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ARBITRATION UNDER ARTICLE 25 OF THE DSU

AWARD OF THE ARBITRATORS

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ABBREVIATIONS USED IN THIS AWARD

Abbreviation	Description
Agreed Procedures	Agreed Procedures for Arbitration under Article 25 of the DSU, WT/DS611/7
ASI	Anti-suit injunction
ASI policy	China's anti-suit injunction policy
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
China's Notice of Other Appeal	Notification of an other appeal by China 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 and Rule 23 of the Working Procedures for Appellate Review, WT/DS611/12
China's written submission	China's written submission filed pursuant to paragraph 5 of the Agreed Procedures and Rule 23(3) of the Working Procedures for Appellate Review
Civil Procedure Law	Civil Procedure Law of the People's Republic of China
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU	European Union
European Union's Notice of Appeal	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 and Rule 20 of the Working Procedures for Appellate Review, WT/DS611/11
European Union's written submission	European Union's written submission filed pursuant to paragraph 5 of the Agreed Procedures and Rule 21(1) of the Working Procedures for Appellate Review
FRAND	Fair, reasonable, and non-discriminatory
GATT 1994	General Agreement on Tariffs and Trade 1994
IP	Intellectual property
MPIA	Multi-Party Interim Appeal Arbitration Arrangement
NPC	National People's Congress
Panel Report	Final panel report as issued to the parties
Paris Convention (1967)	Paris Convention for the Protection of Industrial Property (1967)
SEP	Standard essential patent
SPC	Supreme People's Court of the People's Republic of China
SPC Provisions	SPC provisions on several issues concerning application of law in review of cases involving act preservation in intellectual property disputes
SSO	Standard-setting organization
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights, as amended on 6 December 2005
Vienna Convention	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

CASES CITED IN THIS AWARD

Short Title	Full Case Title and Citation
Argentina – Import Measures	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015, DSR 2015:II, p. 579
Australia – Tobacco Plain Packaging	Appellate Body Reports, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging*, WT/DS435/AB/R and Add.1 *(Honduras)* / WT/DS441/AB/R and Add.1 *(Dominican Republic)*, adopted 29 June 2020
Australia – Tobacco Plain Packaging	Panel Reports, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging*, 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
China – Publications and Audiovisual Products	Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, 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
EC – IT Products	Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III, p. 933
Indonesia – Chicken	Panel Report, *Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products*, WT/DS484/R and Add.1, adopted 22 November 2017, DSR 2017:VIII, p. 3769
Japan – Film	Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, p. 1179
US – Anti-Dumping Methodologies (China)	Panel Report, *United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China*, WT/DS471/R and Add.1, adopted 22 May 2017, as modified by Appellate Body Report WT/DS471/AB/R, DSR 2017:IV, p. 1589
US – COOL	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, 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
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
US – Countervailing and Anti-Dumping Measures (China)	Panel Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, 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
US – Export Restraints	Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001, DSR 2001:XI, p. 5767
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
US – Section 211 Appropriations Act	Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, p. 589
US – Underwear	Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, p. 11
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417

Parties:	Arbitrators:
China European Union	Penelope Ridings, Chairperson Claudia Orozco Mateo Diego-Fernández Andrade
Third Parties:	
Australia; Brazil; Canada; Colombia; India; Indonesia; Japan; Korea, Republic of; Norway; Peru; Russian Federation; Singapore; Switzerland; Chinese Taipei; Thailand; Ukraine; United Kingdom; United States; and Viet Nam	

1 INTRODUCTION

1.1. This arbitration concerns the appeal by the European Union and the cross-appeal by China with respect to certain issues of law and legal interpretations developed in the Panel Report, *China — Enforcement of Intellectual Property Rights*.[1] These issues of law and legal interpretations relate to the Panel's findings regarding the consistency with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) of certain measures taken by China in the context of litigation relating to the determination of a fair, reasonable and non-discriminatory (FRAND) rate for standard essential patents (SEPs).

1.2. The Panel was established on 27 January 2023 to consider a complaint by the European Union that China had acted inconsistently with Articles 1.1, 28.1, 28.2, 41.1, 44.1, 63.1, and 63.3 of the TRIPS Agreement, and with Section 2(A)(2) of the Protocol on the Accession of the People's Republic of China (China's Accession Protocol).[2]

1.3. On 4 July 2023, China and the European Union notified to the Dispute Settlement Body (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 (Agreed Procedures).[3] In its Working Procedures for the panel 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".[4]

1.4. On 21 February 2025 the Panel issued the Panel Report to the parties and, having consulted with the parties, adopted the Additional Working Procedures to Facilitate Arbitration under Article 25 of the DSU (the Panel's Additional Working Procedures).[5] Taking into account paragraph 3 of the Agreed Procedures, the Panel informed the parties that circulation of the Panel Report to Members in all three WTO languages was scheduled for 10 April 2025.

1.5. According to paragraph 4 of the Agreed Procedures, "[f]ollowing the issuance of the final panel report to the parties, but no later than 10 days prior to the anticipated date of circulation of the final panel report to the rest of the Membership, any party may request that the panel suspend the panel

[1] In accordance with paragraph 5 of the Agreed Procedures for Arbitration under Article 25 of the DSU (WT/DS611/7) (Agreed Procedures), the Panel Report in the three working languages of the WTO was attached to the Notification of an Appeal by the European Union under Article 25 of the DSU, paragraph 5 of the Agreed Procedures, and Rule 20 of the Working Procedures for Appellate Review (European Union's Notice of Appeal) circulated to Members when the European Union initiated these Arbitration proceedings. (WT/DS611/11 and WT/DS611/11/Add.1) (See para. 1.8 and fns 15 and 16).

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

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

[4] Working Procedures of the Panel, WT/DS611/11/Add.1, Annex A-1, para. 34.

[5] Paragraph 3 of the Agreed Procedures provides that "[i]n order to facilitate the proper administration of arbitration under these agreed procedures, the parties hereby jointly request the panel to notify the parties of the anticipated date of circulation of the final panel report within the meaning of Article 16 of the DSU, no later than 45 days in advance of that date."

proceedings with a view to initiating the arbitration under these agreed procedures". On 31 March 2025, the European Union, pursuant to paragraph 4 of the Agreed Procedures and Article 12.12 of the DSU[6], made such a request. Upon receipt of this suspension request, on 1 April 2025, the Panel transmitted its Report in the three WTO languages to the parties and third parties and instructed the Dispute Settlement Registry to transmit the same to the pool of MPIA arbitrators, in accordance with paragraph 1 of the Panel's Additional Working Procedures. The Panel informed the DSB of its decision of 2 April 2025 to grant the request to suspend the panel proceedings effective the same day.[7]

1.6. In its Report, the Panel found that:

a. With respect to the existence of an anti-suit injunction (ASI) policy:

i. China's anti-suit injunction policy (the ASI policy) was properly within the Panel's terms of reference;

ii. the European Union had substantiated the precise content of the ASI policy; and

iii. the European Union had demonstrated that the ASI policy is a rule or norm of general and prospective application. The Panel therefore found it unnecessary to address the European Union's alternative argument that the ASI policy could be characterized as ongoing conduct.[8]

b. With respect to the consistency of the ASI policy with the TRIPS Agreement:

i. the European Union had not demonstrated that the ASI policy was inconsistent with Article 28.1, whether or not read in conjunction with Article 1.1, first sentence, of the TRIPS Agreement;

ii. the European Union had not demonstrated that the ASI policy was inconsistent with Article 1.1, first sentence read in conjunction with Article 28.2 of the TRIPS Agreement;

iii. the European Union had not demonstrated that the ASI policy was inconsistent with Article 1.1, first sentence read in conjunction with Article 44.1 of the TRIPS Agreement; and

iv. the obligation in the second sentence of Article 41.1 was not applicable to the ASI policy, as the ASI policy is not an enforcement procedure as specified in Part III.[9]

c. With respect to the European Union's claims concerning the five individual ASIs and their consistency with Articles 1.1, 28.1, 28.2, 41.1, and 44.1 of the TRIPS Agreement, any findings on these measures would be duplicative and not aid in securing a positive solution to the dispute.[10]

d. With respect to the transparency obligations under the TRIPS Agreement:

i. 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, and therefore that China's failure to publish that decision, read

[6] Paragraph 4 of the Agreed Procedures provides that "such request by any party is deemed to constitute a joint request by the parties for suspension of the panel proceedings for 12 months pursuant to Article 12.12 of the DSU". Article 12.12 of the DSU provides that the Panel may suspend its work at any time at the request of the complaining party for a period not exceeding 12 months. This provision also indicates that if the work of the Panel has been suspended for more than 12 months, the authority for establishment of the Panel shall lapse.

[7] WT/DS611/10.

[8] Panel Report, para. 8.1.

[9] Panel Report, para. 8.2.

[10] Panel Report, para. 8.3.

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, was inconsistent with Article 63.1 of the TRIPS Agreement;

ii. the decisions issuing ASIs in ZTE v. Conversant and OPPO v. Sharp are not of general application and were, therefore, outside the scope of the publication obligation in Article 63.1 of the TRIPS Agreement;

iii. the information the European Union requested in Question V[11] of its written request for information is information of the sort referred to in Article 63.1 of the TRIPS Agreement, and China's failure to be prepared to supply that information was, therefore, inconsistent with Article 63.3, first sentence of the TRIPS Agreement; and

iv. the European Union's claim under Article 63.3, second sentence of the TRIPS Agreement was outside the Panel's terms of reference.[12]

e. With respect to the European Union's claims under Section 2(A)(2) of China's Accession Protocol, 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:

i. the European Union had 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;

ii. the European Union had 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;

iii. the European Union had 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;

iv. the European Union had 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;

v. the European Union had 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;

vi. the European Union had 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; and

vii. the European Union had 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.[13]

1.7. Pursuant to Article 19.1 of the DSU, the Panel recommended that China bring its measures into conformity with its obligations under the TRIPS Agreement.[14]

[11] In a request for information to China pursuant to Article 63.3 of the TRIPS Agreement, the European Union included a question entitled "Question V – Guidance on act preservation measures – status" which, according to the Panel, "in effect sought a basic description of the type of measure that the SPC Provisions are". (Panel Report, para. 7.443).

[12] Panel Report, para. 8.4.

[13] Panel Report, para. 8.5.

[14] Panel Report, para. 8.7.

1.8. On 22 April 2025, the European Union notified the DSB of its decision to initiate an arbitration under Article 25 of the DSU through a "Notification of an Appeal" pursuant to Article 25 of the DSU, paragraph 5 of the Agreed Procedures, and Rule 20 of the Working Procedures for Appellate Review (European Union's Notice of Appeal).[15] On the same day, the European Union filed its written submission pursuant to paragraph 5 of the Agreed Procedures and Rule 21(1) of the Working Procedures for Appellate Review (European Union's written submission). The European Union's Notice of Appeal, including the Panel Report, was circulated to Members on 24 April 2025.[16]

1.9. On 28 April 2025, China notified the DSB of its decision to file an Other Appeal in this arbitration pursuant to paragraph 5 of the Agreed Procedures, and Rule 23 of the Working Procedures for Appellate Review (China's Notice of Other Appeal).[17] On the same day, China filed its written submission pursuant to paragraph 5 of the Agreed Procedures and Rule 23(3) of the Working Procedures for Appellate Review (China's written submission).

1.10. Pursuant to paragraph 7 of the Agreed Procedures, we were selected to be the arbitrators in these arbitration proceedings and we appointed Dr Penelope Ridings as the Chairperson in this arbitration.[18] On 2 May 2025, Members were informed of our appointment as arbitrators and the election of the Chairperson.[19]

1.11. Following consultation with the parties at an organizational meeting held on 7 May 2025, and pursuant to paragraph 12 of the Agreed Procedures, we adopted the Additional Procedures for Arbitration under Article 25 of the DSU (Additional Procedures for Arbitration), including the Working Schedule, on the same day.[20]

1.12. In accordance with the Working Schedule contained in the Additional Procedures for Arbitration, the parties filed their respective rebuttal submissions on 12 May 2025. On 15 May 2025, Australia, Japan, and the United Kingdom each filed a third party's written submission.

1.13. Pursuant to paragraph 20 of the Additional Procedures for Arbitration, in order to enhance procedural efficiency and facilitate meeting the 90-day time-period, we decided to convene a virtual pre-hearing conference with the parties and third parties to help identify "those issues that are necessary for the resolution of the dispute", as provided in paragraph 10 of the Agreed Procedures, and to highlight the key issues raised in the appeal that needed further discussion at the hearing. Accordingly, by letter of 20 May 2025, we invited the parties and third parties to a virtual pre-hearing conference on 23 May 2025 to hear their views on those matters and to convey our suggested areas of focus for the hearing.

1.14. In accordance with the Working Schedule, on 28 May 2025 we sent advance questions to the parties and third parties for response at the hearing. On 31 May 2025, we held a discussion with the other members of the pool of MPIA arbitrators in accordance with paragraph 5 of the Multi-Party Interim Appeal Arbitration Arrangement pursuant to Article 25 of the DSU and paragraph 8 of the Agreed Procedures.[21]

1.15. The hearing was held in person on 4-5 June 2025 at the premises of the WTO. The parties and certain third parties (Australia; Brazil; Canada; Japan; Korea, Republic of; Norway;

[15] European Union's Notice of Appeal (Annex B-1).
[16] WT/DS611/11 and WT/DS611/11/Add.1.
[17] China's Notice of Other Appeal (Annex B-2).
[18] Paragraph 7 of the Agreed Procedures provides, *inter alia*, that "[t]he arbitrators shall be three persons selected from the pool of 10 standing appeal arbitrators composed in accordance with paragraph 4 of communication JOB/DSB/1/Add.12", that the selection "will be done on the basis of the same principles and methods that apply to form a division of the Appellate Body under Article 17.1 of the DSU and Rule 6(2) of the Working Procedures for Appellate Review, including the principle of rotation", and that "[t]he arbitrators shall elect a Chairperson."
[19] WT/DS611/13.
[20] Additional Procedures for Arbitration (Annex A-2).
[21] JOB/DSB/1/Add.12 and WT/DS611/7, respectively.

Russian Federation; Singapore; Switzerland; Thailand; Ukraine; the United Kingdom; and the United States) attended the hearing. The parties and seven third parties[22] made oral statements.

2 ARGUMENTS OF THE PARTIES

2.1. The claims and arguments of the parties are reflected in their executive summaries. The European Union's Notice of Appeal, China's Notice of Other Appeal, and the executive summaries of the parties' written submissions and rebuttal submissions are contained in Annexes B and C of the Addendum to this Award, WT/DS611/ARB25/Add.1.

3 ARGUMENTS OF THE THIRD PARTIES

3.1. The arguments of the third parties that filed a written submission (Australia, Japan, and the United Kingdom) are reflected in the executive summaries of their written submissions, and are contained in Annex D of the Addendum to this Award, WT/DS611/ARB25/Add.1.

4 ANALYSIS OF THE ARBITRATORS

4.1 Issues on appeal

4.1. We address the following issues on the basis of claims raised on appeal by the European Union[23]:

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

b. Whether the Panel erred in the interpretation of Article 1.1, first sentence, in conjunction with Article 28.1 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 the ASI policy is inconsistent with Article 28.1, whether or not read in conjunction with Article 1.1, first sentence;

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

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

e. Whether 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,

[22] These third parties were Australia; Canada; Japan; Korea, Republic of; Norway; Ukraine; and the United Kingdom.

[23] European Union's Notice of Appeal (Annex B-1).

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; and

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

4.2. We address the following issues on the basis of claims raised on appeal by China[24]:

a. Whether the Panel erred in its application of the DSU, including Articles 3.3, 7.1, and 19.1, when it concluded that the European Union had proven the existence and precise content of "an alleged unwritten 'anti-suit injunction policy'" in the absence of a finding by the Panel that this alleged "policy" has normative content distinct from the written Chinese laws and judicial decisions that the European Union challenged separately and identified as evidence of the existence and content of the "policy"; and

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

4.3. We took due note of paragraph 12 of the Agreed Procedures, which mandates that the Award in this arbitration be issued within 90 days of the filing of the Notice of Appeal, and which permits the arbitrators to "take appropriate organizational measures to streamline the proceedings". In the pre-appeal letter that we sent to the parties[25], we conveyed that, having read the Panel Report and full Panel record, there would be no need for the parties to repeat facts, arguments or findings set out in either the Panel Report or Panel record. This contributed to enhancing procedural efficiency and facilitated meeting the 90-day time period, together with indicative guidelines for the maximum length of submissions by parties and third parties, a virtual pre-hearing conference with the parties and third parties to help identify those issues necessary for the resolution of the dispute, the provision of questions in advance of the hearing, and time limits for oral statements.

4.2 Measures at issue

4.4. Before the Panel, the European Union made an "as such" claim with respect to the ASI policy, and made "as applied" claims with respect to five individual ASI decisions.[26]

4.5. In relation to the ASI policy, the Panel stated that:

> [T]he precise content of the ASI policy, as set out by the European Union, is one that empowers Chinese courts to impose a range of possible prohibitions[319] 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. 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. These are the main elements that the European Union will need to demonstrate in its submissions, through evidence and arguments.[27]

[24] China's Notice of Other Appeal (Annex B-2).
[25] See Additional Procedures for Arbitration (Annex A-2), Annex 2.
[26] Our overview of the measures at issue in this section is without prejudice to our evaluation of the claims on appeal against the Panel's findings concerning the ASI policy, and pertains only to areas of relevance in these arbitral proceedings.
[27] Panel Report, para. 7.63 and fn 319 (other fns omitted).

[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).

4.6. The Panel understood that the types of legal proceedings that could be prohibited by the ASI policy could include proceedings concerning patent infringement, such as injunctive relief, and proceedings to determine the terms on which a patent would be licensed.[28]

4.7. After examining the evidence before it in light of the parties' arguments, the Panel concluded 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."[29] In finding that the ASI policy was a "rule or norm of general and prospective application", the Panel concluded that "the ASI policy exhibits normative attributes as it creates expectations by public and private actors regarding the availability of ASIs in the context of SEP litigation, it is meant to be applied generally by Chinese courts and affects an undetermined number of economic operators, and there is a high likelihood of its continuation in the future."[30]

4.8. In summary, we understand that the Panel found the ASI policy to comprise a measure of general and prospective application that empowers Chinese courts to impose a range of possible prohibitions at the request of SEP implementers[31] in the context of SEP litigation, which can be enforced through the imposition of cumulative daily fines, and which has been elaborated and promoted by the Supreme People's Court of the People's Republic of China (SPC) and endorsed by the National People's Congress (NPC) Standing Committee.[32] The Panel understood that the range of possible prohibitions in this regard could include preventing the owner of a patent registered in another Member from commencing, continuing or enforcing the results of any proceedings before a non-Chinese court, such as proceedings concerning patent infringement or the terms on which a patent would be licensed.[33] We provide further details on the Panel's reasoning and findings with respect to the ASI policy in section 4.4 in addressing the China's claim on appeal with respect to Article 3.2 of the DSU.

4.9. In addition to the ASI policy as a whole, the European Union challenged the decisions to grant ASIs in five specific instances – namely, Huawei v. Conversant, ZTE v. Conversant, OPPO v. Sharp, Xiaomi v. InterDigital, and Samsung v. Ericsson – as individual measures.[34] Before the Panel, the European Union also challenged the failure by China to publish some of these ASI decisions, namely those ZTE v. Conversant, OPPO v. Sharp, and Xiaomi v. InterDigital (including the reconsideration decision in that case).[35]

4.3 Order of analysis

4.10. The order in which we will evaluate the parties' claims on appeal flows logically from the nature of the issues raised. In particular, we begin in section 4.4 with China's allegation that the Panel committed a legal error in applying the legal standard for the existence of an unwritten measure under Article 3.2 of the DSU. We then turn to the European Union's allegation that the Panel erred in its legal interpretation of the first sentence of Article 1.1 of the TRIPS Agreement (section 4.5), which forms part of its subsequent claims in conjunction with Article 28.1 concerning the exclusive rights of patent owners (section 4.6), Article 28.2 concerning patent owners' right to conclude licensing contracts (section 4.7), and Article 44.1 concerning the authority to order

[28] Panel Report, paras. 7.92 (and fn 373 thereto), 7.155, and 7.250 (and fn 682 thereto).
[29] Panel Report, para. 7.206.
[30] Panel Report, para. 7.204.
[31] By "implementers" or "SEP implementers", we refer to the implementers of a given technical standard that includes a standard essential patent. (See Panel Report, paras. 2.7-2.8).
[32] Panel Report para. 7.204.
[33] Panel Report, paras. 7.92 (and fn 373 thereto), 7.155, and 7.250 (and fn 682 thereto).
[34] Panel Report, para. 7.310.
[35] Panel Report, para. 7.345.

injunctions against infringement (section 4.8).[36] We then turn to the European Union's allegation that the Panel erred in its legal interpretation of Article 41.1 of the TRIPS Agreement (section 4.9), before examining China's allegation that the Panel erred in its legal interpretation of Article 63.1 of the TRIPS Agreement (section 4.11).

4.11. Our evaluation in that regard under Articles 28.1, 28.2, and 44.1 in conjunction with Article 1.1, and under Article 41.1, focuses on the European Union's "as such" challenge in respect of the ASI policy. In section 4.10 below, we turn to the European Union's request that we additionally make findings under those provisions with respect to the five individual ASIs that were allegedly issued pursuant to the ASI policy.[37]

4.12. In section 5, we set out the findings and conclusions that comprise the Award in these proceedings.

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

4.4.1 Introduction

4.13. China appeals the Panel's application of the legal standard for the existence of an unwritten measure. In this regard, China contends that the Panel erred in finding that the European Union had proven "the existence of the alleged 'ASI policy' as a separately cognizable measure under the DSU without making a finding that the so-called 'policy' has normative content *distinct* from the written Chinese laws and judicial decisions that the European Union had identified as evidence of the existence and content of the 'policy'."[38] China submits that "an alleged unwritten measure must be operationally *distinct* from other measures, instrumentalities, or components that the complaining Member identifies as evidence of the existence of the unwritten measure" because under the DSU "every measure identified in dispute settlement (whether written or unwritten) must be capable, at least potentially, of independently violating a Member's legal obligations."[39]

4.14. The European Union recalls the Panel's finding of the existence of the ASI policy as a rule or norm that exhibits normative attributes and is part of China's legal system[40], and argues that China errs in asserting that the Panel "made no finding" that the ASI policy has a normative content distinct from the separately challenged written legal instruments.[41] The European Union submits that the Panel did not err in applying the relevant legal standard and carried out a holistic assessment of all the evidence, upholding the definition of the precise content of the ASI policy.[42]

4.15. In examining whether the European Union had demonstrated the existence of the ASI policy as an unwritten measure of general and prospective application, the Panel assessed the precise content and the specific nature of the measure.[43] The Panel examined the categories of evidence that, as argued by the European Union, demonstrated the precise content of the ASI policy: (i) the temporal overlaps and the similarities of the five ASI decisions; (ii) 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 (iii) the calls from the SPC and the NPC Standing Committee to continue

[36] We note that, in some instances the European Union characterized its claims under Articles 28.1, 28.2, and 44.1 as encompassing Article 1.1, first sentence, read in conjunction with the respective provision of the TRIPS Agreement, whereas in other instances, it characterized its claim as encompassing the relevant provision read in conjunction with Article 1.1, first sentence. In response to questioning at the hearing, the European Union clarified that there was no difference between these respective characterizations. Since it is the obligation in the more specific substantive provision in Articles 28.1, 28.2, and 44.1 that must be read in light of the obligation in the more general one in Article 1.1, first sentence, in this Award, we use the characterisation that refers to relevant provision read in conjunction with Article 1.1, first sentence.

[37] We note that this follows the approach taken by the Panel. See Panel Report, section 7.4.

[38] China's written submission, para. 5. (emphasis original)

[39] China's written submission, para. 10. (emphasis original)

[40] European Union's rebuttal submission, para. 11 (referring to Panel Report, para. 7.197).

[41] European Union's rebuttal submission, para. 14 (referring to China's written submission, paras. 5, 12, 21, 32 and 33).

[42] European Union's rebuttal submission, para. 30.

[43] Panel Report, para. 7.67 (referring to Panel Report, *Indonesia – Chicken*, para. 7.656; Appellate Body Reports, *US – Zeroing (EC)*, para. 198; and *Argentina – Import Measures*, paras. 5.104-5.108).

using and improving the ASI policy.[44] On the basis of its analysis, the Panel found that the European Union had substantiated the precise content of the ASI policy.[45]

4.16. Turning to the measure's general and prospective application, the Panel said it would consider the specific characteristics of the ASI policy as presented by the European Union.[46] Ultimately, the Panel found that the European Union had demonstrated that the ASI policy is a rule or norm of general and prospective application and that it was therefore not necessary to address its argument that the ASI policy can alternatively be characterized as ongoing conduct.[47]

4.4.2 Whether the Panel erred in applying the legal standard for determining the existence of an unwritten measure

4.17. The Panel noted that, in its panel request, the European Union described the measure at issue as 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"; 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"[48]; that the prohibitions are enforced through daily penalties in case of infringement; and that the policy was elaborated and promoted by the SPC and endorsed by the NPC Standing Committee.[49] The European Union argued that "this measure [was] an unwritten measure legally characterized as a rule or norm of general and prospective application, or, in the alternative, ongoing conduct."[50]

4.18. In light of the European Union's claim, the Panel considered that evidence of the following elements was required: "(a) that the alleged measure is attributable to the responding Member; (b) of the precise content; and (c) of the specific nature"[51], which could be a rule or norm of general and prospective application, ongoing conduct, or other type of unwritten measure.[52] China agreed that these were the three main elements to demonstrate that an unwritten measure exists.[53] This constituted the legal standard applied by the Panel. The elements of the analytical framework adopted by the Panel were informed by the European Union's challenge of the measure at issue.

4.19. Article 3.3 of the DSU refers to "[t]he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member". Thus the notion of "measure" in WTO dispute settlement is broad and, in principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings.[54] Specifically, whether

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[44] Panel Report, para. 7.74 (referring to European Union's first written submission to the Panel, para. 235).

[45] Panel Report, para. 7.177.

[46] Panel Report, para. 7.193.

[47] Panel Report, para. 7.205.

[48] Footnote 319 of the Panel Report (quoting European Union's first written submission to the Panel, paras. 232, 108 and 225) indicates that the European Union asserts that the prohibitions include prohibiting SEP holders from commencing, continuing, or enforcing the results of any legal proceeding before courts outside China and from applying for enforcement of judgements of any non-Chinese court in the territories of other Members or from seeking any judicial relief outside the jurisdiction of Chinese courts.

[49] Panel Report, para. 7.21 (quoting European Union's panel request, pp. 1-2). The European Union argued that: (i) the ASI policy was first introduced with Huawei v. Conversant and further elaborated by Chinese courts in at least four other cases where ASIs were issued; (ii) provincial legal and political bodies "confirmed the correctness and exemplary character of those judicial decisions"; and (iii) the SPC had further "elaborated and promoted" the policy in official and public documents issued in 2021 and 2022, while the NPC Standing Committee had "endorsed the policy as applied in 2021 and 2022". (Ibid. (quoting European Union's panel request, pp. 1-2)).

[50] Panel Report, para. 7.68 (referring to European Union's first written submission to the Panel, paras. 217-218).

[51] Panel Report, para. 7.67 (referring to Panel Report, *Indonesia – Chicken*, para. 7.656; Appellate Body Reports, *US – Zeroing (EC)*, para. 198; and *Argentina – Import Measures*, paras. 5.104-5.108).

[52] Panel Report, para. 7.178 (referring to Panel Report, *Indonesia – Chicken*, para. 7.656 (in turn referring to Appellate Body Reports, *Argentina – Import Measures*, para. 5.108)).

[53] Panel Report, para. 7.67 (referring to European Union's first written submission to the Panel, para. 216; China's first written submission to the Panel, para. 110).

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

a measure is expressed in the form of a written instrument is not determinative of the issue of whether it can be challenged in dispute settlement proceedings.[55]

4.20. The methodology and the type of analysis that a panel must conduct in each case to establish the existence of the measure at issue is determined by the manner in which the complainant challenges the measure.[56] At a minimum, the complainant would need to demonstrate that the measure is attributable to the respondent, as well as its precise content, to the extent that such content is the object of the claims raised.[57] Equally, in the context of an unwritten measure, in addition to its attribution and precise content, it is the specific nature of the measure, as characterized by the complainant, that will determine the kind of evidence required and the elements to be proved, in order to establish the existence of such measure.[58]

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

4.22. China's central argument in this appeal is that the Panel erred in finding that the European Union had proven "the existence of the alleged 'ASI policy' as a separately cognizable measure under the DSU without making a finding that the so-called 'policy' has normative content *distinct* from the written Chinese laws and judicial decisions that the European Union had identified as evidence of the existence and content of the 'policy'".[59] According to China, every measure identified in dispute settlement (whether written or unwritten) "must be capable, at least potentially, of independently violating a Member's legal obligations."[60] Thus, an alleged unwritten measure must be "operationally *distinct*" from other measures, or components that the complaining Member identifies as evidence of the existence of the unwritten measure.[61] China recalled that in the panel proceedings both China and the European Union had agreed that a single unwritten measure must exist as "distinct from its components".[62] Thus, China argues, the Panel erred in failing to properly identify and apply the legal standard for establishing the existence of an unwritten measure.[63]

4.23. In addressing China's claims, we first assess the application of the legal standard by the Panel and then turn to China's arguments.

4.24. In the present case, the attribution of the measure was uncontested by the parties.[64] Regarding the precise content of the measure, the Panel based its assessment on the three broad categories of evidence that the European Union argued demonstrated the precise content and existence of the ASI policy: (i) the temporal overlaps and the similarities of the five ASI decisions; (ii) 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 (iii) the alleged calls from the SPC and the NPC Standing Committee to continue using and improving the ASI policy.[65] The Panel then turned to assess whether these arguments and evidence as a whole determine "[t]he existence of the ASI policy as a single measure which operates distinctly from its

[55] This reasoning is consistent with the comprehensive nature of the right of Members to resort to dispute settlement to "preserve [their] rights and obligations ... under the covered agreements, and to clarify the existing provisions of those agreements" as provided for in Article 3.2 of the DSU.

[56] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.123.

[57] Appellate Body Reports, *Argentina – Import Measures*, para. 5.104.

[58] Appellate Body Reports, *Argentina – Import Measures*, para. 5.110.

[59] China's written submission, para. 5. (emphasis original)

[60] China's written submission, para. 10.

[61] China's written submission, paras. 10-11 (quoting Panel Report, *US – Export Restraints*, para. 8.85 and referring to Panel Report, *China – Publications and Audiovisual Products*, para. 7.214; Appellate Body Reports, *Argentina – Import Measures*, para. 5.108). (emphasis original)

[62] China's written submission, para. 11 (referring to European Union's first written submission to the Panel, paras. 216 and 221; China's response to Panel question No. 78, paras. 18-19).

[63] China's written submission, para. 33.

[64] Panel Report, para. 7.69.

[65] Panel Report, para. 7.74 (referring to European Union's first written submission to the Panel, para. 235).

parts, pursuant to a shared objective".[66] The Panel concluded that the European Union had substantiated the precise content of the ASI policy.[67]

4.25. In assessing whether the ASI policy is a rule or norm of general and prospective application, the Panel recalled its findings in the context of assessing the measure's precise content[68] and found that:

> [T]he 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 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.[69]

4.26. Further, the Panel was "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."[70]

4.27. We acknowledge, as the Panel did, that a high evidentiary burden must be applied in assessing the existence of an unwritten measure.[71] We consider that the Panel correctly established and applied the legal standard in determining the existence of the measure at issue by assessing its precise content and its existence as a rule or norm of general and prospective application.

4.28. First, as part of its assessment of the measure's precise content, the Panel specifically analysed the measure's existence as a single measure composed of elements that go beyond the content of the law and relevant judicial decisions and which operates distinctly from its parts pursuant to a shared objective.[72] It undertook an overall assessment of whether the evidence adduced by the European Union demonstrated the precise content of the ASI policy and whether it went beyond the sum of individual judicial decisions with similar legal basis and factual patterns to include policy objectives endorsed and sanctioned by the NPC and Standing Committee.[73]

4.29. We consider that this approach was appropriate in light of the European Union's claim regarding the existence of the unwritten measure. Specifically, the European Union had 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."[74] While indeed the essential content of the ASI policy was materialized in the judicial decisions, the European Union did not claim that these judicial decisions constituted the policy themselves. Rather, as the Panel concluded, these decisions were "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."[75] As part of the appraisal of the precise content, the Panel assessed the policy objectives of the Chinese government and found that the judicial decisions where ASIs had been issued were in furtherance of broader policy considerations expressed by Chinese authorities.[76] The policy objectives refer to: strengthening the

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[66] Panel Report, para. 7.153.
[67] Panel Report, para. 7.177.
[68] Panel Report, para. 7.196.
[69] Panel Report, para. 7.197. (emphasis added)
[70] Panel Report, para. 7.204.
[71] Panel Report, para. 7.66 (referring to Panel Report, *Indonesia – Chicken*, para. 7.656 (in turn referring to Appellate Body Reports, *Argentina – Import Measures*, para. 5.108)).
[72] Panel Report, paras. 7.153 and 7.197.
[73] Panel Report, paras. 7.176 and 7.197.
[74] Panel Report, para. 7.62 (referring to European Union's comments on China's response to Panel question No. 78).
[75] Panel Report, para. 7.163.
[76] Panel Report, paras. 7.164-7.174.

protection of independent IP rights[77]; the national innovation-driven development strategy and intellectual property strategy which included "the construction of an 'anti-suit injunction' system with Chinese characteristics, and the maintenance of judicial sovereignty over foreign-related intellectual property rights"[78]; the protection of legitimate rights and interests of Chinese and foreign property right owners on an equal footing[79]; extraterritorial application of Chinese laws to protect the security and legitimate rights and interests of Chinese citizens and enterprises in foreign countries[80]; and the strengthening of IP-related judicial cooperation with other countries.[81] The Panel found that the policy objectives "were to be implemented by Chinese courts at all levels".[82]

4.30. Further, the Panel found 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."[83] Finally, the Panel assessed "whether the NPC Standing Committee's endorsement of the SPC's work on ASIs extends to a broader measure, i.e. the ASI policy"[84] and concluded that there was sufficient evidence before it that this was the case.[85] In considering the totality of the evidence and argumentation before it, the Panel found that the European Union had substantiated the precise content of the ASI policy.[86]

4.31. Secondly, as part of its assessment of the measure's general and prospective application, the Panel analysed: whether the measure "exhibit[ed] normative attributes, similar to those of a written measure"; whether it was "intended to be generally applied, affecting an unidentified number of economic operators"; and whether there was "a high likelihood, regardless of whether it is mandatory, that it will continue to exist and be applied in the future".[87] Specifically, the Panel noted that the measure's endorsement by the NPC and its Standing Committee and promotion by the Chinese judiciary indicated "that the ASI policy exhibits normative attributes and thus is part of China's legal system". This, in the Panel's view, "create[d] 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."[88] The Panel further observed that "the ASI policy enable[d] an undetermined number of economic actors to request an ASI from a Chinese court in the context of SEP litigation" and was persuaded that there was "a high likelihood that the ASI policy will apply in future cases".[89]

4.32. The Panel concluded that the ASI policy exhibits normative attributes as: "it creates expectations by public and private actors regarding the availability of ASIs in the context of SEP litigation, it is meant to be applied generally by Chinese courts and affects an undetermined number of economic operators, and there is a high likelihood of its continuation in the future."[90] The Panel therefore found that the European Union had demonstrated that the ASI policy is a rule or norm of general and prospective application.[91]

4.33. On the basis of the above, we are satisfied that, as part of its examination of the precise content of the measure and its existence as a rule or norm of general and prospective application, the Panel correctly applied the legal standard for determining the existence of the unwritten measure at issue.

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[77] Panel Report, para. 7.167 (quoting NPC 2021 Standing Committee opinions (Panel Exhibit EU-57b), p. 4).
[78] Panel Report, para. 7.168 (quoting SPC, Report on implementation (Panel Exhibit EU-96b), p. 10).
[79] Panel Report, para. 7.170 (quoting SPC, Notice on Issuing the Plan of the People's Courts on the Judicial Protection of IP Rights (2021-2025) (Panel Exhibit EU-85), Article XVI).
[80] Panel Report, para. 7.170 (quoting SPC, Notice on Issuing the Plan of the People's Courts on the Judicial Protection of IP Rights (2021-2025) (Panel Exhibit EU-85), Article XVI).
[81] Panel Report, para. 7.170 (quoting SPC, Notice on Issuing the Plan of the People's Courts on the Judicial Protection of IP Rights (2021-2025) (Panel Exhibit EU-85), Article XVI).
[82] Panel Report, para. 7.172.
[83] Panel Report, para. 7.172.
[84] Panel Report, para. 7.164.
[85] Panel Report, para. 7.175.
[86] Panel Report, para. 7.177.
[87] Panel Report, para. 7.194 (referring to Appellate Body Reports, *US – Anti-Dumping Methodologies (China)*, paras. 5.129-5.130, and 5.157; *US – Oil Country Tubular Goods Sunset Reviews*, para. 187).
[88] Panel Report, para. 7.197.
[89] Panel Report, para. 7.198.
[90] Panel Report, para. 7.204.
[91] Panel Report, para. 7.205.

4.34. As noted above, China argues on appeal that "an alleged unwritten measure must be operationally *distinct* from other measures, instrumentalities, or components that the complaining Member identifies as evidence of the existence of the unwritten measure"[92], and refers to several prior reports in support of its contention that, where a complaining Member alleges that multiple distinct instruments constitute a single "measure", it must demonstrate that the alleged single measure has "distinct normative content".[93] At the hearing, China explained that, in its view, for any measure to exist within the meaning of the DSU, whether written or unwritten, the complaining Member must demonstrate that the asserted measure has "a functional life of its own".[94] In China's view, at no point did the Panel identify any respect in which the ASI policy added operative content to the content of the written Chinese law and the written judicial decisions interpreting and applying that law.[95]

4.35. With respect to China's argument that an alleged unwritten measure must be operationally distinct from other measures, we noted above that the Panel correctly applied the legal standard by looking at the attribution, precise content, and general and prospective application of the unwritten measure, as alleged by the European Union.

4.36. In our view, the panel reports referred to by China do not support the proposition that, in each case, panels are under an obligation to make a separate determination as to whether an unwritten measure consisting of several elements has "distinct *normative* content" from its components in order to be challenged in WTO dispute settlement. Instead, the reasoning of the Appellate Body and panels in these cases was informed by the specific measures at issue and the arguments of the parties.

4.37. In *Argentina – Import Measures*, the Appellate Body reasoned that, if a complainant is challenging a single measure composed of several different instruments, it "will normally need to provide evidence of how the different components operate together as part of a single measure and how a single measure exists as distinct from its components".[96] However, in the present case the European Union was not challenging a plurality of legal instruments operating as a single measure but *one* measure composed of several elements, including judicial decisions considered to be evidence of the ASI policy and policy documents representing the objectives and endorsement of the overall policy. Moreover, as noted above, the Panel determined that, in light of the objectives expressed by the Chinese government and the endorsement by the NPC and its Standing Committee, the measure at issue went "beyond a simple repetition of a similar legal approach by Chinese courts in different cases where ASIs were requested".[97]

4.38. Furthermore, in *US – Export Restraints*, Canada, as the complainant, had alleged that each of the measures that it had identified "operates individually to require [the investigating authority to treat export restraints as financial contributions in countervailing duty investigations], as well as that these measures 'taken together' require the same treatment".[98] It was in light of this argument that the panel observed that "[i]n considering whether any or all of the measures individually can give rise to a violation of WTO obligations, the central question that must be answered is whether each measure operates in some concrete way in its own right."[99] In *US – COOL*, the parties did not dispute the existence of the measure at issue but disagreed as to whether it should be challenged in its entirety or its constituent elements should be examined individually.[100] The panel addressed this question in light of the objective for panel and Appellate Body findings to "assist the DSB in making sufficiently precise recommendations and rulings so as to allow for prompt compliance, in order to ensure effective resolution of the dispute".[101] In *China – Publications and Audiovisual Products*, the issue was whether certain alleged measures established rules or norms intended to

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[92] China's written submission, para. 10. (emphasis original)

[93] China's written submission, para. 10 (referring to Appellate Body Reports, *Argentina – Import Measures*, para. 5.108; Panel Reports, *US – Export Restraints,* para. 8.85; *China – Publications and Audiovisual Products*, para. 7.214; *US – COOL*, para. 7.50; and *Indonesia – Chicken*, para. 7.668).

[94] China's response to questioning at the hearing. See also China's written submission, para. 10 (quoting Panel Report, *US – Export Restraints,* para. 8.85).

[95] China's response to questioning at the hearing.

[96] Appellate Body Reports, *Argentina – Import Measures*, para. 5.108.

[97] Panel Report, para. 7.197.

[98] Panel Report, *US – Export Restraints*, para. 8.84.

[99] Panel Report, *US – Export Restraints*, para. 8.85.

[100] Panel Reports, *US – COOL*, para. 7.45.

[101] Panel Reports, *US – COOL*, para. 7.47.

have general and prospective application. The panel considered that the alleged measures merely notified the public of the existence of the rules or norms which may have general and prospective application contained in the publications regulations and did not themselves constitute a "measure".[102]

4.39. The comparison of these reports with the Panel Report before us confirms our conclusion that it is the specific measure challenged and how it is characterized by a complainant that will determine the kind of evidence required and the elements to be proved to establish the existence of such measure.

4.40. China refers to Articles 3.3, 4.2, 7, and 19.1 of the DSU, arguing that it follows from those provisions that "the thing identified as a 'measure' must be capable, at least potentially, of independently violating a Member's legal obligations."[103] We do not see that these provisions qualify in any particular manner the measures that can be brought as the subject of dispute settlement proceedings. Furthermore, as noted above, the Panel correctly interpreted and applied the legal standard in determining the existence of the measure at issue.

4.41. In our view, the analysis that the Panel undertook when determining the precise content of the measure (the ASI policy) and whether it has general and prospective application included a determination that the measure has normative attributes, and that these normative attributes went beyond the "simple repetition of a similar legal approach by Chinese courts in different cases where ASIs were requested."[104] In light of the European Union's articulation of the measure at issue, we do not see that the Panel was required to make a finding that the measure had "a functional life of its own" distinct from its components in order to be challenged in WTO dispute settlement.[105]

4.4.3 Conclusion

4.42. On the basis of the above, we uphold the Panel's finding in paragraphs 7.197, 7.205, 7.206, and 8.1 of its Report that the European Union provided sufficient evidence and argumentation to demonstrate the existence of the ASI policy as a rule or norm of general and prospective application.

4.5 Claim under Article 1.1, first sentence of the TRIPS Agreement

4.5.1 Introduction

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

> Members 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.

4.44. The European Union appeals "the Panel's findings that Article 1.1, first sentence of the TRIPS Agreement merely requires WTO Members to implement the provisions of the Agreement within their domestic legal systems and does not require them to refrain from taking measures that undermine the protection and enforcement of IP rights in the territories of other Members."[106] China responds that, "[b]y referring to Article 1.1 and misconstruing the object and purpose of the Agreement, the European Union seeks to convert specific provisions of the TRIPS Agreement that by their terms relate only to the protection and enforcement of intellectual property rights *within a Member's own territory* into a transnational obligation."[107]

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[102] Panel Report, *China – Publications and Audiovisual Products*, paras. 7.215 and 7.225.
[103] China's written submission, para. 8.
[104] Panel Report, para. 7.197.
[105] China's response to questioning at the hearing.
[106] European Union's written submission, para. 19.
[107] China's rebuttal submission, para. 8. (emphasis original)

4.45. The Panel found 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.[108]

4.46. The European Union appeals this legal conclusion and various aspects of the Panel's interpretative reasoning that led to this conclusion.

4.47. The Panel commenced its analysis by considering that the plain meaning of the term "give effect to" is to "make operative" or "put into force".[109] The Panel considered that the second and third sentences of Article 1.1 provide immediate context for the interpretation of the first sentence, and 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."[110] The Panel indicated that 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"[111], and "requires that Members implement the provisions of the TRIPS Agreement within their domestic legal systems."[112]

4.48. In response to the arguments of the European Union on object and purpose, the Panel indicated that:

> [C]ustomary 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.[113]

4.49. The European Union agrees with the Panel that the "the plain meaning of the phrase 'give effect to' is to 'make operative'" but argues that the Panel failed to recognize that this implies "a broader obligation to make the provisions of the TRIPS Agreement 'operative'".[114] According to the European Union, the Panel adopted an unduly "narrow understanding of the content of the obligation in Article 1.1" by incorrectly inferring from its second and third sentences that the first sentence relates only to "each Member's isolated implementation of the provisions of the TRIPS Agreement in its domestic legal system".[115] The European Union additionally argues that "the first sentence of Article 1.1 do[es] not specify that Members are only required to give effect to the provisions of that Agreement within their own territory."[116] The European Union therefore contends that the Panel erred in interpreting the first sentence in a way that excluded "an obligation on Members to refrain from adopting, within their own territory, measures that undermine the protection and enforcement of IP rights in the territories of other Members."[117]

4.50. The European Union alleges that the Panel's interpretation of the first sentence of Article 1.1 reflects a flawed understanding of the object and purpose of the TRIPS Agreement, as well as the role played by the object and purpose and the principle of good faith in treaty interpretation.[118] The

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[108] Panel Report, para. 7.231.
[109] Panel Report, para. 7.213 (quoting *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Oxford University Press, 1993), Vol. 1, p. 786, definition of "effect").
[110] Panel Report, para. 7.214.
[111] Panel Report, para. 7.217.
[112] Panel Report, para. 7.222.
[113] Panel Report, fn 625. (emphasis original)
[114] European Union's written submission, paras. 22-23.
[115] European Union's written submission, paras. 23-28 and 47.
[116] European Union's written submission, para. 28.
[117] European Union's written submission, paras. 35-36.
[118] European Union's written submission, paras. 42-47 and 53-77.

European Union considers that the object and purpose of the TRIPS Agreement can be gleaned from various recitals of the preamble, as well as Article 7 of the Agreement entitled "Objectives".[119] Taking into account these provisions, the European Union submits that the obligation to "give effect to" the provisions of the TRIPS Agreement in Article 1.1, first sentence requires Members to do more than implement the provisions of the Agreement within their domestic legal systems. According to the European Union, "Members are also required, *inter alia*, to refrain from taking measures that undermine the effective and adequate protection and enforcement of intellectual property rights, be it within their own territory or in the territories of other Members."[120]

4.51. China, by contrast, considers that the Panel correctly inferred from the context of the second and third sentences of Article 1.1 that "the obligation to 'give effect to the provisions of this Agreement' is an obligation that Members undertake to implement the requirements of the TRIPS Agreement within their own domestic legal systems."[121] China argues that the TRIPS Agreement is "concerned exclusively with the maintenance of certain minimum standards of intellectual property protection and enforcement by each WTO Member within its own territory."[122] For China, if the European Union were correct that Article 1.1 of the TRIPS Agreement contains an "implicit obligation" on Members to "refrain from adopting, within their own territory, measures that undermine the protection and enforcement of intellectual property rights in the territory of other Members", "the TRIPS Agreement would need to address an array of complex topics that it self-evidently does not address."[123]

4.52. In China's view, the object and purpose of the TRIPS Agreement, as reflected in its first preambular clause, is "to reduce distortions and impediments to international trade" by ensuring that each Member maintains within its domestic legal system certain minimum standards for the "effective and adequate protection" of these private territorial rights.[124] Further, "there is nothing in the TRIPS Agreement to indicate that it is concerned with any aspect of the recognition and enforcement of intellectual property rights across national borders."[125] China argues that "the TRIPS Agreement is concerned exclusively with the maintenance of certain minimum standards of intellectual property protection and enforcement by each WTO Member within its own territory."[126]

4.53. China also responds that "the principle of good faith [does not] allow the treaty interpreter to read into a treaty rights and obligations that do not result from the ordinary meaning of the relevant provision, as it appears in its context and in the light of the object and purpose of the agreement."[127] For China, the European Union's conception of the object and purpose of the TRIPS Agreement is mistaken, and "[t]he Panel properly interpreted Article 1.1 of the TRIPS Agreement, in good faith, and including a consideration of the treaty's object and purpose, to conclude that the agreement does not establish a supranational system for the protection and enforcement of private intellectual property rights across national borders."[128]

4.5.2 Whether the Panel erred in its interpretation of Article 1.1, first sentence of the TRIPS Agreement

4.54. As with all provisions in the WTO Agreements, Article 1.1 of the TRIPS Agreement must be interpreted in accordance with the customary rules of interpretation of public international law.[129] It is generally accepted that such customary rules include those codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention). Article 31.1 of the Vienna Convention provides, in this regard, that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[130]

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[119] European Union's written submission, paras. 42-43.
[120] European Union's written submission, para. 44.
[121] China's rebuttal submission, para. 11.
[122] China's rebuttal submission, para. 17.
[123] China's rebuttal submission, para. 18.
[124] China's rebuttal submission, para. 12.
[125] China's rebuttal submission, para. 16.
[126] China's rebuttal submission, para. 17.
[127] China's rebuttal submission, para. 23.
[128] China's rebuttal submission, para. 26.
[129] Article 3.2 of the DSU.
[130] Article 31.1 of the Vienna Convention.

4.55. We start from the definition of the term "give effect", which is "to make operative"[131] or "to render operative".[132] The relevant definition of the term "operative" is "characterized by operating or working; being in operation or force".[133] Consequently, the term "give effect" means the obligation to enact domestic legislation to implement the provisions of the TRIPS Agreement, and also the corresponding action of giving effect to the provisions of the Agreement on an ongoing basis. In our view, the Panel failed to recognize that the term "give effect" in the first sentence of Article 1.1 has a broader connotation than the term "implement" as used in the second and third sentences of Article 1.1.[134] In particular, we consider that in some cases the term "implement" could connotate a singular act in which something is enacted, whereas the term "give effect" necessarily requires an active and continuing duty to ensure that the provisions of the TRIPS Agreement are made operative on an ongoing basis.[135] While we accept that a difference in the terms used does not automatically imply a significant difference in meaning, the use of "give effect" appears to be deliberate.[136]

4.56. In our view the obligation to "give effect" refers to a Member actively making the provisions of the TRIPS Agreement operative on an ongoing basis, including through taking the steps necessary to ensure that its provisions are put into force and also realized.

4.57. Turning to the context of the term "give effect", the Panel found that the second and third sentences of Article 1.1 indicate that the obligation to "give effect" "imposes a duty on Members to implement the provisions of the TRIPS Agreement within their domestic legal systems while confirming some flexibility in implementation."[137] We agree that the second and third sentences of Article 1.1 are immediate context for the first sentence. The second sentence of Article 1.1 specifically allows Members the flexibility to "implement in their law more extensive protection than is required by this Agreement". The third sentence provides that "Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice." Thus, it is clear to us that, so long as Members give effect to the provisions of the TRIPS Agreement, the manner in which Members *implement* those provisions can vary.

4.58. We note, however, that an important component of the immediate context of the term "give effect" is the first sentence of Article 1.1 itself. It begins with "Members shall", thereby creating the obligation for every Member to give effect to the provisions of the Agreement. This is a characteristic of the TRIPS Agreement whereby each Member of the WTO is required to set up a system for the effective and adequate protection of trade-related aspects of IP rights.[138] The Panel recognized this fact and indicated that its interpretation of Article 1.1 "reflects the specific nature of the

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[131] See Panel Report, para. 7.213 (quoting *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Oxford University Press, 1993), Vol. 1, p. 786, definition of "effect").

[132] See Australia's third-party submission to the Panel, para. 33 (quoting Oxford Dictionaries online, definition of "to give effect to" https://www.oed.com/search/dictionary/?scope=Entries&q=to+give+effect+to (accessed 24 August 2023)).

[133] See Australia's third-party submission to the Panel, para. 33 (quoting Oxford Dictionaries online, definition of "operative" https://www.oed.com/search/dictionary/?scope=Entries&q=operative (accessed 24 August 2023)).

[134] See Panel Report, paras. 7.217 and 7.220.

[135] The Panel noted that its understanding of the term "give effect to" was "supported by the French and Spanish texts of the TRIPS Agreement, which use the terms '*donneront effet aux*' and '*aplicarán*' respectively". (Panel Report, para 7.213). We note that the English and French texts use different terms in the first sentence ("give effect" and "*donneront effet aux*") and in the subsequent sentences ("implement" and "*mettre en œuvre*") of Article 1.1. By contrast, the Spanish version uses the term "*aplicarán*" in the first sentence and "*aplicar*" in the third sentence. We do not derive from the use of the same term "*aplicar*" for both "give effect to" and "implement" (in the English version) that those terms connote an identical meaning. Rather, we understand this to be a function of the term "*aplicar*" in Spanish being capable of having different connotations in different contexts. According to the Real Academia Española, the term "*aplicar*" means, among other things: "Emplear, administrar o poner en práctica un conocimiento, medida o principio, a fin de obtener un determinado efecto o rendimiento en alguien o algo." (to employ, to administer or to put into practice a knowledge, measure or principle, with the objective of obtaining a certain effect or performance in someone or something). (Diccionario de la Real Academia Española, definition of "aplicar" https://dle.rae.es/aplicar (accessed 7 July 2025), meaning 2).

[136] See European Union's written submission, para. 27.

[137] Panel Report, para. 7.215.

[138] We agree with the Panel that "[t]he 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" and that "[t]his contrasts with many provisions of other covered agreements which prohibit conduct rather than mandate certain action." (Panel Report, para. 7.218).

TRIPS Agreement in the WTO system" which "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."[139] The consequence of this obligation is that there has to be a system of protection and enforcement of IP rights in each and every Member.

4.59. In addition to the immediate context, we consider that Article 1.1, first sentence must be interpreted within the broader context of the TRIPS Agreement, which informs what is meant by "give effect". The requirement embodied in the first sentence of Article 1.1 is developed through various provisions that envisage that Members will establish and maintain "national systems for the protection of intellectual property"[140], and that these "national systems" will enshrine a certain set of common minimum standards for the effective and adequate protection of IP rights in the territory of a given Member.[141] In this regard, we note that the fourth preambular recital "[r]ecogniz[es] that intellectual property rights are *private rights*".[142] Thus, Members are required to establish "national systems" that create certain "private rights" and that provide effective and adequate protection of IP in their respective territorial jurisdictions.[143] We understand this to be a central way in which the TRIPS Agreement functions, namely, by prescribing certain minimum standards for the effective and adequate protection of IP rights that are given effect through "national systems" in each Member's territory.

4.60. The context afforded by the TRIPS Agreement also shows that the respective "national systems" of individual Members for the effective and adequate protection of IP rights within their own territories do not exist in isolation. Rather, the TRIPS Agreement provides for cooperation among Members. For example, Article 69 of the TRIPS Agreement provides that "Members agree to cooperate with each other with a view to eliminating international trade in goods infringing intellectual property rights" and "[f]or this purpose, they shall establish and notify contact points in their administrations and be ready to exchange information on trade in infringing goods." Article 63.3 likewise establishes a more particularized obligation for the exchange of information, namely by requiring that "[e]ach Member shall be prepared to supply, in response to a written request from another Member, information of the sort referred to in paragraph 1." This paragraph in turn refers to, *inter alia*, the "[l]aws and regulations, and final judicial decisions and administrative rulings of general application" of that other Member. Article 40.3 similarly establishes a consultation mechanism with respect to issues around anti-competitive practices in contractual licences.

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

4.62. With respect to the object and purpose of the TRIPS Agreement, we observe that its first preambular recital provides:

> *Desiring* to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade…

4.63. This indicates to us that the object and purpose of the TRIPS Agreement is to promote the effective and adequate protection and enforcement of IP rights, in such a way so that they do not become barriers to trade.

4.64. Paragraphs (b) and (c) of the second recital of the preamble recognize the need for new rules and disciplines concerning "the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights" and "the provision of effective

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[139] Panel Report, para. 7.229.
[140] See e.g. preambular recitals 2(c) and 5 of the TRIPS Agreement.
[141] See e.g. preambular recitals 1 and 2 of the TRIPS Agreement.
[142] Emphasis added.
[143] We agree with China that the private rights under the TRIPS Agreement are "territorially defined". (China opening statement at the hearing, para. 23).

and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems". This ensures a minimum level of IP protection in each Member thereby addressing the goal of "reduc[ing] distortions and impediments to international trade" as expressed in the first recital.

4.65. In light of the above, we understand that the operation of the TRIPS Agreement – including its objective to reduce distortions and impediments to international trade – is to be realized by requiring each and every WTO Member to implement and operationalize, in its domestic legal system, a set of private rights that correspond to the minimum standards for the protection and enforcement of IP rights in the TRIPS Agreement. The object and purpose of the TRIPS Agreement confirms that WTO Members shall each implement these minimum levels of IP protection and enforcement within their own territories, recognizing flexibility to provide a higher level of protection and differences in the manner of implementation in domestic legal systems. In this way, the TRIPS Agreement seeks to have effective and adequate protection and enforcement of IP rights in every WTO Member, in a manner that it operates without those measures and procedures becoming barriers to trade.

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

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

4.67. The European Union referred to Article 7 of the TRIPS Agreement in support of its argument that Article 1.1, first sentence requires Members to do more than implement the provisions of the TRIPS Agreement within their domestic legal systems.[144] The Panel recalled the finding of the panel in *US – Section 211 Appropriations Act* that Article 7 articulates a "form of the good faith principle", and concluded that this "does not imply that Article 1.1, first sentence also imposes obligations *vis-à-vis* another Member's implementation of the TRIPS Agreement."[145]

4.68. We observe that Article 7 (as well as Article 8) of the TRIPS Agreement has a function in interpreting the Agreement. The panels in *Australia – Tobacco Plain Packaging*, referring to Article 7, stated[146]:

> Articles 7 and 8, together with the preamble of the TRIPS Agreement, set out general goals and principles underlying the TRIPS Agreement, which are to be borne in mind when specific provisions of the Agreement are being interpreted in their context and in light of the object and purpose of the Agreement.

4.69. Article 7 clarifies that the protection and enforcement of IP rights are not an end in themselves, but should contribute to an end, namely "the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare". The wording of Article 7 reflects that the protection of IP rights should contribute, *inter alia*, to the transfer of technology for the mutual advantage of both producers and users. Furthermore, the protection and enforcement of IP rights should contribute "to a balance of rights and obligations". In our view, the Panel has not properly taken into account the context of Article 7 of the TRIPS Agreement, and in particular the fact that the protection and enforcement of IP rights should contribute to a balance of rights and obligations.

4.70. The above components, i.e. the ordinary meaning of the term "give effect", in its context, and in light of the object and purpose of the TRIPS Agreement, indicate that the first sentence of Article 1.1 means that each and every Member is obliged to make operative the Agreement in its

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[144] European Union's written submission, para. 44.

[145] Panel Report, para. 7.230.

[146] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.2402. The interpretative approach of the panel was endorsed by the Appellate Body. (Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.658).

territory. In our view, the territoriality of IP rights envisaged by the TRIPS Agreement coupled with the obligation for every WTO Member to have its own national system in its territory means that the "national systems" providing effective and adequate protection of IP rights in their territories cannot function if at the same time Members are allowed to frustrate the protection of the trade-related IP rights granted by other Members in their territories pursuant to their implementation of the TRIPS Agreement. This is a key corollary of each Member's duty to give effect to the TRIPS Agreement within its own domestic legal system. Furthermore, the balance of rights and obligations foreseen in Article 7 would be defeated if a WTO Member prevents or frustrates the exercise of IP rights derived from the implementation of the TRIPS Agreement by another Member in that other Member's territory. The provisions of the TRIPS Agreement would be rendered inoperative if Members were allowed to frustrate other Members' implementation of their obligations under the TRIPS Agreement to provide minimum standards for IP rights and provide for their effective enforcement.

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

4.72. We acknowledge the arguments made by China that the TRIPS Agreement does not address issues of private international law.[147] We accept that the transnational litigation of private disputes concerning royalty rates for SEPs is a complex one, particularly in light of the global nature of the standards and products into which SEPs are incorporated.[148] We agree with China's argument that the TRIPS Agreement "does not establish a supranational system for the protection and enforcement of private intellectual property rights across national borders."[149] Nonetheless, the TRIPS Agreement establishes a system of protection of IP rights in every Member of the WTO, and requires that Members not frustrate the effective protection of trade-related IP rights in the territories of other Members.

4.73. In our view, the Panel's conclusion that Article 1.1, first sentence does not address the implementation of the TRIPS Agreement by other WTO Members[150] fails to recognize a key corollary of each Member's duty to give effect to the TRIPS Agreement within its own domestic legal system. As noted above, the *raison d'être* of the TRIPS Agreement is to have minimum standards for the protection and enforcement of IP rights given effect through national systems in the territory of each and every WTO Member. The provisions of the TRIPS Agreement would be rendered inoperative if Members were allowed to frustrate the implementation by other Members of their obligations under the TRIPS Agreement.

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

4.5.3 Conclusion

4.75. On the basis of the above, we find that the Panel erred in its interpretation of the term "give effect" in the first sentence of Article 1.1. Accordingly, we reverse the Panel's findings in paragraph 7.231 of its Report and find that the corollary of the obligation in Article 1.1, first sentence of the TRIPS Agreement to "give effect" to the provisions of that Agreement in a WTO Member's territory is to do so without frustrating the functioning of the systems of protection and enforcement of IP rights implemented by other Members in their respective territories.

[147] China's rebuttal submission, para. 3.
[148] China's rebuttal submission, para. 5.
[149] China's rebuttal submission, para. 26.
[150] Panel Report, para. 7.231.

4.76. We note, however, that, in line with the European Union's claim, we must read Article 1.1, first sentence together with the operative provisions of the TRIPS Agreement. Therefore, we will analyse the claims that the European Union makes under other provisions of the Agreement that are linked to Article 1.1.

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

4.6.1 Introduction

4.77. The European Union appeals "the Panel's conclusion and related findings that the European Union has not demonstrated that [the ASI policy] is inconsistent with Article 1.1, first sentence, in conjunction with Article 28.1 of the TRIPS Agreement".[151]

4.78. The European Union observes that Article 28.1 lists the exclusive rights which Members must ensure that the owners of patents are able to exercise.[152] The European Union's contention is that "Members are not allowed to take measures that interfere, *inter alia*, with the exercise by patent owners of their exclusive rights in the territories of other Members, while [the] ASI policy does precisely that."[153] The European Union considers that the Panel failed to engage with its arguments and "merely asserted that the inconsistency of [the] ASI policy with Article 28.1, whether or not read in conjunction with Article 1.1, first sentence, had not been demonstrated."[154] The European Union further requests the arbitrators to complete the analysis and to find that the ASI policy and the five individual ASI court decisions are inconsistent with China's obligations under Article 1.1, first sentence, in conjunction with Article 28.1 of the TRIPS Agreement.[155]

4.79. China responds that the Panel correctly found, that "[t]he European Union does not allege that patents granted in China fail to confer the exclusive rights set forth in Article 28.1".[156] China recalls the Appellate Body's observation in respect of Article 16.1 that "in accordance with Article 1.1 of the TRIPS Agreement, Members are required to give effect to Article 16.1 by ensuring that, *in the Members' domestic legal regimes,* the owner of a registered trademark can exercise its 'exclusive right to prevent' the infringement of its trademark by unauthorized third parties."[157] China considers that the same conclusion applies in respect of Article 28.1.[158] China contends that, consistent with its object and purpose and territorial scope, the TRIPS Agreement is concerned only with ensuring that each Member accords a minimum standard of patent protection within its own territory. For China, Article 28.1 "does not speak to whether and how an *in personam* order directed toward a party to litigation in Country A may affect, even if temporarily, that party's incentives to exercise patent rights that it holds in Country B."[159] Finally, China argues that the European Union does not elaborate upon, and there is no interpretative basis to discern, what it means by a "broad" ASI.[160]

4.80. The Panel understood that Article 1.1, first sentence, read in conjunction with Article 28.1, requires Members "to ensure that, within their domestic legal systems, a patent confers on its owner the exclusive rights set forth in Article 28.1."[161] Since those rights are independent of patents obtained for the same invention in the territories of other Members, and 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, the Panel considered that there was "no basis to interpret these provisions as addressing patent owners' rights in the territories of other WTO Members".[162] The Panel further observed that its analysis "would be unchanged even if the European Union's claim had been

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[151] European Union's written submission, para. 86 (referring to the Panel Report, paras. 7.240).
[152] European Union's written submission, para. 90.
[153] European Union's written submission, para. 91 (referring to European Union's first written submission to the Panel, paras. 321-323; second written submission to the Panel, para. 68).
[154] European Union's written submission, para. 91.
[155] European Union's written submission, para. 95.
[156] China's rebuttal submission, para. 32 (quoting the Panel Report, para. 7.242).
[157] China's rebuttal submission, para. 30 (quoting Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.586 (emphasis added by China)).
[158] China's rebuttal submission, para. 31.
[159] China's rebuttal submission, para. 33.
[160] China's rebuttal submission, para. 35.
[161] Panel Report, para. 7.240 (referring to European Union's first written submission to the Panel, para. 311; China's first written submission to the Panel, para. 223).
[162] Panel Report, para. 7.240.

brought solely under Article 28.1".[163] The Panel further noted that "issues of enforcement of IP rights are addressed under Part III of the TRIPS Agreement", and "[m]oreover, in light of the legal standard under Article 28.1, the Panel consider[ed] 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."[164]

4.6.2 Whether the Panel erred in its interpretation of Article 28.1, read in conjunction with Article 1.1, first sentence, of the TRIPS Agreement

4.81. Article 28.1 provides:

> A patent shall confer on its owner the following exclusive rights:
>
> > (a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing[6] 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.

4.82. The European Union contends that "[t]he Panel erred in the interpretation of Article 1.1, first sentence, in conjunction with Article 28.1 of the TRIPS Agreement, by stating that these provisions merely require Members to ensure that, within their domestic legal systems, a patent confers on its owners the exclusive rights set forth in Article 28.1".[165] China responds that "[c]onsistent with the object and purpose of the TRIPS Agreement and the territorial scope of the TRIPS Agreement …, Article 28.1 (whether read separately or in conjunction with Article 1.1) is concerned only with ensuring that each Member accords a minimum standard of patent protection within its own territory."[166]

4.83. The Panel reasoned that the exclusive rights conferred under Article 28.1 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. We agree with the Panel's conclusion 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."[167] We also agree that Article 28.1, read on its own, "requires Members to ensure that, within their domestic legal systems, a patent confers on its owner the exclusive rights set forth" in that provision.[168]

4.84. However, we found in section 4.5 above that the proper interpretation of the term "give effect" in Article 1.1, first sentence requires WTO Members, to make operative the provisions of the TRIPS Agreement in their own national systems and to do so without frustrating the functioning of the systems of IP rights protected pursuant to the implementation of the TRIPS Agreement by other WTO Members in their territories. This includes the rights of patent owners bestowed upon them by virtue of the implementation of Article 28.1 by Members in their territories.

4.85. In the context of Article 28.1, this understanding would require an assessment of whether a Member's measure frustrates the conferral, by another WTO Member, of the patent owner's exclusive rights listed in that provision: in particular, the right of the patent owner to prevent third parties

[163] Panel Report, para. 7.241.
[164] Panel Report, para. 7.242. (fn omitted)
[165] European Union's written submission, para. 92.
[166] China's rebuttal submission, para. 33.
[167] Panel Report, para. 7.240.
[168] Panel Report, para. 7.240. (fn omitted)

from certain acts without the owner's consent. These would include, e.g. the making, using, offering for sale, selling, or importing the product which is the subject matter of the patent.

4.86. We therefore disagree with the Panel's finding that the obligation in Article 28.1, read in conjunction with Article 1.1, first sentence, is limited to ensuring the patent owner's exclusive rights in each Member's domestic legal system and nothing more.[169] Instead, we find that Article 28.1, read in conjunction with Article 1.1, first sentence, requires that Members not frustrate the patent owner's ability to exercise the exclusive rights conferred on it by another WTO Member under that provision, i.e. to prevent third parties not having the patent owner's consent from making, using, offering for sale, selling, or importing the patented product.

4.87. For the above reasons, we reverse the Panel's conclusion and findings in paragraphs 7.240 to 7.242 and 8.2.a. of the Panel Report.

4.88. Having found that in order to give effect to the provisions of Article 28.1, a WTO Member must not frustrate a patent owner's ability to exercise the exclusive rights conferred on it by another WTO Member under those provisions, we will now assess the effect of the ASI policy on such rights.

4.6.3 Completion of the analysis

4.89. In turning to complete the analysis concerning the claim by the European Union that the ASI policy as such is in breach of Article 28.1, read in conjunction with Article 1.1, first sentence, we recall, as noted in section 4.2 above, that the Panel found the ASI policy to comprise a measure of general and prospective application that empowers Chinese courts to impose a range of possible prohibitions at the request of SEP implementers in the context of SEP litigation, which can be enforced through the imposition of cumulative daily fines, and which has been elaborated and promoted by the SPC and endorsed by the NPC Standing Committee.[170] The Panel understood that the range of possible prohibitions in this regard could include preventing the owner of a patent registered in another Member from commencing, continuing or enforcing the results of any proceedings before a non-Chinese court, such as proceedings concerning patent infringement or the terms on which a patent would be licensed.

4.90. We note that our evaluation can proceed only on the basis of factual findings made by the Panel and uncontested record evidence in light of the limited scope of our review.

4.91. Turning to the arguments of the parties, before the Panel, the European Union argued 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"; "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"; 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".[171] According to the European Union, since the essence of the exclusive rights of a patent owner is the ability to prevent third parties not having the owner's consent from practicing the acts listed in Article 28.1, the exercise by SEP holders of their exclusive rights is intrinsically restricted if they are prohibited from enforcing those rights through the courts of the countries having granted the patents concerned.[172]

4.92. China argued that it was uncontested that patent owners in China were entitled to prevent unauthorized third parties from using a patent in the ways described in Article 28.1 and it was the responsibility of other Members, not China, to ensure that the minimum exclusive rights of a patent owner set out in Article 28 of the TRIPS Agreement were protected in their territories.[173] China further observed that an *in personam* order directed to a party to litigation in China did not modify

[169] Panel Report, para. 7.240.
[170] Panel Report, para. 7.204.
[171] Panel Report, para. 7.234 (quoting European Union's first written submission to the Panel, para. 311; response to the Panel question No. 37, para. 144; and second written submission to the Panel, paras. 61 and 63-64).
[172] European Union's first written submission to the Panel, para. 321.
[173] Panel Report, para. 7.237 (referring to China's first written submission to the Panel, para. 227; opening statement at the first substantive meeting, para. 49).

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".[174]

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

4.94. In the context of SEP litigation, the Panel observed that, while claims concerning the infringement of the subject matter of a patent must be brought before the national courts of the territory that has granted the patent right, the same is not true for contractual claims relating to licence fees and that courts in some jurisdictions will consider contractual claims concerning worldwide licences.[175] Pursuant to conditions set out by the SSO, the SEP holder[176] commits to provide an irrevocable undertaking or a licensing declaration to the relevant SSO that it will license or allow access to the subject matter of the patent-protected product or process to implementers of the standard on FRAND terms, which is known as a "FRAND undertaking".[177] Implementers may raise the failure to comply with FRAND terms as a defence to proceedings brought by a SEP holder or might sue the SEP holder in another jurisdiction for abuse of dominant position or breach of its obligation to license its SEP on FRAND terms.[178]

4.95. The exercise of the SEP holder's exclusive rights under Article 28.1 is informed by its commitment to license the SEP on FRAND terms. The purpose of this FRAND undertaking is to strike a balance between the rights and legitimate interests of the SEP holder and SEP implementer.[179] Thus, in our view, the ASI policy would frustrate other Members' implementation of Article 28.1 to the extent that it prevents SEP holders from exercising the exclusive rights bestowed upon them by those Members under that provision pursuant to a patent granted by them in their territory, in light of the SEP holder's commitment to license the SEP subject to FRAND terms.

4.96. With this in mind, we turn to the European Union's argument and assess the existence of factual findings made by the Panel and uncontested facts on the record.

4.97. The European Union argues that the ASI policy is "not intended to implement in its law the protection of patents or other intellectual property rights that is required under the TRIPS Agreement" but it is designed to dissuade SEP holders from exercising their rights in the territories of other Members[180]; and "to position Chinese courts as the forum of choice for implementers wishing to obtain a determination of terms and conditions for global FRAND licences more favourable to their interests."[181]

4.98. The Panel found that the judicial decisions where ASIs had been issued were "an expression of the ASI policy, as a principle or course of action"[182], and were in furtherance of policy objectives expressed by Chinese authorities.[183] These policy objectives refer to strengthening the protection of independent IP rights[184], the national innovation-driven development strategy and IP strategy which included "the construction of an 'anti-suit injunction' system with Chinese characteristics, and the

[174] Panel Report, para. 7.237 (quoting China's opening statement at the first substantive meeting, para. 49).
[175] Panel Report, para. 2.10 (referring to European Union's first written submission to the Panel, para. 175 and fn 151).
[176] By "SEP holder", we refer to the owner of a given SEP, and we note that this term was used interchangeably with "SEP owner" by the Panel (see Panel Report, paras. 2.7-2.8, and 7.82).
[177] Panel Report, para. 2.8.
[178] Panel Report, para. 2.10.
[179] Panel Report, paras. 2.8-2.10. The European Union described the FRAND undertaking as "designed to prevent hold up by giving the implementer a defence to a claim for infringement and hence to an injunction, whereas the patentee's ability to obtain an injunction to restrain infringement of an unlicensed SEP should prevent hold out." (European Union's first written submission to the Panel, para. 165).
[180] European Union's first written submission to the Panel, para. 325.
[181] European Union's first written submission to the Panel, para. 325.
[182] Panel Report, para. 7.163.
[183] Panel Report, para. 7.172.
[184] Panel Report, para. 7.167 (quoting NPC 2021 Standing Committee opinions (Panel Exhibit EU-57b), p. 4).

maintenance of judicial sovereignty over foreign-related intellectual property rights"[185]; the protection of legitimate rights and interests of Chinese and foreign property right owners on an equal footing[186]; extraterritorial application of Chinese laws to protect the security and legitimate rights and interests of Chinese citizens and enterprises in foreign countries[187]; and the strengthening of IP-related judicial cooperation with other countries.[188] The Panel found that the policy objectives "were to be implemented by Chinese courts at all levels".[189]

4.99. The European Union also alleges that the ASI policy is abusive because it is not used exceptionally to solve problems of parallel litigation but it is used to *prevent* parallel litigation[190] that may interfere with decisions to be taken by Chinese courts.[191] According to the European Union, the ASI policy is incompatible with the TRIPS Agreement because it is "broad" in the sense that the authority granted to courts is without limits[192] and ASIs are issued without an obstruction of the proceeding in China[193] or a determination that the foreign litigation is vexatious, oppressive, or otherwise abusive.[194] Relatedly, the European Union considers that the ASI policy "constitutes an abuse of anti-suit injunctions in the context of SEP litigation and disrupts the carefully balanced system of protection and enforcement of patents laid down in the TRIPS Agreement."[195]

4.100. We note that the objectives of the ASI policy identified by the Panel (and set out in para. 4.98 above) include considerations relating to parallel litigation and the protection of the legitimate rights and interests of Chinese and foreign property right owners. Further to the objectives of the Chinese authorities, the Panel identified at least five factors[196] that typically form the grounds on which ASIs are issued by Chinese courts. Absent from both the policy objectives and the courts' considerations in each case[197] is any assessment of the SEP holder's ability to exercise the exclusive rights conferred on it under Article 28.1 by another WTO Member that granted a patent, namely, to prevent third parties not having its consent from certain acts listed in that provision. Under Article 28.1, such an inquiry is key given the exclusive right of patent owners to prevent third parties from certain acts related to the subject matter of the patent without their consent, conferred on them by WTO Members under the TRIPS Agreement.[198]

4.101. The European Union argued that the ASI policy presents certain aspects which, in combination, are unique to that policy and constitute a severe restriction on the exercise by SEP holders of the exclusive rights conferred by Article 28.1.[199] First, the European Union argued that ASIs are issued by Chinese courts as requested by the implementers. Chinese courts have issued worldwide ASIs prohibiting SEP holders to commence, continue, or enforce the results of patent

[185] Panel Report, para. 7.168 (quoting SPC, Report on implementation (Panel Exhibit EU-96b), p. 10).
[186] Panel Report, para. 7.170 (quoting SPC, Notice on Issuing the Plan of the People's Courts on the Judicial Protection of IP Rights (2021-2025) (Panel Exhibit EU-85), Article XVI).
[187] Panel Report, para. 7.170 (quoting SPC, Notice on Issuing the Plan of the People's Courts on the Judicial Protection of IP Rights (2021-2025) (Panel Exhibit EU-85), Article XVI).
[188] Panel Report, para. 7.170 (quoting SPC, Notice on Issuing the Plan of the People's Courts on the Judicial Protection of IP Rights (2021-2025) (Panel Exhibit EU-85), Article XVI).
[189] Panel Report, para. 7.172.
[190] European Union's first written submission to the Panel, para. 326.
[191] European Union's response to Panel's question No. 11(a).
[192] European Union's response to Panel's question No. 12.
[193] European Union's response to Panel's question No. 17(c).
[194] European Union's response to Panel's question No. 17(c).
[195] European Union's first written submission to the Panel, para. 326.
[196] Panel Report, para. 7.98. These are: (i) "the impact on Chinese courts of the application for the enforcement of judgments of extraterritorial courts"; (ii) "the necessity of the ASI (i.e. the harm caused to the applicant if the ASI were not granted)"; (iii) "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)"; (iv) "the effect of granting the ASI on the public interest"; and (v) "the compatibility of the ASI with the principle of international comity or a similar consideration".
[197] While one factor assessed under the ASIs included whether the damage caused to the applicants by not taking act preservation measures exceeded that caused to the respondent by taking act preservation measures, the courts' analysis was not linked to SEP holder's exercise of its exclusive rights, considered in light of its FRAND commitment. (See e.g. Panel Report, para. 2.61).
[198] In response to our questioning at the hearing, the European Union notes that factors relevant to such an inquiry include whether the parties have acted in good faith in the context of FRAND negotiations, or whether the SEP holder's exercise of its rights may have been abusive or the parallel litigation vexatious or oppressive.
[199] European Union's first written submission to the Panel, para. 317.

enforcement proceedings before any jurisdiction other than China, whenever such injunctions have been requested by the implementers.[200]

4.102. In this regard, the Panel found, in the context of its analysis of Article 63.1, that "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."[201] We understand the Panel to have confirmed that ASIs have a broad scope which includes prohibiting the filing, continuation, and enforcement of infringement claims in WTO Members other than China and that they are therefore capable of affecting the patent owner's right to prevent third parties not having the patent owner's consent from making, using, offering for sale, selling, or importing the patented product.

4.103. Second, the European Union argued that compliance with the ASIs is ensured by the imposition of fines or penalties whose amount goes beyond what it is normal practice when other types of act preservation measures are adopted in IP disputes in China. The violation of ASIs is punished by high daily fines that can reach the maximum amount allowed under the Civil Procedure Law of the People's Republic of China (Civil Procedure Law): between RMB 600,000 and RMB 1,000,000 per day and the penalties accumulate on a daily basis.[202] In its findings, the Panel recognized that the legal framework was applied in "a novel and unprecedented manner" as no Chinese court had ever before applied cumulative daily fines in the event of a violation of a court order. In addition, the Panel observed that the imposing cumulative daily fines was intended to "secure compliance" and served to "enforce" the broad range of prohibitions under the ASIs.[203]

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

4.105. Turning to the effect of the application of the ASI policy, according to the European Union, this effect is to restrict, or seek to restrict, the exercise by SEP holders of their exclusive rights conferred by Article 28.1 of the TRIPS Agreement in the territories of other WTO Members by prohibiting SEP holders from commencing or pursuing proceedings before courts outside China. According to the European Union:

> Since the essence of the exclusive rights of a patent owner is the ability to prevent third parties not having the owner's consent from practicing the acts listed in Article 28.1, the exercise by SEP owners of their exclusive rights is intrinsically restricted if they are prohibited from enforcing those rights through the courts of the countries having granted the patents concerned.[204]

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

4.107. The Panel confirmed the European Union's argument that the ASI policy 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

[200] European Union's first written submission to the Panel, para. 318.
[201] Panel Report, fn 755.
[202] European Union's first written submission to the Panel, para. 319.
[203] See e.g. Panel Report, paras. 7.104, 7.151, and fn 755.
[204] European Union's first written submission to the Panel, para. 321.

a policy elaborated and promoted by the SPC and endorsed by the NPC Standing Committee.[205] As such, the ASI policy establishes a course of action that frustrates the exercise of the exclusive right of a patent owner to prevent the use of the subject of its patent without its consent, as conferred on it by another WTO Member under Article 28.1 of the TRIPS Agreement.

4.6.4 Conclusion

4.108. In light of the above, we reverse the Panel's findings in paragraphs 7.240 to 7.242 and 8.2.a of its Report.

4.109. In completing the legal analysis, we find that the European Union has demonstrated that the ASI policy is inconsistent with Article 28.1, read in conjunction with Article 1.1, first sentence, of the TRIPS Agreement.

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

4.7.1 Introduction

4.110. The European Union appeals "the Panel's conclusion and related findings that the European Union has failed to demonstrate that [the] ASI policy is inconsistent with Article 1.1, first sentence, in conjunction with Article 28.2 of the TRIPS Agreement".[206]

4.111. The European Union makes two claims on appeal regarding the Panel's interpretation. First, that "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."[207] Second, that the Panel made a "legal error in the interpretation of those provisions by finding that, because SEP owners have committed to license their patents on FRAND terms, provisional measures imposed by courts called upon to determine FRAND terms cannot negate the SEP owners right to license the patent."[208] The European Union requests the arbitrators to reverse the Panel's conclusion and findings in paragraphs 7.247, 7.248, 7.250 to 7.252 and 8.2.b. of the Panel Report.

4.112. On the European Union's first claim on appeal, China responds that "[i]n order to establish a violation of this provision, the complaining Member must demonstrate that, under the responding Member's domestic legal regime, the owner of a patent issued within the territory of that Member does not obtain the right" in question.[209] According to China, at the panel stage the "European Union did not allege that 'the right … to conclude licensing contracts' is not among the rights conferred by a patent under Chinese law."[210] With respect to the European Union's second point of appeal, China responds that FRAND negotiations "take place *after* the patentee has obtained a patent that includes the right to license that patent, which is all that Article 28.2 requires."[211] For China, a Member's compliance with Article 28.2 starts and ends with ensuring that there exists, within that Member's domestic law, a "right to conclude licensing contracts" for a given patent.[212]

4.113. The Panel, following its interpretation that Article 1.1, first sentence requires Members "to implement the provisions of the TRIPS Agreement within their own domestic legal systems", found that "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."[213]

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[205] Panel Report, para. 7.63 (referring *inter alia* to European Union's first written submission to the Panel, para. 108).
[206] European Union's written submission, para. 105 (referring to the Panel Report, paras. 7.247-7.248, 7.250-7.252, and 8.2.b).
[207] European Union's written submission, para. 125. (emphasis original)
[208] European Union's written submission, para. 126.
[209] China's rebuttal submission, para. 31.
[210] China's rebuttal submission, para. 36.
[211] China's rebuttal submission, para. 41. (emphasis original)
[212] China's response to Panel question No. 119, para. 131; response to questioning at the hearing.
[213] Panel Report, paras. 7.231 and 7.247. (emphasis original)

Consequently, regarding patents granted in other Members, the Panel indicated 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."[214] Thus, for the Panel, "what remains to be assessed with respect to the European Union's claim under Article 28.2 of the TRIPS Agreement is whether China ensures that patent owners have the right to conclude contracts licensing patents granted in China consistent with Article 28.2."[215]

4.114. In assessing whether the ASI policy infringed the rights of a patent owner for a patent registered in China, the Panel found that:

> 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.[216]

4.115. We begin in section 4.7.2 by evaluating the two claims on appeal raised by the European Union regarding the interpretation by the Panel of Article 28.2, read in conjunction with Article 1.1, first sentence.

4.116. In section 4.7.3, we then turn to consider the European Union's request that we complete the legal analysis with respect to its claim under Article 28.2, read in conjunction with Article 1.1, first sentence.

4.7.2 Whether the Panel erred in its interpretation of Article 28.2, read in conjunction with Article 1.1, of the TRIPS Agreement

4.117. Article 28.2 of the TRIPS Agreement provides:

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

4.118. In the following sections, we first evaluate the European Union's claim on appeal that the Panel erred under Article 28.2, read in conjunction with Article 1.1, first sentence, by deciding to focus exclusively on Chinese patents, before turning to the European Union's claim that the Panel erred in interpreting what the right to conclude licensing contracts entails under those provisions.

4.7.2.1 Whether the Panel erred in deciding to focus exclusively on Chinese patents

4.119. Concerning the European Union's first claim on appeal, we agree with the Panel that "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 conclude licensing contracts."[217] Article 28.2, read in conjunction with Article 1.1, first sentence, requires each Member to give effect to the obligation to confer on patent holders the "right to conclude licensing contracts" with respect to the patent granted in its territory.[218]

4.120. We disagree, however, that it necessarily follows that "[r]egarding patents granted in *other Members* … 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

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[214] Panel Report, para. 7.248 (referring to Panel Report, para. 7.231). (fn omitted)
[215] Panel Report, para. 7.248.
[216] Panel Report, para. 7.251.
[217] Panel Report, para. 7.247. (emphasis original)
[218] As mentioned above at fn 143, we agree with China that the private rights under the TRIPS Agreement are "territorially defined". (China's opening statement at the hearing, para. 23).

Members."[219] The Panel was correct to the extent that there are no "additional obligations relating to the object and purpose of the TRIPS Agreement" in Article 1.1, first sentence.[220] However the Panel's conclusion was otherwise based on an erroneous interpretation of Article 1.1, first sentence.

4.121. As we have explained above, the proper interpretation of the term "give effect" in Article 1.1, first sentence, requires WTO Members to make operative the provisions of the TRIPS Agreement in their own national systems and to do so without frustrating the functioning of the systems of IP rights protected pursuant to the implementation of the TRIPS Agreement by other WTO Members in their territories. This includes the exercise of the rights of patent owners bestowed upon them by virtue of the implementation of Article 28.2 by Members in their territories.

4.122. In the context of Article 28.2, this understanding would require an assessment of whether a Member's measure frustrates the conferral, by another Member, of the patent owner's "right … to conclude licensing contracts" with respect to a patent held in that other Member's territory. In that respect, we agree with the European Union's contention that the proper inquiry under Article 28.2, read in conjunction with Article 1.1, first sentence is whether the ASI policy "affect[s] not only the right of patent holders to conclude licensing contracts concerning patents granted in China, but also their right to conclude licensing contracts concerning patents granted by other countries within the same family or families of patents."[221]

4.123. We therefore disagree with the Panel's finding that the obligation in Article 28.2, read in conjunction with Article 1.1, first sentence, is limited to ensuring the patent owner's "right … to conclude licensing contracts" in each Member's domestic legal system and nothing more. Instead, we find that Article 28.2, read in conjunction with Article 1.1, first sentence, requires that Members not frustrate the patent owner's ability to exercise its "right … to conclude licensing contracts" as conferred in the territory of another WTO Member under that provision. Accordingly, the Panel erred by focusing exclusively on "whether China ensures that patent owners have the right to conclude contracts licensing patents granted in China consistent with Article 28.2"[222], and by failing to additionally inquire into whether the ASI policy frustrates SEP holders' exercise of their "right … to conclude licensing contracts" for patents in the territories of other Members.[223]

4.124. We therefore reverse this aspect of the Panel's interpretation of Article 28.2, read in conjunction with Article 1.1, first sentence, in paragraphs 7.247 and 7.248 of its Report as it was based on an erroneous understanding of Article 1.1, first sentence.

4.7.2.2 Whether the Panel erred in interpreting what the right to conclude licensing contracts entails

4.125. We now address the European Union's second claim on appeal that the Panel erred by finding that, because SEP holders have committed to license their patents on FRAND terms, provisional measures imposed by courts called upon to determine FRAND terms cannot negate their right to license the patent.

4.126. We observe that the Panel did not explicitly lay out an interpretation for Article 28.2 on this point. Its interpretation is nonetheless apparent from the way that it applied Article 28.2.[224] In particular, we understand that the Panel proceeded on the assumption that compliance with Article 28.2 *only* requires a Member to ensure that there exists a "right to conclude licensing

[219] Panel Report, para. 7.248. (emphasis added)
[220] Panel Report, para. 7.248.
[221] European Union's written submission, para. 114.
[222] Panel Report, para. 7.248.
[223] Having reached this conclusion, we do not consider it necessary to rule on the European Union's claim against the Panel's legal finding that Article 28.2 is "limited to licensing contracts regarding patents granted by one single Member". (European Union's written submission, para. 116). When Article 28.2 is read in conjunction with Article 1.1, first sentence, China is required to "give effect to" the "right to conclude licensing contracts", where the corollary of the obligation is to do so without frustrating the functioning of the systems of protection and enforcement of IP rights implemented pursuant to the provisions of the Agreement by other Members in their territories, including the "right to conclude licensing contracts" in other Members. This includes not frustrating patent owners' exercise of their right to conclude licensing contracts for patents held in the territories of other Members.
[224] See Panel Report, para. 7.251.

contracts" in its domestic law without referring to matters affecting the ability of a patent owner to meaningfully exercise that right.[225]

4.127. As explained in section 4.5, the first sentence of Article 1.1 requires Members to ensure that the provisions of the TRIPS Agreement are made operative on an ongoing basis. We therefore disagree with China's view that the fact that Chinese law enshrines a right to conclude licensing contracts discharges the European Union's claim.[226] The ordinary meaning of Article 28.2 requires that a patent owner be able to exercise its "right" to conclude a "licensing contract", i.e. that the rights bestowed on it can be exercised until it "concludes" a licence. The Panel seems to have found that the exercise of the rights under Article 28.2 is fulfilled once "the SEP owner has agreed to license its patent on [FRAND] terms."[227] This interpretation ignores the Panel's own factual finding that a SEP holder's agreement in this regard does *not* reflect the *conclusion* of a licencing contract.[228]

4.128. Furthermore, the Panel considered it significant that "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."[229] Nonetheless, the fact that a "licensing contract" has been "conclude[d]" does not in itself demonstrate that the patent owner was able to exercise its "right" to conclude licencing contracts under Article 28.2. If the terms of a concluded contract do not reflect the meaningful exercise of a patent owner's "right" due to the impact of a Member's measure, then it cannot be said that the patent owner's "right" under Article 28.2 was fulfilled. It would be artificial to distinguish between a contract on the one hand, and the terms of a contract on the other hand, when speaking of an obligation that aims to protect a patent owner's "*right* … to *conclude* licensing contracts".[230]

4.129. We therefore reverse this aspect of the Panel's interpretation of Article 28.2, read in conjunction with Article 1.1, first sentence, contained in paragraphs 7.250-7.252 as the Panel's interpretation was based on an erroneous understanding of what the "right to conclude licensing contracts" entails.

4.7.3 Completion of the analysis

4.7.3.1 Introduction

4.130. Having reversed two aspects of the Panel's interpretation of Article 28.2 read in conjunction with Article 1.1, first sentence, we turn now to examine the European Union's request that we complete the legal analysis concerning its claim that the ASI policy is "as such" inconsistent with Article 28.2.[231] We recall from section 4.2 that the Panel found the ASI policy to comprise a measure of general and prospective application that empowers Chinese courts to impose a range of possible prohibitions at the request of SEP implementers in the context of SEP litigation, which can be enforced through the imposition of cumulative daily fines, and which has been elaborated and promoted by the SPC and endorsed by the NPC Standing Committee.[232] The Panel understood that the range of possible prohibitions in this regard could include preventing the owner of a patent registered in another Member from commencing, continuing or enforcing the results of any proceedings before a non-Chinese court, such as proceedings concerning patent infringement or the terms on which a patent would be licensed.

4.131. The European Union's case under Article 28.2, read in conjunction with Article 1.1, first sentence, before the Panel was that the ASI Policy "constitutes a restriction on the rights of patent

[225] Panel Report, paras. 7.249-7.251. According to both parties, the Panel proceeded on this assumption. See China's rebuttal submission, paras. 37 and 41; European Union's written submission, paras. 110, 119-122, and 126.

[226] China's response to Panel question No. 119, para. 131; response to questioning at the hearing.

[227] Panel Report, para. 7.251.

[228] Panel Report, paras. 2.8-2.9.

[229] Panel Report, para. 7.251.

[230] Emphasis added. We thus disagree with China that "[n]egotiations or, as the case may be, litigation over the terms and conditions of this license are not subjects addressed by Article 28.2." (China's rebuttal submission, para. 38).

[231] European Union's written submission, paras. 108-110. We recall (see fn 223 above) that we found it unnecessary to rule on the claim against the Panel's legal finding that Article 28.2 is "limited to licensing contracts regarding patents granted by one single Member". (European Union's written submission, para. 116).

[232] Panel Report, para. 7.204.

owners to conclude licensing contracts" because it "prohibits patent owners from resorting to courts outwith China for the purpose of enforcing their exclusive rights in those jurisdictions", thereby "leverage[ing] the position of implementers in the negotiation of licensing contracts and forcing SEP owners to reach a settlement, even when it conflicts with the normal exploitation of the patents".[233] In this arbitration proceeding, the European Union claims that the ASI policy "affect[s] not only the right of patent holders to conclude licensing contracts concerning patents granted in China, but also their right to conclude licensing contracts concerning patents granted by other countries within the same family or families of patents."[234]

4.132. Before we turn to assess whether the ASI policy frustrates the rights of patent owners conferred by China and WTO Members other than China pursuant to Article 28.2, we note that our evaluation can proceed only if there are factual findings made by the Panel and uncontested record evidence that are sufficient to address the claim in light of the arguments by the parties.

4.133. Before the Panel, the European Union argued that the obligation to "give effect" to Article 28.2 prohibits Members from adopting measures that restrict patent owners from exercising the right to conclude licence contracts.[235] According to the European Union, the ASI policy is inconsistent with that legal standard because it prohibits patent owners from resorting to courts outside China for the purpose of enforcing their rights in those jurisdictions, thereby decisively leveraging the position of implementers in the negotiation of licencing contracts and forcing SEP holders to reach a settlement even when it conflicts with the normal exploitation of the patent.[236] According to the European Union, "the right of patent owners 'to conclude licensing contracts' also includes the right to negotiate the terms of SEP licensing contracts free from the pressure to reach a settlement below FRAND terms which results from broad ASIs issued by Chinese courts at the request of implementers."[237]

4.134. China argues that, even if the ASI policy were somehow covered by Article 28.2, there would be no basis to find a violation. First, for China, the arbitrators have been presented with no "means of distinguishing between the types of ASIs that are impermissibly 'broad' … as compared to the types of ASIs that do not have these supposedly impermissible effects".[238] Second, China "observes that the European Union's suggestion that the ASIs in question 'force[d] SEP owners to reach a settlement' on terms that prevented them 'from extracting the economic value that could be expected from the patents' finds no basis in the factual record."[239]

4.135. We begin in section 4.7.3.2 with the question of whether there is a sufficient evidentiary basis in the Panel's factual findings and uncontested evidence on the record to complete the legal analysis. We then turn in section 4.7.3.3 to the question of whether the European Union has demonstrated that the ASI policy is inconsistent with Article 28.2, read in conjunction with Article 1.1, first sentence, based on our interpretation of those provisions set out above.[240]

4.7.3.2 Is there a sufficient evidentiary basis to complete the analysis?

4.136. In light of the European Union's claim against the ASI policy under Article 28.2 of the TRIPS Agreement, read in conjunction with Article 1.1, first sentence, our task is to determine whether the ASI policy frustrates SEP holders' exercise of their "right … to conclude licensing contracts" in China and other Members where the patent is registered.[241] We note, in this regard, that the European Union's claim under Article 28.2 encompassed patents registered in both China

[233] European Union's first written submission to the Panel, paras. 376-377.
[234] European Union's response to Panel question No. 121, paras. 138-140 (referred to in its written submission, para. 114)
[235] European Union's first written submission to the Panel, para. 377.
[236] European Union's first written submission to the Panel, para. 377.
[237] European Union's written submission, para. 122.
[238] China's rebuttal submission, para. 42.
[239] China's rebuttal submission, para. 43.
[240] See above section 4.7.2.
[241] European Union's written submission, para. 114.

and other WTO Members to the extent that they form part of a family of SEPs in a global licensing agreement.[242]

4.137. We recall the Panel's factual findings regarding SEPs. As we recounted above, in the context of SEP litigation, the Panel observed that, while claims concerning the infringement of the subject matter of a patent must be brought before the national courts of the territory that has granted the patent right, the same is not true for contractual claims relating to licence fees and that courts in some jurisdictions will consider contractual claims concerning worldwide licences.[243] Pursuant to conditions set out by the SSO, the SEP holder commits to provide an irrevocable undertaking or a licensing declaration to the relevant SSO that it will license or allow access to the subject matter of the patent-protected product or process to implementers of the standard on FRAND terms, which is, as we have explained, known as a "FRAND undertaking".[244] Implementers may raise the failure to comply with FRAND terms as a defence to proceedings brought by a SEP holder or might sue the SEP holder in another jurisdiction for abuse of dominant position or breach of its obligation to license its SEP on FRAND terms.[245] Finally, the Panel observed that ASIs pursuant to the ASI policy are issued in the context of SEP litigation at the request of SEP implementers, as *in personam* court orders whereby a SEP holder (as defendant) is ordered to refrain from certain actions with respect to litigation in other jurisdictions, and that the SEP litigation in China relates to contractual claims over licence fees.[246] Consequently, the exercise of the "right … to conclude licensing contracts" occurs in a situation where the right owner, i.e. the SEP holder, has made an irrevocable "FRAND undertaking" in which they agree to licence their SEPs to any user on FRAND terms. In effect, the SEP holders have waived their right *not* to conclude licensing contracts, but that waiver is conditional on the SEP implementer paying royalties on FRAND terms.

4.138. Against this background, the legal standard to address whether the ASI policy is capable of "negating"[247] SEP holders' "right … to conclude licensing contracts" under Article 28.2 requires an assessment as to whether the ASI policy frustrates the fulfilment of the condition on which SEP holders waive that right, namely the possibility to negotiate FRAND terms for a licence contract. We recall, in that regard, that the obligation under Article 28.2, read in conjunction with Article 1.1, first sentence, involves a Member observing the "right to protect licensing contracts" in its own territory and doing so without frustrating the implementation of the "right to conclude licensing contracts" in the territories of other Members, such as by adopting measures that effectively "negate"[248] a patent owner's exercise of its "right" in those other territories.

4.139. We turn now to the parties' arguments to establish whether there is a sufficient evidentiary basis to complete the analysis. The European Union argues that the ASI policy leverages the position of the implementer and forces SEP owners to settle under pressure even if it conflicts with a normal exploitation of the patents.[249] For the European Union, SEP holders must have the right to negotiate the FRAND terms of the licencing contract free from coercion.[250] The European Union also argues that SEP holders have "committed to offer a licence to all implementers on FRAND terms" and that FRAND terms are to be established through negotiation.[251] China responds that there is no factual basis for the proposition that SEP holders are coerced into below-FRAND outcomes, and that there is no basis for distinguishing between permissible and impermissible ASIs under Article 28.2.[252]

4.140. In light of the parties' arguments, we consider that we would be able to complete the analysis and ascertain the consistency of the ASI policy with Article 28.2 only if the following three matters can be substantiated based on the Panel's factual findings and uncontested evidence on the record:

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[242] European Union's written submission, paras. 113 and 116; response to Panel question No. 121, paras. 138-140; response to questioning at the hearing. As explained earlier (see fn 223 above), we consider it unnecessary for the resolution of the present dispute to resolve the territorial scope of the "licensing contracts" covered under Article 28.2.

[243] Panel Report, para. 2.10 (referring to European Union's first written submission to the Panel, para. 175 and fn 151).

[244] Panel Report, para. 2.8.

[245] Panel Report, para. 2.10.

[246] Panel Report, paras. 2.11 and 7.250-7.251.

[247] European Union's written submission, paras. 119-120.

[248] European Union's written submission, paras. 119-120.

[249] European Union's written submission, paras. 120-126.

[250] European Union's written submission, para. 122.

[251] European Union's written submission, para. 121.

[252] China's rebuttal submission, paras. 42-43.

(a) whether the ASI policy hinders the negotiating position of SEP holders; (b) whether any such hinderance frustrates SEP holders' "right … to conclude licensing contracts" on the terms that they had agreed; and (c) relevant evidence on the operation of the ASI policy. We will consider whether there are sufficient factual findings by the Panel and uncontested evidence on the record addressing those matters. If so, we will proceed to evaluate whether the ASI policy is inconsistent with Article 28.2 (see section 4.7.3.3 below).

4.141. Beginning with whether the ASI policy impacts the negotiating position of SEP holders, we note that the Panel found that a producer implementing a given technical standard that uses a SEP needs to obtain a licence to use the patent-protected technology or risk infringing upon patent owners' rights and the attendant legal consequences of doing so.[253] Accordingly, for the Panel, there is a "risk" that SEP implementers will face patent infringement proceedings (e.g. injunctive relief and/or damages) if they do not obtain a licence from the patent owner. Effectively, the availability of legal remedies for patent infringement is the mechanism through which SEP holders protect their rights and disincentivise infringement, due to the aforementioned "risk" to SEP implementers. The Panel found that the function of ASIs issued by Chinese courts is to remove that risk to SEP implementers in the particular context of litigation over licensing terms in China by prohibiting SEP holders from (*inter alia*) enforcing, continuing, or initiating patent infringement or any other legal proceedings in the territory where the patent is registered.[254] It is apparent from the Panel's overview that Chinese courts themselves recognized that the issuance of ASI's would have such an effect.[255]

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

4.143. Second, we turn to evaluate whether such impact frustrates a SEP holder's exercise of its "right … to conclude licensing contracts" on the terms that it had agreed. Central to this question is the role played by the irrevocable "FRAND undertaking" which conditions the exercise of that right, and about which the Panel reached the following findings:

> 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. 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".
>
> 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. 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. 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

[253] Panel Report, para. 2.7.

[254] Panel Report, paras. 2.10-2.11, 2.51-2.52 (referring to SPC, Huawei v. Conversant (Panel Exhibit EU-1b), pp. 8-9), 2.61 (referring to SPC, Huawei v. Conversant, reconsideration decision (Panel Exhibit EU-6b), p. 11), 2.74 (referring to Wuhan Intermediate People's Court, Xiaomi v. InterDigital (Panel Exhibit EU-2b), p. 8), 2.105 (referring to Shenzhen Intermediate People's Court, OPPO v. Sharp (Panel Exhibit EU-4b), pp. 7-8), 2.122 (referring to Wuhan Intermediate People's Court, Samsung v. Ericsson (Panel Exhibit EU-5b), p. 6), and 2.126 (referring to Wuhan Intermediate People's Court, Samsung v. Ericsson (Exhibit EU-5b), p. 8).

[255] Panel Report, paras. 2.51-2.52, 2.60, 2.61, 2.64, 2.73, 2.88, and 2.105. See also European Union's written submission, para. 124.

> 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. 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. 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.[256]

4.144. Based on the foregoing factual findings of the Panel, it is clear to us that a SEP holder qualifies its "right … to conclude licensing contracts" in two important ways. First, the SEP holder makes an irrevocable commitment to enter into such contracts with any entity that wishes to use its SEP. Second, the SEP holder's irrevocable commitment in this regard applies only with respect to SEP implementers that agree to pay FRAND terms, which are not pre-determined but are envisaged as being the outcome of a process of good faith negotiations between the SEP holder and SEP implementer. This is clear from the Panel's factual finding that "[w]hat terms qualify as FRAND can be different for each patent and market" and "there is no supranational or international body empowered to determine what is FRAND", which means that "[i]t is therefore for the parties to agree terms that they consider fair and reasonable, including the licence fees or royalty rates".[257]

4.145. Accordingly, in the particular context of SEPs, a SEP holder's "right … to conclude licensing contracts" is conditional. The SEP holder has effectively waived its right *not* to conclude licensing contracts, *conditioned* on obtaining FRAND rates for such contracts. This necessarily requires users to enter into good faith negotiations as to what those FRAND rates will be. As the Panel found, it is possible that those good faith negotiations between SEP holders and SEP implementers may not yield an outcome, in which case a court may be called upon to intervene.[258] However, the Panel found that this occurs only in instances where "parties do not reach an agreement".[259] Hence, an opportunity for good faith negotiations on FRAND terms is necessary before any such court intervention can be warranted.

4.146. It follows from the Panel's factual findings that the engagement by SEP implementers in good faith negotiations over FRAND terms is the central condition under which a SEP holder exercises its "right … to conclude licensing contracts" under Article 28.2. Given that the Panel considered that the ASI policy impacts the negotiating position of SEP holders, the question as to whether an ASI issued under that policy could frustrate a SEP holder's "right … to conclude licensing contracts" is essentially a contingent one. In particular, it is contingent on whether the ASI policy frustrates that central condition on which the SEP holder has pre-committed to enter into licencing contracts. It follows that, in the particular context of SEPs, the underlying reason for which an ASI is issued under the ASI policy is key to whether it frustrates the patent owner's "right … to conclude licensing contracts."

4.147. Third, as regards the relevant evidence on the operation of the ASI policy, the Panel identified the five factors[260] that typically form the grounds on which ASIs are issued by Chinese courts. The Panel's identification of these factors reveals that the courts' consideration do not include any inquiry concerning the exercise of the SEP holder's right to conclude a licensing contract under Article 28.2, in light of the SEP holder's commitment to license the SEP on FRAND terms and thereby to negotiate those terms with implementers.[261]

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[256] Panel Report, paras. 2.8-2.9 (referring to China's first written submission to the Panel, paras. 21-23; European Union's first written submission to the Panel, paras. 154-155 and 162; United Kingdom's third-party submission to the Panel, paras. 5-6 and 10; and UK Supreme Court, Unwired Planet v. Huawei (Panel Exhibit EU-71), para. 2). (fns omitted)

[257] Panel Report, paras. 2.8-2.9.

[258] Panel Report, paras. 2.9.

[259] See para. 4.143 above.

[260] Panel Report, para. 7.98. See fn 196 above.

[261] Panel Report, paras. 7.97-7.98 and 7.105-7.106. According to the Panel's overview (see e.g. Panel Report, paras. 2.43-2.47, 2.60, 2.71-2.72, and 2.97), some of the individual ASI decisions indicate that, when raised by a litigant, the conduct of the negotiations and the motivations of a SEP holder in instigating parallel litigation elsewhere were taken into account by the court adjudicating the request for an ASI (see e.g. SPC,

4.148. We also recall that, as part of the appraisal of the precise content, the Panel assessed the policy objectives of the Chinese Government and found that the judicial decisions where ASIs had been issued were in furtherance of policy objectives that refer: to strengthening the protection of independent IP rights[262]; the national innovation-driven development strategy and intellectual property strategy which included "the construction of an 'anti-suit injunction' system with Chinese characteristics, and the maintenance of judicial sovereignty over foreign-related intellectual property rights"[263]; the protection of legitimate rights and interests of Chinese and foreign property right owners on an equal footing[264]; the "[e]xtraterritorial application of Chinese laws… to protect the security and legitimate rights and interests of Chinese citizens and enterprises in foreign countries"[265]; and the strengthening of IP-related judicial cooperation with other countries.[266] The Panel found that the policy objectives "were to be implemented by Chinese courts at all levels."[267] Notably absent from these objectives is any consideration of the SEP holder's ability to exercise the "right … to conclude licensing contracts" in light of the FRAND undertaking made in respect of that "right".

4.149. Based on the foregoing, we consider that there are sufficient factual findings by the Panel and uncontested record evidence to proceed to evaluate whether the ASI policy is inconsistent with the legal interpretation of Article 28.2, read in conjunction with Article 1.1, first sentence, set out above (see section 4.7.2).

4.7.3.3 Has the European Union demonstrated that the ASI policy is inconsistent with Article 28.2, read in conjunction with Article 1.1, first sentence?

4.150. We begin by briefly recalling the parties' arguments on whether the ASI policy is inconsistent with Article 28.2, read in conjunction with Article 1.1, first sentence.

4.151. The European Union claims that the ASI policy "leads SEP owners to settle for below FRAND royalties and thus prevents them from extracting the economic value that could be expected from the patents."[268] Before the Panel, the European Union elaborated that "if SEP owners are prohibited from requesting injunctions against infringers of their patents, prospective licensees are put in a position of strength in licensing negotiations", which in turn means that "[t]he licensing terms ultimately agreed by the parties necessarily reflect that imbalance in bargaining power, thus leading SEP owners to settle for below FRAND royalties."[269]

4.152. According to the European Union "[t]he conclusion of global SEP licensing agreements ideally takes place after good faith negotiations between patent owners and implementers of the standardised technology during which the negotiators agree on FRAND terms", but "[i]f negotiations break down, both SEP holders and implementers may resort to legal action and have at their disposal several courts in different countries that may accept jurisdiction over such disputes".[270] In such circumstances, the European Union explained that "SEP owners may introduce several types of actions before the courts: a) bring an action for infringement of SEPs by implementers; b) request a declaratory judgment that it offered FRAND terms to implementers; and/or c) request to determine

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Huawei v. Conversant (Panel Exhibit EU-1b), pp. 7-8; Wuhan Intermediate People's Court, Xiaomi v. InterDigital (Panel Exhibit EU-2b), pp. 5 and 7-8; and Shenzhen Intermediate People's Court, OPPO v. Sharp (Panel Exhibit EU-4b), pp. 3-4 and 7-9). However, the Panel's factual findings on the grounds on which ASIs are issued suggest that such inquiries are not a pre-requisite to the issuance of ASIs under the ASI policy.

[262] Panel Report, para. 7.167 (quoting NPC 2021 Standing Committee opinions (Panel Exhibit EU-57b), p. 4).

[263] Panel Report, para. 7.168 (quoting SPC, Report on implementation (Panel Exhibit EU-96b), p. 10).

[264] Panel Report, para. 7.170 (quoting SPC, Notice on Issuing the Plan of the People's Courts on the Judicial Protection of IP Rights (2021-2025) (Panel Exhibit EU-85), Article XVI).

[265] Panel Report, para. 7.170 (quoting SPC, Notice on Issuing the Plan of the People's Courts on the Judicial Protection of IP Rights (2021-2025) (Panel Exhibit EU-85), Article XVI).

[266] Panel Report, para. 7.170 (quoting SPC, Notice on Issuing the Plan of the People's Courts on the Judicial Protection of IP Rights (2021-2025) (Panel Exhibit EU-85), Article XVI).

[267] Panel Report, para. 7.172.

[268] European Union's written submission, para. 123.

[269] European Union's response to Panel question No. 9, para. 46 (referred to in European Union's written submission, fn 116).

[270] European Union's response to Panel question No. 9, para. 43 (referred to in European Union's written submission, fn 116); first written submission to the Panel, para. 173.

the terms of a FRAND license in those jurisdictions that allow such claims".[271] For the European Union, "[g]iven its wide scope and deliberate coercive effect, China's anti-suit policy in SEP litigation, restricts, or seeks to restrict, the exercise by SEP owners of their right to conclude licensing contracts in accordance with a normal exploitation of their patents".[272] The European Union thus contended before the Panel that the availability of broad ASIs at the request of SEP implementers under the ASI policy had a "chilling effect"[273] or a "coercion" effect.[274]

4.153. China responds that "the European Union's suggestion that the ASIs in question 'force[d] SEP owners to reach a settlement' on terms that prevented them 'from extracting the economic value that could be expected from the patents' finds no basis in the factual record".[275] Before the Panel, China elaborated that "the European Union would have to do more than surmise that the issuance of an ASI 'forced' or 'coerced' a SEP owner into reaching a licensing agreement", particularly since "an array of factors" would influence the terms of such agreements.[276] China also points out that "the European Union's position is not that all ASIs are necessarily inconsistent with the provisions of the TRIPS Agreement", but rather, "it is only 'broad' ASIs that are inconsistent".[277] China contends that the European Union has never explained what it means by "broad" ASIs, and in any case, there is no basis in Article 28.2 for "distinguishing between the types of ASIs that are impermissibly 'broad' and therefore interfere with the 'normal exploitation of the patent', as the European Union puts it, as compared to the types of ASIs that do not have these supposedly impermissible effects" since "this is not a topic that Article 28.2 addresses".[278]

4.154. The main question for us to resolve is whether the ASI policy "as such"[279] frustrates the SEP holders exercise of their "right … to conclude licensing contracts" under Article 28.2, read in conjunction with Article 1.1, first sentence.[280] In our view, the Panel's factual findings described above show clearly that an ASI issued under the ASI policy impacts the negotiating position of SEP holders. Moreover, the Panel found that the *availability* of legal remedies for SEP holders is the main incentive for SEP implementers to seek out a licence, since SEP implementers otherwise "risk infringing upon patent owners' rights and the attendant legal consequences of doing so".[281] This is significant because, through their FRAND undertaking, SEP holders conditionally waive their right under Article 28.2 to not conclude a licensing agreement, so long as SEP implementers engage in good faith negotiations over FRAND terms.

4.155. It is clear, therefore, that the question of whether the ASI policy is inconsistent with SEP holders' "right … to conclude licensing contracts" turns on whether the policy disrupts the negotiating process between SEP holders and SEP implementers. In that regard, we recall the Panel's findings of the existence of the ASI policy as an unwritten measure that empowers Chinese courts to grant ASIs with a range of potential prohibitions when requested by an implementer and that the measure is of general and prospective application available in SEP litigation proceedings.[282]

4.156. The option created by the ASI policy for SEP implementers to obtain ASIs alters the process of negotiation in a fundamental way. As described in section 4.6, an ASI prohibits SEP holders from pursuing or enforcing the legal proceedings outside China that are specified in the given ASI,

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[271] European Union's first written submission to the Panel, para. 174. See also European Union's response to Panel question No. 29, para. 114 (referred to in European Union's written submission, fn 116).

[272] European Union's first written submission to the Panel, para. 378.

[273] Panel Report, para. 7.336; European Union's opening statement at the first meeting of the Panel, para. 60; and first written submission to the Panel, para. 168.

[274] European Union's written submission, para. 118.

[275] China's rebuttal submission, para. 43.

[276] China's first written submission to the Panel, para. 244; second written submission to the Panel, paras. 92-93 (referred to in China's rebuttal submission, fn 41).

[277] China's rebuttal submission, para. 34.

[278] China's rebuttal submission, para. 42.

[279] European Union's written submission, para. 104.

[280] As we have found above (see para. 4.138 above), for the purposes of the present proceedings, the obligation under Article 28.2 read in conjunction with Article 1.1 involves a Member observing the "right to protect licensing contracts" in its own territory and doing so without frustrating the implementation of the "right … to conclude licensing contracts" in the territories of other Member, such as by adopting measures that effectively "negate" a patent owner's exercise of its "right" in this regard.

[281] Panel Report, para. 2.7 (referring to European Union's first written submission to the Panel, section 4.1.1).

[282] Panel Report, paras. 7.63 and 7.204-7.206.

particularly injunctive relief for infringement by SEP implementers.[283] It therefore abates the very "risk" that the Panel identified as the main incentive for SEP implementers to seek to obtain a licence and start paying royalties for use of a SEP.[284] Meanwhile, SEP holders have made an irrevocable commitment to provide licences on FRAND terms or risk facing litigation for breach of contract or other relief.[285] Their ability to withdraw from negotiations is accordingly constrained. In our view, therefore, the grounds on which an ASI can be obtained by a SEP implementer are pivotal to understanding whether the ASI policy frustrates SEP holders' "right … to conclude licensing contracts" which they have, in effect, conditionally waived through the irrevocable FRAND undertaking. If the ASI policy undermines the process of negotiations to arrive at FRAND terms, this would mean that SEP holders would be entering into licensing contracts without fulfilment of the central condition on which their exercise of that right was premised.

4.157. Turning to the grounds on which ASIs are granted under the ASI policy, we recall the Panel's factual findings described above.[286] In particular, ASIs can be issued under the ASI policy without any inquiry into the SEP holder's ability to exercise the "right … to conclude licensing contracts" in light of the FRAND undertaking made in respect of that "right". The fact that some ASI decisions may reflect considerations on the negotiating process when raised by the SEP implementer does not detract from the ability for ASIs to be issued under the ASI policy without necessarily engaging in an inquiry into the SEP holder's ability to exercise its right under Article 28.2.[287]

4.158. Accordingly, we consider that the availability of ASIs to SEP implementers under the ASI policy alters the negotiating position of SEP holders in a fundamental way. It removes the main incentive for SEP implementers to negotiate with a SEP holder a licensing contract on FRAND terms. This is confirmed by the Panel's factual finding that SEP implementers are incentivised to enter into licensing contracts to avoid the "risk [of] infringing upon patent owners' rights and the attendant legal consequences of doing so".[288]

4.159. China contends that an "array of factors" can affect commercial negotiations for licensing terms. We agree. However, if such factors comprise a measure attributable to a Member and contribute to the non-fulfilment of the central condition on which a SEP holder has predicated the exercise of its "right … to conclude licensing contracts", then Article 28.2 is potentially contravened.

4.160. We note that China also argues that "the European Union is simply assuming, without any evidence, that implementers were necessarily seeking to pay *un*reasonable royalty rates", whereas "[i]t is equally likely that the SEP owners were the ones acting unreasonably in terms of the rates they were seeking to extract in the first place".[289] What China is describing, however, is a circumstance in which the issuance of an ASI would *not* necessarily infringe the SEP holder's "right … to conclude licensing contracts" for the very reason that the SEP holder has conditioned the exercise of its right on engaging in good faith negotiations but – per China's scenario – has itself failed to fulfil that condition. We thus disagree with China that there is an inherent indeterminacy in respect of *which* ASIs may violate with Article 28.2, and which may not.[290]

4.161. In our view, the availability of ASIs to SEP implementers in China on the grounds described in section 4.7.3.2 removes a key incentive for negotiating licences, which in turn leaves a SEP holder potentially facing litigation in China and an inability to enforce its SEP rights outside China wherever its SEP is patented at risk of cumulative daily fines. It is important to recall, in this regard, that SEPs emerge as part of the process of development of a technical standard by an SSO for which the SEP holder has decided to invest in creating a patentable invention.[291] In creating that invention, the patent owner expects that, in agreeing to an irrevocable commitment to licence to all users on FRAND terms, it will be able to negotiate the FRAND terms with SEP implementers, and will be able

[283] Panel Report, para. 7.250 and fn 682.
[284] Panel Report, para. 2.7 (referring to European Union's first written submission, section 4.1.1).
[285] Panel Report, paras. 2.8-2.10 (referring to China's first written submission to the Panel, paras. 23-24; European Union's first written submission to the Panel, paras. 174-176).
[286] See section 4.7.3.2 above.
[287] See fn 261 above.
[288] Panel Report, para. 2.7 (referring to European Union's first written submission to the Panel, section 4.1.1). (fn omitted)
[289] China's second written submission to the Panel, para. 93. (emphasis original)
[290] China's rebuttal submission, paras. 19, 34-35, and 42.
[291] Panel Report, paras. 2.6-2.7.

to prevent third parties from using its patented invention without payment of royalties by seeking injunctive relief, court-determined FRAND terms, or other legal remedies.[292]

4.162. China, by contrast, makes the point that, by committing to provide a license on FRAND terms, a SEP holder has opened itself to the possibility that a court somewhere may be called upon to determine the FRAND terms.[293] For China, therefore, the possibility that there will be litigation over FRAND terms as part of good faith negotiations over the conclusion of a licensing contract is within the scope of the SEP holder's meaningful exercise of its right under Article 28.2.[294] We do not disagree. Indeed, we observe that the Panel found, as a factual matter, that "[i]t is not uncommon… that parties do not reach an agreement" and "[i]n some jurisdictions parties may… be able to bring litigation to determine the terms of the licence."[295] There is nothing inherently or necessarily incompatible between the intervention by a court to settle a dispute over FRAND terms and the obligation under Article 28.2 of the TRIPS Agreement, which protects a SEP holder's "right … to conclude licensing contracts" for a SEP held in the territory of a given Member. In the present case, however, the key point is that such intervention should not frustrate the central condition on which the SEP holder waived its right not to offer a licence through its irrevocable FRAND undertaking, namely that SEP implementers and SEP holders engage in good faith negotiations over FRAND terms. By contrast, under the ASI policy, an ASI can be obtained at the request of a SEP implementer without any inquiry into the SEP holder's ability to exercise the "right … to conclude licensing contracts" in light of the FRAND undertaking made in respect of that "right".[296]

4.163. Additionally, we note that China contends that there is no legal standard in the TRIPS Agreement by which to adjudicate what does or does not constitute FRAND terms.[297] We agree with China on that point because, as the Panel found, FRAND terms are not pre-determined but are rather the outcome of a *process of good faith negotiations* between the SEP holder and SEP implementer.[298] In our view, however, China's contention in this regard is misplaced given that the issue with respect to a Member's obligation under Article 28.2 is whether a measure attributable to that Member frustrates a patent owner's "right … to conclude licensing contracts" for a patent held in the territory of that Member or the right of patent owners bestowed by another Member concerning a patent registered in that other Member.[299] For the reasons described in this section, we consider that the ASI policy does indeed contribute to the non-fulfilment of the central condition on which a SEP holder has predicated the exercise of its "right … to conclude licensing contracts", namely on the engagement of SEP implementers in good faith negotiations to arrive at mutually-agreeable FRAND terms.

4.164. In summary, for the reasons outlined in this section, we find that the European Union has demonstrated that the ASI policy is inconsistent with Article 28.2, read in conjunction with Article 1.1, first sentence, of the TRIPS Agreement concerning patents in China and outside of China.

4.7.4 Conclusion

4.165. In light of the above, we reverse the Panel's findings in paragraphs 7.247, 7.248, 7.250-7.252 and 8.2.b of its Report.

4.166. In completing the legal analysis, we find that the European Union has demonstrated that the ASI policy is inconsistent with Article 28.2, read in conjunction with Article 1.1, first sentence, of the TRIPS Agreement.

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[292] Panel Report, paras. 2.9-2.18.
[293] China's response to questioning at the hearing.
[294] China's response to questioning at the hearing.
[295] Panel Report, para. 2.9 (referring to European Union's first written submission to the Panel, paras. 155 and 162; China's first written submission to the Panel, paras. 21-23). (fn omitted)
[296] As noted earlier, some ASI decisions may reflect considerations on the negotiating process when raised by the SEP implementer, but this does not detract from the ability for ASIs to be issued under the ASI policy without necessarily engaging in an inquiry the SEP holder's right under Article 28.2 (see fn 261 above).
[297] China's response to questioning at the hearing.
[298] Panel Report, paras. 2.8-2.9.
[299] As explained earlier, we do not consider it necessary to rule on the Panel's interpretation that global licensing contracts covering a family of SEPs are outside the scope of Article 28.2 (see fn 223 above).

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

4.8.1 Introduction

4.167. The European Union claims that the Panel erred in its interpretation of Article 44.1, read in conjunction with Article 1.1, first sentence, of the TRIPS Agreement.

4.168. The text of Article 1.1 is set out above (paragraph 4.43). Paragraph 1 of Article 44, entitled "[i]njunctions", provides:

> 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 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.

4.169. In reaching the finding that the European Union now challenges, the Panel reasoned that:

> 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.
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> In light of the Panel's interpretation of Article 1.1 in [section 7.3.1 of the Panel Report], 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.[300]

4.170. The European Union alleges that "[t]he Panel erred in the interpretation of Article 1.1, first sentence, in conjunction with Article 44.1 of the TRIPS Agreement, by stating that it sees no basis to conclude that these provisions 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".[301] The European Union clarified, in response to a question at the hearing, that its claim under Article 44.1 could stand independently of Article 1.1, first sentence, insofar as its preferred approach to Article 1.1, first sentence, could be implicitly read into Article 44.1.[302] For the European Union, the effect of the ASI policy "is that SEP owners are prohibited from availing themselves of the enforcement procedures that should be available to them in the territory of the Member which has granted them a patent".[303]

4.171. China responds that, since "the European Union's claim of error rests on [a] mistaken understanding of Article 1.1, …, the Arbitrators should reject the European Union's claim" under Article 44.1.[304] China additionally contends that "an *in personam* order directed to a private party to litigation in Country A does not affect the ability of Country B to ensure that its judicial authorities have the power to 'order a party to desist from an infringement' as required by Article 44.1".[305] For China, "[w]hile such an order may affect, if temporarily, the incentives of that private party to avail itself of judicial procedures available in another country or countries, that is a question of private

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[300] Panel Report, para. 7.260-7.261 (referring *inter alia* to European Union's second written submission to the Panel, para. 112). (fns omitted)
[301] European Union's written submission, para. 142.
[302] European Union's response to questioning at the hearing.
[303] European Union's written submission, para. 136.
[304] China's rebuttal submission, para. 45.
[305] China's rebuttal submission, para. 47.

international law and has no bearing upon the ability of other Members, including their judicial authorities, to implement their obligations under the TRIPS Agreement".[306]

4.8.2 Whether the Panel erred in its interpretation of Article 44.1, read in conjunction with Article 1.1, of the TRIPS Agreement

4.172. We have addressed above the European Union's claim on appeal with respect to the Panel's interpretation of Article 1.1, first sentence (see section 4.5.2). As explained therein, the proper interpretation of the term to "give effect" in Article 1.1, first sentence, requires WTO Members to make operative the provisions of the TRIPS Agreement in their territory, where the corollary of that obligation is to do so without frustrating the functioning of the systems of IP rights protected pursuant to the implementation of the TRIPS Agreement by other WTO Members in their territories.

4.173. In the context of Article 44.1, the above understanding on the meaning of Article 1.1, first sentence requires a Member to not frustrate the implementation by another Member of its obligation to grant to its judicial authorities the authority to order a party to desist from an infringement. When assessing the claim by the European Union that the ASI policy as such infringes Article 44.1, read in conjunction with Article 1.1, first sentence, we find it significant that the subject of Article 44.1 is the judicial authorities of a Member who must have the authority to order a party to desist from infringement. In response to a question at the arbitral hearing, the European Union acknowledged that there is nothing about an *in personam* order on a patent owner facing SEP litigation in China that *directly* affects "the authority" of the "judicial authorities" in the territory of other Members.[307] Rather, the European Union contends that the disincentive on SEP holders to approach "judicial authorities" in other Members to obtain injunctive relief from those authorities is alone sufficient to diminish "the authority" of those authorities. The European Union therefore contends that ASIs cause an *indirect* violation of Article 44.1.[308]

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

4.175. We therefore find that the European Union has not demonstrated that the ASI policy is inconsistent with Article 44.1 of the TRIPS Agreement, irrespective of whether it is read in conjunction with Article 1.1, first sentence.

4.8.3 Conclusion

4.176. On the basis of the above, we uphold, albeit for different reasons, the Panel's finding in paragraph 8.2.c of its Report that the European Union has not demonstrated that the ASI policy is inconsistent with Article 44.1, read in conjunction with Article 1.1, first sentence, of the TRIPS Agreement.

4.9 Claim under Article 41.1 of the TRIPS Agreement

4.9.1 Introduction

4.177. The European Union claims that the Panel erred in its interpretation of Article 41.1 of the TRIPS Agreement, which provides:

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[306] China's rebuttal submission, para. 47.
[307] European Union's response to questioning at the hearing.
[308] European Union's response to questioning at the hearing. See also European Union's written submission, para. 136.

> 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.

4.178. Of particular relevance to the European Union's appeal concerning Article 41.1, the Panel found that:

> [A]n 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.
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> As noted in paragraph 7.284 [of the Panel Report], 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. The Panel, thus, will not proceed further with an analysis of the European Union's claim under this provision.[309]

4.179. Accordingly, the Panel found that the ASI policy did not qualify as an "enforcement procedure" under the first sentence of Article 41.1, and therefore fell outside the scope of the second sentence of Article 41.1.

4.180. The European Union alleges that the Panel erred in finding that "enforcement procedures as specified in Part III are limited to those that permit a right holder, acting as the applicant taking action against an alleged unauthorized user of IP-protected subject matter, to seek to stop, prevent, deter or remedy infringement of IP rights provided for in the TRIPS Agreement".[310] For the European Union, the context afforded by Article 42 points to a broad definition of the phrase "enforcement procedures as specified in [Part III of the TRIPS Agreement]", "which includes any civil judicial procedures, that are effective in bringing about the enforcement of any intellectual property rights covered by the TRIPS Agreement".[311] For the European Union, "Article 41.1 when read in the context of Article 42 addresses the enforcement of any right covered by the TRIPS Agreement, which does not necessarily entail infringement procedures launched by right holders against unauthorized users."[312] Rather, the European Union contends that "a procedure whereby a party seeks to restrict or prohibit enforcement of IP rights by right holders in other Members or a procedure relating to the setting of licence terms also concerns the enforcement of IP rights provided in the TRIPS Agreement and … qualifies as an enforcement procedure".[313] The European Union therefore requests that we complete the analysis on the basis that the Panel erroneously excluded the ASI policy and the five individual ASI court decisions from the scope of the second sentence of Article 41.1.[314]

4.181. China responds that "[b]ecause the 'procedures' that may be the subject of a claim under Article 41.1, second sentence, are necessarily 'enforcement procedures … against any act of

[309] Panel Report, paras. 7.308-7.309. (fn omitted)
[310] European Union's written submission, para. 147.
[311] European Union's written submission, para. 161.
[312] European Union's written submission, para. 168. (emphasis omitted)
[313] European Union's written submission, para. 174.
[314] European Union's written submission, para. 195.

infringement', it follows that Article 42 must be interpreted in this context as a form of 'enforcement procedure … against any act of infringement'".[315] For China, "[t]he fact that Article 42 requires these procedures to be made available 'to right holders' indicates that the civil procedures that Members must make available under this provision are civil procedures initiated *by right holders* as a means of obtaining 'effective action against any act of infringement'".[316]

4.182. China therefore contends that "the 'enforcement procedures' specified in Part III, including the civil enforcement procedures under Article 42, are all procedures '*against any act of infringement*'".[317] For China, the "decisive criterion" in interpreting "enforcement procedures" is that "all such procedures are directed 'against any act of infringement'".[318]

4.9.2 Whether the Panel erred in its interpretation of Article 41.1 of the TRIPS Agreement

4.183. The interpretative issue before us is the scope of the term "enforcement procedures" in the first sentence of Article 41.1. We understand that it is uncontested between the parties that the scope of the term "enforcement procedures" in the first sentence of Article 41.1 is determinative to what is subsequently within the scope of the second sentence of Article 41.1 and therefore for the European Union's claim under that provision.[319]

4.184. The ordinary meaning of the term "enforce" includes "the process of compelling observance of a law, regulation, etc.", and the term "procedure" includes the "formal steps to be taken in a legal action".[320] The immediate context for the interpretation of the second sentence of Article 41.1 is the textual link to "[t]hese procedures" in the first sentence. The first sentence of Article 41.1, therefore, constrains the scope of "enforcement procedures" to those "procedures" that are "so as to *permit effective action against any act of infringement* of intellectual property rights covered by this Agreement".[321]

4.185. As outlined by the Panel[322], various provisions in Sections 2 to 5 of Part III support the interpretation that enforcement procedures are those that compel observance of the provisions of the TRIPS Agreement with a view to preventing infringement of IP rights under these provisions. For instance, Article 42 requires Members to "make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right" covered by the TRIPS Agreement; Article 50.1(a) requires that judicial authorities have the authority "to prevent an infringement of any intellectual property right from occurring"; and Article 51 requires Members to adopt procedures "to enable a right holder … to lodge an application" with the competent authorities for suspending the release of suspected counterfeit trademark or pirated copyright goods. It is clear to us that the aim of the procedures that Members are required to put in place is to enable right holders – to whom intellectual property rights are conferred by virtue of the provisions of the TRIPS Agreement – to prevent the occurrence of infringements to those rights. These provisions provide context for the interpretation of Article 41.1, second sentence.

4.186. We agree with the European Union that, in order to give meaning to the term "enforcement procedures", it must be understood as broader than the term "infringement procedures".[323] We note in this regard that some of the procedures under Part III are not in the nature of infringement procedures. For instance, this may be the case for procedures involving injunctions ordering a party to desist from an infringement under Article 44.1; orders for the infringer to pay damages adequate to compensate the right holder's injury under Article 45; or criminal procedures and penalties in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale under Article 61. It remains, however, that these enforcement procedures are intended to prevent the occurrence of infringements to the IP rights conferred under the TRIPS Agreement.

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[315] China's rebuttal submission, para. 51.
[316] China's rebuttal submission, para. 51. (emphasis original)
[317] China's rebuttal submission, para. 55. (emphasis original)
[318] China's rebuttal submission, para. 55.
[319] Panel Report, para. 7.282.
[320] Panel Report, fn 744 (quoting *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Oxford University Press, 1993), Vol. 1, p. 820 and Vol. 2, p. 2363).
[321] Emphasis added.
[322] See Panel Report, para. 7.285 and Table 5.
[323] European Union's written submission, para. 186.

4.187. This reading of the term "enforcement procedures" is confirmed by the object and purpose of the TRIPS Agreement. As we noted in section 4.5.2 above, the TRIPS Agreement envisages that Members will establish and maintain "national systems for the protection of intellectual property"[324], and that these "national systems" will enshrine a certain set of common minimum standards for the effective and adequate protection of intellectual property rights in the territory of a given Member.[325] In this context, we understand the enforcement procedures specified in Part III of the TRIPS Agreement as intended to ensure the observance of the minimum standards for the effective and adequate protection of intellectual property rights set out by the provisions of the TRIPS Agreement and given effect to in the territory of each Member.

4.188. We therefore agree with the Panel that "enforcement procedures 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".[326]

4.9.3 Whether the Panel erred in its application of Article 41.1 of the TRIPS Agreement

4.189. In the context of patents, Article 28 is entitled "[r]ights conferred", and its first paragraph affords patent owners the exclusive right to prevent third parties not having the owner's consent from the acts of making, using, offering for sale, selling, or importing the process or product that is the subject of the patent. This is the only aspect of Section 5 of Part II, concerning patents, which creates a "right" in which an "act of infringement" by a private third party would be affected.[327]

4.190. As the Panel noted, "[t]he SEP litigation in China is brought by the implementer and is not addressing infringement, but rather the determination of a FRAND royalty rate under a licence agreement the right holder has agreed to conclude with the implementer" and "the action taken under the measure, the issuance of an ASI, is not against infringement".[328] For these reasons, we agree with the Panel that "the ASI policy is not an enforcement procedure as specified in Part III so as to permit effective action against any act of infringement of IP rights."[329]

4.191. The European Union strives to characterize ASIs issued under the ASI policy as an "enforcement procedure" by virtue of it being either a civil procedure in which a patent owner is a defendant in the context of adjudication of FRAND terms, or more narrowly, as a procedure initiated by a patent user requesting an ASI in connection with such a proceeding.[330] Neither such characterizations, however, would amount to a "procedure" that is "so as to *permit effective action against any act of infringement* of intellectual property rights covered by this Agreement".[331] Indeed, under both such characterizations the inverse would be true, insofar as the remedy sought is to enable *use* of the applicable intellectual property right.

4.192. For the European Union, the fact that the enforcement of patent rights features as the *object* of a proceeding on whether to issue an ASI, as well as being the main focal point of the *outcome* of any such issued ASI, seems to be pivotal to construing "enforcement procedures" as encompassing the measure at issue.[332] The European Union emphasizes, in this regard, the role of the term "concerning" in Article 42, which covers "civil judicial procedures *concerning* the enforcement of any intellectual property right".[333]

4.193. In our view, however, the mere fact that enforcement may be the object of a proceeding – or may be implicated in the outcome of a proceeding – does not automatically mean that such a proceeding qualifies as an "enforcement procedure" in the sense of Article 41.1. In this regard, the

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[324] See e.g. preambular recitals 2(c) and 5 of the TRIPS Agreement.
[325] See e.g. preambular recitals 1 and 2 of the TRIPS Agreement.
[326] Panel Report, para. 7.301.
[327] We note that Article 28.2 confers certain other rights on "[p]atent owners", namely that they "shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts". Since these relate to positive rights that the patent owner may exercise at its own discretion, they lack the character of a right that can be infringed by a private third party. We note China's statement to this effect in response to our questioning at the hearing.
[328] Panel Report, para. 7.308.
[329] Panel Report, para. 7.309.
[330] European Union's written submission, para. 174.
[331] Emphasis added.
[332] European Union's written submission, paras. 168-169.
[333] Emphasis added.

European Union relies on the context of Article 42 to seek to expand the scope of procedures that are covered under Article 41.1.[334] On the relationship between Articles 41.1 and 42, we observe that Article 41.1 is the first provision of Part III and sits in Section 1 entitled "General Obligations". As already mentioned, the first sentence of Article 41.1 provides in relevant part 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".[335] As we understand it, Article 41.1 describes the suite of "enforcement procedures" that are subsequently referred to in Part III. In turn, Article 42 sits in Section 2 of Part III, which is entitled "Civil and Administrative Procedures and Remedies". Article 42 explicitly requires that civil judicial procedures be made available "to right holders". Therefore, this provision confirms that the aim of the procedures that Members are required to put in place is to enable right holders – to whom IP rights are conferred by virtue of the provisions of the TRIPS Agreement – to prevent the occurrence of infringements to those rights.

4.194. Against that background, to use Article 42 as interpretive context to expand the scope of Article 41.1 would run contrary to the basic structure of Part III. In our view, the ordinary meaning of Article 41.1 is clear. It refers to "enforcement procedures" that are "*so as to permit effective action against any act of infringement of intellectual property rights* covered by this Agreement".[336] The reference in Article 42 to the civil judicial procedures "concerning" the enforcement of any IP right covered by this Agreement does not alter our analysis.

4.195. We have some reservations about the prominence afforded in the Panel's reasoning to the identity of "who" must be the one to instigate a "procedure" in Part III, as distinct from the nature of the "procedure" itself.[337] We agree that the "right holder" is the necessary counterpart of the "right" conferred under the provisions of the TRIPS Agreement. Therefore, enforcement procedures under Part III are aimed at preventing the rights of the right holder from being infringed. At the same time, we consider that it is the *nature* of the procedure – and its objective "to *permit effective action against any act of infringement* of intellectual property rights covered by this Agreement" – which is determinative. For the purposes of the present proceedings, we need not determine whether a right holder can ever be a defendant or respondent in an "enforcement procedure". To the extent that this reasoning formed part of the Panel's interpretation of Article 41.1[338], we do not support it.[339]

4.196. We recall that our mandate is limited to "address[ing] those issues that are necessary for the resolution of the dispute".[340] With respect to the European Union's claim regarding the ASI policy, we uphold the Panel's ultimate conclusion that the European Union did not demonstrate that the ASI policy qualifies as an "enforcement procedure" under the first sentence of Article 41.1 of the TRIPS Agreement, and was therefore not within the ambit of its second sentence.[341]

4.9.4 Conclusion

4.197. On the basis of the above, we uphold the Panel's finding in paragraphs 7.309 and 8.2.d of its Report that the obligation in the second sentence of Article 41.1 of the TRIPS Agreement is not applicable to the ASI policy, as the ASI policy is not an enforcement procedure as specified in Part III of that Agreement.

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[334] See European Union's written submission, para. 171.

[335] Emphasis added.

[336] Emphasis added.

[337] We note, for instance, that footnote 4 to Article 23.1 appears to presuppose that a proceeding in which an interested party brings an action against a trademark that makes use of a geographical indication could potentially be subject to Article 42, and would thereby qualify as an "enforcement procedure" in the sense of Part III.

[338] See e.g. Panel Report, paras. 7.292 and 7.301.

[339] Accordingly, we do not necessarily disagree with the European Union's contentions at paragraphs 176-187 of its written submission. Rather, we find it unnecessary to address those matters to resolve the present issue.

[340] See paragraph 10 of the Agreed Procedures.

[341] Panel Report, paras. 7.308-7.309.

4.10 Claims concerning the five individual ASI decisions

4.198. The European Union requests, in the event that we reverse the Panel's interpretations of the first sentence of Article 1.1 in conjunction with either Articles 28.1, 28.2, or 44.1, or of Article 41.1, that we complete the analysis for its "as applied" challenge with respect to the five individual ASIs and that we find that they are inconsistent with China's obligations under those provisions.[342]

4.199. The Panel declined to reach findings on the five individual ASIs issued pursuant to the ASI policy for the following reasons:

> 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. Moreover, the European Union identified the five individual ASIs as integral parts of the ASI policy. The reasoning in those decisions is dealt with extensively by the Panel in [section 7.2.3.1.1.2 of the Panel Report].
>
> 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. 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.[343]

4.200. The European Union contends that "the Panel found that it has jurisdiction over the five individual ASI court decisions" – that is, despite their expiry – and that an adverse finding regarding the ASI policy might cause China to "implement the report by rescinding the ASI policy while allowing its courts to continue to issue individual ASI decisions outside the ASI policy".[344] For the European Union, "[i]n the present case, even if the five individual ASIs are integral parts of the ASI policy, they remain separate measures from the ASI policy."[345]

4.201. China responds that, if we reverse the Panel's interpretation of an applicable provision, we should nonetheless refrain from completing the analysis with respect to the five individual ASIs because "doing so is [not] necessary to 'secure a positive solution to [the] dispute'".[346] According to China, "[i]t is undisputed that the individual court decisions at issue are expired measures", and the Panel properly exercised discretion not to reach findings on those expired measures.[347] China also argues that "it is difficult to identify a circumstance in which [individual judicial decisions] can indeed violate the TRIPS Agreement", and the Panel did not examine "this issue of systemic importance".[348]

4.202. Our evaluation of the European Union's claims on appeal with respect to Article 41.1, and Article 44.1 read in conjunction with Article 1.1, of the TRIPS Agreement did not result in a reversal of the Panel's respective legal conclusions. We therefore have no cause to consider completing the analysis for the five individual ASIs with respect to those claims by the European Union.

4.203. However, our evaluation of the European Union's claims on appeal with respect to the Panel's findings concerning Articles 28.1 and 28.2, both read in conjunction with Article 1.1 of the TRIPS Agreement, resulted in our reversal of the Panel's respective interpretations of those provisions. We then turned to the European Union's request to complete the analysis for an "as such" challenge of the ASI policy as an unwritten measure of general and prospective application vis-a-vis the obligations in Articles 28.1 and 28.2, read in conjunction with Article 1.1. We found that the ASI policy is "as such" inconsistent with those provisions. In this context, and given that

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[342] European Union's Notice of Appeal, para 6; written submission, paras. 8, 85, 95, 128, 145, 194, and 206-212.
[343] Panel Report, paras. 7.337-7.338. (fns omitted)
[344] European Union's written submission, para. 208.
[345] European Union's written submission, para. 208.
[346] China's rebuttal submission, para. 64.
[347] China's rebuttal submission, para. 68.
[348] China's rebuttal submission, para. 70.

the five individual ASIs are now expired[349], we consider that additional findings related to the five individual measures are not necessary to assist the parties in the effective resolution of the dispute. We therefore reject the request to complete the analysis of consistency of the five individual measures with Articles 28.1 and 28.2, read in conjunction with the first sentence of Article 1.1 of the TRIPS Agreement.

4.11 Claim under Article 63.1 of the TRIPS Agreement

4.11.1 Introduction

4.204. China argues that the Panel misinterpreted the term "of general application" in Article 63.1 of the TRIPS Agreement in the manner it further developed and added to the interpretation of the same term in Article X:1 of the GATT 1994 in *Japan – Film*.[350] First, China takes issue with the Panel's proposition that a decision that applies an existing provision of law in a novel factual situation amounts to a revision of a principle or criteria.[351] China considers that it is only when the content of those decisions and rulings goes *beyond* merely applying existing law to different fact patterns, to such a degree that it sets out new principles or criteria that should be applicable to other courts in the future, that such decisions and rulings can be viewed as potentially affecting an unspecified group of interested parties, and thus be considered "generally applicable".[352] Second, China disagrees with the Panel that new or revised principles or criteria should necessarily be considered applicable in future cases when they are "intended to serve as a reference for other courts".[353] Rather, China believes that, to be considered "of general application," a judicial decision must exert a certain level of authoritativeness to compel other courts to adopt its reasoning, thereby affecting the future interpretation and application of the principles it establishes or revises.[354] In China's view, the "broad" interpretation of the Panel "risks expanding the scope of what must be published or made publicly available under Article 63.1 as it pertains to judicial decisions, placing undue burdens on Members regarding their transparency obligations."[355]

4.205. China further contends that the Panel erred in finding that the decision issuing an ASI in Xiaomi v. InterDigital is "of general application". Specifically, the Panel: (i) did not clarify "what it was about the court's assessment that led to the establishment or revision of criteria beyond the legal framework provided in the Civil Procedure Law, as previously interpreted in *Huawei v. Conversant*"[356]; and (ii) did not engage "in any analysis of the extent to which the decision carries a level of authoritativeness that would bring it to bear upon all or nearly all relevant cases by compelling other courts to adopt the same line of reasoning in future case".[357]

4.206. The European Union considers that "new factual patterns" "differ from routine variations across cases, which involve shifts in factual details but do not require the establishment or revision of legal principles or criteria to resolve the disputes" and "refer to factual patterns that cannot be immediately understood by interested parties to be covered by the scope of existing rules, in view of those rules' text and the existing judicial practice".[358] Furthermore, the European Union argues that China's interpretation is not compatible with the text, context, and object and purpose of the TRIPS Agreement, as it excludes from the scope of the transparency obligations under Article 63.1 all final judicial decisions issued in WTO Members without a system of binding precedent.[359]

4.207. In addressing the meaning of the phrase "of general application" in Article 63.1, the Panel noted that its text contains language parallel to that in Article X:1 of the GATT 1994. In the context of judicial decisions, the Panel considered applicable the legal standard in *Japan – Film*, according to which the obligation in Article X:1 extended to administrative rulings made in individual cases that "establish or revise principles or criteria applicable in future cases".[360] The parties agreed with

[349] Panel Report, para. 7.334.
[350] China's written submission, para. 37.
[351] China's written submission, para. 40.
[352] China's written submission, para. 43. (emphasis original)
[353] China's written submission, para. 40.
[354] China's written submission, para. 52.
[355] China's written submission, para. 48.
[356] China's written submission, para. 58.
[357] China's written submission, para. 62.
[358] European Union's rebuttal submission, para. 55.
[359] European Union's rebuttal submission, para. 70.
[360] Panel Report, para. 7.379 (quoting Panel Report, *Japan – Film*, para. 10.388).

this standard.[361] The Panel distinguished, and further elaborated on, "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".[362] With respect to (a), the Panel noted it should "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."[363] 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."[364] As regards (b), the Panel considered it necessary to "assess whether any new or revised principles or criteria are meant to be applicable in future cases". The Panel reasoned that "[a]n 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."[365] This is because, "[e]ven if such a final judicial decision is not formally binding, foreign governments and right holders will not necessarily be able to become acquainted with a Member's IP system if the judicial decision is not published or otherwise made publicly available."[366]

4.208. In applying this standard to the case at hand, the Panel found that the decisions issuing the ASIs in ZTE v. Conversant and OPPO v. Sharp did not establish or revise principles or criteria applicable in future cases.[367] By contrast, the Panel found that the new interpretation or clarification of the Civil Procedure Law and the SPC provisions on several issues concerning application of law in review of cases involving act preservation in intellectual property disputes (SPC Provisions)[368] in Xiaomi v. InterDigital, which served as a reference for future cases, was of general application within the meaning of Article 63.1.[369]

4.11.2 Whether the Panel erred in its interpretation of Article 63.1 of the TRIPS Agreement

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

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

4.210. Before us is the interpretation of the term "of general application" in the phrase "final judicial decisions … of general application" in the first sentence of Article 63.1. We note that, while this is the first time Article 63.1 is being interpreted in the context of WTO dispute settlement, the provision bears important parallels with Article X:1 of the GATT 1994 which equally addresses the matter of publication and administration of trade regulations within its scope.[370]

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[361] Panel Report, para. 7.380 (referring to European Union's first written submission to the Panel, para. 618; second written submission to the Panel, para. 122; and China's first written submission to the Panel, para. 325).

[362] Panel Report, para. 7.383.

[363] Panel Report, para. 7.383 (referring to Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 7.35-7.36).

[364] Panel Report, para. 7.383

[365] Panel Report, para. 7.383.

[366] Panel Report, para. 7.383. (fn omitted)

[367] Panel Report, paras. 7.387 and 7.393.

[368] See Panel Report, para. 2.25 and fn 48.

[369] Panel Report, para. 7.391.

[370] We note that this reasoning is supported by the drafting history of the TRIPS Agreement which suggests that the language in Article 63.1 has been drawn from Article X of the GATT 1994. (GATT document MTN.GNG/NG11/17, para. 34).

4.211. The Appellate Body has highlighted the "fundamental importance" and due process dimensions of the transparency provisions in Article X of the GATT 1994.[371] In particular, its paragraph 1 addresses the due process notion of notice, i.e. by requiring 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.[372] The "essential implication" of this due process dimension is "that Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures."[373]

4.212. Similarly, we consider Article 63.1 of the TRIPS Agreement to reflect the fundamental importance of transparency. Article 63 should be understood as part of the regime on transparency of the TRIPS Agreement that was negotiated by Members "to ensure the availability of information while at the same time not creating onerous burdens on Members".[374] In this regard, Article 63.1 offers some latitude to Members in terms of the timing and means available to them to ensure that other Members and right holders become acquainted with relevant IP rights-related rules.[375]

4.213. Turning to the term "judicial decisions", it refers to an action or pronouncement by a judicial body or authority.[376] The Panel considered, and the parties agreed, that the legal standard articulated by the panel in *Japan – Film* in the context of Article X:1 of the GATT 1994 with respect to whether administrative rulings in individual cases are "of general application" should also apply to judicial decisions.[377] According to that panel, "inasmuch as the Article X:1 requirement applies to all administrative rulings of general application, it also should extend to administrative rulings in individual cases where such rulings establish or revise principles or criteria applicable in future cases."[378] We agree with this standard, namely 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.[379] This standard also allows for an individual inquiry into final judicial decisions, in order to ascertain their significance with respect to the subject matter covered by the TRIPS Agreement and accordingly the importance of providing transparency for WTO Members and right holders with respect to such decisions.

4.214. With respect to whether a final judicial decision establishes or revises principles or criteria, the Panel indicated that it would 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."[380] The Panel considered that "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."[381]

4.215. China argues that it is only when the content of judicial decisions and administrative rulings "goes *beyond* merely applying existing law to different fact patterns, to such a degree that it sets out new principles or criteria that should be applicable to other courts in the future, that such decisions and rulings can be viewed as potentially affecting an unspecified group of interested

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[371] Appellate Body Report, *US – Underwear*, p. 20; Panel Reports, *EC – IT Products*, fn. 1312 to para. 7.1015.

[372] Panel Reports, *EC – IT Products*, para. 7.1015 (referring to Appellate Body Report, *US – Underwear*, pp. 20-21).

[373] Appellate Body Report, *US - Underwear*, p. 21.

[374] Panel Report, para. 7.342 (referring to GATT documents MTN.GNG/NG11/13, para. 11; MTN.GNG/NG11/17, paras. 34-35; and MTN.GNG/NG11/18, paras. 24-25). (fn omitted)

[375] Differently from Article X of the GATT 1994, Article 63.1 does not require "prompt" publishing and provides for the alternative of making laws and regulations, and final judicial decisions and administrative rulings of general application "publicly available", where publication is not practicable.

[376] Panel Reports, *EC – IT Products*, para. 7.1025.

[377] Panel Report, para. 7.379 (quoting Panel Report, *Japan – Film*, para. 10.388).

[378] Panel Report, *Japan – Film*, para. 10.388.

[379] We acknowledge that judicial decisions are different from individual administrative rulings in terms of their nature and scope of application. At the same time, their publication under the obligation of Article 63.1 addresses the same transparency objective. We therefore consider that there are sufficient parallels between them allowing for a similar legal standard to be applied, as recognized by the parties and the Panel.

[380] Panel Report, para. 7.383 (referring to Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 7.35-7.36).

[381] Panel Report, para. 7.383.

parties, and thus be considered 'generally applicable'."[382] For China, the critical factor is whether the court's application of a provision "had the effect of establishing or revising existing rules or principles – essentially, whether it had something like a rule-making effect."[383]

4.216. We agree with China that, whereas laws and regulations are by default "generally applicable" as they affect an unspecified number of parties, judicial decisions are typically directed at specific situations involving identified parties.[384] While this may be the reason why the transparency obligation in Article 63.1 only applies to final judicial decisions "of general application", nothing in the language of this provision suggests that this is "an *exceptional* rule".[385] Because judicial decisions are applicable between the parties to the dispute, a meaningful interpretation of the term "of general application" would involve assessing whether there is something specific in the interpretation of a provision or its application to the facts of a case by a judicial decision, such that the decision assumes significance in establishing or revising principles and criteria beyond the parties to the dispute. While not every application of the law to a "new" factual situation would have that significance, we agree with the Panel that a decision that determines that an existing provision can be applied "in a novel fact situation" and "breaks new ground" could amount to a revision of a principle or a criterion. This assessment would have to be undertaken on a case-by-case basis and informed by the transparency objective of Article 63.1 to ensure that Members and right holders are informed about laws and regulations, as well as final judicial decisions and administrative rulings of general application, within the subject matter of the TRIPS Agreement.

4.217. With respect to whether the judicial decision establishes or revises principles or criteria "applicable in future cases", the Panel noted that an interpretation or clarification of a previously established principle or criteria in a judicial decision "may be intended to serve as a reference for other courts, and therefore be considered generally applicable, whether it is a binding authority or merely persuasive" and that "[e]ven if such a final judicial decision is not formally binding, foreign governments and right holders will not necessarily be able to become acquainted with a Member's IP system if the judicial decision is not published or otherwise made publicly available."[386]

4.218. China contends that, "to be considered 'of general application,' a judicial decision must exert a certain level of authoritativeness to compel other courts to adopt its reasoning, thereby affecting the future interpretation and application of the principles it establishes or revises."[387] At the hearing, China clarified that many factors should be considered in assessing whether the judicial decision is authoritative, including whether such authoritativeness is directly provided or indicated by the Member's domestic legal system in its written laws and whether, as a factual matter, other courts follow the decision because they have the obligation to follow as ordered by its domestic legal system.[388]

4.219. We agree with China to the extent that, to be considered "of general application", a judicial decision must have a certain degree of authoritativeness and be expected to be followed by other courts in the future. We believe this reasoning to be consistent with the standard that the Panel articulated under this element of the test. Indeed, the Panel itself explained its reasoning by reference to the concept "degree of authoritativeness" articulated by the panel in *EC – IT Products*.[389] However, we find it important not to confine the scope of the transparency obligation in Article 63.1 to cases where courts are bound by domestic law to apply such rulings. Such a distinction may render the scope of the obligation very different from Member to Member, depending on whether they adhere to a system of precedent. As the Panel observed, the drafting history of the TRIPS Agreement confirms 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."[390]

4.220. In this regard, we further highlight that the meaning of "judicial decisions … of general application" must be assessed in light of the content and substance of the instrument, rather than

[382] China's written submission, para. 43. (emphasis original)
[383] China's written submission, para. 44.
[384] China's written submission, para. 42.
[385] China's written submission, para. 43. (emphasis original)
[386] Panel Report, para. 7.383. (fn omitted)
[387] China's written submission, para. 52.
[388] China's response to questioning at the hearing.
[389] Panel Report, fn 883.
[390] Panel Report, fn 885.

its form or nomenclature.[391] This phrase should be capable of encompassing more than those instruments formally characterized as such by a WTO Member. Otherwise, WTO Members themselves could determine which provisions would be subject to the transparency obligation in Article 63.1 merely by the labelling of those instruments.[392] What constitutes a "degree of authoritativeness" would require a case-by-case assessment of the particular factual features of the final judicial decisions in each case.[393]

4.221. At the hearing, China further observed that interpreting Article 63.1 in the context of the object and purpose of the TRIPS Agreement means it would have to draw boundaries and not create overly onerous obligations for Members, and that the phrase "in such a manner as to enable governments and right holders to become acquainted" at the end of Article 63.1, first sentence qualifies the manner in which final judicial decisions shall be published and not the phrase "of general application".[394] Conversely, the European Union considers that "the purpose of the transparency commitments in the TRIPS Agreement is explained in the text of Article 63.1 itself, as 'to enable governments and right holders to become acquainted' with Members' measures pertaining to IP rights" and that "[s]uch objective would not be attainable, and Members would not be able to follow the developments in the IP legal framework of other Members if judicial decisions that establish or revise principles or criteria were not published or otherwise made publicly available."[395]

4.222. We agree that, as a matter of syntax, the phrase "as to enable governments and right holders to become acquainted" informs the manner in which laws and regulations, and final judicial decisions and administrative rulings of general application shall be published or made publicly available. At the same time, in our view, this phrase more generally addresses the objective of the transparency obligation in Article 63.1 and speaks to its practical dimension, i.e. the need for Members and right holders to be afforded an actual and reasonable opportunity to acquire information about the instruments listed therein and be able to adjust their activities accordingly. This interpretation reflects the objective of Article 63.1 which, as noted above, balances the need to ensure availability of information while at the same time not creating onerous burdens on Members.

4.223. In light of the above, we consider that the Panel did not err in its interpretation of Article 63.1 of the TRIPS Agreement.

4.11.3 Whether the Panel erred in its application of Article 63.1 of the TRIPS Agreement

4.224. Turning to the Panel's application of Article 63.1, the Panel found that the scope of the ASI in Xiaomi v. InterDigital was much broader than the one in Huawei v. Conversant as it "not only enjoined InterDigital from enforcing an injunction already requested in a foreign court (in this case, the District Court of Delhi) and enjoined InterDigital to withdraw or suspend the injunctions applied for in India but also, for the first time in China, it enjoined the patent owner from applying for or enforcing injunctions anywhere in the world, and from requesting any court anywhere in the world to determine the SEP licence fee rates or licence fee disputes".[396] Furthermore, the decision was issued in accordance with the same provisions of the Civil Procedure Law cited by the SPC in Huawei v. Conversant but it also cited specific articles of the SPC Provisions, which were not cited by the SPC in Huawei v. Conversant.[397]

4.225. First, China argues that the Panel did not clarify what it was about the court's assessment that led to the establishment or revision of criteria beyond the legal framework provided in the Civil Procedure Law, as previously interpreted in Huawei v. Conversant.[398] In China's view, the Panel itself found that Huawei v. Conversant allegedly introduced an "ASI policy", and the general legal approach employed in Xiaomi v. InterDigital was similar to that articulated in Huawei v. Conversant.[399]

[391] See Panel Reports, *EC – IT Products*, para. 7.1023.
[392] See Panel Reports, *EC – IT Products*, para. 7.1024.
[393] See Panel Reports, *EC – IT Products*, para. 7.1027.
[394] China's response to questioning at the hearing.
[395] European Union's rebuttal submission, para. 69 (quoting Panel Report, para. 7.371).
[396] Panel Report, para. 7.388c.
[397] Panel Report, para. 7.388e.
[398] China's written submission, para. 58.
[399] China's written submission, para. 59 (referring to Panel Report, para. 7.385).

4.226. In this regard, the Panel reasoned as follows:

> 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. 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.[400]

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

4.228. We consider that the Panel correctly based its analysis on the significance of the decision for right holders beyond the parties to the dispute and from the perspective of the subject matter of the TRIPS Agreement. Therefore, we agree with the Panel's conclusion 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."[401]

4.229. Second, China argues that the Panel considered neither the authority or competences of the court issuing the decision at issue, nor whether there would be any consequences for other courts not following the decision in future cases. The Panel also failed to examine whether there is a "clear expectation" that the decision would be adhered to by other courts.[402]

4.230. In this regard, the Panel considered that "[t]he value of this new interpretation or clarification [in Xiaomi v. InterDigital] 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… 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", which featured it as a case that "*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 improving the ability of Chinese courts to participate* in the formulation of international standard rules for judicial protection of intellectual property rights."[403]

4.231. Above we noted that what constitutes a degree of authoritativeness would require a case-by-case assessment of the particular factual features of the measure at issue.[404] For this reason, contrary to China's argument, we do not consider application of the criteria employed by the panel in *EC – IT Products* in the context of a very different measure to be dispositive of whether the Panel erred in its interpretation or application of Article 63.1.[405]

4.232. At the hearing, China explained that, under Chinese law, only guiding cases selected and published by the SPC have the effect to compel other courts to follow in similar cases and in nearly

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[400] Panel Report, para. 7.389. (fn omitted)
[401] Panel Report, para. 7.389.
[402] China's written submission, para. 62.
[403] Panel Report, para. 7.390 (quoting Hubei Province Higher People's Court, Work Report 2021: Interpretation of Typical Cases II, 22-01-2022 (Panel Exhibit EU-102), p. 3 (emphasis added by the Panel)).
[404] Panel Reports, *EC – IT Products*, para. 7.1027.
[405] See China's written submission, paras. 53 and 62.

or almost all similar instances and this is not true of typical cases.[406] In our view, this criterion cannot be dispositive of whether a judicial decision is applicable in future cases since it leaves it to the Member's domestic laws and practices to determine the extent of the transparency obligation under Article 63.1.

4.233. In the present case, the Panel had already noted that China is not a common law country.[407] Therefore, most judicial decisions would normally not have a binding but rather may have a persuasive authority for other courts. Therefore, in our view, the Panel rightly took into account the designation of the Xiaomi v. InterDigital case as typical and the language in the Hubei Province Higher People's Court Work Report signalling its significance as "useful practice" in matters of "judicial protection of intellectual property rights". We agree with the Panel that this designation speaks to the role of the case as a reference for courts in future similar cases.[408]

4.11.4 Conclusion

4.234. In light of the above, we uphold the Panel's findings in paragraphs 7.383, 7.388-7.391, 7.394.b, and 8.4.a of its Report that the decision issuing an ASI in Xiaomi v. InterDigital, read together with the reconsideration decision in the same case, is a judicial decision "of general application" within the meaning of Article 63.1 of the TRIPS Agreement.

[406] China's response to questioning at the hearing.
[407] Panel Report, para. 2.24.
[408] Panel Report, para. 7.391.

5 AWARD FINDINGS

5.1. In this Award, we have reached the following findings:

a. We uphold the Panel's findings in paragraphs 7.197, 7.205, 7.206, and 8.1 of its Report that the European Union provided sufficient evidence and argumentation to demonstrate the existence of the ASI policy as a rule or norm of general and prospective application.

b. We reverse the Panel's findings in paragraph 7.231 of its Report and find that the corollary of the obligation in Article 1.1, first sentence of the TRIPS Agreement to "give effect" to the provisions of that Agreement in a WTO Member's territory is to do so without frustrating the functioning of the systems of protection and enforcement of IP rights implemented by other Members in their respective territories.

c. We reverse the Panel's findings in paragraphs 7.240 to 7.242 and 8.2.a of its Report. In completing the legal analysis, we find that the European Union has demonstrated that the ASI policy is inconsistent with Article 28.1, read in conjunction with Article 1.1, first sentence, of the TRIPS Agreement.

d. We reverse the Panel's findings in paragraphs 7.247, 7.248, 7.250-7.252 and 8.2.b of its Report. In completing the legal analysis, we find that the European Union has demonstrated that the ASI policy is inconsistent with Article 28.2, read in conjunction with Article 1.1, first sentence, of the TRIPS Agreement.

e. We uphold, albeit for different reasons, the Panel's finding in paragraph 8.2.c of its Report that the European Union has not demonstrated that the ASI policy is inconsistent with Article 44.1, read in conjunction with Article 1.1, first sentence, of the TRIPS Agreement.

f. We uphold the Panel's findings in paragraphs 7.309 and 8.2.d of its Report that the obligation in the second sentence of Article 41.1 of the TRIPS Agreement is not applicable to the ASI policy, as the ASI policy is not an enforcement procedure as specified in Part III of that Agreement.

g. We uphold the Panel's findings in paragraphs 7.383, 7.388-7.391, 7.394.b, and 8.4.a of its Report that the decision issuing an ASI in Xiaomi v. InterDigital, read together with the reconsideration decision in the same case, is a judicial decision "of general application" within the meaning of Article 63.1 of the TRIPS Agreement.

5.2. Paragraph 9 of the Agreed Procedures provides that the findings of the Panel that have not been appealed in this Arbitration shall be deemed to form an integral part of this Award together with our own findings, and that the Award shall include recommendations where applicable. Accordingly, we recommend that China bring into conformity with the TRIPS Agreement those measures found in this Award, and in the Panel Report as modified by this Award, to be inconsistent with that Agreement.

Penelope Ridings
Chairperson

Claudia Orozco
Arbitrator

Mateo Diego-Fernández Andrade
Arbitrator