevant legal regime, an alleged transformation of that purpose, and the extent to which the application of that legal regime was predictable. In the Panel's view, when applying the relevant legal standard under Section 2(A)(2) the European Union's argument is inapposite. Given the novelty of the factual circumstances, even assuming that Chinese courts applied the existing legal instruments in a manner that was not envisaged at the time when those legal instruments were drafted, or in a manner that arguably contradicted the original purpose of those legal instruments, this would not suffice to demonstrate any lack of *uniformity* in application.

7.502. The Panel therefore finds that the European Union has not demonstrated that, by applying the relevant legal regime in an unpredictable manner, Chinese courts applied China's laws, regulations or other measures in a non-uniform manner.

7.6.2.1.2.3 Issuance of ASIs exclusively in SEP litigation

7.503. The European Union's second argument that Chinese courts failed to apply China's laws, regulations or other measures in a uniform manner is that Chinese courts have only issued ASIs in IP litigation in the context of SEP litigation, such that there is a "lack of uniformity between the application of the legal framework in SEP litigation and the application of the same legal framework in the broader field of IP disputes".¹⁰²⁵

7.504. China argues that "Chinese courts determine whether to grant act preservation measures, including ASIs, only upon application by a party to a dispute", and "[i]f no patent owners have requested an ASI, then the fact that no ASIs have been granted at the request of patent owners does not provide evidence of 'non-uniform' application of the Civil Procedure Law."¹⁰²⁶

7.505. The Panel recalls that the legal standard of "uniform" application requires China to apply its laws, regulations, or other measures consistently in similar situations. With that in mind, the Panel recalls that the first time an ASI was issued in IP litigation was in *Huawei v. Conversant*.¹⁰²⁷ In all five instances in which ASIs have been issued by Chinese courts in the context of IP litigation, they were issued at the request of a party to the litigation. Because ASIs have only been issued upon request by a party, the Panel considers that a similar situation for purposes of comparison must be a situation where an ASI was requested by a party.

7.506. According to the evidence before the Panel, including the parties' responses to questions, although IP right holders have requested other act preservation measures, no IP right holder has ever requested an ASI. In the case of *Lenovo v. Nokia*, the Shenzhen Intermediate People's Court

¹⁰²⁵ European Union's first written submission, para. 555. See also para. 558; response to Panel question No. 151. The European Union also notes the SPC's statements that the ASI issued in *Huawei v. Conversant* "resolutely safeguard[ed] China's national interests, judicial sovereignty and legitimate rights and interests of enterprises" and "established the judicial practice path of China's 'anti-suit injunction'". (Ibid. paras. 556-557 (quoting SPC Report on *Huawei v. Conversant* (Exhibit EU-12b))); and SPC, Top 10 IP Cases and 50 Typical IP Cases, 2020 (Exhibit EU-11b)).

¹⁰²⁶ China's comments on the European Union's response to Panel question No. 151, para. 78. China submits that "[i]f and when a party to an IP dispute other than a SEP dispute applies for the issuance of an ASI, the Chinese court will make its ruling based on the facts of each case in accordance with the law". (China's first written submission, para. 302). China also notes the European Union's position that "ASIs have only been issued in favour of ... those not holding the IP rights at issue" and argues that "[i]f these are the only ASIs that have been requested, then the fact that no ASIs have been granted at the request of right holders does not provide evidence of non-uniform application." (China's comments on the European Union's response to Panel question No. 151, para. 79 (quoting European Union's response to Panel question No. 151, para. 79)).

¹⁰²⁷ See parties' responses to Panel question No. 69.

denied a request for an ASI. However, that request was denied *in the context of SEP litigation*. The European Union has not articulated any claim of lack of uniform application of China's measures on the basis of the denial of the request for an ASI in that dispute (i.e. within SEP litigation itself). Rather, the European Union compares, on the one hand, the application of China's laws, regulations or other measures in *SEP litigation* with, on the other hand, *other IP litigation*.

7.507. Thus, the evidence before the Panel does not show that Chinese courts, when addressing a request for an ASI, have applied the relevant Chinese laws, regulations or other measures differently in the context of SEP litigation as compared to other IP litigation. Specifically, because the European Union has not demonstrated that any requests for ASIs have been made in IP litigation other than SEP litigation, the European Union has failed to show that Chinese courts have acted differently in similar situations. The Panel therefore finds that the European Union has not demonstrated that, by issuing ASIs exclusively in SEP litigation, Chinese courts applied China's laws, regulations or other measures in a non-uniform manner.

7.6.2.1.2.4 Cumulative daily fines

7.508. The European Union argues that the potential application of cumulative daily fines for violation of an ASI is unprecedented and prohibited under China's Civil Procedure Law.¹⁰²⁸ The European Union considers that in four cases in which ASIs were issued the relevant Chinese court indicated that in the event of non-compliance with the ASI fines would be imposed on a daily basis, thereby disregarding Article 184 of the SPC Interpretation of the Civil Procedure Law, which provides that "fines shall not be applied continuously".¹⁰²⁹ The European Union also argues that: (a) daily fines have only been applied in IP litigation in the context of cases concerning FRAND rates in SEP disputes; (b) pursuant to the SPC's reasoning, daily fines are warranted in situations where an act preservation measure prohibits a party from committing certain acts and every day the party continues committing the act is a violation; and (c) other provisional act preservation measures in IP cases are comparable to the ASIs issued in SEP litigation, because they prohibit a respondent from committing certain acts (such as measures to order pre-trial cessation of infringement of IPRs). The European Union considers that under the SPC's logic, if an act preservation measure requires a party to stop selling infringing goods, every day of non-compliance would also constitute a violation of the order, thus warranting daily fines, however no Chinese court has established daily fines in those other cases.¹⁰³⁰

7.509. China notes that Article 184 of the SPC Interpretation of the Civil Procedure Law prohibits continuous imposition of fines against a single act that obstructs the civil litigation proceedings (such as destruction of evidence), whereas Article 115 (now 118) of the Civil Procedure Law allows imposition of multiple fines when a party commits multiple acts obstructing the proceedings.¹⁰³¹ China argues that in *Huawei v. Conversant* the SPC concluded with respect to Article 115 (now 118) of the Civil Procedure Law that "each day of non-compliance with an act preservation measure is a new act of non-compliance and therefore subject to the imposition of a new fine".¹⁰³² China considers that this interpretation is "fully consistent" with Article 115 of the Civil Procedure Law and Article 184 of the SPC Interpretation of the Civil Procedure Law.¹⁰³³ China also argues that "the European Union's proposed 'comparable' situation is not based on any 'evidence' but a purely hypothetical case, namely a 'common act preservation measure' that 'requires an infringer to stop selling infringing goods'".¹⁰³⁴

¹⁰²⁸ European Union's first written submission, para. 563. The European Union highlights that Article 184 of the SPC Interpretation of the Civil Procedure Law provides that fines "shall not be applied continuously". (Ibid. para. 559 (quoting SPC Interpretation of the Civil Procedure Law (Exhibit EU-49b), Article 184)).

¹⁰²⁹ European Union's first written submission, paras. 559-564 (quoting Article 184 of the SPC Interpretation of the Civil Procedure Law (Exhibit EU-49b)).

¹⁰³⁰ European Union's response to Panel question No. 152, paras. 226-231 (referring to SPC, Report on *Huawei v. Conversant* (Exhibit EU-12b), pp. 1 and 5-6; China's first written submission, para. 103; SPC Interpretations on Issues Concerning the Application of Law in the Handling of Cases Involving the Review of Act Preservation in Intellectual Property Disputes [Exposure Draft] (Exhibit EU-112b), pp. 1-2).

¹⁰³¹ China's response to Panel question No. 153, para. 176.

¹⁰³² China's first written submission, para. 304.

¹⁰³³ China's first written submission, para. 304; China's response to Panel question No. 153(b), para. 177.

¹⁰³⁴ China's comments on the European Union's response to Panel question No. 152, para. 81.

7.510. As a factual matter, the Panel recalls that the European Union's claim is limited to the four challenged ASIs where the relevant Chinese court indicated that, if the respondent were to violate the ASI, fines would be applied on a cumulative daily basis (namely *Huawei v. Conversant*, *Xiaomi v. InterDigital*, *OPPO v. Sharp*, and *ZTE v. Conversant*).¹⁰³⁵ The European Union essentially raises two arguments alleging a lack of uniformity in this respect¹⁰³⁶: (a) Chinese courts acted in a non-uniform manner by disregarding or misinterpreting Article 184 of the SPC Interpretation of the Civil Procedure Law; and (b) Chinese courts have not applied cumulative daily fines, or indicated that cumulative daily fines would be applied, in comparable situations.

7.511. The Panel first addresses the argument that Chinese courts disregarded or misinterpreted Article 184 of the SPC Interpretation of the Civil Procedure Law. The Panel notes that this argument in principle raises an issue of fact. If the Panel were to conclude that Chinese courts did disregard or misinterpret Article 184, then it would need to address the legal question of whether that is inconsistent with Section 2(A)(2).

7.512. Article 184 requires that:

The measure of fines or detention taken against the same act that obstructs civil litigation proceedings shall not be applied continuously. Where a new act obstructing civil litigation proceedings occurs, the competent people's court may impose a new fine or take the measure of detention again.¹⁰³⁷

7.513. In *Huawei v. Conversant* the SPC stated, among other things, that "[t]he Respondent was deemed to have conducted separate violations each day. For such acts of obstructing civil litigation that continue to occur on a daily basis, the punishment shall be determined in a daily manner."¹⁰³⁸ The Wuhan Intermediate People's Court adopted similar reasoning in *Xiaomi v. InterDigital*.¹⁰³⁹ In *ZTE v. Conversant* and in *OPPO v. Sharp* the Shenzhen Intermediate People's Court did not elaborate on the legal basis for indicating that cumulative daily fines would be applied in the same way in the event of a violation of the ASI.¹⁰⁴⁰

7.514. The reasoning of the SPC and Wuhan Intermediate People's Court directly addresses the requirements of Article 184 of the SPC Interpretation of the Civil Procedure Law. The Panel therefore disagrees with the European Union's factual assertion that Chinese courts disregarded Article 184.¹⁰⁴¹

¹⁰³⁵ See European Union's first written submission, para. 561. See also para. 7.100 above.

¹⁰³⁶ The Panel emphasizes that in no case did any Chinese court impose the cumulative daily fines. In those four proceedings where the courts indicated the cumulative daily fines to be applied, the application of the fines was conditional on the respondent violating the ASI and the discretion of the court. In at least two cases the respondent did violate the terms of the ASI, yet the threatened fines were not imposed. (See European Union's response to Panel question No. 88; see also section 2.6 above).

¹⁰³⁷ SPC Interpretation of the Civil Procedure Law (Exhibit EU-49b), Article 184.

¹⁰³⁸ SPC, *Huawei v. Conversant*, reconsideration decision (Exhibit EU-6b), p. 14.

¹⁰³⁹ The Wuhan Intermediate People's Court stated that a violation of the ASI would constitute "proactive and willing violations of the law", and a "continuation of such conduct should be deemed as separate illegal behaviors, which are subject to daily fines on an accumulative basis." (Wuhan Intermediate People's Court, *Xiaomi v. InterDigital*, reconsideration decision (Exhibit EU-7b), p. 16).

¹⁰⁴⁰ The Panel also notes that the European Union has not identified the absence of such reasoning in *ZTE v. Conversant* and *OPPO v. Sharp* as a ground for claiming that Chinese courts acted inconsistently with Section 2(A)(2) of China's Accession Protocol.

¹⁰⁴¹ Regarding the ASIs in *ZTE v. Conversant* and *OPPO v. Sharp*, the Panel notes that, although the Shenzhen Intermediate People's Court did not set forth the legal basis for applying cumulative daily fines (possibly because such application of cumulative daily fines was not challenged by the respondent in either litigation), there is no reason to consider that the reasoning of the SPC and Wuhan Intermediate People's Court would not be equally pertinent. In other words, although the Shenzhen Intermediate People's Court did not explicitly address the requirements of Article 184 of the SPC Interpretation of the Civil Procedure Law, that omission does not undermine the reasoning of the SPC and Wuhan Intermediate People's Court in explaining how cumulative daily fines to be imposed in the context of ASIs in SEP litigation may be consistent with the requirements of Article 184.

7.515. As to the European Union's contestation of the SPC's interpretation of the SPC Interpretation of the Civil Procedure Law¹⁰⁴², the Panel recalls that to demonstrate a lack of uniform application of Chinese law, a complainant must demonstrate that China does not apply relevant laws, regulations, or other measures consistently in similar situations. That the European Union disagrees with how Chinese courts have interpreted and applied Chinese law does not show any lack of *uniformity* in that interpretation and application. It is therefore not necessary for the Panel to address this factual issue as, even if true, it would show no inconsistency with the uniformity obligation under Section 2(A)(2).

7.516. The Panel therefore turns to the European Union's second argument, namely that Chinese courts have not applied, or indicated that cumulative daily fines would be applied, in comparable situations. This is not a question of interpretation of Chinese law, but rather whether Chinese courts acted consistently with provisions of WTO law. In that respect, the Panel recalls that to establish that Chinese courts acted in a non-uniform manner with respect to the imposition of cumulative daily fines, it would need to be shown that Chinese courts did not apply cumulative daily fines, or indicate that such fines would be applied, in any similar situation. The Panel will therefore examine the similarity – or comparability – of any situation which the European Union asserts to be relevant to showing a lack of uniformity in application. Various factors may influence the comparability of different situations. Given the extremely broad range of factual scenarios that might arise, a determination of the comparability of different situations must be made on a case-by-case basis and take into account the specific factual circumstances of each situation.

7.517. The Panel notes that the European Union has posited a hypothetical court order to stop selling IP-infringing goods as a situation comparable to that of ASIs in SEP litigation. For the European Union, such orders are comparable to ASIs in SEP litigation because, in both situations, violations of the court order would constitute continuous, daily conduct which, in line with the SPC's reasoning in *Huawei v. Conversant*, warrant the imposition of cumulative daily fines.¹⁰⁴³

7.518. The Panel acknowledges that, viewed in the abstract, violations of injunctions other than ASIs, including orders to refrain from selling IP-infringing goods, may constitute continuous, daily conduct in a manner that is comparable to an ongoing violation of an ASI. The Panel considers, however, that for purposes of comparing different circumstances in which fines might be applied, the gravity of the consequences of violation of the court's order is also a relevant factor to be taken into account. This is because the gravity of the consequences of a violation of a court order is a factor that will in most – if not all – cases directly inform the level or nature of any fines (or other penalty) to be imposed on a party for disobeying that court order. Thus, for purposes of assessing whether Chinese courts acted in a uniform manner, identifying a relevant comparable situation must take into account the gravity of the consequences of a violation of the court order.

7.519. The Panel also recalls that the specific circumstances of parallel litigation concerning FRAND determinations for SEP licences presented a novel factual scenario for the SPC (and other Chinese courts). In the context of imposing cumulative daily fines, the SPC emphasized that "Huawei Technologies and Conversant are litigating around the world due to their SEP licensing disputes, and the existence of relevant international parallel lawsuits makes courts in different jurisdictions face complex situations in the trials."¹⁰⁴⁴ In the Panel's view, the overall factual circumstances of ASIs issued in the context of SEP litigation are directly relevant to an identification of other situations that can be considered comparable to violations of an ASI in SEP litigation.

7.520. With these considerations in mind, the Panel observes that in alleging that injunctions to prevent infringement are comparable to the five challenged ASIs the European Union has not asserted that the gravity of the consequences of a violation of such injunctions is comparable to the

¹⁰⁴² The Panel is aware of the European Union's position that it is "not argu[ing] that the Panel should find that Chinese courts have misinterpreted or misapplied Chinese law". (European Union's response to Panel question No. 66, para. 270). However, in the same set of responses to questions, the European Union states that it "contests China's interpretation that 'each day of non-compliance with an act preservation measure is a new act of non-compliance' because the act that does not comply with the anti-suit injunction is the submission of the complaint before a foreign court." The European Union argues that, "[o]n the contrary, a new act of non-compliance cannot be constituted by every single day that the proceeding before the foreign court is pending – a period whose length does not depend upon the complainant." (European Union's response to Panel question No. 72, para. 288).

¹⁰⁴³ European Union's response to Panel question No. 152, paras. 226-231.

¹⁰⁴⁴ SPC, *Huawei v. Conversant*, reconsideration decision (Exhibit EU-6b), p. 15.

gravity of the consequences of a violation of the ASIs issued in the circumstances of these cases. Moreover, beyond characterizing both sets of situations as involving act preservation measures and continuous violations of a court order, the European Union has not addressed how the factual circumstances of an injunction to prevent infringement are comparable to those of an ASI issued in the context of SEP litigation. Nor has the European Union identified or demonstrated any other situation that might be comparable to the circumstances of an ASI issued in the context of SEP litigation. In short, the European Union has not identified a situation that can be considered comparable to that of ASIs issued in the context of SEP litigation. In the absence of any evidence of a comparable situation, the Panel has no basis to conclude that Chinese courts acted in a non-uniform manner by indicating that cumulative daily fines would be applied if the respondent were to violate the ASI.

7.521. The Panel therefore finds that the European Union has not met its burden of demonstrating that, by imposing cumulative daily fines, Chinese courts applied China's laws, regulations or other measures in a manner that was non-uniform.

7.6.2.2 Whether Chinese courts applied Chinese laws, regulations or other measures in an "impartial" manner

7.6.2.2.1 Summary of the parties' arguments

7.522. The European Union argues that while "act preservation measures in IP disputes are intended to be requested by the right owners, in the five cases in which ASIs were issued, these measures were instead granted in favour of the implementers", demonstrating that the relevant legal framework "has not been administered or applied by China in an impartial manner in the context of SEP litigation".¹⁰⁴⁵ The European Union considers that the interests of implementers have been "systematically favoured" over the interests of SEP holders, and the fact that the five ASIs "were only granted in favour of implementers and against patent holders, and that they were only granted in SEP litigation and not in other IP disputes, demonstrates that the administration of the legal framework was not carried out in an impartial manner".¹⁰⁴⁶

7.523. China submits that the European Union's argument is entirely dependent on its incorrect view that Chinese law did not previously permit the issuance of ASIs at the request of an implementer¹⁰⁴⁷, and therefore the European Union's claim must fail.¹⁰⁴⁸ China further notes that "[u]nder Chinese law, both implementers and IP right holders (along with other types of litigants) may apply for the issuance of an act preservation measure and obtain such a measure if the legal conditions for the issuance of an act preservation measure are satisfied", such that the "administration and application of its written legal framework governing the issuance of act preservation measures does not 'favour either party involved in any procedure to the detriment of the other', whether 'fairly', 'unfairly', or otherwise."¹⁰⁴⁹

7.6.2.2.2 Panel's analysis

7.6.2.2.2.1 Legal standard of "impartial" application and administration

7.524. Section 2(A)(2) of China's Accession Protocol requires that "China shall apply and administer in a[n] ... impartial ... manner" all relevant laws, regulations and other measures. Regarding the applicable legal standard, the Panel notes that the plain meaning of "impartial" is: "[n]ot partial; not favouring one party or side more than another; unprejudiced, unbiased; fair".¹⁰⁵⁰ The Panel recalls that prior interpretation of Article X:3(a) of the GATT 1994 may be useful and relevant to the

¹⁰⁴⁵ European Union's first written submission, paras. 570-571; opening statement at the first meeting, para. 98. In response to a question from the Panel inquiring as to the basis for concluding that predictability is an element of the legal standard of uniform application and administration, the European Union states merely that "[p]redictability can be said to be both an element of uniformity and of reasonableness in the application of the relevant legal framework." (European Union's response to Panel question No. 148, para. 216).

¹⁰⁴⁶ European Union's second written submission, paras. 166-167.

¹⁰⁴⁷ China's first written submission, para. 306.

¹⁰⁴⁸ China's first written submission, para. 306; response to Panel question No. 73, para. 116.

¹⁰⁴⁹ China's response to Panel question No. 73, para. 116.

¹⁰⁵⁰ *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Oxford University Press, 1993), Vol. 1, p. 1318.

interpretation of Section 2(A)(2).¹⁰⁵¹ In this respect, previous panels, in the context of interpreting Article X:3(a), , summarized the legal standard of "impartial" application as requiring "application or implementation of the relevant laws and regulations in a fair, unbiased and unprejudiced manner".¹⁰⁵²

7.525. The Panel observes that the European Union defines "impartial" administration as "manners of administration that do not favour either party involved in any procedure to the detriment of the other".¹⁰⁵³ Although China does not contest that articulation of the standard, the Panel observes that this standard of "impartiality" as articulated by the European Union does not necessarily connote questions of fairness, prejudice, or bias, but rather seems to entail an assessment of whether the application of a particular law, regulation, or measure is "to the detriment" of one or the other party. The Panel notes that the result of any contested application of a particular law, regulation, or measure by a court may be to the detriment of one or another party. Thus, the European Union's formulation does not assist in assessing whether an adjudicator's application of a given measure in the context of an adversarial proceeding is impartial (i.e. fair, unbiased, and unprejudiced).

7.526. The Panel therefore considers that the requirement of impartiality in Section 2(A)(2) of China's Accession Protocol protects against unfair, biased, or prejudiced application of relevant laws, regulations or measures. The Panel will conduct its assessment on that basis.

7.6.2.2.2 Issuance of ASIs at the request of parties not holding IP rights and only in favour of implementers

7.527. The European Union advances two arguments purporting to demonstrate that Chinese courts acted in a manner that was not impartial: (a) act preservation measures in IP disputes are intended to be requested by IP right holders, but in the five cases in which ASIs were issued they were issued at the request of implementers¹⁰⁵⁴; and (b) ASIs have only been issued in favour of implementers and against patent holders.¹⁰⁵⁵ The European Union submits that the five ASIs "systematically favoured" the interests of the implementer over those of the SEP holder.¹⁰⁵⁶ The Panel addresses each argument in turn.

7.528. First, regarding the assertion that it is contrary to the purpose of China's legal framework governing act preservation measures in IP disputes to issue ASIs at the request of implementers, the Panel does not see how that assertion – even if true – would demonstrate partiality in application. That a legal instrument is applied in a manner different from its original purpose does not demonstrate bias, prejudice, partiality or unfairness. Similar to the requirement of uniformity discussed above, a requirement of impartiality in application does not preclude courts and tribunals from applying existing legal instruments to novel factual circumstances.¹⁰⁵⁷ As stated above, the issuance of ASIs in the five cases challenged by the European Union constituted the first instances in which Chinese courts were faced with the issue of whether an implementer in SEP litigation could request – and be granted – an ASI. The Panel therefore considers that the European Union has not demonstrated that Chinese courts acted in an unfair, biased, or prejudiced manner simply because they granted ASIs at the request of implementers, even assuming that the relevant legal regime was not originally intended for such purpose.

7.529. Second, regarding the argument that ASIs have only been issued in favour of implementers and against IP right holders, while the Panel recognizes that fact the Panel also recalls that a court does not issue an ASI on its own motion, but upon the formal request of one party to litigation. In all five instances in which Chinese courts issued ASIs in IP litigation, the requesting party was a SEP implementer. The fact that all the ASIs at issue were requested by implementers cannot be attributed to the Chinese courts. The European Union has adduced no evidence that a Chinese court has ever received, let alone denied, a request for an ASI from an IP right holder. Indeed, there is no evidence

¹⁰⁵¹ See para. 7.492 above.

¹⁰⁵² Panel Report, *Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)*, para. 7.361 (quoting Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.899; and referring to Panel Reports, *China – Raw Materials*, para. 7.694)). (fns omitted)

¹⁰⁵³ European Union's first written submission, para. 506.

¹⁰⁵⁴ European Union's first written submission, paras. 570-571; opening statement at the first substantive meeting, para. 98.

¹⁰⁵⁵ European Union's second written submission, paras. 166-167.

¹⁰⁵⁶ European Union's second written submission, para. 166.

¹⁰⁵⁷ See paras. 7.500-7.501 above.

before the Panel that a Chinese court has ever received a request for an ASI in IP litigation other than in the context of SEP litigation.¹⁰⁵⁸ Thus, the European Union has not demonstrated that Chinese courts acted in an unfair, biased, or prejudiced manner simply because ASIs have only been issued in favour of implementers and against patent holders.

7.530. The Panel also notes that in *Lenovo v. Nokia* the Shenzhen Intermediate People's Court rejected an implementer's request for an ASI.¹⁰⁵⁹ The Shenzhen Intermediate People's Court is the same court that issued the ASIs in *ZTE v. Conversant* and *OPPO v. Sharp*. Thus, there is no indication of bias in the application of the legal framework. The Panel highlights that based on the evidence before it, this situation has only arisen before Chinese courts on six occasions – the fact that in five such instances the court decided the issue in favour of the implementer and not the SEP holder is not sufficient, in and of itself, to demonstrate bias or partiality in China's application of its laws, regulations, and other measures.

7.531. The Panel therefore finds that the European Union has not demonstrated that in issuing the five ASIs at issue in this dispute Chinese courts applied China's laws, regulations or other measures in a manner that was not impartial.

7.6.2.3 Whether Chinese courts applied Chinese laws, regulations or other measures in a "reasonable" manner

7.6.2.3.1 Summary of the parties' arguments

7.532. The European Union argues that administration of a measure is not reasonable within the meaning of Section 2(A)(2) if it is not based on applicable law; is inappropriate, disproportionate, not sensible, irrational; or poses a "very real risk" to the interests of relevant parties.¹⁰⁶⁰ The European Union raises several arguments seeking to demonstrate that the application by Chinese courts of China's legal framework governing act preservation measures in IP disputes was not reasonable. First, the European Union argues that the issuance of the ASIs was "unpredictable", thereby demonstrating unreasonable application¹⁰⁶¹, because (a) the legal basis for the issuance of the ASIs was unpredictable "*tout court*"¹⁰⁶²; (b) the legal basis for the issuance of ASIs in favour of implementers and against IP right holders was unpredictable¹⁰⁶³; and (c) the legal basis for the daily fines for violation of the ASIs was unpredictable because Chinese courts disregarded Article 11 of the SPC Provisions.¹⁰⁶⁴ Second, the European Union argues that the amounts of the fines that Chinese courts indicated would be imposed if the ASIs were violated was extremely high compared to the amounts of the securities required of the applicants.¹⁰⁶⁵ Third, the European Union argues that the fines in case of violation of the ASIs constituted a very real risk to the interests of the SEP holders.¹⁰⁶⁶

7.533. China argues that prior to the SPC decision in *Huawei v. Conversant*, Chinese law permitted issuance of ASIs at the request of implementers, and the SPC affirmed as much.¹⁰⁶⁷ Regarding the European Union's references to Article 11 of the SPC Provisions, and its comparison of the amount of the fines with the amounts of the securities, China argues that the European Union has no evidentiary basis for its interpretation of Chinese law, there is nothing inherently unreasonable about the amounts of the daily fines for non-compliance, and in any event these are issues for Chinese courts to address, not a WTO panel.¹⁰⁶⁸ To the extent the European Union's argument is that the Chinese courts' determinations of equivalence were inherently unreasonable because they were disproportionate, China considers that the European Union has failed to articulate a legal standard

¹⁰⁵⁸ See para. 7.506 above.

¹⁰⁵⁹ Shenzhen Intermediate People's Court, *Lenovo v. Nokia* (Exhibit EU-50b).

¹⁰⁶⁰ European Union's first written submission, paras. 507-516 and 572.

¹⁰⁶¹ European Union's response to Panel question No. 67(a), para. 271; second written submission, para. 169.

¹⁰⁶² European Union's first written submission, paras. 575-578.

¹⁰⁶³ European Union's first written submission, paras. 575-577 and 578-581.

¹⁰⁶⁴ European Union's first written submission, paras. 575-577 and 582-596.

¹⁰⁶⁵ European Union's first written submission, paras. 575 and 585-596; opening statement at the first substantive meeting, para. 99; response to Panel question No. 77; second written submission, paras. 170-177.

¹⁰⁶⁶ European Union's first written submission, paras. 575 and 597; opening statement at the first substantive meeting, para. 99.

¹⁰⁶⁷ China's first written submission, paras. 307-308.

¹⁰⁶⁸ China's first written submission, paras. 313-318; second written submission, paras. 125-126.

or evidentiary basis in support of such a conclusion.¹⁰⁶⁹ Regarding the alleged risk to the interests of SEP holders, China argues that the European Union misinterprets the legal standard under Section 2(A)(2) of China's Accession Protocol.¹⁰⁷⁰

7.6.2.3.2 Panel's analysis

7.534. The Panel first addresses the legal standard to be applied in assessing whether the application or administration of a relevant measure is "reasonable" within the meaning of Section 2(A)(2). The Panel then turns to address the parties' arguments concerning: (a) the alleged lack of predictability of Chinese courts' application of China's legal framework governing act preservation measures in IP disputes; (b) the amount of the fines to be imposed on SEP holders as compared to the amount of the securities required of the implementers; and (c) the alleged risks to the interests of SEP holders arising from the granting of the ASIs.

7.6.2.3.2.1 Legal standard of "reasonable" application and administration

7.535. Section 2(A)(2) of China's Accession Protocol requires that "China shall apply and administer in a ... reasonable manner" all relevant laws, regulations and other measures. Regarding the legal standard to be applied, the plain meaning of the term "reasonable" is "[i]n accordance with reason; not irrational or absurd"; "[p]roportionate"; "[w]ithin the limits of reason; not greatly less or more than might be thought likely or appropriate"; and "[o]f a fair, average, or considerable amount, size".¹⁰⁷¹ The Panel also recalls that prior interpretation of Article X:3(a) of the GATT 1994 may be useful and relevant to the interpretation of Section 2(A)(2).¹⁰⁷² In the context of Article X:3(a) of the GATT 1994, prior panels concluded that the legal standard of "reasonable" application of relevant laws, regulations or other measures is "administration that is equitable, appropriate for the circumstances and based on rationality" and that "[t]he analysis of a claim of violation of the requirement of reasonableness entails a consideration of the factual circumstances specific to each case, for which purpose it is necessary to examine the features of the administrative act at issue, in the light of its objective, cause or the rationale behind it".¹⁰⁷³

7.536. The Panel therefore understands that the legal standard for assessing a claim that China has failed to apply or administer its laws, regulations or other measures in a "reasonable" manner entails consideration of notions of fairness, appropriateness, proportionality, and rationality.

7.537. The Panel notes that, similar to its arguments concerning uniformity, the European Union seeks to equate the legal standard for "reasonable" administration or application with administration or application which is "predictable".¹⁰⁷⁴ However, the European Union's assertion that "predictability is an element of reasonableness"¹⁰⁷⁵ is without any textual or interpretative support. Whether a certain action is *predictable* is conceptually distinct from whether that action is *reasonable*. For example, if a court or tribunal were to apply a relevant measure repeatedly the same way, but in a way that is irrational or inappropriate, such conduct might be considered predictable, but

¹⁰⁶⁹ China's first written submission, para. 317. China further submits that courts must have methods to ensure compliance and it is not the job of a WTO panel to review such determinations. (Ibid. para. 318).

¹⁰⁷⁰ China's first written submission, para. 319.

¹⁰⁷¹ *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Oxford University Press, 1993), Vol. 2, p. 2496.

¹⁰⁷² See para. 7.492 above.

¹⁰⁷³ Panel Reports, *Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)*, para. 7.362 (quoting Panel Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.385; *China – Raw Materials*, para. 7.696; *US – COOL*, para. 7.851). See also Panel Reports, *Thailand – Cigarettes (Philippines)*, para. 7.921; *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.932). (fns omitted)

¹⁰⁷⁴ See European Union's first written submission, paras. 575-577 and 598(a).

¹⁰⁷⁵ European Union's response to Panel question No. 67(a), para. 271; second written submission, para. 169. In its first written submission, the European Union omitted any mention of "predictability" in its articulation of the legal standard, yet proceeded to rely on such an interpretation of the legal standard in applying the legal standard to the measures at issue. (See European Union's first written submission, paras. 507-517 and 574-577, 594 and 598). In response to questions from the Panel, and in its second written submission, the European Union asserts, without elaboration, that "predictability is an element of reasonableness". (European Union's response to Panel question No. 67(a), para. 271; second written submission, para. 169).

unreasonable. The Panel declines to adopt a legal standard to assess the reasonableness of a measure's application by reference to the predictability of that application.

7.538. The Panel also observes that the parties contest whether the reasonableness requirement of Section 2(A)(2) protects against a "very real risk to the interests of the relevant parties" or rather protects against a "very real risk of ... unreasonable administration". The European Union refers to the findings of the panel in *China – Raw Materials* as support for its view that "the administration of a measure is unreasonable if: ... it poses a very real risk to the interests of relevant parties."¹⁰⁷⁶ The European Union considers that it would be "circular" and "tautological" to find that Section 2(A)(2) protects against a very real risk of unreasonable administration of China's measures, instead of "a very real risk to the interests of relevant parties".¹⁰⁷⁷ China considers that "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'".¹⁰⁷⁸ In China's view, the panel in *China – Raw Materials* did not apply such a legal standard, but rather assessed whether the relevant administrative process posed a "very real risk" of unreasonable administration.¹⁰⁷⁹

7.539. The Panel notes that in any adversarial proceeding in which a law, regulation, or other measure is applied the outcome may prejudice the interests of one or the other party. That such risk is inherent to such proceedings does not demonstrate any lack of fairness, appropriateness, proportionality, rationality, or indeed reasonableness. Regarding the European Union's reliance on the panel reports in *China – Raw Materials*, the panels in those disputes, in interpreting Article X:3(a) of the GATT 1994, stated that "reasonable" administration can be considered "administration that is equitable, appropriate for the circumstances and based on rationality".¹⁰⁸⁰ Applying that legal standard, the panels found that there was "a very real risk that ... similar exporters ... may be treated differently depending on which of 32 dispersed local office deals with their application" and "the lack of any definition, guidelines or standards pose a very real risk that this criterion will be administered differently depending on which Local Department handles the quota application".¹⁰⁸¹ Thus, the panels concluded *not* that there was "a very real risk to the interests of relevant parties"¹⁰⁸² but rather that there was a very real risk of unreasonable administration of the relevant measure. As to the European Union's view that it would be "circular" and "tautological" to find that an obligation of reasonable application protects against a very real risk of unreasonable administration¹⁰⁸³, the Panel disagrees. There is nothing circular or tautological in a finding that an obligation of reasonableness in application not only protects against actual unreasonable application in the past but also a risk of unreasonable application in the future. In short, neither the language of Section 2(A)(2) itself, nor the panel reports in *China – Raw Materials*, supports the European Union's interpretation of that obligation as protecting against a "very real risk to the interests of the relevant parties".

7.540. The Panel, therefore, finds that an assessment of reasonableness under Section 2(A)(2) of China's Accession Protocol entails assessing the rationale underlying the administration of the relevant law, regulation, or measure, as well as its fairness, appropriateness, proportionality, and rationality.

7.6.2.3.2.2 Predictability of China's application of its legal framework governing act preservation measures in IP disputes

7.541. The European Union submits that "the legal framework in force at the time did not clearly provide for the issuance [of ASIs] at the request of implementers", and the legal basis was "created" by the SPC "on the basis of a legislation that was not intended for that purpose".¹⁰⁸⁴ For this reason the European Union argues that the issuance of the ASIs was unpredictable, and therefore

¹⁰⁷⁶ European Union's first written submission, para. 507 (referring to Panel Reports, *China – Raw Materials*, para. 7.746). (fns omitted)

¹⁰⁷⁷ See European Union's response to Panel question No. 75, para. 295.

¹⁰⁷⁸ China's first written submission, para. 319 (quoting European Union's first written submission, para. 507). (emphasis original)

¹⁰⁷⁹ China's first written submission, para. 319 (quoting Panel Reports, *China – Raw Materials*, para. 7.708). China adds that 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'". (Ibid.).

¹⁰⁸⁰ Panel Reports, *China – Raw Materials*, para. 7.741.

¹⁰⁸¹ Panel Reports, *China – Raw Materials*, paras. 7.743 and 7.745.

¹⁰⁸² European Union's first written submission, para. 507.

¹⁰⁸³ See European Union's response to Panel question No. 75, para. 295.

¹⁰⁸⁴ European Union's first written submission, para. 576.

unreasonable, because (a) the legal basis for issuing the ASIs was unpredictable "*tout court*"; (b) the issuance of ASIs at the request of implementers was unpredictable; and (c) the legal basis for imposing cumulative daily fines was unpredictable in light of Article 11 of the SPC Provisions.¹⁰⁸⁵

7.542. China submits that the European Union's arguments are based on a "misapprehension of Chinese law".¹⁰⁸⁶ China argues that the SPC in *Huawei v. Conversant* "affirmed that the Civil Procedure Law of China as previously interpreted by the SPC itself permits the issuance of act preservation measures upon the request of implementers in SEP-related litigation", and the fact that "[t]hat decision had a clear basis in Article 100 of the Civil Procedure Law and the SPC's 2018 Provisions on Act Preservation in IP Disputes ... is sufficient to establish that the actions of the Chinese courts in the five cases at issue were in accordance with existing Chinese law."¹⁰⁸⁷

7.543. The Panel observes that the European Union's arguments here rely on the notion that the predictability of China's application of its laws, regulations and other measures is an element of the legal standard to assess the reasonableness of that application. For the reasons explained above, the Panel does not consider that predictability of application can be equated with reasonableness of application.¹⁰⁸⁸ The Panel therefore proceeds to assess the merits of the European Union's arguments by applying the legal standard of reasonableness, which entails consideration of notions of fairness, appropriateness, proportionality, and rationality.

7.544. First, regarding the argument that the legal basis for issuing the ASIs was unpredictable "*tout court*"¹⁰⁸⁹, the Panel recalls that the SPC in *Huawei v. Conversant* and the intermediate people's courts in subsequent cases cited Article 100 (now 103) of the Civil Procedure Law, read together with the SPC Provisions, as the legal basis for the court's ability to issue ASIs. The parties agree that when Huawei requested the SPC to issue an ASI pursuant to Article 100 (now 103) of the Civil Procedure Law, it was a novel factual situation. The Panel does not see the obligation in Section 2(A)(2) (or the similarly worded obligation in Article X:3(a) of the GATT 1994) as being intended to preclude Chinese courts (or courts of other Members) from interpreting or applying relevant laws, regulations, or other measures in any novel factual situation.¹⁰⁹⁰ It would, therefore, be inappropriate to conclude that China applied its laws, regulations and other measures in an unreasonable manner simply because its courts applied an existing legal framework to a novel factual situation.¹⁰⁹¹ Rather, it must be shown that such application in a novel factual situation is *unreasonable*, for instance because it is unfair, inappropriate, disproportionate, or irrational.

¹⁰⁸⁵ European Union's first written submission, paras. 575-596; second written submission, para. 169.

¹⁰⁸⁶ China's first written submission, para. 308.

¹⁰⁸⁷ China's first written submission, para. 311.

¹⁰⁸⁸ See para. 7.537 above. The Panel also notes that predictability of application is not the same as predictability of outcome. In any event, as noted, the legal standard of reasonableness is not synonymous with the notion of predictability, either in application or outcome.

¹⁰⁸⁹ The European Union argues that "the legal framework in force at the time did not clearly provide for the issuance" of ASIs at the request of implementers, and "the legal basis for the issuance of the five anti-suit injunctions in SEP litigation was created by the [SPC] on the basis of a legislation that was not intended for that purpose." (European Union's first written submission, para. 576).

¹⁰⁹⁰ The Panel notes that the European Union's reference to the panel report in *Dominican Republic – Import and Sale of Cigarettes* is inapposite to the present dispute. (See European Union's first written submission, para. 509 and fn 438 to para. 572 (referring to Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.383-7.385)). In that dispute, the panel concluded not only that there was "no evidence that the [relevant] decision was based on any particular provision of ... law in force at the time", but that the methodology to be applied should have been based on one of "three methodologies contained in the legislation in force at the time". (Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.387-7.388). In the present dispute, the legal basis for the SPC to issue the ASIs is Article 100 (now 103) of the Civil Procedure Law, read together with the SPC Provisions, and there is no indication that the Panel can see that such issuance of ASIs at the request of implementers is prohibited under Chinese law.

¹⁰⁹¹ In support of its argument that the issuance of ASIs was unpredictable "*tout court*", the European Union notes that "a number of scholars have observed that, whereas injunctions are expressly foreseen by the Chinese legal framework on act preservation measures, the particular category of anti-suit injunctions is not explicitly permitted." (European Union's first written submission, para. 578 (referring to S. Tang, "Anti-Suit Injunction Issued in China: Comity, Pragmatism and Rule of Law", *Conflict of Laws*.Net, published 27 September 2020 (Exhibit EU-52); K.F. Tsang and J. Lee, "The Ping-Pong Olympics of Antisuit Injunction in FRAND Litigation" (2022), Vol. 28, No. 2, *Michigan Technology Law Review* (Exhibit EU-51), p. 338; K. Yu, J.L. Contreras, and Y. Yang, "Transplanting Anti-Suit Injunctions" (2022), Vol. 71, No. 4, *American University Law Review* (Exhibit EU-53), p. 1578). In the Panel's view, the literature the European Union cites indicates that

7.545. Second, regarding the argument that the issuance of ASIs at the request of implementers was unpredictable because the SPC Provisions were "designed and drafted with the intention of allowing IP right holders to request act preservation measures"¹⁰⁹², the Panel considers that similarly to the requirements of uniformity and impartiality, the obligation of reasonableness in application does not prevent courts and tribunals from developing and applying existing legal instruments to novel factual situations.¹⁰⁹³ That the novel factual situation might differ from the original purpose of given legal instruments – or indeed that another Member disagrees with the manner in which those legal instruments have been applied in the novel factual situation – does not suffice to show that such application is unfair, inappropriate, disproportionate, or irrational. Moreover, as noted above the notion of "predictability" is not synonymous with the legal standard of reasonableness.¹⁰⁹⁴ In the absence of any supporting arguments seeking to demonstrate why the issuance of ASIs at the request of implementers was *unreasonable*, the Panel considers that the European Union has failed to demonstrate that, by issuing ASIs at the request of implementers in IP litigation, Chinese courts applied the relevant legal instruments in a manner that was not reasonable. The Panel also notes that it is not for the Panel to decide on the proper interpretation of Chinese law or to substitute its interpretation for that of the SPC.

7.546. Third, regarding the argument that the legal basis for imposing daily fines was applied unpredictably, the European Union argues that Article 11 of the SPC Provisions requires 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", and this provision was "disregarded, as no such equivalence was ensured by the Chinese courts in the five ASI rulings".¹⁰⁹⁵ China argues that the European Union has not provided any evidentiary basis for its view that "equivalence" must take into account the number of days of non-compliance by the respondent and the amount of the fines to be imposed for non-compliance.¹⁰⁹⁶ China also questions why Chinese courts should assume persistent non-compliance with their orders.¹⁰⁹⁷

7.547. Article 11 of the SPC Provisions provides:

Where an applicant applies for act preservation, the applicant shall provide a security in accordance with the law. The amount of security provided by the applicant shall be equivalent to the loss that the respondent may incur due to enforcement of the act preservation measures, including reasonable losses such as sales proceeds and custody expenses of the products involved in the order to stop the infringement. Where, during the execution of act preservation measures, the respondent may suffer losses exceeding the amount of the applicant's security, the people's court may order the applicant to provide additional security in the corresponding amount. If the applicant refuses to provide such additional security, the people's court may rule to terminate or partially terminate the preservation measures.¹⁰⁹⁸

7.548. The Panel notes that interpretation of a Member's municipal law is an issue of fact, and does not concern whether that municipal law is inconsistent with a provision of WTO law. As a factual matter, the Panel notes that, in accordance with the requirement in Article 11 that an applicant for an act preservation measure must provide an amount of security "equivalent to the loss that the respondent may incur due to enforcement of the act preservation measures", in each of the five cases in which an ASI was requested, the applicant indeed provided an amount of security.¹⁰⁹⁹ Additionally, in all five cases, in issuing the ASI the court indicated that if the ASI were to be violated, fines would be imposed.¹¹⁰⁰ In four of those cases, the court indicated the amount of the fine to be applied and stated that such fine would be applied on a cumulative daily basis. In the fifth case the

prior to the issuance of the ASI by the SPC in *Huawei v. Conversant*, Article 100 (now 103) of the Civil Procedure Law had not been used to issue ASIs. However, the literature does not indicate that Article 100 (now 103) precluded courts from doing so.

¹⁰⁹² European Union's first written submission, para. 579.

¹⁰⁹³ See paras. 7.500-7.501 and 7.528 above.

¹⁰⁹⁴ See para. 7.537 above.

¹⁰⁹⁵ European Union's first written submission, paras. 583-584.

¹⁰⁹⁶ China's first written submission, para. 316.

¹⁰⁹⁷ China's first written submission, para. 316.

¹⁰⁹⁸ SPC Provisions (Exhibit CHN-55).

¹⁰⁹⁹ See section 2.6 above.

¹¹⁰⁰ See section 2.6 above.

court noted that there would be penalties for non-compliance but did not specify them.¹¹⁰¹ The European Union's claim concerning fines for non-compliance is limited to the four cases in which the courts indicated in advance the amounts of the fines to be imposed, namely *Huawei v. Conversant*, *Xiaomi v. InterDigital*, *OPPO v. Sharp*, and *ZTE v. Conversant*.¹¹⁰² The respective amounts of securities paid by the applicants and the fines to be paid by the respondents in each case are set out below.

Table 7: Amounts of securities and daily fines for each ASI

Case	Amount of security	Amount of daily fine
Huawei v. Conversant	CNY 19.7 million (EUR 2.8 million)	CNY 1 million (EUR 143,159)
ZTE v. Conversant	CNY 6 million (EUR 852,900)	CNY 600,000 (EUR 85,290)
Xiaomi v. InterDigital	CNY 10 million (EUR 1.43 million)	CNY 1 million (EUR 143,159)
OPPO v. Sharp	CNY 9 million (EUR 1.3 million)	CNY 1 million (EUR 143,159)

7.549. The main point of contention between the parties is whether, under Article 11 of the SPC Provisions, "the loss that the respondent may incur due to enforcement of the [act] preservation measure" in Article 11 exclusively refers to losses that may be incurred as a consequence of *compliance* with the court's order, or more broadly includes losses incurred by a party as a consequence of *non-compliance* with the court's order (such as fines for violation of an ASI).

7.550. The Panel notes at the outset that penalties for non-compliance with a court order are different in nature and purpose from losses suffered as a result of compliance with a court order. Where a party declines to comply with a court order it is acting in contempt of court. Any fines to be imposed as a consequence of such action are punitive in nature. In contrast, where a party opts to comply with a court order, and subsequently incurs losses as a result, those losses are not punitive but rather consequential to the party's act of compliance. A security paid by an applicant for an injunction in principle insures the other party against losses in the event that the injunction turns out to be unjustified – in which case, the party that suffered losses through complying with the order deserves to be compensated.

7.551. Regarding the specific interpretation of Article 11 of the SPC Provisions, the European Union argues that "[i]n the phrase 'the loss that the respondent may incur due to enforcement of the [act] preservation measure' the word 'enforcement' indicates the phase of the act preservation measure proceedings in which the act preservation measure is effective."¹¹⁰³ For the European Union, during the period "[w]hen the act preservation measure is effective, 'the respondent may incur in losses such as the sales proceeds, custody expenses [in case of seizure], [loss of market share], and other reasonable loss relating to the products involved in the order to stop the act of infringement.'"¹¹⁰⁴ The European Union argues that fines for non-compliance "are part of the reasonable loss incurred by the respondent when the act preservation measure is made effective."¹¹⁰⁵ China argues that "'enforcement' means implementing or carrying out the act preservation measure by doing or not doing something as ordered by the court in that act preservation measure", and the "potential loss referred to under Article 11 covers losses that the respondent may incur by complying with or implementing the act preservation measure, and does not include 'losses' due to fines for non-compliance".¹¹⁰⁶ The difference between these views depends on the meaning of the word "enforcement" (执行) in Article 11.

7.552. The Panel notes that the context within Article 11 supports China's understanding. Article 11 provides indicative examples of potential losses such as "sales proceeds and custody expenses", which flow from compliance with an order. The Panel also notes that Chinese courts have applied Article 11 in accordance with this understanding. Thus, a finding by the Panel in favour of the European Union's interpretation would imply that Chinese courts (including the SPC) misinterpreted

¹¹⁰¹ See para. 7.100 above. The Panel notes that in no case, even when there was non-compliance, did a court impose any fines. (See e.g. European Union's response to Panel question No. 88).

¹¹⁰² See European Union's first written submission, paras. 585-590.

¹¹⁰³ European Union's response to Panel question No. 76, para. 300.

¹¹⁰⁴ European Union's response to Panel question No. 76, para. 300. The European Union also considers that "Article 11 requires equivalence between the amount of the security and the amount of loss a respondent may incur due to enforcement in order to ensure the equality of arms of the disputing parties, for them to fairly share the economic risk of the impact of a judicial measure pending the assessment of the IPR in the main proceeding". (Ibid. para. 302).

¹¹⁰⁵ European Union's response to Panel question No. 76, paras. 300-301.

¹¹⁰⁶ China's response to Panel question No. 76, para. 117.

and misapplied Chinese law (specifically a provision adopted by the SPC itself).¹¹⁰⁷ The European Union has provided no evidence that would support the Panel reaching such a conclusion. The Panel therefore considers that Article 11 refers to situations where a party incurs losses as a consequence of compliance, not non-compliance, with an act preservation measure (including an ASI).

7.553. In summary, the Panel considers that the European Union has not demonstrated that, by applying the relevant legal regime in an unpredictable manner, Chinese courts applied China's laws, regulations or other measures in a manner that was unreasonable.

7.6.2.3.2.3 Amount of fines: disproportionality compared to securities required from implementers

7.554. In addition to its argument that the legal basis for imposing daily fines (Article 11 of the SPC Provisions) was applied unpredictably and therefore unreasonably, the European Union argues that a comparison between the amounts of the fines to be imposed on SEP holders and the amounts of the securities required to be paid by the implementers demonstrates a lack of reasonableness in the application of daily fines. For the European Union, the amounts of the fines to be imposed in the event of violation of the ASIs were extremely high compared to the amounts of the securities required of the applicants.¹¹⁰⁸ The European Union considers that the security provided by the applicants for the ASIs is a useful comparator to assess the reasonableness of the amounts of the fines to be imposed in the event of non-compliance.¹¹⁰⁹

7.555. China considers that the European Union has failed to articulate a legal standard or evidentiary basis in support of its argument that the level of fines to be imposed in the event of a violation of the ASI was unreasonably disproportionate compared to the securities paid by the applicants.¹¹¹⁰

7.556. The Panel addressed above, and rejected, the European Union's argument that Article 11 of the SPC Provisions requires equivalence between the amount of the fines to be imposed for non-compliance and the amount of securities paid by the applicants for act preservation measures.¹¹¹¹ The Panel understands that as a separate argument – independently of any reference to or interpretation of Article 11 of the SPC Provisions – the European Union considers that the amounts of the fines to be imposed for non-compliance are disproportionately high as compared to the amounts of the securities paid by the applicants.¹¹¹² Thus, unlike the European Union's arguments addressed above concerning the alleged lack of predictability of the Chinese courts' application of cumulative daily fines, this argument by the European Union does not require the Panel to consider the meaning or interpretation of Article 11 of the SPC Provisions. Rather, the question is whether Chinese courts acted unreasonably by imposing fines that were much higher than the securities paid by applicants. As indicated above, the European Union's claim concerning fines for non-compliance is limited to the four cases in which the courts indicated the amounts of the fines to be imposed, namely *Huawei v. Conversant*, *Xiaomi v. InterDigital*, *OPPO v. Sharp*, and *ZTE v. Conversant*.¹¹¹³

¹¹⁰⁷ The European Union is unambiguous in the context of this claim, stating that it "contests China's interpretation that 'each day of non-compliance with an act preservation measure is a new act of non-compliance'". (European Union's second written submission, para. 177 (quoting China's first written submission, para. 304)). The Panel notes, however, that the interpretation with which the European Union takes issue is not an *ex post* argument raised by China in these proceedings, but rather reflects the SPC's interpretation of Article 115 (now 118) of the Civil Procedure Law. (See China's first written submission, para. 304; SPC, *Huawei v. Conversant*, reconsideration decision, 11 September 2020 (Exhibit EU-6b), p. 14)). Thus, when the European Union states that it disagrees with China's interpretation, it is in fact indicating its disagreement with the SPC's interpretation of Chinese domestic law. By requesting the Panel to take a position on the correct interpretation of Article 11, the European Union is essentially requesting the Panel to conclude that the SPC misinterpreted and misapplied Chinese law.

¹¹⁰⁸ European Union's first written submission, paras. 575 and 585-596; opening statement at the first substantive meeting, para. 99; response to Panel question No. 77; second written submission, paras. 170-177.

¹¹⁰⁹ European Union's response to Panel questions Nos. 77 and 155.

¹¹¹⁰ China's first written submission, para. 317. China further submits that courts must have methods to ensure compliance and it is not the job of a WTO panel to review such determinations. (Ibid. para. 318).

¹¹¹¹ See paras. 7.546-7.553 above.

¹¹¹² In response to a Panel question seeking clarity on this point, the European Union "confirm[ed]" that it argues that the amounts of the penalties imposed are unreasonably high compared to the amount of the guarantees". (European Union's response to Panel question No. 77(a), para. 303).

¹¹¹³ European Union's first written submission, paras. 585-589.

7.557. The Panel recalls its view that fines for non-compliance with a court order are different in nature and purpose from securities posted to indemnify a party for losses suffered as a result of compliance with a court order.¹¹¹⁴ In the context of this argument, the Panel recalls and emphasizes that the function or purpose of a penalty to be imposed in the event of non-compliance with an order of a court is to induce compliance with that order, including in situations where the amount of the penalty is indicated *ex ante*. Indeed, in addition to monetary fines, a penalty for non-compliance with a court order may include detention, depending on the severity of the situation.¹¹¹⁵ In contrast, the purpose of a security required of applicants seeking injunctions is to compensate the other party for losses that they may suffer as a consequence of compliance, in the event the injunction is deemed to have been unjustified. To serve their different purposes, the amount of the penalty for non-compliance and the amount of the security required to cover losses incurred due to compliance may be radically different. The Panel sees no reason that the amount of one should inform – or have any relationship to – the amount of the other and the European Union has not provided any.¹¹¹⁶ The Panel therefore does not consider that the securities provided by the applicants for the ASIs are appropriate comparators to assess the reasonableness or proportionality of the fines to be imposed in the event of non-compliance with the ASIs.

7.558. The Panel, therefore, finds that the European Union has not demonstrated that the Chinese courts' determination of the amounts of the fines to be imposed in the event of violation of the ASIs was unreasonable. The Panel emphasizes, however, that the mere fact that a security is an inappropriate comparator for assessing the proportionality of a punitive measure such as a fine does not mean that such penalties are insulated from review under Section 2(A)(2). An appropriate comparator might be identified to assess the proportionality of a penalty, or it might be shown for other reasons that a particular penalty is unreasonable. In the circumstances of this dispute, however, the European Union has not made such a demonstration.

7.6.2.3.2.4 Amount of fines: risk to SEP holders' interests

7.559. The European Union's final ground for asserting that China applied its laws, regulations or other measures in a manner that was not reasonable is that the amount of the fines to be imposed in the event of non-compliance with the ASIs constituted "a very real risk" to the interests of the SEP owners involved in parallel proceedings" in jurisdictions outside China.¹¹¹⁷

7.560. China considers that Section 2(A)(2) does not prohibit very real risks to the interests of parties and this argument is based on a misunderstanding of the legal standard of reasonableness.¹¹¹⁸

7.561. The Panel has addressed the interpretation of the term "reasonable" above, including the argument that the requirement of reasonable administration protects against risks to parties. The Panel rejected that interpretation.¹¹¹⁹ As this aspect of the European Union's arguments is entirely premised on its interpretation of Section 2(A)(2), it is not necessary for the Panel to address this issue further. Even if the fines to be imposed by Chinese courts in the event of non-compliance with the ASIs presented very real risks to the interests of the SEP holders involved in parallel proceedings outside China, that would not demonstrate any inconsistency with the requirement that China apply its laws, regulations and other measures in a reasonable manner.

7.562. The Panel therefore finds that the European Union has not demonstrated that Chinese courts applied China's laws, regulations or other measures in a manner that was unreasonable on the

¹¹¹⁴ See para. 7.550 above.

¹¹¹⁵ See e.g. Article 111 of the Civil Procedure Law 2017 (Exhibit CHN-38).

¹¹¹⁶ In response to questions from the Panel asking why the reasonableness of the amounts of the fines to be imposed can be based on the amount of the securities required of applicants, the European Union responds that "in order to achieve an appropriate point of comparison for determining the reasonableness of the penalty, the amount of the penalty needs to be comparable to the amount of the security, and this can be achieved by imposing a fixed-rate penalty, instead of a daily penalty" and "[a] reasonable penalty must have some degree of equivalence to the amount of the security provided by the party requesting the provisional measure". (European Union's response to Panel question No. 77(b), para. 305, and No. 155, para. 234). In the Panel's view, these responses fail to explain why the amount of the security required of an applicant seeking an injunction is related to, or informs, the amount of a fine for non-compliance with that injunction.

¹¹¹⁷ European Union's first written submission, para. 597.

¹¹¹⁸ China's first written submission, para. 319.

¹¹¹⁹ See paras. 7.538-7.539 above.

ground that the fines to be imposed in the event of non-compliance constituted a very real risk to the interests of SEP holders.

8 CONCLUSIONS AND RECOMMENDATION

8.1. With respect to the existence of an ASI policy, the Panel finds that:

- a. The ASI policy is properly within the Panel's terms of reference.
- b. The European Union has substantiated the precise content of the ASI policy.
- c. The European Union has demonstrated that the ASI policy is a rule or norm of general and prospective application. It is not necessary, therefore, for the Panel to address the European Union's alternative argument that the ASI policy could be characterized as ongoing conduct.

8.2. With respect to the consistency of the ASI policy with the TRIPS Agreement, the Panel finds that:

- a. The European Union has not demonstrated that the ASI policy is inconsistent with Article 28.1, whether or not read in conjunction with Article 1.1, first sentence of the TRIPS Agreement.
- b. The European Union has not demonstrated that the ASI policy is inconsistent with Article 1.1, first sentence read in conjunction with Article 28.2 of the TRIPS Agreement.
- c. The European Union has not demonstrated that the ASI policy is inconsistent with Article 1.1, first sentence read in conjunction with Article 44.1 of the TRIPS Agreement.
- d. The obligation in the second sentence of Article 41.1 is not applicable to the ASI policy, as the ASI policy is not an enforcement procedure as specified in Part III.

8.3. With respect to the European Union's claims concerning the five individual ASIs, the Panel declines to make findings with respect to their consistency with Articles 1.1, 28.1, 28.2, 41.1, and 44.1 of the TRIPS Agreement as any findings on these measures would be duplicative and not aid in securing a positive solution to the dispute.

8.4. With respect to the transparency obligations under the TRIPS Agreement, the Panel finds that:

- a. The decision issuing an ASI in *Xiaomi v. InterDigital*, read together with the reconsideration decision in the same case, is a final judicial decision of general application made effective by China pertaining to the subject matter of the TRIPS Agreement. China's failure to publish that decision, read together with the reconsideration decision in the same case, or to make it publicly available in such a manner as to enable governments and right holders to become acquainted with it, is inconsistent with Article 63.1 of the TRIPS Agreement.
- b. The decisions issuing ASIs in *ZTE v. Conversant* and *OPPO v. Sharp* are not of general application and are, therefore, outside the scope of the publication obligation in Article 63.1 of the TRIPS Agreement.
- c. The information the European Union requested in Question V of its written request for information is information of the sort referred to in Article 63.1 of the TRIPS Agreement. China's failure to be prepared to supply that information is, therefore, inconsistent with Article 63.3, first sentence of the TRIPS Agreement.
- d. The European Union's claim under Article 63.3, second sentence of the TRIPS Agreement is outside the Panel's terms of reference.

8.5. With respect to the European Union's claims under Section 2(A)(2) of China's Accession Protocol, the Panel considers that findings on the five ASIs with respect to the European Union's claims under Section 2(A)(2) would aid in securing a positive solution to the dispute, and finds that:

- a. The European Union has not demonstrated that, by applying the relevant legal regime in an unpredictable manner, Chinese courts applied China's laws, regulations or other measures in a non-uniform manner.
- b. The European Union has not demonstrated that, by issuing ASIs exclusively in SEP litigation, Chinese courts applied China's laws, regulations or other measures in a non-uniform manner.
- c. The European Union has not met its burden of demonstrating that, by imposing cumulative daily fines, Chinese courts applied China's laws, regulations or other measures in a manner that was non-uniform.
- d. The European Union has not demonstrated that in issuing the five ASIs at issue in this dispute Chinese courts applied China's laws, regulations or other measures in a manner that was not impartial.
- e. The European Union has not demonstrated that, by applying the relevant legal regime in an unpredictable manner, Chinese courts applied China's laws, regulations or other measures in a manner that was unreasonable.
- f. The European Union has not demonstrated that the Chinese courts' determination of the amounts of the fines to be imposed in the event of violation of the ASIs was unreasonable.
- g. The European Union has not demonstrated that Chinese courts applied China's laws, regulations or other measures in a manner that was unreasonable on the ground that the fines to be imposed in the event of non-compliance constituted a very real risk to the interests of SEP holders.

8.6. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment accruing under that Agreement. In view of the foregoing, the Panel concludes that, insofar as China has acted inconsistently with the provisions of the TRIPS Agreement, it has nullified or impaired benefits accruing to the European Union under that Agreement.

8.7. Pursuant to Article 19.1 of the DSU, the Panel recommends that China bring its measures into conformity with its obligations under the TRIPS Agreement.
