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CHINA – WORLDWIDE LICENSING TERMS FOR STANDARD ESSENTIAL PATENTS

REQUEST TO JOIN CONSULTATIONS

Communication from Japan

The following communication, dated 3 February 2025, from the delegation of Japan to the delegation of China, and the delegation of the European Union, is circulated to the Dispute Settlement Body in accordance with Article 4.11 of the DSU.

I wish to refer to the consultations requested by the European Union ("EU") 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") in the communication circulated to WTO Members on 22 January 2025, titled "CHINA – WORLDWIDE LICENSING TERMS FOR STANDARD ESSENTIAL PATENTS" (WT/DS632/1, G/L/1560, IP/D/45, and WT/DS632/1/Corr.1, G/L/1560/Corr.1, IP/D/45/Corr.1, as circulated on 24 January 2025). My authorities have instructed me to notify the consulting Members and the Dispute Settlement Body of the desire of Japan to join the consultations, pursuant to Article 4.11 of the DSU.

Japan has a substantial trade interest in the consultations requested by the EU with regard to China's laws and other legal instruments authorizing Chinese courts to take decisions, without the consent of the parties, on worldwide licensing conditions, including royalty rates, for portfolios of standard essential patents (SEPs) which include patents registered in other Members. According to the EU's request for consultations, such decisions by Chinese courts are not only enforceable in China, including with respect to non-Chinese SEPs, but also appear to curtail the ability of the parties to enforce their patent rights or ensure the respect of obligations with respect to non-Chinese SEPs through court proceedings in the jurisdictions where the non-Chinese patents were granted. The request further states that, as a result, such Chinese court decisions preempt adjudications on non-Chinese patents by the courts of the jurisdictions where those patents were registered, and thereby obstruct the exercise of the authority of those courts with respect to the patents registered in the same jurisdiction. The EU further identifies in its request for the consultations a case in which a Chinese court actually rendered a decision setting a worldwide licensing condition for a portfolio of SEPs including non-Chinese patents without the consent of one of the parties.

China's laws, regulations, and other legal instruments that enable Chinese courts to give decisions setting conditions for worldwide licenses for SEPs including patents registered in other Members, which are identified in the request for consultations by the EU, could have serious negative impacts on the business activities of Japanese companies. In the telecommunications technology sector alone, Japanese entities hold around 8.6% of the SEP families that have been declared to be 5G cellular technology. Many Japanese SEP holders engage in global business activities, including in China and the EU, and thus may be seriously harmed by Chinese court decisions preventing patent holders from seeking judicial relief or exercising their patent rights in other jurisdictions. This risk is not hypothetical; there have already been cases where Japanese SEP holders were involved in court proceedings before the Chinese courts in relation to their SEPs.

Japan also notes that, according to the EU's request for consultations, China's response to the EU's request for a certain Chinese court judgment pursuant to Article 63.3 of the TRIPS Agreement appears to be inconsistent with the transparency obligations under that provision. The transparency obligations are one of the key pillars across different WTO agreements, which effectively encourage Members to act in accordance with the substantive rules laid out by those agreements. It is thus vital to ensure Members' compliance with the transparency obligations, including by, pursuant to Article 63.3 of the TRIPS Agreement, supplying the information of a specific judicial decision when so requested by another Member who believes that the requested judicial decision affects its rights under the TRIPS Agreement. Ensuring China's compliance with the transparency obligations under the TRIPS Agreement is particularly important for Japan, as many Japanese SEP holders perform business activities in China and could be adversely affected by any potential lack of transparency or predictability in relation to China on its policy concerning the protection of intellectual property rights.

For the reasons stated above, Japan has a substantial trade interest in these consultations, and requests to join them pursuant to Article 4.11 of the DSU.

Japan looks forward to receiving confirmation of acceptance of this request.

Japan is providing a copy of this letter directly to the Chairperson of the Dispute Settlement Body, with a request that the letter be circulated to Members.
